Introduction

*Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan**

In early nineteenth-century America, Alexis de Tocqueville (1835) famously observed, "[S]carcely any political question arises . . . that is not resolved, sooner or later, into a judicial question." That may have been a considerable exaggeration at the time, but today, the dynamic Tocqueville highlighted marks many constitutional democracies in which independent courts are vested with powers of judicial review. In such countries, political actors, organizations, and ordinary individuals who become enmeshed in political conflicts have strong incentives to frame their desires as constitutional or statutory claims and ask courts to vindicate them.

As a result, in the early twenty-first century, courts have become versatile actors in the governance of many constitutional democracies, and judges and justices play multiple roles in politics and policymaking. As many observers have noted,[1] politically consequential courts have emerged in new democracies from Korea to South Africa to Brazil and beyond; courts in more established democracies such as Canada and New Zealand have been given or have assumed more power to protect individual rights and invalidate government policies; and both the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) have taken on dramatic roles in European governance.

However, the political power of courts has ebbed as well as flowed. In many Latin American countries, judges are not blazing the way to robust constitutional democracy in the way many hoped they might. The Hungarian Constitutional Court, once hailed as one of the most significant new constitutional courts (Zifcak 1996), had its wings clipped less than a decade after its creation (Scheppele 1999).[2]

* Respectively, Assistant Professor of Political Science, University of California, Irvine; Assistant Dean, Yale Law School; Professor Emeritus of Political Science and Law, University of California, Berkeley.

[1] See, for example, Tate and Vallinder 1997, Stone Sweet 2000, Hirschl 2006.

[2] After another brief period of judicial independence from 2002 to 2010 (Piana 2010), the wing clipping became far more aggressive starting in November 2010 when the Hungarian government amended

There has been a sustained backlash against the growing authority of the Supreme Court in Israel. And in the last two decades, the U.S. Supreme Court has issued many rulings designed to limit the use of litigation and courts to challenge governmental decisions and policies (Staszak 2010, Siegel 2006).

This ebb and flow raises two broad questions: (1) what induces some high courts to become actively involved in politics and policy making at certain moments; and (2) in what arenas and to what effect do courts assume expanded roles in governance? During a year-long Andrew W. Mellon Foundation John E. Sawyer Seminar at the University of California, Berkeley, these questions were considered by an array of academic specialists on high courts. Much discussion dwelt on the first issue – identifying the reasons for the rise and fall of judicial power – a more traditional topic for political scientists. However, at the heart of our deliberations was the conviction that it is also vital to focus on the second question: what do empowered courts actually *do* with their power? Where, to what extent, how, and why do they become politically consequential actors in the life of a nation? Fully understanding judicial politics, our discussions indicated, requires careful attention to the functional, substantive *roles* that judges and courts play in government, politics, and policy. This book – consisting primarily of detailed studies of the roles that courts in nations from every region of the world have begun to play in politics and government – is the fruit of those conversations.

We are not the first to consider judicial roles in politics, of course.[3] This volume is distinctive, however, in its explicitly comparative method, and its mapping of the variety of roles in governance that courts are now undertaking, the political conditions and judicial strategies that have fostered those assertions of power, and the extent to which courts' attempts to play these roles have been politically consequential. With only a limited number of case studies and with numerous, often hard-to-measure causal variables in play, we cannot offer definitive explanations for variation in judicial role expansion, or make definitive claims about the broader consequences of expanded judicial governance. The volume does, however, offer a wealth of ideas about how and why diverse patterns of judicial activity in governance

the constitution, stripping the Constitutional Court of its power to review legislation on key economic policy issues. In part in reaction to the court's continued assertiveness, Hungarian officials rewrote the entire charter in 2011, reducing the Constitutional Court to a shadow of its former self by packing the bench, limiting the court's jurisdiction, and eliminating open access for petitions challenging the constitutionality of laws (Scheppele 2011a, 2011b, 2011c).

[3] Beyond the myriad studies of judicial roles in American politics, important work has been published concerning the roles particular courts have played in other nations, for example, examining the development of constitutional courts in France (Stone Sweet 1980); the Charter of Rights and the legalization of politics in Canada (Mandel 1994); the emergence and growth of the European Court of Justice (Alter 2001); and the growth of judicial power in India (Reddy 2009). Other scholars have compared how different courts handle similar challenges – such as adjudicating social policy (Tushnet 2009, Epp 1998); constitutional design (Skach 2005); individual rights (Kende 2009); transitional justice (Teitel 2002, Elster 2004); and economic governance (Kapiszewski 2012). Other studies have examined the role of courts at particular political moments – such as democratic transition (e.g., Stotzky 1993; Czarnota, Krygier, and Sadurski 2005).

emerge and how courts have made a difference in the political life of their societies. In that respect, we believe the book advances a new agenda for the comparative study of courts.

In this chapter, we begin by discussing the concept of "judicial roles," distinguishing the political functions some courts are taking on today from the dispute-resolution and law-enforcement roles that had traditionally been their bailiwick. We then describe the various political arenas in which courts have become more active, and the types of political-judicial roles that have emerged in some polities, referencing a range of examples from the volume's empirical chapters and illustrating what we refer to as judicial role expansion. Next, we offer a three-category framework for considering the various factors and forces that impinge on judicial role expansion and contraction, again employing a range of examples from the volume's chapters. Finally, we discuss how courts have maneuvered to play (or indeed, avoid) new roles, discussing the strategies, techniques, and tactics they have adopted to do so.

EXPANDED JUDICIAL ROLES IN GOVERNANCE

The concept of a judicial role has commonly been used with reference to jurisprudential issues, characterizing how individual judges approach decision making in individual cases. Judges, it has been said, might have: (1) a *legalistic* role conception (feeling obliged to protect or adhere closely to legal texts and precedents, regardless of consequences); (2) an *activist* role conception (prioritizing judicial flexibility and substantive justice); or (3) a *deferential* role conception (convinced that judges should defer, on democratic grounds, to legislative judgments in disputes over constitutional meaning).

Our emphasis in this volume, by contrast, is on the *functional* roles courts play in politics, governance, and society. Thirty years ago in *Courts: A Comparative and Political Analysis*, Martin Shapiro (1981) pointed out several basic sociopolitical roles that courts traditionally have played in governmental systems. First, through both criminal and civil cases, courts promote the peaceful resolution of everyday disputes and reinforce widely held norms, thus helping maintain order.[4] Second, Shapiro noted that the legitimacy attached to ostensibly neutral courts enables them to play an important role in enforcing and legitimating the laws and policies promulgated by the dominant political leaders, also helping the central government control local governments, police, and bureaucrats (see also Shapiro, Ch. 16 in this volume). Third, courts traditionally have helped legitimate existing systems of economic power by enforcing rules relating to property, contract, and in many

[4] Courts do not provide everyday justice in all cases, of course, nor do they do so to everyone's satisfaction. There are always risks of corruption, and political and social biases are often built into the law; moreover, the costs, delays, and complexities of litigation usually give the "haves" an advantage (Galanter 1974). However, by adhering to the trappings and practices of legal neutrality, courts acquire enough legitimacy to be virtually ubiquitous in human societies.

cases, restrictions on competition. Fourth, Shapiro observed that applying generally stated laws to individual cases entails interpreting legal ambiguities in a way that draws courts into an interstitial lawmaking role. Echoing some of Shapiro's points, Ginsburg and Moustafa (2008: 4) observe that even authoritarian polities commonly establish courts and grant them some degree of autonomy, because courts perform five systemic functions or roles. Political rulers use courts, Ginsburg and Moustafa argue, to: "(1) establish social control and sideline political opponents, (2) bolster a regime's claim to 'legal' legitimacy, (3) strengthen administrative compliance within a state's own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies."[5]

In playing the sociopolitical roles outlined by Shapiro, and Ginsburg and Moustafa, courts act primarily as agents of top political authorities. Traditionally, courts are expected to faithfully enforce the laws, not make or change them, for in principle the law is to be made by political leaders, embodying those leaders' policy preferences. However, as both established and newer democracies have empowered courts to declare laws and executive orders unconstitutional, there has been a marked increase in courts' potential to assume new roles – to make new law and apply law in new ways. When courts play these new roles in ways that depart from political leaders' preferences, they can exert a significant, independent, and distinctively judicial influence on broad realms of public policy, redistributing political authority. To mention just a few examples from the case studies in this volume, courts can decide legal disputes between political incumbents and challengers in ways that contribute significantly to the consolidation of (or, indeed, weakening of) constitutional democracy; resolve disputes between different branches of government, thus helping to decide who governs; and affect the quality of government by breaking legislative deadlocks and ordering bureaucracies to comply with statutory and constitutional law.

Why would political leaders empower courts such that they can overrule governmental decisions or otherwise function as independent political actors? Why would politicians enact constitutionally entrenched bills of rights with the potential to limit the government's own powers? Political scientists have identified a variety of explanatory scenarios. In the wake of a cruelly repressive regime, political leaders shaping a new democracy often act on the hope that strong, independent judges – armed with judicial review powers and constitutional bills of rights – will serve as barriers against re-descent into tyranny (Scheppele 2000; Klug, Ch. 3 in this volume; Ferejohn, Ch. 14 in this volume; Shapiro, Ch. 16 in this volume). Sometimes, a number of jostling political parties, none of which can count on becoming or remaining dominant (or a currently dominant political faction that is losing confidence), seek political insurance by establishing a new constitution that enshrines aspects of their

[5] See also Ferejohn, Ch. 14 in this volume.

political program, secures political rights, and empowers a constitutional court to enforce those provisions (Ginsburg, 2003; Hirschl 2007; see also Ramseyer 1994; Magalhães 1999; Finkel 2008; and Guarnieri, Ch. 6 in this volume). However, elected leaders with a more stable power base may also obtain a range of political benefits from designating courts the ultimate interpreters of the constitution, and thus sometimes foist that power on them (Whittington 2007). For instance, judicial empowerment sometimes reflects political leaders' desire to signal their commitment to the rule of law in order to attract support from other nations, prevent capital flight, and/or encourage foreign investment (e.g., North and Weingast 1989; Farber 2002; Silverstein 2003, 2006; Moustafa 2003, 2007). In federal polities, a powerful court may promise subnational governments fairer treatment by the other subnational units and by the central government, or may provide the central government a tool to rein in subnational governments (e.g., Magaloni and Sanchez 2008; Shapiro, Ch. 16 in this volume).

Moreover, as governments empower courts, demands for judicial action can also well up from civil society. In modern states, citizens and voters expect governments to protect human rights, promote equal treatment, and provide protection from bureaucratic arbitrariness and threats to their economic liberty and security (Friedman 1984). Accordingly, political activists, legal reformers, business firms, and ordinary litigants have increasingly sought judicial remedies for a broad array of administrative, political, and policy grievances – thus calling on courts to play new roles in governance.

Judges do not invariably respond to those demands, of course. Their willingness and ability to act assertively, scholars have noted, depends on many factors, including: (a) the extent to which the constitutional text and judicial precedents give the judges a clear duty or opportunity to decide assertively in a particular case; (b) judges' own political and judicial philosophy (Segal and Spaeth 1993); (c) the current political regime's determination and capacity to squelch unwanted judicial challenges (Epstein, Knight, and Shvetsova 2001, Ginsburg 2003, Trochev 2008); (d) the extent to which an assertive court can expect political support from powerful allies (Vanberg 2001; Staton 2004, 2006, 2010); and (e) the relative strength of the national tradition of respecting judicial independence, the rule of law, and judicial creativity.[6]

As this long list of relevant factors implies, judges' willingness and ability to respond to citizens' (and politicians') demands for more assertive rulings, as well as political leaders' tolerance for such rulings, vary from polity to polity, over time, and even from issue to issue. However, where judges have grown more willing to make assertive rulings, and political leaders are more inclined to comply with their

[6] Judges' education or hard negative experience may have produced a judicial culture that favors a more mechanical application of legal texts and strongly discourages judicial assertiveness against political authority or involvement in politically controversial issues. See, e.g., Couso 2005, Hilbink 2007, and Huneeus 2010 on Chilean judges.

decisions, lawyers and political activists are concomitantly encouraged to bring a widening array of grievances to court. This can lead judges to adopt more expansive interpretations of constitutional ideals, further expanding their roles in governance (Stone Sweet 1999). It is these roles that our volume explores.

Before proceeding with our analysis, several caveats, qualifications, and prefatory points are in order. First, let us reemphasize that we do not mean to suggest courts have become more powerful political actors everywhere, or that all high courts follow the same developmental path toward expanding roles in governance. The courts examined in this volume – the lion's share of which have assumed important roles in society, politics, and policy making – are not fully representative of courts around the world. Rather, the countries under study were selected to illuminate the questions that inspired this project. We sought to examine a particular phenomenon – courts acting more expansively than most judiciaries did in the past – in order to identify new roles high courts have been playing in recent decades and thereby to encourage scholars to ask new questions about the place and impact of courts in politics and policy. We therefore had to examine country cases that had already become the object of serious academic attention, revealing courts' expansive actions. Simultaneously, we sought to examine courts from a broad geographic range, from both civil-law and common-law traditions, with newer as well as long-established records of judicial independence. Those goals recommended a nonrandom, targeted process for choosing country cases. We hunted where highly qualified scouts – our chapter authors – had already identified and studied the kind of quarry that fit our criteria. Given this case-selection technique, the empirical chapters do not warrant conclusions about what percentage of courts are playing more important roles throughout the world, or strong generalizations about why or when they do or do not do so. Instead, the chapters offer a broad foundation of contextually rich empirical evidence and compelling examples of courts that do play consequential roles in governance in polities around the world, and demonstrate that one cannot fully understand national politics in those contexts without paying close attention to their courts and the interaction of courts with other government institutions.

Second, we do not imply that courts will necessarily resolve (rather than exacerbate) government stasis, that they will defuse (rather than enflame) normative conflict, or that if they assume the role of delineating and enforcing individual rights they will interpret them expansively. We are not proposing that courts are everywhere and always "the good guys." Courts can play new roles in different ways, prioritizing order and authority as well as liberty or equality, endorsing local autonomy as well as central governmental power. Our volume illustrates some of that variety.

Third, we acknowledge that as passive institutions – and "the least dangerous branch" (Hamilton 1788; Bickel 1962) – courts hardly ever act alone. Just as one can think of the roles that different musical instruments play in an orchestra – with first violins carrying the melody, basses and percussion propelling the rhythm, and so forth – so, too, courts, once they are granted or assume constitutional review

powers, rarely perform as soloists, instead becoming part of the ensemble of governing institutions. The more important the parts (or musical roles) assigned to courts in the orchestral score, the more forcefully courts play their parts, and the broader the range of other instruments (political and societal actors) to which they play counterpoints, the more courts affect the ensemble's overall performance – that is, the more they influence society and the output of a political system.[7] Where the "legal complex"[8] and support for constitutional norms are less developed or political cleavages too entrenched and intense, court rulings supporting constitutional democratic values, for instance, may have lesser or only short-lived effects. One of our goals in this volume, then, is to understand how courts interact with other political actors: how some actors encourage courts to play new roles and help them do so, whereas others hamper and block their efforts.

Finally, as the title of this volume suggests, asserting that courts are playing more and expanded roles in governance implies that their decisions are in some sense consequential, that they have some actual effect on the governance of the surrounding society. Making such a claim, however – even if only implied – involves an evidentiary challenge. It requires investigating what happened *after* a court issued its decisions, both in the short- and long-term, and to what extent its dictates – as opposed to other factors – actually shaped the subsequent course of events. Judicial consequentiality, therefore, can confidently be assessed – and hence a full account of judicial role expansion offered – only with the passage of time.[9] However, most of the studies in this volume focus on relatively recent court decisions, thereby limiting contributors' ability to trace the consequences of the rulings they discuss and comment on how enduring and significant expanded judicial roles in governance have been. We believe, however, that the studies represent a crucial first step toward understanding the conditions under which courts can be consequential.

POLITICAL ARENAS AND JUDICIAL ROLES

Certain kinds of political disputes, conflicts, and tensions emerge – sooner or later – in virtually all polities, and increasingly, in some countries, they are generating demands for judicial action. The empirical studies in this volume reflect five such arenas of political contention: (1) conflicts between incumbent political regimes and their challengers; (2) conflicts between proponents of secular versus religious values; (3) conflicts between competing power centers within national governments or

7 We are indebted to Mark Graber for the orchestral image of interbranch relations.

8 This term, as Halliday (Ch. 13 in this volume) discusses, is drawn from Halliday, Karpik, and Feeley (2007: 6–7), who use it to refer to "the system of relations among legally-trained occupations which mobilise on a particular issue." For Halliday et al., lawyers (including government lawyers and legal academics) and judges form the heart of the legal complex.

9 To be clear, there is an important difference between courts playing a particular role successfully, and being consequential. Even when a court is not successful in the sense of outcomes exactly matching its dictates, its rulings may still be very important to the way political events play out.

between central governments and culturally or politically divergent subnational governments; (4) conflicts emerging from popular anger concerning official corruption, or governmental deadlock or stasis; and (5) conflicts reflecting government failure to recognize or implement constitutionally or legally promised rights. Because the issues with which courts grapple are complicated and multifaceted, many of the judicial roles our authors analyze fit in more than one arena. Nonetheless, we believe this typology helps us effectively summarize our chief findings concerning the expanded roles in governance that some high courts now play.

Conflict Arena I: Disputes between Political Incumbents and Challengers

Especially (but not exclusively) in new and fragile democracies, disputes often arise between political incumbents and challengers concerning the legitimacy and fairness of potentially pivotal elections, and rights of political expression and organization. Moreover, as Ginsburg (Ch. 1 in this volume) observes, after the displacement of an autocratic regime, new democracies often face controversial questions of transitional justice (construed broadly), for example, concerning the binding quality of laws or constitutional provisions promulgated by, and/or the legal immunity or punishment of officials from, the old regime. When contenders push these political controversies onto the dockets of high courts, judges face a choice between ruling for regime stalwarts or challengers, between strengthening or weakening aspirations for constitutional democracy, between entrenching the interests and values of incumbents or of new majorities. No matter what they choose, courts are thrust into a new role in governance: influencing the struggle for political power. Several chapters in this book, as summarized in the next few pages, illustrate ways in which courts have been called on to play, and have played, this new judicial role.

Facilitating Democratic Transitions

In Korea, Taiwan, and Thailand, as shown by Ginsburg (Ch. 1 in this volume), legal challenges to disputed elections (or as in Korea, impeachment proceedings) led to crucial judicial decisions that determined who shall rule and who shall not. In Ukraine, Georgia, and Kyrgyzstan, as Trochev describes (Ch. 2 in this volume, p. 68), high courts "staffed with Soviet-era judges . . . cancelled rigged elections, thus opening the way for a peaceful change of government." By resolving leadership succession crises during tense moments of constitutional challenge, high courts can strengthen – although of course not guarantee – prospects for a political regime characterized by the rule of law and respect for constitutionally defined democratic processes and procedures. Indeed, whereas Ginsburg (Ch. 1 in this volume) indicates that the Korean and Taiwanese high courts successfully played this role, acting as what he calls "downstream [democratic] consolidators," the Ukrainian, Georgian, and Kyrgyzstani high courts' success in doing so was significantly less enduring (Trochev, Ch. 2 in this volume).

More broadly, in many new democracies, independent high courts are widely viewed as symbolizing the aspiration for government characterized by constitutionalism, bound by the rule of law, and responsive to reason. Klug's chapter tells us that in postapartheid South Africa, the Constitutional Court quickly became such a symbol. Faced with a politically sensitive transition to majority rule, leaders managing the transformation gave the Constitutional Court an extraordinary role – helping make and legitimate the constitution itself. The 1993 interim constitution provided for a democratically elected Constitutional Assembly to draft the new constitutional text, but stipulated that the court would scrutinize the Assembly's work before certifying that it had abided by the principles enshrined in the interim constitution (Ch. 3 in this volume, p. 103). Amidst great political pressure, the court boldly denied certification of the new constitution drafted by the Assembly. Although it endorsed the "overwhelming majority" of its provisions, it insisted that the Bill of Rights must be further entrenched, that a controversial labor clause be subjected to (rather than insulated from) judicial review, and that the supremacy of central government law over centrifugal regional powers be protected (Id. at 104). The Constitutional Assembly complied, revising the constitution along the lines the court dictated.

Further, Klug shows that early in the postapartheid era, the court issued a series of assertive constitutional decisions that signaled its independence and commitment to constitutional principles rather than political expediency. The Bill of Rights, the court held, required invalidation of laws enacted by apartheid-era legislatures – including the death penalty and numerous other criminal laws (Ch. 3 in this volume, pp. 99–100). However, the court also invalidated some legislation that was passed by the sitting African National Congress (ANC)-dominated Parliament and signed by Nelson Mandela. The court held, for example, that newly empowered black-majority governments in South Africa – both national and regional – were bound to respect constitutionally guaranteed procedural and property rights of white citizens. The court's evenhandedness, Klug observes, enabled it to play an important political role: consolidating the core idea of constitutionalism and the rule of law in the national political culture. In so doing, he argues, judges made the constitution and court central symbols of the reconstituted nation's political identity (Ch. 3 in this volume).[10]

Sparking Antiauthoritarian Movements

In authoritarian regimes with some elements of the rule of law and measure of judicial independence, courts sometimes serve as what Ginsburg (Ch. 1 in this volume)

[10] Ginsburg's chapter describes a similar role for the Korean Constitutional Court. "Since its establishment in late 1988," he suggests, the court "has become the embodiment of the new democratic constitutional order," routinely being "called upon to resolve major political conflicts and issues of social policy," including carrying out "a complete overhaul of the country's criminal procedure . . . prompting . . . significant amendments to the National Security Act, and (establishing) an important administrative law jurisprudence" (Ch. 1 in this volume, p. 104).

calls "upstream triggers for democratization." That is, court decisions can operate as focal points for political movements demanding democracy (or a return to democracy after authoritarian intervention). When courts label repressive governmental actions against pro-democracy advocates illegal or unconstitutional – even if doing so provokes retaliation from political leaders – their decisions "can provide clarity as to what constitutes a violation of the rules," help "legitimate regime opposition," and "raise the costs of oppression" (Ch. 1 in this volume, p. 48).

How such a process unfolded in Pakistan is recounted by Ginsburg, and Mate (Ch. 10 in this volume) discusses the Indian experience in that regard. In 1975, Indian Prime Minister Indira Gandhi, perturbed that the Supreme Court had repeatedly ruled her redistributive economic policies unconstitutional, and fearful that it would affirm a lower court ruling that she had violated electoral laws to win reelection, responded aggressively. She declared a state of emergency, assuming broad emergency powers; packed the Supreme Court with allies and drove the legislature to enact constitutional amendments and statutes that curbed judicial powers; authorized preventive detention of political opponents; and suspended fundamental political and due process rights. The Supreme Court, however, had established a record of decisions defending constitutional and legal rights, and it enjoyed the support of a lively legal complex (Halliday, Karpik, and Feeley 2007; Epp 1998). Popular and elite support for the court and constitutional values enabled previously weak opposition political parties to use Gandhi's attack on the courts and law as a rallying point. Ultimately, they pushed Gandhi to end the period of untrammeled executive rule, and then defeated her in the ensuing election.

Electoral Conflicts in Established Democracies

Even in established democracies, of course, courts are often drawn into disputes between political incumbents and their opponents, between governments and their critics, between those who regulate the boundaries of political activity and those who challenge them. The more dense the statutory and constitutional law governing democracy, the more easily political disputes can be transformed into plausible legal claims – and the more often courts have the opportunity to play a significant role in determining political winners and losers. In the United States, *Bush v. Gore* (2000) provides a widely known example. The Supreme Court resolved an extraordinarily close, intensely litigated presidential vote-counting dispute in Florida, propelling George W. Bush into office. More broadly, as Kagan (Ch. 8 in this volume) notes, in its 1962 decision in *Baker v. Carr* and a series of follow-up cases, the U.S. Supreme Court significantly reshaped the U.S. electoral process. It did so by mandating decennial redrawing of electoral district lines to equalize district population size, and by its expansive interpretation of the Voting Rights Act of 1965, which enabled the government to draw electoral district lines designed to enhance the influence of certain racial and ethnic minority voters.