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# THE EXCEPTIONAL ROLE OF COURTS IN THE CONSTITUTIONAL ORDER

*N.W. Barber & Adrian Vermeule\**

## INTRODUCTION

In constitutional terms, the life of the judge is normally fairly unexciting. Most judges spend most of their time resolving disputes over facts and, having resolved the dispute to their own satisfaction, applying the law to the case. More rarely, judges have a lawmaking role, clarifying legal rules, filling in legal gaps, and—sometimes—modifying the law where necessary. The lawmaking task of the judge becomes more pronounced at higher levels of the judicial hierarchy, but even in the highest courts the latitude accorded the judge is grounded in the constitution and shaped by the law. The legal order, contained within the constitution, establishes the institution of the court and the office of the judge. It empowers the judge to make decisions that bind others in the system, determining the legal standing of her judgments. And, more generally, the legal order sets the broad principles of law that guide the judge when exercising her discretion. Even if the pre-existing law is not determinative of the decision, it can still shape the way the judge reasons towards her decision and limit the range of her discretion.

This Article looks at a rare, and in some ways more exciting, part of the judicial role: those exceptional cases when the judge is called upon to pass judgment on the constitution itself. This arises in three groups of cases, roughly speaking. First, in exceptional cases the validity of the constitution and the legal order is thrown into dispute. The court is asked to rule on the legitimacy of the constitution and, by derivation, on the standing of the court and the legal authority of the judge. The case requires the judge to pull herself up by her own bootstraps: she is ruling on the basis of her own legitimacy, and on the constitutional jurisdiction both of the courts and other institutions.

Second, on some occasions the judge is asked to rule on the transition from one constitutional order to another. This can occur in the aftermath of

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a revolution, or when the state is acceding to a new constitutional order. On these occasions the existing constitutional order may seek to regulate the change, but the very challenge presented by the dispute involves the incapacity of the outgoing constitution to bind its successors.

Third, there are some cases in which the health of the constitutional order requires the judge to act not merely beyond the law, as it were, but actually contrary to the law. The judge must act contrary to the rules of the legal order, precisely in order to preserve the health of the legal order. The judge must, in other words, act in a way she is not legally empowered to do.

These three groups of cases raise many different issues, but they are all instances of the judge's exceptional constitutional role: situations in which the judge may properly decide the case in a manner that transcends, or even runs contrary to, the rules of the existing legal order. This Article surveys these situations, and reflects on the principles and processes judges have used, and should use, to guide their reasoning. Even if the positive rules of the legal order are unable to resolve the dispute, there are still underlying principles of constitutionalism the judge can call upon to guide and legitimate her decision. Furthermore, given the profound, even radical, implications of these types of decisions, the process by which the court reaches its decision may need to be modified; the judge may need to allow a broader range of interested parties and institutions to participate in the decision than would normally occur. Most broadly, we claim that *constitutional decisionism* is inevitable in such cases. Courts sometimes have no option but to take it upon themselves to rule upon, and indeed to participate in constituting, the validity of the very constitutional order that gives them their authority, in a kind of bootstrapping.

We take up our three categories of cases in order. In Part I, we examine cases in which courts determine constitutional competence, either of themselves (Section A) or of other actors (Section B). We presume two background conditions: (1) there exists a well-defined constitutional polity, in which the locus of sovereignty is clearly defined; (2) there is no immediate or urgent threat to the stability of that polity. In subsequent Parts we will relax these two conditions in turn. Part II examines constitutional transitions (relaxing condition (1)), whilst Part III examines constitutional crises (relaxing condition (2)).

Part IV distills our conclusions by focusing on the problem of bootstrapping. How can courts act in an authoritative way when exceptional circumstances challenge the very foundations of their authority in the first place? There is no general answer; courts have approached the resulting dilemma in various ways, depending upon circumstances. That there is no theoretically compelling answer does not, however, entail that there is no answer at all. Rather, courts necessarily engage in *constitutional decisionism*—they make decisions without fully worked-out theoretical foundations, based on a mix of constitutional principles and pragmatic judgments. In this way courts offer a forum for politically relevant actors and interests to hash out their differences by a mix of arguing and bargaining.

Our aims are both taxonomic and analytical, on the one hand, and prescriptive on the other. On the taxonomic and analytical side, we adopt the standpoint of the analyst, attempting to identify recurring patterns of exceptional circumstances that confront judges, and attempting to understand both the dilemmas courts face in such circumstances, and the means they use to cope with them. There is nothing oxymoronic about this enterprise, because exceptional circumstances *within* any given constitutional order sometimes fall into recurring patterns when viewed in the aggregate *across* constitutional orders.<sup>1</sup> Given enough cases, even the mutation becomes a species. And as we hope to show, comparative constitutional adjudication contains identifiable species of exceptional cases.

On the prescriptive side, we offer normative advice but only nonideal advice, subject to constraints. We do not pretend to offer a comprehensive theory of political morality to guide judges in cases calling for constitutional decisionism. In the nature of these cases, real dilemmas and tradeoffs, true conflicts of principle and of value, and uncertain pragmatic judgments are unavoidable. Yet we indicate a number of lower-level principles, both procedural and substantive, to help courts avoid hubristic or ill-informed decision-making and disastrous outcomes—perhaps the most that can be hoped for when circumstances yield extraordinary situations.

## I. DETERMINING, OR SETTING, THE CONSTITUTIONAL BASE OF THE STATE

### A. *Courts Judging Their Own Constitutional Authority*

We begin with a category of cases in which courts rule on the scope and limits of their own authority. From one perspective, such cases are extremely rare. In the mine-run of litigation, civil and even criminal parties (including defendants) unquestioningly accept the authority of the court. The parties will offer arguments within the system, confining themselves to contesting their own liability or attempting to impose liability on others.

In some fraction of these ordinary cases, there may be technical questions about whether jurisdiction and venue should lie in this or that court within the overall judicial system, but these questions are ordinary as well. In some even smaller fraction of the cases, there may even be questions about “reviewability” or “justiciability,” such that parties argue that no court should take cognizance of the case. But even then, the parties will unquestioningly accept that the court (or at least some other court in the legal system) has competence to make *that* determination—they will accept, in other words, the maxim that courts always have “jurisdiction to determine [their own] jurisdiction.”

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1 For a different taxonomy, see Sanford Levinson and Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707 (2009). Balkin and Levinson categorize crises from the standpoint of constitutional design, whereas our focus is on how courts respond to crises within an ongoing constitutional order, or during the transition between such orders. The two approaches are partly, but only partly, overlapping.

In the rarest cases, however, actors brought before the court offer a more fundamental challenge to the court's authority. These actors not only deny the authority of the court to impose sanctions upon them, but deny the court's very authority to determine that question—they deny the court's jurisdiction to determine jurisdiction. There is a superficial irony to these situations: the court appears to be asked to use legal reasoning to determine if it has the capacity to apply the law. In these cases it would therefore beg the question to call these actors "parties." That is precisely what they deny being, insofar as they challenge the very authority of the court to determine its own jurisdiction over them. Frequently, such cases arise when one of the actors has been compelled to appear before the tribunal. Charles I, majestic and contemptuous in defeat, utterly denied that his "pretended Judges" had any legal status different than "thieves and robbers by the highways."<sup>2</sup> But if we admire that example, what are we to think of other political trials in which defendants hurl defiance at *their* pretended judges—defendants such as accused terrorists who refuse to acknowledge the authority of the tribunal<sup>3</sup> or, less alarmingly, cranks who possess strong, but strange, beliefs about the legal limitations of the courts?<sup>4</sup>

A different subcategory of cases involves not political trials, but fundamental political issues arising in the course of otherwise ordinary disputes. These cases are "political" insofar as they call into question the foundations of the constitutional order somehow defined, necessarily including the scope and limits of judicial authority. Here judges decide whether they possess the power to review legislation for conformity with some hierarchically superior source of law, such as a written constitution, an enforceable treaty, or an entrenched previous statute of the legislature itself that is taken to trump subsequent legislation (at least if the subsequent legislation does not

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2 Charles I famously stated:

I would know by what power I am called hither . . . . I would know by what authority, I mean lawful; there are many unlawful authorities in the world, thieves and robbers by the highways . . . . I have a trust committed to me by God, by old and lawful descent; I will not betray it, to answer a new unlawful authority: therefore resolve me that, and you shall hear more of me.

. . . .

. . . . I do stand more for the Liberty of my people, than any here that come to be my pretended Judges . . . .

4 A COMPLETE COLLECTION OF STATE TRIALS 995–96 (T.B. Howell ed., London, Longman & Co. 1816); see also Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 367–88 (2010) (describing the background of the English Revolution and the trial of King Charles I).

3 In a trial of Islamic extremists who plotted to derail a train running between Canada and the United States, one of the defendants "refused to acknowledge the court's authority [or to] retain[ ] legal counsel." *Canada Terror Suspects Planned to Derail US-Bound Train, Court Hears*, DEUTSCHE WELLE (Mar. 2, 2015), <http://www.dw.com/en/canada-terror-suspects-planned-to-derail-us-bound-train-court-hears/a-18231091>.

4 Meads v. Meads, 2012 ABQB 571 (Can. Alta.).

expressly repeal the earlier). Leading examples are *Marbury v. Madison*<sup>5</sup> from the United States Supreme Court in 1803, the landmark second judgment by the House of Lords in the *Factortame* litigation in 1990,<sup>6</sup> and the *Mizrahi Bank* case from the Supreme Court of Israel in 1995.<sup>7</sup> A recent example from Canada is the Supreme Court Act Reference (2014), in which the supreme court decided that its jurisdiction, although initially created by statute, is strongly entrenched against legislative revision, so that revision requires using the process for constitutional amendment.<sup>8</sup> The decision has been called the “Canadian *Marbury*.”<sup>9</sup> It may or may not be a coincidence that, roughly speaking, the courts in all these cases, after due deliberation, solemnly judged that they did indeed possess more expansive authority than some of the actors before the court had claimed. But it is no accident that in all these cases, the relevant courts ruled themselves competent to rule on the limits of their own jurisdiction.

A related, if less remarkable, set of cases can be found in the decisions of courts of the Member States of the European Union, which reassert the constitutional supremacy of their own domestic constitutions. The Court of Justice of the European Union (ECJ) makes an ambitious set of claims for the standing of European law. Not only does it claim that European law has supremacy over conflicting rules of national law,<sup>10</sup> it also claims that it, the court, is entitled to provide definitive answers to all questions of European law,<sup>11</sup> and, moreover, to determine what constitutes an issue of European law.<sup>12</sup> If national courts accepted these claims, it would amount to a radical shift in constitutional power: the capacity of the constitutional institutions of the Member States to have the final say about the exercise of power within their territory—a crucial aspect of state sovereignty—would be called into question. Unsurprisingly, the supreme courts of the Member States have proved unwilling to fully endorse the view of the European court.

5 5 U.S. (1 Cranch) 137 (1803).

6 R v. Sec’y of State for Transp., *Ex parte Factortame Ltd.* (No. 2) [1991] 1 AC 603 (HL) (appeal taken from Eng.); R v. Sec’y of State for Transp., *Ex parte Factortame Ltd.* (No. 1) [1990] 2 AC 85 (HL) (appeal taken from Eng.).

7 CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 221, [1995] Isr. L.R. 1 (1995) (Isr.).

8 In the Matter of a Reference by the Governor in Council Concerning Sections 5 and 6 of the Supreme Court Act, [2014] 1 S.C.R. 433 (Can.).

9 Richard Albert, *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, 41 QUEEN’S L.J. 143, 174 (2015).

10 *Costa v. ENEL*, 1964 E.C.R. 585.

11 See Treaty Establishing the European Community art. 234, Mar. 25, 1957, 2002 O.J. (C 325) 0127 (now Treaty on the Functioning of the European Community art. 267).

12 J.H.H. WEILER, *The Transformation of Europe*, in THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION 10, 21 (1999); see also *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 4199.

The most notable dissident has been the German Constitutional Court. In *Solange I*<sup>13</sup> the German Constitutional Court rejected the supremacy of European law. The court insisted on its duty to protect fundamental constitutional rights contained within the German Constitution: the supremacy of European law would not be accepted by the German Constitutional Court until the European legal order had the capacity to protect these rights. In the *Maastricht*<sup>14</sup> decision, the court rejected the Court of Justice's claim to have the final say as to the meaning and scope of European law. The German court stated that it would not accept surprising readings of the Lisbon Treaty that had the effect of extending the Union's powers.<sup>15</sup> The recent decision on the Treaty follows this jurisprudence: European law takes effect through and because of the German Constitution, and that constitution limits what can be done in the name of European law.<sup>16</sup> In the latter two cases the German court has cited the importance of democracy as a reason, amongst others, to maintain the primacy of the German Constitution: whilst the European Union lacks an effective set of democratic institutions, the German court will continue to subject decisions of European institutions to the constraints of the German Constitution.

The decisions of the German Constitutional Court are far from unique, and many other national courts have adopted similar positions.<sup>17</sup> These are unusual cases—the court is being asked to rule on the scope and basis of its own authority—but the outcome is unsurprising. In the face of a challenge to the jurisdiction of national constitutions coming from the Court of Justice of the European Union, the courts of the Member States have reasserted the status quo: the Member States of the European Union have preserved their statehood within that Union, and it is their national constitutions—not the European Treaties—that underpin the authority of the state and, by derivation, the court. This is a form of “constitutional decisionism,” but a comparatively dull one. These courts have considered the assertion that their constitutional foundation has shifted, that they have become parts of a new legal order, and have rejected the claim. The judges have been asked to pass

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13 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 37 BVerfGE 271, 2 C.M.L.R. 540, 1974 (Ger.).

14 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 BVerfGE 155, 1 C.M.L.R. 57, 1994 (Ger.); see Manfred Zuleeg, *The European Constitution Under Constitutional Constraints: The German Scenario*, 22 EUR. L. REV. 19 (1997) (offering an energetic criticism of the decision); see also Mattias Kumm, *Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 351 (1999).

15 1 C.M.L.R. at 84.

16 See generally Christian Wohlfahrt, *The Lisbon Case: A Critical Summary*, 10 GER. L.J. 1277 (2009).

17 See, e.g., CE Ass., 20 octobre 1989, Rec. Lebon 190, 1 C.M.L.R. 173 (1990) (Fr.); Corte Cost., 27 dicembre 1973, Giur. it. 1973, I, 1, 2401, 2 C.M.L.R. 372 (1974) (It.); R (HS2 Action Alliance Ltd.) v. Sec'y of State for Transp. [2014] UKSC 3 (appeal taken from Eng.) (UK); see also Wojciech Sadurski, *Solange, Chapter 3: Constitutional Courts in Central Europe—Democracy—European Union*, 14 EUR. L.J. 1 (2008).

judgment on the legal basis of their authority—and this assessment necessarily requires the judges to consider making decisions that would be beyond the scope of their powers under the existing legal system—but have declined the invitation to effect constitutional change.

### 1. Exceptions as the Norm

So far we have called all these cases rare or exceptional. They pose exceptions to the normal legal framework and reveal the hidden presuppositions of that framework, presuppositions that operate just as fully in “ordinary” or “normal” cases, albeit with lower visibility. When judges hear the most ordinary criminal cases and determine them one way or another, perhaps with a jury’s help, they are exercising jurisdiction. That exercise necessarily implies (whether or not the thought ever occurs to the judge) that the court has jurisdiction, and it therefore also necessarily implies that the court has jurisdiction to determine its own jurisdiction. It turns out that every case is the exceptional case, in which courts assert this sort of reflexive jurisdictional competence.

### 2. Judges in Their Own Cause

It should also be apparent from these cases that there is at least a severe tension between two deep principles of the law. On the one hand, there is the maxim necessarily implied by any judicial determination, that judges have “jurisdiction to determine their own jurisdiction.” On the other hand, there is an equally hoary maxim of the law: *nemo iudex in sua causa*, “no man should be judge in his own case.”<sup>18</sup> The judges in these cases are judges in their own causes, in at least an indirect institutional sense; their determination of the scope and limits of their own jurisdiction will determine the relative power and importance of the judiciary and the courts as constitutional actors, vis-à-vis other officials and actors. (In yet other cases, as when judges sit to determine the constitutional requirements for judicial salaries,<sup>19</sup> they are judges in their own cause in a more direct, personal, and material sense).

For this reason, it is necessarily and not merely contingently specious—an incomplete and therefore misleading comparison—when judgments announcing the power of the courts to review the decisions of legislatures or other actors are justified on the ground that, absent such power, the legislature would become a “judge in its own cause,” or a “fox in charge of the henhouse.” Judges who make that determination are necessarily (although perhaps implicitly) ruling on the limits of their own power as well. The ultimate question is not *whether* some institution will have unreviewable power to

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18 Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384 (2012).

19 See, e.g., *United States v. Hatter*, 532 U.S. 557 (2001) (deciding whether a statutory change in judicial compensation violated the Compensation Clause of Article III); see also John O’Dowd, *Judges in Whose Cause? The Irish Bench After the Judges’ Pay Referendum*, 48 IRISH JURIST 102 (2012).



determine the limits of its own power, but rather *which* institution will do so. Jeremy Waldron puts it clearly:

Those who invoke the maxim *nemo iudex in sua causa* in this context say that it requires that a final decision about rights should not be left in the hands of the people. Rather, it should be passed on to an independent and impartial institution such as a court.

It is hard to see the force of this argument. Almost any conceivable decision-rule will eventually involve someone deciding in his own case. Unless we envisage a literally endless chain of appeals, there will always be some person or institution whose decision is final. And of that person or institution, we can always say that because it has the last word, its members are ipso facto ruling on the acceptability of their own view.<sup>20</sup>

There is one further twist, however. It is perfectly possible to have (what in the United States would be called) a “departmentalist” system, in which more than one institution has jurisdiction to determine its own jurisdiction. Each such institution may form a view about the scope and limits of its own constitutional power, and act on that view. In such an arrangement, it is emphatically not the case that there is no institution that determines the limits of its own power. Rather the premise of the system is that there are multiple such institutions—many foxes in charge of the henhouse. These institutions may not only take a view about the scope of their own power, but also about the jurisdiction of other bodies within the system. This may be done directly—one body may seek to rule on the competence of another—or by implication, where an institution’s decision about its own jurisdiction has implications for the capacities and duties of other bodies.

When, as sometimes happens in a departmentalist system, the views of the several institutions about the scope(s) of their own power(s) are logically or pragmatically incompatible, the system may leave it *legally* undetermined who should prevail. Such disagreement may persist without resolution—constitutional disputes can be surprisingly durable<sup>21</sup>—but if the dispute is forced to a conclusion, the victory will often go to the institution that can better marshal the forces of public opinion.<sup>22</sup> As a matter of constitutional engineering, the thought behind creating such disagreement, or allowing it to persist, is that, quite predictably, the foxes will fall to fighting amongst themselves, “battling . . . in self-defense.”<sup>23</sup> This indirect mechanism will protect

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20 Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1400–01 (2006).

21 The dispute over the relative jurisdiction of the House of Commons and the courts over the scope of parliamentary privilege persisted for at least a hundred and fifty years. See JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 68–86 (2007).

22 Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1006 (2008).

23 ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 35 (rev. ed. 2013). For the role of institutional self-defence in a constitutional order, see N.W. Barber, *Self-Defence for Institutions*, 72 CAMBRIDGE L.J. 558 (2013); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014).

the chickens more reliably than the direct mechanism of trying to keep all foxes away from the henhouse all the time—probably a hopeless endeavour in the long run. Whatever its engineering merits, however, the departmentalist system proliferates, rather than eliminates, institutions that in some sense act as judges in their own causes.<sup>24</sup>

### B. *Courts Determining the Constitutional Jurisdiction of All Constitutional Actors*

In many of these cases, courts assert constitutional competence not only to determine their *own* competence, but also to determine the constitutional jurisdiction of *all* relevant constitutional bodies or institutions. This category includes some of the most famous judgments in constitutional law around the globe; examples are *Marbury v. Madison*, *Factortame*, and *Mizrahi Bank*. All of these cases involved courts deciding whether they possessed the power of judicial review (somehow defined, in strong or weak form), and indeed deciding that they did possess it. But all of the cases necessarily also involved courts laying out a comprehensive vision of the allocation of constitutional powers across the major institutions of the constitutional order. Indeed, these courts derived their conclusions about judicial review from a comprehensive theory of competences. We will examine *Marbury* and *Mizrahi* as particularly pure examples (in part because both cases strictly involve domestic constitutionalism, and lack the complex overlay of supra-national treaties that structured the questions in *Factortame*).<sup>25</sup>

In both cases, we suggest, the court's comprehensive theory of the constitutional allocation of competences represented, at bottom, an exercise in *creative decisionism*. The legal materials, combined with ordinary principles of logic and the ordinary tools of the lawyers' craft, simply underdetermined the questions at hand; multiple different answers to those questions were legally and logically possible. The relevant courts, in the end, "exercise[d] the sovereign prerogative of choice,"<sup>26</sup> and attempted to will into being a particular specification or conception of the constitutional order. Of course that is not what they said they were doing—especially not in *Marbury v. Madison* (*Mizrahi Bank* is more candid, although not completely so). But that is what they did nonetheless.

#### 1. *Marbury*

The immediate legal issue in *Marbury* was whether the Supreme Court could, and should, issue a writ commanding the Secretary of State, James Madison, to deliver an official commission to William Marbury.<sup>27</sup> The Court

24 Vermeule, *supra* note 18, at 396–97.

25 For discussion of *Factortame*, see N.W. Barber, *The Afterlife of Parliamentary Sovereignty*, 9 INT'L J. CONST. L. 144 (2011); P.P. Craig, *Sovereignty of the United Kingdom Parliament After Factortame*, 11 Y.B. EUR. L. 221, 252–53 (1991).

26 Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 461 (1899).

27 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 146 (1803).

issued a complicated, backhanded holding that established its power to review the acts of all other bodies for constitutionality, including legislative enactments, whilst nonetheless avoiding an immediate political confrontation. The Court's trick was to first declare that it indeed had the power, in a validly presented case, to order compliance by executive officials; but then to immediately declare unconstitutional the statute vesting it with "original jurisdiction" (jurisdiction in the first instance) to decide the case at all.<sup>28</sup> That odd combination of holdings exercised the constitutional power of statutory invalidation whilst eliminating the legal predicate for the lawsuit, thereby ducking immediate conflict.

What is important for our purposes is the Court's major rationale, which attempted to derive the power of judicial review from the intrinsic character of adjudication in courts that interpret written and hierarchically superior constitutions. The Court claimed that when judges decide cases, and a party claims that a statute is inconsistent with the written Constitution, the Court must either prefer the Constitution to the statute, or vice versa.<sup>29</sup> The very nature and idea of a written and hierarchically superior Constitution entails that the Court must prefer the Constitution to the statute—or so the argument runs.<sup>30</sup>

As many have pointed out, however, the deduction was then and is now simply fallacious.<sup>31</sup> The bare notion of interpreting a written constitution in court, by itself, entails nothing at all about what judges are to do when there is an inconsistency between a statute and the constitution. As a logical matter, it is perfectly possible to imagine a regime in which there is a written constitution, acknowledged by all to be paramount law, yet in which courts are not to enforce that constitution by setting aside or ignoring duly enacted legislation. Rather the enforcement mechanisms, in such a regime, are extrajudicial ("political," if we like);<sup>32</sup> the constitution is enforced by electoral retribution, by the vaguer but powerful sanction of ambient popular disapproval, and by competition amongst elected officials. We can imagine such a regime because many such regimes have actually existed, including in many American states before *Marbury*, and in polities around the world. A written constitution may be paramount law even if it is not enforced as such by courts. Analytically, the two questions are entirely distinct.

The legal materials and institutional background in *Marbury* simply underdetermined the question of judicial review. The Court was in effect faced with a choice between distinct constitutional regimes, featuring distinct (packages of) enforcement mechanisms; the Court's decision, in effect (whether or not fully thought through), represents a choice, an attempt to

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28 *Id.* at 175–76.

29 *Id.* at 176–77.

30 *Id.*

31 See, e.g., William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 *DUKE L.J.* 1, 17–18.

32 See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 251–53 (2004).

push the entire set of constitutional institutions in one direction rather than another—in effect, to help create a new constitutional order. That order took decades, indeed generations, to fully emerge, but the principle laid down in *Marbury* has triumphed in the long run. Indeed, it has metastasized into ever-stronger forms.<sup>33</sup>

## 2. *Mizrahi Bank*

The sprawling, absurdly verbose set of judgments from the Supreme Court of Israel in *Mizrahi Bank*, larded with repetitive and exhaustive block quotations, defy easy summary.<sup>34</sup> A stylized and simplified version runs this way. In 1992, the Knesset enacted a statute entitled “Basic Law: Human Liberty and Dignity,” which guaranteed certain rights.<sup>35</sup> In particular, it forbade violation of rights guaranteed by the Basic Law except “by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.”<sup>36</sup> It is apparent on the face of this statute that it attempts to specify conditions for the validity of subsequent legislation enacted by the same body, the Knesset. Now, of course, it is an open question whether the law might nonetheless be repealed by the express or necessarily implied terms of a subsequent law on the same level of the legal hierarchy. But if anything is required over and above what would be required to repeal ordinary legislation, then to that extent the law would have a binding effect on later legislators.

All of this immediately raises a formidable question, a chestnut of constitutional theory: whether a parliamentary body can bind “itself,” enacting “entrenched” legislation that to some degree constrains the freedom of action of later legislators in the same body.<sup>37</sup> The members of the Supreme Court of Israel issued an array of judgments addressing the question; the bottom line was that the court upheld the power of the Knesset to bind “itself” through Basic Laws establishing entrenched guarantees.<sup>38</sup> Not at all incidentally, the court also clearly established its own power to review subsequent ordinary legislation (i.e., non-Basic legislation) for conformity with Basic Laws<sup>39</sup>—a kind of weak-form constitutional judicial review. The

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33 See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (proclaiming judicial supremacy in constitutional matters).

34 CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Coop.* Vill. 49(4) PD 221, [1995] Isr. L.R. 1 (1995) (Isr.).

35 *Id.* at 21.

36 *Id.* at 22 (quoting Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391 p. 90, as amended (Isr.)).

37 As to these questions, see N.W. Barber, *Why Entrench?*, 14 INT'L J. CONST. L. 325 (2016), and Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002).

38 Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457, 501 (2012).

39 *Mizrahi Bank*, [1995] Isr. L.R. at 34, 62, 84, 97 (opinion of Shamgar, J.).

supreme court also held that entrenchment was effective only when included in a certain type of statute: a Basic Law.<sup>40</sup> It falls to the courts to determine whether a statute is or is not a “Basic Law” and may be entrenched; the decision by the Knesset to label the statute a “Basic Law” is indicative, but not decisive.<sup>41</sup> Not only did the supreme court empower the Knesset to create entrenched constitutional rules within the Israeli system, it also opened up the possibility that it could adjudicate the constitutionality of these attempts at entrenchment. As in a number of other constitutional systems, the court has reserved to itself the right to distinguish between “constitutional” and “unconstitutional” constitutional amendments.<sup>42</sup>

Political theology was the order of the day. One judgment took the paradoxical line that the unlimited sovereignty of the Knesset entails that it has the power to bind itself through restrictions on future legislation—lacking that power would imply less than omnipotence.<sup>43</sup> But the leading judgment, by Justice Aharon Barak, took a more plausible line that the Knesset actually enjoys multiple powers, conferred upon it by the *pouvoir constituant*—the first Knesset and, behind that, the “national consciousness and legislative history of the State of Israel.”<sup>44</sup> On this view, the Knesset may act in two distinct capacities, as an ordinary assembly or a constituent assembly, and may thus produce two distinct instruments: ordinary statutes, on the one hand, and Basic Laws on the other.

Barak leveraged the holding that the Knesset could create quasi-constitutional basic laws into a *Marbury*-style holding, that the court could review ordinary legislation for conformity with Basic Laws.<sup>45</sup> On this point, his judgment advanced a step beyond *Marbury*; it did not fallaciously assume that the hierarchical legal superiority of Basic Laws automatically entails that judges should enforce them to trump ordinary legislation. Instead the argument was that “legal tradition” entails that the remedy for violation of higher law is “abrogation by the courts.”<sup>46</sup> One may pick and choose amongst traditions, of course, and Barak did so with gusto, offering a smorgasbord of decisions from around the world that supported judicial review, but essentially ignoring the existence of equally widespread traditions, from equally reputable constitutional democracies, that denied it.<sup>47</sup> Just as the argument from the intrinsic character of adjudication in *Marbury* obscured the essentially creative institutional decision that the Court made, so too with the selective argument from legal tradition in *Mizrahi Bank*.

40 *Id.* at 41; *id.* at 183 (opinion of Barak, J.)

41 *Id.* at 42, 71, 76, 102 (opinion of Shamgar, J.); *id.* at 208 (opinion of Barak, J.).

42 Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 *ISR. L. REV.* 321, 338–41 (2011).

43 *Mizrahi Bank*, [1995] *ISR. L.R.* at 359, 380 (opinion of Cheshin, J.).

44 *Id.* at 3 (syllabus).

45 *Id.* at 139, 218–32 (opinion of Barak, J.).

46 *Id.* at 5 (syllabus).

47 *Id.* at 218–22 (opinion of Barak, J.)

### 3. Creative Decisionism in New Constitutional Orders

It was no accident that these courts were faced with the need for creative decisions about the institutional structure of the constitutional order. In a relevant sense, both polities were young polities, in which the constitutional arrangements were still very much up for grabs (in the United States) and changing rapidly under various external and internal pressures (Israel). Courts in new or rapidly changing constitutional polities will often have both more scope to push constitutional arrangements in preferred directions, and greater incentive to do so. They have more scope because the roles and positions of other institutions are more fluid and malleable; there are fewer fixed routines, entrenched constituencies, and unquestioned norms and traditions to constrain judicial action. They have greater incentive because of the large net benefits of molding constitutional arrangements, relative to letting other institutions do so. In the examples given above the courts were successful, and the judges were able to shape the fundamental structures of the constitution, but such success cannot be guaranteed. When the Supreme People's Court of China sought to make the Chinese Constitution judicially enforceable in *Qi Yuling v. Chen Xiaoqi* (2001),<sup>48</sup> its decision was not followed by other courts and—after a period of being studiously ignored—was declared void in 2008.<sup>49</sup> The attempt to create a Chinese *Marbury* had failed. Whereas *Marbury* and *Mizrahi Bank* show the judges as effective constitutional innovators, *Qi Yuling* is an instance where the judges were unable to exercise this capacity: the role of the court in the development of the Chinese Constitution remains unusually limited.

These examples demonstrate that in relatively plastic and unsettled constitutional orders, someone or another will push institutions into a path-dependent trajectory that, if successful, will be very difficult for later actors to undo. These issues arise with particular force in constitutional transitions—either from one constitutional order to another within a polity, or when a new polity comes into being, as by secession or the withdrawal of an imperial power. We take up these questions in the next Part.

## II. TRANSITIONS: THE ASCRIPTION OF SOVEREIGN POWER BY COURTS

The constitutional position of the judge at the start of a new political order is a delicate one. The normal way in which questions of constitutional legitimacy—and legal legitimacy—are answered is by the identification of an empowering rule. Institutions are constitutionally legitimate because there are rules that establish and validate them; these rules, in their turn, were passed by institutions that were established by other rules. This chain of validity often extends a great distance but, at some point, it comes to an end. There must be a rule or a collection of rules that, ultimately, lack a constitutional grounding. The constitutional validity of this rule is—must be—

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48 73 SUP. PEOPLE'S CT. GAZ. 158 (Sup. People's Ct. 2001) (China).

49 See QIANFAN ZHANG, THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS 173–74 (2012).

accepted by the institutions, officials, and, perhaps a portion of the citizenry, if the state is to function.<sup>50</sup> In an established state this rarely presents significant problems—legal disputes do not normally extend so far back into the constitutional order—but the constitutional foundations of a new state are more exposed; the tradition of constitutional acceptance has yet to be established. Indeed, courts in transitional situations may be called upon to do no less than to declare the locus of sovereignty. We will examine cases of that sort in Section A, and then look at special problems posed by ongoing treaties in Section B.

#### A. *Transitions and the Locus of Sovereignty*

There are at least three groups of transitional situations in which courts, especially supreme courts, may engage with the foundational rules of new states. First, and least controversially, the courts may explicitly endorse the new constitutional order. The judges' public acceptance of the constitutional foundations of the new state is a significant act of acceptance in itself and, also, provides a signal that other state officials and citizens should also endorse the constitution. Often, this will require the judges to legally endorse a pre-existing political consensus, and, even if there is no legal authority for the outcome, the political good sense of the decision is not in doubt. Secondly, and far more controversially, the judges may be asked to resolve a dispute over the very existence of the state. It may be unclear whether a new constitutional territory has emerged, or whether an older constitutional order continues to prevail over the territory. On rare occasions, the court may have the capacity to resolve the dispute even when there is no political consensus. Finally, the courts may sometimes act as midwives to new constitutional orders; handing down decisions that may help solidify political consensus around the emergence of a new state or, at least, creating constitutional space in which that political consensus can emerge.

It is not uncommon to find judicial statements about the foundations of constitutional orders in the years after independence. Perhaps the most recent example of such a case is found in the Hong Kong Court of Appeal. In *Hong Kong v. Ma Wai-Kwan*,<sup>51</sup> the Hong Kong Court of Appeal considered the continuing applicability of common law rules to the law of Hong Kong. It decided that these rules remained part of that legal order, but only because the Basic Law incorporated them into the system.<sup>52</sup> The foundation of the legal order had shifted from English law<sup>53</sup> to the indigenous Basic Law: even though the vast bulk of the laws of Hong Kong remained constant,

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50 Or, to complicate matters, it may be more accurate to say that the validity of some or all of a set of foundational rules must be accepted. See N.W. BARBER, *THE CONSTITUTIONAL STATE* 145–71 (2010).

51 [1997] 2 H.K.L.R.D. 761 (C.A.) (H.K.).

52 *Id.* ¶ 95.

53 The pre-1997 Hong Kong legal order rested on the exercise of a prerogative power. See Albert HY Chen, *The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives*, 30 H.K.L.J. 380, 417–20 (2000).

their constitutional foundation had changed. Hong Kong had become a part of China; sovereignty over the territory had shifted. Albert Chen has described this as amounting to a replacement of the *grundnorm*: the changing loyalties of the judges altered the fundamental rule of the Hong Kong legal order, a change mandated by the new political consensus over the basis of Hong Kong's constitution.<sup>54</sup>

Hong Kong is not, of course, a state—though, as we shall see, the ambiguities around its constitutional status make it a particularly interesting lens through which to examine the role of the courts—but the type of decision seen in *Ma Wai-Kwan* is one found in many post-independence polities. In the case of *The State (Ryan) v. Lennon*,<sup>55</sup> for example, the Supreme Court of the Irish Free State identified the Irish Constitution<sup>56</sup> as the fundamental law of the nation, the legitimacy of which rested on the Third Dáil Éireann sitting as a constituent assembly and articulating the will of the Irish people.<sup>57</sup> Similarly, in the Australian case of *Sue v. Hill*<sup>58</sup> the High Court declared that the Australia Act 1986 had succeeded in bringing about Australian constitutional independence, whilst in *Leeth v. Commonwealth*<sup>59</sup> the court identified the Australian people as providing the foundational legitimacy of the Australian state.<sup>60</sup>

The Hong Kong and Australian decisions were relatively uncontroversial. In these cases the courts endorsed a shift in sovereignty that had previously been endorsed by the body ceding power—not only was there general agreement within these territories over the desirability of independence, but there was, also, agreement between these new states and the old imperial power: Britain.<sup>61</sup> The Irish example proved more difficult. Whilst the Dáil presented itself as a constituent assembly, a body competent to craft a constitution for an independent state, and whilst the Irish Supreme Court subsequently endorsed this view, a rival understanding of the constitutional status of Ireland was expressed by the old imperial institutions. At around the same time the Dáil enacted the Constitution of the Irish Free State (*Saorstát Éireann*) Act 1922, the United Kingdom Parliament enacted the Irish Free State Constitution Act 1922.<sup>62</sup> These two legal instruments were largely similar,<sup>63</sup> save that the first provided an indigenous grounding for the Irish Constitu-

54 *Id.* at 418.

55 [1935] 1 IR 170 (H. Ct.) (Ir.).

56 CONSTITUTION OF THE IRISH FREE STATE 1922.

57 K.C. WHEARE, *THE CONSTITUTIONAL STRUCTURE OF THE COMMONWEALTH* 90–92 (1960).

58 (1999) 199 CLR 462 (Austl.).

59 (1992) 174 CLR 455 (Austl.).

60 *See also Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (Austl.); *cf. Re: Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 (Can.) (rejecting the one-province veto as contrary to the principle of equality of the provinces).

61 *See* Australia Act 1986, c. 2 (UK); Hong Kong Act 1985, c. 15 (UK).

62 Irish Free State Constitution Act 1922, 13 Geo. 5 c. 1 (UK).

63 There were some important differences that are not relevant for our purposes. *See* WHEARE, *supra* note 57, at 93.



tion whilst the second grounded it in an act of the Westminster Parliament.<sup>64</sup> This disagreement was also manifested in judicial decisions. The decision of the Irish Supreme Court in *Ryan* has already been discussed, but it had its parallel in the Privy Council case of *Moore*, decided the following year. In *Moore v. The Attorney-General for the Irish Free State*, the Privy Council identified the Imperial Parliament as the source of the Irish constitutional order's legitimacy.<sup>65</sup> It seems that whilst there was significant consensus within Ireland about the desirability of independence, this consensus was not shared by the British political and legal elite. In the face of this disagreement, the Irish political class could, perhaps, have relied upon *Ryan* as an authoritative statement of the base of the constitution; it could have ignored both the Imperial Parliament and the Privy Council. Instead, Ireland chose to enact a new constitution in such a manner that the chain of constitutional legitimacy could not be traced back to the Westminster Parliament. Ireland's 1937 constitution was approved by the Dáil but, crucially, that institution did not purport to enact the document; instead the constitution was put to a referendum, and grounded its constitutional legitimacy explicitly in the will of the Irish people.<sup>66</sup> In this instance, it seems that the Irish court's attempt to resolve the constitutional deadlock was not regarded as sufficient to demonstrate the autonomy of the Irish constitutional order.

Some thirty years after *Ryan*, the courts of Southern Rhodesia faced a similar dilemma. Before 1965, the Rhodesian Constitution took the form of an Order in Council,<sup>67</sup> which had been made under a power conferred by a British statute.<sup>68</sup> Although the Rhodesian legislature was accorded wide constitutional independence, it was not given the power to alter entrenched provisions of the constitution.<sup>69</sup> On November 11, 1965, the Rhodesian Prime Minister declared Rhodesian independence, and sought to bring into effect a new constitution: the "Constitution of Rhodesia, 1965."<sup>70</sup> This document purported to replace the old imperial constitution. The 1965 constitution provided that no United Kingdom statute would apply to Rhodesia unless its effect was extended to Rhodesia by the Rhodesian Parliament,<sup>71</sup> and the constitution removed the right of appeal to the Privy Council on matters relating to the Declaration of Rights. The Westminster Parliament responded with the Southern Rhodesian Act 1965, which reasserted Westminster's control, and, in an Order in Council made under the Act, emphasized that constitu-

64 See CONSTITUTION OF THE IRISH FREE STATE (SAORSTÁT ÉIREANN) ACT 1922; Irish Free State Constitution Act 1922, 13 Geo. 5 c. 1 (Eng.).

65 [1935] AC 484, 497 (PC) (appeal taken from Irish Free State) (UK).

66 See CONSTITUTION OF IRELAND (BUNREACTH NA HÉIREANN) p.mbl., art. 1.

67 Southern Rhodesia (Constitution) Order in Council 1961, SI 1961, art. 2314 (UK).

68 Southern Rhodesia (Constitution) Act 1961, 10 & 11 Eliz. 2 c. 2 (UK). For further discussion of the Rhodesian crisis, see BARBER, *supra* note 50, at 145-71.

69 GEOFFREY MARSHALL, CONSTITUTIONAL THEORY 64-72 (1971); J.M. Eekelaar, *Splitting the Grundnorm*, 30 MOD. L. REV. 156, 162 (1967).

70 Proclamation No. 53, 1965, Rhodesian Gov't Notice 737N (1965), reprinted in *Rhodesia: Proclamation of Independence*, 5 I.L.M. 230 (1966); see also Eekelaar, *supra* note 69, at 159.

71 CONSTITUTION OF RHODESIA 1965 §§ 3-5; see also Eekelaar, *supra* note 69, at 159.

tional change could only occur through a statute of the Westminster Parliament.<sup>72</sup> In *Madzimbamuto v. Lardner-Burke*<sup>73</sup> the Privy Council considered the legal implications of this mess; it held that the usurpation was unlawful, and that the purported 1965 constitution was of no legal effect. In contrast, the Rhodesian courts, after some hesitation,<sup>74</sup> endorsed the 1965 constitution<sup>75</sup> and rejected the Privy Council's continued role as the final court of appeal for Rhodesia.<sup>76</sup> The old imperial court—the Privy Council—had, from its seat in Downing Street, failed to prevent the emergence of the new state. The Rhodesian courts, in contrast, contrary to the pre-existing rules of judicial and statutory hierarchy, but following the elite political consensus in Rhodesia, were able to resolve, for a time, Rhodesia's constitutional crisis by accepting the constitutional autonomy of the 1965 constitution.

The previous two groups of cases involved the judges passing judgment on the creation of a new constitutional order. A third group of cases can be identified where the courts create space in which a new constitutional order could develop, if the political will is found to push for its creation. Even before the Australia Act 1986 (Cth) settled the question, Australian judges minimized the roles of the old imperial institutions, and were signalling their willingness to support constitutional independence. For example, the role of the Privy Council in Australian cases was steadily reduced.<sup>77</sup> Initially, this was as a result of legislation—in 1968 and 1975 the Australian Parliament limited the range of cases in which a litigant could appeal to the Privy Council<sup>78</sup>—but these legislative limitations were supported and reinforced by the judges. The High Court confirmed that the Australian Parliament did, indeed, possess the capacity to constrict access to the imperial court,<sup>79</sup> and it was the High Court, rather than the Parliament, that finally ended the capacity of the Australian states to appeal through it to the Privy Council.<sup>80</sup> As the possibility of appeal to the Privy Council was steadily restricted, the High Court also sought to limit the significance of the rulings of that body. In *Viro v. The Queen* it was no longer bound by decisions of the Privy Council,<sup>81</sup> and a

72 Southern Rhodesia Act 1965, c. 76, § 1 (UK).

73 [1969] 1 AC 645 (PC) (appeal taken from S. Rhodesia) (UK).

74 See Eekelaar, *supra* note 69; J.M. Eekelaar, *Rhodesia: The Abdication of Constitutionalism*, 32 MOD. L. REV. 19 (1969); Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat & Common Law*, 27 CORNELL INT'L L.J. 49, 60–65 (1994).

75 R. v. Ndhlovu [1968] 4 SA 515, 535 (AD) (Rhodesia); see COLIN MUNRO, *STUDIES IN CONSTITUTIONAL LAW* 152 (2d ed. 1999).

76 Dhlamini v. Carter [1968] 2 SA 445, 464, 465 (AD) (Rhodesia).

77 GEORGE WILLIAMS ET AL., *AUSTRALIAN CONSTITUTIONAL LAW AND THEORY* 118–21 (6th ed. 2014).

78 *Privy Council (Appeals from the High Court) Act 1975* (Cth) (Austl.); *Privy Council (Limitation of Appeals) Act 1968* (Cth) (Austl.).

79 *A-G (Cth) v T & G Mut Life Soc'y Ltd* (1978) 144 CLR 161 (Austl.).

80 *Kirmani v Captain Cook Cruises Proprietary Ltd [No. 2]* (1985) 159 CLR 461, 464 (Austl.). However, the capacity of the state courts to allow appeals remained until 1986, see *S Ctr of Theosophy, Inc v S Austl* (1979) 145 CLR 246, 264 (Austl.).

81 *Viro v The Queen* (1978) 141 CLR 88 (Austl.).

majority of the judges in that case asserted that state courts should treat decisions of the High Court as taking precedence over decisions of the imperial body.<sup>82</sup>

Alongside the marginalization of the Privy Council, a number of Australian judges also indicated that they would no longer accept the authority of the Westminster Parliament over Australia.<sup>83</sup> Perhaps the strongest statement of this position was given by Justice Murphy, in *Bistrivic v. Rokov*, in which he argued that the enactment of the Commonwealth of Australia Constitution Act 1900 had stripped the United Kingdom Parliament of its power to pass statutes that had force in the Australian legal order.<sup>84</sup> According to Murphy, the constitutional basis of the Australian system was the acceptance by the Australian people of this statute, rather than its enactment by Westminster.<sup>85</sup> In a later case Justice Deane expressed a similar view, though in more cautious language. Deane indicated that the justices might endorse the view that Australia was a sovereign state, and, like Murphy, identified the Australian people as the source of its constitutional authority.<sup>86</sup>

It should be noted that the opinions of Murphy and Deane were far from uncontroversial and as late as 1979 there were judges who contended that Westminster retained a power to legislate for Australia.<sup>87</sup> But their speeches stood as a warning, as an opportunity, and as threads that could later be woven into the constitutional story of an independent Australia. As a warning, the dicta raised the potential costs for the Westminster Parliament in the unlikely event that it would be tempted to legislate for Australia. There was a chance that such legislation would be ignored by the Australian courts and, as in the Rhodesian example,<sup>88</sup> the attempt to exercise the remnants of imperial power would lead to the ending of that power. As an opportunity, the speeches indicated that a portion, at least, of the judiciary would be willing to support Australian constitutional independence, even without the support of the Westminster Parliament.<sup>89</sup> The eventual mechanism used to secure independence—legislation enacted in both the Australian and Westminster Parliaments simultaneously<sup>90</sup>—was effective, but was, perhaps, not the only way in which this end could have been achieved. Finally, these speeches form part of the ideology that animates the Australian Constitution. When, after 1986, in *Leeth* the Australian High Court identified

82 *Id.*

83 PETER C. OLIVER, *THE CONSTITUTION OF INDEPENDENCE: THE DEVELOPMENT OF CONSTITUTIONAL THEORY IN AUSTRALIA, CANADA, AND NEW ZEALAND* 233–39 (2005).

84 See *Bistrivic v Rokov* (1976) 135 CLR 552, 565–67 (Austl.); see also *Robinson v WAustl Museum* (1977) 138 CLR 283, 343–44 (Austl.).

85 *Bistrivic*, 135 CLR at 567.

86 *Kirmani v Captain Cook Cruises Proprietary Ltd [No. 2]* (1985) 159 CLR 461, 464–65 (Austl.).

87 See *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 209 (Austl.) (opinion of Stephen, J.).

88 See *supra* notes 67–76 and accompanying text.

89 See, e.g., *China Ocean Shipping Co.*, 145 CLR at 209 (opinion of Stephen, J.).

90 See *Australia Act 1986* (Cth) (Austl.); *Australia Act 1986*, c. 2, § 16 (UK).

the Australian people as the source of the constitutional order, the judges were building on the ideas expressed in these earlier decisions.<sup>91</sup>

Hong Kong's judges have also created constitutional space within which the constitutional relationship between that territory and the Mainland could, one day, be reassessed. A little while after *Ma Wai-Kwan*<sup>92</sup> was decided, in *Ng Ka Ling*, the judges of the Court of Final Appeal took a different view.<sup>93</sup> They presented Hong Kong's Basic Law as constraining the capacity of the Mainland's institutions to act within Hong Kong's constitutional order: Hong Kong's courts could review legislation of the National People's Congress and the interpretive decisions of the Standing Committee that extended to Hong Kong.<sup>94</sup> Where those decisions went against the Basic Law the Hong Kong courts could find them invalid or ineffective.<sup>95</sup> This ruling proved to be the high-water mark of judicial separatism in Hong Kong. Following pressure from the Mainland, the court glossed its decision, making clear that decisions of the Standing Committee of the National People's Congress bound the courts,<sup>96</sup> and in *Lau Kong Yung*, decided later that year, the court revisited the question of the relationship between the legal institutions of Hong Kong and those of the Mainland.<sup>97</sup> It accepted that the Standing Committee of the National People's Congress had the power to issue binding interpretations of the Basic Law—even if there had been no judicial request for a ruling by that body.<sup>98</sup> However, the case left open the question of whether this power was grounded in a provision of the Basic Law,<sup>99</sup> or in the Chinese Constitution;<sup>100</sup> as each instrument included such an interpretative power, the Hong Kong court probably saw no need to choose between them. *Lau Kong Yung* consequently steers a middle course between *Ma Wai-Kwan* and *Ng Ka Ling*: the question of the fundamental basis of Hong Kong law is left open, and the possibility remains that a future court could hold that the Standing Committee's jurisdiction is confined within the bounds set by the Basic Law, as determined by Hong Kong institutions.

The power asserted in the first *Ng Ka Ling* decision has never been invoked by the Hong Kong courts.<sup>101</sup> If the National People's Congress's

91 See generally *Leeth v Commonwealth* (1992) 174 CLR 455 (Austl.).

92 *Hong Kong v. Ma Wai-Kwan*, [1997] H.K.L.R.D. 761 (C.A.) (H.K.).

93 *Ng Ka Ling v. Dir. of Immigration*, [1999] 1 H.K.L.R.D. 315 (C.F.A.) (H.K.).

94 *Id.* at 318–19.

95 *Id.* at 318.

96 *Id.* at 343; see Albert H.Y. Chen, *The Rule of Law Under "One Country, Two Systems": The Case of Hong Kong 1997–2010*, 6 NAT'L TAIWAN U. L. REV. 269, 271–76 (2011).

97 *Lau Kong Yung v. Dir. of Immigration*, [1999] 3 H.K.L.R.D. 778 (C.F.A.) (H.K.).

98 *Id.* at 798.

99 See XIANGGANG JIBEN FA art. 158 (H.K.).

100 See XIANFA art. 67, § 1 (1982) (China).

101 But see *Hong Kong v. Ng Kung Siu*, in which the Court of Appeal of the High Court did review a decision of the Standing Committee to insert a Chinese law on flag desecration into the Basic Law, but, in the event, found it compatible with the Basic Law. [1999] 1 H.K.L.R.D. 783, 791 (C.A.).

power to amend the Basic Law is limited by the Basic Law,<sup>102</sup> it could be argued that the case places the Basic Law above the Chinese Constitution in the context of the Hong Kong system: Hong Kong judges will only recognize as effective those amendments that are permitted by the Basic Law, after all.<sup>103</sup> On this account, it is the Basic Law and not the Chinese Constitution that empowers the National People's Congress to act in Hong Kong. It is safe to assume that were this question put to the Standing Committee of the National People's Congress, this institution would side with the account of Hong Kong's legal order given in *Ma Wai-Kwan* and reject that articulated in the original *Ng Ka Ling* ruling.

Like the Australian cases, discussed above,<sup>104</sup> the decision in *Ng Ka Ling* creates ambiguity over the fundamental base of the Hong Kong order, an ambiguity that persists after *Lau Kong Yung*—and it is, perhaps, significant that one of the judges in *Ng Ka Ling* was Sir Anthony Mason, who had sat on a number of the key Australian cases discussed earlier.<sup>105</sup> As with the pre-1986 Australian dicta,<sup>106</sup> the judgment in *Ng Ka Ling* should be seen as one that creates constitutional space rather than as an assertion of a power that the courts can utilize: as a matter of raw politics, it is hard, in present circumstances, to imagine a Hong Kong judge declaring a decision of the National People's Congress contrary to Hong Kong law. But the decision does create the possibility that, at some point in the future, Hong Kong's judges could use *Ng Ka Ling* to distance Hong Kong's legal order from that of the Mainland. There is the potential that, in changed times, Hong Kong's courts could set aside attempts by China's institutions to determine the laws of Hong Kong—a potential that might, in itself, help restrain Beijing. And if there were a political will in Hong Kong to push towards constitutional independence, the Hong Kong courts, like their Australian cousins, would have introduced the flexibility into the constitutional order needed to accommodate these aspirations.

### B. *Constitutional Foundations: The Special Problems of Treaties*

The previous Section discussed cases in which judges attempted to determine, or to define, the location of sovereignty, considering whether the legal order of which the court was a part was the legal order of a state, or a legal order contained within a semi-autonomous territory located within a broader constitutional structure. As well as ascertaining the location of sovereignty, judges may also be compelled to determine the constitutional foundations of

102 Article 159 of the Basic Law precludes amendments that “contravene the established basic policies of the People’s Republic of China regarding Hong Kong.” XIANGGANG JIBEN FA art. 159 (H.K.).

103 *Ng Ka Ling v. Dir. of Immigration*, [1999] 1 H.K.L.R.D. 315, 318 (C.F.A.).

104 See *supra* notes 77–88 and accompanying text.

105 Mason sat in *Bisticic v Rokov* (1976) 135 CLR 552, 565–67 (Austl.), *Kirmani v Captain Cook Cruises Proprietary Ltd [No. 2]* (1985) 159 CLR 461 (Austl.), and the post-1986 case of *Leeth v. Commonwealth* [1992] HCA 29 (Austl.).

106 See *supra* notes 77–91 and accompanying text.

the polity: the rules on which the constitution rests, and which then empower and constrain the institutions of the constitution, including, of course, the court itself. Here we examine the special problems of foundational assessment that the court may be asked to make relating to the continuing constitutional significance of a treaty, perhaps one concluded with an outgoing imperial power.

Many polities are established by treaty. On occasion, states have chosen—more or less freely—to join together into a new sovereign order,<sup>107</sup> have agreed to the creation of a new political entity,<sup>108</sup> and have created new states through agreements with indigenous peoples.<sup>109</sup> New Zealand's Treaty of Waitangi<sup>110</sup> and the set of linking treaties that underpin the European Union provide contrasting stories of the constitutional significance of treaties. Indeed, it could be argued these polities provide mirror-image accounts of the possible role accorded to treaties: in New Zealand, Waitangi was initially ignored by the judges but now is accorded increasing significance, whilst the foundational significance<sup>111</sup> of the European Treaties has decreased—though, of course, has not vanished—over time as it has been overlaid by caselaw generated by the Court of Justice of the European Union.<sup>112</sup>

The signing of the Treaty of Waitangi was a vital historical step towards the emergence of modern New Zealand. The Treaty of Waitangi was drawn up between the imperial Crown and a number of Maori chiefs, and, though its meaning is disputed, it is generally regarded as embodying an agreement by the chiefs to transfer sovereignty to the imperial Crown in return for Crown protection of their lands and peoples.<sup>113</sup> The Treaty was subsequently breached in a number of different ways. Hanna Wilberg has argued that the “original” breach was the passing of the Treaty obligations from the imperial Crown—which was a party to Waitangi—to the New Zealand Crown—which was not.<sup>114</sup> The imperial Crown had undertaken to protect the Maori people and had broken that duty by renouncing its right to govern New Zealand. Allied to this “original” breach were many other violations, as

107 As, for example, with the Union with Scotland Act 1706, through which England and Scotland created Great Britain. See An Act for an Union of the Two Kingdoms of England and Scotland 1706, 6 Ann. c. 11 (Gr. Brit.).

108 See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 503–64 (2d ed. 2006).

109 See *id.* at 268–70 (“In principle, then, it was a condition for the valid acquisition of inhabited territory that the indigenous rulers or peoples consented by treaty or otherwise.”).

110 Treaty of Waitangi Act 1975 (N.Z.).

111 F.M. BROOKFIELD, *WAITANGI & INDIGENOUS RIGHTS: REVOLUTION, LAW & LEGITIMATION* 151–58 (1999).

112 See *infra* notes 130–35 and accompanying text.

113 See BROOKFIELD, *supra* note 111, at 108–35.

114 Hanna Wilberg, *Facing Up to the Original Breach of the Treaty*, 2007 N.Z. L. REV. 527, 528.

the New Zealand government failed to respect the Treaty in its acquisition and confiscation of Maori lands.<sup>115</sup>

Faced with this state of affairs, the courts—and the other constitutional institutions of New Zealand—had three options: first, to ignore the Treaty of Waitangi altogether; second, to treat the Treaty as possessing constitutional significance but deny it foundational constitutional authority; and third, to identify the Treaty as New Zealand’s foundational constitutional document, one which limited the constitutionally legitimate range of actions of the New Zealand state, a limit that would extend to the courts and legislature.

The courts initially disregarded the Treaty. In *Wi Parata v. Bishop of Wellington*,<sup>116</sup> Chief Justice James Prendergast secured a place in legal history by describing the Treaty as “a simple nullity” entered into by “primitive barbarians.” Whilst this decision has been both widely criticised and distinguished,<sup>117</sup> Prendergast’s treatment of the Treaty may be contestable, but it was, perhaps, not surprising.<sup>118</sup> Even if the Treaty were a valid international instrument—which Prendergast rejected—it would still not have limited the Imperial Parliament under imperial law. The crucial decision in the case was the determination of the source of the court’s legitimacy: once Prendergast had decided that he sat as a judge of the imperial system, the capacity of Waitangi to limit the Imperial Parliament and, subsequently, the capacity of the Imperial Parliament to confer unfettered lawmaking power upon the New Zealand legislature, was not in any doubt.<sup>119</sup>

Although recent judicial decisions have followed *Parata* in declining to treat Waitangi as a limit on the state,<sup>120</sup> they have increasingly accorded the Treaty constitutional and, more specifically, legal, significance. Waitangi has come to be used as an interpretative tool: where possible, statutes will be construed in a manner that conforms to the principles set out in the Treaty.<sup>121</sup> The Treaty has also had a broader political impact, leading to the creation of the Waitangi Tribunal, a body established to hear disputes over its powers.<sup>122</sup> The Tribunal does not issue binding rulings, but makes recommendations to the government.<sup>123</sup> As F.M. Brookfield has commented, there is an apparent paradox in the Waitangi Tribunal’s position: it is a body set up to inquire into and help resolve breaches of the Treaty, yet the legal order

115 *Id.* at 544 (citing Foreshore and Seabed Act 2004 (N.Z.)).

116 *Wi Parata v. Bishop of Wellington* [1877] NZSC 72, at 78 (N.Z.).

117 *See, e.g.,* David V. Williams, *Judges and Judging in Colonial New Zealand: Where Did Native Title Fit In?*, in *JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW: FROM ANTIQUITY TO MODERN TIMES* 306 (Paul Brand & Joshua Getzler eds., 2012).

118 OLIVER, *supra* note 83, at 30–36.

119 *See generally* Richard Ekins, *The Treaty of Waitangi and the Constitution of New Zealand* (Jan. 20, 2011) (unpublished manuscript) (on file with authors).

120 *See Te Heuheu Tukino v. Aotea Dist. Maori Land Bd.* [1941] NZLR 590 (PC) (N.Z.); F M Brookfield, *Constitutional Law*, 1993 N.Z. RECENT L. REV. 278, 282; *see also* Kerensa Johnston, *The Treaty of Waitangi*, 2004 N.Z. L. REV. 613, 628–30.

121 *See, e.g., N.Z. Maori Council v. Attorney-General* [1987] 1 NZLR 641 (CA) (N.Z.).

122 Treaty of Waitangi Act 1975 (N.Z.).

123 *Id.* § 5.

that established the Tribunal is, itself, dependent upon a breach of the Treaty.<sup>124</sup>

Whilst there is little or no dispute amongst New Zealand's courts<sup>125</sup> over the extent to which Waitangi provides a foundational constraint, this has not prevented some from arguing that New Zealand's lawmaking capacity is restricted by the Treaty.<sup>126</sup> This echoes a similar argument that has been run, from time to time, in the United Kingdom, where it has sometimes been claimed that the Act of Union between England and Scotland constrains the legislative scope of the United Kingdom Parliament, at least in Scots Law.<sup>127</sup> It is hard to imagine, but just conceivable, that Chief Justice Prendergast could have declared that he sat as a judge in a system that had been established and validated by the Treaty of Waitangi. He could have declared that the Treaty limited the imperial Crown and, in consequence, New Zealand's constitutional institutions. Such a decision would have located the court in an alternative legal order: it would not have been an emanation of the imperial legal order, but, rather, a court set within an autonomous New Zealand system that interacts with that legal order. Perhaps some of the arguments over the Treaty of Waitangi should be seen as calls for a shift of this type: a "revolution"<sup>128</sup> in which the judges revise their understanding of the basis of their authority.<sup>129</sup>

The significance of treaties as foundational documents may be disputable in the context of the state, where it could be argued the emergence of the state eclipses the treaty as the source of constitutional legitimacy, but in international organizations, most notably the European Union, treaties indisputably possess continuing constitutional authority. The European Union is a body of limited jurisdiction: its institutions only possess the powers conferred upon them by the Member States.<sup>130</sup> Nevertheless, the European Court of Justice (now renamed the Court of Justice of the European Union) has still been required to make a number of decisions about the legal significance of the underlying treaties. Like many constitutional courts of emerging states, the ECJ was compelled to address questions of its own legitimacy and compe-

124 BROOKFIELD, *supra* note 111, at 151–52.

125 However, the Waitangi Tribunal has occasionally used language that suggests a foundational role for the Treaty. See Ekins, *supra* note 119, at 16.

126 See, e.g., Moana Jackson, *The Treaty and the Word: The Colonization of Maori Philosophy*, in JUSTICE, ETHICS, AND NEW ZEALAND SOCIETY 1 (Graham Oddie & Roy W. Perrett eds., 1992); Jessica Orsman, Note, *The Treaty of Waitangi as an Exercise of Maori Constituent Power*, 43 VICT. U. WELLINGTON L. REV. 345 (2012).

127 See, e.g., Gibson v. Lord Advocate [1975] Sess. Cas. 136, (1975) (Scot.); MacCormick v. Lord Advocate (1953) SC 396 (CS) (Scot.); see also NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 49–62 (1999); T.B. Smith, *The Union of 1707 as Fundamental Law*, 1957 PUB. L. 99.

128 See BROOKFIELD, *supra* note 111, at 169–74.

129 See Wilberg, *supra* note 114, at 549–50 (discussing this idea).

130 Matthew Parish, *International Courts and the European Legal Order*, 23 EUR. J. INT'L LAW 141, 141 (2012).



tence in the early years of its existence. In *Van Gend en Loos*<sup>131</sup> the European Court of Justice declared that the Member States had, by signing the Treaty of Rome establishing the European Economic Community, limited their sovereign rights and had created a new legal order, one that conferred new legal rights on the citizens of these states, which they could vindicate in their domestic courts. This case was quickly followed by *Costa v. Ente Nazionale Energia Elettrica*.<sup>132</sup> *Costa* developed the idea of European law as a discrete legal order, one that was binding both on and within Member States.<sup>133</sup> Not only was European law accessible from within the legal orders of Member States, it also took precedence over conflicting national law.<sup>134</sup> A national judge faced with conflict between national and European law should, therefore, accord priority to the latter—even if the national rule possessed constitutional status.<sup>135</sup>

The decisions made by the European Court of Justice, articulating its understanding of the significance of its foundational Treaty,<sup>136</sup> came as a surprise to some of the Member States who had only recently signed that document,<sup>137</sup> a surprise that was reflected in the decisions of many national courts, discussed earlier in this Article.<sup>138</sup> Many had assumed that the court would conceptualise the European legal order in terms of a standard international law model. Under this model, the Treaty would bind the states in international law, but would not—without further action—be legally effective within domestic legal orders: national sovereignty would have been preserved.<sup>139</sup>

Treaties, like state constitutions, are legal instruments that simultaneously empower and constrain. In both the New Zealand and European examples, the courts were asked to determine their position under the treaty. In New Zealand, the question was, and is, whether Waitangi provided a constitutional foundation for the state that both legitimated and constrained courts and other constitutional institutions. In the European Community, the fundamental status of the Treaty was not in question, but its implications were: the court's existence and jurisdiction clearly depended on the Treaty, but the scope of that jurisdiction was in doubt. In each case, there was no higher body to which the courts could refer the question. The judges must decide on the scope of their own authority: whether, and how, the treaties shape the powers of the court.

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131 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

132 *Costa v. Ente Nazionale Energia Elettrica*, 1964 E.C.R. 587.

133 *Id.*

134 *Id.*

135 *See Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1152–55.

136 *See supra* notes 131–36 and accompanying text.

137 *See generally* J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L.J. 411 (1996).

138 *See supra* notes 10–17 and accompanying text.

139 Parish, *supra* note 130, at 141.

## III. RESPONDING TO CONSTITUTIONAL CRISIS

The examples of the exceptional role of the judge discussed in the previous Part are remarkable, but, in a sense, also not all that surprising. All legal orders must have a starting point, and so all courts will be compelled to consider—or must resolve to studiously ignore—questions about the origins of the legal order and their own position within it. A further, and often more dramatic, set of examples arises when there is the possibility that it might be expedient for the court to bring about a change to the legal order that the legal order, at present, does not permit. In these instances, there is a constitutional crisis that the judges may have the power to bring to an end, but only by acting outside of their legal powers.

A. *Coups and Courts*

Courts are often asked to consider the legal status of regimes established after coups.<sup>140</sup> Following a coup, most of the state's constitutional structures are left unchanged: the usurpers—who are normally a section of the military—claim to have taken control of some of the offices of state, and intend to make use of pre-existing state institutions.<sup>141</sup> In these circumstances, the endorsement, or cooperation, of the courts will often be desired by the usurper.<sup>142</sup> Such a decision may help the usurper present herself as the protector, rather than the destroyer, of the constitution.<sup>143</sup> This symbolism may be reassuring to the leaders of the coup, but, more importantly, may also enhance the perception of their legitimacy amongst their supporters and within constitutional institutions more generally.<sup>144</sup> This perception, in turn, may make it more likely that other elements of the constitutional order will cooperate with the usurpers. Consequently, after a coup, the judges have a certain amount of political capital that they can use to condition the actions of the usurpers.<sup>145</sup> The difficulty faced by the court is that the act of usurpation seems, almost by definition, to run contrary to the state's existing legal structures: to ask the court to legitimate the act of a usurper may seem to amount to asking the judges to render lawful that which is, at the time of the decision, unlawful.

Faced with a coup, the first question faced by the judges is whether the pre-existing constitutional order continues, or whether the coup amounts to

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140 For a broad discussion, see Mahmud, *supra* note 74, at 51–52 (“Often in the wake of coups d’état, courts in common law jurisdictions are called upon to resolve issues of the survival of the constitutional order and the validity, legitimacy, and legislative power of usurper regimes.”).

141 See generally Ozan O. Varol, *The Democratic Coup d’État*, 53 HARV. INT’L L.J. 291 (2012) (describing the role of the military in coups d’état and transitions in the form of government).

142 *Id.* at 318–19.

143 *Id.*

144 Mahmud, *supra* note 74, at 120.

145 Varol, *supra* note 141, at 318–19.

a break in constitutional continuity: a “revolution” in Kelsenian terms.<sup>146</sup> In one of the earliest cases on revolutionary legality, *State v. Dosso*,<sup>147</sup> the Supreme Court of Pakistan purported to apply Kelsen’s model of a legal order to the question. Kelsen’s model of a legal order asserts that each legal order possesses a single supreme rule: the *grundnorm*.<sup>148</sup> The *grundnorm* plays at least two roles in Kelsen’s legal philosophy.<sup>149</sup> First, it enables actors within the legal system to identify proposed norms as valid legal norms; the *grundnorm* identifies a founding constitution that, in its turn, provides a set of rules that could be used to identify and validate lower-level legal norms.<sup>150</sup> Each separate legal system, consequently, has its own, distinct *grundnorm*.<sup>151</sup> Secondly, the *grundnorm* acts as the presupposition of validity that enables legal reasoning.<sup>152</sup> Challenges to the validity of a legal rule may be countered by pointing to a higher norm that empowered the creation of the lower norm, a process that could continue all the way up the legal chain to the *grundnorm*—a norm whose legal validity cannot be demonstrated by reference to another rule, but whose validity has to be presumed to enable legal reasoning. In a revolution the *grundnorm* changes: there is a break in legal continuity—the changes brought about by the revolutionaries cannot be traced back to the old *grundnorm*, and a new legal order is established.<sup>153</sup> In *Dosso*, this aspect of Kelsen’s jurisprudence was relied upon to validate the actions of the usurpers.<sup>154</sup> According to the court, the actions of the usurpers had been effective: they had transformed power into authority, and, as a result of this, the *grundnorm* had changed.<sup>155</sup> In a remarkable ruling, the judges found that because the revolution had been successful it was, itself, a law-creating fact.<sup>156</sup> The legality of the usurpation should be judged by reference to its own success, and not by reference to the old constitution.<sup>157</sup>

The approach of the court in *Dosso* has been criticised at a number of levels. Some of this criticism turns on the correctness of Kelsen’s account of

146 HANS KELSEN, *THE PURE THEORY OF LAW* 209 (Max Knight trans., 1967) [hereinafter *KELSEN, PURE THEORY*].

147 *State v. Dosso*, (1958) PLD (SC) 533, 1 Pak. L. Rep. 849 (Pak.); Mahmud, *supra* note 74, at 54–57.

148 KELSEN, *PURE THEORY*, *supra* note 146, at 8; *see also* HANS KELSEN, *GENERAL THEORY OF LAW AND STATE*, 110–23, 395–96 (Anders Wedberg trans., 1948) [hereinafter *KELSEN, GENERAL THEORY*].

149 J.W. Harris, *When and Why Does the Grundnorm Change?*, 29 *CAMBRIDGE L.J.* 103, 106–07 (1971); *see also* Catherine Richmond, *Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law*, 16 *LAW & PHIL.* 377, 392–94 (1997).

150 KELSEN, *PURE THEORY*, *supra* note 146, at 198–201.

151 Hans Kelsen, *Professor Stone and the Pure Theory of Law*, 17 *STAN. L. REV.* 1128, 1149 (1965).

152 KELSEN, *GENERAL THEORY*, *supra* note 148, at 116–17.

153 *See id.* at 117; KELSEN, *PURE THEORY*, *supra* note 146, at 209.

154 *See State v. Dosso*, (1958) PLD (SC) 533, 1 Pak. L. Rep. 849, 856–58.

155 *See id.* at 858.

156 *Id.*

157 The reasoning in *State v. Dosso* was applied in a number of other Commonwealth “revolutionary legality” cases. *See* Mahmud, *supra* note 74, at 57–60.

a legal order. As many have argued, tying the identity of a legal order to a single, foundational rule is overly reductionist.<sup>158</sup> Legal orders are networks of rules and institutions, and their identity rests on a broad range of these features—an unlawful change to a single rule, or to a number of rules, need not trigger the creation of a new legal order. But even if Kelsen's model is embraced, the decision in *Dosso* is far from inevitable. Faced with the act of a usurper, the Kelsenian judge has the option of upholding the pre-existing legal order; the old *grundnorm* could be reasserted and the usurpation declared unlawful. Indeed, on Kelsen's account, the decision in *Dosso* appears to effect what it seeks to prove: it is the decision of the judges that brought about the creation of the new legal order, not the act of creating a new legal order that has brought about the decision.<sup>159</sup>

Even if we set aside doubts about the reasoning in *Dosso*, the move from the decision that the usurpation established a new constitutional or legal order to the conclusion that the court was required to hold that the usurpers were legitimated by the new system was too quick. Having decided that the old legal order had been brought to an end, the position of the court was thrown into doubt; it was, after all, the old legal order that established the court and empowered the judges. The court could have concluded that the extinction of the old legal order extinguished the court, too. It is sometimes argued that a principled judge, faced with a usurper, should resign rather than attempt to decide the case. *Dosso* opens a more radical possibility: rather than resign, those who had held the office of judge could decide that the coup has removed the legal apparatus establishing the judge and the court. Having so concluded, all that would be left would be a group of people sitting in a nicely decorated room: the institution of the judge and the court would have vanished, with no judge left to rule on the lawfulness of the revolution.

Having concluded that the old legal order had ceased to exist, the former judges of the old order—now effectively private individuals—could accept the implied invitation of the usurper to become judges of a new legal order. If we take *Dosso* at face value, this was effectively what was decided in that case.<sup>160</sup> But as judges of a new legal order there is no reason why the court must, as it did in *Dosso*, provide unqualified acceptance of the usurper's entitlement to govern. As we have seen, courts at the start of constitutional orders often exercise a creative role: setting the constitutional boundaries of state institutions and determining the principles on which the state rests. As judges of a new constitutional order, the supreme court in *Dosso* had wide—even legally unlimited—latitude to decide which of the doctrines of Paki-

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158 BARBER, *supra* note 50, at 145–71 (2010); JOHN FINNIS, *Revolutions and Continuity of Law*, in 4 PHILOSOPHY OF LAW: COLLECTED ESSAYS 407, 413 (2011); JOSEPH RAZ, *The Identity of Legal Systems*, in THE AUTHORITY OF LAW 78, 99 (1979).

159 This aspect of *Dosso* has not been followed by subsequent Pakistani cases on revolutionary legality. See, e.g., *Jilani v. Gov't of the Punjab*, (1972) PLD (SC) 139 (Pak.); *Bhutto v. Army Chief of Staff*, (1977) PLD (SC) 657 (Pak.).

160 See generally *Dosso*, 1 Pak. L. Rep. (SC) 849.

stan's former legal order continued to constrain the usurpers. In effect, they had an opportunity to bargain with the usurpers, a chance to protect certain aspects of Pakistan's constitution in return for legitimating the usurpation.

The second option open to judges following a coup is to declare that the pre-existing legal order continues to apply. Following this decision, four groups of strategies present themselves to the court. First, the court may reject the coup entirely, declaring it unlawful. Second, the court may decide that the coup is legitimated by the rules of the old constitutional order, and those who have brought about the coup have become the lawful government. Third, the court may attempt a middle path: treating the coup as lawful, but setting limits on the duration the leaders of the coup can lawfully hold office. Fourth, the court could declare the legality of the coup a nonjusticiable question: the existing legal order continues, but the court declines to rule on the constitutional status of the usurper.

In some circumstances, the first of these strategies may be open to the judges: it may be possible for the court to re-assert the old legal order and, in so doing, bring the coup to an end. In *Republic of Fiji v. Prasad*,<sup>161</sup> the Fijian Court of Appeal ruled that an attempted coup was unlawful, and the purported revocation of the prior constitution was ineffective. The decision echoes that of the Privy Council case of *Madzimbamuto*,<sup>162</sup> discussed earlier, but this time the judges prevailed: the coup was brought to an end, and the old regime was re-established.<sup>163</sup> The latitude accorded to the judges in *Prasad* was unusual. Where a coup is sufficiently successful for its leaders to apply to the court for confirmation of their legitimacy, it is unlikely—though, as *Prasad* shows, not impossible—that these leaders will accept a wholesale judicial rejection of their actions. On the other hand, it is also possible that where the leaders of a coup feel it politically necessary to ask a court to legitimate their actions, their political situation may be sufficiently weak that they will bow to a judicial rebuke.

The court in *Prasad* identified two principles that Commonwealth courts have used to test the legality of the acts of usurpers: the doctrine of effectiveness and the doctrine of necessity.<sup>164</sup> The doctrine of effectiveness has its origins in *Dosso*<sup>165</sup> but, unlike *Dosso*, the conclusion that a coup has been effective does not require the judge to conclude that a wholly new legal order has been created. The doctrine is either a principle contained within that existing legal order, or is, perhaps, a supra-constitutional principle that exists

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161 *Republic of Fiji v. Prasad*, [2001] 2 L.R.C. 743 (CA) (Fiji); see also Nicholas W. Barber, *State Necessity and Revolutionary Legality in Fiji*, 117 L.Q. REV. 408 (2001); George Williams, *The Case That Stopped a Coup? The Rule of Law and Constitutionalism in Fiji*, 1 OXFORD U. COMMW. L.J. 73 (2001).

162 *Madzimbamuto v. Lardner-Burke*, [1969] 1 AC 645 (PC) (appeal taken from Rhodesia) (UK).

163 See *Prasad*, 2 L.R.C. at 774.

164 *Id.* at 760, 770.

165 See *Dosso*, 1 Pak. L. Rep. (SC) at 858.

outside the legal order to which the judge can refer.<sup>166</sup> Though the court in *Prasad* was careful to renounce any political role, asserting that the principle of efficacy was part of the common law of Fiji, it is hard to see efficacy as anything other than a principle of political morality in the context of that legal order.<sup>167</sup> The claim that effectiveness is a legal principle runs contrary to provisions in Fiji's 1997 constitution: Section 2 asserts that the constitution is the supreme law of Fiji and invalidates laws that are inconsistent with that document.<sup>168</sup> The doctrine of effectiveness is in conflict with this rule: it enables, or even requires, the court to declare lawful actions and rules that are inconsistent with the constitution.

Though the claim of the usurpers ultimately failed, the court identified two groups of considerations relevant to the application of the doctrine of effectiveness.<sup>169</sup> First, the usurpation must have been successful; it must have destroyed the possibility of the old order resuming power and the new rulers must be in control of the territory of the state.<sup>170</sup> Second, there must be evidence of popular acceptance of the new regime; the effectiveness of the new regime must not merely be based on fear and coercion.<sup>171</sup> The best proof of this acceptance would be through electoral support, though the longevity of the regime would also be significant. This second group of considerations—considerations that relate to the perceived legitimacy of the regime—is an important development, absent in *Dosso*. Its significance can be seen in a number of Commonwealth cases on usurpation, where the test of effectiveness has been held to require the judges to examine the public's attitudes towards the usurpers—assessing whether there has been acceptance of the coup,<sup>172</sup> or, more strongly still, whether the public has consented to the new regime.<sup>173</sup>

The doctrine of necessity was also considered, though more briefly, in *Prasad*.<sup>174</sup> The doctrine of necessity provides a legal basis for action that is required in order to protect peace, order, and good government.<sup>175</sup> Additionally, the person pleading necessity must respect the rights of the citizens under the constitution, and not aim to effect or consolidate a revolution under the guise of necessity. The Fijian Court of Appeal rejected the usurpers' claim of necessity for two closely linked reasons. First, the usurpers did not intend to protect the 1997 constitution: their aim was rather to remove

166 See Williams, *supra* note 161, at 91–92.

167 See *id.* at 86.

168 FIJI CONST. 1997, § 2.

169 See *Prasad*, 2 L.R.C. at 770.

170 *Id.*

171 *Id.*

172 See Mahmud, *supra* note 74, at 76–78 (discussing *Liasi v. Attorney General*, 1975 C.L.R. 558 (Cyprus)).

173 See *id.* at 82–84 (discussing an unreported 1977 ruling on the coup in the Seychelles).

174 *Prasad*, 2 L.R.C. at 760–62.

175 See *id.* at 761.

the 1997 constitution and establish an alternative legal order.<sup>176</sup> Second, the usurpers' attempts to make permanent changes to the 1997 constitution went beyond what the doctrine could validate; necessity could have authorized only temporary measures undertaken with the aim of restoring the 1997 constitution.<sup>177</sup>

The doctrine of necessity was successfully invoked, and considered at greater length, in Pakistan's *Military Action Case*,<sup>178</sup> in which the supreme court considered the legality of General Pervez Musharraf's 1999 coup. The supreme court declined to accept the Army's claim that the usurpation was validated by the doctrine of effectiveness, instead invoking the doctrine of necessity to confer limited legitimacy on the usurpers.<sup>179</sup> Two criteria for necessity can be identified in the judgment. First, the action undertaken by the usurper must have been required to save the state from extreme evil.<sup>180</sup> What counts as extreme evil is a matter for the court, but it seems that threats to the democratic processes of the constitution are significant and, perhaps, economic mismanagement and corruption may also be relevant. Furthermore, these evils must be beyond the capacity of regular constitutional institutions to remedy; to satisfy the test of necessity, the welfare of the people must be better served by armed rule than by suffering the evil.<sup>181</sup> Second, the usurper must return the state to normal constitutional government as quickly as possible—though, in contrast to the Fijian ruling, there was no requirement that the usurper *intend* a return to constitutional government at the time of the usurpation.<sup>182</sup>

Setting aside the doctrinal differences between effectiveness and necessity, the political difference, for the court, lies between a doctrine that validates a new constitutional regime within an existing legal order, and a doctrine that permits a temporary shift in constitutional power. In the latter instance, the court strikes an implied bargain with the usurper: the usurper is given a form of legitimacy, but only if there is a commitment to return to constitutional government. Furthermore, this grant of legitimacy is time-limited: the court can use necessity to set the period in which the usurper can legitimately exercise power, or can reserve the capacity to revisit the question of legitimacy at a later date.

The cost of both effectiveness and necessity is that they encourage usurpation and destabilize the constitutional order, encouraging would-be usurpers by opening up the possibility that their actions will be legitimated. Partly for this reason, Tayyab Mahmud has argued that courts should regard coups as nonjusticiable, quintessentially political questions that fall outside of the

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176 *Id.* at 760.

177 *Id.* at 761.

178 *Shah v. Musharraf*, (2000) PLD (SC) 869 (Pak.).

179 *Id.* ¶ 4.

180 *Id.* ¶ 2.

181 *Id.*

182 *Id.* ¶ 72.

realm of the courts.<sup>183</sup> In some instances this may be an attractive option, but in other cases the court may be in a position to mitigate the consequences of the coup. As the Fijian example shows, a court that is prepared to engage with these questions might be able to bring the coup to an end. This case is probably an outlier in terms of judicial power, but the modern development of the tests of both effectiveness and necessity may help shape the way usurpers behave. The effectiveness test now requires some notion of acceptance or consent from the people of the state: the court will not recognize the constitutional shift in power based purely on force and threats. The necessity test is time-limited: the best the usurper can hope for is a temporary conferral of legitimacy by the court.

### B. *Cutting the Gordian Knot*

Finally, there is a set of crisis cases in which other constitutional institutions have reached a deadlock or impasse. In such cases, courts may take it upon themselves to cut the Gordian knot—to take up questions, to accept legal arguments, to issue decisions, or to allow or forbid remedies, in ways that the courts themselves would ordinarily eschew as legally invalid or beyond the competence of the courts. In such cases, courts may perceive themselves as stepping outside of a malfunctioning constitutional order, with a view to taking extraordinary measures to restore it to ordinary functioning.<sup>184</sup>

Let us begin with *Cernauskas v. Fletcher*, a humble but theoretically interesting example from the Supreme Court of Arkansas, an American state, in 1947.<sup>185</sup> A new state statute regulating real property contained a remarkable clause, according to which “[a]ll laws and parts of laws, and particularly [an earlier statute], are hereby repealed.”<sup>186</sup> Read at face value, the result would be a legal vacuum in the state of Arkansas—we might imagine pillagers roaming the streets with legal impunity until the legislature could meet to restore order. This is the point at which even the most hard-bitten textualist flinches. On a strict textualist view, interpolating words based on what the legislature would have said, had it been paying attention or thinking clearly, is a thoroughly illegitimate move—unless perhaps the consequence would be a lawless vacuum.

Accordingly, the Arkansas Supreme Court blandly, and quite correctly, observed that, “No doubt the legislature meant to repeal all laws in conflict with [the new statute], and, by error of the author or the typist, left out the usual words ‘in conflict herewith’, which we will imply by necessary construction.”<sup>187</sup> There is nothing theoretically disreputable about a version of textu-

183 See Mahmud, *supra* note 74, at 131–38.

184 Cf. CARL SCHMITT, *DICTATORSHIP* 20–21 (Michael Hoelzl & Graham Ward trans., 2014) (defining a temporary or “commissary” dictatorship as opposed to “sovereign” dictatorship).

185 201 S.W.2d 999 (Ark. 1947).

186 *Id.* at 1000 (quoting Act 17, 1945 Ark. Acts 30, 34).

187 *Id.*



alism that has this sort of catastrophe override. It is legal theory's equivalent of a position called threshold deontology in moral theory, which likewise commands agents to follow prescribed rules unless extreme harms would ensue.<sup>188</sup> From the judicial standpoint, however, the theoretical reputability of the court's decision is entirely irrelevant. The pragmatic question is what the judges in *Cernauskas* were supposed to do; and they had no real alternative but to do what they did. The only possible judicial decision was the one that would prevent an implosion of the legal system—what in ordinary parlance, and revealingly, is called an “executive decision.”

A more serious instance, along the same lines, was the *Re Manitoba Language Rights* decision from the Supreme Court of Canada in 1985.<sup>189</sup> The Constitution Act 1867<sup>190</sup> and the Manitoba Act 1870<sup>191</sup> required that laws be enacted and printed in both English-language and French-language versions. The requirement had not been fully complied with; for generation upon generation, many laws were enacted in English only. What then was the legal status of the many noncomplying laws? If they were invalid, a legal vacuum would result in the affected area. The court issued a Solomonic judgment, devising an entirely new remedy in order to both uphold the rule of law and also to ward off chaos.<sup>192</sup> The court held the English-only laws invalid, but “deemed” them temporarily valid until they could be properly translated and re-enacted.<sup>193</sup> This remedy—the delayed judgment of invalidity—has since become a standard tool in the judicial repertoire in Canada. At its inception, however, it was born of necessity, in an instance of judicial decisionism, justified if at all by the need to ensure the ongoing functioning of the legal order in Manitoba.

In U.S. constitutional law, the most recent and most famous decision of this sort is undoubtedly *Bush v. Gore*.<sup>194</sup> The decision quieted—as a matter of law, if not of politics—a typhoon of controversy over the votes cast in Florida during the 2000 presidential election, and in effect awarded victory to the

188 For an extended analysis and defence of threshold deontology, see generally EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* (2010).

189 *Re Manitoba Language Rights*, [1985] S.C.R. 721 (Can.).

190 Constitution Act 1867, 30 & 31 Vict., c. 3 § 133 (UK), *reprinted in* R.S.C. 1985, app II, no 5 (Can.).

191 Manitoba Act of 1870, S.C. 1870, c 3, § 23 (Can.).

192 See Peter W. Hogg, *Necessity in a Constitutional Crisis*, 15 *MONASH U. L. REV.* 253, 256–57 (1989).

193 *Re Manitoba Language Rights*, [1985] S.C.R. at 725.

194 531 U.S. 98 (2000) (per curiam). Levinson and Balkin deny that *Bush v. Gore* amounted to a constitutional crisis at all, seemingly on the ground that it was resolved speedily by the courts, and that relevant political actors acquiesced without street protests or “the mobilization of troops.” See Levinson & Balkin, *supra* note 1, at 744. Needless to say, on our account that description is unacceptably narrow; it would imply that courts can never confront constitutional crises at all, even in the coup cases we have discussed, so long as their decisions are respected *ex post*. The problem is that *ex ante*, courts cannot know whether their decisions will be respected, and it is that feature of the situation that makes it a crisis from the court's point of view.

Republican candidate George W. Bush, who went on to a highly consequential eight-year presidency. The critical disagreement that split the Supreme Court five to four, on partisan lines, was not whether the recount could proceed under the standards then being used; seven out of nine Justices agreed that those standards were unconstitutional, because different standards were being used in different parts of the state, in violation of the Constitution's guarantees of equality before the law.<sup>195</sup> Rather, the critical issue was remedial—whether or not the Court should immediately shut down the recount. Looming in the background was the knowledge that, should Florida's vote still be undetermined by a date that was rapidly approaching, the election would be decided by a complex scheme of voting in the U.S. Congress, under the Constitution and an old statute, the Electoral Count Act of 1887, a scheme that had never been invoked, whose operation was uncertain, and that would provide ample scope for partisan shenanigans. Even worse, were the presidential succession still unresolved by January 20 of 2001, an Acting President would have had to be appointed—and due to a bizarre constellation of circumstances, the appointee might have been the Secretary of the Treasury, Lawrence Summers, a man notable for his sundry powers to alienate all.<sup>196</sup>

The five-Justice majority acted decisively to prevent (what it doubtless saw as) a descent into partisan and institutional chaos, ordering an immediate halt to all recounts. The opinion spoke in ordinary legal terms, with one critical and revealing exception: the majority, quite remarkably, explicitly attempted to eliminate the precedential force of its *own* opinion, writing that “[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”<sup>197</sup> One of us has argued elsewhere that an attempt of this sort to write opinions without precedential force is inherently doomed, because it is ultimately up to the future to decide what will or will not count as a precedent.<sup>198</sup> But the validity of that claim is neither here nor there for present purposes. The majority's very attempt betrays a view that its action was exceptional—an attempt to step outside the ordinary bounds of judicial action on an extraordinary occasion.

Plausibly, *Bush v. Gore* is best seen as a cautionary tale about exceptional interventions by courts, explicitly or (in this case) implicitly justified by pragmatic necessity. The problem is that the Court's intervention was in fact quite possibly premature and unnecessary. Many constitutional crises in American history, including many electoral controversies, have been resolved politically, despite the pressures of partisan deadlock. As James Bryce observed, partisan deadlock is a temporary and short-run phenomenon;

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195 *Bush*, 531 U.S. at 98.

196 RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 138 (2001).

197 *Bush*, 531 U.S. at 109.

198 Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1770–71 (2013).

when the issue is highly salient, democratic public opinion becomes engaged and eventually throws its irresistible weight into the balance in favor of one party or the other.<sup>199</sup> The other party backs down and gives away the lion's share of the concessions, and the dispute is resolved upon more or less favorable terms.

Of course no one will ever observe the counterfactual; it is impossible to know whether allowing the election to be thrown into the House of Representatives would have produced a partisan collision of constitution-wrecking proportions. Judge Richard Posner defended *Bush v. Gore* as a "pragmatic solution to a looming national crisis."<sup>200</sup> Spinning out a "worst-case scenario" in which the "[t]he Constitution puts the counting of electoral votes in the hands of Congress with no hint of a judicial role," Posner concluded that the Court had no option but to intervene, in a bid to prevent chaos.<sup>201</sup> This is of course the classical justification cited by men on white horses, who claim that the ordinary operation of democratic institutions cannot be trusted to avert the worst possibilities.

An alternative possibility, however, is that allowing the prescribed institutional processes to unfold would have resulted in a more enduring political settlement. Bush's first term, at least, was conducted under a kind of haze of constitutional and political illegitimacy arising from the very circumstances of his quasi-election; this was emphatically one of the circumstances that the Justices ought to have taken into account. As Ronald Dworkin observed in reply to Posner's argument, it is a curious pragmatism that fails to consider all relevant costs and benefits of all possible courses of action,<sup>202</sup> including the legitimacy costs of pragmatism itself.

As a temporary expedient, justified by an implicit claim of necessity, the merits of *Bush v. Gore* are highly dubious, and at best unclear. But no one doubts that it must be justified, if at all, in terms of this sort. The basis for *Bush v. Gore*, if there is one, can only be extra-legal; it is that extraordinary action was (perceived to be) necessary to prevent system-wide chaos.

#### IV. ON BOOTSTRAPPING AND DECISIONISM

Our principal aim has been to offer a taxonomy and analysis of exceptional adjudication by constitutional courts. In other words, we have attempted first to describe what courts actually do in various types of exceptional cases, and second to indicate some means by which, given their goals (or the goals of the median or controlling voters within these multimember

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199 See Adrian Vermeule, "Government by Public Opinion": Bryce's Theory of the Constitution 24 (Harv. Pub. L. Working Paper No. 11-13, 2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1809794](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809794).

200 RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 322 (2003).

201 See Richard A. Posner, *The 2000 Presidential Election: A Statistical and Legal Analysis*, 12 SUP. CT. ECON. REV. 1, 28-29 (2004).

202 Ronald Dworkin, *Introduction to A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 1, 31-43 (Ronald Dworkin ed., 2002).

bodies), they might best proceed. Let us step back from the subcases and try to see the picture as a whole.

In a range of settings, courts face problems that press the limits of the normal legal order, either because there is an immediate crisis that threatens the existence of a given constitutional regime (Part III), or because there is a transition between constitutional regimes (Part II), or simply because the courts are challenged to explain the grounds, scope, and limits of the authority of actors within the constitutional regimes—either themselves or others (Part I). In any of these cases, dilemmas of *bootstrapping* inevitably arise. Where the very grounds of the constitution's authority are themselves challenged, it is not straightforward for courts to know how to give any response at all *qua* courts. Like a person struggling to rise out of quicksand, who has no firm ground from which to push upwards, there is no theoretical bedrock on which courts may stand.

Strictly theoretical and jurisprudential approaches to the bootstrapping problem seem doomed to fail. Our approach is very different. We have attempted to view the problems in their natural habitats, as it were, by showing that bootstrapping is a real-world problem that arises in a surprising range of cases, with surprisingly high frequency. And we have attempted to show that in exceptional cases, courts invariably resort to a kind of *constitutionally inflected decisionism*. Above all, they do not succumb to paralysis, but instead draw upon general principles of constitutionalism and pragmatic judgments in some uncertain and heavily circumstantial mix. This constitutional decisionism is of course thoroughly “political,” but it is not political in the same way that, say, decisions by the central committee of a political party are political. Rather, it draws upon the distinctive training, knowledge, and political circumstances of courts. We will conclude by offering some generalizations about the sources and methods courts draw upon in the course of constitutional decisionism.

### A. *Principles of Constitutionalism*

In U.S. constitutional law, scholars have argued that there are no free-standing “principles” of constitutionalism, such as the separation of powers, federalism, or democracy.<sup>203</sup> And, of course, as a legal matter this must be the case: legal principles, whether labeled “constitutional” or not, only exist if they are to be found within legal sources. Consequently, as a matter of law, there are only constitutional provisions, which instantiate or protect these principles to some degree or in some ways, but not fully and not in all possible ways.

It is arguable, though, that law does not exhaust the range of considerations that apply to judges. Sometimes other considerations—including moral principles that are not found within legal sources—may be relevant. Where these moral principles have a special connection to the structuring of

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203 See John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014).

the state it may be appropriate to think of them as principles of constitutionalism: principles that may be reflected in the legal order, but which are not subsumed by their reflection.<sup>204</sup> The constitution is a network of particular deals, compromises, and tradeoffs, such that an attempt to generalize principles and use them in constitutional interpretation will inevitably amount to a half-truth: the best that can be done is to identify factors and principles judges should consider, whilst recognizing that they rarely point towards simple or obvious answers.

Whatever merit that argument might have in ordinary constitutional contexts, it has even greater merit in the extraordinary contexts we have examined. These cases arise, necessarily and by definition, when it is imperative that courts resolve cases whose outcome is radically underdetermined by standard legal sources. (By “resolve,” we do not at all mean that the court is simply to impose its own vision of the good. Shortly we will urge that courts in extraordinary situations should also display an extraordinary degree of political sensitivity and epistemic humility.) Such cases lie at a kind of constitutional frontier, such that multiple competing principles of constitutionalism will often be implicated more or less directly. Indeed these cases are often “hard cases” precisely because, and to the extent that, there are competing principles of constitutionalism in play. Constitutional decisionism then amounts not to principle-free political decisionmaking (if there is such a thing), but an attempt to reconcile, balance, and accommodate constitutional imperatives, in a kind of optimization of principles.<sup>205</sup> An example is the Manitoba language rights litigation, in which the Supreme Court of Canada used the expedient of a temporarily delayed judgment of invalidity to trade off, and accommodate, competing imperatives of nondiscrimination and the viability of the system of extant laws.<sup>206</sup>

One of the most significant considerations that applies to courts in these “bootstrapping” situations is what might be termed the principle of *effectiveness*: the requirement that the constitution, and through it, the state, be structured in such a way that it can operate successfully. The judges ought, and often do, strive to ensure that the capacity of state institutions, including courts, to act is preserved and fostered. This can be most clearly seen in cases like *Manitoba* and *Cernauskas*, where the court was faced with an apparently clear legal issue that, if the court applied the law, would prove a disaster for the state. But many of the other situations discussed in this Article can also be seen as instances in which the principle of effectiveness is in play.

Where the court is faced with a changed political consensus about the basis of the constitutional order, it will often be appropriate for the judges to alter the legal side of a constitution to accommodate this new agreement. There is little point—and potentially much cost—in the courts holding to

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204 See generally N.W. Barber, *Constitutionalism: Negative and Positive*, 38 DUBLIN U. L.J. 249 (2015).

205 Cf. ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* 52 (2014) (defending an optimizing approach to constitutional tradeoffs).

206 See *Re Manitoba Language Rights*, [1985] S.C.R. 721 (Can.).

the older settlement. The *Ma Wai-Kwan* case is a particularly clear example of this: for the Hong Kong courts to have ignored the transfer of power from Britain to China would have been unimaginably foolish.<sup>207</sup> Many of the autochthony cases fall into this category. They are legally interesting—as this Article has argued, there is no legal justification open to the courts in these situations—but they are politically boring. As state officials, the correct course of action for the judges was obvious: the principle of effectiveness required the acceptance of the new political consensus.

In other instances, the court creates space in which a new political consensus can emerge by introducing the potential for change into the law. The ambiguities surveyed in the Australian examples, and the later Hong Kong cases, show judges—perhaps deliberately—introducing flexibility into the constitution to accommodate the ways in which the political consensus may develop.

The principle of effectiveness may also require, or weigh towards, the court empowering bodies to create constitutional structures in fledgling states. *Mizrahi Bank*, *Marbury v. Madison*, and, perhaps, *Van Gend en Loos* were cases in which courts empowered bodies to develop the constitutional order. *Mizrahi Bank* empowered the Knesset to entrench laws and, in so doing, create constitutional structures that could regulate future generations of Israel's politics. *Marbury* made the American Constitution judicially enforceable, empowering both state courts and lower federal courts to enforce it as against the federal government. Whilst in *Van Gend en Loos*, the court created structures that would help ensure the effectiveness of Union institutions.

It would be a mistake to equate the principle of effectiveness with a crude defence of stability. Evil constitutional orders—like North Korea—may be stable, but they are not structures that help the state to flourish or promote overall well-being. Rendering the constitution effective may also require the preservation of democratic structures and other institutional arrangements that contribute to flourishing. The principle of effectiveness engages with other principles of constitutionalism; courts in the exceptional situations discussed in this Article may seek to protect or foster these features of the state. In those cases in which the German Constitutional Court defines the relationship between the German Constitution and European law, this motivation is rendered explicit. The German Constitutional Court has upheld the primacy of the German Constitution over European law to protect, at least in part, the democratic structures of the German state. Similarly, in the coup cases the courts have sometimes used their position to pressure usurpers into respecting key elements of the constitutional order. In Pakistan's *Military Action Case* the court effectively bargained with the usurpers, granting limited approval of their actions in return for the preservation of features of Pakistan's constitutional structures.

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207 See *Hong Kong v. Ma Wai-Kwan*, [1997] H.K.L.R.D. 761 (C.A.) (H.K.).

B. *Political Sensitivity*

In the extraordinary cases we have examined, the necessity for decision is thrust upon the courts. It does not at all follow, however, that there is any necessity for the court to make a decision strictly according to its own lights, as it thinks best. Rather, precisely because of the extraordinary character of the occasion, prudence counsels that courts should consult a wider spectrum of views and opinions than it otherwise would, and indeed that courts should display greater openness to arguments and considerations that would ordinarily be classed as “political.” And indeed that is what we observe, as courts unavoidably forced to decide exceptional cases—and thus unable to resort to the techniques of avoidance, delay, and modesty that go under the label of “the passive virtues”<sup>208</sup>—tend to relax rules for participation, allowing extraordinary interventions by public parties, briefs by amici curiae, and other expanded informational inputs.

The basic reason for this openness to the political is that ambient public opinion will be more influential in determining the constraints on feasible actions open to the court and in determining whether the court’s decision will create an enduring settlement. Ordinary cases often lack salience to public opinion and this gives elites, such as judges, greater freedom of action in a political sense, although the legal materials will often prove more constraining. In extraordinary cases, the situation is reversed. The legal materials radically underdetermine outcomes, affording judges greater freedom on that margin, but salience is increased and the decision is far more likely to attract the attention of general public opinion writ large—what James Bryce described as the irresistible power of the sovereign master in all democratic polities.<sup>209</sup>

Public opinion is doubtless sometimes malleable, and indeed partly an endogenous product of what judges do, rather than representing a strictly exogenous constraint. But that is more likely to be true in the long run. In the short run, the clear view of a clear national majority on a salient question is irresistible, as James Fitzjames Stephen argued.<sup>210</sup> In many of the cases discussed in the first Part of this Article, the political consensus was clear: within the Member States of the European Union there is little eagerness to accept European law as trumping national constitutions, and the granting of constitutional autonomy to New Zealand and Australia was endorsed by the people of those territories and by the British state. Sensible judges, who want their decisions in such cases to create stable and enduring settlements rather than to provoke a political backlash or to prove evanescent, will think twice about political constraints and political reactions—even if they believe that

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208 See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111 (2d ed. 1986).

209 See Vermeule, *supra* note 199, at 17.

210 James Fitzjames Stephen, *Parliamentary Government*, 23 *CONTEMP. REV.* 1, 1–19, 165–81 (1873); see also Adrian Vermeule, *The Force of Majority Rule*, in *MAJORITY DECISIONS: PRINCIPLES AND PRACTICES* 132 (Stephanie Novak & Jon Elster eds., 2014).

this sort of consideration is no part of the judicial role in ordinary cases. This constraint is the flipside of the significance of the role of political consensus, discussed in the previous Section. Not only is it right—in many instances—for the court to seek to give effect to a settled political consensus within the constitution, a court that ignores such a clear consensus will struggle to maintain its authority.

Where there is a settled political consensus, the institutional implications are clear: the judge should normally seek to give constitutional effect to this broad agreement. But in some of our examples public opinion is divided, and divided in an interesting way. Sometimes, there is a dispute about who constitutes the public. In the Irish and Hong Kong cases—and perhaps in the Rhodesian case, too—there was an underlying dispute about who constituted the “public” and, in consequence, where the judge should look to identify a putative consensus. In the Irish example, from the Privy Council’s perspective both the Westminster and Irish polities were relevant to ascertaining any such consensus—whereas for the Irish courts, it was the Irish people alone whose voices mattered. In Hong Kong, the constitutional ambiguities about the relationship between that territory and the Mainland echo—or are generated by—ambiguities over the extent to which the Hong Kong people consider themselves to be part of the Chinese political order. In these cases, then, public opinion and political consensus are relevant, but it may fall to the judge to decide what “the public” should be for these purposes, as well as whether a broad consensus exists within this group. Here, the judge must reflect on the boundaries of the political unit—the group whose views should count towards the decision—and the judge may be led back to the questions of effectiveness discussed in the previous Section: What boundaries are most likely to enable the polity to function successfully, and how likely is it that the judges’ decision on this question will stand?

Given the importance of public opinion, judges deciding these extraordinary cases should be willing to consult a far broader range of sources than they ordinarily do. At a minimum, they should be willing to accept submissions from a greater variety of interested political actors in a greater variety of forms—not merely briefs *amicus curiae*, but official letters and public statements of position should all be fair game. At a maximum, judges should rely upon whatever informal data they find useful for assessing the likely consequences for public opinion of ruling in one way or another. Lon Fuller satirized such practices by creating a “Judge Handy” who wrote opinions based on public opinion polls,<sup>211</sup> but Fuller’s logic was weak and his conclusion impractical. His logic was weak because he confused the issue of *decisionmaking* with the very different issue of *transparency*. The proposition that judges should take account of all relevant information about ambient public opinion says nothing at all about whether judges should discuss or cite such information. Fuller’s conclusion was impractical because there is no real alternative to political sensitivity in extraordinary, highly salient cases.

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211 Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 637 (1949).



Where the foundations of the constitutional order are in play, to act in a blind and heedless fashion, oblivious to aroused public opinion and to the political consequences of decision, is to court disaster.

The issue of transparency arises in a second way in many of these foundational cases. In a recent book, Oren Gross and Fionnuala Ní Aoláin argue that where emergencies require extra-legal action from officials, this should be done openly.<sup>212</sup> Officials should explain why they felt it was necessary to act outside the law, in the hopes that the legislature will validate their conduct after the fact. Their argument aims to accommodate the need—hopefully, a rare need—for extra-legal acts, whilst also creating a constitutional structure to review the propriety of those actions.

Whatever the merits of this approach, it is far harder to implement when the court is the institution considering acting in this manner. It is likely that a significant part of the practical power of the court comes from its assertion that it is declaring what the law is, that it is not merely inventing new legal rules. The public—if not legal scholars—may believe that the decisions of courts should be respected because the judges have used their legal expertise to discover pre-existing, pre-agreed answers to disputes. In many of the cases in this Article, the efficacy of the court's decision might be undermined if the judges admitted that they lacked a legal basis for their decision. Indeed, in the coup cases, the whole rationale of the case turned on the capacity of the courts to grant or withhold legitimacy. If, after a coup, a court seeks to engage with the usurpers—perhaps in order to preserve, as far as possible, the positive features of the old system—it embarks on a task that, whilst having the potential to bring enormous rewards, also presents serious institutional challenges. If the court is discovered to have entered into covert discussions with the usurpers—even if these “negotiations” are conducted through hints and signals during the trial—the exposure of the raw politics behind its decision may render its judgment less effective. And in those cases involving the identification of the locus of sovereignty, the court might risk its authority if it admitted that there was only one outcome open to it, or if it confessed that the choice was, in essence, a political one. And, as we suggested with reference to *Bush v. Gore*, it is pragmatically impossible for a court to take consequential action whilst ensuring that it creates no precedent for the future. Whatever the court does, the future may decide to treat that action as a precedent, de jure or de facto; the current court lacks control over the matter. In these exceptional cases, then, there may be an argument for caution in the extent to which judges are open about the reasons that motivate their decisions. Whilst the court should, sometimes, be open to a wider range of considerations than is normally appropriate, it should also be cautious in the extent to which it explains the outcome of the case.

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212 See OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 110, 111–12 (2006).

C. *Epistemic Humility and Deference*

Finally, that courts should consult all available information, including information about ambient public opinion, does not at all entail that courts should go on to simply decide what *they* think best, all things considered. The information base for a decision and the rule that the decisionmaker applies to that base are, analytically speaking, entirely different issues. Their connections, if any, are contingent and pragmatic rather than conceptual.

We mean to underscore an institutional point that we have already mentioned, and that is often overlooked. Circumstances may thrust upon courts the obligation to make extraordinary decisions, but nothing in that fact, by itself, entails anything at all about how those decisions are to be made. In particular, the circumstantial obligation of decision, by itself, does not at all imply that the court should decide according to its own first-order views. Rather, an epistemically and politically modest court may well decide that the best decision is to defer to the views of other institutions, or to let nonjudicial processes unfold in their own way, as we have suggested with respect to *Bush v. Gore*. Or the court may open the possibility of constitutional change without itself effecting that change: the examples drawn from Australia before 1986 and from modern-day Hong Kong can be seen as attempts to create space in which other institutions, including the citizenry, can experiment with, and press for, constitutional transformations.

In every constitutional law seminar, a student points out that the “passive virtues”<sup>213</sup>—the arts of prudence by which courts avoid or postpone decisions on the merits—are themselves a type of active decision. Of course that is true as far as it goes, but they are not the same *sort* of decisions as full merits decisions in which the court enforces its own first-order views upon the polity. The same point applies here. Decisions to defer to other institutions, or to unfolding nonjudicial processes, although themselves an exercise of judicial choice in extraordinary circumstances, are not the same sort of decision as the choice to lay down constitutional rights and obligations for other actors. The distinctive virtues of courts—their relatively formal and structured processes of deliberation, their evenhanded intake of information, and their prohibition of the informal *ex parte* communications that are hallmarks of legislative and administrative information-gathering<sup>214</sup>—may often prove to be of least advantage in extraordinary circumstances. Extraordinary cases feature some combination of high political salience, unusual facts, critical stakes, and legal ambiguity, such that lawyers’ distinctive training and competence is less valuable than in ordinary cases. In such circumstances, institutional humility will often be the better part of prudence, and of wisdom.

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213 See BICKEL, *supra* note 208, at 111.

214 NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 123 (1994).

## CONCLUSION

In the nature of things, constitutional decisionism is heavily circumstantial; it is difficult to offer crisp generalizations. That said, the exceptional cases that call for decisionism by courts fall into surprisingly recurrent patterns, as does the judicial response to such cases. Our aim here has been modest—to offer a taxonomy of exceptional adjudication, and an analytic introduction both to the bootstrapping problem that inevitably arises in exceptional cases, and to the constitutional decisionism that inevitably results. If we have not provided a general decision procedure for such cases, it is because—the exception being what it is—there simply is no such procedure.