STRATEGIC JUDICIAL EMPOWERMENT

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When courts seek to strengthen their own institutional power, they often need to be strategic. In many fraught political contexts, judiciaries lack a history of asserting authority against powerful political actors. How can courts with fragile authority establish and enhance judicial power? This Article explores the phenomenon of strategic judicial empowerment, offering an account of how and when courts deploy various strategies aimed at enhancing their institutional position vis-à-vis other branches of government. Drawing on recent examples from apex courts in Pakistan, Malawi, Malaysia, and the United Kingdom, it explores the ways in which judges use tools of statecraft to increase the effectiveness of their decisions and enhance their role in the constitutional order.

The Article explores the particular strategies that courts might employ in service of self-empowerment: first, a strategy of maxi-minimalism features Marbury*-style maximalist reasoning that expands judicial power*

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while issuing a narrow ruling to avoid political backlash; second, an inverse strategy of mini-maximalism involves formalistic, orthodox doctrine that downplays the expansion of judicial power, even as a court delivers a decision of immediate consequence; third, a strategy of coalition-building that aids a judiciary in seeking allies in other institutional stakeholders; fourth, a rhetorical strategy that courts may use to craft a constitutional narrative of public salience; and fifth, a unanimous, single-voice decision that provides the optics of a unified judicial front. This Article also assesses the conditions that tend to give rise to instances of judicial self-empowerment. Courts in diverse contexts tend to assert themselves, for example, when their own institutional turf is threatened, during moments of political or constitutional crisis, when judges can capitalize on popular support for the outcome of a ruling, and under an influential judicial leader mindful of establishing a legacy.

INTRODUCTION

As the world reeled in the grips of a devastating pandemic in the middle of 2020, democracy unfolded in an unlikely spot. In May, Malawi's Supreme Court voided the results of a presidential election, beset with charges of electoral irregularities, and ordered fresh polls. Within weeks of the court's decision, even as the country struggled to grapple with the Covid-19 outbreak, millions of people headed to vote, resulting in the opposition's victory over the president.[1] It was a moment imbued with history. For the first time, a court-overturned election had led to an incumbent leader being ousted from power in Africa, an outcome that caught the world's attention.[2] Several months before, another supreme court had also faced an intense political controversy. After Prime Minister Boris Johnson suspended Parliament amidst heated debates over Brexit in September 2019, the United Kingdom Supreme Court waded into the fraught political tussle, ruling the executive's prorogation of Parliament unlawful.[3] And in the Asian democracies of Pakistan and Malaysia, apex courts confronted with dominant political power asserted an extraordinary authority to declare constitutional amendments unconstitutional. Despite differences in institutional configurations of power and constitutional histories, courts in these diverse settings have recently employed strategic assertiveness toward judicial self-empowerment.

More than half a century ago, Alexander Bickel declared that the "least dangerous branch of the American government" had become "the

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

[2] *See, e.g.*, *Admiration Nation: Which is The Economist's country of the year?*, ECONOMIST (Dec. 22, 2020), https://www.economist.com/leaders/2020/12/19/which-is-the-economists-country-of-the-year? (naming Malawi as The Economist's "country of the year" for "reviving democracy in an authoritarian region").

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

most extraordinarily powerful court the world has ever known."[4] Yet the United States Supreme Court is hardly the only example of strong judicial power today.[5] Still, judiciaries in many democracies operate without a long-standing history of constitutional judicial review over powerful political actors. How do courts with fragile authority assert and enhance their institutional power?

Judicial strategy and statecraft matter. This Article explores how courts use strategic assertiveness to establish and expand their own institutional power in politically challenging contexts. Drawing on recent examples from Pakistan, Malawi, Malaysia, and the United Kingdom, this Article locates the phenomenon of strategic judicial self-empowerment across a diverse group of countries by examining recent instances in which judges have been highly assertive. It explores how and when courts in various parts of the world employ specific strategies aimed at empowering their position vis-à-vis the other branches of government.

Part I situates this Article's discussion of judicial self-empowerment within the broader literature on judicial power in comparative contexts. Over the twentieth century, judicial review proliferated with the rise of many modern constitutions,[6] and scholars have studied how the judicialization of politics has led to courts in many newer democracies to emerge as influential actors in resolving major policy matters.[7] An important body of scholarship has explored the construction of judicial

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[4] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962).

[5] *See* Rosalind Dixon, *Strong Courts: Judicial Statecraft in Aid of Constitutional Change*, 59 COLUM. J. TRANSNAT'L L. 298 (2021).

[6] By the end of the twentieth century, eighty percent of all constitutions explicitly provided for judicial review, compared with twenty-five percent at the end of the Second World War. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 793–94 (2012).

[7] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); Ran Hirschl, *Judicialization of Politics, in* THE OXFORD HANDBOOK OF POL. SCI. (Robert E. Goodwin ed., 2011); THE GLOBAL EXPANSION OF JUDICIAL POWER 1 (Neal Tate & Torbjörn Vallinder eds., 1997); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

power globally.[8] Some accounts have sought to explain the phenomenon in terms of a regime's political party system,[9] or by viewing judges as rational choice maximizers of their preferred policy interests.[10] Yet although political context is undoubtedly important, accounts that focus primarily on the external political regime do not reveal the whole story.

Courts in many emerging democracies have asserted broad powers to protect an array of constitutional rights,[11] to consolidate democracy,[12] and to hedge against democratic erosion.[13] A vibrant literature has emerged over whether judiciaries in these more fragile democracies should take on

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[8] *See* Lee Epstein & Jack Knight, *Efficacious Judging on Apex Courts*, *in* COMPARATIVE JUDICIAL REVIEW 272 (Delaney & Dixon eds., 2018); Georg Vanberg, *Constitutional Courts in Comparative Perspective: A Theoretical Assessment*, 18 ANN. REV. POL. SCI. 167 (2015).

[9] *See* Matthew C. Stephenson, *'When the Devil Turns ...': The Political Foundations of Independent Judicial Review,* 32 J. LEGAL STUD. 59 (2003).

[10] *See, e.g.*, Lee Epstein & Jack Knight, *Strategic Accounts of Judging*, *in* ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOUR 48 (2018); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Does)*, 3 SUP. CT. ECON. REV. 1, 3 (2011). *See also* Roni Mann, *Non-ideal theory of constitutional adjudication*, 7 GLOBAL CONSTITUTIONALISM 14, 18 (2018) (observing that "a recent 'realist turn' in political science literature on judicial behavior contends that judicial outcomes reflect judges' calculation of expected results, with a view to maximizing their preferred policy outcomes").

[11] *See, e.g.*, PO JEN YAP, CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA (2015); COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., 2008); Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002).

[12] *See, e.g.*, SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015); Theunis Roux, *Constitutional Courts as Democratic Consolidators: Insights from South Africa after 20 Years*, J. S. AFR. STUD. 5 (2016); Sujit Choudhry, *"He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1 (2009). *Cf.* TOM DALY, THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS (2017).

[13] *See, e.g.*, Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C.L. REV. 1 (2019); Yaniv Roznai, *Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy*, 29 WM. & MARY BILL RTS. J. 327 (2020); WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019); CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVES (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013).

these roles,[14] and how courts should assert these powers, especially in the face of opposition from powerful political branches.[15]

A fragile court may transform itself into a powerful one, but that endeavor often requires strategy. In terms of judicial power, this inquiry focuses on a court's ability to exercise judicial review against the governing powers and to affect the outcomes of major constitutional and political issues.[16] And in terms of judicial strategy, this account envisages the court's role as both a political and legal actor. While judges operate within a political setting, they are nonetheless situated within a constitutional order as legal institutions. Courts act as courts, even when they act strategically. Judges can affect a court's institutional viability through tactical choices about the framing, timing, and scope of their decision-making.[17] This Article explores the use of particular judicial strategies, explicit or implicit, in pursuit of a court's self-empowerment.

This account contributes to a growing literature on judicial strategy in comparative contexts. To be sure, in the context of the United States, much attention has been paid to the Supreme Court's accumulation of power,[18] not least through Chief Justice Marshall's strategic maneuvers to assert judicial authority in *Marbury v. Madison*.[19] But far less scholarship has taken a wider perspective. Within the comparative constitutional law literature, some scholars have focused on specific aspects of judicial statecraft, like the timing or framing of judicial decisions. Courts may delay

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[14] *See, e.g.*, Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961 (2011); PO JEN YAP, COURTS AND DEMOCRACIES IN ASIA (2017).

[15] *See, e.g.*, YVONNE TEW, CONSTITUTIONAL STATECRAFT IN ASIAN COURTS (2020); THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005 (2016).

[16] Stephen Gardbaum, *What Makes for More or Less Powerful Constitutional Courts?*, 29 DUKE J. COMP. & INT'L L. 1, 5-6 (2018).

[17] *See* Dixon, *Strong Courts*, *supra* note 5.

[18] *See, e.g.*, JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT (2012) (advancing a developmental account of judicial power as an architectonic project).

[19] Marbury v. Madison, 5 U.S. 137 (1803). *See, e.g.*, Mark A. Graber*, Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229 (1998); ROBERT MCCLOSKEY & SANFORD LEVINSON, THE AMERICAN SUPREME COURT 25-28 (2016). *See also* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455 (2005).

or avoid contentious decisions.[20] And judges can frame the style and tone of their reasoning to increase their decisions' effectiveness.[21] Still, most of these accounts have focused on judiciaries that have long established authority, like those in Canada and Europe,[22] or well-known examples from India, South Africa, South Korea, and Taiwan.[23]

This Article broadens the lens to explore how judicial self-empowerment strategies manifest in different political regimes across different countries. Drawing on recent examples from Pakistan, Malaysia, Malawi, and the United Kingdom, I offer a series of fresh comparative case studies to explore the dynamics of strategic judicial assertiveness.[24]

This Article's account of the phenomenon of strategic judicial self-empowerment focuses on how courts engage in statecraft to enhance their own institutional power. Its approach is mainly analytic, offering a framework for understanding the ways in which courts deploy a judicial toolkit to increase the effectiveness of their decisions and the strength of

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[20] *See, e.g.*, Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 4 WIS. L. REV. 685, 694 (2016); Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016).

[21] Dixon, *Strong Courts*, *supra* note 5.

[22] *See, e.g.*, Delaney, *Analyzing Avoidance, supra* note 20, at 28-58 (using the European Court of Human Rights and the Canadian Supreme Court as case studies); Steven Arrigg Koh, *Marbury Moments*, 54 COLUM. J. TRANSNAT'L L. 116, 129-138 (2015) (discussing the European Court of Justice and the International Criminal Tribunal for the former Yugoslavia).

[23] *See, e.g.*, Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8 INT'L J. CONST. L. 885 (2010) (examining the experiences of the constitutional courts of Taiwan and South Korea); Dixon, *Strong Courts*, *supra* note 5 (using India and South Africa as case studies).

[24] *See* RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 211 (2014) (critiquing the lack of comparative studies on the global south, observing that "[t]he constitutional experiences of entire regions—from sub-Saharan Africa to Central America and Eurasia—remain largely *terra incognita*, understudied, and generally overlooked").

their institutional position.[25] A shared feature of the experiences from Pakistan, Malaysia, Malawi, and the United Kingdom is that all these judicial approaches enhance the judiciary's own institutional position vis-à-vis other branches of government. Although differences exist in their constitutional design and history, these apex courts operate in settings traditionally dominated by political, rather than judicial, power. Pakistan, Malaysia, and Malawi have been controlled by the military or single party regimes, while the United Kingdom has historically operated under a Diceyan notion of parliamentary supremacy. [26]

Yet courts in these contexts have sought to adopt self-empowering legal doctrines that expand the scope of their authority and enable judicial intervention in major political matters. For example, judiciaries may claim jurisdictional authority over novel areas of political controversy, as asserted by the supreme courts of Malawi and Britain. Or, as demonstrated by the judges in Pakistan and Malaysia, they may develop innovations as far-reaching as the power to invalidate procedurally proper constitutional amendments. Still, a key question remains: *how* do courts manage to adopt and employ such self-empowering mechanisms?

Part II tells the story of how judges in diverse contexts use various strategies to establish judicial power. Pakistan, Malaysia, Malawi, and the United Kingdom offer examples of judiciaries at different stages of that process. All four jurisdictions have common law systems with an apex final appellate court that also adjudicates constitutional matters. The legal systems of Pakistan, Malaysia, and Malawi derive from British practice, although, unlike the United Kingdom, these post-colonial countries have codified constitutions that contain guarantees for fundamental rights and judicial review.

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[25] This Article does not advance a normative position on whether courts should self-empower; rather, it seeks to better understand the phenomenon of strategic judicial empowerment and the toolkit employed by some courts to expand judicial power. In other work, I provide a normative account of judicial power in the specific context of fragile Asian democracies with a history of dominant political rule. *See* TEW, CONSTITUTIONAL STATECRAFT, *supra* note 15.

[26] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3 (8th ed. 1915) (describing the "sovereignty of Parliament," i.e., the "right to make or unmake any law whatever," as "the dominant characteristic" of Britain's constitution).

Apex courts in these countries have delivered decisions regarded as assertive, even audacious. In Pakistan, an unstable democracy that regularly vacillates between civilian and military rule, the Supreme Court is on a nascent, but noticeable, path toward developing a doctrinal tool to declare certain constitutional features immutable.[27] The Malaysian Federal Court demonstrates how it can be done: through a carefully staged process, the judiciary has managed to establish the power to nullify unconstitutional constitutional amendments even in the face of dominant political power.[28] And in May 2020, Malawi's judiciary invalidated the outcome of a presidential election in a remarkable demonstration of judicial intervention against an incumbent president.[29] The United Kingdom, albeit a long-established democracy, features a relatively young supreme court negotiating the dynamics of its position in a system traditionally based on legislative supremacy,[30] now in a state of constitutional upheaval, particularly post-Brexit.[31]

These four case studies profile courts negotiating various configurations of political power and constitutional dynamics in polities with histories of military and dominant party rule or that are negotiating significant political transformation. Whether emerging or established, all democracies can be fragile.[32] These four jurisdictions are not meant to be a full survey of judicial self-empowerment; rather, they are illustrative examples of a range of strategic judicial approaches. Judges in Pakistan, Malaysia, Malawi, and the United Kingdom, in one way or another, have attempted to carve out increased space for themselves even when pitched

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[27] *See* District Bar Ass'n, Rawalpindi and others v. Fed'n of Pakistan and others, (2015) PLD (SC) 401 [hereinafter *Rawalpindi*].

[28] *See* Semenyih Jaya v. Pentadbir Tanah Daerah Hulu Langat [2017] 3 MALAYAN L.J. 561 [hereinafter *Semenyih Jaya*]; Indira Gandhi v. Pengarah Jabatan Agama Islam Perak [2018] 1 MALAYAN L.J. 545 [hereinafter *Indira Gandhi*].

[29] Mutharika v. Chilima (Constitutional Appeal No. 1 of 2020) [2020] MWSC 1 (Malawi) [hereinafter *Mutharika*].

[30] In 2009, the United Kingdom Supreme Court was established, replacing the Appellate Committee of the House of Lords pursuant to the Constitutional Reform Act of 2005.

[31] *See* Mark Elliott, *The United Kingdom's Constitution and Brexit: A 'Constitutional Moment'?*, [2020] HORITSU JIHO 15 (2020).

[32] *See* Issacharoff, *Judicial Review in Troubled Times*, *supra* note 13, at 3.

against the regime's interests and powerful political actors. These examples illustrate an arc of apex courts in fraught political contexts at various points of establishing judicial authority.

Part III explores how courts in these contexts strategically engage in self-empowerment. I examine the specific strategies that judges employ to increase their own institutional power. These strategies are not exclusive; indeed, a court may use some mechanisms to support another in service of an overall aim of judicial empowerment.

First, a court may assert authority by using a *maxi-minimalist* strategy. A *Marbury*-style decision features broad, maximalist reasoning that expands judicial power, while delivering a narrow holding that avoids or defers immediate political confrontation.[33] Timing matters, particularly when a court seeks to insulate itself from immediate political or public backlash.[34] Judges in Pakistan and Malaysia planted the seeds for a doctrinal tool to review constitutional amendments that the court would be able to deploy in future confrontations with the governing powers, while simultaneously minimizing the impact of the immediate ruling by leaving the challenged amendments intact or by issuing remedies with only prospective effect. A strategy of maxi-minimalism may aid a court in delaying or avoiding frontal political attack—of especial consequence for a fragile court confronting powerful political actors.

Next, consider the inverse approach: what I call a strategy of *mini-maximalism*. A mini-maximalist approach involves reasoning that seeks to downplay the expansion of the judiciary's power, typically justifying the decision as orthodox legal doctrine or employing formalistic interpretation, while delivering a ruling of immediate constitutional and political consequence. Take, for example, the United Kingdom Supreme Court's *Miller II* decision overruling the Prime Minister's advice to the Queen to prorogue Parliament, which resulted in Parliament reconvening the

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[33] *See* Dixon & Issacharoff, *Judicial Deferral*, *supra* note 20, at 687. *See also* William Michael Treanor, *The Story of* Marbury v. Madison, *in* FEDERAL COURTS STORIES 30 (Vicki Jackson & Judith Resnick eds., 2009) (describing how "in *Marbury*, Marshall was able to assert judicial authority, but avoid direct confrontation with the Executive").

[34] *See* Dixon, *Strong Courts*, *supra* note 5; Delaney, *Analyzing Avoidance*, *supra* note 20.

following day.[35] Lady Hale, writing for a unanimous bench, presented the justiciability of the judiciary's extraordinary intervention into this political sphere as incremental, based on perfectly orthodox constitutional principles.[36] And the Malawi Supreme Court's decision on perhaps the most political of questions—the outcome of a presidential election—was carefully couched in terms of constitutional, not judicial, supremacy. A court that adopts narrowly formalistic reasoning that de-emphasizes the aggrandizement of its own power, even as it issues a consequential decision that has a substantial impact on the political or constitutional order, is being mini-maximalist.

Third, courts seeking allies in other institutional stakeholders may employ a strategy of *coalition-building*, which can help secure support for their decisions and shore up their own institutional authority. The way that a judiciary self-positions in interbranch contestations between political institutions may impact its own institutional power.[37] Thus, a court may frame a decision as protecting the legislature from an overbearing executive, as Britain's Supreme Court did by espousing Parliament's sovereignty in the prorogation decision.[38] Framing a decision as locating authority in another branch of government also helps to obscure the judiciary's own expansion of power. By presenting itself as a bulwark safeguarding one branch against the encroachment of another, the judiciary gains a valuable political ally. The resulting support from a political institution increases buy-in for a court's decision—especially valuable in high-stakes issues—and

[35] R (on the application of Miller) v. The Prime Minister, Cherry and Others v. The Advocate General for Scotland [2019] UKSC 41 [hereinafter *Miller II*].

[36] Aileen McHarg, *The Supreme Court's prorogation judgement: guardian of the Constitution or architect of the Constitution?,* 24 EDINBURGH L. REV. 88, 94 (2020).

[37] *See* Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. (forthcoming 2021) (manuscript at 4) (describing how the United States Supreme Court self-presents as a neutral arbiter in interbranch contestations to appear more trustworthy, therefore accruing more power).

[38] *Miller II* [2019] UKSC 41 at [41]-[42].

incentivizes other institutional actors to promote the court's ruling and legitimacy to the public.[39]

Fourth, *rhetorical strategy* in *popular signaling* through crafting a constitutional narrative is a powerful means of building support for a court's position. Judges that are sensitive about increasing a court's legitimacy and influence are conscious about appealing to a broader audience beyond the courts. We see this public-facing sensibility in Pakistan's Supreme Court invoking local values by insisting that the power to review constitutional amendments is based on the "salient features" of the Pakistan Constitution.[40] Or a court may proclaim itself on the side of the people, like the Malawian Supreme Court framing its decision as giving effect to the expressed democratic will.[41] Consider also the style and rhetoric of the U.K. Supreme Court's streamlined and succinct opinion in *Miller II*:[42] the prorogation decision was worded in "unusually forthright"[43] and "crystal-clear"[44] language that appeared crafted for popular salience and to engage the broad public.

Fifth, consider the optics of a *unanimous* court decision. A unified front increases the weight and legitimacy of the judiciary's decision; it also helps to shield the preferences of individual judges from the public.[45] When seeking to assert power in high stakes constitutional or political situations, many courts across the world—including the United States Supreme

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[39] *See e.g.*, Ian Murray, *Supreme Court ruling confirms that we don't live in dictatorship*, HERALD (Sept. 25, 2019), https://www.heraldscotland.com/news/17925499.ian-murray-supreme-court-ruling-confirms-dont-live-dictatorship/ (Member of Parliament Murray declaring that "[t]he judges have upheld our democracy and we should all thank them for that").

[40] *Rawalpindi* (2015) PLD (SC) 401 at para. 180(d) (Saeed, J.); para. 51 (Khawaja, J.).

[41] *Mutharika* [2020] MWSC 1 at 31.

[42] *Miller II* [2019] UKSC 41.

[43] Bowcott, Quinn & Carrell, *Johnson's suspension of parliament unlawful*, *supra* note 3.

[44] Aileen McHarg, *The Art of Judicial Disguise*, JUDICIAL POWER PROJECT (Sept. 30, 2019), https://judicialpowerproject.org.uk/aileen-mcharg-the-art-of-judicial-disguise/.

[45] Catherine Barnard, *The unanimity in Cherry/Miller*, JUDICIAL POWER PROJECT (Oct. 3, 2019), https://judicialpowerproject.org.uk/catherine-barnard-the-unanimity-in-cherrymiller/.

Court[46] and the constitutional courts of South Korea and Taiwan[47]—have sought to issue single-voice decisions. So, too, with the supreme courts of Malawi, Malaysia, and Britain: all issued unanimous judgments, without dissenting or concurring opinions, in their recent decisions over politically contentious issues.

Part IV assesses the conditions that tend to give rise to courts strategically reaching for self-empowerment. It does not seek to predict conclusively when instances of judicial assertiveness will arise. Rather, it considers situations in which judges are likely to employ self-empowering strategies and suggests factors that might influence how effectively they are employed.

To begin, courts typically resort to asserting themselves against the governing powers when their own institutional turf is under threat, such as when political institutions attempt to interfere with the court's independence or judicial review powers. As with similar invocations of the basic structure doctrine by courts in places across Asia, Africa, and South America,[48] the supreme courts of Pakistan and Malaysia reached for this tool when confronted with constitutional amendments that sought to limit the judiciary's power to review certain matters or to alter the process of appointing judges.[49]

Moreover, it is often in moments of political or constitutional crisis that courts are presented with the space to take on an interventionist role.[50] Sometimes, the judiciary may emerge from the constitutional rupture with an enhanced position, for instance, when the transition results in a new political order as appears to be the case in Malawi. But such judicial ventures may also backfire resulting in political backlash against the courts, especially when the dominant political regime remains in power. After being re-

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[46] *See, e.g.*, Cooper v. Aaron 358 U.S. 1 (1958); Brown v. Board of Education 347 U.S. 483 (1954).

[47] Chang, *Strategic Judicial Responses*, *supra* note 23, at 900-01.

[48] *See* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 39-70 (2017).

[49] Issacharoff, *Judicial Review in Troubled Times*, *supra* note 13, at 20.

[50] *See* Nathan J. Brown & Julian G. Waller, *Constitutional courts and political uncertainty: Constitutional ruptures and the rule of judges*, 14 INT'L J. CONST. L. 817 (2016).

elected, for example, Prime Minister Johnson's Government took steps to "take back control" from the courts,[51] establishing an independent review panel to consider reforms to the courts' powers.[52] In response to the Supreme Court's *Miller II* decision, the U.K. Government also introduced legislation that revived the Prime Minister's prerogative to dissolve Parliament, with an ouster clause specifically prohibiting courts from questioning the exercise of that power,[53] as well as a bill implementing reforms to judicial review.[54]

Another key factor relates to public support. Especially when rendering politically sensitive decisions against the dominant governing power, judges tend to be more willing to assert themselves when they can capitalize on a wave of popular support for the outcome of their decision. Institutions of government, after all, tend to accrue power through successful engagements with the public.[55] A court that can take advantage of high levels of support for a particular decision from the public, in addition to the legal elite,[56] builds public trust and institutional power. It is relevant in this regard that the Malawi judiciary annulled the outcome of the presidential election after months of nationwide protests following the 2019 election. In an unprecedented move, Malawi's high court judges allowed court proceedings to be broadcast live on radio.[57] For months,

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[51] *See* Owen Bowcott, *New attorney general wants to 'take back control' from courts*, GUARDIAN (Feb. 13, 2020), https://www.theguardian.com/politics/2020/feb/13/new-attorney-general-wanted-to-take-back-control-from-courts.

[52] Press Release, U.K. Ministry of Justice, Gov't launches indep. panel to look at judicial review (July 31, 2020).

[53] Dissolution and Calling of Parliament Act 2022, §3, https://www.legislation.gov.uk/ukpga/2022/11/enacted.

[54] Judicial Review and Courts Act 2022, https://www.legislation.gov.uk/ukpga/2022/35/data.pdf.

[55] *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 16-25 (2017).

[56] *See, e.g.*, FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 43 (Malcolm Feeley, Terence Halliday & Lucien Karpik eds., 2007).

[57] *See Malawians await ruling on contested presidential poll*, AL JAZEERA (Dec. 6, 2019), https://www.aljazeera.com/news/2019/12/6/malawians-await-ruling-on-contested-presidential-poll.

people across the country followed the hearings, which culminated in a day-long live broadcast of the high court judges reading out their decision.[58] Support from the public and legally educated elite can help secure the position of the judiciary—or that of an individual justice, as illustrated by the protests from lawyers and civil society groups that proved instrumental in stopping Malawi's government from removing the chief justice just before the fresh presidential election.[59]

Lastly, judicial leadership can play a crucial role in guiding a court to seize an opportunity to build power. The unanimous judgments of the supreme courts in Malawi, Malaysia, and the United Kingdom were authored by prominent apex court judges—two of whom were chief justices. It also bears notice that all three of these justices were due to retire from the bench shortly after delivering those major decisions.[60] A unanimous court is often powerful, and all the more so when guided by an influential individual judge with an eye toward establishing an intellectual or institutional legacy.[61]

Judicial gambles for power are precarious endeavors. In making a play for self-empowerment, a court may reach for various strategies in constitutional decision-making. Sometimes such strategies may fail, undermining a court's authority; at other times, well-executed judicial strategies can enhance a court's legitimacy and power. This Article seeks to shed light on some strategies of judicial empowerment that form part of the judicial toolkit in diverse settings around the world.

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[58] *See* Jason Burke & Charles Pensulo, *Malawi court annuls 2019 election results and calls for new ballot*, GUARDIAN (Feb. 3, 2020), https://www.theguardian.com/world/2020/feb/03/malawi-court-annuls-2019-election-results-calls-new-ballot.

[59] Charles Pensulo, *Forced retirement of Malawi's chief justice before June election blocked*, GUARDIAN (June 16, 2020), https://www.theguardian.com/global-development/2020/jun/16/forced-retirement-of-malawis-chief-justice-before-june-election-blocked.

[60] *See* opinions written by Lady Hale, President of the United Kingdom Supreme Court in *Miller II* [2019] UKSC 41, Chief Justice Mutharika of the Malawi Supreme Court in *Mutharika* [2020] MWSC 1, and Justice Zainun Ali of the Malaysian Federal Court in *Semenyih Jaya* [2017] 3 MALAYAN L.J. 561 and *Indira Gandhi* [2018] 1 MALAYAN L.J. 545.

[61] *See generally* TOWERING JUDGES: A COMPARATIVE STUDY OF CONSTITUTIONAL JUDGES (Rehan Abeyratne & Iddo Porat eds., 2021).

I. SITUATING STRATEGIC JUDICIAL EMPOWERMENT

A. *Judicial Empowerment and Judicial Strategy*

With the emergence of constitutional courts in many newer democracies over the 20th century, much scholarship has examined the rise of judicial review as one of the hallmarks of modern constitutionalism.[62] Yet courts vary in their capacity to enforce constitutional limits against the political branches of government. In many constitutional democracies, courts are empowered with strong judicial review of the form familiar to the United States: the authority to enforce the constitution against the political branches of government by invalidating legislation. In other countries where courts possess a weaker form of judicial review, legislatures are constitutionally permitted to override or ignore judicial decisions.[63]

Judicial power in practice has to do with more than the formal design of a court's powers of judicial review. Daniel Brink and Abby Blass suggest that judicial power can be captured in terms of a court's "*ex ante* autonomy" from external control over judicial appointments, "*ex post* autonomy" in relation to formal means of punishing or rewarding judges, and scope of authority over a broad range of politically significant disputes.[64] Yet as they "readily concede," "actual judicial power is not simply a function of institutional design."[65]

Powerful courts are consequential actors that actively exercise powers of strong judicial review against the government of the day and

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[62] *See, e.g.*, HIRSCHL, TOWARDS JURISTOCRACY, *supra* note 7.

[63] *See* Stephen Gardbaum, *Reassessing the new Commonwealth model of constitutionalism*, 8 INT'L J. CONST. L. 167 (2010); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2009).

[64] Daniel M. Brinks & Abby Blass, *Rethinking judicial empowerment: The new foundations of constitutional justice*, 15 INT'L J. CONST. L. 296, 299 (2017).

[65] *Id.* at 304.

impact the outcomes of important constitutional and political issues.[66] While formal constitutional design may affect the scope of judicial review, as Rosalind Dixon notes, "ultimately, a court's response to these features will be a product of how judges themselves understand their role—and how they anticipate that a broader set of political actors will react to assertions of strong judicial power."[67] A court's overall actual judicial strength is significantly affected by the broader legal culture and political context.

The last few decades have seen a vibrant discourse emerge on judicial review and judicial empowerment in many democracies worldwide. An important and growing body of literature has explored the political construction of judicial power.[68] Strategic approaches, from a political science perspective, take a rational-choice view of how courts behave in relation to elected officials or the public,[69] viewing the judge as "a rational maximizer of…his 'self-interest.'"[70] Others see judicial behavior as determined by the dominant political regime,[71] or the competitiveness of a polity's electoral party system.[72] And some accounts explain the establishment of judicial review as a way of providing a form of "insurance" to political institutions against the risks that come with a potential electoral loss.[73] Scholars have explored the constitutionalization of judicial review

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[66] Gardbaum, *Powerful Constitutional Courts?*, *supra* note 16, at 5-6. Gardbaum suggests the "international influence" of a court as a third criterion. I agree with Rosalind Dixon that there are problems of endogeneity and circularity in measuring a court's global influence. *See* Dixon, *Strong Courts*, *supra* note 5, at 306. For the purposes of this project, I focus on the extent of a court's judicial review practice and the impact of its decisions on major constitutional and political issues.

[67] Dixon, *Strong Courts*, *supra* note 5, at 308.

[68] *See* Lee Epstein & Jack Knight, *Efficacious Judging on Apex Courts*, *supra* note 8; Georg Vanberg, *Constitutional Courts in Comparative Perspective*, *see supra* note 8.

[69] *See, e.g.*, Lee Epstein & Jack Knight, *Strategic Accounts of Judging*, *supra* note 10; Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, (53(3) POL. RES. Q. 625 (2000).

[70] Posner, *supra* note 10.

[71] *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

[72] Stephenson, *supra* note 9.

[73] *See, e.g.*, GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES, *supra* note 7, at 24-25.

and theorized about the judicialization of politics,[74] or what Ran Hirschl has called "juristocracy."[75] On this account, courts are empowered by influential political actors seeking to insulate their policy preferences and preserve their hegemonic position.[76]

Political context is significant, of course. Yet largely external or instrumentalist accounts that are focused on a court's proximate political setting do not capture the whole narrative.[77] As illustrated by courts in authoritarian or deeply unstable regimes, from Pakistan and Malaysia to Malawi, judges have managed to carve out space for themselves even when pitched against the regime's interests and powerful political actors.

Courts worldwide have become significant actors in constitutional governance.[78] Scholars have shown how constitutional courts have played a key part in hedging against democratic erosion in many fragile democracies.[79] In a world in which rising illiberal populism has resulted in authoritarian backsliding,[80] the role of courts in governance has become an urgent question. A burgeoning literature has explored how courts in emerging and established democracies have asserted authority to preserve constitutional democracy.[81] But for courts to assume an empowered role

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[74] *See* C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER 1 (C. Neal Tate & Torbjörn Vallinder eds., 1995).

[75] HIRSCHL, TOWARDS JURISTOCRACY, *supra* note 7.

[76] *Id.* at 49.

[77] *See* Mark Tushnet, *Authoritarian Constitutionalism,* 100 CORNELL L. REV. 391, 431 (2015) (criticizing instrumentalist or functional accounts of courts and constitutions in authoritarian regimes as "subject to important instabilities"). As an example, Tushnet cites RULE OF LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tamir Moustafa & Tom Ginsburg eds., 2012).

[78] *See* Robert A. Kagan, Diana Kapiszewski, and Gordon Silverstein, *New Judicial Roles in Governance*, *in* COMPARATIVE JUDICIAL REVIEW, *supra* note 8, at 142.

[79] Issacharoff, *Fragile Democracies*, *supra* note 12.

[80] *See* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2019); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2019). *See also* Stephen Gardbaum, *The Counter-playbook: Resisting the Populist Assault on Separation of Powers*, 59 COLUM. J. TRANSNAT'L L. 1 (2021).

[81] *See, e.g.*, Roznai, *Who Will Save the Redheads?, supra* note 13; *see* Issacharoff, *Judicial Review in Troubled Times*, *supra* note 13; DALY, , *supra* note 12; SADURSKI, *supra* note 13.

particularly in the face of consolidated political power raises a central question: how?

Judicial strategy is important to that endeavor. Courts may strategize to survive in times of crisis,[82] to shape a newly formed political order following a constitutional rupture,[83] or to protect the democratic order.[84] Significantly, as this Article explores, courts may use strategy in explicit or implicit ways toward self-empowerment.

Within comparative constitutional law scholarship, emerging accounts have explored particular aspects of judicial strategy. Rosalind Dixon and Samuel Issacharoff have examined how courts use deferral tactically; implicit—or what they call "second-order"—deferral is "*Marbury*-like in aspiration" in that it is designed "to allow courts to assert themselves short of a frontal confrontation with the political branches."[85] Indeed, the archetypical example is United States Chief Justice Marshall's carefully crafted declaration of judicial authority over the executive in *Marbury v. Madison*.[86] By deferring politically sensitive constitutional decisions to a later date, courts can sidestep the immediate legal or political consequences of a ruling.[87] Avoidance is a related strategy. As Erin Delaney shows, courts employ justiciability limits and doctrines of deference to avoid deciding contentious issues.[88] These accounts of deferral and avoidance focus on a particular aspect of judicial strategy: timing.

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[82] Roni Mann & Conrado Hübner Mendes, *What Judges Don't Say – Judicial Strategy and Constitutional Theory*, LAWLOG (Feb. 2015), https://lawlog.blog.wzb.eu/2015/02/09/what-judges-dont-say-judicial-strategy-and-constitutional-theory/.

[83] Brown & Waller, *Constitutional courts and political uncertainty, supra* note 50.

[84] Dixon & Issacharoff, *Judicial Deferral*, *supra* note 20.

[85] *Id.* at 687.

[86] *See* Graber, *Federalist or Friends, supra* note 19, at 229; Treanor, *The Story of* Marbury v. Madison, *supra* note 33, at 30 (arguing that *Marbury* was "not a vehicle to establish judicial review," but "rather, a vehicle to establish a judicial power to direct Executive compliance with the law").

[87] *See also* John Ferejohn, *Judicial Power: Getting it and Keeping it, in* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVES 349 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013).

[88] *See, e.g.*, Delaney, *Analyzing Avoidance, supra* note 20.

Courts may use other techniques related to the authorship, narrative, tone, and engagement of their opinions to influence elite and popular responses, which may increase respect for the implementation of their orders, as Dixon argues the Indian and South African courts have done.[89] And in East Asia, Wen-Chen Chang shows how the constitutional courts of Korea and Taiwan have strategically responded to highly politically charged cases.[90]

These important accounts have begun to identify the strategic choices that courts make about the scope and framing of their decisions to impact the effectiveness of their decisions. Still, the scholarship so far has been primarily focused on judiciaries that have long secured their institutional authority, like the European Court of Justice,[91] the European Court of Human Rights, and the Supreme Court of Canada.[92] Other cases focus on well-known courts regarded as successful institutions that have helped to develop relatively robust constitutionalism in places like India,[93] South Africa,[94] South Korea,[95] and Taiwan.[96] This Article broadens comparative horizons by exploring recent examples of judges in diverse contexts employing various strategies to empower their position.

B. *Defining Strategic Judicial Self-Empowerment*

In this Article, I explore the use of judicial strategy and the tools of statecraft that courts employ to enhance their own institutional power. This section sets out to define and explain that phenomenon, which I identify as strategic judicial self-empowerment.

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[89] Dixon, *Strong Courts*, *supra* note 5.

[90] Chang, *supra* note 23, at 886, n.3 (observing that these East Asian courts have "long been credited as successful constitutional institutions helping to steer democratic transitions and guaranteeing individual rights").

[91] *See* Koh, *supra* note 22, at 129-38.

[92] *See* Delaney, *Analyzing Avoidance, supra* note 20, at 28-58.

[93] *See* Dixon, *Strong Courts*, *supra* note 5.

[94] *See* ROUX, *supra* note 15; Choudhry, *supra* note 12.

[95] *See* Chang, *supra* note 23.

[96] *See id.*; David S. Law & Hsiang-Yang Hsieh, *Judicial Review of Constitutional Amendments: Taiwan*, *in* CONSTITUTIONALISM IN CONTEXT (David S. Law ed., forthcoming).

By judicial power, I refer to the strength of a court's ability to assert itself against the governing political branches and to affect the outcomes of constitutionally and politically significant issues.[97] This account is concerned with particular instances of judicial self-empowerment at a punctuated equilibrium in time, rather than with the evolutionary accretion of judicial power over an extended period.[98]

In terms of judicial self-empowerment, this inquiry focuses on the judiciary's own institutional empowerment vis-à-vis other branches of government. Unlike weak or dialogic forms of judicial review, which seek to promote cooperative dialogue with the political branches,[99] judicial self-empowerment strategies are aimed at expanding the court's power at the expense of other government actors.[100] Judicial strategies of self-empowerment may include how a court employs legal reasoning and pronounces on the scope of their rulings. Other more implicit strategies involve the choices that judges make about the timing of their decisions and the rhetorical framing of their opinions.

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[97] *See* Dixon, *Strong Courts*, *supra* note 5, at 306 (defining judicial strength in terms of "the extent to which courts exercise strong powers of judicial review and…have some 'actual impact on social and political outputs' in line with the outcome intended by the court"). *See also* Brinks & Blass, *Rethinking judicial empowerment, supra* note 64, at 299 (identifying a key dimension of judicial empowerment as "the scope of a court's authority…to intervene efficiently and decisively in a broad range of politically significant disputes on behalf of a broad range of actors"); Gardbaum, *Powerful Constitutional Courts?, supra* note 16, at 5-6 (defining powerful courts as those that "exercise their powers of judicial review against the government of the day" and that are "consequential" in "affecting the outcomes of important constitutional and political issues").

[98] For accounts of judicial power being constructed through a slower evolutionary process, *see* CROWE, *supra* note 18 (on the U.S. Supreme Court's institution-building from 1789 to the close of the twentieth century); HIRSCHL, TOWARDS JURISTOCRACY, *supra* note 7 (on the rise of judicial power globally over the twentieth century).

[99] *See, e.g.*, YAP, *supra* note 11 (2015) (arguing that dialogic review treats courts and the political branches as "participants in an enduring constitutional colloquy" allowing "a constitutional dialogue between co-equal branches of government."). *See also* Delaney, *Analyzing Avoidance*, *supra* note 20, at 4 (describing how "courts worldwide seem to rely on the possibilities and benefits of extrajudicial political dialogue as a healing salve for their democratic deficits").

[100] *Compare* Chafetz, *Nixon/Trump*, *supra* note 37, at 4 (describing how the U.S. Supreme Court's self-presentation in separation of powers conflicts has resulted in the court's aggrandizement at the expense of Congress).

The notion of judicial strategy may seem incongruous with constitutional theories of adjudication premised on judges undertaking reasoned interpretation and elaboration of legal principles. [101] John Ferejohn notes that it is "of course controversial among lawyers to describe courts as 'political' or 'strategic,'" although he acknowledges that such characterization is "sometimes unavoidable."[102] This Article seeks to show how courts can and do use a set of strategies within a broader political context to construct judicial power.

Judicial strategy, though, does not simply refer to judges as rational choice actors acting solely to maximize their own policy preferences.[103] This is not a deterministic view of judicial behavior based on the external political context. While judges operate within a particular political setting, they nevertheless exercise agency as legal actors. Courts are situated and perceived within a constitutional order as *legal* institutions. Thus, as Dixon puts it, their strategic choices "have a distinctive logic and focus in a judicial context."[104] This account explicitly envisages the court's dual role as a legal and political actor.

As legal actors, courts expand power through adopting self-empowering doctrinal mechanisms that enlarge their scope of authority. Courts may deploy strategies in a protective capacity, typically in efforts to defend their judicial power. In Pakistan and Malaysia, for example, when confronted with legislative impingements on the power of judicial review or judicial independence, the apex courts laid out a doctrine of unconstitutional constitutional amendments. Thus, the Pakistani and the Malaysian supreme courts declared that the constitution consists of an unamendable core of fundamental features, including judicial power and

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[101] Mann, *supra* note 10, at 14 (observing that the "idealizing discourse of constitutional theory" based on the normative force of generalized principles and doctrines "overlooks the social and political pressures that courts must confront").

[102] Ferejohn, *supra* note 87, at 353.

[103] *See* Posner, *supra* note 10; *see also* Mann, *supra* note 10, at 28; Dixon, *Strong Courts*, *supra* note 5, at 312;

[104] Dixon, *Strong Courts*, *supra* note 5, at 312.

the separation of powers, that could not be altered by the legislature.[105] By establishing the power to nullify even procedurally proper constitutional amendments, these courts invoked a potent legal tool that empowered the judiciary to defend its institutional turf from political intrusion.

Judges can also use strategic assertions of power in a proactive manner that bring about major constitutional change or regime transformation. For example, courts may assert jurisdictional authority over novel areas of political controversy. The United Kingdom Supreme Court offers an example. In 2019 it held that the executive's prerogative to decide when to suspend Parliament was justiciable, and ultimately declared the prorogation of Parliament to be unlawful. Consider also the Malawi Supreme Court's ruling in May 2020 on one of the most political of questions: the outcome of a presidential election, a decision that forced the rerunning of an election. Instead of considering these issues to be beyond the judiciary's ambit, the U.K. and Malawian courts directly took on the task of resolving these contentious issues of high political stakes. The instances in effect resulted in a transfer of power from the majoritarian political branches to the courts, while also precipitating regime transformation.

Whether by asserting the power to review constitutional amendments that undermine the existing constitution or claiming jurisdiction over novel political questions, the legal mechanisms employed by these courts share a commonality. All these approaches empower the judiciary at the expense of the other branches of government in politically challenging contexts where that kind of assertion has been without precedent.[106] Courts in Malawi, Malaysia, and Pakistan operate in fragile democracies historically controlled by powerful political interests in the form of military or dominant party rule. But judicial self-empowerment is not limited to these newer polities, as illustrated in the case of the Supreme Court of the United Kingdom, a country with a longstanding tradition of parliamentary sovereignty.

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[105] *Rawalpindi*, (2015) PLD (SC) 401; *Semenyih Jaya* [2017] 3 MALAYAN L.J. 561; *Indira Gandhi* [2018] 1 MALAYAN L.J. 545.

[106] *See* Chang, *supra* note 23, at 905 (noting that "[o]f all the governing institutions, only the courts are empowered directly by [these] legal doctrines").

The question, then, is *how* courts manage to establish self-empowering mechanisms in fraught political contexts.

II. JUDICIAL STATECRAFT IN COMPARATIVE PERSPECTIVE

This Part tells the story of how apex courts in various national settings have strategically sought to establish and expand their own institutional power. Drawing on Pakistan, Malaysia, Malawi, and the United Kingdom as illustrative examples, it examines how judges in these countries have tactically sought to establish authority against the governing political power. All four jurisdictions have common law legal systems in which an apex court functions as the final appellate court as well as arbiter over constitutional matters, unlike those that have a distinct constitutional court.[107] These countries exhibit different configurations of political power. Pakistan has periodically been controlled by military rule, while Malaysia and Malawi have historically been dominated by a single political party. Meanwhile, the United Kingdom, a long-established democracy that has traditionally operated under parliamentary sovereignty, is experiencing major political and constitutional changes following its exit from the European Union. Across a variety of geographic, cultural, and political settings, there have been striking instances in which courts have launched strategic responses toward self-empowerment.

A. *The Supreme Court of Pakistan: Judges versus Generals*

Ever since emerging from the violent 1947 partition of British India as an independent nation state, Pakistan has vacillated between military rule and civilian governance. Amidst a tumultuous cycle of coups, emergencies, and elections, the country has had three constitutions. Pakistan's first constitution was established in 1956 and annulled two years later after a military coup. Between 1958 to 1971, the country was ruled by the military with a second constitution promulgated in 1962. In 1970, Pakistan held its first democratic elections. After a civil war, which resulted in East Pakistan seceding to become what is now Bangladesh, the military regime eventually relinquished power to the Pakistan People's Party led by Zulfiqar Ali

[107] *See, e.g.*, S. AFR. CONST., 1996, art. 167 (creating the Constitutional Court of South Africa); art. 168 (creating a Supreme Court of Appeal).

Bhutto. A new constitution was adopted in 1973, transitioning Pakistan to a parliamentary system of governance, with Bhutto as Prime Minister. Civilian rule ended in 1977 when the military commanded by General Zia-ul Haq overthrew the Bhutto-led Pakistan People's Party government and suspended the Constitution. In 1985, the Constitution was restored, albeit with significant modifications brought about by the Eighth Amendment, which expanded the power of the President.[108]

Within this unstable regime, the Supreme Court of Pakistan has held a precarious position.[109] For the first several decades of Pakistan's history, the courts took a subservient attitude toward the governing regime, almost invariably validating actions taken by the military or civilian powers.[110] For instance, in a 1977 decision, the Supreme Court cited "state necessity" to unanimously validate a military coup.[111] The Court also upheld Bhutto's conviction on contentious charges of criminal conspiracy and murder, which led to the first democratically elected prime minister being executed.[112]

In the period following Pakistan's transition to a civilian government in 1985, the Supreme Court made some tentative gestures

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[108] PAKISTAN CONST. art. 58(2)(b) (authorizing the President to "dissolve the National Assembly in his discretion where, in his opinion, a situation had arisen in which the Government of the Federation could not be carried on in accordance with the provisions of the Constitution and an appeal to the electorate was necessary.").

[109] See generally YASSER KURESHI, SEEKING SUPREMACY: THE PURSUIT OF JUDICIAL POWER IN PAKISTAN (2022) (providing an account of the judiciary's shift in assertiveness towards the military in Pakistan). See also Aziz Z. Huq, *Mechanisms of Political Capture in Pakistan's Superior Courts*, 10 Y.B. ISLAMIC AND MIDDLE E. L. 21 (2003-2004).

[110] *See* Mooen H. Cheema, *Two Steps Forward One Step Back: The Non-Linear Expansion of Judicial Power in Pakistan*, 16 INT'L J. CONST. L. 503, 505 (2018).

[111] Begum Nusrat Bhutto v. Chief of the Army Staff, (1977) PLD (SC) 657. The Court had previously validated a military coup in State v. Dosso, (1958) PLD (SC) 533 and mentioned the doctrine of state necessity in Fed'n of Pakistan v. Maulvi Tamizuddin Khan, (1955) PLD (FC) 240. *But compare* Asma Jillani v. Government of Punjab (1972) PLD (SC) 139 (although the Court declared President Yahya Khan regime's legislative and executive actions illegal, this decision was only delivered after Khan had already handed over power to Zulfiqar Ali Bhutto).

[112] Zulfiqar Ali Bhutto v. State, (1979) PLD (SC) 53. *See also* SADAF AZIZ, CONSTITUTION OF PAKISTAN: A CONTEXTUAL ANALYSIS 132 (2018) (describing the episode as the "judicial murder" of Bhutto).

toward carving out greater space for judicial review. In the 1996 case of *Al-Jehad Trust*, the Supreme Court tacitly recognized that when there is conflict between a constitutional provision and a later amendment, it must be resolved by reading the entire Constitution "as a whole," considering "the basic features of the Constitution."[113] In *Mahmood Khan Achakzai*,[114] the Court reiterated that the Constitution of Pakistan has "salient features," which include "federalism" and a "parliamentary form of Government blended with Islamic provisions." The challenge was brought after the President exercised his powers under the Eighth Amendment to dismiss the government. The Court held that "Parliament has full freedom to make any amendment to the Constitution," but declared that was so "as long as salient features and basic characteristics of the Constitution" as reflected in the Objectives Resolution adopted in 1949 "are untouched and allowed to remain intact as they are."[115] The Court thus left open the door to operationalize the doctrine, even as it conserved its institutional capital by upholding the legality of the Eighth Amendment.[116] A similar scenario arose in *Wukala Mahaz v. Federation of Pakistan*, a challenge to the Fourteenth Amendment passed in 1997 that empowered the head of a political party to dismiss party members if they spoke or voted against their party and barred judicial review over any legal proceeding relating to the amendment. Here again, the Court did not invalidate the Fourteenth Amendment.[117] Instead of directly declaring the constitutional provision invalid, the majority read down the effect of the ouster clause and amendment, stating that it would adopt the interpretation most consonant with the constitutional guarantees of fundamental rights, independence of the judiciary, and democratic principles blended with Islamic provisions.[118]

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[113] Al-Jehad Trust v. Fed'n of Pakistan, (1996) PLD (SC) 324 (laying down specific criteria in relation to how the judicial appointments were to take place).

[114] Mahmood Khan Achakzai v. Fed'n of Pakistan, (1997) PLD (SC) 426.

[115] *Id.* at para. 56.

[116] *See* Po Jen Yap & Rehan Abeyratne, *Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia*, 19 INT'L J. CONST. L. 127 (2021).

[117] Wukala Mahaz Barai Tahafaz Dastoor v. Fed'n of Pakistan, (1998) PLD (SC) 1263.

[118] HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN 838 (2001).

In October 1999, General Pervez Musharraf toppled Prime Minister Nawaz Sharif after Sharif attempted to remove him as army chief. In short order, Musharraf suspended Pakistan's National Assembly, declared a state of emergency, suspended the Constitution, and limited judicial review.[119]

In the face of Musharraf's military rule, the Supreme Court retreated.[120] In a 2000 decision, the Court followed an old script: it unanimously validated Musharraf's coup on the basis of the doctrine of state necessity.[121] Still, the Court emphasized that "no amendment shall be made in the salient features of the Constitution, i.e. independence of the judiciary, federalism, parliamentary form of government blended with Islamic provisions."[122] But the Court later appeared to fully capitulate when it upheld the Seventeenth Amendment, which allowed Musharraf to take over the office of President while retaining the post of the Chief of Army Staff and precluded the issue from judicial review.[123] Dismissing the notion of judicially enforceable limitations based on the constitution's basic structure, the Court insisted that the "remedy lay in the political not the judicial process."[124]

Soon, though, the judiciary would be at the epicenter of Pakistan's political turmoil. In 2007, General Musharraf suspended Chief Justice Iftikhar Chaudhry for alleged "misuse of office."[125] When the Supreme Court reinstated the chief justice,[126] Musharraf imposed a state of

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[119] *See* Provisional Constitution Order, No 1. of 1999, § 4 ("(1) No Court, tribunal or other authority shall call or permit to be called in question the Proclamation of Emergency of 14th day of October 1999 or any Order made in pursuance thereof. (2) No judgment, decree, writ, order or process whatsoever shall be made or issued by any Court or tribunal against the Chief Executive or any authority designated by the Chief Executive.").

[120] *See* Taiyyaba Ahmed Qureshi, *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan*, 35 N.C. J. INT'L L. & COM. REG. 485 (2010).

[121] Zafar Ali Shah v. Pervez Musharraf, (2000) PLD (SC) 869.

[122] *Id.* at para. 1221.

[123] Pakistan Lawyers Forum v. Fed'n of Pakistan, (2005) PLD (SC) 719.

[124] *Id.* at paras. 56-57.

[125] Osama Siddique, *Judicialization of Politics: The Supreme Court after the Lawyers' Movement*, *in* UNSTABLE CONSTITUTIONALISM 159-170 (Mark Tushnet & Madhav Khosla eds., 2015).

[126] Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan v. The President of Pakistan, (2007) PLD (SC) 578.

emergency, dismissed the chief justice along with sixty other superior court judges, and appointed new judges willing to take an oath of allegiance to the regime. That precipitated the start of a sustained nationwide lawyers' movement, regarded as a turning point in the public's embrace of the judiciary and the Court's subsequent rise in popularity and legitimacy.[127] After thousands of lawyers undertook a protest march in 2009, a coalition government eventually replaced Musharraf, and Chaudhry was restored as chief justice.[128] Soon after, the Chaudhry-led Supreme Court declared Musharraf's 2007 state of emergency illegal and invalidated the appointments of judges made by Musharraf during that period.[129]

The judicial appointments process has long been an issue of tension between the executive and Pakistan's courts. In 2010, the Chaudhry court considered a challenge to the Eighteenth Amendment which introduced a judicial appointments process requiring nominations to be put forward by a Judicial Commission and vetted by a Parliamentary Committee. [130] The Parliamentary Committee, comprising four members from the National Assembly and four members from the Senate, was not required to furnish reasons for rejecting the Commission's nominees. The Court issued an interim order recommending that Parliament make specific changes to the appointments process, including increasing the number of judges on the Judicial Commission and empowering the Commission to overrule the decision of the Parliamentary Committee.[131]

The following year, Parliament incorporated most of the judiciary's proposed changes by passing the Nineteenth Amendment, which increased judicial representation on the Commission from two to four and required the Parliamentary Committee to provide reasons for rejecting judicial

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[127] *See* Siddique, *supra* note 125, at 169-173.

[128] *See* Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 L. & SOC. INQUIRY 985 (2010).

[129] Justice Hasnat Ahmed Khan v. Fed'n of Pakistan, (2011) PLD (SC) 680.

[130] Nadeem Ahmed v. Fed'n of Pakistan, (2010) PLD (SC) 1165.

[131] *Id.* at paras. 10, 13, 14, 17. *See* AZIZ, CONSTITUTION OF PAKISTAN, *supra* note 112, at 148 (noting that "while the committee structure still stands, the balance has tipped toward the judicial branch in terms of effective power").

nominees put forward by the Judicial Commission.[132] The Court thus avoided having to rule definitively on the question of invalidating a constitutional amendment, while effectively maintaining the judiciary's prerogative over the appointments process. Shortly after, in *Munir Hussain Bhatti v. Federation of Pakistan*,[133] the Court upheld the Nineteenth Amendment in form, but not in substance, by ruling that the Parliament Committee's reasons for refusing a nomination put forward by the Judicial Commission was reviewable.[134] The Court's assertions of power enhanced its institutional independence.[135]

The seminal case is the Supreme Court's decision in 2015 in *District Bar Association, Rawalpindi v. Federation of Pakistan*.[136] It involved a combined challenge against the Twenty-First Amendment, which authorized terrorist suspects to be tried by military court martials, and the Eighteenth Amendment on the judicial appointments process. The central questions for the Supreme Court were whether any implied limits existed on Parliament's power to amend the Constitution and, if so, whether the courts had the authority to review the constitutional amendments.[137]

The Supreme Court of Pakistan answered both questions in the affirmative in "a major reversal in the highest courts' posture towards the basic structure."[138] A majority of the Court expressly recognized substantive limits on Parliament's amending power and that the judiciary had the power to invalidate unconstitutional constitutional amendments. *Rawalpindi* was decided by a full bench of seventeen justices. Thirteen justices agreed that the judiciary could review the substance of constitutional amendments to protect the Constitution's inviolable core. In a plurality opinion joined by eight justices, Justice Sheikh Azmat Saeed held

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[132] *See* Constitution (Nineteenth Amendment) Act, 2010 § 4.

[133] (2011) PLD (SC) 407 at paras. 22, 24-26, 32, 59, 64.

[134] *See* Yap & Abeyratne, *supra* note 116, at 147.

[135] *See* Cheema, *supra* note 110, at 520.

[136] *Rawalpindi*, (2015) PLD (SC) 401.

[137] *See* Sameer Khosa, *Judicial Appointments in Pakistan—The Seminal Case of the 18th Amendment*, *in* APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA 242 (Arghya Sengupta & Ritwika Sharma eds., 2018).

[138] *See* AZIZ, *supra* note 112, at 144.

that the Constitution contains "salient features," including democracy, a parliamentary form of government, and the independence of the judiciary; the Court could review a constitutional amendment "to determine whether any of the Salient Features of the Constitution has been repealed, abrogated, or substantively altered."[139] Five other judges agreed that the Court had the power to determine the legality of constitutional amendments, although they did not locate this power in the salient features doctrine. Rather, Justice Jawad Khawaja argued in a separate opinion, the Constitution and its preamble provides judicially enforceable limits on the powers of Parliament.[140] In the minority, four judges rejected the notion of any judicially enforced constraints on Parliament's constitutional amendment power.[141]

Crucially, the Supreme Court's majority holding explicitly affirmed that the judiciary could strike down procedurally valid constitutional amendments passed by Parliament.[142] And while the separate opinions differed over the exact basis for the holding, all thirteen justices in the majority reached a clear consensus that the Court has the final say over whether a constitutional amendment is valid.

Yet the Supreme Court refrained from exercising the broad power it had laid out and did not actually invalidate any of the challenged constitutional amendments in the case.[143] The majority held that the Twenty-first Amendment's provision for military court trials was a

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[139] *Rawalpindi*, (2015) PLD (SC) 401 at para. 180(d) (Justice Sheikh Azmat Saeed, joined by Justices Anwar Zaheer Jamali, Amir Hani Muslim, Umar Ata Bandial, Sarmad Jalal Osmany, Gulzar Ahmed, Justice Mushir Alam, and Justice Maqbool Baqar).

[140] *See id.* at paras. 40-41, 51-55. (Khawaja, J.) The other four justices are Justices Qazi Faez Isa, Ejaz Afzal Khan, Ijaz Ahmed Chaudhry and Dost Muhammad Khan. *See also* Waqqas Mir, *Saying Not What the Constitution is … But What It Should be: Comment on the Judgment on the 18th and 21st Amendments to the Constitution,* 2 LAHORE U. MGMT. SCI. L J. 64, 64-65 (2015).

[141] The minority consisted of Chief Justice Nasir-ul-Mulk, and Justices Iqbal Hameedur Rahman, Mian Saqib Nisar, and Asif Saeed Khan Khosa.

[142] Although the Court had on previous occasions alluded to the Constitution's basic structure, *see, e.g.*, Al-Jehad Trust v. Fed'n of Pakistan, (1996) PLD (SC) 324; Wukula Mahaz Barai Tahafaz Dastoor v. Fed'n of Pakistan, (1998) PLD (SC) 1263, *Rawalpindi* amounted to one of the most explicit affirmations of the judiciary's power to review constitutional amendments that undermine the Pakistan Constitution's salient features.

[143] *Rawalpindi*, (2015) PLD (SC) 401.

proportionate response to terrorist threats.[144] The Eighteenth Amendment on the judicial appointments process also survived, albeit with a caveat. Justice Saeed, writing for the plurality, made clear that the provision amended by the Eighteenth Amendment was constitutionally valid in its current form as revised by the Nineteenth Amendment and interpreted by the Court in *Munir Hussain*.[145] If the constitutional provision were to be "amended or reinterpreted," it might well be struck down for being in conflict with the independence of the judiciary, a "salient feature of the Constitution."[146]

Thus, the Supreme Court of Pakistan managed to establish an expansive judicial power to review constitutional amendments, while simultaneously leaving the challenged constitutional amendments intact. The Twenty-first Amendment regarding trial by military courts had been passed in the aftermath of public outcry over a terrorist attack on a school in Peshawar that left 149 people—mostly students—dead,[147] and the Eighteenth Amendment that expanded the legislature's role in the judicial appointments process. Directly striking down these constitutional amendments would likely have attracted public backlash or precipitated the court into a frontal confrontation with the political branches.

The *Rawalpindi* majority exhibited a classic strategy of judicial deferral characterized as "breadth in reasoning and narrow in result" to avoid "the immediate legal and political consequences of a ruling."[148] That maneuver is reminiscent of Chief Justice Marshall in *Marbury v. Madison* declaring broad powers of judicial review while denying any remedy against the government.[149]

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[144] *Id.* at para. 178 (Saeed, J.)

[145] *Id.* at para. 104. *See* Munir Hussain Bhatti v. Fed'n of Pakistan, (2011) PLD (SC) 407.

[146] *Rawalpindi*, (2015) PLD (SC) 401 at para. 104.

[147] *Two Bills Tabled in NA for Changes to the Constitution, Army Act*, THE NEWS (Pak.) (Jan. 4, 2015), https://www.thenews.com.pk/print/10118-two-bills-tabled-in-na-for-changes-to-constitution-army-act.

[148] Dixon & Issacharoff, *supra* note 20, at 699.

[149] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

Another archetype of this judicial strategy, closer to home for Pakistan, is the Indian Supreme Court's decision in *Kesavananda Bharati v. State of Kerala*.[150] That now famous case articulated the notion that Parliament could not amend the "basic structure" of the Constitution, providing the foundation for a doctrine of unconstitutional constitutional amendments that has since migrated to courts worldwide.[151] Yet when the Indian Supreme Court initially set out the doctrine of immutable constitutional features in *Kesavananda*, [152] it did so "gingerly"[153]—indeed, it left intact much of the challenged constitutional amendment. Nevertheless, in a sprawling judgment of eleven distinct opinions—of which the *Rawalpindi* nine-hundred-page decision bears many hallmarks—a majority of the Indian Supreme Court declared the basic structure of the constitution to be beyond Parliament's amendment power, although it did not establish precisely what features constituted the basic structure.[154] With that, the Indian Supreme Court established a powerful doctrinal tool that it would employ to great effect in future cases.[155]

With *Rawalpindi*, the Supreme Court of Pakistan joined the ranks of its South Asian neighbors by affirming the judiciary's authority to invalidate constitutional amendments.[156] Like its counterparts in India and Bangladesh, the Court asserted this power when confronted with amendments that sought to intrude on the judiciary's institutional turf. In responding to these amendments, the Court showed itself willing to

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[150] AIR 1973 4 SC 1461 (India).

[151] *See* ROZNAI, *supra* note 48.

[152] *Kesavananda Bharati,* AIR 1973 4 SC 1461 (India).

[153] Dixon & Issacharoff, *Judicial Deferral*, *supra* note 20, at 712.

[154] *See generally* SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009).

[155] *See, e.g.*, Indira Nehru Gandhi v. Shri Raj Najrain, AIR 1975 3 SC 2299 (striking down the Thirty-Ninth Amendment passed by Indira Gandhi that prevented any court from adjudicating any dispute relating to the election of the President, Vice-President, Parliament Speaker, and Prime Minister); Minerva Mills Ltd. v. Union of India, (1980) SC 1789 (invalidating the Forty-Second Amendment that removed all limitations on Parliament's amending power); Supreme Court Advocates on Record Ass'n v. Union of India, (2015) 4 SCC 1 (striking down the Ninety-Ninth Amendment that established a National Judicial Appointments Commission as part of the judicial appointments process).

[156] *See* ROZNAI, *supra* note 48, at 52.

"jealously guard its own turf."[157] The Pakistan Supreme Court's 2015 decision furthers a trend in South Asia where apex courts have deployed the unconstitutional constitutional amendments doctrine to protect their institutional prerogative over the process of judicial appointment and removal.[158]

The regional constitutional practice in India, Bangladesh, and Pakistan provides an insight into when a fragile court is willing to risk reaching for enhanced power even when confronted with a dominant military or political power. Courts in these South Asian democracies have typically made a play for self-protection and empowerment when they perceive threatened intrusion on the institution and power of the judiciary itself.

Strikingly, although the *Rawalpindi* decision appears to bring the Pakistan Supreme Court's constitutional jurisprudence in line with its immediate South Asian neighbors, the court's rhetoric was crafted to appeal to local constitutional values. The Pakistan court majority insisted that the notion of implicit unamendability they endorsed was distinct from the "basic structure" doctrine adopted by the courts in India and Bangladesh.[159] The plurality opinion firmly located the judicial review power in the "salient features" of the Constitution, which it declared "obvious and self-evident upon a harmonious and wholistic interpretation of the Constitution."[160] And Justice Khawaja's separate opinion expressly rejected any grafting of the "alien concept" onto Pakistan's body politic,[161] arguing that Pakistan's Constitution and preamble provided the basis for judicially enforcing limits on Parliament's amending power.[162] In a context where the transnational

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[157] *See* Mir*, supra* note 140, at 74.

[158] Yap & Abeyratne, *supra* note 116, at 4.

[159] The Bangladesh Supreme Court recognized the basic structure doctrine in the case of Anwar Hussain Chowdhury v. Bangladesh, (1989) 41 DLR (AD) 165. The Court has applied the doctrine since in Bangladesh Italian Marble Works v. Gov't of Bangladesh II, ADC (2005) 553; Abdul Mannan Khan v. Gov't of Bangladesh, (2012) 64 DLR (AD) 169, and Bangladesh v. Asaduzzaman Siddiqui Civil, Appeal No. 6 of 2017 (AD).

[160] *Rawalpindi*, (2015) PLD (SC) 401 at para. 180(a)-(b) (opinion of Saeed, J.).

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

[162] *Id.* at para. 40.

borrowing of perceived Indian ideas would likely have been widely unpopular, these judges on Pakistan's apex court appeared conscious of the role of constitutional narrative in building support for the court's decision and institutional legitimacy.

When a fragile court in an unstable democracy seeks to assert power, it must do so carefully. Over the course of several opinions grounded in appeals to local constitutional values, the Supreme Court in *Rawalpindi* laid down an expansive power to review constitutional amendments, even as it delivered a narrow ruling that left the constitutional amendments intact, thus avoiding immediate political or public backlash. But by asserting the authority to guard against changes that would fundamentally alter the core of the Constitution, the Supreme Court established a novel and powerful judicial tool, with potentially profound implications.

B. *The Malaysian Federal Court: Confronting Dominant Political Power*

On August 31, 1957, Malaya, a British colony in Southeast Asia, gained full independence. Six years later, on September 16, 1963, Singapore and the Borneo states of Sabah and Sarawak united with Malaya to become the new Federation of Malaysia.[163] The Federal Constitution of Malaysia set up a system of governance closely modelled on the Westminster parliamentary system, with a legislature, executive, and judiciary, and a constitutional monarch as the head of state.[164]

Much of Malaysia's story has taken place under the long shadow of dominant party rule. For more than six decades, the same political coalition—the Barisan Nasional—dominated governance in the country.[165] Until its unprecedented loss in the 2018 general elections, the ruling alliance

[163] Singapore later separated from the Federation of Malaysia in 1965.

[164] FED. CONST. (MALAY.), arts. 44-65 (legislature), 39-43 (executive), 121-131 (judiciary), 32-37 (the supreme head of the federation).

[165] The Alliance, Barisan Nasional's predecessor, had held a dominant political position even before independence, winning the first pre-independence general elections by a landslide in 1955.

had never lost its grip on power.[166] What's more, for most of the country's history since independence in 1957, the ruling alliance also controlled more than two-thirds of the seats in Parliament. That legislative supermajority meant that the Barisan Nasional government was able to amend most constitutional provisions—a power it wielded frequently.[167]

Courts are constitutionally empowered to invalidate legislation and executive actions for unconstitutionality. The Malaysian Constitution contains a supremacy clause as well as a judicially enforceable bill of rights.[168] But, in practice, the judiciary has traditionally been highly passive, employing an insular, rigidly formalistic approach marked by extensive deference to the political branches.[169] Indeed, many scholars have thought it futile for courts in a dominant party system to assert authority in the face of consolidated political power.[170]

And yet, the Malaysian apex court appeared to achieve just that in two decisions delivered in 2017 and 2018.[171] Through strategic jurisprudence, the Federal Court carved out a power for the courts to nullify

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[166] *After six decades in power, BN falls to 'Malaysian tsunami*,' MALAYSIAKINI (May 10, 2018), https://www.malaysiakini.com/news/423990.

[167] *See* Cindy Tham, *Major Changes to the Constitution*, THE SUN (July 17, 2007), https://perma.cc/5LU7-LRQ9 (noting that there have been more than fifty constitutional amendment acts totaling 700 individual textual amendments to Malaysia's Constitution since 1957).

[168] FED. CONST. (MALAY.), art. 4(1) (declaring the Constitution as "the supreme law of the Federation and any law… shall, to the extent of the inconsistency, be void."); arts. 5–13 (fundamental liberties).

[169] *See* Yvonne Tew, *On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics*, 25 WASH. INT'L L.J. 674, 681-91 (2016).

[170] *See, e.g.*, Li-ann Thio, *Soft Constitutional Law in Nonliberal Asian Constitutional Democracies*, 8 INT'L J. CONST. L. 766, 767 (2010) (arguing that courts in "Asian nonliberal democracies," like Malaysia, play "a relatively marginal role in constitutional politics" and "do not play a primary role in shaping constitutional understandings"); PO JEN YAP, COURTS AND DEMOCRACIES IN ASIA 2 (2017) (observing that in jurisdictions such as Malaysia, "where a dominant political party has remained in power since independence," courts are "at a fringes of the entity's political life").

[171] The following discussion draws from TEW, CONSTITUTIONAL STATECRAFT, *supra* note 15, at 98-106, 113-122, 133-140.

constitutional amendments passed by Parliament that would undermine the constitution's core framework.

The first case, *Semenyih Jaya*,[172] involved what seemed on its face to be a mundane dispute over land acquisition compensation. Landowners dissatisfied with their compensation challenged the Land Acquisition Act,[173] which allowed lay assessors, sitting with a judge in the High Court, to determine how much the state should compensate owners for land it had compulsorily acquired. Because the statute empowered the lay assessors to make a conclusive determination on compensation, the litigants argued that it unconstitutionally infringed the judicial power of the courts.

The challenge directly engaged the provision on judicial power under Article 121(1) of the Constitution. That judicial power clause has long been a site of tension between the judiciary and the political branches in Malaysia. Article 121(1) had originally provided: "The judicial power of the Federation shall be vested in a Supreme Court and such inferior courts as may be provided by federal law." In 1988, the Malaysian Parliament amended Article 121(1) so that it now reads that the courts "shall have such jurisdiction and powers as may be conferred by or under federal law." For some time after that, Malaysian courts appeared cowed into subservience. Earlier precedent had seen the Federal Court take a highly literalist, impoverished view of how to interpret the amended constitutional provision. In a 2007 case, for instance, the Court simply accepted that the scope of judicial power "depends on what federal law provides,"[174] in effect subjecting the judiciary's scope of authority entirely to the behest of the legislature.

In the 2017 decision of *Semenyih Jaya*, a unanimous Federal Court struck down the land acquisition statutory provision as unconstitutional for infringing the judicial power and the separation of powers. It was the first time in twenty years that the apex court had invalidated a federal law. And that's not all. The Court explicitly repudiated the 1988 constitutional amendment for undermining judicial power and impinging on the

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[172] *Semenyih Jaya* [2017] 3 MALAYAN L.J. 561.

[173] Land Acquisition Act of 1960 (Malay.).

[174] Kok Wah Kuan v. Public Prosecutor [2008] 5 MALAYAN L.J. 1 at [11].

separation of powers,[175] concluding that "the judicial power of the court resides in the Judiciary and no other as is explicit in [Article] 121(1) of the Constitution."[176]

In doing so, the Federal Court drew on the doctrine that certain basic constitutional features cannot be altered even by constitutional amendment, citing the Indian Supreme Court's well-known basic structure doctrine decision in *Kesavananda*.[177] Departing from its earlier precedent that had rejected the notion of constitutional unamendability,[178] the Malaysian court embraced the basic structure doctrine as applicable to the Malaysian Constitution. The Court declared that Parliament does not have power to amend the Constitution to the effect of undermining the separation of powers and the independence of the judiciary,[179] features it described as "critical" and "sacrosanct" in the constitutional framework.[180]

Yet, for all this, the Malaysian Federal Court did not invalidate the constitutional amendment. Instead, it interpretively read down the 1988 constitutional amendment, depriving it of any effect on the judicial power of the courts. By holding that the judicial power resides in the judiciary as inherent to Article 121(1) of the Constitution,[181] the Court effectively nullified the 1988 amendment and, as a matter of constitutional interpretation, restored Article 121(1) to the meaning it had before it was amended.

What the Federal Court did in *Semenyih Jaya* is, in many ways, an exemplar of strategic judicial self-empowerment. For one, the Federal Court refrained from striking down the constitutional amendment outright; nonetheless, in a forcefully reasoned opinion, it endorsed a tool that effectively empowered the judiciary to assert authority against the political

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[175] *Semenyih Jaya* [2017] 3 MALAYAN L.J. 561, at [74].

[176] *Id.* at [86].

[177] *Id.* at [87] (citing Kesavananda Bharati v. Kerala, AIR 1973 SC 1461).

[178] *See* Gov't of the State of Kelantan v. Gov't of the Fed'n of Malaya [1963] MALAYAN. L.J. 355; Loh Kooi Choon v. Gov't of Malaysia [1977] 2 MALAYAN L.J. 187; Phang Chin Hock v. Pub. Prosecutor [1980] 1 MALAYAN L.J. 70.

[179] *Semenyih Jaya* [2017] 3 MALAYAN L.J. 561, at [76].

[180] *Id.* at [90].

[181] *Id.* at [86].

branches. It thus laid the foundation for a powerful tool for courts to resist incursions from the political branches channeled through the formal constitutional amendment process. At the same time, it stopped short of actually invalidating the constitutional amendments, insulating the court from immediate political repercussions.

That the Court articulated this power in a case involving a seemingly prosaic issue of land acquisition, which did not necessarily appear to signal huge constitutional implications, is another telling feature. The *Semenyih Jaya* dispute was not, on its face, a constitutional blockbuster involving contentious issues relating to democratic protection or fundamental rights. Rather, as with the basic structure jurisprudence of the Indian Supreme Court, the Malaysian Federal Court cautiously set out the notion of reviewing constitutional amendments in a case dealing with the protection of property. [182]

Moreover, consider the remedy that the Federal Court issued in *Semenyih Jaya*. In its opinion, to replace the statutory provision that it had invalidated, the Court outlined a highly detailed set of procedural guidelines that would leave final determination only to the High Court judge—but ruled that its decision would only have prospective effect.[183] By specifying that its remedy would only apply prospectively, the Court sought to mitigate the impact of its immediate decision, thus helping to insulate the judiciary from potential public or political backlash.[184]

It worth noting, too, that the Malaysian apex court's *Semenyih Jaya* decision was unanimous. Justice Zainun Ali wrote the single-voice judgment for a five-member bench of the Federal Court, and there were no separate opinions.

To wit, in this case involving an apparently mundane matter of land acquisition compensation, the Malaysian Federal Court could have avoided addressing the broader implications of the constitutional amendment to

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[182] *See* David Landau, *A Dynamic Theory of Judicial Review*, 55 B.C. L. REV. 1501, 1557 (2014) (observing that "[t]he origins of the basic structure doctrine in India in fact focus on the protection of private property, rather than on democratic protection.").

[183] *Semenyih Jaya* [2017] 3 MALAYAN L.J. 561, at [126].

[184] *See* Dixon & Issacharoff, *supra* note 20, at 685 (explaining that courts use prospective overruling as a deferral mechanism to avoid direct political confrontation).

Article 121(1) relating to judicial power. Yet, even as it issued a holding that insulated the judiciary from any immediate political ramifications, the Malaysian apex court embedded the seeds for a broad doctrine that would ultimately protect judicial power.

Not quite a year after *Semenyih Jaya*, the Malaysian Federal Court issued another landmark decision in *Indira Gandhi*,[185] firmly entrenching the doctrine of preserving an unalterable constitutional basic structure. And in this decision delivered in January 2018, the Court remarkably asserted itself in one of the most fraught areas of Malaysian law: religious authority.

The Indira Gandhi case, which involved a mother of three, was emblematic of a broader struggle over the position of Islam in the public order. Unbeknownst to Indira Gandhi, her ex-husband had converted to Islam and formally changed the religious status of all three of their children to Muslim, before obtaining custody orders in his favor from the Sharia Court. As a non-Muslim unable to access the religious courts, Indira Gandhi brought a petition to the civil courts challenging the children's conversions. By the time her case reached the Federal Court, the public had been following her drawn out legal battle for almost a decade.

In a unanimous decision—once again written by Justice Zainun Ali—the Federal Court quashed the children's conversion certificates issued by the registrar of Muslim converts, ruling that the Malaysian Constitution's equal protection guarantee requires that both parents consent to changing their children's religion. In a clear declaration of the civil courts' authority over religious courts—a stark contrast from its usual pattern of deference to the Sharia courts—the Court held that civil courts have jurisdiction over constitutional matters even when questions of Islamic law are involved.[186]

Significantly as regards judicial power, the Federal Court expressly grounded the civil courts' judicial power in the basic structure of the constitution. Justice Zainun Ali's sweeping opinion in *Indira Gandhi* referred to the Court's judgment the year before in *Semenyih Jaya*, as well as to the Indian Supreme Court cases establishing the basic structure doctrine in

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[185] *Indira Gandhi* [2018] 1 MALAYAN L.J. 545.

[186] *Id.* at [104].

Kesavananda and *Minerva Mills*.[187] The Court declared that "the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution," thus, "[i]t cannot be amended or altered by Parliament by way of a constitutional amendment."[188]

Having affirmed that the Malaysian Constitution has an immutable basic structure, the Federal Court applied that doctrine to interpret Article 121(1A) of the Constitution, which provides that the civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Sharia courts." This clause has its origins in the constitutional amendments passed in 1988 to alter the Article 121(1) clause on judicial power, which was the subject of *Semenyih Jaya*. When Parliament amended the Article 121(1) provision in 1988, it had also introduced a new provision—Article 121(1A)—to demarcate the jurisdiction of the civil and religious courts. Since then, the civil courts had tended to extensively defer jurisdiction to the Sharia courts. [189] Following in the path taken by the Federal Court in *Semenyih Jaya*, which had dealt with the constitutional amendment to Article 121(1) on judicial power, the *Indira Gandhi* Court now took on the Article 121(1A) clause on the authority of the civil and religious courts.

The *Indira Gandhi* Court asserted that powers of judicial review and constitutional interpretation are "pivotal constituents of the civil courts' judicial power under Article 121(1)." In a resounding affirmation that judicial power lies solely with the *civil* courts, Justice Zainun Ali wrote: "As part of the basic structure of the constitution, it cannot be abrogated from the civil courts or conferred upon the Syariah Courts, whether by constitutional amendment, Act of Parliament or state legislation."[190]

As with the initial formulation of the constitution's basic structure used by the Indian Supreme Court and other judges around the world,[191] the Malaysian court invoked the doctrine of unconstitutional constitutional

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[187] *Id.* at [42], [48]-[49].

[188] *Id.* at [48].

[189] *See* Yvonne Tew, *Stealth Theocracy*, 58 VA. J. INT'L L. 31, 50-58 (2018).

[190] *Indira Gandhi* [2018] 1 MALAYAN L.J. 545, at [70].

[191] Issacharoff, *Judicial Review in Troubled Times*, *supra* note 13, at 20.

amendments to safeguard against threats to judicial power. The Malaysian Federal Court built on the foundations it had carefully laid earlier in *Semenyih Jaya* to assert its power in *Indira Gandhi*, this time with a highly charged issue at stake. In this unanimous decision, authored by the same judge who had written the *Semenyih Jaya* opinion, the Court applied the basic structure doctrine to establish an empowered role for the courts, in what has been described as its clearest endorsement of the basic structure doctrine so far.[192] If *Semenyih Jaya* might be thought of as Malaysia's *Marbury* moment, *Indira Gandhi* might well be its *Cooper v. Aaron*.[193]

With *Semenyih Jaya* in 2017 and then *Indira Gandhi* in 2018, the Federal Court placed certain basic constitutional commitments beyond the reach of the political branches. In a two-stage process, it asserted and entrenched a constitutional basic structure doctrine empowering the courts to invalidate constitutional amendments.

Such a mechanism, which allows courts to review even constitutional amendments, is a powerful one for judges to have at their disposal, especially when faced with dominant political power. In 2018, Malaysia experienced its first ever change of government after an astounding national election that ousted the Barisan Nasional ruling party.[194] Two years later, however, the democratically elected Pakatan Harapan government collapsed after a government crisis in early 2020,[195] resulting in a hastily assembled alliance, known as Perikatan Nasional, ascending to power.[196]

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[192] Jaclyn L. Neo, *A Contextual Approach to Unconstitutional Constitutional Amendments: Judicial Power and the Basic Structure Doctrine in Malaysia*, 15 ASIAN J. COMP. L. 69, 92 (2020).

[193] Cooper v. Aaron, 358 U.S. 1 (1958) (in which the United States Supreme Court asserted that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution.").

[194] *See* TEW, CONSTITUTIONAL STATECRAFT, *supra* note 15, at 1-3.

[195] Hannah Beech, *Malaysia's Premier, Mahathir Mohamad, Is Ousted in a Surprising Turn*, N.Y. TIMES (Feb. 29, 2020), https://www.nytimes.com/2020/02/29/world/asia/malaysia-mahathir-mohamad.html.

[196] *See* Yvonne Tew, *Malaysia's 2020 Government Crisis: Revealing the New Emperor's Clothes*, I-CONNECT (April 15, 2020), http://www.iconnectblog.com/2020/04/malaysias-2020-government-crisis-revealing-the-emperors-clothes/.

When the Malaysian apex court carefully established a doctrine of unconstitutional constitutional amendments in its landmark decisions in 2017 and 2018, it carved out a central place for that notion of unalterable basic features in the Malaysian legal landscape. Judicial attitudes toward the basic structure doctrine have since manifested unevenness,[197] particularly against the backdrop of an uncertain political landscape that has continued to remain in flux.[198] Still, with its jurisprudence in *Semenyih Jaya* and *Indira Gandhi*, the Malaysian Federal Court laid concrete foundations that enable the judiciary to wield a potent tool to protect judicial power and independence—an important safeguard for a court in an unstable political system.

C. *The Malawi Supreme Court: Judicial Review in Defense of Democracy*

On June 23, 2020, even as the coronavirus pandemic swept across the world, Malawi forged ahead with an unprecedented re-run of the presidential election that had been held the previous year. The result was a historic victory for opposition leader Lazarus Chakwera, who defeated incumbent president Peter Mutharika. Even more remarkable was that the do-over of the presidential election was the direct result of the Malawi High Court and Supreme Court annulling the 2019 vote on the basis of widespread electoral irregularities. For the first time in Malawi—indeed, in the African region—a court-overturned election had led to the democratic ousting of the ruling regime.[199]

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[197] *See, e.g.*, Maria Chin Abdullah v. Director-General of Immigration [2021] 2 CURRENT L. J. 579; *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & ors* [2021] 3 MALAYSIAN L. Rev. (App. Cts.) 260. *See generally* H.P. Lee & Yvonne Tew, *The Law and Politics of Unconstitutional Constitutional Amendments in Malaysia, in* THE POLITICS OF UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN ASIA 87, 100-105 (Rehan Abeyratne & Bui Ngoc Son eds., 2022) (observing that a number of decisions post-2020 reveal divisions on the Malaysian Federal Court in approaching toward the basic structure doctrine).

[198] *See* Yen Nee Lee, *Malaysia gets a new prime minister — the country's third in 3 years*, CNBC (August 20, 2021), https://www.cnbc.com/2021/08/20/malaysia-king-appoints-ismail-sabri-yaakob-as-new-prime-minister.html.

[199] *Opposition wins rerun of Malawi's presidential election in historic first*, GUARDIAN (June 27, 2020), https://www.theguardian.com/world/2020/jun/27/opposition-wins-rerun-of-malawis-presidential-election-in-historic-first.

In Malawi, the judiciary has not historically had much independence or power. After gaining independence from the British in 1964, the Malawian constitutions established in 1964 and 1966 centralized power in an elected president; they did not include a judicial review provision for the courts.[200] In 1994, however, Malawi adopted a new constitution, which recognized fundamental principles of the rule of law and good governance,[201] marking the country's transition from one-party rule to a multiparty constitutional democracy.

Malawi's Constitution of 1994 sought to establish an independent judiciary, separating it from the executive and legislative branches and limiting the president's power to remove judges.[202] The Constitution expressly provides that the judiciary "shall have the responsibility of interpreting, protecting and enforcing this Constitution" and all laws in accordance with it "in an independent and impartial manner."[203] Still, as Ellett observes in her study of African courts, "establishing a court on paper is one thing; imbuing those provisions with meaning is another."[204]

In practice, operating in a country where judges are vulnerable to interference and pressure from a powerful executive, Malawian courts have been reluctant to exercise judicial review.[205] Although the 1994 Constitution professes a commitment to constitutional supremacy, a culture of judicial subservience to the government, tied to traditions of parliamentary supremacy, runs deep.[206] Since the 1990s, though, the courts have

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[200] Janet Liabunya, *Judicial Accountability in a Democratic Malawi: A Critical Assessment*, 6 MALAWI L.J. 203, 205 (2012).

[201] CONSTITUTION, 1994, §§ 12(1)(f), 13(o) (Malawi).

[202] *See id.* at §§ 7-9, 116-119. *See also* Liabunya, *Judicial Accountability in a Democratic Malawi, supra* note 200, at 205; Peter Vondoepp, *Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zambia*, 59 POL. RES. Q. 389, 397 (2006).

[203] CONSTITUTION, 1994 at § 9 (Malawi).

[204] RACHEL ELLETT, PATHWAYS TO JUDICIAL POWER IN TRANSITIONAL STATES: PERSPECTIVES FROM AFRICAN COURTS 13 (Routledge ed. 2013).

[205] *See* Rachel Ellett, *Politics of Judicial Independence in Malawi*, FREEDOM HOUSE 1, 64 (2014) https://freedomhouse.org/sites/default/files/inline_images/Politics%20of%20Judicial%20Independence%20in%20Malawi_1.pdf.

[206] *See* Danwood Mzikenge Chirwa, *Liberating Malawi's Administrative Justice Jurisprudence from Its Common Law Shackles*, 55 J. AFR. L. 105 (2011).

incrementally become more independent, sporadically asserting their powers vis-à-vis the executive.[207] Notably, the High Court rejected the incumbent president's attempt to nullify the results of the 2014 election and allowed the electoral commission's power to continue counting votes.[208] But by and large, judicial power has waxed and waned over time.[209]

Then, in 2020, Malawi's judiciary was thrust into a dispute at the center of political power: a contested presidential election. In May 2019, President Mutharika had been declared the winner of a national election so fraught with irregularities that it was tellingly called the "Tipp-Ex" election due to the widespread use of Tipp-Ex correction fluid on voter tally sheets. After the electoral commission refused to call for another vote, widespread unrest followed and opposition parties petitioned a panel of High Court judges for constitutional review.[210] In February 2020, the High Court invalidated the election results and ordered a re-run of the election to be held within 150 days.[211] The incumbent president challenged that decision by appealing to the Supreme Court of Appeal.

On May 8, 2020, Malawi's Supreme Court——the highest court of the land—upheld the High Court's ruling in a unanimous decision that annulled the presidential election and ordered new elections.[212] The apex court's judgment was a sweeping and decisive affirmation of the High Court's decision. It overturned President Mutharika's victory, citing "numerous irregularities" that it said "seriously undermined the credibility, integrity and fairness" of the electoral process.[213] The Court also determined that the constitutional threshold for "the majority of the

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[207] *See, e.g.*, Malawi Law Society v. The State [2002] MHWC 54 (High Ct. of Malawi).

[208] The State v. The Electoral Commission (Judicial Review Cause No. 38 of 2014) MWHC (High Ct. of Malawi).

[209] Ellett, *supra* note 205, at 16.

[210] A panel of at least three judges on the High Court reviews matters related to the Constitution pursuant to Sections 9(2) and 9(3) of the Courts Act (Chapter 3:02) (Malawi). Malawi does not have a separate constitutional court.

[211] Chilima et al. v. Mutharika (Constitutional Reference No. 1 of 2019) [2020] MWHC (High Ct. of Malawi).

[212] *Mutharika* [2020] MWSC 1.

[213] *Id.* at 117.

electorate" meant that a candidate must obtain more than half of the votes cast—rather than a mere plurality—to win the presidency.[214]

The impact of the judgment of the Malawi judiciary was momentous. Millions of voters cast their ballots in a fresh presidential poll held on June 23, 2020, and the results were announced four days later. Opposition leader Chakwera won with a decisive vote tally of 59%, leaving the incumbent president with little room to dispute the outcome.[215]

The Malawian Supreme Court's decision not only reshaped the political landscape, it also has profound implications for the judiciary's role. By asserting its authority to decide a key political controversy—the outcome of a presidential election, no less—Malawi's judiciary showed itself prepared to intervene in the realm of "mega-politics."[216] Such judicialization of politics expands a court's power beyond the legal sphere, as Ran Hirschl has observed, transforming the judiciary into a critical actor in a country's governance. Yet the Malawian court's assertiveness was not achieved with the support of influential political stakeholders, as has typically been the case elsewhere.[217] Quite the contrary, in fact; the judges deciding this election dispute were demonstrably under immense political pressure—as starkly illustrated by the bulletproof vests worn by the High Court judges when they announced their decision and the Mutharika government's attempt to remove the chief justice shortly after the Supreme Court's decision.[218]

The Malawian High Court and Supreme Court made a move of calculated assertiveness against the dominant political powers at the time. When a court asserts itself in that way against powerful political actors,

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[214] *Id. See* CONSTITUTION, 1994 at § 80(2) ("The President shall be elected by a majority of the electorate through direct, universal and equal suffrage.").

[215] *Second time lucky: Malawi's re-run election is a victory for democracy*, THE ECONOMIST (July 4, 2020), https://www.economist.com/middle-east-and-africa/2020/07/04/malawis-re-run-election-is-a-victory-for-democracy.

[216] Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 727 (2006).

[217] *Id.* (observing that the judicialization of politics takes place because it is "supported, either tacitly or explicitly, by powerful political stakeholders.").

[218] *See, e.g.*, Pensulo, *supra* note 59.

doctrinal legal skill alone is not enough; it must deploy statecraft in rendering its judgment.

One of the striking characteristics of the Malawi court decision is how it is crafted to appeal to the broader public. The key audience for the high court and supreme court in the election case appeared to be the people, and the rhetoric of their opinions reflect this understanding. After the 2019 elections, people across the country had flocked to the streets in nationwide protests against the election results. As public interest in the election litigation increased, the judges allowed private radio stations to broadcast the proceedings for the first time in Malawi's history.[219] The broadcasts from the court were aired live on radio, keenly followed by the public for months.[220] In February 2020, millions of Malawians listened as the high court's decision was read out live on radio in English and Chichewa in a ten-hour long session.[221]

In upholding the High Court's decision, the Supreme Court portrayed itself as aligned with the people, presenting its judgment as affirming the people's fundamental expression of their democracy. "[E]lections are perhaps the most visible, eventful and concrete expression of democracy in a democratic society,"[222] wrote the Chief Justice. "It should not be for the courts to decide elections; it is the electorate that should do so."[223] Still, the Court advanced its role in upholding the will of the people:

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[219] *Malawians await ruling on contested presidential poll*, AL JAZEERA (Dec. 6, 2019), https://www.aljazeera.com/news/2019/12/6/malawians-await-ruling-on-contested-presidential-poll.

[220] Peter Jegwa, *Malawi election: Court orders new vote after May 2019 result annulled*, BBC (Feb. 3, 2020), https://www.bbc.com/news/world-africa-51324241 (describing how "four radio stations broadcast[ed] the sessions live and on public transport passengers sometimes demanded that the radio be switched on so they could follow what was happening").

[221] *See* Jason Burke and Charles Pensulo, *Malawi court annuls 2019 election results and calls for new ballot*, GUARDIAN (Feb. 3, 2020), https://www.theguardian.com/world/2020/feb/03/malawi-court-annuls-2019-election-results-calls-new-ballot.

[222] *Mutharika* [2020] MWSC 1 at 31.

[223] *Id.* at 32-33.

"[T]he duty of the courts is to strive, in the public interest, to sustain that which the people have expressed as their will."[224]

Throughout its opinion, the Supreme Court focused almost entirely on constitutional supremacy, downplaying any aggrandized portrayal of judicial power. In this vein, it referred to judicial review only as a mechanism to protect the constitutional order: "In a constitutional democracy, nothing perches itself above and beyond legal scrutiny, judicial review…[is] intended to ensure the supremacy of the very constitutions and laws upon which democratic values are affirmed."[225]

The constitutional narrative that the Supreme Court presented was at once grounded in the particular values of Malawi's constitution as well as in a global discourse. The Court based its understanding of electoral integrity in "the underlying and fundamental principle" of Malawi's Constitution that "all legal and political authority of the State derives from the people," emphasizing that the "Constitution specifically accorded our people the right to participate in the political agenda."[226] At the same time, it also sought to locate its approach in protecting the electoral process as in line with the regional jurisprudence of the courts in Kenya, Uganda, and Zambia.[227]

The Supreme Court's unanimous opinion was authored by Chief Justice Andrew Nyirenda. His opinion stressed that all members of the court had unanimously agreed on "all the aspects" of the reasoning that "must necessarily lead" to the decision.[228]

Shortly after the Chief Justice delivered the ruling in May 2020, Mutharika's government placed Nyirenda on leave with immediate effect. This move was widely understood to be an attempt to force him into early retirement although he was only due to step down later that year, in December.[229] Hundreds of lawyers and civil society groups marched in

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[224] *Id.* at 33.

[225] *Id.*

[226] *Id.* at 5-6.

[227] *Id.* at 85-88.

[228] *Id.* at 116.

[229] *See* Pensulo, *supra* note 59.

protest, as legal elites and citizens gathered in a show of support for the chief justice. Remarkably, Mutharika's government eventually backed down. To be sure, the government's cited reasons for Nyirenda's retirement was a bald effort to remove the chief justice from office.[230] Still, it may not be irrelevant that the chief justice was about to retire in a matter of months when he wrote the landmark judgment annulling the election. Judicial leadership, as scholars have noted, "is critical in simultaneously advocating for the institution" and in "defending the court."[231] Or, as it happens, in guiding a court in the defense of democracy while also building its own institutional power.

The Malawi judiciary's decision stands out in a region where, in many parts, democratic processes have struggled to thrive.[232] The Malawian decision was not the first time, though, that an African court had invalidated the results of a presidential election. The Kenyan Supreme Court in 2017 nullified the incumbent president's reelection citing serious irregularities. However, the Kenyan election commission failed to resolve the issues plaguing the vote and judges were intimidated from hearing a petition to postpone the vote. Ultimately, the opposition boycotted Kenya's new election and no regime change occurred.[233] In 2022, another presidential election challenge was brought in Kenya, but this challenge was rejected by the Kenyan Supreme Court, which upheld the presidential win.[234]

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[230] *More African judges are standing up to governments*, THE ECONOMIST (June 25, 2020), https://www.economist.com/middle-east-and-africa/2020/06/25/more-african-judges-are-standing-up-to-governments (reporting that the government insisted it had merely wished to give the chief justice "enough time to relax and 'write his biography'").

[231] ELLETT, PATHWAYS TO JUDICIAL POWER, *supra* note 204, at 9.

[232] *See* Calum Fisher, *The Malawi election court ruling affects the whole continent*, LSE BLOG (Feb. 18, 2020), https://blogs.lse.ac.uk/africaatlse/2020/02/18/malawi-election-court-ruling-whole-continent-corruption-2019-democracy/.

[233] Raila Odinga, *Kenya's flawed elections: A bad election is worse than a delayed one*, THE ECONOMIST (Oct. 26, 2017), https://www.economist.com/leaders/2017/10/26/a-bad-election-is-worse-than-a-delayed-one.

[234] George Obulutsa and Katharine Houreld, *Kenya Supreme Court upholds Ruto's presidential victory*, REUTERS (Sept. 5, 2022), https://www.reuters.com/world/africa/kenyas-top-court-rule-disputed-presidential-election-2022-09-04/.

Malawi's 2020 judicial decision nullifying President Mutharika's controversial reelection resulted in a re-run election process that brought about the ousting of the incumbent. The Malawi Electoral Commission publicly stated that it respected the Supreme Court's ruling and the head of the commission later resigned, claiming respect for the rule of law.[235] Crucially, too, as noted earlier, the judiciary refused to back down—with support from the public—when the incumbent Mutharika government attempted to remove the chief justice after the decision had been delivered.[236]

The Malawian judiciary's assertiveness came amidst a political crisis and, critically, drew public support. Public protests had taken place in the months before the ruling, with supporters from the legal and popular sphere taking to the streets to protest the chief justice's forced retirement. When a court "can count on support in the streets, as well as on allies in the bar and in civil society," it "can more confidently render assertive decisions."[237]

The role played by Malawi's judiciary in the 2020 presidential election and the ensuing regime change was heralded as a marker for constitutional democracy building in the country and beyond its borders.[238] The Economist magazine named Malawi its "country of the year,"[239] and the constitutional court judges were awarded the 2020 Chatham House Prize in recognition of their "courage and independence in defense of

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[235] Lameck Masina, *Malawi Top Court, Upholds Presidential Election Re-Run*, VOA (May 9, 2020), https://www.voanews.com/africa/malawi-top-court-upholds-presidential-election-re-run; Lameck Masina, *Malawi Electoral Commission Chairperson Resigns,* VOA (May 22, 2020), https://www.voanews.com/africa/malawi-electoral-commission-chairperson-resigns.

[236] Antony Sguazzin & Frank Jomo, *Malawian Judiciary Rejects Government Bid to Sideline Top Judge*, BLOOMBERG (June 14, 2020), https://www.bloomberg.com/news/articles/2020-06-14/malawi-s-chief-justice-placed-on-leave-ahead-of-election.

[237] Charlotte Heyl, *As Malawi Shows, African Courts Are Slowly Becoming More Independent*, WORLD POL. REV. (Feb. 28, 2020), https://www.worldpoliticsreview.com/articles/28567/as-the-malawi-election-showed-african-courts-are-slowly-becoming-more-independent.

[238] *See* Fergus Kell, *Malawi's Re-Run Election is Lesson for African Opposition*, CHATHAM HOUSE (July 1, 2020), https://www.chathamhouse.org/expert/comment/malawi-s-re-run-election-lesson-african-opposition.

[239] ECONOMIST, *Admiration Nation*, *supra* note 2.

democracy."[240] The longer term implications for Malawi's democratic order and judicial independence remain to be seen, but if the judiciary's assertion of authority sticks, it may well mark a crucial point in Malawi's consolidation of democracy and judicial authority.

D. *The United Kingdom Supreme Court: Dicey After Brexit*

Political crises that turn into constitutional battles can make or break a court—even one in a mature democracy. In the case of the United Kingdom, the situation can be especially, well, dicey.

After all, as Albert Venn Dicey articulated in 1885, the "dominant characteristic" of Britain's political order has long been understood to be the sovereignty of Parliament.[241] In his classic work, *An Introduction to the Study of the Law of the Constitution*, Dicey encapsulated Parliament's supremacy as "the right to make or unmake any law whatever; and further, no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."[242] On a Diceyan account of the British constitution, no legal limitations exist on Parliament's power; courts thus have little provision to play a constraining role. Unlike its American counterpart, the United Kingdom Supreme Court does not have the power to declare a statute invalid. Britain has existed for centuries without a codified constitution, embodying a system of political constitutionalism.[243]

Yet in modern times Britain's traditional constitution has come under strain.[244] Over a period of two decades—a relative blip in the history of a constitutional system that has existed in more or less the same form

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[240] *Chatham House Prize: Malawi Judges Win for Election Work*, CHATHAM HOUSE (Oct. 26, 2020), https://www.chathamhouse.org/2020/10/chatham-house-prize-malawi-judges-win-election-work.

[241] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3 (8th ed. 1915).

[242] *Id.* at 3-4.

[243] *See* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM 10 (2010).

[244] *See* VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION 24-49 (2010).

since at least the 18th century[245]—the United Kingdom's constitution has undergone a series of major changes. At the end of the twentieth century and the start of the twenty-first, Britain incorporated the rights set out in the European Charter of Human Rights into domestic law in the form of the Human Rights Act of 1998. It also devolved power to Scotland, Wales, and Northern Ireland. And in October 2009, following the Constitutional Reform Act passed in 2005, the Appellate Committee of the House of Lords—Britain's final court of appeal—was replaced by a new Supreme Court.[246]

And then came Brexit. In a national referendum on June 23, 2016, 51.9% of voters opted for Britain to leave the European Union.[247] The Brexit process generated political upheaval that resulted in two major constitutional disputes involving fundamental questions about the relationship between Parliament and the executive and, more broadly, the role of the courts.

"Brexit means Brexit," declared Prime Minister Theresa May after she assumed premiership, stating her government's intention to begin the process of withdrawing the United Kingdom from the European Union. The mechanism for exiting the Union is laid out in Article 50 of the Treaty of the European Union, which provides that "[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements" and "[a] Member State which decides to withdraw shall notify the European Council of its intention."

The first *Miller* litigation was brought in an effort to stop the United Kingdom Government from giving notice of Britain's withdrawal from the European Union without first obtaining Parliament's approval.[248] Prime

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[245] *See* ANTHONY KING, DOES THE UNITED KINGDOM STILL HAVE A CONSTITUTION? 53 (2001) (observing that "the truth is that the United Kingdom's constitution changed more between 1970 and 2000, and especially between 1997 and 2000, than during any comparable period since at least the middle of the 18th century.").

[246] *See* Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 N.W. U. L. REV. 543, 555-73 (2014).

[247] *EU Referendum Results,* BBC NEWS (June 23, 2016), https://www.bbc.com/news/politics/eu_referendum/results.

[248] R (on the application of Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5, [2018] AC 61 [hereinafter *Miller I*].

Minister May's administration argued that it could trigger Article 50 of the Treaty under its royal prerogative powers, which cover treaty-making. Gina Miller, an entrepreneur and activist,[249] brought a challenge contending that the government could not initiate the exit process without legislation passed by Parliament.

In January 2017, in *R (Miller) v. Secretary of State for Exiting the European Union* (*Miller I*) the Supreme Court held, by a majority of eight to three, that the United Kingdom government had no power to trigger the withdrawal process from the European Union without Parliament's authority.[250] Given that European Union law had become a source of domestic law, it said, exiting the Union would remove rights that had been incorporated into United Kingdom law.[251] The majority focused on the constitutional importance of the United Kingdom's exit from the European Union, concluding that such a fundamental change to the United Kingdom's constitutional arrangements could not be effected by the executive alone and required Parliament's authorization.[252]

Much of the majority's judgment appears animated by the sheer magnitude of the constitutional change implicated by Brexit,[253] changes it described as "fundamental," "far-reaching," and "major."[254] Although the justices claimed to rely on "long-standing and fundamental principle" to declare that such changes cannot be achieved by the executive alone,[255] they were opaque about those principles. Rather, the majority's conclusion seems to turn on the scale of the changes: Brexit appeared simply too constitutionally important for the executive to carry it out without

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[249] Haroon Siddique, *Gina Miller: the woman who took on the UK government and won – twice,* GUARDIAN (Sept. 24, 2019), https://www.theguardian.com/politics/2019/sep/24/gina-miller-the-woman-who-took-on-the-uk-government-and-won-twice.

[250] *Miller I* [2017] UKSC 5 at [101].

[251] *Id.* at [74]-[80], [83]-[94].

[252] *Id.* at [78]-[82].

[253] *See* Mark Elliott, *The Supreme Court's Judgment in Miller: In Search of Constitutional Principles*, 76 CAMBRIDGE L.J. 257, 263-68 (2017).

[254] *Miller I* [2017] UKSC 5 at [78], [81], [82].

[255] *Id.* at [81].

Parliament's authorization.[256] Scholars criticized the majority's declaration that major constitutional change could be achieved only through parliamentary legislation as appearing "to pull a constitutional principle out of a hat," resting on "nebulous" constitutional foundations,[257] "constitutionally confused,"[258] and even "intellectually lackadaisical."[259]

Viewed against the broader political background, though, the *Miller I* decision is telling in terms of how the judiciary perceived its role. Caught in a fraught political context, the Supreme Court sought to assume the role of protecting the constitutional constraints of democratic governance.[260] The Court stepped into a constitutional gap that had arisen from the Brexit transition to delineate institutional arrangements of power between the executive and Parliament.[261]

Cast in this light, the Court presented *Miller I* as an affirmation of parliamentary sovereignty, where it intervened to protect Parliament's proper role in the institutional order of Britain's political governance. Indeed, in a speech delivered in Malaysia in 2016 not long after the lower court's *Miller I* decision, Lady Hale—soon to be the head of the Supreme Court—described the United Kingdom's apex court as "the guardian of the constitution."[262]

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[256] *See* Timothy A.O. Endicott, *Lord Reed's Dissent in Gina Miller's Case and the Principles of our Constitution*, 8 U.K. SUP. CT. Y.B. 259, 259 (2017).

[257] Cormac Mac Amhlaigh, *Miller, The Prerogative and Constitutional Change*, 21 EDINBURGH L. REV. 448, 454 (2017).

[258] Richard Ekins & Graham Gee, *Miller, Constitutional Realism and the Politics of Brexit*, *in* THE UK CONSTITUTION AFTER MILLER: BREXIT AND BEYOND 249, 261 (Mark Elliott, Jack Williams, Alison L. Young eds., 2018).

[259] Elliott, *The Supreme Court's Judgment in Miller, supra* note 253, at 286.

[260] Issacharoff, *Judicial Review in Troubled Times*, *supra* note 13, at 29.

[261] *Cf.* Endicott, *Lord Reed's Dissent in Gina Miller's Case, supra* note 256, at 280 (arguing that there was no constitutional need for the Court to exercise such a constituent power in *Miller I*).

[262] Brenda Hale, Deputy President of the Supreme Court, *The Supreme Court: Guardian of the Constitution?*, The Sultan Azlan Shah Lecture 2016 (Nov. 9, 2016).

The *Miller I* litigation and decision was not only criticized by scholars,[263] but also condemned on the public front. The High Court judges were excoriated in a newspaper headline as "enemies of the people" after their *Miller I* decision.[264] As Lord Reed warned in his dissent in *Miller I*, "the legalization of political issues…may be fraught with risk, not least for the judiciary."[265]

Still, on the whole, the Supreme Court seemed to emerge from *Miller I* with its authority relatively unscathed. After the *Miller I* decision, Parliament duly passed the European Union (Notification of Withdrawal) Act 2017 authorizing the Prime Minister to proceed with notification of the United Kingdom's withdrawal, which Prime Minister Theresa May carried out in March 2017.[266] But *Miller I* would not be the last major litigation surrounding Brexit.

Two years after the first *Miller* decision, the Supreme Court was again thrust into the nucleus of the Brexit turmoil. On August 28, 2019, after succeeding Theresa May as premier and two months before the United Kingdom was set to exit the European Union, Prime Minister Boris Johnson announced that Parliament would be prorogued for a period of five weeks. Prorogation marks the end of parliamentary session; it is an act of prerogative power, exercised by the Crown on the advice of her

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[263] *See, e.g.*, Ekins & Gee, *supra* note 258, at 267 (arguing that the "judgment betrays an ambition to superintend constitutional practice rather than to uphold constitutional law" and that "the Court betrays its own responsibility when it acts in such a way").

[264] James Slack, *Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis*, DAILY MAIL (Nov. 3, 2016), https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html.https://www.bbc.com/news/uk-38986228. Gina Miller herself received violent threats in the months following her Brexit challenge. *See* Lisa O'Carroll, *Gina Miller afraid to leave her home after threats of acid attacks*, GUARDIAN (Aug. 9, 2017), https://www.theguardian.com/politics/2017/aug/09/gina-miller-afraid-to-leave-her-home-after-threats-of-acid-attacks.

[265] *Miller I* [2017] UKSC 5 at [240].

[266] *Queen Gives Royal Assent to Article 50 Bill, Clearing Way for Theresa May to Start European Union Exit Talks*, TELEGRAPH (Mar. 16, 2017), https://www.telegraph.co.uk/news/2017/03/16/queen-give-royal-assent-article-50-bill-clearing-way-theresa/.

Ministers.[267] Prime Minister Johnson had advised Her Majesty Queen Elizabeth II to prorogue Parliament using prerogative powers, thus suspending all proceedings in both Houses of Parliament for an unusually long five-week period. Uproar ensued over the Prime Minister's move, widely seen as aimed at preventing Parliamentarians from debating a "no deal" exit from the European Union.

The prorogation of Parliament had started on September 10, 2019. In early September, the English and Scottish courts of first instance ruled that the matter was not justiciable;[268] Scotland's Inner House Court of Session later overturned the Scottish lower court's decision.[269] Both cases were appealed to the United Kingdom Supreme Court, which heard arguments from September 17 to 19.

In *R(Miller) v. The Prime Minister*,[270] or *Miller II*, the United Kingdom Supreme Court was confronted with ruling on the legality of the Prime Minister's actions. On September 24, 2019, in a unanimous decision, eleven justices of the Supreme Court held that the Prime Minister's prorogation of Parliament was both justiciable and unlawful. The Court declared that the Prime Minister's advice to the Queen to suspend Parliament was "unlawful, null and of no effect"; thus, "Parliament has not been prorogued."[271]

The opinion of Lady Hale and Lord Reed, for a unanimous Supreme Court, was sweeping and unambiguous. Lady Hale, the President of the Court, delivered the summary in *Miller II*. The judgment dismissed the government's argument that the Prime Minister's advice to the Queen to prorogue Parliament was an essentially political matter that the courts cannot adjudicate.[272] The Court held that it could review the scope of the

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[267] Graeme Cowie, *Prorogation of Parliament*, HOUSE OF COMMONS LIBR., BRIEFING PAPER NO. 8589, at 3 (June 11, 2019), https://researchbriefings.files.parliament.uk/documents/CBP-8589/CBP-8589.pdf.

[268] R (Miller) v. Prime Minister [2019] EWHC 2381 (QB); Cherry v. Advocate Gen. [2019] CSOH 70 (Scot.).

[269] Cherry v. Advocate Gen. [2019] CSIH 49, [2019] SLT 1097 (Scot.) (ruling that the attempted prorogation was justiciable and illegitimate).

[270] *Miller II* [2019] UKSC 41.

[271] *Id.* at [70].

[272] *Id.* at [28].

prorogation power,[273] emphasizing that it was the "proper function" of the courts to give effect to the separation of powers by ensuring limits on the executive's use of the prorogation power.[274] The two "fundamental principles" of constitutional law—parliamentary sovereignty and parliamentary accountability—required legal limits on the prorogation power.[275]

Having established that the matter was justiciable, the Court then ruled that the Prime Minister's advice to the Queen to prorogue Parliament was unlawful because it had "the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as a body responsible for the supervision of the executive."[276] "This was not a normal prorogation,"[277] the Court declared, given that the circumstances surrounding Brexit were "quite exceptional."[278] It found it "impossible" to conclude "that there was any reason—let alone a good reason—to advise Her Majesty to prorogue Parliament for five weeks."[279]

In a remarkable passage, the Supreme Court elucidated the nature of the United Kingdom's constitutional order and the role of the Supreme Court. "Although the United Kingdom does not have a single document entitled 'The Constitution,' it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice," which "includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles."[280]

Strikingly, Lady Hale asserted the authority of the *courts* in enforcing the United Kingdom's constitution:

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[273] *Id.* at [35].

[274] *Id.* at [34].

[275] *Id.* at [41]-[46].

[276] *Id.* at [50].

[277] *Id.* at [56].

[278] *Id.* at [57].

[279] *Id.* at [61].

[280] *Id.* at [39].

> In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits.[281]

Lady Hale's robust language on the judiciary's "particular responsibility" carries more than a hint of an echo of another chief justice's famous declaration that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[282]

The Supreme Court's monumental judgment in *Miller II* was a work of judicial statecraft. To begin, the Court presented its decision as wholly orthodox, based on well-established precedent and principles, even as it employed creative reasoning that expanded judicial review and developed constitutional principles in novel ways. Many had thought that the executive's decision to prorogue Parliament would be regarded as a quintessential matter of "high policy" unsuitable for judicial resolution; indeed, the High Court of England and Wales and the Scottish lower court had ruled exactly that way.[283] In concluding that the matter was in fact justiciable, the Court recategorized the question as about the scope—rather than the exercise—of prerogative power.[284] The Court also held that the Prime Minister's suspension of Parliament without providing reasonable justification went against the "fundamental" constitutional principle of parliamentary accountability.[285]

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[281] *Id.*

[282] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) (Marshall, CJ.).

[283] Paul Daly, *Justiciability and the 'Political Question' Doctrine: R (Miller) v Prime Minister [2091] EWHC 2381 (QB),* ADMIN. L. MATTERS (Sept. 11, 2019), https://www.administrativelawmatters.com/blog/2019/09/11/justiciability-and-the-political-question-doctrine-r-miller-v-prime-minister-2019-ewhc-2381-qb/.

[284] *Miller II* [2019] UKSC 41 at [35]-[36].

[285] *Id.* at [41], [52]-[55].

The claim that *Miller II* is in line with constitutional orthodoxy has been, to say the least, contested.[286] Critics have called the Court's neat delineation between the limits and the exercise of the prerogative an "argumentational sleight[] of hand."[287] John Finnis has described the claim that the Court "merely patrols boundaries" as "a card-shuffle, a fudge," arguing that the conventions on prorogation are "purely political," not legally justiciable.[288] Likewise, the Court's application of parliamentary accountability has been said to be a novel transformation of the notion of executive accountability to Parliament.[289] Those who viewed the Court as intruding impermissibly into the realm of political matters saw *Miller II* as opening the door for future judicial intervention into "political questions," threatening the United Kingdom's traditional political constitutionalism.[290]

A second striking feature of the Supreme Court's judgment is how it situates supremacy with Parliament, while expanding the role of the courts in relation to the other branches of government. The Court's opinion presents the judiciary as seeking to protect parliamentary supremacy against the Johnson Government's prorogation of Parliament.[291] "Under the separation of powers, it is the function of the courts" to determine that the executive acts within "lawful limits," she

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[286] *See, e.g.*, Steven Spadijer, *Miller No. 2: Orthodoxy as Heresy, Heresy as Orthodoxy*, U.K. CONST. L. ASS'N (Oct. 7, 2019), https://ukconstitutionallaw.org/2019/10/07/steven-spadijer-miller-no-2-orthodoxy-as-hersey-hersey-as-orthodoxy/.

[287] Aileen McHarg, *The Supreme Court's prorogation judgment: guardian of the constitution or architect of the constitution?*, 24 EDINBURGH L. REV. 88, 89 (2020).

[288] John Finnis, *The unconstitutionality of the Supreme Court's prorogation judgment*, POL'Y EXCHANGE 5, 15 (Sept. 28, 2019), https://policyexchange.org.uk/publication/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment/.

[289] Stephen Tierney, *Turning political principles into legal rules: the unconvincing alchemy of the Miller/Cherry decision*, POL'Y EXCHANGE (Sept. 30, 2019), https://policyexchange.org.uk/stephen-tierney-turning-political-principles-into-legal-rules-the-unconvincing-alchemy-of-the-miller-cherry-decision/.

[290] *See, e.g.*, Paul Yowell, *Is Miller (No. 2) the UK's Bush v. Gore*?, U.K. CONST. L. ASS'N. (Oct. 7, 2019), https://ukconstitutionallaw.org/2019/10/07/paul-yowell-is-miller-no-2-the-uks-bush-v-gore; Stephen Tierney, *Has 'far more assertive' Supreme Court over-reached in Miller 2?*, LEGAL BUS. (Oct. 2, 2019), https://www.legalbusiness.co.uk/blogs/guest-comment-has-far-more-assertive-supreme-court-over-reached-in-miller-2/.

[291] *Miller II* [2019] UKSC 41 at [42]-[45].

wrote,[292] underscoring that it is the "particular responsibility" of the courts "to determine the legal limits of the powers conferred on each branch of government."[293] The Court seems to affirm parliamentary sovereignty, a move that at first appears judicially modest, while simultaneously establishing the courts' authority to delineate the boundaries of the constitution's foundational principles. But by assuming responsibility for safeguarding the constitutional order,[294] the Court in effect conferred ultimate power on the judiciary to determine the limits of the United Kingdom's constitution.

Third, *Miller II* was a unanimous judgment of eleven justices of the United Kingdom Supreme Court. In United Kingdom courts, where the practice is for judges to issue individual opinions, it is common for cases—especially contentious ones—to feature a number of opinions. *Miller II*, however, was the "unanimous judgment of all eleven Justices"—"the maximum number of serving Justices who are permitted to sit," Lady Hale made a point of noting.[295] That unified front "sent out the strong message that the eleven most senior judges in the land were able to agree on this crucial and highly controversial constitutional case," where any division could have created space for backlash from politicians and the public.[296] Unanimity presented a protective front that helped shore up the Court's authority as it decided a high stakes dispute in a contentious political environment.

Finally, the rhetoric used by the *Miller II* Court in its opinion—of only twenty-four pages—is clear, compelling, and robustly framed. In straightforward and unequivocal terms,[297] Lady Hale described what the Court's decision meant: when the Royal Commissioners entered parliament for the prorogation ceremony on September 9, 2019, she said, it was "as if

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[292] *Id.* at [36].

[293] *Id.* at [39].

[294] Finnis, *supra* note 288, at 13.

[295] *Summary: R (on the application of Miller) v. The Prime Minister,* U.K. SUP. CT. 1, 3 (Sept. 24, 2019), https://www.supremecourt.uk/cases/uksc-2019-0192.html.

[296] Barnard, *supra* note 45.

[297] *Id.* at 1 ("model of clarity"); McHarg, *The Supreme Court's prorogation judgement, supra* note 287, at 88 ("clearly and beguilingly reasoned").

the Commissioners had walked into Parliament with a blank piece of paper."[298] The Court's opinion is written in a manner that appears not only aimed at the parties to the litigation, but to reach a broader public.

It's worth comparing the United Kingdom Supreme Court's decisions in *Miller I* and *Miller II*. Both involved judicial pronouncements on the use of the executive's prerogative powers. But in *Miller I*, the Court's intervention was confined to delineating the institutional arrangements of power between Parliament and the executive—it "did not predetermine either the ultimate decision on Brexit or substitute for the political accountability of Parliament."[299] It was narrowly focused on which institution could initiate the notification of Britain's exit in line with the terms of the European Union treaty. The *Miller I* Court was divided, and the majority's somewhat ambiguous, convoluted reasoning was ultimately of "limited intervention."[300]

By contrast, the Supreme Court's *Miller II* decision was highly interventionist. The prorogation case did not involve any institutional gap of power between the political branches; here, the Court intervened to overrule the actions that had already been taken by the Prime Minister (and the Queen!) to prorogue Parliament.[301] That the Court decided that it "can review something as fundamental as that done by Her Majesty as unlawful" has been described as "astonishing."[302] The *Miller II* judgment was unanimous, forcefully reasoned in forthright and robust language that communicated its decision clearly to the public, and established broad constitutional principles with far-reaching implications for the relationship between the courts and the political branches.

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[298] *Miller II* [2019] UKSC 41 at [69].

[299] Issacharoff, *Judicial Review in Troubled Times*, *supra* note 13, at 29.

[300] *Id.*

[301] Yowell, *supra* note 290 (observing that "the Supreme Court asserted power…over one of the most fundamental discretionary powers of the highest political office in the land").

[302] Mark Landler & Benjamin Mueller, *How the U.K. Supreme Court's Rebuke to Boris Johnson Remakes British Law,* N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/world/europe/uk-constitution-supreme-court-boris-johnson.html (quoting Stephen Tierney, a constitutional professor at Edinburgh).

Right after the Supreme Court's judgment in *Miller II*, the Speaker of the House, John Bercow, announced that Parliament would reconvene the next day[303]—and it did, at 11:30 a.m. on September 25, 2019. The Court's decision had immediate political impact. And, more broadly, it had significant constitutional implications for the Court's own position.

Miller II displays a United Kingdom Supreme Court willing to assert authority and assume a central role in the constitutional order. Commentators have called the Court's prorogation decision "the most significant judicial statement in over 200 years" on the United Kingdom constitution;[304] it has invited comparison to a constitutional moment akin to *Marbury*,[305] and India's *Kesavananda* or *Minerva Mills*.[306] It could also be viewed as a culmination of the Supreme Court's rise over the last two decades as the British constitution has shifted away from a traditional framework of parliamentary sovereignty.[307] Whether *Miller II* is viewed as a transformative constitutional moment or an inflection point along a broader pattern of the accretion of judicial power, what seems indisputable is that it reveals an apex court ready to take on a more empowered role than before. As Mark Elliott puts it: "The various factors that are at work in this judgment paint a picture of a supreme court judiciary that is prepared to

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[303] Rowena Mason & Peter Walker, *MPs to Return Immediately in Wake of Supreme Court Ruling*, GUARDIAN (Sept. 24, 2019), https://www.theguardian.com/politics/2019/sep/24/bercow-mps-return-urgent-supreme-court-ruling-suspension-parliament.

[304] Thomas Poole, *Understanding what makes "Miller & Cherry" the most significant judicial statement on the constitution in over 200 years,* PROSPECT (Sept. 25, 2019), https://www.prospectmagazine.co.uk/politics/understanding-what-makes-miller-2-the-most-significant-judicial-statement-on-the-constitution-in-over-200-years.

[305] *See* Sam Shirazi, *The U.K.'s Marbury v. Madison: The Prorogation Case and How Courts Can Protect Democracy,* ILL. L. REV. (Nov. 11, 2019). *Cf.* Yowell, *supra* note 290.

[306] *See* Erin F. Delaney, *The UK's Basic Structure Doctrine:* Miller II *and Judicial Power in Comparative Perspective* (manuscript on file with author); Anurag Deb, *A Constitution of Principles: From Miller to Minerva Mills,* U.K. CONST. L. ASS'N (Oct. 1, 2019), https://ukconstitutionallaw.org/2019/10/01/anurag-deb-a-constitution-of-principles-from-miller-to-minerva-mills/.

[307] *See* Delaney, *Judiciary Rising*, *supra* note 246.

serve as a guardian of constitutional principle in a way and to an extent that previous generations of apex court judges in the U.K. were not."[308]

The Supreme Court's approach in *Miller II* is not merely a change in legal doctrine or constitutional adjudication; it represents a fundamental shift in judicial self-perception. Established barely ten years before its prorogation decision, the United Kingdom Supreme Court appears to have become increasingly confident in its position as a *de facto* constitutional court.[309]

In a speech given one year before the *Miller II* decision, Lady Hale described the Supreme Court as looking "more and more like a constitutional court."[310] Britain's Supreme Court is a relatively young apex court—not unlike the United States Supreme Court when it decided *Marbury* in 1803, fourteen years after the United States Constitution came into force. But while Chief Justice Marshall in *Marbury* maneuvered a holding that left the actions of President Jefferson's administration unchallenged; here, the United Kingdom Supreme Court directly voided actions taken by the highest political office in British government.

Miller II attracted strong political backlash. A member of Johnson's Cabinet declared the Court's decision "a constitutional coup,"[311] and commentators criticized the judges for overreaching into political matters, calling it a "constitutional outrage."[312] A few weeks after the decision, Prime Minister Johnson called for a general election, and ran on a manifesto that pledged to ensure that judicial review "is not abused to conduct politics by

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[308] Owen Bowcott, *After 10 years, the supreme court is confident in its role,* GUARDIAN (Sept. 26, 2019), https://www.theguardian.com/law/2019/sep/26/after-10-years-the-supreme-court-is-confident-in-its-role (quoting Cambridge law professor Mark Elliott).

[309] *See* Adam Taylor, *The U.K. Supreme court is only 10 years old. But it just showed its power.,* WASH. POST (Sept. 24, 2019), https://www.washingtonpost.com/world/2019/09/24/why-uk-supreme-courts-decision-against-boris-johnson-is-remarkable/.

[310] Brenda Hale, President of the United Kingdom Supreme Court, *Should the Law Lords have left the House of Lords?,* Address Before the Michael Ryle Memorial Lecture 2018 (Nov. 14, 2018).

[311] *Supreme Court: Suspending Parliament was unlawful, judges rule*, BBC News (Sept. 24, 2019), https://www.bbc.com/news/uk-politics-49810261

[312] *See, e.g.*, Charles Day, *The British Supreme Court's decision is a constitutional outrage,* SPECTATOR (Sept. 24, 2019), https://spectator.us/british-supreme-court-constitutional-outrage/.

another means."[313] After his re-election in December 2019, Johnson promised a "radical" overhaul of the justice system,[314] and appointed an attorney general vocal about the need to "take back control" from the courts.[315]

The Conservative Government soon appeared to take steps to make good on its promise. In July 2020, the United Kingdom Government launched the Independent Review of Administrative Law, a panel of experts charged with terms of reference that contemplated far-reaching changes to judicial review.[316] And in December 2020, the Government introduced draft legislation that would revive the prerogative power to dissolve Parliament, and that specifically provided that the courts cannot question the revived prerogative powers.[317]

The Independent Review's report, published in March 2021, eschewed significant changes to judicial review, and recommended only two limited reforms.[318] In response, the Government announced that it

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[313] *Get Brexit Done: Unleash Britain's Potential,* THE CONSERVATIVE AND UNIONIST PARTY MANIFESTO 1, 48 (2019), https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf.

[314] Andrew Woodcock, *Queen's Speech: Boris Johnson promises 'radical overhaul' of constitution and justice system,* INDEPENDENT (Dec. 19, 2019), https://www.independent.co.uk/news/uk/politics/boris-johnson-queens-speech-constitution-democracy-justice-system-a9253251.html.

[315] Suella Braverman, *People we elect must take back control from people we don't. Who includes the judges.*, CONSERVATIVE HOME (Jan. 27, 2020), https://www.conservativehome.com/platform/2020/01/suella-braverman-people-we-elect-must-take-back-control-from-people-we-dont-who-include-the-judges.html.

[316] Press Release, *Gov't launches indep. panel to look at judicial review, U.K. Ministry of Justice* (July 31, 2020), https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review.

[317] Fixed-term Parliaments Act 2011 (Repeal) Bill (2020), https://www.gov.uk/government/publications/draft-fixed-term-parliaments-act-repeal-bill.

[318] MINISTRY OF JUSTICE, THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW 69-70 (2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf (recommending that applications for *Cart* review of Upper Tribunal cases to the High Court be discontinued, and that courts should have the power to make suspended quashing orders over government decisions).

would propose additional measures aimed at, as the Lord Chancellor put it, "affirming the role of the courts as 'servants of Parliament'."[319] It also made clear in the Queen's Speech in May 2021 that it intended to proceed with a bill to reform the conduct of judicial review.[320] The Judicial Review and Courts Act, introduced in July 2021 and enacted in April 2022, implemented relatively modest changes that did not go far beyond the proposals of the Review.[321]

The United Kingdom Government's salvo of shots nonetheless points to a wider and ongoing tension between the political branches and the judiciary. In addition to the judicial review bill, the Government also affirmed in the Queen's Speech that it would move forward with the proposed legislation to reinstate the prerogative power of parliamentary dissolution. That statute, now enacted as the Dissolution and Calling of Parliament Act 2022, contains a judicial review ouster clause that specifies that the revived prerogative powers are non-justiciable.[322]

That *Miller II* served as a trigger for the Government's threats to restrict judicial review is "perfectly clear."[323] Still, it remains to be seen how a constitutional showdown will unfold. If the judiciary refuses to back down from a confrontation with the executive, it may well find ways not to give

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[319] JUDICIAL REVIEW: PROPOSALS FOR REFORM, https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/?utm_source=twitter&utm_medium=tweet&utm_campaign=IRAL. *See also* Paul Craig, *The Panel Report and the Government's Response*, U.K. CONST. L. BLOG (Mar. 22, 2021), https://ukconstitutionallaw.org/2021/03/22/paul-craig-iral-the-panel-report-and-the-governments-response/.

[320] The Queen's Speech 2021 (May 11, 2021), at 9, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986770/Queen_s_Speech_2021_-_Background_Briefing_Notes.pdf.

[321] Judicial Review and Courts Bill 2021-22, HC Bill [152], https://bills.parliament.uk/bills/3035.

[322] The Dissolution and Calling of Parliament Act 2022, §3, https://www.legislation.gov.uk/ukpga/2022/11/enacted.

[323] Mark Elliott, *Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context*, 16 EUR. CONST. L. REV. 625, 644 (2020).

effect to laws seeking to exclude judicial review.[324] More broadly, in contrast to the executive's asserted conception of courts as subservient to a sovereign parliament, *Miller II* is emblematic of the Court's own vision of where power should lie in Britain's constitutional governance.[325]

As Britain's former supreme court president Lord Sumption has observed: "Judges are famously resistant to having their wings clipped."[326] That's especially so once a court has discovered the heights to which it can soar.

III. STRATEGIES OF JUDICIAL SELF-EMPOWERMENT

Courts employ various tools and mechanisms to enhance their institutional position. This Part seeks to illuminate the specific strategies in the judicial toolkit that courts might use in pursuit of self-empowerment. The account of these tools of statecraft is illustrative, rather than exhaustive, and non-exclusive; judges can, and do, use various strategies in tandem or consecutively toward strengthening judicial power.

A. *Maxi-minimalism*

Begin with the *Marbury* strategy. Judges may assert authority in a strategic manner to insulate themselves from immediate political or public backlash. Often, courts accomplish this by issuing a *Marbury*-style decision featuring broad, maximalist reasoning that expands judicial power even as it results in a narrow holding that avoids provoking a fight with the governing political power. By issuing a remedy with minimal consequences

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[324] *See, e.g.*, R (Privacy International) v. Investigatory Powers Tribunal [2019] UKSC 22 at [119] (stating a "strong case for holding that, consistent with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal…"). *See also* Mark Elliott, *Repealing the fixed-term parliaments act,* LAW FOR EVERYONE (Dec. 2, 2020), https://publiclawforeveryone.com/2020/12/02/repealing-the-fixed-term-parliaments-act/ (observing that "it would be naïve to assume that a determined court would be unable, in the face of the ouster, to preserve any vestige of judicial review").

[325] Mark Elliott, *Constitutional Adjudication and Constitutional Politics, supra* note 323, at 646.

[326] Jonathan Sumption, *Meddling by judges is a problem only they can fix*, TIMES (Feb. 16, 2020), https://www.thetimes.co.uk/article/meddling-by-judges-is-a-problem-only-they-can-fix-5bm9kg6nv.

for the case at hand, a court mitigates the immediate impact of its assertion of authority and the threat of political attack.

Deferral strategies are closely connected to considerations of timing.[327] In deciding when to issue a decision, courts are sensitive to the broader political climate. Judges may defer or delay certain constitutional questions to avoid frontal confrontations with the executive or legislature.[328] Time allows a fragile court to build legitimacy and support before trying to directly enforce its authority in future confrontations with powerful political actors.

At the same time, while issuing such decisions, courts may use maximalist reasoning to set the foundation for legal mechanisms that it can use in the future to constrain the political branches. In Malaysia, for example, the Federal Court in the case of *Semenyih Jaya* struck down a land acquisition statute, announcing that its decision would have only prospective effect, even as it delivered an expansive opinion that laid the seeds for a doctrine empowering judicial review of constitutional amendments.[329] A year later, in *Indira Gandhi*, the Malaysian court reached for the legal tool it had established in that previous decision to nullify a constitutional amendment for undermining the courts' power of judicial review.[330]

The Pakistan Supreme Court's *Rawalpindi* decision exhibits a similar *Marbury*-model strategy.[331] A majority of the Court expressly authorized substantive review of constitutional amendments that abrogate the salient features of the Constitution. But endorsing a doctrine is one thing; actually invalidating a constitutional amendment is another. The Court in fact upheld the two challenged constitutional amendments in the case—one amendment authorizing military trials for terrorist suspects while the other

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[327] Dixon, *Strong Courts, supra* note 5, at 317-320.

[328] *See* Dixon & Issacharoff, *Judicial Deferral*, *supra* note 20, at 687. *See also* Delaney, *Analyzing Avoidance, supra* note 20.

[329] *Semenyih Jaya* [2017] 3 MALAYAN L.J. 561.

[330] *Indira Gandhi* [2018] 1 MALAYAN L.J. 545.

[331] *Rawalpindi,* (2015) PLD (SC) 401.

dealt with judicial appointments—thus mitigating public hostility to its ruling and potential backlash from the governing regime.

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."[332]

B. *Mini-maximalism*

An inverse approach to *Marbury*-style maxi-minimalism is a strategy of *mini-maximalism*. A court taking a mini-maximalist approach downplays or obscures its judicial aggrandizement with narrow reasoning couched in formalistic interpretive terms, even as it delivers a highly consequential ruling of immediate impact. Judges adopting this posture seek to minimize their adoption of self-empowering mechanisms by portraying their approach as orthodox legal doctrine.

Consider the United Kingdom Supreme Court's 2019 prorogation decision. When the Court pronounced unlawful Boris Johnson's prorogation of Parliament in the tense build-up to Brexit, it intervened in a contentious political matter in which many had assumed Britain's highest court would hesitate to engage.[333] The impact of *Miller II* was immediate. On the day after the Court's judgment, Parliament resumed, and the Speaker of the House of Commons ordered the prorogation "expunged" from the parliamentary records.[334]

The Supreme Court portrayed its assertion of judicial authority in *Miller II* as based on perfectly orthodox constitutional principles and precedent.[335] She held that the matter was justiciable on the basis of a (some say too neat) distinction that the case was about the scope—rather than the

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[332] *Id.* at para. 82 (Mian Saquib Nisar, J.).

[333] *See* Mark Landler, *Britain's Supreme Court Is Thrust Into Center of Brexit Debate*, N.Y. TIMES (Sept. 18, 2019), https://www.nytimes.com/2019/09/18/world/europe/britain-supreme-court-proroguing-parliament.html.

[334] *See* Bianca Britton, *Lawmakers return to Parliament after court rules against Boris Johnson's prorogation*, CNN (Sept. 25, 2019), https://www.cnn.com/2019/09/25/uk/mps-return-to-parliament-gbr-intl/index.html.

[335] McHarg, *The Supreme Court's prorogation judgement, supra* note 287, at 94.

exercise—of the prerogative power.[336] The Court also sought to frame the decision as about protecting the supremacy of Parliament, although that discussion of parliamentary sovereignty draws heavily on the notion of parliamentary accountability.[337] Aileen McHarg observes that the Court "cleverly presented its conclusion as the unproblematic consequence of centuries-old constitutional precedents" to "disguise the novelty of its reasoning and to make the result appear more inevitable than it was."[338]

Many regard the judiciary's review of the executive's decision to prorogue Parliament as an unprecedented intrusion into what they considered a quintessential political question.[339] Defenders of *Miller II*, on the other hand, view the judgment as a proper exercise of the Court's role in safeguarding the constitution, by acting as a constitutional counter-balance to an executive usurpation of power from the legislature.[340] Yet others, like Delaney, argue that we might understand *Miller II*, when viewed against a global backdrop of courts protecting constitutional basic

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[336] *See, e.g.*, Paul Daly, *Some Qualms about R (Miller) v Prime Minister*, ADMIN. L. MATTERS (Sept. 24, 2019), https://www.administrativelawmatters.com/blog/2019/09/24/some-qualms-about-r-miller-v-prime-minister-2019-uksc-41/(arguing that the "neatness of the distinction…breaks down" because rationality review seeps into the determination of the scope of the prerogative).

[337] *See, e.g.*, Tierney, *Has 'far more assertive' Supreme Court over-reached in Miller 2?*, *supra* note 290 (describing the principle of parliamentary accountability as a "substantial innovation").

[338] McHarg, *The Art of Judicial Disguise*, *supra* note 44.

[339] *See, e.g.*, Finnis, *supra* note 288, at 9 (describing the Court's decision as "replacing some main elements of a constitutional settlement that has given effect, for hundreds of years, to certain tried and tested political assessments and judgments"); *The Supreme Court's prorogation judgment and its constitutional implications: Hearing on HC 2666 Before the Public Administration and Constitutional Affairs Committee*, House of Commons (Oct. 8, 2019) (written evidence from Professor Richard Ekins, Head of Policy Exchange's Judicial Power Project and Professor of Law, University of Oxford), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/prorogation-and-the-implications-of-the-supreme-court-judgment/oral/106206.html (calling the decision "part of the judicialisation of politics" and "a politicization of the judicial process"); Timothy Endicott, *Making Constitutional Principles into Laws*, 136 L. Q. REV. 175, 178 (2020).

[340] *See, e.g.*, Alison Young, *Deftly guarding the constitution*, JUD. POWER PROJECT (Sept. 29, 2019), http://judicialpowerprogject.org.uk/alison-young-deftly-guarding-the- constitution/; Paul Craig, *The Supreme Court, prorogation and constitutional principle*, 2 PUB. L. 248 (2020); Mark Elliott, *Constitutional Adjudication and Constitutional Politics, supra* note 323.

structures, as an example of the United Kingdom Supreme Court acting in a manner that is unorthodox, yet legitimate.[341]

The Supreme Court in *Miller II*, though, presented its decision as no more than a conventional application of a power that it had long possessed. Framed this way, such reasoning minimized the expansive assertion of judicial power in a decision that had immediate political and constitutional consequences. To wit, the Court was being *mini*-maximalist.

Sometimes, the strategies of maxi-minimalism and mini-maximalism can be used effectively in sequence. Take, for example, the Malaysian apex court's two-stage approach in the 2017 and 2018 decisions of *Semenyih Jaya* and *Indira Gandhi*, as we have discussed. In the first case, the Malaysian Federal Court took a *Marbury*-style *maxi*-minimalist approach, combining expansive reasoning establishing the judiciary's power with a ruling that had limited consequence.[342] Once that groundwork had been laid, in a high-profile case the following year on the authority of civil courts and religious courts, the Federal Court issued a consequential decision that entrenched the judiciary's power to nullify constitutional amendments and strengthened its authority.[343]

That temporal sequence of a *maxi*-minimalist approach establishing the seeds of judicial empowerment in a manner that avoids political backlash followed by a *mini*-maximalist decision of consequential impact is familiar in many courts across the globe. We can see this pattern, for example, in how the Indian Supreme Court developed the basic structure doctrine over a series of cases. It was in the 1967 case of *Golaknath v. State of Punjab* that the Court first articulated that Parliament could not amend the Constitution in a manner that encroached on fundamental rights guarantees, but nevertheless upheld the constitutional amendment.[344] In 1973, the specific justifications used in *Golaknath* were replaced in *Kesavananda*, where the Court placed substantive limits on Parliament's amendment power on the basis that the Constitution had an unalterable

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[341] Delaney, *Miller II*, supra note 306.

[342] *Semenyih Jaya* [2017] 3 MALAYAN L.J. 561.

[343] *Indira Gandhi* [2018] 1 MALAYAN L.J. 545.

[344] Golaknath v. State of Punjab 1967 AIR 1643 (India).

"basic structure."[345] The Indian Supreme Court would only later use this doctrine to full effect to invalidate the challenged constitutional amendments in *Indira Nehru Gandhi v. Raj Najrain* and *Minerva Mills v. Union of India*.[346]

Indeed, if the experience of its neighbors is anything to go by, the maxi-minimalist approach employed by Pakistan's Supreme Court in *Rawalpindi* may be in service of laying the foundation for a more forceful ruling in the future. The groundwork laid in an earlier maxi-minimalist decision may set up a court to later employ a highly assertive posture in a *mini*-maximalist, or perhaps even a *maxi*-maximalist, decision.[347]

Still, a mini-maximalist approach can be risky. Judicial rulings that have obvious and immediate impact may provoke political or popular backlash. The United Kingdom Supreme Court may be a case in point. After the *Miller II* decision, the Johnson Government announced an independent commission to review the courts' powers and has proposed legislation aimed at curtailing judicial review over certain matters.[348] Indeed, the explanatory notes relating to the bill introduced to revive the powers relating to the dissolution of parliament made no bones that the ouster clause was drafted to address the Supreme Court's *Miller II* decision that it was justiciable for a court to review the scope of the prerogative power.[349]

The *Miller II* ruling was not minimalist in its impact, and in part because of this the Court has since faced political retaliation. The battle over where power should lie in Britain's constitutional governance is an

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[345] Kesavananda Bharati v. Kerala, AIR 1973 SC 1461 (India).

[346] Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299 (India); Minerva Mills v. India, A.I.R. 1981 1 S.C 1789 (India).

[347] It is possible, along the dimensions suggested by this Article, to imagine mechanisms of constitutional adjudication that could be styled "mini-minimalist" (narrow legal scope, small immediate impact) or "maxi-maximalist" (expansive legal scope, large immediate impact). In this project, I focus on *maxi*-minimalist and *mini*-maximalist approaches because these judicial mechanisms appear more revealing of some form of strategic judicial behavior at play.

[348] *See supra* notes 316 to 322 (and accompanying text).

[349] Dissolution and Calling of Parliament Bill, Explanatory Notes [23], https://bills.parliament.uk/publications/41468/documents/207.

ongoing struggle.[350] This may suggest, though, that a maxi-minimalist *Marbury*-style strategy that seeks to defer political confrontation could be more effective for sustaining judicial empowerment endeavors in the longer-term. A court that delivers a highly consequential ruling even while it attempts to downplay its assertion of power may be less successful in its gamble for power compared to one that bides its time.

C. *Strategy of Coalition-building*

A court may seek allies in other institutional stakeholders using a strategy of coalition-building. The way that a court positions itself in contests for power between the political branches can impact its own institutional position.[351] In an interbranch conflict between the legislature and the executive, a court that presents itself as protecting one branch of government against another's encroachment stands to gain a valuable institutional ally. Moreover, an opinion framed as locating authority in another branch of government can help to downplay the judiciary's own expansion of power. The identification of allies can be especially helpful when used in conjunction with a mini-maximalist strategy, that is, when a court's decision that has an immediate, practical effect creates or cements alliances with other institutional actors.

Return to the United Kingdom Supreme Court's decision invalidating the executive's prorogation of Parliament.[352] The *Miller II* opinion portrayed the judiciary as at the vanguard of protecting the supremacy of *Parliament*. Lady Hale warned that parliamentary sovereignty would be "undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament

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[350] Recent constitutional controversy has surrounded the U.K. Government's proposed Safety of Rwanda (Asylum and Immigration) Bill 2023-24 in response to the Supreme Court's judgment in *R (AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42. *See generally* Mark Elliott, *The Rwanda Bill and its constitutional implications,* Pub. L. Blog (December 6, 2023), https://publiclawforeveryone.com/2023/12/06/the-rwanda-bill-and-its-constitutional-implications/.

[351] *Compare* Chafetz, *Nixon/Trump, supra* note 37 (describing how the U.S. Supreme Court presents itself as a neutral, trustworthy arbiter in interbranch contestations, thus accruing more power).

[352] *Miller II* [2019] UKSC 41.

from exercising its legislative authority for as long as it pleased."[353] She described the judiciary's role in protecting Parliament from an overbearing executive in historic—one might even say heroic—terms: "Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers" by the executive.[354]

Framed in this way, the United Kingdom Supreme Court's opinion displayed judicial modesty by emphasizing that sovereignty lies with another branch of government—in this case, the legislature. In this conflict between the political branches, the judiciary positioned itself on the side of Parliament and as a bulwark for parliamentary sovereignty. The Court thus self-presented as valiantly protecting the legislature's supremacy from an overbearing executive that had orchestrated a move to suspend Parliament. As Lady Hale witheringly put it, it was impossible for the Court to conclude "that there was any reason—let alone a good reason" for the Prime Minister to advise the Queen to prorogue Parliament for five weeks.[355]

Lady Hale emphasized that the courts have the task "of upholding the values and principles of our constitution and making them effective," concluding that it is the judiciary's "particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits."[356] That declaration that it is the judiciary's "particular" role to determine and enforce constitutional limits reveals an understanding of the Court as the ultimate guardian of the United Kingdom's uncodified constitution.

At the same time, by aligning itself with Parliament's interests, the Supreme Court managed to attract support from a powerful institutional actor for the outcome of its ruling as well as increase buy-in for the Court's position as a robust protector of the constitutional system. Minutes after the Court's unanimous ruling, the Speaker John Bercow, who "welcomed" the judgment, declared that it "vindicated the right and duty of parliament

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[353] *Id.* at [42].

[354] *Id.* at [41].

[355] *Id.* at [61].

[356] *Id.* at [39].

to meet at this crucial time to scrutinize the executive," and promptly reconvened Parliament.[357] Other Parliamentarians hailed the Supreme Court's ruling as an "astonishing rebuke to Boris Johnson for his disgraceful behavior,"[358] and appealed to the public not to allow the Government "to deride the judiciary," declaring that "the judges have upheld our democracy."[359]

In this decision at the center of the Brexit contest between the executive and the legislature, Britain's highest court presented itself as an ally of the Parliament, thus forging an alliance with another branch of government. Legislators not only lent support to the prorogation decision but were also incentivized to make the case to the public promoting the ruling, in turn enhancing the judiciary's stature.

D. *Popular Signaling as Rhetorical Strategy*

Audience matters. For judges in constitutional cases, their audience typically extends beyond the parties in the litigation.[360] Judges that are conscious about establishing a court's legitimacy and influence are sensitive about appealing to a broader audience beyond the court. In addition to legally educated elites,[361] that wider audience includes political actors, the

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[357] Ashley Cowburn, *Jeremy Corbyn tells Boris Johnson to resign after PM's parliament suspension ruled illegal,* INDEPENDENT (Sept. 24, 2019), https://www.independent.co.uk/news/uk/politics/boris-johnson-news-corbyn-supreme-court-decision-ruling-resign-brexit-a9117981.html. Notably, Bercow has been viewed by his supporters as a champion of Parliament throughout his tenure as Speaker of the House. *See* Chris Mullin, *In defence of John Bercow*, PROSPECT (Mar. 2, 2020), https://www.prospectmagazine.co.uk/magazine/in-defence-of-john-bercow-memoir-review-chris-mullin.

[358] *See e.g.*, Bowcott, Quinn & Carrell, *supra* note 3.

[359] *See* e.g., Ian Murray, *Supreme Court ruling confirms that we don't live in dictatorship*, HERALD (Sept. 25, 2019), https://www.heraldscotland.com/news/17925499.ian-murray-supreme-court-ruling-confirms-dont-live-dictatorship/.

[360] Jamal Greene & Yvonne Tew, *Comparative Approaches to Constitutional History, in* COMPARATIVE JUDICIAL REVIEW 379, 382 (Erin Delaney & Rosalind Dixon eds., 2018).

[361] *See* Lucien Karpik & Terence Halliday, *The Legal Complex*, 7 ANN. REV. L. SOC. SCI. 217 (2011). *Cf.* Kim Lane Scheppele, *The Legal Complex and Lawyers-in-Chief*, *in* THE LEGAL PROCESS AND THE PROMISE OF JUSTICE: STUDIES INSPIRED BY THE WORK OF MALCOLM FEELEY 361 (Rosann Greenspan, Hadar Aviram, & Jonathan Simon eds., 2019).

media, and the public. Judges make strategic choices about how to frame the issues in their opinions and describe the motivations of various institutional actors.

Rhetorical strategy takes different forms in different contexts. Scholars have studied how courts may strategically refer to precedent—or, conversely, refrain from using foreign citations—to enhance governmental compliance with their decisions,[362] as well as how judges use vague opinions to manage their uncertainty over policy outcomes and obscure potential noncompliance from public view.[363] A court making an unpopular decision may use rhetoric that reassures the dominant political and economic social groups by affirming its allegiance to their shared values.[364] Or a court may seek to maintain legitimacy by self-presenting itself as a neutral arbiter above the fray of political contestation.[365]

Judicial rhetoric in an emerging democracy can be particularly potent in crafting a constitutional narrative that has popular salience. Rhetorical persuasion in such contexts may involve advancing a particularized constitutional narrative that appeals to local commitments and values. Take, for example, the Pakistan Supreme Court's insistence that its power to review unconstitutional constitutional amendments is located in the Pakistan Constitution's "salient features."[366] Although the doctrine of implicit unamendability was developed by the Indian Supreme Court in

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[362] *See* Olof Larsson et al., *Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union*, 50 COMP. POL. STUD. 879 (2017); Erik Voeten, *Borrowing and Nonborrowing among International Courts*, 39 J. LEGAL STUD. 547 (2010).

[363] Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. J. POL. SCI. 504 (2008); *see also* RYAN C. BLACK ET AL., U.S. SUPREME COURT OPINIONS AND THEIR AUDIENCES (2016); Pamela C. Corley & Justin Wedeking, *The (Dis)Advantage of Certainty: The Importance of Certainty in Language*, 48 L. & SOC'Y REV. 35 (2014).

[364] Wojciech Sadurski, *"It All Comes Out in the End": Judicial Rhetorics and the Strategy of Reassurance,* 7 OXFORD J. LEGAL STUD. 258, 272 (1987).

[365] *See* Chafetz, *Nixon/Trump*, *supra* note 37, at 15-24 (describing the differences in the U.S. Supreme Court's rhetoric toward grand jury and congressional subpoenas issued against the President in the 2020 decisions of *Trump v. Vance* and *Trump v. Mazars*).

[366] *Rawalpindi,* (2015) PLD (SC) 401 at para. 180(a)-(b) (Saeed, J.).

a number of now well-known cases in the 1960s and 1970s,[367] Pakistan's judges pointedly rejected the "basic structure doctrine" as a project that "took root in an alien soil under a distinctly different constitution."[368] Given the baggage of history between India and Pakistan, it is unsurprising that the Pakistani judges emphatically appealed to local constitutional values in the form of their Constitution's own "salient features."[369] Their insistence on a local account of the unamendability doctrine reveals mindfulness of the salience of constitutional narrative in popular discourse.

We see a public-facing sensibility, too, in the Malawi Supreme Court's 2020 judgment in which the judiciary rhetorically presents itself in a manner that popularly engages the public. In annulling the results of the 2019 presidential election, which had prompted mass protests, the Court emphasized the "duty of the courts to strive, in the public interest, to sustain that which the people have expressed as their will."[370] Its opinion contains popular appeals, characterizing the people's electoral will as "the most visible, eventful and concrete expression of democracy."[371] Presenting its decision as protecting the "sanctity" of the popular will, the Court firmly placed itself on the side of the people; it made almost no reference to its own unprecedented exercise of power, except to refer obliquely to "judicial review" as a means of ensuring the "supremacy of the constitution" and affirming "democratic values."[372] The Court's constitutional narrative also relies on the jurisprudence of other African courts to bolster its articulation of the Malawi Constitution's "fundamental" commitment to all of the state's authority "deriving from the people."[373]

The style and rhetoric of a judicial opinion designed for public salience can carry powerful persuasive force. To wit, compare the United Kingdom Supreme Court's decisions in *Miller I* and *Miller II*. The majority's

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[367] *See supra* notes 344-346(and accompanying text).

[368] *Rawalpindi,* (2015) PLD (SC) 401 at para. 51 (Khawaja, J.).

[369] Dixon, *Strong Courts*, *supra* note 5.

[370] *Mutharika* [2020] MWSC 1 at 33.

[371] *Id.* at 31.

[372] *Id.* at 33.

[373] *Id.* at 85-88.

"nebulous"[374] reasoning on whether the executive could initiate the Brexit process in the first *Miller* case has been described as "confused"[375] and "intellectually lackadaisical."[376] By contrast, the Supreme Court in *Miller II* unanimously delivered a "streamlined"[377] judgment, with "unusually forthright"[378] and "crystal-clear" wording.[379] Reading the judgment from the bench on live television—sporting a now infamous spider brooch[380] — Lady Hale explained what it meant that the prorogation was unlawful in simple, stark terms: it was "as if the Commissioners had walked into Parliament with a blank sheet of paper."[381]

E. *The Optics of Unanimity*

When seeking to assert power in high stakes constitutional or political matters, many courts have sought to issue single-voice decisions. From the United States Supreme Court's judgments in *Cooper v. Aaron* and *Brown v. Board of Education*,[382] to decisions by the constitutional courts of Taiwan and Korea,[383] judiciaries across the world have often delivered politically sensitive judgments with one voice.[384]

We can see this unanimity at work in the recent court decisions in Malawi, Malaysia, and the United Kingdom. In voiding the results of a national presidential election, the Malawian Supreme Court rendered a

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[374] *See* Cormac Mac Amhlaigh, *Miller, The Prerogative and Constitutional Change*, 21 EDINBURGH L. REV. 448, 453 (2017).

[375] Ekins & Gee, *supra* note 258, at 261.

[376] *See* Elliott, *The Supreme Court's Judgment in Miller, supra* note 253, at 286.

[377] Poole, *supra* note 304.

[378] Bowcott, Quinn & Carrell, *supra* note 3.

[379] McHarg, *The Art of Judicial Disguise*, *supra* note 44.

[380] Lou Stoppard, *Big Spider Love: The Brooch That Ate Brexit*, N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/style/brenda-hale-brexit-brooch.html.

[381] *Miller II* [2019] UKSC 41 at [69].

[382] Cooper v. Aaron 358 U.S. 1 (1958); Brown v Board of Education 347 U.S. 483 (1954).

[383] J. Y. Interpretation No. 627 (2007) (Taiwan); The Impeachment of President Roh Moo-hyun Case (2004) 16-1 KCCR 609, 2004 Hun-Na 1 (S. Kor.).

[384] Chang, *supra* note 23, at 900-01.

unanimous judgment.[385] The Malaysian Federal Court established its power to nullify unconstitutional constitutional amendments in two unanimous decisions.[386] And, in contrast to its divided judgment in *Miller I,* a full bench of eleven Supreme Court justices in *Miller II* declared the prorogation of Parliament to be unlawful.[387]

The optics of this sort of unanimous decision sends a powerful message. A unified front can increase the weight of a judicial decision with no distraction or division from any separate opinions.[388] It helps strengthen a court's authority by sending a forceful message backed by the entire court,[389] and helps prevent the politicization of any divide that detractors could use to discredit the decision. A single judgment also shields the stances of individual judges from the public and provides protective cover in politically charged cases.[390]

To be sure, unanimity may not always strengthen support for a court's authority. Sometimes, as studies suggest, dissenting opinions may increase public support of court decisions by boosting acceptance among opponents of the decision's procedural justice,[391] particularly in a highly polarized political environment.[392]

It's therefore worth looking closely at the broader legal backdrop to a court's unanimous decision. Unlike most constitutional and regional courts in Europe, which share a civil law tradition of delivering a single judgment,[393] common law courts regularly feature separate opinions by individual judges. Indeed, separate opinions—whether concurrences or

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[385] *Mutharika* [2020] MWSC 1.

[386] *Semenyih Jaya* [2017] 3 MALAYAN L.J. 561; *Indira Gandhi* [2018] 1 MALAYAN L.J. 545.

[387] *Miller II* [2019] UKSC 41.

[388] Chang, *supra* note 23, at 900.

[389] Dixon, *supra* note 5, at 322.

[390] *See* Barnard, *supra* note 45 (observing that the newspaper headline labelling the High Court judges as "Enemies of the People" following *Miller I* had "a profound effect on the legal profession").

[391] *See* Henrik Bentsen, *Dissent, Legitimacy, and Public Support for Court Decisions: Evidence from a Survey-Based Experiment*, 53 L. & SOC'Y REV. 588 (2019).

[392] *See* MICHAEL F. SALAMONE, PERCEPTIONS OF A POLARIZED COURT (2018).

[393] Chang, *supra* note 23, at 901; Barnard, *supra* note 45.

dissents—are sometimes used as a tool to diffuse the effects of a court's judgment or to signal the direction for possible legal change.[394] The United Kingdom Supreme Court operates in a common law system, as do the apex courts of Malawi and Malaysia.[395] Yet, in the instances we have discussed, these common law courts all issued a unanimous judgment with no concurring or dissenting opinions.[396]

For these common law judges, the united act of delivering a single opinion provides compelling optics. That's perhaps especially so when a court weighs in multiple times over a particular political situation, and then ultimately presents a unified front. This is illustrated by the United Kingdom Supreme Court's two Brexit decisions. *Miller I* featured a divided court: the majority opinion was joined by eight justices, while the three dissenters—Lord Reed, Lord Carnwath, and Lord Hughes—each wrote separate dissenting opinions.[397] By contrast, the Court's *Miller II* judgment was backed by all eleven justices, including the three who had dissented in *Miller I*. It bears note that *Miller II* expressly states "Lady Hale and Lord Reed giving the judgment of the Court"[398]—the same Lord Reed who was soon to succeed Lady Hale as the head of the President of the Supreme Court. The Court's unanimity in *Miller II* signaled the weight of the Court's full institutional authority and underscored its regime continuity.

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[394] *See* Thomas B. Bennett, Barry Friedman, Andrew D. Martin, & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817 (2018); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010).

[395] The common law nature of these courts may also translate to broader influence in comparative contexts as common law judgments are generally more likely than decisions in civil law systems to be read and cited by judges in other common law systems. This helps explain why, for example, the Indian Supreme Court's decision on the basic structure doctrine in *Kesavananda Bharati v. Kerala* (1973) has been cited by other common law courts, like the Malaysian Federal Court, seeking to establish a power to review constitutional amendments.

[396] *See Miller II* [2019] UKSC 41 (U.K.); *Semenyih Jaya* [2017] 3 MALAYAN L.J. 561 (Malaysia); *Indira Gandhi* (2018) 1 MALAYAN L.J. 545 (Malaysia); *Mutharika* [2020] MWSC 1.

[397] *Miller I* [2017] UKSC 5.

[398] *Miller II* [2019] UKSC 41.

IV. WHEN DO COURTS REACH FOR SELF-EMPOWERMENT?

Across emerging and established democracies, courts use diverse strategies to expand judicial power. Still, judicial assertiveness is a tricky endeavor. When and why might fragile courts seek to make a play for self-empowerment? This final Part considers the conditions under which courts tend to make use of self-empowerment strategies and the factors that might influence their effectiveness. It does not seek to establish conclusively when particular instances of empowerment will occur. Rather, it seeks to suggest situations in which courts may be willing to employ strategic assertiveness and the circumstances that help explain when such efforts are more likely to succeed.

To begin with, courts tend to resort to asserting power vis-à-vis the political branches when the judiciary's own institutional turf appears under threat. When confronted with constitutional amendments that modified the judicial appointments process and transferred the trial of civilian suspects to military courts, for example, the Supreme Court of Pakistan saw fit to declare a judicial power to enforce limits on Parliament's power to amend the Constitution. A similar story emerges in the Malaysian Federal Court. To address amendments passed by Parliament designed to remove the courts' judicial power and limit the authority of the civil courts over religious courts, the Malaysian court asserted the power to nullify the amendments that infringed foundational constitutional principles. This pattern of judicial self-protection has been evident elsewhere. In India,[399] as in Bangladesh[400] and Taiwan,[401] courts have proclaimed the authority to invalidate constitutional amendments when confronted with attempts by dominant political actors to curtail judicial review or judicial independence.

Next, moments of political or constitutional crisis often present courts with the opportunity to take on a highly interventionist role. In times of constitutional rupture "in which the fundamental constitutional order, in political and sometimes even juridical terms, is itself the subject of disagreement and active dispute," as Nathan Brown and Julian Waller

[399] Kesavananda Bharati v. State of Kerala, AIR [1973] SC 1461 (India).

[400] Yap & Abeyratne, *supra* note 116.

[401] Law & Hsieh, *supra* note 96.

observe, courts can emerge as critical actors.[402] When Malawi's High Court and Supreme Court issued their rulings annulling the presidential elections, the country had undergone several months of political turmoil, with protestors taking to the streets and the opposition mounting a slew of legal challenges over the heavily disputed 2019 elections.[403] And the United Kingdom Supreme Court's decision in *Miller II* was delivered in a "politically febrile atmosphere," after the Government had sought to suspend Parliament with the United Kingdom "apparently hurtling towards the cliff-edge of leaving the [European Union] without any withdrawal agreement."[404] The Malawi and United Kingdom crises were not merely ordinary political turbulences, nor were they the experiences of democracies transitioning over time from authoritarian to democratic rule.[405] These highly charged political crises involved a disruption of the constitutional order. In Malawi and the United Kingdom, the apex court chose to step into the breach that had arisen in unprecedented circumstances from a political and constitutional rupture. Sometimes, a court may succeed in emerging from the crisis with an enhanced position, especially when a new political order transpires, as appears to be the case in Malawi. But such judicial ventures may also backfire, resulting in political retaliation. Since the *Miller II* judgment, the United Kingdom Government created the Independent Review of Administrative Law and has passed draft legislation seeking to limit judicial review, especially over the executive's prerogative powers.[406]

Another key feature highlights that for courts, as with political actors, public support matters. A court's institutional power is constructed within a broader public sphere; as Josh Chafetz has written, the institutions of government largely accrue power through successful engagements with

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[402] Brown & Waller, *supra* note 50, at 818.

[403] Charles Pensulo, *"It's the year of mass protests": Malawi awaits crucial election ruling*, AFR. ARGUMENTS (Jan. 30, 2020), https://africanarguments.org/2020/01/30/year-mass-malawi-protests-election-ruling/.

[404] Elliott, *Constitutional Adjudication and Constitutional Politics*, *supra* note 323, at 626.

[405] *Compare* GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES, *supra* note 7.

[406] *See supra* notes 318-322 (and accompanying text).

the public.[407] Courts that capitalize on popular support for a particular outcome are thus able to increase the effectiveness of their decisions and their institutional strength. As we have seen, the Malawi Supreme Court's decision upholding the High Court decision that voided the presidential elections came after almost a year of nationwide protests against the incumbent president's victory following what was widely perceived as a flawed election. There had also been widespread support for the High Court's decision delivered three months prior to the Supreme Court's decision. For the first time in Malawi, the court proceedings were aired live on radio. Millions of people followed the day-long broadcast of the High Court's judgment, which the Supreme Court later upheld in May 2020. Malawi's judiciary has also received global acclaim: commentators declared the decision "evidence that even in a relatively young democracy, one branch of government can hold another branch accountable, especially when citizens take to the streets to demand it;"[408] and the Malawi judges have been heaped with international accolades.[409] It appears that, at home and abroad, the Malawian Court's electoral decision has been almost universally lauded.

Things have been more complicated in the United Kingdom, where the public reaction to the *Miller II* decision has been far from uniform. On the one hand, against the political backdrop of a legislature incapacitated by the executive in the lead up to Britain leaving the European Union,[410] the Supreme Court's invalidation of the prorogation garnered many staunch supporters. The prorogation was widely viewed, after all, as a blatant attempt by Prime Minister Johnson to prevent Parliament from taking any

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[407] *See* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 55, at 16-25.

[408] Kim Yi Dionne & Boniface Dulani, *A Malawi court just ordered a do-over presidential election*, WASH. POST (Feb. 4, 2020), https://www.washingtonpost.com/politics/2020/02/04/malawi-court-just-ordered-do-over-presidential-election-heres-what-you-need-know/.

[409] *See, e.g.*, *Chatham House Prize: Malawi Judges Win for Election Work*, *supra* note 240; ECONOMIST, *Admiration Nation, supra* note 2.

[410] Jessica Elgot and Heather Stewart, *Boris Johnson move to suspend parliament sets up clash with MPs*, GUARDIAN (Aug. 28, 2019), https://www.theguardian.com/politics/2019/aug/28/boris-johnson-suspend-parliament-mps-no-deal-brexit.

action to block a no-deal Brexit.[411] "Given the reprehensible nature of the government's conduct," one commentator observed, it was "difficult not to applaud the result."[412] Newspaper editorials described the judgment as "of undoubted constitutional significance,"[413] the "culmination of a long and socially useful process of judicial review,"[414] and a ruling that "will restore some of the lustre to British democracy."[415] For some legal scholars, the decision was a welcome defense of foundational constitutional principles,[416] affirming "the Supreme Court's role as the guardian of the UK's Constitution."[417]

Critics, on the other hand, viewed the decision as an illegitimate judicialization of politics and an outrageous overreach by the Court.[418] Trenchant criticism has also been lobbed at the Court's decision from the political sphere. The Conservative Government has sought to rein in judicial power through various reform measures, including introducing bills designed "to restore the balance of power between the executive, legislature, and the courts."[419] Whether *Miller II* turns out to be a decision

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411 *See, e.g.*, *Parliament suspension sparks furious backlash,* BBC NEWS (Aug. 29, 2019), https://www.bbc.com/news/uk-politics-49504526 (describing protesters outside Westminster chanting "stop the coup" and a Conservative MP resigning in protest).

412 McHarg, *The Art of Judicial Disguise*, *supra* note 44.

413 *The Times view on the Supreme court ruling: Boris Johnson Stymied*, TIMES (Sept. 25, 2019), https://www.thetimes.co.uk/edition/comment/the-times-view-on-the-supreme-court-ruling-boris-johnson-stymied-zkrwtkt6w.

414 Editorial, *The Guardian view on Boris Johnson: guilty but he won't go*, GUARDIAN (Sept. 24, 2019), https://www.theguardian.com/commentisfree/2019/sep/24/the-guardian-view-on-boris-johnson-guilty-but-he-wont-go/.

415 *Boris Johnson's unlawful conduct has been called to account*, FIN. TIMES (Sept. 24, 2019), https://www.ft.com/content/2b217664-deb9-11e9-b112-9624ec9edc59.

416 *See, e.g.*, Mark Elliott, *Constitutional Adjudication and Constitutional Politics*, *supra* note 323; Craig, *supra* note 340.

417 Young, *supra* note 340.

418 *See, e.g.*, Timothy Endicott, *Making Constitutional Principles into Laws*, 136 L. Q. REV. 175, 178 (2020); Martin Loughlin, *The Case of Prorogation,* POL'Y EXCHANGE (2019), https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf (stating that "we should not pretend" that the Court's maneuver "is anything other than a political act"). *See also supra* note 288.

419 The Queen's Speech 2021, *supra* note 320, at 9.

that enhances the Court's position, or "a 'one-off' case will rest on how far the Johnson Government goes in pushing back against it."[420] In Britain, with its traditional commitment to parliamentary sovereignty and judicial restraint, even if the Court understands its role "as a robust protector of the constitutional system, it is far from clear the public share that view."[421]

Finally, while a unanimous court may be powerful, it is all the more so when combined with strong leadership. Judicial leadership can play a key role in marshalling a court to capitalize on an opportunity to build power.[422] The story of strategic judicial empowerment is not only institutional, but one that accounts for the profound impact of influential judicial personalities.[423] Influential court leaders may be the chief justice, but they could also be a key swing justice or an instrumental player on the bench. Individual judges—with their particular motivations and interests—are often key actors in the tale of a court pursuing self-empowerment, as Chief Justice Marshall famously illustrated in deciding *Marbury* at a time of bitter controversy involving the Federalist-dominated judiciary and incoming Democratic-Republican administration.[424] Lady Hale, the President of the United Kingdom Supreme Court who has described her court as looking "more and more like a constitutional court,"[425] delivered the summary of Court's unanimous opinion in *Miller II*. The Malawi Supreme Court's decision was written by Chief Justice Nyirenda,[426] whom the Mutharika government later unsuccessfully attempted to force into early retirement.[427]

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[420] Delaney, *Miller II, supra* note 306, at 25.

[421] *Id.* at 23.

[422] *See* Brown & Waller, *supra* note 50, at 833.

[423] *See, e.g.*, Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PENN L. REV. 1757 (2006); Stefanus Hendrianto, *The Rise and Fall of Heroic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia*, 25 WASH. INT'L L. J. 489 (2016); Rivka Weill, *The Strategic Common Law Court of Aharon Barak and its Aftermath: On Judicially-Led Constitutional Revolutions and Democratic Backsliding*, 14(2) L. & ETHICS HUM. RTS. 227 (2020).

[424] *See* Treanor, *The Story of* Marbury v. Madison, *supra* note 33, at 30.

[425] Baroness Hale of Richmond, *Should the Law Lords have left the House of Lords?,* Michael Ryle Memorial Lecture 2018 (Nov. 14, 2018).

[426] *Mutharika* [2020] MWSC 1.

[427] Pensulo, *Forced retirement of Malawi's chief justice before June election blocked*, *supra* note 59.

And both the landmark judgments in 2017 and 2018 for a unanimous Malaysian Federal Court were penned by the same judge: Justice Zainun Ali.[428]

Something should also be said about judicial legacy. As has been observed in many comparative contexts, towering judges leave lasting legacies in terms of their political, institutional, or jurisprudential impact.[429] Judges conscious about their longer-term influence may more readily seek to establish foundational precedents or contribute to a broader endeavor of institution-building. Strikingly, the three justices who authored the single-voice opinion for a unanimous court in the United Kingdom, Malaysia, and Malawi were all due to retire from the bench shortly after those major constitutional judgments were delivered. When Justice Zainun Ali delivered the *Indira Gandhi* decision in January 2018, which capped the opinion she had written the year before in *Semenyih Jaya*, she was due to retire from the Malaysian Federal Court in a matter of months.[430] Malawi's Chief Justice Nyirenda ultimately remained on the bench despite the government's attempts to remove him, but he was nonetheless close to reaching the mandatory retirement age.[431] And Lady Hale was succeeded by Lord Reed as President of the Supreme Court on January 11, 2020, three months after she read out the decision in *Miller II*. A judge's influence may extend beyond their time on the bench: beyond their written opinions, they may seek to communicate directly with the public through speeches, interviews, and extra-judicial writings.[432] Lady Hale—dubbed the Beyoncé of the legal profession in a BBC interview[433]—gave sixteen speeches in 2019 alone.[434] In a lecture she delivered in December 2019 to mark the court's tenth

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[428] *Semenyih Jaya* [2017] 3 MALAYAN L.J. 561; *Indira Gandhi* [2018] 1 MALAYAN L.J. 545.

[429] See Rehan Abeyratne & Iddo Porat, *Introduction in* TOWERING JUDGES: A COMPARATIVE STUDY OF CONSTITUTIONAL JUDGES 10-12 (Rehan Abeyratne & Iddo Porat eds., 2021).

[430] Justice Zainun Ali retired from the Malaysian Federal Court on October 4, 2018, after reaching the mandatory retirement age of 66 years.

[431] Malawi's Chief Justice reached the mandatory retirement age of 65 in December 2021.

[432] Dixon, *Strong Courts,* supra note 5, at 358-359.

[433] Polly Botsford, *Lady Hale on Trump, Beyoncé comparisons and whether the Lord Chancellor must be a lawyer*, LEGAL CHEEK (Jun. 12, 2019), https://www.legalcheek.com/2019/06/lady-hale-on-trump-beyonce-comparisons-and-whether-the-lord-chancellor-must-be-a-lawyer/.

[434] THE SUPREME COURT, SPEECHES, https://www.supremecourt.uk/news/speeches.html.

anniversary, Lady Hale closed her speech by referring to *Miller II* as an example that illustrates "the importance of having a Supreme Court for the whole United Kingdom to resolve such conflicts."[435]

Once a judge has left a court, however, whether their influence increases or diminishes over time hinges, too, on external contextual factors.[436] New court leadership may herald a changing of the guard that impacts the judiciary's attitude toward its institutional role,[437] or a change in political environment might influence some members on the court to shift directions jurisprudentially.[438] Nonetheless, judicial leadership can be a potent force, especially when wielded by an influential judge with an eye toward establishing their legacy over their judicial institution.

CONCLUSION

In constitutional adjudication, as in politics, strategy matters. The account told by this Article shows how courts in diverse settings have employed judicial statecraft to enhance their own position amidst fraught political contexts and in the face of powerful institutional actors. The apex courts of Pakistan, Malawi, Malaysia, and the United Kingdom provide examples of various strategies employed toward judicially self-empowering ends. This Article uses these four jurisdictions to offer illustrative narratives of judicial self-empowerment from a range of countries that help to illustrate the phenomenon. It considers when and why some courts are likely to make a play for self-empowerment, and the situations in which judges might reach for these strategies. Not all judicial wagers for power

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[435] Lady Brenda Hale, President of The Supreme Court, Ten-Year Anniversary Lecture Series at the Supreme Court of the United Kingdom: Lessons from Our First Ten Years (Dec. 12, 2019).

[436] *See* Rosalind Dixon, *Towering versus Collegial Judges: A Reflection, in* TOWERING JUDGES, *supra* note 61, at 314-315 (on timing as an element of determining a judge's impact in the short-run versus the long-run).

[437] *See, e.g.*, Alexander Horne, *Has the UK Supreme Court reformed itself?*, PROSPECT (Aug. 5, 2021), https://www.prospectmagazine.co.uk/politics/supreme-court-lord-reed-reforming-itself-child-benefit-cap-law (noting that the United Kingdom Supreme Court's "change in tone" under Lord Reed's presidency "might be having a significant impact on…relations between judges and politicians").

[438] *See* H.P. Lee & Yvonne Tew, *see supra* note 197.

pay off, of course. Judges that overplay their hand with ineffectual strategic choices may leave the court in a vulnerable position, open to public backlash and political incursion. Still, a court that employs strategies of self-empowerment judiciously may find itself poised to emerge from institutional battles for power with an enhanced position in the constitutional order.