Judicial self-empowerment and unconstitutional constitutional amendments

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In the context of global judicial aggrandizement, many courts have developed and accepted the unconstitutional constitutional amendments doctrine. However, with the exception of some case studies, there is little comparative scholarship on the causes of judicial expansion in this area. This article addresses this gap by examining the development of the power to review amendments in three constitutional systems: Colombia, India, and Malaysia. The article argues that in all three cases, one of the important elements that contributed to the consolidation of this power is the strategic behavior of courts. To understand the importance of strategy, the article suggests a rational choice theory of judicial empowerment, according to which judges estimate the costs of potential backlashes and act in certain moments and in certain ways so as to make political reaction unlikely. It further suggests three different types of strategies utilized by these courts that helped curb political backlash. First, courts engaged in timing strategies: they decided the scope of their own power when political competition was high and the likelihood of backlash was low. Second, courts engaged in outcome strategies: they expanded their own power while simultaneously giving the dominant political coalition a "win." Third, courts employed case selection strategies: they picked mundane and low-stake cases in order to decrease the incentives for political reaction. The article concludes with some considerations on the limits of judicial strategy.

1. Introduction

Constitutional courts have assumed a position of great prominence in many democracies. Their powers now extend greatly over all sorts of political and legal controversies.[1] In the context of this important transformation, few developments

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1 *See* Ran Hirschl, Towards Juristocracy: The Origins and Consequences of New Constitutionalism (2007); The Global Expansion of Judicial Power (C. Neal Tate & Torbjörn Vallinder eds., 1995).

seem more significant than the migration of the unconstitutional constitutional amendments doctrine and its enforcement by courts.[2] In many different systems, no longer do legislatures have the last word over disputes by enacting constitutional amendments: courts have challenged the legitimacy and legality of many such attempts, and often strike down formal changes to the constitutional text.[3]

One of the interesting aspects of this transformation is that diffusion of this power has occurred mostly through a process of judicial self-empowerment, not direct constitutionalization. Unlike with ordinary constitutional review,[4] the migration of such an idea is mostly an initiative and enterprise of courts. And when constitutions do expressly limit or prohibit the power of review, those provisions are often expanded judicially or read out of the constitution entirely.[5] Although the road to self-empowerment has, as we shall see, been a bumpy one that has created significant tension among different branches of government, many courts have in the long run successfully expanded their reach over alterations to the constitution.

But how have courts been able to accomplish this? After all, the limitations of courts in enforcing their own judgments and facing up to political power are well known. In Alexander Hamilton's famous observations, "the judiciary. . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment."[6] If it is true that "there is no obvious reason to suppose that [courts] would prevail in confronting formidable political power,"[7] how can one explain the rise of courts in such a delicate area of constitutional politics? Indeed, some experiences seem to suggest that "courts have little recourse when powerful political interests align against them."[8]

In this article, the answer I offer for the success of constitutional courts in self-empowering themselves relates to the strategies they employ vis-à-vis other political branches.[9] By using this power in certain times and in specific ways, courts have been able to build up their authority and power over time to curb negative reactions from

[2] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea*, 61 Am. J. Comp. L. 657 (2013).

[3] *See, e.g.*, Yaniv Roznai, Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (2017); Richard Albert, *The Power of Judicial Nullification in Asia and the World*, *in* The Law and Politics of Unconstitutional Constitutional Amendments in Asia 231 (Rehan Abeyratne & Ngoc Son Bui eds., 2021).

[4] Constitutional review has migrated primarily through constitutionalization. For data regarding the constitutions that establish constitutional review, see Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J. L. Econ. & Org. 587 (2014).

[5] This was the case, for example, of the Constitutional Court of Colombia, which textually could only review whether the amendment procedure was correctly followed, but expanded its jurisdiction to cover also the substance of amendments. In Turkey, a similar procedural limitation was also read broadly by the Constitutional Court to include substance.

[6] The Federalist No. 78, at 412 (Alexander Hamilton) (J. R. Pole ed., Hackett Publishing Company, 2005).

[7] Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 Wis. L. Rev. 683, 689 (2016).

[8] Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 Duke L.J. 1, 3 (2016).

[9] For one account of the importance of strategy, see Dixon & Issacharoff, *supra* note 7, at 689 ("In constitutional law, as in other domains of political life, tactics and strategy matter").

other political powers. These strategies can be understood in the following way: courts act when the costs of backlash are too high, and/or act in ways that make political backlash unlikely. Although this is certainly not the only reason for the success of this transformation, the multiple cases I explore here show that judicial strategy has helped courts consolidate power.

In advancing this argument, the study further complements the observation of many scholars regarding the importance of strategy in processes of self-empowerment.[10] To this end, the article proposes a rational choice theory of self-empowerment, which proceeds on the assumption that courts (and other actors) act and react strategically in order to achieve their goals—in this case, the power of judicial review of constitutional amendments. This approach, as we will see, provides a framework for understanding why courts decide the way they do, and why and when other political actors respond to courts.

I am primarily concerned here only with the power of courts to invalidate constitutional amendments. There are two important reasons for looking at this power as opposed to other instances of self-empowerment. First, it presents a particularly interesting case as it is arguably the strongest and most consequential power a court can have; after all, it gives courts a type of supremacy in which they have the last word over changes to the fundamental law.[11] For this reason, strategy is likely to be utilized in these cases with more frequency by courts and may have an outsized importance to successful self-empowerment. Second, examining only the power to review amendments ameliorates many of the methodological difficulties that comparative endeavors present by isolating one common challenge: faced with a similar problem, what different approaches do courts employ? As many have noted, understanding how different systems deal with similar issues is one of the main goals of comparative constitutional studies.[12]

In order to better visualize the strategic element in judicial self-empowerment of unconstitutional constitutional amendments, this article puts aside the intricacies of judicial doctrine that serve as the legal underpinnings for judicial review of

[10] *See* Lee Epstein & Jack Knight, *Mapping Out Strategic Terrain*, *in* Supreme Court Decision-Making: New Institutionalist Approaches 215 (Cornell W. Clayton & Howard Gillman eds., 1999); Gretchen Helmke, Courts under Constraints: Judges, Generals, and Presidents in Argentina (2004); Lee Epstein, Jack Knight, & Andrew D. Martin, *The Political (Science) Context of Judging Respondents*, 47 St. Louis U. L.J. 783 (2003); Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 Wm. & Mary L. Rev. 2017 (2015); Lee Epstein, William Landes, & Richard A. Posner, The Behavior of Federal Judges (2013); Lee Epstein & Keren Weinshall, The Strategic Analysis of Judicial Behavior: A Comparative Perspective (2021) (describing the strategic approach as "Judges are strategic actors who realize that their ability to achieve their goals depends on the preferences of other actors, the choices they expect others to make, and the institutional context in which they interact").

[11] Richard Albert, *How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments*, 77 Md. L. R. 181 (2017) (discussing the idea that courts are only really "supreme" when they have power to review amendments).

[12] Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 Pa. St. Int'l L. Rev. 319 (2009).

amendments and focuses attention on constitutional politics and political context.[13] By doing so, it is possible to see more clearly how the diffusion of this concept is due in large part to the strategic behavior of key actors, in particular courts.[14] The descriptive theory offered here argues that, in order to navigate the threat of backlash, courts have utilized a combination of different strategies to alter the costs and benefits of political reaction, including the timing of decisions, the cases that are decided, and the content of the decision. I argue that this may help us better understand judicial empowerment surrounding constitutional amendments.

After analysis of three case studies—India, Colombia, and Malaysia—I suggest a typology for describing the different tactics courts use to empower themselves in regard to unconstitutional amendments. First, with case-selection strategies, courts pick cases from their docket that are low stakes and thus less likely to provoke a negative reaction from political branches. Second, with outcome strategies, courts declare their power to review amendments but render a final outcome that is favorable to the dominant political coalition thus decreasing the incentives for backlash. Third, with timing strategies, courts strategically select particular moments in which it is costly for political branches to react to their decisions. Although these different types, at least on some occasions, are somewhat interchangeable and hard to distinguish, they help illustrate the variety of moves courts have employed.

These strategies show how courts can take advantage of particular institutional features (such as the ability to control their docket and the timing of their decisions) as well as specific political contexts (such as political competition and elections) to push through decisions that might otherwise be politically intractable. What unifies these different strategies, however, is that they all act upon an estimation of the costs associated with political backlash: by being aware that the costs of retaliating against courts are higher at certain moments, or that certain types of decisions will have a greater effect on political mobilization and coordination, courts are able to make their decisions stick even when they challenge the authority of unified political coalitions.[15] Furthermore, the implications of these basic insights allow us to theorize about how and when courts will successfully acquire power over amendments.[16]

The article also describes different patterns and commonalities of self-empowerment strategies in relation to judicial review of constitutional amendments. It argues that although courts approach the challenge of expansion considering their own political

[13] I do not mean, however, that legal provisions, doctrines, and other factors are not important in processes of self-empowerment, but only that this article is concerned with other political variables. I discuss this further in Section 5.

[14] For a recent similar approach, see The Law and Politics of Unconstitutional Constitutional Amendments in Asia (Rehan Abeyrante & Ngoc Son Bui eds., 2021).

[15] *See* Sergio Verdugo, *How Judges Can Challenge Dictators and Get Away with It*, 59 Colum. J. Transnat'l L. 554 (2020).

[16] These implications, however, might also be applicable to other cases of self-empowerment, although review of amendments is in some ways particularly delicate and thus more subject to careful use of strategies. In powers of less import, courts might more easily get away with self-empowerment without heavy use of strategy.

circumstances, the strategies they employ are surprisingly similar: they wait for particular time openings, select specific types of cases, and/or decide in ways that appease ruling political factions. Although some scholars have engaged with some of these hypotheses of judicial strategy in specific jurisdictions,[17] this article notes a broader convergence in the ways in which courts go about their own expansion by observing multiple courts in different systems.[18] Moreover, instead of focusing on single decisions, this article also engages in a historical examination of how power is slowly built up in courts: it follows the development of this power through the years and decades to examine how courts establish power in incremental ways, specifically by combining multiple different strategies over time. It argues that self-empowerment generally does not occur in a single moment but is rather a long process with certain critical junctures.[19]

To flesh out these claims, the article is structured as follows. First, it discusses the migration of the unconstitutional constitutional amendments doctrine (Section 2). Second, it examines the development of the unconstitutional constitutional amendments doctrine in three different countries: Colombia, India, and Malaysia (Section 3). It then establishes a rational choice framework in order to understand how and when courts might suffer backlash from other political actors, arguing that backlash is the product of costs and benefits associated with strong responses (Section 4). Lastly, it compares and describes the different strategies these courts utilized and tentatively discusses some potential implications (Section 5).

2. Constitutional review of constitutional amendments

In the mid-twentieth century, as the wave of democratization took hold post World War II, the idea that courts could strike down amendments was fanciful at best, and absurd at worst. However, much has changed in the last seventy years. Many courts began slowly acquiring this power and successfully limiting the amendment power of supermajorities. The first emblematic cases can be found in India, Colombia, and Germany, all of which fashioned sophisticated doctrines, such as the "replacement doctrine"[20] or the "basic structure doctrine"[21] that were ultimately accepted by political elites. After these initial success cases, the migration of the unconstitutional constitutional amendment doctrine spread wildly in all four corners of the globe.[22] Adapting and copying these doctrines, other courts also began asserting their ultimate authority

[17] *See* Vicente F. Benítez-R, *"With a Little Help from the People": Actio Popularis and the Politics of Judicial Review of Constitutional Amendments in Colombia 1955–90*, 19 Int'l J. Const. L. 1020 (2021); Helmke, *supra* note 10.

[18] For a similar recent effort, see Yvonne Tew, *Strategic Judicial Empowerment*, 71 Am. J. Comp. L. (forthcoming 2024), manuscript at 85.

[19] *See* Tom Ginsburg, *Courts and New Democracies: Recent Works*, 37 Law & Soc. Inquiry 720 (2012).

[20] On the construction of this in Colombia, see Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia*, 11 Int'l. J. Const. L. 339 (2013).

[21] *See* Sudhir Krishnaswamy, Democracy and Constitutionalism in India 70–131 (2009).

[22] *See* Kemal Gözler, Judicial Review of Constitutional Amendments 103 (2008).

over amendments and were in many cases able to fend off significant backlashes to their authority.[23]

In this context, constitutional review of amendments has arisen primarily through a process of self-empowerment. It has for the most part not spread through constitutionalization, with the exception of some constitutions which have *ex ante* powers over amendments (such as Ukraine and Moldova). According to an initial estimation, roughly two-thirds of courts with powers to review amendments have established these powers themselves, while many courts in the other third have expanded their powers beyond what the text of the constitution would seem to allow.[24] Therefore, despite its potentially controversial nature, self-empowerment regarding this type of power is surprisingly common.

Why is it that political elites are embracing this shift into judicial supremacy? We are not discussing, after all, a marginal power that has little implication for the legal and political life of a country, but rather a momentous transfer, which essentially gives courts the final word over the most fundamental of disputes. This would seem, at least at first glance, to present a puzzle: what motivated the "acceptance" of this power by political elites? To answer this question, let us first examine in detail three cases of judicial self-empowerment regarding judicial review of constitutional amendments.

3. Three cases of self-empowerment

To examine self-empowerment, I have selected three examples of judicial expansion over amendments. First, I examine the Supreme Court of Colombia and the development of the power to review amendments under the Constitution of 1886. As I shall describe, the Court began slowly developing the doctrine in the mid-twentieth century and had clear review powers over amendments by the time the 1991 Constitution was enacted. The second case study is India and the development of the "Basic Structure Doctrine," which would come to influence the development of the power to review amendments around the world, particularly in Asia. Third, I discuss the Federal Court of Malaysia's forays into review of amendments and its development regarding review of constitutional amendments.

The selection of these cases follows what has been called the "most similar cases approach." As described by Ran Hirschl, this method requires studies to "compare cases that, as much as possible, are identical but for the factors of causal interest,"[25] and it

[23] *See* Roznai, *supra* note 2.

[24] Initial estimation in Nicola Tommasini & Pedro Riccetto, Database of Constitutional Review of Constitutional Amendments (in production) (on file with authors). National courts that have declared (at one point or another) they have power to review amendments or original constitutional provisions, although such powers are not explicitly established in the constitutional text: Colombia, Croatia, Ghana, India, Mexico (although case law is not established), Mongolia, Nicaragua, Pakistan, Peru, Taiwan, Tanzania, Uganda, Uruguay, Zambia, Zimbabwe, Algeria, Austria, Bangladesh, Benin, Brazil, Bulgaria, Comoros, Cyprus, Czech Republic, El Salvador, Gambia, Germany, Guatemala, Guinea, Guyana, Honduras, Kazakhstan, Kenya, Lithuania, Madagascar, Malawi, Mali, Niger, Philippines, Slovakia, Thailand, Turkey, Venezuela.

[25] Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law 246 (2014).

is of particular importance to small-N studies because it "helps to 'isolate' the effect of the key independent variable on the dependent variable, creating a partial substitute for statistical or experimental control."[26] For the purposes of this article, these cases were selected because they share important political and legal similarities that might otherwise compromise comparison.

First, all three systems are democracies that have wrestled with elevated degrees of political instability. It is important to control for this variable because it impacts a well-known factor of judicial empowerment and independence: political competition.[27] Stable democracies in general have higher degrees of political competition than unstable ones. All three of the selected countries, during the periods under analysis, were under persistent pressure from anti-democratic and authoritarian forces, albeit to different degrees. The Emergency Rule decreed by Indira Ghandi, for example, posed a threat to the constitutional order of India.[28] In Malaysia, the dominance of a single political coalition for the vast majority of its new constitutional system and the emasculation of the judiciary in 1988 contributed to the lack of a desirable degree of political competition. Indeed, Malaysia is often characterized as a "hybrid regime" or "flawed democracy."[29] And in Colombia, the country went through periods of political liberalism but also others in which it was under dictatorial rule (e.g., Rojas from 1955 to 1956). Therefore, although these different courts are acting within very different political contexts, they are all operating within systems in which political instability is a known and present factor.

Second, from a legal perspective, all these courts had the difficult task of changing the legal status quo in order to secure self-empowerment (a skeptic might say they had to "change" the law). In particular, none of the constitutions they acted under explicitly established power to review amendments, nor did they establish any textual limitations to the amendment power (e.g., eternal or unamendable clauses).[30] In Colombia, the Supreme Court had to reverse its own precedents in which it established it did not have power to review amendments. In India, the Court had at a certain point in time not only to overcome its own precedent on the matter, but had also to invalidate a constitutional amendment that prohibited review of amendments.[31] And in Malaysia, the Federal Court had to overcome decades of well-established precedent

[26] *Id.*

[27] John Ferejohn, Frances Rosenbluth, & Charles R. Shipan, *Comparative Judicial Politics*, *in* The Oxford Handbook of Comparative Politics 727, 733–4 (Carles Boix & Susan C. Stokes eds., 2009); John Ferejohn, *Judicial Power: Getting It and Keeping It*, *in* Consequential Courts: Judicial Roles in Global Perspective 349 (Diana Kapiszewski, Gordon Silverstein, & Robert A. Kagan eds., 2013); Rebecca Bill Chávez, John A. Ferejohn, & Barry R. Weingast, *A Theory of the Politically Independent Judiciary: A Comparative Study of the United States and Argentina*, *in* Courts in Latin America 219 (Gretchen Helmke & Julio Rios-Figueroa eds., 2011).

[28] *See* W. H. Morris-Jones, *Creeping but Uneasy Authoritarianism: India, 1975–6*, 12 Gov't & Opposition 20 (1977).

[29] *See* Economist Democracy Index, www.eiu.com/n/campaigns/democracy-index-2022/ (last visited Jan. 20, 2024). Malaysia has historically been classified as a "flawed democracy" by this index but was most recently demoted to a "hybrid regime."

[30] *See* Roznai, *supra* note 3, at 236–74.

[31] Krishnaswamy, *supra* note 21.

denying that courts had review powers over amendments, as well as an amendment which removed all "judicial power" from courts.[32] In sum, these courts all faced the difficult and similar task of "changing the law" regarding their own powers.[33]

Third, the cases present a unique opportunity for studying self-empowerment not as the result of a single pivotal moment, but rather as a long, drawn-out process, in which there are advances as well as setbacks. Court advances generally did not go unanswered and political actors have attempted to push back. But these courts have been successful in the long run. This temporal dimension, oftentimes lacking in strategic accounts,[34] allows for a broader perspective of the complexity of judicial self-empowerment and shows how a combination of different strategies can be crucial for this process. Another good reason for selecting these different cases, in particular Colombia and India, is that it presents a different perspective of them. Given some of these cases are frequently studied and discussed by scholars, it is important to offer different readings of them to further enrich scholarly discussion.

3.1. The Supreme Court of Colombia

One of the first cases of judicial review of constitutional amendments hails from Colombia. The development of the unconstitutional constitutional amendments doctrine in that country occurred, first, under the auspices of the previous constitution of Colombia. After several momentous political changes were reflected in constitutional amendments, the Supreme Court was able to ride different waves of political unification and fragmentation by being strategic about when it decided cases and how it decided them. Judicial strategy played an important role by allowing the Court to avoid direct conflict, at times under authoritarian rule. While there is much written about the role of strategy of the Colombian Court within the system of the 1991 Constitution,[35] I investigate here the lesser known case of the Supreme Court of Colombia under the previous constitutional arrangement.[36]

In order to understand how the Court was able to construct this power, it is important to first examine the institutional features of this Court and its historical background. Judicial review in Colombia began under the auspices of the 1886 Constitution, which gave the Supreme Court of Colombia (SCC) the power to decide when Congress chose to override the President's veto on a bill. The Court's powers were expanded considerably in 1910, when the legislature introduced a series of changes to the framework of judicial review, including giving the SCC powers of abstract review of legislation.[37] Particularly important here is the creation of the *actio popularis*, which is a procedural

[32] *See* A. J. Harding, *The 1988 Constitutional Crisis in Malaysia*, 39 Int'l & Comp. L. Q. 57 (1990).

[33] I make no claim here on whether these interpretations were correct, but simply examine the political context and dynamics in which they took place. For a discussion on how these judicial innovations redeemed the constitution in Malaysia, see Yvonne Tew, Constitutional Statecraft in Asian Courts (2020).

[34] Ginsburg, *supra* note 19, at 738.

[35] *See* Dixon & Issacharoff, *supra* note 7; David Landau, *Constitutional Backsliding: Colombia*, *in* Constitutionalism in Context 497 (David S. Law ed., 2021).

[36] *See* Bernal, *supra* note 20.

[37] Manuel Jose Cepeda-Espinosa, *Judicial Activism in a Violent Context*, 3 Wash. U. Global Stud. L. Rev. 529 (2004).

instrument that allowed any Colombian citizen to challenge the constitutionality of state action. It was especially important because it gave the SCC time to consider when and how to decide. As Benítez argues, "the public action provided a considerable pool of cases to the SCC, that is, it gave it several opportunities to entertain, revisit and manage its competence to examine amendments."[38] However, the system contained an "imprecise definition of the scope of the Court's functions, which created frequent conflicts with other authorities."[39]

The development of the SCC's case law can be roughly separated into three distinct phases, all of which are characterized by different levels of political fragmentation and application of the unconstitutional constitutional amendment doctrine. During the first period, which ran from 1955 to 1971, there was very little political competition in Colombia. From 1955 to 1956, Colombia was under the dictatorship of Rojas, which controlled the legislature. During his short reign, Rojas "took advantage of having a malleable body with the power to pass amendments and tailored it to his agenda"[40] by enacting amendments that essentially suppressed electoral contestation. Although these would be prime examples of unconstitutional constitutional amendments and despite challenges to their validity being brought to the Court, the judges did not face Rojas head on and at every opportunity the Supreme Court rejected invitations to strike down amendments and was "clearly deferential to Rojas."[41] Not only were the Court's preferences aligned with those of Rojas, but it is unlikely that the Court would have survived direct confrontation with him.[42]

When Rojas was ousted, a different temporary junta took hold of Colombian political powers. But to retrieve conditions of political competitiveness, the junta had to pass a number of amendments which it technically did not have authority to pass. It therefore decided to organize a plebiscite, in the hope that "popular support would be enough legal basis to amend the constitution."[43] The amendments were once again questioned at the Supreme Court, which refused to engage in any type of review. Again, although no longer under Rojas's control, the dominant political forces were unified in their support of the amendment. However, the Court signaled that the power to amend might not be without limit, and several judges dissented and argued that amendment would be unconstitutional. In this context, as Benítez-R emphasizes, "the SCC took this opportunity and, in a typical second-order deferral, planted the seeds for the new thesis that would be assertively applied in better times."[44]

As Colombia developed in 1972 into a constitutional democracy, the conditions of political unification that once did not allow the Court to act had vanished. It is no coincidence that it was in this period that the Court first quashed an amendment and began constructing a doctrine on the limits of amendment powers. In 1974, Alfonso

[38] Benítez-R, *supra* note 17, at 5.
[39] Cepeda-Espinosa, *supra* note 37.
[40] Benítez-R, *supra* note 17, at 10.
[41] *Id.* at 9.
[42] *See* Mario Cajas-Sarria, *La justicia constitucional del general Gustavo Rojas Pinilla*, 17 Historia Constitucional 273, 275–6 (2016).
[43] Benítez-R, *supra* note 17, at 11.
[44] *Id.* at 12.

Lopez was elected president of Colombia and, as often occurs in systems with analytical constitutions, many of his campaign promises revolved around amending the Constitution. The government thus altered the amendment procedure of the constitution, in which a limited constituent assembly would convene and deliberate on proposals to alter the constitution. In fact, some of the amendments to be considered would significantly impact the SCC, including the creation of a Constitutional Court and subjecting the Court to a disciplinary regime. The decision to convene an assembly, however, was heavily disputed in Congress.[45]

It was within this scenario of increased political competition that the Court struck down the amendment that convened an assembly. It overruled its previous findings and concluded that the amendment power was a "constituted" as opposed to constituent power, and thus any alterations to the constitutions were subject to review under constitutional limitations—in particular, Congress could not destroy the political identity of the Constitution.[46] Importantly, the Court handed down its decision soon before López was to exit power and a new presidential campaign for his successor (Julio Turbay) was in full swing. Moreover, the presidential race was tight and there was uncertainty as to whether López would succeed in electing Turbay. Under these conditions, the costs for attacking the Court for its ruling were simply too high. The Court was aware of these favorable conditions and decided to expand its powers. And, indeed, although the decision was criticized, it was obeyed without further backlash.

When Turbay was elected, he too promised to change the Constitution to institute his policy program, but this time the changes would be done through the ordinary congressional amendment process. When he amended the Constitution and altered the SCC in the manner Lopez had originally envisioned, the Court was in a potentially more complicated position. Unlike Lopez, Turbay was not on his way out when the amendments were enacted, and they had ample support of different political forces. But the Court strategically navigated this context, in particular by utilizing its temporal discretion and deciding the issue almost two years after the amendments were passed and when elections were only months away. In reviewing the amendment, the Supreme Court established that it did not properly follow the constitutional amendment procedure and was thus unconstitutional.[47] The Court came to this conclusion despite the fact that these procedural standards were not explicitly set out in the Constitution but were rather to be found in sparse statutes.[48]

The last phase is marked by new efforts to replace the constitution. By the time a new constitution was being actively considered in Colombia, the Supreme Court's jurisdiction over amendments was consolidated and accepted by political elites, to the point that the events that led to the enactment of a new constitution closely considered

[45] Mario Alberto Cajas-Sarria, *Judicial Review of Constitutional Amendments in Colombia*, 5 Theory & Practice Legis. 245 (2017).

[46] Corte Suprema de Justicia [C.S.J.] [Supreme Court], mayo 5, 1978, M.P: José Velasco, Gaceta Judicial [G.J.] (No. 2397, p. 104).

[47] Corte Suprema de Justicia [C.S.J.] [Supreme Court], noviembre 3, 1981, M.P: Fernando Uribe, Gaceta Judicial [G.J.] (No. 2405).

[48] Benítez-R, *supra* note 17, at 17.

the Court's judgments about the legality of constitutional change and were determinant in the selection of constitutional replacement via a constituent assembly as the appropriate option.[49]

3.2. Supreme Court of India

Although the Indian Constitution does not contain any explicit unamendable clauses, the Supreme Court of India, in a series of celebrated decisions, established that the Constitution's basic elements cannot be amended. This "basic structure doctrine" is undoubtedly one of the most successful and influential doctrinal constructions of constitutional law and has spread across multiple jurisdictions.[50] But the history behind the creation of this doctrine is not a simple one. The clashes between the Court and dominant political coalitions endured for a significant time until finally a settlement was reached regarding the limits of amendments power and the ultimate power of courts over changes to the constitution. It was, as we shall see, in large part due to the strategies employed by the Court that it was able to successfully establish itself as a success case of judicial supremacy.

The saga began soon after the independence of India, in which a law that sought to redistribute land was struck down by the Patna High Court. The Court argued that the law violated the equality principle "by providing a graduated scale of compensation that was related to the size of the landholdings, set up an unreasonably discriminatory classification."[51] In response to the judgment, the Indian Constitution was amended to limit compensation in cases of government takings. Initially, when the amendment was challenged in *Sankari Prasad v. India*, the majority of the Supreme Court decided that the amendment power was not limited by constitutional fundamental rights.[52] This essentially gave government the power to change the constitution without limits. The Court upheld this position in *Sajjan Singh v. State of Rajasthan*, by confirming that the constitution did not place material limits on amendments.[53]

However, the clashes regarding the right to property and fair compensation continued. Despite its initial hesitation to strike down amendments, the Court began favoring property holders and the need for just compensation when exercising ordinary judicial review. Responding to these rulings, the government enacted another amendment that, among other provisions, shielded forty-four laws from judicial review. In *Golaknath v. State of Punjab*, the Court departed from its original stance and determined that the power to amend could not abridge fundamental rights, citing that Article 13 of the Constitution applied also to amendments.[54] This is effectively the case that "began the great war. . . over parliamentary supremacy versus judicial supremacy,"[55] as the "intense political reaction to the Court's move left little doubt that something very important had occurred."[56]

[49] Cajas-Sarria, *supra* note 45, at 402.
[50] Roznai, *supra* note 2.
[51] Kameshwar Singh v. State of Bihar (1951).
[52] Sankari Prasad v. Union of India (1952) 1 S.C.R. 89.
[53] Sajjan Singh v. State of Rajasthan (1965) 1 S.C.R. 933, 933–4.
[54] Golaknath v. State of Punjab (1967) 2 S.C.R. 762, 762.
[55] Granville Austin, Working a Democratic Constitution: A History of the Indian Experience (2003).
[56] Gary J. Jacobsohn, Constitutional Identity 53 (2010).

Striking down the enacted amendments, however, would likely mean the Court's demise. For this reason, it softened the impact of this innovation in different ways, the most important of which was the application of the technique of prospective overruling, according to which this new understanding only applied to future amendments, not the ones in question in *Golaknath*. Thus, although the amendments were incompatible with the constitution, they were not invalidated. Nonetheless, the Court continued to resist many of the changes championed by Indira Ghandi and the Court's intervention began to seriously affect her political agenda.[57]

Indira Gandhi responded and enacted the Twenty-Fourth and Twenty-Fifth Amendments, which, among other things, determined that the amendment power was unlimited. These amendments, in turn, were challenged before the Supreme Court in *Kesavananda Bharati v. State of Kerala*,[58] in which the Court abandoned the finding in *Golaknath* and argued that Article 13 did not apply to amendments. However, a majority of justices also determined that the amendment power did not extend to the basic structure of the Constitution.[59] In this momentous ruling, "the Court in effect designated itself enforcer of constitutional entrenchment at its deepest level, able now to nullify the results of legislative rule making even when such action expressed itself in the exalted form of the constituent power."[60] Again, the Court demonstrated it was aware of the tense political context and attempted to avoid more serious political conflict by refusing to apply these considerations to the amendments under question. Still, Ghandi took exception to the decision and decided to continue attacking the Court by, among other things, appointing a new Chief Justice, in defiance of the traditional appointment of the most senior justice, and soon thereafter packing the Court.

After the 1971 election was invalidated by the High Court, Indira Gandhi declared a state of emergency and facilitated the passage of several amendments which were designed to reverse the decision and keep her in power. For that purpose, the Twenty-Eight and Twenty-Nine Amendments sought to establish that the proclamation of a state of emergency could not be reviewed by the Court and the statutes that were utilized to invalidate Gandhi's election were altered and made immune to adjudication. After these multiple amendments, the Supreme Court, in *Indira Nehru Gandhi v. Raj Narain*, reversed the judgment of the High Court and validated Gandhi's election.[61] However, it also determined that excluding laws from judicial review violated basic elements of the Indian Constitution and was unconstitutional.[62]

[57] On these decisions, see Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, *in* Consequential Courts: Judicial Roles in Global Perspective 262 (Diana Kapiszewski, Gordon Silverstein, & Robert A. Kagan eds., 2013).
[58] Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461.
[59] Krishnaswamy, *supra* note 21.
[60] Jacobsohn, *supra* note 56, at 55.
[61] Indira Nehru Gandhi v. Shri Raj Narain, (1975) 2 S.C.C. 159.
[62] *Id.*

Further backlash ensued. In 1976, a new amendment was passed that prohibited the exercise of judicial review of amendments by courts. It read: "No amendment of this Constitution. . . shall be called in question in any court on any ground", and "for the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution." Soon after the amendment was passed, however, Ghandi lost the 1977 elections. In an increased environment of political competition, the newly elected Janata party did not reverse the amendments, but the context was now more favorable for court intervention.

In *Minerva Mills Ltd. v. Union of India*, the amendment that established unlimited amendment powers and prohibited judicial review of amendments was challenged before the Supreme Court.[63] In its judgment, the Court argued that "Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features."[64] It therefore declared that the amendments were unconstitutional and void. Since *Minerva*, the Court has applied the basic structure to several other cases, and it is now an established and accepted power of Indian courts.[65] As a consequence of these complex sequence of events,

> [T]he "Basic Structure Doctrine" has been accepted and applied in various other cases and is now an established constitutional principle in India. It now includes general features of a liberal democracy, such as the supremacy of the Constitution, the rule of law, separation of powers, judicial review, judicial independence, human dignity, national unity and integrity, free and fair elections, federalism, and secularism.[66]

Indeed, within that extensive list, we might also include the power to review amendments.

As Mate shows, the history of the Supreme Court of India is one of selective assertiveness, in which the Court decides cases in specific ways and times. Moreover, the Court's self-empowerment is not a straightforward or linear process. There were incessant backlashes; moments in which the Court backed down and those in which it stood its ground. But despite these numerous conflicts, the Court expanded its powers in strategic ways by softening its decisions, slowly constructing a sophisticated doctrine, and picking the moments in which to make bolder claims regarding its power.[67]

[63] Minerva Mills v. Union of India, AIR 1980 SC 1789.
[64] *Id.*
[65] Roznai, *supra* note 3, at 46 ("Since Minerva Mills, the 'Basic Structure Doctrine' has been accepted and applied in various other cases. . .").
[66] *Id.*
[67] Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, *in* Consequential Courts: Judicial Roles in Global Perspective 262 (Diana Kapiszewski, Gordon Silverstein, & Robert A. Kagan eds., 2013).

3.3. The basic structure doctrine in Malaysia

Another interesting case study of judicial strategy can be found in Malaysia and the recent decisions of the Federal Court declaring the existence of a "basic constitutional structure" that must be protected judicially. To understand these decisions, however, it is necessary to take a step back and examine the Court's long trajectory since the independence of Malaysia. As I will show, the Malaysian story of judicial independence is "shaped by political crises and conflicts where courts have been drawn in to resolve the struggle for political power between competing political factions."[68] In this context, the Court had initially rejected the doctrine in 1977 but was able to assert broader power after employing different types of strategies. Changes in the political context of Malaysia, in particular the end of the dominance of a single party, were important for the Court to assert its power.[69]

As Jaclyn Neo recounts, there are broadly three periods that characterize the relationship between political powers and the judiciary since the 1957 Constitution of Malaysia formally put an end to colonial rule.[70] The first period, which lasted from the founding to 1988, is marked by systematic deference of courts to political powers. The unwillingness of courts to actively and consistently overrule political powers led to the natural rejection of the basic structure doctrine, which at the time was under discussion in India. In *Loh Kooi Choon v. Government of Malaysia* (1977), Lord Raja Azlan Shah of the Supreme Court concluded that the doctrine was not applicable in Malaysia as it "concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power."[71] The Supreme Court later reaffirmed its conclusions in *Phang Chin Hock v. Public Prosecutor* (1988), determining that "it is enough for us merely to say that Parliament may amend the Constitution in the way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself."[72]

The second period is characterized by a lack of judicial independence, as interbranch relations were put under severe stress in what became known as "the 1988 constitutional crisis."[73] After a disputed electoral and political battle between two different camps of the dominant political coalition (United Malays National Organization, UNMO) which involved the High Court, tensions between the executive and judiciary had reached an all-time high. Despite attempts to relieve this conflict—for example, the Court wrote a letter to the King requesting his intervention—disagreement continued to mount and led to the removal of the President of the Court on grounds

[68] H. P. Lee & Marilyn Pittard, *Asia-Pacific Judiciaries: Themes and Contemporary Perspectives*, *in* Asia-Pacific Judiciaries: Independence, Impartiality and Integrity 1, 5 (H. P. Lee & Marilyn Pittard eds., 2017).

[69] *See* Hp Lee & Yvonne Tew, *The Law and Politics of Unconstitutional Constitutional Amendments in Malaysia*, *in* The Law and Politics of Unconstitutional Constitutional Amendments in Asia 87 (Rehan Abeyrante & Ngoc Son Bui eds., 2021).

[70] Jaclyn L. Neo, *A Contextual Approach to Unconstitutional Constitutional Amendments: Judicial Power and the Basic Structure Doctrine in Malaysia*, 2020 Asian J. Comp. L. 1, 9.

[71] Loh Kooi Choon v. Government of Malaysia (1977) 2 MLJ 187.

[72] Phang Chin Hock v. Public Prosecutor (1980) 1 MLJ 70, 72.

[73] Harding, *supra* note 32.

of misbehavior.[74] Ultimately, an amendment was passed in March that struck a severe blow to judicial independence by stripping "judicial power" from the Supreme Court.[75] The Court was disempowered, and there was little it could do at the time to resist the backlash. The obliteration of its independence led to judicial indifference towards the basic structure in the context of Malaysia for the next couple of decades. As Dinah Shah observes, "the lesson to be drawn from the Malaysian. . . experience is that retaliation against judicial activism can be quick and conspicuous, with damning consequences for the judiciary."[76] The Court's independence, furthermore, was undercut by the fact that appointment and removal powers are largely concentrated in the executive branch,[77] which was particularly strong considering the historical domination of a single coalition, who easily removed the Court from political disputes when it posed a potential threat.

It is in the third period, after efforts to establish "a credible, effective and independent judiciary,"[78] that the courts began slowly chipping away at the 1988 amendments and *Loh Kooi Choon*. In particular, the Supreme Court began reasserting the power of courts to interpret the constitution and protect the constitutional limitations to political power. In *Sivarasa Rasiah v. Badan Peguam*, for example, the Court "rejected the position in *Loh Kooi Choon* as having incorrectly adopted the doctrine of parliamentary sovereignty."[79] Although the Federal Court dismissed the challenge, it crucially began planting the seeds of a basic structure doctrine. In signaling a potential change in its position, the Court stated that "it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional."[80]

This strategy continued, as other courts discussed and engaged with the basic structure doctrine, although to "varying degrees of acceptance" and without striking down an amendment. It was in *Semeyih Jaya Sdn Bhd v. Pentadbir Daerah Hulu Langat* that the Court more clearly endorsed the basic structure doctrine.[81] As with the main issue of disagreement during the construction of the basic structure in India, the question at hand concerned fair compensation for public takings. In sum, the Court was faced with the question of whether the procedure established by law for determining compensation and the limited scope of the High Court in reviewing such determination were constitutional. On the one hand, the 1988 amendment constrained the Court's jurisdiction to statutory provisions. But was the 1988 amendment itself constitutional? Although there is some ambiguity in the Court's decision, the Court seemingly endorsed the basic structure doctrine and stated that the amendment violated

[74] For a detailed account, see *id.*
[75] Federal Constitution, art. 121, as amended by the Constitution (Amendment) Act 1988.
[76] Dian A.H. Shah, Constitutions, Religion and Politics in Asia 170 (2017).
[77] *Id.* at 170, 176.
[78] Neo, *supra* note 70.
[79] Sivarasa Rasiah v. Badan Peguam Malaysia (2010) 2 MLJ 333.
[80] *Id.* at 341.
[81] Semenyih Jaya Sdn Bhd v. PTD Hulu Langat (2017) 3 MLJ 561.

the separation of powers and the independence of the judicial branch.[82] Following *Semenyih Jaya*, the Court went further in *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors* (2018) by declaring that "the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution" and that it "cannot be abrogated or altered by Parliament by way of a constitutional amendment."[83]

To understand why the Court altered its position, it is important to appreciate the political context of Malaysia and recent transformations in its electoral landscape. Since its independence from Britain, Malaysia has been under the rule of a single political coalition (Barisan Nasional, BN). However, the 2018 election put an end to the supremacy of BN by electing the Pakatan Harapan (PH) coalition and broke, for the first time, with the country's historical single-party dominance. It is within this increased environment of political competition that the Court found space to assert the basic structure doctrine, as the costs of delegitimizing became much higher than they once were.

As we shall see, the Malaysian Court has been able to assert its power by "acting strategically, by accommodating such constraints," thus allowing "courts to avoid direct conflict with other branches of government, especially if they anticipate that such confrontation may ultimately prompt political actors to attack the Court and its independence."[84] Indeed, according to Shah, the decisions that led to the obliteration of judicial independence in Malaysia "adhered to a path of strict legalism," in which the Court was less concerned about its political context and more formalist in its approach to legal interpretation. However, the Court's recent decisions are "indicative of the court's recognition of the strategic constraints surrounding it."[85]

4. Judicial self-empowerment: A rational choice framework

The cases I have just examined bear witness to the importance of judicial strategy and "selective assertiveness"[86] in processes of self-empowerment. To better understand this strategic behavior, however, a theoretical framework is required. For this purpose, I conceptualize strategy under the rational choice approach, which considers that courts will make rational judgments and decisions in order to advance their goals and objectives. By the same token, other political actors (legislatures, prime-ministers, presidents, etc.) will equally (re)act rationally to court decisions—and on whether or not to take on the courts.

Strategic approaches have proven to be a fruitful framework of analysis. Twenty years ago, Epstein and Knight described a "strategic revolution" in the study of judicial behavior, noting that efforts were beginning to point towards the rationality

[82] Neo, *supra* note 70, at 22.
[83] Indira Gandhi ap Mutho v. Pengarah Jabatan Agama Islam Perak (2018) 1 MLJ 545.
[84] Shah, *supra* note 76, at 184.
[85] *Id.* at 186.
[86] Yasser Kureshi, *Selective Assertiveness and Strategic Deference: Explaining Judicial Contestation of Military Prerogatives in Pakistan*, 28 Democratization 604 (2021).

paradigm, according to which "(1) social actors make choices in order to achieve certain goals; (2) social actors act strategically in the sense that their choices depend on their expectations about the choices of other actors; and (3) these choices are structured by the institutional setting in which they are made."[87] For Epstein, this revolution "may represent the most important development in the law and courts field since behavioralism took hold in the 1950s."[88]

Strategic accounts represented an important advancement in relation to the then dominant "attitudinal" approaches, which attempted to demonstrate that judges decide cases almost exclusively according to their "sincere policy preferences."[89] Strategic approaches considered that courts suffer many different types of constraints, in particular due to their institutional and political environment. While it might be true that judges prefer certain policy outcomes, they are aware of the fact that they must sometimes forgo their immediate preference in search of second-best options or be strategic about the ways in which they push their agendas. Among the many types of constraints judges face, scholars have examined the need to form majorities within courts, appeal to public opinion, avoid and consider potential overrides and backlashes, and others. Unlike the attitudinal approach, which was developed mainly to explain the way judges decide in the United States, the strategic approach considers different institutional and political arrangements and can thus be applied to a multitude of different systems for comparative purposes.

In recent years, strategic accounts have been criticized for their apparent rejection of law as a source of constraint. To address this, some scholars have opted to adopt a historical-institutional model that "regards institutions, including courts, as historically determined sites of purposive activity"[90] in which "institutions do not constrain what political actors do as constitute the normative environment in which political actors operate."[91] While this is an important criticism, these other approaches suffer from their own shortcomings[92] and, most importantly, do not reject strategic accounts but merely "seek[] to discern patterns of historical evolution and political development that demonstrate that conscious, jurisprudential decisions of judicial actors matter."[93]

While this article does not apply a historical-institutional approach, as it is still mostly concerned with strategic considerations, it examines the different case studies within a historical lens and considers the different normative backgrounds in order to account for those potential sources of constraint. As I shall demonstrate, the rational choice approach is still important as it helps our understanding of why actors decide the way that they do, and can uncover the reasons for timing, form, and content of

87 Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 Pol. Rsch. Q. 625 (2000).

88 *Id.*

89 Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002).

90 Theunis Roux, The Politics of Principle (2013).

91 *Id.*

92 Edgar Kiser & Michael Hechter, *The Debate on Historical Sociology: Rational Choice Theory and Its Critics*, 104 Am. J. Socio. 785 (1998).

93 Nancy Maveety, *Part 3: The Historical-Institutionalists Pioneers*, *in* The Pioneers of Judicial Behavior 285, 285 (Nancy Maveety ed., 2003).

decisions.[94] Nonetheless, the limitations and shortcomings of rational choice theory will to some extent be present in the model presented here as well; it will take limited account of cultural and other legal factors that might have played a role in these court self-empowerment processes.

A rational-choice theory of self-empowerment begins with the claim that some courts have the objective of retaining the last word over constitutional amendments. Courts can have this objective due to purely selfish reasons, for pragmatic reasons, or simply because they believe the legal system properly understood grants them this power. For the theory, these motivations are not important; what matters is that they have this goal and will rationally attempt to achieve it by strategically navigating their specific political context.[95] In this perspective, it is possible that judges do not conceive of their decision-making as "strategic," but rather that they are employing these tools in "a manner that involves an appreciation of the value of judicial statecraft."[96] As Mann has observed, the idea of strategy only recognizes that judges engage in rational calculation that is "free from normative grey areas,"[97] but these types of decision can be understood and evaluated as hard cases in which courts act to reinforce constitutional commitments within real social and political contexts.

The difficulty of achieving this goal varies significantly from system to system. In some systems, for example, the constitution and broader constitutional culture may already provide a firm enough basis from which the court may move without hesitation to declare its power over amendments. In Brazil, for example, the existence of eternal clauses in the constitution seems to have provided enough political and legal basis for the Court to swiftly declare ultimate control over amendments, with strategy playing a minor (or perhaps non-existent) role. In the cases we have examined, however, there is great skepticism regarding the function of courts in relation to amendment review: the constitutions of the examined cases provide little support for the thesis (they may in fact explicitly reject it) and political actors resist an expansion of the court's role. In such systems, there is greater demand for judicial strategy in self-empowerment given the constitutional and political resistance to power expansion.

In general, the theory posits that in this last group of cases (when there is skepticism over whether courts have this power and/or the foundation for it is politically or legally uncertain), judges estimate whether there is likely to be political backlash to judicial review of amendments by examining the costs and benefits of political reaction. In order to avoid conflict, courts act when the balance of that cost-benefit is tilted towards the unlikelihood of reaction. They will assume that political coalitions make reasonably rational cost-benefit estimations about how and when to react, and whether taking on the cost of delegitimizing a court is worth the effort. In many cases,

[94] Scholars continue to work with the rational choice paradigm in studies of judicial behavior as it continues to prove to be a fruitful framework for investigation. See references in note 10.

[95] Not all courts will necessarily have this objective, however, and may thus not exhibit the behavioral patterns we are describing here.

[96] Rosalind Dixon, *Strong Courts: Judicial Statecraft in Aid of Constitutional Change*, 59 Colum. J. Transnat'l L. 298, 303 (2020).

[97] Roni Mann, *Non-Ideal Theory of Constitutional Adjudication*, 7 Global Constitutionalism 14 (2018).

courts themselves will be sufficiently close to the political process and to key actors that they will be in a position to evaluate with reasonable precision whether bolder moves towards self-empowerment are likely to succeed.

There are many different variables that might impact the cost-benefit of engaging in backlash, many of which may be very particular to a given political circumstance. But in general, the effort to delegitimize a court in democratic systems may have at least four important costs. First, there are significant *temporal* costs: political actors will have to spend a significant amount of their time and energy responding to the court and away from other matters that may be more central to their constituencies.[98] Second, political actors must also take on *political* costs: taking on the court might have the important effect of fragmenting the coalition if not all its members are on board, and can disable the ability of the coalition to implement its other preferred policies.[99] Third, there may be significant *electoral/public opinion* costs: particularly in a democracy, attacking courts may prove to be an unpopular course of action, which may affect the coalition's re-election and public approval. Fourth, when the electoral outcome of an upcoming election is uncertain, dominant political elites might want to preserve the court in order to provide for a safeguard in case they become the minority. This *electoral uncertainty* cost, inspired by "insurance theories" of judicial review,[100] has proven to have significant explanatory power regarding the origins and maintenance of judicial review.[101]

The exact price to be paid on each of these fronts, however, varies significantly according to specific political circumstance. For example, if the coalition is significantly cohesive, it might be able to react quickly and with little political cost. Likewise, if the court does not hold a good standing among the public in general, attacking it might prove to be an electoral bonus as opposed to a cost. It is exactly because these costs change significantly according to circumstance that courts approach the threat of backlash by considering whether the conditions are right for it to expand its powers.

On the benefit side of the equation, eliminating the court as an obstacle for the implementation of preferred policies may be more or less important. Generally speaking, the benefits of attacking a court will increase according to the degree to which they are perceived as a potential hurdle for active majorities. But there are occasions when the benefits to be accrued from backlash are small or inexistent. For example, some courts might be traditionally deferential towards government decisions and thus attacking the court would bring little practical advantage. In other cases, courts may not be sufficiently independent and the ability of coalitions to informally influence the court's decisions via political pressure may also diminish the need for a formal and organized reaction to the court. Lastly, some courts might be completely captured and

[98] *See* Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, 38 Cardozo L. Rev. 2193 (2016); Mirit Eyal-Cohen, *Unintended Legislative Inertia*, 55 Ga. L. Rev. 1193 (2021).

[99] This seemed to have happened, for example, in the case of Supreme Court of Colombia: when Turbay reacted to prevent the court from striking down amendments, his coalition was fragmented, and many members came in defense of the court. *See* Section 3.

[100] *See* Tom Ginsburg, Judicial Review in New Democracies (2003).

[101] Ginsburg & Versteeg, *supra* note 4.

be well positioned to do the bidding of the majority coalition, in which case expansion of the judicial power might in fact be welcome.

This theory has much in common with the idea of a "tolerance interval," proposed by Epstein, Knight, and Shevstova. According to those authors, "all actors prefer policy that is as close as possible to their ideal points, but they are not unfettered in their ability to achieve that goal."[102] For this reason, different actors "may be willing to tolerate policy that is not on their ideal points. Specifically, an interval—what we call tolerance interval—exists around each of their ideal points that they would be unwilling to challenge a Court decision place within that interval."[103] The authors further theorize that from the tolerance interval theory a few predictions might be postulated. First, "if courts wish to issue efficacious decisions, then they will not accept petitions for review that involve policy dimension for which an intersection of tolerance range does not exist."[104] I call this a case selection strategy and give some examples of it in the context on unconstitutional constitutional amendments.[105] Second, "if courts accept cases involving policies for which the tolerance set is not empty and they reach decisions within that set then they lengthen the tolerance intervals."[106] Indeed, as I show in the next section, courts use different strategies in the context of unconstitutional constitutional amendments to alter the different tolerance intervals regarding judicial review, in particular by deciding in certain ways and at certain moments.

Another important account of strategy can be found in Rosalind Dixon and Samuel Issacharoff's description of the ways courts defer the implementation of their decisions in order to "avoid direct political confrontation."[107] In their paper, they examine multiple devices that courts employ to delay the effect of their decisions (such as suspended declarations of invalidity, doctrine of perspective overruling, and progressive implementation) and distinguish two types of deferral. "First-order" deferral refers to the cases in which courts explicitly delay the immediate impact of their decisions, while "second-order" deferral describes the cases in which courts' decisions are implicitly softened for strategic reasons.[108] While I shall not be adopting that specific categorization here, it is nonetheless important as it shows how courts can shield themselves from political conflict in myriad explicit and implicit ways, in particular by using strategy to make eventually impactful decisions seem less significant than they are. Although I offer different categories for the analysis of strategy (outcome, timing, and case selection)—in particular because I am less concerned with the implicit or explicit nature of the strategy—they overlap to some degree with Dixon and Issacharoff's typology.

These theories all converge on the idea that courts behave strategically to expand the range of their powers: by engaging in a variety of different tactics, courts act in

[102] Lee Epstein, Jack Knight, & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 Law & Soc'y Rev. 117, 128 (2001).
[103] *Id.* at 129.
[104] *Id.* at 132.
[105] *See* Section 5.3.
[106] Epstein, Knight, & Shvetsova, *supra* note 10, at 132.
[107] Dixon & Issacharoff, *supra* note 7.
[108] *Id.*

ways, times, and contexts that alter the cost-benefit of political backlash. They either act when backlash is unlikely or they act in ways in which the costs of backlash become too high to pay. Courts examine the political context and estimate the costs of reaction to assure their empowerment: they employ a variety of different strategies to stave off political reaction and accrue political consensus on the existence of such powers. The following section details these different strategies and their implications in terms of self-empowerment.

Although it is not my objective here to examine whether there is good normative reason to overrule or reconsider limitations to the court's powers over amendments, decisions sidestepping these limitations have sometimes been severely criticized and sometimes internationally celebrated. For example, the headscarf case in Turkey is considered to be a "textbook example of terrible constitutional jurisprudence" given its content and the fact that the court did not abide by the constitutional limitations to its authority.[109] On the other hand, the invalidation of the amendment that would have allowed Álvaro Uribe's second reelection in Colombia, which expanded the Court's powers beyond those established in the text, has been regarded as one of the most important decisions for the protection of constitutional democracy against erosion.[110] It would seem, therefore, that whether it is advisable for courts to sidestep these limitations will depend on the context and purpose of the court's actions: at times, courts may have to expand their own powers in order to protect greater constitutional values, in particular democratic principles. Judicial self-empowerment over amendments can be pro-democratic (and perhaps even be an important tool in the arsenal of militant democracy),[111] or it can be "abusive," in the sense that it is disguised as a democratic tool but in fact serves authoritarian purposes.[112]

5. A typology of strategies (and some implications)

The three examples I have discussed are rife with different judicial strategies that are designed to make self-aggrandizement stick. By employing this theory of self-empowerment, I describe here three different strategies that can be observed in the aforementioned cases: timing strategies, case-selection strategies, and outcome strategies. There may be grey areas when attempting to cleanly distinguish these different strategies, but they nevertheless help us better understand the ways courts

[109] Ran Hirschl, *The Fuzzy Boundaries of (Un)Constitutionality*, 31 U. Queensland L.J. 319 (2012).

[110] *See* Samuel Issacharoff, Fragile democracies: Contested Power in the Era of Constitutional Courts (2015). The unconstitutional constitutional amendments doctrine has been utilized extensively in order to adjudicate questions of term limits in other legal systems as well. *See* David Landau, Yaniv Roznai, & Rosalind Dixon, *Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America*, *in* The Politics of Presidential Term Limits 53 (Alexander Baturo & Robert Elgie eds., 2019).

[111] Yaniv Roznai & Tamar Hostovsky Brandes, *Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine*, 14 Law & Ethics Hum. Rts. 19 (2020).

[112] For a greater exploration of these categories, as well as examples, see David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013); David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts against Democracy*, 53 U.C. Davis L. Rev. 1313 (2019); Rosalind Dixon & David Landau, Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy (2021).

navigate political contexts and how they can come to have powers that were not long ago unimaginable.

This conceptual distinction does not mean that in practice, courts must pick one strategy over another and that they cannot be compounded and combined in order to accrue political acceptance. Quite to the contrary, what these case studies demonstrate is that courts utilize multiple different strategies to attain the power over amendments. It is through a combination of strategies, propagated over time, that courts acquire greater decision-making power over constitutional change.[113] In relation to this last aspect, it is crucial to keep in mind the temporal dimension of processes of self-empowerment. All these strategies, although analytically distinguishable, can only be properly understood as part of an often long process, one that can take years or decades. While it may be tempting to reduce these processes to single moments of attack or retreat, self-empowerment usually takes time and requires seizing certain opportunities and deciding to back off in others.

5.1. Timing strategies

I argued in the previous section that courts navigate the threat of political backlash by acting in ways that make negative reactions unlikely. The first specific strategy they use to that end is timing: courts will move to expand their powers when political reaction is improbable. Within this context, all three cases demonstrate that one variable is particularly important: the degree of political competition. Courts tend to act when political competition is low, as the inability of political power to coordinate a response dramatically increases the costs of political reaction.

The evolution of the Supreme Court of Colombia is a case in point: the Court rejected or fashioned the "replacement doctrine" depending on the strength of dominant coalitions. As Benítez shows, "in those situations where we find political fragmentation, the Court handed down bold decisions against the government."[114] In the first phase of its development, the Court refrained from outright declaring it had judicial review powers over amendment due to low levels of political competition; in the second phase, with higher levels of competition, the court established its power over amendments and acted more boldly towards constitutional change; in the third, with a decline in political competition, the Court retreated but not entirely.[115]

Similarly, the Federal Court of Malaysia took to reviewing amendments only after an unprecedented level of political competition. As explained before, Malaysia has since its independence been ruled by a single political coalition. This coalition has not only been generally strong enough to secure a majority in parliament but also "generally enjoyed more than the two-thirds parliamentary majority required for

[113] In fact, these different strategies interact in different complex ways. There are some cases in which it will be appropriate to use some, and not others, or even some occasions in which the use of one strategy precludes another. What strategies can be productively combined to lead to self-empowerment depends heavily on context and the specific costs and benefits in each situation.

[114] Benítez-R, *supra* note 17.

[115] *Id.*; Cajas-Sarria, *supra* note 45.

effecting constitutional amendments."[116] Under this degree of control, the judiciary had in the past suffered greatly when it attempted to interfere: in 1988, an amendment was passed that was designed to remove the Court's ability to engage in any sort of meaningful review. It was only in recent years, as the dominant coalition began losing significant steam and subsequently lost the election to the opposition coalition, that courts saw an opportunity to expand their jurisdiction. Under increased political competition, the Court essentially nullified the amendment passed in 1988 and rediscovered its review powers—including the power to strike down amendments.

Lastly, in India, the Court equally waited for the right moment to declare the existence of a "basic structure" and its power to strike down amendments that violated it. As Rosalind Dixon and Samuel Issacharoff show, the Supreme Court of India utilized techniques of "judicial deferral" that were "designed to temporize, to allow courts to assert themselves short of a frontal confrontation with the political branches."[117] The Court did this, as we have seen, by employing the judicial technique of prospective overruling in relation to different amendments, and by deciding to back down on its original position regarding limitations on amendment power at the height of the Court's political conflicts with the authoritarian impetus of Indira Ghandi.

These cases add further evidence to the claim that court action is more intense when there is a high degree of political competition. As many commentators have noted, the unification (or absence thereof) of political power "seems to go far in explaining the correlation between divided governments and judicial autonomy."[118] The inability of political forces to respond and react to judicial expansionism due to competition allows courts to act boldly and establish power over acts of government. As political coalitions become fragmented, this theory posits, the cost of reaction becomes higher, often to the point of disabling any type of unified political response. This is even more so the case in regard to decisions that establish power of review over amendments, which often will require the consensus of a super-majority to enact a new overriding amendment.

A natural, if perhaps somewhat obvious, implication of this is that courts are more likely to successfully expand their power in well-functioning democracies, as the dispute for political power among parties and factions will give courts more space to maneuver. In dictatorships or in systems of single-party dominance, courts will struggle to find an opening in which to assert their powers given autocrats are likely to concentrate political power which decreases the costs of reaction.[119] This is certainly one of the reasons why judicial aggrandizement is strongly related to democratization.[120]

Delaying decisions might also allow for dialogue among the different branches of government and create favorable conditions for agreement as opposed to conflict.

[116] Andrew Harding, *The* Keris*, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia*, 6 Sing. J. Int'l & Comp. L. 154 (2002).
[117] Dixon & Issacharoff, *supra* note 7, at 687.
[118] Ferejohn, Rosenbluth, & Shipan, *supra* note 27.
[119] This will not be the case with captured courts, in which expansion of judicial power might tighten control of the ruling coalition. See, for example, Venezuela.
[120] Ginsburg, *supra* note 19, at 721.

Many important constitutional scholars, ranging from Alexander Bickel's defense of judicial prudence[121] to Cass Sunstein's account of judicial minimalism,[122] have argued for the importance of these types of strategies in order for courts to accrue legitimacy. Dixon and Issacharoff also discuss the different ways courts can delay the implementation of their decisions.[123] Delaney, for example, argues that "by postponing a difficult decision until popular opinion shifts or a solution can be developed through the political branches, the court[s] would not have to take responsibility for imposing a new rule on a reluctant populace or opposing elites."[124] Timing decisions, she continues, "might impact the quality and nature of dialogue that a court can have with the political branches."[125] Similar conclusions are reached by other authors, including Rosalind Dixon, who in examining some constitutional cases in India and South Africa, concludes that the use of this tool mattered because "the timing of a court decision may affect both the political and legal context in which it is delivered."[126]

Moreover, there are a few scenarios and circumstances within democratic systems in which we might generally expect competition to be high or low. For example, in times of electoral dispute, self-empowerment is more likely due to high electoral and electoral uncertainty costs: the potential electoral cost of going after the courts is likely to dissuade any type of immediate backlash and/or the dominant coalition may want to preserve the court as a counter-majoritarian force in case they become minorities in the near future. On the other hand, political competition is lowest usually in the months following the election, in which political incumbents or newly elected representatives have just received a vote of electoral confidence. All else being equal, self-empowerment is costly in this moment. In Colombia, for example, we have seen how the Court strategically handed down important decisions at the end of presidential terms precisely to take advantage of the momentarily increased cost of backlash.

Second, the cost of reaction might also be high when governments start losing power. As developed by Gretchen Helmke, courts that lack judicial independence may "strategically defect" when the government appears to be exiting a position of dominance.[127] Because it is improbable that these weakened political actors will drum up the necessary support for reaction, it has been shown in some scenarios that "a significant increase in anti-government decisions [occurs] at the end of weak dictatorships and weak democratic governments."[128] Thus, these conditions might prove to be ideal for courts to expand their own powers, such as the power to review constitutional amendments.

[121] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1986). *See also* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 Yale L.J. 1567 (1984).
[122] Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (2001).
[123] Dixon & Issacharoff, *supra* note 7.
[124] Delaney, *supra* note 8, at 10.
[125] *Id.* at 67.
[126] Rosalind Dixon, *Strong Courts: Judicial Statecraft in Aid of Constitutional Change*, 59 Colum. J. Transnat'l L. 298, 314 (2020).
[127] Helmke, *supra* note 10.
[128] Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy*, 96 Am. Pol. Sci. Rev. 291 (2002).

But it is worth noting that timing strategies are also limited in their ability to secure self-empowerment. When particular threats arrive and require immediate action, judicial deferral or delay might not provide the appropriate judicial relief. Indeed, when deferring questions for too long, courts may find themselves in an even worse political context than they were in before. Thus, as Dixon notes, "an immediate threat to democracy may be so great that failure by courts to promptly enforce constitutional constraints may risk permanently undermining constitutional commitments."[129]

5.2. Outcome strategies

Apart from strategically timing their decisions, courts might also seek to convince political elites that backlash is not worth the effort because the power to review amendments will not be utilized to block their policy changes but might actually help legitimize them. Outcome strategies do this by expanding the court's power while simultaneously catering to a government interest or, at the very least, not disturbing the political agenda of the dominant political forces.[130] In other words, the self-empowering decision either (i) will be favorable to the government or (ii) will not interfere with its immediate plans. In such cases, although political branches might be concerned about the expansion of judicial power, they will be less motivated to react to that expansion when the court's rulings advance their own ideological, political, or party interests. In other words, if the court expands its power while at the same time advancing the interests of dominant political factions—or, at the very least, not disturbing the favorable status quo—political elites may consider it unnecessary to react. To the contrary, they may welcome the innovation or even prompt the court to expand its powers, particularly when it is captured.

One classic example of a successful outcome strategy is *Marbury v. Madison*. In that now acclaimed decision, the Supreme Court was put in the middle of a difficult political dispute. In 1800, the Federalist Party lost the presidential election to Thomas Jefferson's Republican Party. In a last-ditch attempt to entrench Federalist power within the state, John Adams appointed forty-two Federalist Justices of the Peace in February 1801. However, not all the commissions signed by Adams were delivered to the appointees, including William Marbury. When Jefferson came into office, James Madison, then Secretary of State, refused to deliver the commissions. Marbury sued, seeking to compel Madison to deliver them. The Supreme Court was put in a difficult political position. If it decided in favor of Marbury, there was a significant chance that its decision would not be complied with, or that other more drastic measures would be taken against it. Instead of defying Jefferson's interests, Marshall took advantage of the opportunity to expand the court's powers. In particular, the Supreme Court affirmed that Marbury was entitled to the commission, but that the Court could not

[129] Dixon, *supra* note 126, at 303.

[130] Outcome strategies can, in these cases, also be understood as case-selection strategies. Courts may select cases with its potential outcome in mind: if an amendment is an obstacle to or is opposed by the current dominant political faction, the court is able to align its interest with those of the political branches and significantly decrease chances of any negative reaction.

concede the remedy he sought because the provision Judiciary Act of 1789 that allowed Marbury to bring his claim to the Supreme Court was incompatible with the Constitution and therefore invalid. In so doing, the court was able to establish the power of judicial review while, in practice, allowing the commissions to go undelivered. In terms of outcome strategies, Marshall married a favorable outcome to the recently elected government with self-empowerment in order to diminish the incentives for reaction.

Similar strategies can be observed in relation to judicial expansion over constitutional amendments. In Malaysia, for example, the Court engaged in outcome strategies by expanding its powers while at the same time not interfering in the agenda of the ruling coalition. As Tew observes, the court "stopped short of invalidating the constitutional amendments, deliberately insulating the court from immediate political repercussions while establishing the framework to assert judicial authority in the future."[131] In other words, the Court's findings refused to directly confront the amendment and call out abuse of power, preferring instead to simply give the amendments new meaning.

Similarly, the Supreme Court of India's slow construction of the basic structure involved multiple examples of a court giving favorable rulings to government during self-expansion, even though if the court were acting according to its own policy preferences it would not have done so. In particular, in *Golaknath* and *Kesavananda Bharati*, the Court did not declare the amendments under consideration unconstitutional, despite the fact that they would not be compatible with the constitution according to the very doctrine those cases establish. This technique of prospective overruling was utilized above all as an outcome strategy; a means of promoting self-expansion by not immediately interfering with the government's plans.

There are at least three different types of outcome strategies. First, a court may strike down an amendment that was enacted before the coalition was formed or/and that is contrary to the current coalition's political agenda. In fact, the court may provide a significantly less costly alternative for getting rid of unwanted amendments, which ordinarily require the enactment of another revoking amendment. Second, a court may legitimate an amendment enacted by the dominant coalition by declaring it constitutional and therefore valid (while simultaneously establishing its authority over amendments).[132] A declaration of constitutionality will have a legitimating effect that is more pronounced than if the court were to simply stay silent or refuse to rule on the matter. Third, a court may utilize forms of "judicial deferral"[133] and decide that the amendments are unconstitutional but refrain from invalidating them, as occurred at least twice in India.

These different types of outcome strategies are not without consequence, as they bear differently upon the cost-benefit of backlash. The prospective overruling technique adopted in India, for example, is likely to be less effective than other techniques

[131] Tew, *supra* note 18, manuscript at 37.
[132] For a discussion of the legitimating effect of judicial review, see Bickel, *supra* note 121.
[133] *See* Dixon & Issacharoff, *supra* note 7.

because it involves an aspect of judicial admonishing of the government; it falls short of striking down the amendment but clearly signals that future violations will not be tolerated and thus positions the court's newfound power as a potentially significant obstacle. On the other hand, declaring the constitutionality of an amendment and legitimating it is likely to be a more effective technique, as it bolsters the government's policy agenda.

5.3. Case selection strategies

Lastly, the cost-benefit of reaction is likely to be different depending on the stakes of the particular controversy decided by the court. For illustrative purposes, we can imagine that amendments and their adjudication can be placed on a continuum which indicates their significance and importance to political coalitions. At one extreme stands a somewhat trivial amendment (e.g., an amendment that allows the admission of foreigners into public universities of that country), while at the other we will find an extremely controversial policy change (e.g., an amendment regulating abortion). While the first amendment is likely to be relatively low on the priority list of the dominant political coalition, the latter may be extremely high stakes. The incentives for reacting when the court meddles with a central policy issue are much more significant than the incentives when the amendment is of little political significance.

Thus, courts consider that reaction to expansionist decisions will vary according to the stakes of the particular political controversy at hand. In other words, courts engage in case-selection strategies and pick "low-stakes" cases as opposed to "high-stakes" cases in order to diminish the incentives for political backlash in an attempt to stave off severe criticism and political reaction. In the context of amendments, it is important to recall that not all amendments result from "constitutional moments" of extraordinary political participation,[134] nor do they necessarily touch upon fundamental matters of the polity. Many constitutions are frequently amended—either because the amendment process is relatively easy[135] or for broader reasons of constitutional culture[136]—and thus often entrench matters that are of little political consequence. In others, some constitutions are long documents, in which amendments are needed for relatively specific policy changes.[137] Further, older amendments may cease to be politically important. Within this context of varying political salience, courts may strategically select those cases in which there are fewer vested political interests to assert their own power.

[134] For the idea of "constitutional moments" in the context of the American Constitution, see Bruce A. Ackerman, 1 We the People: Foundations (1993).

[135] *See generally* Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 Am. Pol. Sci. Rev. 355 (1994).

[136] *See* Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All?*, 13 Int'l J. Const. L. 686 (2015).

[137] Versteeg and Zackin show that constitutions have become less entrenched but much longer and broader. *See* Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 Am. Pol. Sci. Rev. 657 (2016).

Among the cases we have examined, the expansion of judicial power of amendments in Malaysia occurred within the context of a uniquely mundane dispute. As Tew describes, *Semeyih Jaya*—one of the first cases to articulate the basic structure doctrine—was a "mundane case, which, on its face, did not necessarily signal huge constitutional implications."[138] Instead of deciding to construct the basic structure within a case that contained a hugely contentious issue which would have much at stake politically, the Court carefully picked a case which did not draw the attention of political elites, thus diminishing the potential benefits of political backlash.

The implication of this strategy is that court self-empowerment may come from unlikely sources and may arise in cases that do not capture the attention of political elites. Indeed, courts may establish their power to review amendments in cases that are only remotely related to the court's judicial review powers generally, precisely so that a new precedent which expands the court's powers is in effect but might go relatively unnoticed. However, courts may be limited in the ability to select cases, depending on the specific procedural mechanisms that they are bound by. Constitutional Courts, for example, often do not have a mechanism (such as the writ of certiorari in the United States, or the *actio popularis* in Colombia) which allows them to select when to settle a controversy.[139] Depending on specific procedural constraints, courts may have to resort to other types of strategy.

6. Conclusion

I have argued that the success of the unconstitutional constitutional amendments doctrine world-wide may be related, at least in part, to the different strategies utilized by courts to alter the costs and incentives for backlash. These different strategies—which we have called here case-selection strategies, outcome strategies, and timing strategies—influence the cost of political reaction and strengthen inertial forces within the legislature.

Although my assessment has focused on unconstitutional constitutional amendments, I believe the strategies outlined here can be applied more broadly to other instances of self-empowerment. The general framework according to which courts will suffer backlash depending on the costs and benefits of reaction remains whatever the particular scenario, and the strategies we have described will impact that calculation beyond the particular instance of review of amendments. Indeed, we have also seen the use of some of these strategies in systems where the power of judicial review over statutes was established, in particular *Marbury v. Madison* in the United States. In other words, the examples and analytic framework provided here may be useful for understanding the determinants of self-empowerment more generally and may contribute to a better understanding of the processes of judicial aggrandizement.[140]

[138] Tew, *supra* note 18.
[139] For an examination of this in the United States, see H. W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court (1994).
[140] On the expansion of judicial power, see The Global Expansion of Judicial Power, *supra* note 1.

The cases also show how strategy has helped courts overcome de jure constraints to their power. First, in some systems, no provisions regarding the power over amendments exist and doubt remains as to the extent of the court's powers. This is the example of Malaysia, in which the Court constructed the basic doctrine in the absence of an explicit empowering constitutional provision. Second, in other systems, courts may wish to extend their powers beyond the limitations or prohibitions established in the constitutional text. Examples of this include Colombia and (arguably) India. Lastly, courts may need to reverse their own precedents that had once denied the power to review amendments. Colombia, Malaysia, and India can all be included within this last group. In all these scenarios, courts face a similar problem: how to overcome the legal status quo, which apparently does not concede them power over amendments. The ways and degrees to which norms and practices establish this status quo, however, vary significantly. The costs to engaging in self-empowerment are likely to differ when the status quo is instilled in precedent, as opposed to when it is explicitly established in the constitution, for example. But in either case, the court must somehow convince other actors that the present status quo is wrong. Moreover, because the conclusion empowers courts, they must overcome the charge that they are merely acting in a self-interested way.

It is important to also be clear about the limitations of my conclusions. Strategy is an important component of self-expansion, but there are certainly other important factors that cannot be ignored. It is likely that legal context, cultural understandings, and historical background might all significantly bear upon this complex phenomenon.[141] For example, in examining social rights adjudication, Malcolm Langford cites factors such as the level and nature of social rights, judicial culture, and degree of judicialization, as well as other cultural factors that might also be applied, with some adaption, to the question of unconstitutional constitutional amendments.[142] Brinks and Blass develop a framework of judicial empowerment which considers the autonomy and authority of courts.[143] Among the different factors that might also have been important in the cases examined here are changing attitudes towards courts, a global movement that promotes judicial self-expansion, the development of a network of courts that allow for the dissemination of ideas and practices, a growing dissatisfaction with political branches, the development of new legal doctrines, transition and commitment to the rule of law, the narrative and tone of the decisions themselves,[144] and others.

[141] To cite but one example, from a cultural perspective, the beliefs and attitudes that are held about courts and legislatures are likely to influence how these different bodies behave and how their decisions are accepted. In systems where courts are expected to act with restraint in political matters (e.g., Japan, United Kingdom), their processes of empowerment might look very different from systems where courts are largely believed to be responsible for social transformation (e.g., India).

[142] Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, *in* Social Rights Jurisprudence: Emerging Trends in International and Comparative Law 3 (Malcolm Langford ed., 2009).

[143] Daniel M Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15 Int'l. J. Const. L. 296 (2017).

[144] Dixon, *supra* note 126.

Lastly, the explanatory power of this theory might be limited in other cases of self-empowerment. First, it is not clear that all transfers of power to courts in cases of unconstitutional amendments will always be as polemical as we might think. While the tension between democracy and the suspicion of judicial review looms large in some systems, others might well find this empowerment all but natural. In Brazil, for example, the Court's expansion was not seen as a particularly controversial move: many believed eternal clauses provided a sufficient legal foundation for that claim.[145]

Second, while strategies have enabled many courts to retain power over amendments, their ability to do so is limited by context.[146] For example, judicial aggrandizement may be extremely unlikely in certain political contexts—particularly non-democratic ones. Hungary and the downfall of its highest court provides a cautionary tale. The Constitutional Court of Hungary invalidated in 2012 the Act on the Transitional Provisions of the Fundamental Law "with a claimed constitutional status which partly supplemented the new constitution even before it came into effect."[147] Although the Court did not examine the substance of the amendment, it signaled that in the future they may consider doing so to protect the unity of the constitution. The Court, however, seemingly went too far, and backlashes came in the form of constitutional amendments soon after. Among the amendments and "as an indirect reaction to the readiness of the court to review the substance of constitutional amendments. . . the new text of the Basic Law, while allowing the review of the procedural aspects of an amendment, specifically excludes any substantive review."[148] Having been cornered, the Court's majority later concluded that the amendment was constitutional and that the Court did not have powers to review the substance of any amendment.

[145] For a critical take of the decision, see Nicola Tommasini & Pedro Arcain Riccetto, *Do Unamendable Clauses Implicitly Authorize Judicial Review?*, *in* Derechos Humanos, Derecho Constitucional, Derecho Internacional: Sinergias contemporáneas 163 (Nuria Saura Freixes ed., 2021).

[146] Dixon & Issacharoff, *supra* note 7 ("We do not suggest that judicial deferral is a universal strategy for courts, or a strategy for all times. A number of quite localized, context specific factors can affect the viability of second-order deferral as a strategy-including the strength of doctrines of precedent, relative length of judicial term limits, and the way in which court decisions affect as well as interact with prevailing political conditions." *Id.* at 688).

[147] Gabor Halmai, *Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective*, 50 Wake Forest L. Rev. 951, 978 (2015).

[148] *Id.* at 980.