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The Rise of Hybrid Constitutionalism

INTRODUCTION

Constitutional review, or the competence of courts to review legislation and administrative acts for consistency with constitutional norms, has spread to every inhabited continent since its birth in the United States in the early nineteenth century.¹ Politically consequential constitutional courts² have arisen in nascent democracies from South Korea to Brazil, and courts in entrenched parliamentary democracies in the Commonwealth have assumed greater power to protect individual rights and nullify government policies.³ As a result, the democratic world has experienced a profound “judicialization of politics.”⁴ Courts all over the world are regularly petitioned to protect individual freedoms from governmental encroachment, regulate campaign finance, resolve electoral disputes, remove elected officials, and mediate conflicts between government bodies.⁵ The political importance of courts has come to transcend the resolution of particular issues. For all practical purposes, courts now make and unmake

¹ Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15(4) INT’L J. CONST. L. 988, 988 (2017) (“Constitutional review has spread all over the world in recent decades, to the point where some three-quarters of all constitutional systems have it in some form.”).

² Two well-known models of constitutional review exist: the American “decentralized” review model by ordinary courts, and the Continental European model of “centralized” review by a specialized constitutional court. See Albert H.Y. Chen & Miguel Poiars Maduro, *The Judiciary and Constitutional Review*, in ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 97 (Mark Tushnet et al. eds., 2015). This book uses the term “constitutional court” broadly to encompass both specialized constitutional courts and apex courts in decentralized review systems.

³ Diana Kapiszeswiki et al., *Introduction*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL GOVERNANCE 1, 1 (Diana Kapiszeswiki et al. eds., 2013).

⁴ Mark Tushnet & Madhav Khosla, *Unstable Constitutionalism*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 3, 9 (Mark Tushnet & Madhav Khosla eds., 2015).

⁵ Tom Ginsburg & Aziz Z. Huq, *Assessing Constitutional Performance*, in ASSESSING CONSTITUTIONAL PERFORMANCE 3, 19 (Tom Ginsburg & Aziz Z. Huq eds., 2016).

public policy⁶ by way of standard, authoritative interpretations of constitutional texts, clothed in the imprimatur of the law,⁷ that have gradually altered the former meaning of constitutional norms and adapted statutory and administrative acts to ever-changing circumstances, mostly absent meaningful popular participation.⁸

It is now a truism in constitutional scholarship that independent constitutional review is a precondition of a nation's entitlement to global respect;⁹ a credible signal to foreign and international actors of a regime's commitment to property rights;¹⁰ and an essential characteristic of democratic constitutionalism,¹¹ good governance, and the rule of law, under which political power is subject to genuine legal accountability and judicial checks.¹² Constitutional review by judicial bodies has become a dominant, nearly universal trait of liberal democracies.¹³ It is no surprise that the spread of constitutional review in the last three decades of the twentieth century coincided with the so-called third wave of democratization,¹⁴ which hit much of Africa, Asia, Latin America, and the Eastern bloc.¹⁵ Since the Portuguese Carnation Revolution of 1974 and until 2004, the number of formally liberal democratic regimes has doubled worldwide.¹⁶

⁶ ROBERT M. HOWARD & AMY STEIGERWALT, *JUDGING LAW AND POLICY: COURTS AND POLICYMAKING IN THE AMERICAN POLITICAL SYSTEM* 177 (2012).

⁷ Haig Patapan, *Leadership, Law, and Legitimacy: Reflections on the Changing Nature of Judicial Politics in Asia*, in *THE JUDICIALIZATION OF POLITICS IN ASIA* 219, 223 (Björn Dressel ed., 2012).

⁸ JULIO RÍOS-FIGUEROA, *CONSTITUTIONAL COURTS AS MEDIATORS: ARMED CONFLICT, CIVIL-MILITARY RELATIONS, AND THE RULE OF LAW IN LATIN AMERICA* 200 (2016).

⁹ Tom Ginsburg & Robert Kagan, *Introduction: Institutional Approaches to Courts as Political Actors*, in *INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES* 1, 5 (Tom Ginsburg & Robert Kagan eds., 2005).

¹⁰ See Nuno Garoupa and Maria Maldonado, *The Judiciary in Political Transitions: The Critical Role of U.S. Constitutionalism in Latin America*, 19 *CARDOZO J. INT'L & COMP. L.* 593 (2011).

¹¹ See generally DAVID ROBERTSON, *THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW* (2010).

¹² See Aylin Aydin, *Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition*, 47(1) *LAW & SOC'Y REV.* 105 (2013); Carlo Guarneri, *Judicial Independence in Authoritarian Regimes: Lessons from Continental Europe*, in *JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION* 234, 235 (Randall Peerenboom ed., 2010).

¹³ Georg Vanberg, *Constitutional Courts in Comparative Perspective: A Theoretical Assessment*, 18 *ANNU. REV. POLIT. SCI.* 167, 167 (2015).

¹⁴ Ran Hirschl, *The Strategic Foundations of Constitutions*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 157, 157 (Denis J. Galligan & Mila Versteeg eds., 2013).

¹⁵ KELLY M. McMANN, *ECONOMIC AUTONOMY AND DEMOCRACY: HYBRID REGIMES IN RUSSIA AND KYRGYZSTAN* 174 (2006).

¹⁶ The resilience of the third wave of democratization is unprecedentedly in international history. See Andreas Schedler, *The Logic of Electoral Authoritarianism*, in *ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION* 1, 2 (Andreas Schedler ed., 2006).

Not all are liberal democratic in substance: elite accession to a constitutional instrument does not guarantee its observance in actual governmental practice.¹⁷ It is hardly disputed that the prevalence of liberal democratic ideology after the downfall of Communism has incentivized many of the ruling politicians who seized power in the aftermath of single-party dictatorships and military juntas across Africa, Eurasia, and Latin America during the close of the Cold War, to take up democratic mantles and showcase multiparty elections notwithstanding their lack of commitment to the liberal democratic ideal.¹⁸ In brief, new regimes prefer speaking the language of liberal democracy,¹⁹ and coupling plebiscitarianism with authoritarianism “in an astounding rate,”²⁰ to committing themselves to contested, free, fair elections, enabled by civil and political rights.²¹ By the early twenty-first century, no less than half of all countries, from Azerbaijan to Zimbabwe, from Russia to Singapore, from Belarus to Cameroon, from Egypt to Uzbekistan, can be said to have regimes that adhered at least superficially to these political patterns.²²

A sizeable part of the “third wave” of democratization was thus a “dramatic trend” toward a new kind of authoritarianism, variously branded “hybrid regime,”²³ “semi-democracy,”²⁴ “semi-authoritarianism,”²⁵ “electoral authoritarianism,”²⁶ “competitive authoritarianism,”²⁷ “democratically

¹⁷ Yasuo Hasebe & Cesare Pinelli, *Constitutions*, in *ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW* 9, 15 (Mark Tushnet et al. eds., 2015).

¹⁸ Steven Levitsky & Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after The Cold War* 3 (2010); Matthew Y.H. Wong, *Comparative Hong Kong Politics: A Guidebook for Students and Researchers* 106 (2017).

¹⁹ Elections are necessary but not sufficient for the endurance of democracy: SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* 6 (2015).

²⁰ Jason Brownlee, *Portents of Pluralism: How Hybrid Regimes Affect Democratic Transitions*, 53 (3) *AM. J. POL. SCI.* 515, 515 (2009).

²¹ Carlos Gervasoni, *The Dimensions of Democratic and Hybrid Subnational Regimes: Evidence from an Expert Survey in Argentina*, in *ILLIBERAL PRACTICES: TERRITORIAL VARIANCE WITHIN LARGE FEDERAL DEMOCRACIES* 120, 129 (Jacqueline Behrend & Laurence Whitehead eds., 2016).

²² McMANN, *supra* note 15, at 174.

²³ Larry J. Diamond, *Thinking about Hybrid Regimes*, 13(2) *J. DEMOCRACY* 21, 27 (2002). For the sake of clarity, the term “hybrid regime” will be used throughout this book.

²⁴ John P. Burns, *Editorial Introduction: Special Issue on the Second Decade of the Hong Kong Special Administrative Region of China: Themes and Overview*, 39(2) *ASIA PAC. J. PUB. ADMIN.* 79, 79 (2017).

²⁵ See MARINA OTTAWAY, *DEMOCRACY CHALLENGED: THE RISE OF SEMI-AUTHORITARIANISM* (2003).

²⁶ Schedler, *supra* note 16, at 1.

²⁷ LEVITSKY & WAY, *supra* note 18, at 4.

disguised dictatorship,”²⁸ “the gray zone,”²⁹ and so on. Ironically, this authoritarianism spread much more rapidly than actual liberal democracy during the third wave, and has become the most common form of authoritarianism, above absolute monarchies, single-party regimes, and military dictatorships.³⁰ The hybrid has even spilled over to the local level, such that subnational authoritarian enclaves can be found in federated countries, liberal democratic or not, such as Argentina, Brazil, Mexico, India, and Russia.³¹ The considerable diversity of terms used to describe hybrids at both national and subnational levels³² implies that neither a satisfactory definition nor a standard way to classify them exists.³³ Nevertheless, it is safe to say that hybrid regimes generally lack either of two, but not both, components of liberal democracies or else they would have been fully fledged closed authoritarian regimes,³⁴ and could be called, with more generality, “illiberal democracies”³⁵ or “liberal autocracies.”³⁶ As noted above, there are competing ways in political science to conceptualize hybrid regimes.³⁷ This book will not engage in that debate. It suffices to summarize the

²⁸ PAUL BROOKER, *NON-DEMOCRATIC REGIMES* 2 (2014).

²⁹ Thomas Carothers, *The End of the Transition Paradigm*, 13(1) *J. DEMOCRACY* 5, 9 (2002).

³⁰ Beatriz Magaloni, *The Game of Electoral Fraud and the Ousting of Authoritarian Rule*, 54(3) *AM. J. POL. SCI.* 751, 751 (2010). Each year, *THE ECONOMIST* Magazine releases a well-known list of “flawed democracies” and “hybrid regimes” in its annual Democracy Index. See *THE ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2017: FREE SPEECH UNDER ATTACK* 2 (2017).

³¹ André Borges, *Subnational Hybrid Regimes and Democratization in Brazil: Why Party Nationalization Matters*, in *ILLIBERAL PRACTICES: TERRITORIAL VARIANCE WITHIN LARGE FEDERAL DEMOCRACIES* 162, 162 (Jacqueline Behrend & Laurence Whitehead eds., 2016); See generally Jacqueline Behrend & Laurence Whitehead, *Setting the Comparative Agenda: Territorially Uneven Democratization Processes in Large Federations*, in *ILLIBERAL PRACTICES: TERRITORIAL VARIANCE WITHIN LARGE FEDERAL DEMOCRACIES* 1 (Jacqueline Behrend & Laurence Whitehead eds., 2016); EDWARD L. GIBSON, *BOUNDARY CONTROL: SUBNATIONAL AUTHORITARIANISM IN FEDERAL DEMOCRACIES* (2012).

³² AGUSTINA GIRAUDY, *DEMOCRATS AND AUTOCRATS: PATHWAYS OF SUBNATIONAL UNDEMOCRATIC REGIME CONTINUITY WITHIN DEMOCRATIC COUNTRIES* 37 (2015).

³³ OTTAWAY, *supra* note 25, at 7. See Honorata Mazepusa et al., *A Comparative Study of Legitimation Strategies in Hybrid Regimes*, 37(4) *POL’Y STUD.* 350 (2016); Steffen Kailitz, *Classifying Political Regimes Revisited: Legitimation and Durability*, 20(1) *DEMOCRATIZATION* 39 (2013).

³⁴ Gervasoni, *supra* note 21, at 125.

³⁵ Fareed Zakaria, *The Rise of Illiberal Democracy*, 76(6) *FOREIGN AFF.* 22, 29 (1997).

³⁶ Tom Ginsburg, *East Asian Constitutionalism in Comparative Perspective*, in *CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY* 32, 37 (Albert H.Y. Chen ed., 2014).

³⁷ See Samuel Handlin, *Observing Incumbent Abuses: Improving Measures of Electoral and Competitive Authoritarianism with New Data*, 24(1) *DEMOCRATIZATION* 41 (2017);

state of research in two methods of classification – namely a continuum with liberal democracy on one extreme and fully fledged authoritarianism on the other, with electoral democracy, hybrid ambiguous regimes, hybrid competitive authoritarian regimes, and hybrid hegemonic electoral authoritarian regimes in between.³⁸ Regardless of their differences, hybrid regimes tend to be officially civilian and provide electoral channels for the Opposition legally to contend for official positions, albeit disadvantagedly,³⁹ in that electoral institutions are “heavily skewed” in favor of incumbent rulers.⁴⁰ Opposition political parties, civil society organizations, an independent press, and political debate are intermittently tolerated, provided that they do not directly threaten regime security.⁴¹

It is coming to be recognized that hybrid regimes are “a persistent and unique regime form” that cannot be presumed to be trending in a democratic direction.⁴² Belarus and Russia have become more authoritarian, Malaysia and Singapore remain fairly stable,⁴³ and formerly liberal democratic Venezuela and Turkey have slipped into hybrid authoritarianism.⁴⁴ It is no longer in serious dispute that the hybrid regime is a type in its own right, and not transitional between closed authoritarianism and liberal democracy.⁴⁵ It follows that hybrids are not necessarily by-products of failed attempts to establish either closed autocracies or liberal democracies.⁴⁶ They may be intentionally designed by elites to extract the *bona fides* and international goodwill of liberal democratic institutions,⁴⁷ while reducing the risk of losing political control at home.⁴⁸ Elections can be used by rulers as a cost-effective mechanism to reveal crucial information about popular preferences and

Leah Gilbert & Payam Mohseni, *Beyond Authoritarianism: The Conceptualization of Hybrid Regimes*, 46 ST. COMP. INT’L DEV. 270 (2011).

³⁸ WONG, *supra* note 18, at 95; Diamond, *supra* note 23, at 26.

³⁹ GRAEME B. ROBERTSON, THE POLITICS OF PROTEST IN HYBRID REGIMES: MANAGING DISSENT IN POST-COMMUNIST RUSSIA 6 (2011).

⁴⁰ LEVITSKY & WAY, *supra* note 18, at 5.

⁴¹ Schedler, *supra* note 16, at 3.

⁴² Gabrielle Bardall, *Coding Competitive Authoritarianism*, 10 Z. VGL. POLIT. WISS. (SUPPL.) 19, 20 (2016).

⁴³ LEVITSKY & WAY, *supra* note 18, at 4.

⁴⁴ Mark V. Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 394, 435 (2015).

⁴⁵ McMANN, *supra* note 16, at 174.

⁴⁶ OTTAWAY, *supra* note 25, at 7.

⁴⁷ The logic of hybrid regimes establishing electoral mechanisms is much more sophisticated than mere window dressing. See Sherzod Abdukadirov, *The Problem of Political Calculation in Autocracies*, 21(4) CONST. POL. ECON. 360 (2010).

⁴⁸ ROBERTSON, *supra* note 39, at 12.

regime support, enabling incumbents to coopt the opposition and segments of the electorate, and to modify policies that are not central to the regime.⁴⁹

Liberal democratic constitutional texts are drafted by authoritarian elites to elicit “an enthusiasm for and loyalty to the constitutional order and [they] have more to do with rhetorical appeal than with practical efficacy, more to do with symbols than with reality, more to do with their ability to raise a cheer than with their ability to serve interests.”⁵⁰ In short, hybrid regimes are more adaptive and flexible than closed autocracies, but at the same time are far more authoritarian than liberal democracies. The proliferation of a liberal democratic *form* of government must therefore not mislead us to believe that undemocratic higher control has been consigned to the dustbin of history.⁵¹ Authoritarianism has been the norm for most of human history, and is likelier than not to remain so.⁵²

The two liberal democratic institutional forms adopted most prominently, almost universally, by hybrid regimes are multiparty elections⁵³ and independent judiciaries armed with constitutional review powers.⁵⁴ The adoption of constitutional review and its exercise by independent courts are, of course, two separate developments. Founding documents do not distribute review competence once for all: their provisions, viewed as desirable by framers at the moment of constitutional making, do not necessarily explain the perdurable influence of such a court in day-to-day politics.⁵⁵ The court may claim primacy over constitutional meaning, but whether its assertions will be tolerated by political actors is another question.⁵⁶ At the end of the day, independent and consequential constitutional review cannot be presumed, simply

⁴⁹ Clara Boulianne Lagacé & Jennifer Gandhi, *Authoritarian Institutions*, in ROUTLEDGE HANDBOOK OF COMPARATIVE POLITICAL INSTITUTIONS 278, 288 (Jennifer Gandhi & Rubén Ruiz-Rufino eds., 2015).

⁵⁰ See Geoffrey Brennan & Alan Hamlin, *Constitutions as Expressive Documents*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 329, 342 (Barry R. Weingast & Donald A. Wittman eds., 2006).

⁵¹ BROOKER, *supra* note 28, at 1.

⁵² Stephen Haber, *Authoritarian Government*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 693, 693 (Barry R. Weingast & Donald A. Wittman eds., 2006).

⁵³ See JASON BROWNLEE, *AUTHORITARIANISM IN AN AGE OF DEMOCRATIZATION* (2007).

⁵⁴ Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT’L L. 285, 287 (2015); Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANNU. REV. LAW SOC. SCI. 281, 294 (2014).

⁵⁵ Vanberg, *supra* note 13, at 169.

⁵⁶ See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).

because it is bound, eventually, to inconvenience those wielding political power.⁵⁷

Indeed, it is hard to imagine that a dictator, regardless of ideological orientation, would invite or allow even nominally independent judges potentially to obstruct the making of major public policies, or tolerate checks and balances that give priority to adherence to procedural rights over achievement of desired substantive outcomes.⁵⁸ The presence of democratic forms thus appears to be a necessary, though certainly not a sufficient, condition for consequential constitutional review to be entrenched.⁵⁹ A settled consensus in the comparative constitutional law literature holds that “[i]t seems very unlikely that one will encounter the judicialization of politics outside democratic polities.”⁶⁰ Often it is casually assumed that judicial independence is impossible in non-democracies, including hybrid regimes, in which legal institutions are unable to restrain political power, and judges are faithful tools of the ruling regime.⁶¹ This assumption is understandable. After all, “abrasive” constitutional review could provoke dictators to abort entire constitutions by brute force.⁶² There is no shortage of examples of hybrid regimes prepared to inflict extralegal sanctions on courts and judges according to political needs.⁶³ In September 1993, Russian President Boris Yeltsin preemptively suspended the entire Constitutional Court after the Court became embroiled in a power struggle between the presidency and the Duma.⁶⁴ In April 2011, under the auspices of Prime Minister Viktor Orbán, an open advocate of “illiberal democracy,” the Hungarian parliament passed a new Constitution that curbed the jurisdiction of and access to the country’s previously powerful

⁵⁷ Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1(3) INT’L J. CONST. L. 446, 446 (2003).

⁵⁸ David S. Law & Mila Versteeg, *Constitutional Variation among Strains of Authoritarianism*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 165, 166 (Tom Ginsburg & Albert Simpser, eds., 2014).

⁵⁹ C. Neal Tate, *Why the Expansion of Judicial Power?*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 27, 29 (C. Neal Tate & Torbjörn Vallinder eds., 1995).

⁶⁰ *Id.* at 28.

⁶¹ Randall Peerenboom, *Introduction*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 1, 3 (Randall Peerenboom ed., 2010).

⁶² PO JEN YAP, COURTS AND DEMOCRACIES IN ASIA 207 (2017).

⁶³ Terence C. Halliday, *Why the Legal Complex Is Integral to Theories of Consequential Courts*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL GOVERNANCE 337, 349 (Diana Kapiszewska et al. eds., 2013).

⁶⁴ JANE HENDERSON, THE CONSTITUTION OF THE RUSSIAN FEDERATION: A CONTEXTUAL ANALYSIS 205 (2011).

Constitutional Court.⁶⁵ In January 2013, Sri Lanka's parliament, dominated by the ruling Freedom Party, defied a Supreme Court ruling in removing the Chief Justice from her office after the Court had imposed stringent procedural hurdles on a development budget proposed by the President's brother.⁶⁶ More recently, in February 2018, Maldivian President Abdulla Yameen declared a state of emergency in response to the Supreme Court's decision to release political prisoners, including convicted but exiled former President Mohamed Nasheed, and to reinstate twelve ousted Opposition parliamentarians; consequently, two justices, including the Chief Justice, were arrested, and the controversial judgment was rescinded by the Court's remaining members.⁶⁷

Recent detailed case studies of constitutional review under authoritarian regimes – a nascent field of study⁶⁸ – have also discovered that courts in at least some hybrid regimes have from time to time aggrandized power with impunity.⁶⁹ The reconstituted Constitutional Court of the Russian Federation has, since 1995, “done far better than its counterpart constitutional courts in most post-Soviet countries,”⁷⁰ and has endured “as an arbiter of

⁶⁵ Miklos Bankuti et al., *Hungary's Illiberal Turn: Disabling the Constitution*, in *THE HUNGARIAN PATIENT: SOCIAL OPPOSITION TO AN ILLIBERAL DEMOCRACY* 37, 38–39 (Peter Krasztev et al. eds., 2015).

⁶⁶ Gardbaum, *supra* note 54, at 287–88.

⁶⁷ Editorial Board, *China's Man in the Maldives How Xi's Belt and Road Project Is Promoting A Political Crisis*, *THE WALL STREET JOURNAL*, Feb. 19, 2018.

⁶⁸ See Moustafa, *supra* note 54, at 282.

⁶⁹ Examples include, but are not limited to, Argentina: Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy*, 96(2) *AM. POL. SCI. REV.* 201 (2002); Benin: Theodore Holo, *Handling of Petitions by the Constitutional Court of Benin*, in *CONSTITUTIONAL ADJUDICATION IN AFRICA* 315 (Charles M. Fombad ed., 2017); Egypt: TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* (2007); Nigeria: Ameze Guobadia, *Constitutional Adjudication in Nigeria: Formal Structures and Substantive Impact*, in *CONSTITUTIONAL ADJUDICATION IN AFRICA* 136 (Charles M. Fombad ed., 2017); Pakistan: PAULA NEWBERG, *JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN* (2002); Singapore: Lynette J. Chua & Stacia L. Haynie, *Judicial Review of Executive Power in the Singaporean Context, 1965–2012*, 4(1) *J. L. & CTS.* 43 (2016); Soviet Union and Russia: ALEXEI TROCHEV, *JUDGING RUSSIA: CONSTITUTIONAL COURT IN RUSSIAN POLITICS 1990–2006* (2008); Turkey: Yaniv Roznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment – The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision*, 10(1) *INT'L J. CONST. L.* 175 (2012); Zimbabwe: DANIEL COMPAGNON, *A PREDICTABLE TRAGEDY: ROBERT MUGABE AND THE COLLAPSE OF ZIMBABWE 150–152* (2011). See Brad Epperly, *Political Competition and de facto Judicial Independence in Non-Democracies*, 56(2) *EUR. J. POL. RESEARCH* 279 (2017).

⁷⁰ Peter H. Solomon, Jr., *Judicial Power in Authoritarian States: The Russian Experience*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 261, 279 (Tom Ginsburg & Tamir Moustafa eds., 2008).

political disputes and increasingly as a guarantor of stable constitutional rules” for more than two decades till the present day.⁷¹ In spite of formidable political limits, it has effectively abolished the death penalty in all of Russia,⁷² and from time to time upheld the civil rights of individuals in cases involving state officials.⁷³ In 2014 alone, in the teeth of backlash from Prime Minister and later President Erdoğan, the Constitutional Court of Turkey struck down legal provisions that would have conferred on the Minister of Justice sweeping powers over judicial and prosecutorial appointments; invalidated government bans on social media as breaching the freedom of expression; nullified legal impediments on high-ranking civil servants returning to their positions within two years of being unjustly removed; and ruled unconstitutional a law that empowered the state to shut down websites within four hours without a court order.⁷⁴

Overall, the constitutional courts of nondemocratic regimes show ever greater tendencies to converge on common patterns of behavior and reasoning with their counterparts, and biases in favor of secularism and modernism.⁷⁵ Constitutional courts have been found to produce stabilizing effects that hold even authoritarian elites themselves together, and also vital “focal points” that coordinate state-society conflict.⁷⁶ It is therefore imprudent uncritically to presume that constitutional review matters only in democracies.⁷⁷ The above developments have led some scholars to discern the emergence of alternative constitutionalisms, ranging from “sham constitutionalism”⁷⁸ and “authoritarian constitutionalism”⁷⁹ through “abusive constitutionalism,”⁸⁰ to “mixed constitutionalism”⁸¹ and “hybrid constitutionalism,”⁸² within the universe of authoritarian regimes. “Constitutional-oligarchic regimes . . . [that]

⁷¹ CARLA L. THORSON, *POLITICS, JUDICIAL REVIEW AND THE RUSSIAN CONSTITUTIONAL COURT* 156 (2012).

⁷² TAMARA O. KUZNETSOVA ET AL., *RUSSIAN CONSTITUTIONAL LAW* 45 (2014).

⁷³ THOMAS F. REMINGTON, *POLITICS IN RUSSIA* 235 (2015).

⁷⁴ RETHINK INSTITUTE, *2015 TURKEY COUNTRY REPORT* 12–13 (2014).

⁷⁵ RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 162 (2010).

⁷⁶ SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* 10 (2015).

⁷⁷ MOUSTAFA, *supra* note 69, at 2.

⁷⁸ David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863, 878 (2013).

⁷⁹ Tushnet, *supra* note 44, at 450.

⁸⁰ David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

⁸¹ Graham Walker, *The Idea of Nonliberal Constitutionalism*, in *ETHNICITY AND GROUP RIGHTS* 164 (Ian Shapiro & Will Kymlicka eds., 1997), cited in LI-ANN THIO, *A TREATISE ON SINGAPORE CONSTITUTIONAL LAW* 61–62 (2012).

⁸² Albert H.Y. Chen, *The Achievement of Constitutionalism in Asia: Moving beyond “Constitutions without Constitutionalism,”* in *CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY* 1, 14 (Albert H.Y. Chen ed., 2014).

combine high levels of constitutionalism with low levels of electoralism” can indeed be found in jurisdictions such as Singapore, Malaysia, and Hong Kong.⁸³ In any event, with over half of all countries recognized as closed authoritarian or hybrid regimes, little can excuse our neglect of the constitutional and judicial dynamics in these political settings.⁸⁴

CONSTITUTIONAL REVIEW IN THE CHINESE SPECIAL ADMINISTRATIVE REGIONS

Under what conditions will the final appellate courts⁸⁵ of two subnational hybrid regimes diverge fundamentally in their understandings of and approaches to constitutional review, despite endowment with identical jurisdiction by kindred constitutions, overseen by a common sovereign in roughly the same time frame? This book ventures to address this question with the Hong Kong and Macau Special Administrative Regions (SARs) of the People’s Republic of China as case studies. Both Regions are located on the northern edge of the South China Sea, bordering Guangdong Province, and only 60 kilometers apart from each other.⁸⁶ The two Chinese SARs are in many ways “most similar” to each other, politically, economically, and socially (see Tables 1.1 and 1.2). They were the only European dependencies left on East Asian soil at the resumption of Chinese sovereignty in 1997 and 1999, respectively. Hong Kong was founded by the British in the midst of the First Anglo-Chinese War (1839–42) on one of the islands lying off the coast of the Cantonese County of Bao’an. In 1842, Qing China, by the Treaty of Nanking, ceded to the British Crown in perpetuity.⁸⁷ The geographical

⁸³ See Mikael Wigell, *Mapping “Hybrid Regimes”: Regime Types and Concepts in Comparative Politics*, 15(2) *DEMOCRATIZATION* 230 (2008).

⁸⁴ Tamir Moustafa & Tom Ginsburg, *Introduction: The Function of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 1, 1 (Tom Ginsburg & Tamir Moustafa eds., 2008).

⁸⁵ Gretchen Helmke & Julio Ríos-Figueroa, *Introduction: Courts in Latin America*, in *COURTS IN LATIN AMERICA* 1, 7 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011) (political economy analyses of judicial behavior are “interested first and foremost in how judges interact with other political actors and how these interactions shape policy outcomes. Whereas lower-level courts can sometimes play this role, courts imbued with constitutional review jurisdiction – whether they are supreme courts, constitutional chambers, or separate constitutional courts – hold the proverbial last word over whether to enforce the political rules of the game, at least within the judicial hierarchy.”).

⁸⁶ Bill K.P. Chou, *Interest Group Politics in Macau after Handover*, 14(43) *J. CONTEMP. CHINA* 191, 192 (2005).

⁸⁷ See G.B. ENDACOTT, *A HISTORY OF HONG KONG* (1964).