
CONGRESS IN COMPARATIVE PERSPECTIVE

PARLIAMENTARY SUPPLEMENTS (OR WHY DEMOCRACIES NEED MORE THAN PARLIAMENTS)

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INTRODUCTION	796
I. PARLIAMENTARY PROBLEMS AND DEMOCRATIC THEORY.....	798
A. <i>Democracy on Demand</i>	800
B. <i>The Standard Democratic Story</i>	805
II. DEMOCRACY BEYOND THE STANDARD STORY: TAKING THE LONG VIEW.....	810
A. <i>Constitutional Courts</i>	812
B. <i>Central Banks</i>	818
CONCLUSION: PARLIAMENTARY DEMOCRACY WITH THICK CONSTITUTIONS.....	823

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INTRODUCTION

We live in an era of disenchantment with the legislative process.¹ A symposium on the “most disparaged branch” invites us to consider whether the United States Congress deserves such disparagement. A Lexis search for the word “Congress” within ten words of the word “failure” produces more than 3000 hits – too many responses to be displayed. Many contributors to this symposium document Congress’s bad image – not just in recent years, but persistently throughout its history – and not least due to observers’ unreasonable expectations of the institution.²

Looking only at the United States, it is easy to forget that Congress represents only one approach in establishing legislative bodies, and that Congress’s role with respect to the other branches reveals only one model for designing the crucial interlocking and mutually supportive institutions necessary to the long-term stability of democracy. Congress, however, has a lot going for it. On the positive side: The U.S. has had the luxury of more than two centuries of more-or-less continual constitutional governance.³ It has been relatively free of the extremist political movements that have tortured the politics of many of its allies.⁴ It has lived for a long time with judicial review, with a complex governmental structure that requires many players to sign off before ideas become laws, and with the constitutional mantra after nearly every

¹ This is not to say that this is the first era of crisis. In a *Harvard Law Review* article in 1899, the sense that Congress was dysfunctional came through clearly:

It is of course true that a parliament is and must be the legislative branch of government. But if such a body has unlimited power of legislation, it will sooner or later reduce not only the executive but the very society which has elected it to be the mere instruments of the caprices and passions of its members; and it will arrive at this result by means of its committees, whether elected or appointed by a speaker. The vital question to be resolved is how can its legislation be limited and guided with a view to the public welfare.

Gamaliel Bradford, *The Permanence of Parliamentary Government*, 13 HARV. L. REV. 256, 262 (1899).

² See Barbara Sinclair, *Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 B.U. L. REV. 387, 387 (2009) (listing the failures usually attributed to Congress).

³ The actual history is surely muddier than the official self-congratulatory one. See generally MARK BRANDON, *FREE IN THE WORLD* (1998) (suggesting the Civil War was a constitutional failure); HAROLD RELYEA, *A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES* (2005) (detailing the ways the country has responded to threats with extraordinary measures from the beginning of its history).

⁴ WERNER SOMBART, *WHY IS THERE NO SOCIALISM IN THE UNITED STATES?*, at xix-xxiii (Patricia M. Hocking & C. T. Husbands trans., 1976) (chronicling how certain unique aspects of American society have reduced the threats of radicalism); *WHY IS THERE NO SOCIALISM IN THE UNITED STATES?* 23 (Jean Heffer & Jeanine Rovet eds., 1988) (comparing the lack of strong socialist movements in the United States with the experience of European nations that have generally had strong socialist movements).

crisis that “the constitution works.”⁵ But on the negative side: The U.S. lives with an eighteenth-century model of government that has not been able to take full advantage of what history knows about modern institutions that function more effectively than their older counterparts. The U.S. is meaningfully different than most governments in the world in the role it assigns to Congress.⁶ Perhaps the thought that Congress is broken can be fixed by looking abroad: comparative insight can guide us past our own unique history to more general observations.

Americans may believe that Congress is uniquely broken,⁷ but this diagnosis is too limited. It is not just the U.S. Congress but parliaments in general that are seen as being in crisis.⁸ Studies of attitudes toward parliaments in fourteen countries indicated that in eleven of those countries, confidence in the parliament declined during the 1980s.⁹ In some countries (Britain, Canada, Germany, Sweden, and the United States) the drop was particularly steep.¹⁰ The widespread discontent across a number of very different political spaces suggests that some aspects of parliamentary governance¹¹ are dysfunctional regardless of its specific design. Does that mean, then, that comparative analysis is useless?

There is another role that comparative analysis can play besides providing models for the redesign of single institutions. If virtually all legislatures are considered broken, then they cannot be “fixed” by considering changes to legislatures alone. Comparative analysis suggests something else – that legislative bodies are just not suited for some basic political responsibilities that they are typically assigned, so that no amount of tinkering with their basic design is likely to solve the problem. But some of these responsibilities are essential to democratic and constitutional governance. To see this, we need to reconsider the assignment of parliaments as the primary – perhaps even sole –

⁵ See, e.g., MICHAEL SCHUDSON, *WATERGATE IN AMERICAN MEMORY: HOW WE REMEMBER, FORGET, AND RECONSTRUCT THE PAST* 144 (1988) (describing Gerald Ford’s reaction to the Watergate scandal).

⁶ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 729 (2000).

⁷ See generally THOMAS MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2d ed. 2008).

⁸ Robert D. Putnam, Susan J. Pharr & Russell J. Dalton, *Introduction: What’s Troubling the Trilateral Democracies?*, in *DISAFFECTED DEMOCRACIES: WHAT’S TROUBLING THE TRILATERAL COUNTRIES?* 3, 19-20 (Susan J. Pharr & Robert D. Putnam eds., 2000).

⁹ *Id.* (showing that only Belgium, Italy, and the Netherlands experienced increases in voter confidence).

¹⁰ *Id.*

¹¹ The term “parliamentary governance” covers the range of governmental types in which the legislature is meant to be the central democratic body in a democratic government. Michael Mezey, *New Perspectives on Parliamentary Systems: A Review Article*, 19 LEGIS. STUD. Q. 429, 430 (1994). To describe the central legislative body of a national government, I will use “legislature” and “parliament” interchangeably.

carrier of democratic legitimacy,¹² an association that carries with it the simultaneous suggestion that other parts of government are democratically deficient. In particular, the parts of government that do not carry a direct electoral mandate such as the judiciary and other independent bodies (central banks, electoral commissions and human rights monitors)¹³ have gotten a bad rap for being “counter-majoritarian”¹⁴ – which means being essentially anti-democratic. No matter how often the accusations of counter-majoritarianism have been discounted, such accusations persist.¹⁵ The continual public discontent with elected parliaments indicates that they alone cannot carry the weight either of political responsiveness or of democratic legitimacy.

I. PARLIAMENTARY PROBLEMS AND DEMOCRATIC THEORY

Perhaps the usual theory of parliaments as the institution *par excellence* of a democratic society needs correcting. This theory may need correcting because parliaments could be victims of their own success. If too much is expected of them, parliaments are bound to disappoint. Parliaments are now so ubiquitous and so ubiquitously identified with democratic government that they carry the whole weight of democratic legitimacy. Parliaments are the representative assemblies,¹⁶ the lawmakers,¹⁷ the constituent-servers,¹⁸ and the pulse of the public.¹⁹ Those who write about the comparative design of political institutions, defend parliamentarism (a system in which the executive is responsible to the legislative body) over presidentialism (in which the executive has an independent electoral mandate) because parliamentarist governments are less likely to spiral into dictatorships.²⁰ To their defenders,

¹² David Dyzenhaus, “*Now The Machine Runs Itself*”: *Carl Schmitt on Hobbes and Kelsen*, 16 *CARDOZO L. REV.* 1, 3 (1994) (“[T]hrough parliamentarianism liberalism can claim, by an appeal to representation, democratic legitimacy.”).

¹³ Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 *DUKE L.J.* 953, 958 (2007).

¹⁴ The classic statement is found in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962): “The root difficulty is that judicial review is a counter-majoritarian force in our system.”

¹⁵ For a review of the vast literature that has followed this accusation, see Mark Graber, *The Counter-majoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 *ANN. REV. L. & SOC. SCI.* 361, 363 (2008).

¹⁶ Much of the defense of parliaments as the key bodies in constitutional democracies rests on the assertion that they are representative, which in turn rests on the claim that elections work to ensure representation. G. BINGHAM POWELL, JR., *ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS* 3-4 (2000).

¹⁷ Jeremy Waldron’s defense of parliaments over courts focuses exclusively on parliaments’ roles as lawmakers. JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 1 (1999). But, of course, parliaments do more than this.

¹⁸ RICHARD FENNO, *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 31 (1978).

¹⁹ DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 6 (1975).

²⁰ Juan J. Linz, *The Perils of Presidentialism*, 1 *J. DEMOCRACY* 51, 52 (1990).

parliaments are the guarantors of democracy itself because the stronger they are, the less likely governments are to fail.²¹

One of the main reasons for focusing on Congress in particular and on parliaments more generally is a concern about democracy. Parliaments are generated by the complex mandates of elections because every democratic system elects parliaments.²² But democratic governments have to do more than link elections to a representative body.²³ Even though competitive elections are the core element of modern democracies,²⁴ not all systems with competitive elections seem to generate fully democratic and responsive politics.²⁵

²¹ Fred Riggs has documented that of the thirty-three “third world” countries that adopted presidentialist constitutions, nearly all have had catastrophic failure, characterized by coups, martial law, constitutional displacement, or collapse. Fred W. Riggs, *The Survival of Presidentialism in America: Para-Constitutional Practices*, 9 INT’L POL. SCI. REV. 247, 249 (1988). At the same time, two-thirds of the forty-three “third world” countries that had parliamentarist systems held up under pressure. *Id.* Riggs further acknowledges that “the democratic constitutions found in Western Europe, all of which were established after the American Revolution, uniformly rejected presidentialism in favor of some kind of parliamentarism.” *Id.*

²² RICHARD ROSE, WILLIAM MISHLER & CHRISTIAN HAERPER, DEMOCRACY AND ITS ALTERNATIVES: UNDERSTANDING POST-COMMUNIST SOCIETIES 25 (1998) (“The presence or absence of competitive elections is the simplest definition of democracy.”).

²³ Alain Touraine begins his discussion of democracy by noting that “[t]he first requirement of democracy is that its rulers be *representative* Moreover . . . democracy cannot be representative unless it is pluralistic.” ALAIN TOURAINE, WHAT IS DEMOCRACY? 26-27 (David Macey trans., 1997). But he believes that this is only the first of a number of elements required of democracies. The others are that voters see themselves as citizens and that state power is limited by law. *Id.* at 27. In his view, different sorts of democracies evolve out of the privileging of each of these elements over the others. *Id.* at 29-30.

²⁴ POWELL, *supra* note 16, at 4 (“There is a widespread consensus that the presence of competitive elections, more than any other feature, identifies the contemporary nation-state as a democratic political system.”).

²⁵ “Managed democracy” provides an illuminating example of elections without democratic legitimacy. In “managed democracies,” elections are held, but the elected governments use the power of incumbency to manipulate public opinion to maintain their own positions. The idea has been variously applied to the United States under George W. Bush and to post-communist Russia under Vladimir Putin. SHELDON WOLIN, DEMOCRACY INCORPORATED: MANAGED DEMOCRACY AND THE SPECTER OF INVERTED TOTALITARIANISM 141-42 (2008) (discussing managed democracy in the U.S.); Nicolay Petrov, Scholar-in-Residence, Carnegie Moscow Center, Address at the Carnegie Endowment for International Peace Meeting: The Essence of Putin’s Managed Democracy (Oct. 18, 2005), *summary available at* <http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=819> (discussing managed democracy in Russia).

A. *Democracy on Demand*

The spectacular changes of the last two decades should have made us all aware of the complexities of introducing democratic governments on demand and the errors in assuming that if a state has elections, it must therefore be fully democratic.²⁶ Southern Europe (Greece and Spain in particular),²⁷ Latin America,²⁸ Eastern Europe,²⁹ and even parts of Africa,³⁰ Asia,³¹ and the Middle East³² have undergone democratic transformations.³³ From these various transitions have come multiple experiments in democratic government, some far more successful than others.

Scholarship in the West, which during the Cold War contrasted the then-small-number of democratic governments with the then-larger-number of clearly authoritarian ones, has followed these democratic transitions with assumptions generated during the Cold War about the inevitable organization of transitional governments. This scholarship assumes, first and foremost, that the governments that have thrown off authoritarian pasts are “transitioning” between authoritarianism and democracy – they are neither on some other

²⁶ Of course, the experience of the Bush Administration in bringing democracy to autocratic countries through military means has, by now, been exposed for the overly optimistic vision underlying it:

Getting the United States back onto a better track with regard to democracy promotion will not be easy. The damage that the Bush administration has wrought in this domain is considerable. Bush policies have engendered powerful suspicions abroad about the very idea both of the United States as a democracy promoter and of democracy promotion itself.

THOMAS CAROTHERS, CARNEGIE ENDOWMENT FOR INT’L PEACE, U.S. DEMOCRACY PROMOTION DURING AND AFTER BUSH 32 (2007), *available at* http://www.carnegieendowment.org/files/democracy_promotion_after_bush_final.pdf.

²⁷ JUAN LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 87-150 (1996).

²⁸ *Id.* at 151-234 (discussing democratic transformations in Uruguay, Brazil, Argentina, and Chile).

²⁹ *Id.* at 235-458 (discussing democratic transformations in Poland, Hungary, Czechoslovakia, Bulgaria, Romania, Russia, Estonia, and Latvia).

³⁰ DEMOCRATIZATION IN AFRICA, at ix (Larry Diamond & Marc F. Plattner eds., 1999).

³¹ DEMOCRACY IN EAST ASIA, at xxvi (Larry Diamond & Marc F. Plattner eds., 1998).

³² Abdou Filali-Ansary, *Muslims and Democracy*, in THE GLOBAL DIVERGENCE OF DEMOCRACIES 37 (Larry Diamond & Marc F. Plattner eds., 2001).

³³ Since 9/11, this process has arguably been reversed, despite the Bush Administration’s claims that it wanted to bring democracy to the world: “The idealistic fervor and self-confident messianism that have infused American declarations of an armed crusade for democracy betray a dangerous disregard for the prospect of tragedy that Weber said inevitably accompanies politics when it turns to violence as a means for achieving its ends.” JOHN BRENNKMAN, THE CULTURAL CONTRADICTIONS OF DEMOCRACY: POLITICAL THOUGHT SINCE SEPTEMBER 11, at 22 (2007) (citing MAX WEBER, *Politics as Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY (H.H. Gerth & C. Wright Mills eds. & trans., 1946)).

trajectory nor have they found a permanent political home along the way that is neither of these endpoints.³⁴ Across the range of democratic experiments over the past several decades, we see an attempt in the scholarship of transition to shoehorn the variety of quasi-democratic governments into a “one model fits all” conception of democracy, running under the name of “democratic consolidation.”³⁵ This theory puts formerly authoritarian and totalitarian regimes of the South and East into the same theoretical framework as the governments of the North and West, measured as orderly differences along a few common variables.³⁶ Democracy is all the rage these days, in theory and

³⁴ See, e.g., JON ELSTER, CLAUS OFFE & ULRICH K. PREUSS, *INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA* 3-6 (1998) (discussing the transition in Bulgaria, the Czech Republic, Hungary, and Slovakia); LINZ & STEPAN, *supra* note 27, at 9 (arguing for the need of a strong civil society to aid in the transition); GUILLERMO O'DONNELL & PHILLIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* 3-14 (1986); Laurence Whitehead, *International Aspects of Democratization*, in *TRANSITIONS FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES* 3, 3-10 (Guillermo O'Donnell, Phillippe C. Schmitter & Laurence Whitehead eds., 1986) (giving a historical overview of democratic transitions in the second half of the twentieth century).

³⁵ See, e.g., LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 3-18 (1999) (proposing a model democracy and assessing various nations' governments in light of that standard); LINZ & STEPAN, *supra* note 27, at 6 (defining consolidated democracy as including an attitudinal piece, a behavioral piece, and a constitutional piece); Larry Diamond, *Introduction: In Search of Consolidation*, in *CONSOLIDATING THE THIRD WAVE DEMOCRACIES: THEMES AND PERSPECTIVES*, at xiii, xvi-xvii (Larry Diamond, Marc Plattner, Yun-Han Chu & Hung-Mao Tien eds., 1997) (“[T]he bulk of our contributors have converged on an understanding of democratic consolidation as a discernible process by which the rules, institutions, and constraints of democracy come to constitute ‘the only game in town,’ the one legitimate framework for seeking and exercising political power.”); Klaus von Beyme, *Institutional Engineering and Transition to Democracy*, in *1 DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE: INSTITUTIONAL ENGINEERING* 3, 6-14, 17-22 (Jan Zielonka ed., 2001) (discussing constitutional design and the development of electoral law as steps in the transition from authoritarianism to democracy).

³⁶ See, e.g., GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES* 83-142 (1994) (comparing new democracies' experiences with presidentialism, parliamentarism, and semi-presidentialism to their American, British, and French counterparts); Constitution Drafting Committee, Federal Republic of Nigeria, *Report on the Draft Constitution of Nigeria*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT* 181, 181-86 (Arend Lijphart ed., 1992) (examining parliamentarist and presidentialist approaches in the Nigerian constitution); J.P.A. Gruijters, *The Case for a Directly Elected Prime Minister in the Netherlands*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT*, *supra*, at 191, 191-93 (evaluating parliamentarist changes in light of British precedent); International Forum, Israel-Diaspora Institute, *Direct Election of the Prime Minister*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT*, *supra*, at 194, 194-200 (considering parliamentarist versus presidentialist approaches in a direct election for the prime minister); Vasant Sathe, *For a Directly Elected President of India*, in *PARLIAMENTARY VERSUS PRESIDENTIAL*

in practice. It is very nearly “the only game in town.”³⁷ Even anti-liberal governments want to pretend to be democracies.³⁸

But even while democratic elections are essential for democratic governance, they are not enough. And while representative parliaments are essential to democratic governance, they are not enough either. To consider what is thought to be broken about parliaments, we need to consider just what the expectations for parliaments have been. For this, we should consult the standard democratic story.

In the standard democratic story, there is a recipe for democracies: (a) adopt a constitution; (b) establish democratic institutions – centrally a parliament – to carry out normal politics; and (c) tap into civil society to provide the infrastructure for the representation of interests in the parliament through an electoral system.³⁹ But the problem is that democracies differ – and their

GOVERNMENT, *supra*, at 187, 187-90 (considering constitutional reform in light of parliamentarist and presidentialist examples); Kurt von Mettenheim, *Introduction: Presidential Institutions and Democratic Politics*, in PRESIDENTIAL INSTITUTIONS AND DEMOCRATIC POLITICS: COMPARING REGIONAL AND NATIONAL CONTEXTS 1, 1-2 (Kurt von Mettenheim ed., 1997) (arguing in favor of democratization along the presidentialist rather than the parliamentarist model).

³⁷ GIUSEPPE DI PALMA, TO CRAFT DEMOCRACIES: AN ESSAY ON DEMOCRATIC TRANSITIONS 113 (1990).

³⁸ Belarus, despite being an authoritarian state, still holds regular (if rigged) elections for both President and Parliament. See Ethan S. Burger & Viktor Minchuk, *Alyaksandr Lukashenka's Consolidation of Power*, in PROSPECTS FOR DEMOCRACY IN BELARUS 29, 31-33 (Joerg Forbrig, David Marples & Pavol Demeš eds., 2006). The Organization for Security and Cooperation in Europe (“OSCE”) deployed election monitors to Uzbekistan for the 1999 and 2004 parliamentary elections as well as for the 2007 presidential elections. Office for Democratic Institutions & Human Rights – Elections – Uzbekistan, <http://www.osce.org/odihr-elections/14681.html> (last visited Mar. 6, 2009). Even though OSCE did not find the elections free and fair, they noted that there were repeated attempts to improve the election laws to make elections seem more open and democratic. *Id.* For example, they observed that changes to the election laws between 2000 and 2007 allowed social groups to nominate candidates for President but also changed the candidate registration rules to make it nearly impossible for such candidates to register. OFFICE FOR DEMOCRATIC INST. & HUMAN RIGHTS, OFFICE FOR SEC. AND COOPERATION IN EUR., OSCE/ODIHR LIMITED ELECTION OBSERVATION MISSION FINAL REPORT 1 (2008), available at http://www.osce.org/documents/odihr/2008/04/30832_en.pdf. These efforts to tinker with election laws indicate that governments are anxious to appear as if they have the trappings of democratic elections, even when they do not. If democracy were not such a normatively indispensable criterion for government these days, such persistent tinkering would be hard to explain.

³⁹ BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 46-68 (1992) (arguing for the importance of early constitutional drafting in transitional societies and also for the normal politics that follows to make a clean break with the past without engaging in retribution); RALF DAHRENDORF, REFLECTIONS ON THE REVOLUTION IN EUROPE 86-105 (1990) (describing transitions as involving the “hour of the lawyer” to draft constitutions,

problems are more various – than the standard theory acknowledges. Viewing the world through the conventional lens of first-world empirical political science, democratic analysts have assumed that all democracies must have the same small set of moving parts;⁴⁰ divide their governmental responsibilities into executive, legislative, and judicial functions;⁴¹ and pass roughly through the same stages on their way to a broadly similar endpoint.⁴² Accordingly, while political scientists evaluate new democracies according to degrees of “development” or “consolidation,” what it means to be a functioning democracy is the same ideal for all.⁴³ To paraphrase Tolstoy,⁴⁴ functioning democracies are all alike, but dysfunctional democracies are miserable each in their own way.⁴⁵

the “hour of the politician” to conduct normal politics and the “hour of the citizen” to build civil society to underwrite both the constitution and normal politics).

⁴⁰ Arendt Lijphart is perhaps the most famous for working out the grid of variables by which democratic countries can be measured and classified as either Westminster democracies or “consensual” democracies. See AREND LIJPHART, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* 2-3 (1999) (documenting ten institutional differences between the two models).

⁴¹ Montesquieu famously described this tripartite division. See CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 156 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., Cambridge Univ. Press 1989) (1748). Even today, the division is commonly used as an exhaustive description of the powers of government. See, e.g., Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 754 (1999) (“When lawyers and judges write about constitutional structure, they typically reach out to the terms ‘executive,’ ‘judicial,’ and ‘legislative’ and seek to define and describe them, and thus to cabin them, as function.” (quoting Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 479 (1991))).

⁴² See DIAMOND, *supra* note 35, at 64-67.

⁴³ See *id.* at 67 (“Democracy can be consolidated only when no significant collective actors challenge the legitimacy of democratic institutions or regularly violate its constitutional norms, procedures, and laws.”); DI PALMA, *supra* note 37, at 15-16 (1990) (pronouncing an objective definition of democracy with “emphasis . . . on free and universal suffrage in a context of civil liberties, on competitive parties, on the selection of alternative candidates for office, and on the presence of political institutions that regulate and guarantee the roles of government opposition”); Stephen Hansen, *Defining Democratic Consolidation*, in *POSTCOMMUNISM AND THE THEORY OF DEMOCRACY* 126-51 (Richard D. Anderson, Jr. et al. eds., 2001) (defining “democratic consolidation” as occurring “when the staff of governing political parties, state bureaucracies, coercive apparatuses, and the judiciary consistently act to maintain or expand the functioning of electoral competition and legally defined citizenship rights”).

⁴⁴ LEO TOLSTOY, *ANNA KARENINA* 3 (Constance Garnett trans., 1939) (“Happy families are all alike; every unhappy family is unhappy in its own way.”).

⁴⁵ See ROSE ET AL., *supra* note 22, at 26-27.

If parliaments are to be regarded in theory as the core democratic institutions in any constitutional democracy,⁴⁶ variety in practice should convince us that this is often not the case. In some democratic systems, the executives dominate,⁴⁷ in others, the courts do.⁴⁸ Focusing in particular on the sheer variety of institutions (and their interrelations) that we see being established in various democracies, I want to suggest that there may be some times when *independent* bodies, like strong constitutional courts⁴⁹ or central banks,⁵⁰ make it *more* likely that elected parliaments can carry out their *democratic* mandates. In short, having strong and independent organs of state often strengthens democracies and their core institutions rather than undermining them.

The power of independent state institutions to engage in democratic bolstering is in part a function of institutional design. Constitutional courts can be structured so that they have better access than the more conventionally elected branches, to what democratic publics want from democratic politics.⁵¹ Central banks that have some independence from short-term electoral

⁴⁶ See ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 3 (1956) (“[A]t a minimum, it seems to me, democratic theory is concerned with processes by which ordinary citizens exert a relatively high degree of control over leaders . . .”); AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES 1 (1984) (“The literal meaning of democracy – government by the people – is probably also the most basic and most widely used definition.”).

⁴⁷ See, e.g., JOSÉ ANTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY 1 (2007) (introducing two “basic forms of democratic governments” and explaining that presidential democracies are particularly fragile); Linz, *supra* note 20, at 52-53 (characterizing the presidential system in terms of executive independence, fixed terms, and democratic claim to power).

⁴⁸ The idea of a “courtocracy” or a “juristocracy” indicates that courts may be among the strongest institutions of state. For an explanation of “courtocracy,” see Kim Lane Scheppele, *Declarations of Independence: Judicial Reactions to Political Pressure*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS 227, 263-64 (Stephen B. Burbank & Barry Friedman eds., 2002). For an explanation of “juristocracy,” see RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1 (2004).

⁴⁹ Constitutional courts have exclusive jurisdiction over all constitutional matters. See Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1761-62 (2006) [hereinafter Scheppele, *Guardians*] (describing constitutional courts and their differences from supreme courts).

⁵⁰ See Geoffrey P. Miller, *An Interest-Group Theory of Central Bank Independence*, 27 J. LEGAL STUD. 433, 435 (1998) (explaining independent central banks’ role in inflation and price stability and its impact on political deals).

⁵¹ See Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1924-25 (2004) [hereinafter Scheppele, *Realpolitik Defense*] (describing a decision of the Hungarian Constitutional Court that restored popular social welfare programs); *infra* Part II.A.

calculations can withstand immediate pressures to engage in inflationary policies and therefore behave in ways that are more beneficial over the long haul.⁵² Human rights monitoring bodies – like ombudsmen and human rights councils – can be especially sensitive about and responsive to those on the losing end of state policies.⁵³ That these institutions can provide crucial support for democratic government is because of the long, detailed and substantively thick constitutions in modern political life that constitute and constrain these institutions.⁵⁴ The decisions of these independent bodies, whose legitimacy is constitutionally specified rather than based on popular elections, may in fact provide better indicators than legislation to what democratic publics want from their governments. And, as we consider whether parliaments are “broken,” we might find these independent bodies provide crucial policies and support crucial values that underwrite the crucial commitments of democratic governments.

To see how democratic governance in this new mode may work, we need first to explore what is usually meant by a democracy – in what I will call the “standard democratic story.” This is a tale of elections and elected officials as the central features of governance, generally confining courts and other independent bodies to the sidelines. After all, courts and expert bodies are legendarily counter-democratic (or counter-majoritarian) because they have judges and top officials who are not directly elected, with longer terms of office than ordinary politicians and allegedly no regularized way to get broader public input (focused as they are on their areas of special expertise). As I will show, those *usual* features of independent bodies are not *typical* features and, as a result, they do not necessarily lead to democratic blindness.

B. *The Standard Democratic Story*

The standard story about the functioning of democracies goes (simplistically) as follows.⁵⁵ Democratic institutions are set up through

⁵² See Miller, *supra* note 50, at 446-47.

⁵³ See Elmendorf, *supra* note 13, at 961-63 (“The paradigmatic ombudsman’s office . . . impartially investigate[s] individuals’ claims of administrative unfairness . . . Commissions of inquiry, by contrast, are usually . . . set up to study large-scale societal problems and to propose policy reforms.”).

⁵⁴ See *infra* Conclusion.

⁵⁵ This Section is based on the account of the “standard democratic story,” which first appeared in Kim Lane Scheppele, *Democracy by Judiciary (Or, Why Courts Can Sometimes Be More Democratic than Parliaments)*, in *RETHINKING THE RULE OF LAW IN POST-COMMUNIST EUROPE: PAST LEGACIES, INSTITUTIONAL INNOVATIONS, AND CONSTITUTIONAL DISCOURSES* 25, 27-31 (Wojciech Sadurski, Martin Krygier & Adam Czarnota eds., 2005). What follows here is an abstracted consolidation of the discussions in ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 232-34 (1989); DIAMOND, *supra* note 35, at 10-13; S.N. EISENSTADT, *PARADOXES OF DEMOCRACY: FRAGILITY, CONTINUITY AND CHANGE* 14-17 (1999); TOURAINE, *supra* note 23, at 26-33. The necessary elements for a system to be

democratically certified constitutions that define the rules of the game.⁵⁶ The central institutions of a democratic polity comprise politicians who earn their democratic credentials through winning elections. These politicians typically belong to a set of relatively stable political parties that represent the relatively stable interests of a relatively stable population. Candidates associated with parties are elected to parliaments that work in partnership with democratically accountable executives (who may or may not be directly elected themselves but who are chosen from among the same set of parties, creating ideological alliances across institutions). Democratic citizenries direct the expression of their political desires to, and through, these parties and institutions, which aggregate (sometimes well, sometimes imperfectly) these interests into policies. If the policies suit, then the politicians and their parties are reelected. If the policies do not, then opposition politicians and parties are given a chance at the next election to do better. If the politicians exceed their mandates or violate the rules of the game, judicial review will require that the politicians step back into the constitutional box that defines the legitimate boundaries of the system.

Courts are, in this view, simply the referees in a system where the rules of the game are placed beyond the possibility of easy change. The most powerful court in the system, a supreme court or constitutional court, is most involved in this refereeing process, since it generally has the last word. The judges of this high court are not usually democratically elected, but instead are appointed by those who have been elected. Without a direct electoral mandate, and with terms of office that typically exceed the terms of the elected officials who put them into office, judges must wrestle with the “counter-majoritarian difficulty.”⁵⁷ This difficulty consists in the fact that elected politicians, with their democratic and majoritarian mandate, must sometimes be reined in by judges who do not have to subject themselves to direct electoral certification. The standard rationales for giving judges this power is that the judges are in the best position (precisely because they are politically insulated) to protect the survival of both democratic institutions and minority rights from the populism of the majority. Judges, as a result, can insulate democratic institutions from elected officials who may run amok.

The same is true of other expert bodies, like central banks, election commissions and human rights monitors.⁵⁸ Typically, the heads of these

democratic, in their view, have been arranged here in the chronological order in which they would typically appear.

⁵⁶ Democratic consolidationists generally say that the commitment of all parties to the rules of the game is precisely what makes a democracy “consolidated.” LINZ & STEPAN, *supra* note 27, at 5.

⁵⁷ BICKEL, *supra* note 14, at 16-23; *see supra* note 14 and accompanying text.

⁵⁸ *See* Elmendorf, *supra* note 13, at 1032-33 (highlighting the importance of “(1) appointment and removal procedures; (2) conflict-of-interest rules; and (3) mechanisms for guarding budgets” in assessing “the problem of de facto independence” for advisory

organizations also are not elected directly. They may serve longer than elected politicians and may make decisions that seriously constrain what elected politicians may do. Using their expertise and specialized focus to intervene in matters that would otherwise be left to the political process, independent bodies may mandate certain policies that the elected officials would never have proposed or voted for. There is thus an unavoidable tension between constitutionalism and democracy: while these bodies may be constitutionally authorized, they are nevertheless undemocratic in the literal and direct sense. Perhaps judges, central bankers and human rights monitors are properly on the side of constitutionalism in this contest – as constitutional constraints on democracy.

The big worry in democratic regimes, then, is that these non-elected political actors will usurp political power that should be reserved for the electorally accountable institutions. Experts – whether judges or central bankers or human rights experts – can get too full of themselves and step in inappropriately – either before a political issue has been through the proper political process, or after a political issue has been satisfactorily resolved in a political manner – only to be unsettled by considerations that matter to experts and that upset the fragile politics of the issue. The positions of judges, central bankers, and others like them, therefore, must be justified in light of and constrained by constitutionalism, which is the *framework* that allows democratic institutions to maintain their democratic character in the face of anti-democratic challenges.

That is the standard story about constitutional democracy. Of course, it is idealized, but it identifies the crucial actors and the sources of their democratic legitimacy within a well-functioning, democratic political system. There are, to be sure, important variations in the precise structures of democratic governments. But the basic outline is still the same.

The problem is that this standard story masks the fact that the theoretical model of democratic institutions reflects the specific and idealized histories of (at least some) Western democracies, histories that newly minted democratic regimes cannot suddenly repeat. Important features like, for example, the ability of elections to in fact produce majoritarian winners, the ability of political parties to reflect interests, the ability of elected officials to retain their primary allegiance to their constituents and the institutional separations that allow politicians to avoid crippling conflicts of interest – all of these are not simply abstract properties of an ideal system. They are also very real historical accomplishments, accomplishments that often took centuries of struggle to establish. Without the history of struggle and institutional adjustment, democratic institutions can be a sham because one can have elections, parties, parliaments and laws, but at every moment in the political process, political mandates can break free of the democratic underpinning that sustains them.

bodies); Miller, *supra* note 50, at 449-50 (comparing central bank independence with judicial independence).

In North America and much of Western Europe, protracted political and sometimes military struggles in the modern period settled the question historically of whether power would be lodged primarily in an executive or in a parliament and how those powers would be shared.⁵⁹ At first, in the age of constitutionalism,⁶⁰ these were struggles over the ability of nobilities, parliaments or constituent assemblies to constrain the monarchy. Those struggles then turned to bringing monarchs to account in more general terms through instituting explicit procedures for the selection of an executive that did not depend on heredity. By forcing a monarch to rule with a parliament, and then by toppling the monarchy and replacing heredity with elections (either popular or parliamentary), democracy advanced regardless of the content of the specific policies that were adopted by governments constructed on the new model. As the democratic story has been elaborated, parliaments too have become more directly accountable through electoral mandate because there has been a tendency to remove non-elected members from these bodies and also to expand the franchise to more and more of the population. To prevent the excesses of hereditary power from concentrating again, power was dispersed either through creating functional differences among political institutions that were forced to govern together (for example, through bicameral parliaments) or through creating overlapping responsibilities and majorities among differently chosen political leaders, themselves differently accountable to differently constructed constituencies (for example, through complex electoral laws).

Generalizing from these distinctive experiences of Western democracies – in which accomplishments of democratic governance were more the successful outcomes of political struggles against monarchy than they were a start-from-scratch design given by democratic theory – the main constitutional choice in the standard democratic story as it currently plays itself out in the drafting of new constitutions is between a *presidentialist* regime – where the executive has

⁵⁹ For a general account of this constitutional history, see Kim Lane Scheppele, *The Agendas of Comparative Constitutionalism*, LAW & CTS. (Am. Political Sci. Ass'n, Wash., D.C.), Spring 2003, at 5, 12-13, available at <http://www1.law.nyu.edu/lawcourts/pubs/newsletter/spring03.pdf>.

⁶⁰ My account of the story, and therefore what I will label the age of constitutionalism, begins at somewhat different points in different countries. It begins when a country starts to shake off absolutism by having parliamentary (as in England) or populist (as in France) challenges to the absolute power of the king. See *id.* at 8, 12-13. I identify the age of constitutionalism as beginning in each state with the rise of long-term agreements between the king and some other sectors of the society that power will be shared and thereby constrained. *Id.* at 7, 9 (“Throughout the 19th century, much constitutional change in Europe was motivated by the desire on the part of newly empowered classes – empowered either by Enlightenment ideas or by the money made from the profits of industrialization – to force kings to share power.”). In some countries, as a result, this will start as a set of conflicts between church and state (for example) and in other countries, the starting point will be the conflicts between monarchies and nobilities. *Id.* at 14.

an electoral mandate that is independent of the electoral mandate of the parliament – and a *parliamentarist* government – in which electoral power underwrites a parliament to whom an executive can be then held accountable through election by, and/or a vote of no confidence from, that body.⁶¹ In both presidentialist and parliamentarist visions, however, democratic legitimacy is assumed to be given by the very fact that the representatives have been elected, because the immediate historical alternative was that political position was inherited or justified by divine grace. Power in the age of constitutionalism is dispersed either through a system of checked and separated powers (presidentialism) or through the large numbers necessary to control a government (parliamentarism).⁶² These were clearly democratic advances over the system that preceded them – monarchies, and absolutist ones at that.

In Western experience, the precise *content* of the democratic institutions is commonly portrayed as empty, except for a thin constitutional residue that guarantees the structures themselves and includes a few basic rights that typically specify the limits of government rather than its positive obligations.⁶³ This empty space is then filled by the desires of “the people” through elections. (Of course, the idea of the relevant “people” has changed over time as well.) The democratic nature of political institutions is given by the *procedure* through which its members are chosen in the first place, which is to say that it is precisely because the highest levels of government are chosen in elections that the regime is considered democratic. The *substance* of what this government stands for then takes care of itself, except in the unusual instance when democratic excesses produce unconstitutional results (in the thin sense just described) or when there is interference with the political process so that

⁶¹ See SARTORI, *supra* note 36, at 83-142; MATTHEW SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS 1-17 (1992); Douglas V. Verney, *Parliamentary Government and Presidential Government*, in PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT, *supra* note 36, at 31, 31-49.

⁶² The extent of separation of powers in Western democracies varies widely – from the Westminster model of concentrated powers to the presidentialist one of separated and checked powers. The tendency in parliamentarist systems, however, is toward increased separation of powers, as the imminent launching of an independent Supreme Court in England, a court no longer part of the upper house of parliament, suggests. For the announcement of the new court, see Judiciary of England and Wales, The New Supreme Court, http://www.judiciary.gov.uk/about_judiciary/judges_and_the_constitution/supreme_court/index.htm (last visited Mar. 5, 2009). Conversely, the tendency in presidentialist regimes is exactly in the opposite direction, toward more sharing of power with the parliament. Here, France’s period of “cohabitation” followed by the decrease in the presidential term from seven to five years blurs the boundaries between presidentialist and parliamentary regimes. Jean Poulard, *The French Double Executive and the Experience of Cohabitation*, 105 POL. SCI. Q. 243, 263-66 (1990).

⁶³ This is sometimes described as the “mini constitution.” JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 110-17, 125-35 (1996).

the connection between popular mandates and electoral results is blocked.⁶⁴ Democratic governments have the sort of policies they have, on this view, because the leaders are elected and accountable to a population that wants these policies. Democratic theory is not a theory about which policies to have in detail, but rather a theory about how the officials who make decisions about policies are put into place.

So what happens to democratic institutions, then, in countries that do not have a history of developing these institutions gradually over time through political struggle and resolution – or in countries in which this history, if it ever got started, ended in a somewhat different way? What happens to the societies which, having had this history, adopted new political institutions as the result of the post-World War II wave of new constitutions? I do not want to argue there is an essential democratic deficit in newly revamped democracies – mostly because I believe the deficit is wildly overstated in most accounts – but instead, I want to explore how different historical paths and different senses of opportunity and danger in the present political moment are reflected in the new institutions that new democrats have built. In many ways, as I will argue, new political institutions now handle problems that used to be considered the sole province of the most democratic branch, the parliament.

The new political institutions that supplement the capacity of parliaments to respond to democratic mandates are, among others, constitutional courts, central banks, electoral commissions and human rights monitors. These institutions perform valuable functions that increase the democratic legitimacy of governments by acting in parliamentary blind spots. Even though they are run by officials who are not themselves directly elected, these institutions assist parliaments in accomplishing their democratically mandated tasks. While they appear to take powers away from parliaments in the short term, these institutions typically permit parliaments to take a longer view, to be more democratically responsive and to operate with more integrity *as democratic institutions*. In the next Part, we will consider the roles of two of these institutions, constitutional courts and central banks, in helping parliaments to see long-term goals as well as short-term incentives.

II. DEMOCRACY BEYOND THE STANDARD STORY: TAKING THE LONG VIEW

Democracy has spread amazingly quickly across the globe in the last quarter of the twentieth century.⁶⁵ But the new democracies very rarely feature parliaments acting alone as the central institutions of government, with executives merely carrying out the laws parliaments make and courts merely applying those laws in individual cases. Instead, new democratic governments

⁶⁴ This is the familiar argument of JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

⁶⁵ In 1974, thirty-nine countries out of the 145 in existence at that time were democracies – twenty-seven percent of all states. By 1997, the number of democracies grew to 117 out of 191 existing states – or sixty-one percent of all states. DIAMOND, *supra* note 35, at 24-25.

– as seen through their constitutional structures – typically have many more institutions supplementing the traditional tripartite structure of an executive, legislature, and judiciary. A whole series of relatively new constitutional institutions have been designed into the new democracies as part and parcel of the modern package of constitutional reform. These new institutions are designed in particular to solve particular and recurrent problems with complex representative democracies, supplementing parliaments with a support system that enables parliaments to be more effective. In this Part, I consider one potential problem with parliamentary government: parliaments often take a short-term perspective that blocks paths more beneficial to democratic legitimacy in the long run. To do this, I consider two supplementary institutions designed to overcome this predictable parliamentary problem: constitutional courts and central banks.

Democracies are famously prone to panics⁶⁶ and thus fall prey to short-term agendas of elected leaders who only look ahead to the next election and not to the future when they will not be in power.⁶⁷ Indeed, democratic legitimacy and stability require not just short-term fixes to immediate political problems; they also require long-term thinking about the overall welfare of a people and its future generations.⁶⁸ In order to balance the future welfare of the population against the immediacy of panics, parliaments may need to be supplemented by other institutions that force parliaments to think beyond immediate electoral pressure. If parliaments are in fact representative and responsive in the

⁶⁶ This is particularly true in the aftermath of terrorist attacks which, as their name suggests, operate precisely through the creation of terror in the public and the consequent calls for extreme state action:

Terror produces its effects by regularly blurring the bounds between the spaces and times of war and peace. It also works by its efforts to disguise its own principles of organization and mobilization. And it is above all devoted to the decimation of order, understood as peace or freedom from violence. Terror, in the name of whatever ideology of equity, liberty, or justice, seeks to install violence as the central regulative principle of everyday life. This is what is terrifying about terror Terror is the rightful name for any effort to replace peace with violence as the guaranteed anchor of everyday life.

ARJUN APPADURAI, *FEAR OF SMALL NUMBERS: AN ESSAY ON THE GEOGRAPHY OF ANGER* 32 (2006).

⁶⁷ As John Brenkman states:

The enjoyment of power is inescapably ambivalent. When Weber identified one of the ‘inner enjoyments’ of the political vocation as the ‘feeling of holding in one’s hand the nerve fiber of historically important events,’ he brought out the nature of the ambivalence. To hold power is at the same time to be gripped *by* power. The politician does not simply enjoy power, he is enjoyed – seized, jolted, thrilled – *by* power.

BRENKMAN, *supra* note 33, at 27 (citing MAX WEBER, *supra* note 33).

⁶⁸ See NORMAN DANIELS, *JUSTICE AND JUSTIFICATION* 257-83 (1996); DEREK PARFIT, *REASONS AND PERSONS* 351-79 (1984); Axel P. Gosseries, *What Do We Owe the Next Generation(s)?*, 35 *LOY. L.A. L. REV.* 293, 295 (2001).

moments of public panic, they will have a tendency to engage in short-term actions with insufficient attention to the long-term consequences.

To help parliaments focus on the future, new constitutional institutions may be thought of as standing in for future generations of voters not yet on the political scene. Both constitutional courts and central banks have the ability to slow quick parliamentary responses that may be destructive to long-term interests. Not surprisingly, these new institutions often introduce considerations of future effect into the political process.

A. *Constitutional Courts*

Judicial review is one mechanism that forces parliaments to think about more than the immediate political landscape before them.⁶⁹ While the United States invented judicial review in general,⁷⁰ by now judicial review has been developed beyond the practices with which Americans are familiar.⁷¹ In particular, many of the new democracies now have constitutional courts, which are separate state institutions whose only task is to ensure all political actors comply with the constitution. Having an institution tasked with guaranteeing constitutional compliance is an important way to ensure that a government retains both its basic principles and its ability to carry those principles into the future. Indeed, constitutional courts have become almost a standard element of

⁶⁹ In this Section, I will lay out the model of constitutional courts, though of course some of the features of constitutional courts are also found in supreme courts with the power of judicial review. Most supreme courts, however, have both constitutional and statutory interpretation in their remit, and so can often turn what might be constitutional questions into matters of statutory interpretation. Also, since supreme courts generally can hear cases only as the last layer of appeal from ordinary court proceedings, they tend to get involved later in the process than constitutional courts, which can hear complaints as soon as they become evident. Supreme courts, as a result, tend to have a lower profile in their respective political systems than do constitutional courts, and are considered less justified in taking on the political branches because they have the mixed function of being the highest court in the ordinary judicial system and the primary judicial guarantor of the constitution. For a more extended discussion of the difference between supreme courts and constitutional courts, see Scheppele, *Guardians*, *supra* note 49, at 1761-72.

⁷⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

⁷¹ Most of the rest of the world uses a more aggressive form of judicial review, a form that allows courts to review legislation in the abstract before it is promulgated or before it has had a chance to cause negative effects. Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 266 (2008) (presenting the competing views about *why* judicial review was so liberalized). In addition, many countries have built in ways for individuals to take complaints that their constitutional rights have been violated by either legislation or executive interpretation of that legislation directly to a body that can make a final resolution of the constitutional claim without the need for a long process of appeals. ALLAN R. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW 210-12 (1989); Wolfgang Zeidler, *The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 NOTRE DAME L. REV. 504, 506 (1987).

new constitutions drafted in the last thirty years.⁷² All of the post-Soviet constitutions established a constitutional court,⁷³ and many other transitional regimes have them as well.⁷⁴

Constitutional courts are quite different from supreme courts or other appeals courts that are perched at the apex of the ordinary court system. Because constitutional courts have jurisdictional and institutional segregation from the rest of the legal system, and because their judges, court leadership, and administrative personnel are chosen differently from those of other courts,⁷⁵ they do not look like regular courts and are therefore not held to the standards of political disengagement of ordinary courts. Instead, constitutional courts often appear more like “third chambers of parliament”⁷⁶ or “negative legislators”⁷⁷ because the questions that they answer address large-scale political issues of the sort usually left to parliaments. Indeed, constitutional courts cannot avoid political engagement because, unlike the United States Supreme Court, the jurisdiction of constitutional courts is limited to constitutional matters alone. Moreover, constitutional courts do not typically have formally recognized discretionary powers to choose which cases they will decide.⁷⁸ If a constitutional question falls within the jurisdiction of the court,

⁷² See Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38, 39-40, 51-55 (Louis Henkin & Albert J. Rosenthal eds., 1990) (discussing the development of separate constitutional courts in various European countries).

⁷³ HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 1 (2000).

⁷⁴ See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1675 (2004) (discussing France, Spain, Portugal, and Italy); Tom Ginsburg, *Constitutional Courts in New Democracies: Understanding Variation in East Asia*, GLOBAL JURIST ADVANCES, Feb. 2002, art. 4, at 2, available at <http://www.bepress.com/gj/advances/vol2/iss1/art4/> (discussing Thailand, South Korea, and Mongolia).

⁷⁵ Scheppele, *Guardians*, *supra* note 49, at 1766-69.

⁷⁶ ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 34 (2000).

⁷⁷ See Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitutions*, 4 J. POL. 183, 187 (1942) (“The decision of the Constitutional Court by which a statute was annulled had the same character as a statute which abrogated another statute. It was a negative act of legislation.”).

⁷⁸ In practice, because of the huge press of cases, courts have to find a way to triage their decisions. In this footnote and the specific references on constitutional courts to follow, I will use examples from the two courts with which I have worked, because I am most familiar with their rules: the Hungarian Constitutional Court and the Russian Constitutional Court.

In Hungary, the procedures the court uses to decide a constitutional issue depend on the sort of norm that is reviewed. Cases only engage the whole court if a statute is being reviewed for constitutionality; three-judge panels deal with the constitutionality of administrative regulations. Georg Brunner, *Structure and Proceedings of the Hungarian*

the court must generally answer it.⁷⁹ As a result, unlike in U.S. federal courts, there is usually no “political question doctrine”⁸⁰ or other evasive doctrinal mechanism for staying out of major political battles.⁸¹ Given the prevalence of abstract review, there are not even mootness, ripeness, and other fact-based

Constitutional Judiciary, in CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 65, 74-75 (László Sólyom & Georg Brunner eds., 2000). In Russia, the Constitutional Court separates cases into first-impression cases and cases that merely elaborate on those first-impression cases (*postanovleniya* as opposed to *opredeleniya* in Russian). *Postanovleniya* require formal briefing, oral arguments, and plenary sessions of a Senate of the Court. *Opredeleniya* are decided on the basis of the initial submissions and are generally written by one judge as rapporteur, with the decision then voted on in the plenary session of a Senate, without full oral argument. Scheppele, *Realpolitik Defense*, *supra* note 51, at 1954 n.145.

⁷⁹ In Hungary, the court must hear all legitimately filed petitions within its jurisdiction and must also refer all petitions not within its jurisdiction to the state body that bears responsibility for inquiring into the matter raised. Act No. XXXII of 1989 on the Constitutional Court, ch. III, art. 23, *available at* <http://www.mkab.hu/content/en/encont5b.htm> (“The Chairperson refers petitions for cases outside of the competence of the Constitutional Court to the organ having competence for the case.”).

In Russia, the reasons for legitimately dismissing a petition are listed in the Constitutional Court’s framework statute:

Article 43 – Dismissal of Petition.

The Constitutional Court of the Russian Federation shall decide to dismiss a petition when:

- 1) Resolution of the question raised in the petition does not fall under the jurisdiction of the Constitutional Court of the Russian Federation;
- 2) The petition is inadmissible in accordance with the requirements of the present Federal Constitutional Law;
- 3) The Constitutional Court of the Russian Federation has issued a ruling on the object of the petition and the ruling remains in force.

If the constitutionally challenged act has been abrogated or terminated by the beginning or during the consideration of the case, the proceedings initiated by the Constitutional Court of the Russian Federation may be stopped, except when constitutional rights and freedoms of citizens have been violated during the operation of the act.

Sobranie Zakonodatel’stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1994, No. 1, Item 3.

In both constitutional courts, the courts *must decide* the legitimately posed questions one way or another. They cannot hide behind the political question doctrine or dismiss cases because they would be inconvenient to decide.

⁸⁰ *See generally* Baker v. Carr, 369 U.S. 186 (1961).

⁸¹ Because the U.S. Supreme Court has jurisdiction for both statutory and constitutional questions, it can sometimes avoid making a constitutional decision by interpreting a statute to sidestep the constitutional question. *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 473 (2004) (addressing Guantánamo detainees’ habeas claims in a purely statutory manner before the Supreme Court revisited the question in *Boumediene v. Bush*, 128 S. Ct. 2229, 2247-48 (2008), where it could no longer avoid the question of the scope of constitutional habeas doctrine).

procedural tactics for avoiding the decision on grounds that the court is not ready to decide the case.⁸² Without these tactics for leaving matters over until another day, these constitutional courts are therefore built for political controversy, and political controversy they get.⁸³

In systems that have constitutional courts, typically *only* the constitutional court has the power to rule on constitutional matters.⁸⁴ As a result, in these systems all constitutional questions have to be referred to the constitutional court, both from other courts and from other places in the political system – for example, from the losing factions in the parliament. Not only is the constitutional court the *only court* to hear constitutional questions, but it also

⁸² See, e.g., Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 605 (1992) (observing that the justiciability doctrines – standing, ripeness, and mootness – “disempower federal courts from deciding certain kinds of cases”).

⁸³ This is not to say that constitutional courts do not have any evasive tactics for avoiding head-on political conflicts. Constitutional courts often decide controversial matters on procedural rather than substantive grounds. So, for example, when the Hungarian Constitutional Court decided its first abortion case, the court struck down the communist-era abortion law on the grounds that it had been enacted as an administrative regulation rather than as a constitutionally required statute, thereby avoiding the more politically controversial question of when life began under the Hungarian constitution. See Magyar Közlöny [MK.] 64 (Alkotmánybíróság [Constitutional Law Court] 1991) (Hung.), translated in *On the Regulation of Abortion*, in CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT, *supra* note 78, at 178, 178-99. Similarly, when the Russian Constitutional Court had to rule on the constitutionality of the first Chechen War, the court limited itself to inquiring into whether the procedures for declaring war had been followed by involving the parliament appropriately, avoiding the question of whether the war required a formal declaration of a state of emergency under the Russian Constitution or whether the tactics used in the war violated the rights of the citizens of Chechnya. Rossiiskaia Gazeta [Ros. gaz.] Aug. 11, 1995 (Russ.), translated in *In the Case Concerning Verification of the Constitutionality of Edict No. 2137 of the President of the Russian Federation “On Measures for the Restoration of Constitutional Legality and Law and Order on the Territory of the Chechen Republic” of 30 November 1994*, in 31 STATUTES & DECISIONS: THE LAWS OF THE USSR AND ITS SUCCESSOR STATES, Sept.-Oct. 1995, at 48, 51.

Based on my personal observation from having worked in both settings and having observed the flow of cases in each court, the judges also have the power to delay decisions on cases because there is no requirement in either courts’ framework statutes to decide cases within any particular time frame. As a result, constitutional courts can avoid complicated political issues while the issues are red hot, but not forever.

⁸⁴ Constitutional courts have their intellectual origin in the work of Hans Kelsen, the Austrian legal theorist and creator of the first specialized constitutional court, that of Austria in its post-World War I constitution. It was important for Kelsen that the Constitutional Court, bearing enormous political weight in the constitutional order of Austria, be the only one that could exercise judicial review. See Kelsen, *supra* note 77, at 186. For a discussion of Kelsen’s contribution, see MARTIN M. SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* 147-48 (2002).

has the jurisdiction to hear *only constitutional questions*, which means that questions of routine interpretation of statutes are simply never on a constitutional court's docket. As a result, it is generally only the constitutional court that has the power to nullify laws inconsistent with the constitution and to require governments to take steps to correct the problem.⁸⁵

The constitutional court typically has a jurisdictional segregation from other courts.⁸⁶ Jurisdictional segregation means constitutional court decisions have a different sort of status and audience than supreme court decisions. If the constitutional court rules on a case that looks like a "case or controversy" in the United States (that is, where there are concrete individuals locked in a dispute),⁸⁷ the constitutional court only has the final word in the matter if the case involves only a constitutional claim. Because the constitutional question can be one of many legal issues in a concrete dispute, matters decided by the constitutional court will often be sent back for final resolution to the ordinary court that referred the case in the first place.⁸⁸ All other claims – including claims that require fact-finding – have to be settled in their finality elsewhere.⁸⁹ But constitutional courts often have the power to rule in matters that are not strictly the "cases or controversies" to which the U.S. Constitution limits federal courts.⁹⁰ *Abstract* review allows constitutional courts to review laws for their constitutionality in the absence of a concrete dispute.⁹¹ While most

⁸⁵ See Kelsen, *supra* note 77, at 186 ("The most important fact, however, is that in Austria the decisions of the highest ordinary court . . . concerning the constitutionality of a statute or an ordinance had no binding force upon the lower courts.").

⁸⁶ See Scheppele, *Guardians*, *supra* note 49, at 1761-72.

⁸⁷ U.S. CONST. art. III, § 2, cl. 1.

⁸⁸ When an ordinary court judge has a constitutional question that cannot be resolved by her court, the judge in such a case is supposed to send the constitutional question to the constitutional court for resolution, staying the proceedings in her court until she gets an answer. When the constitutional court provides the answer to the constitutional question, the case in the ordinary court can be resumed. Herbert Hausmaninger, *Judicial Referral of Constitutional Questions in Austria, Germany, and Russia*, 12 TUL. EUR. & CIV. L.F. 25, 29-30, 35-36 (1997). This may look like the old system of interlocutory appeals in the U.S., but it has a different rationale. Rather than ensuring that a particular intermediate question is finally settled through the usual mechanisms of appeal, the constitutional reference process sends a constitutional question to the only court that can hear it. *Id.* at 27. The ordinary judge cannot make a ruling on the matter and must wait for the one body that *can* make such a judgment to make it.

⁸⁹ HELMUT STEINBERGER, *MODELS OF CONSTITUTIONAL JURISDICTION* 29 (1993).

⁹⁰ U.S. CONST. art. III, § 2, cl. 1.

⁹¹ Abstract review occurs when a constitutional court is asked to review legislation for constitutionality "in the abstract" – that is, as a facial challenge to a law without any concrete parties who have been affected by it appearing before the court. In fact, abstract review may and often does occur before a law has even gone into effect. Favoreu, *supra* note 72, at 40-42 (explaining that this is because "in Europe constitutional issues are generally raised by a public authority . . . and not by individuals").

constitutional systems only allow certain political actors to ask for abstract review – for example, the president of the country, the head of either chamber of parliament, or a substantial fraction of members of parliament – some countries allow even lone individuals to request it.⁹² If a law is found constitutionally deficient on abstract review, the court will nullify the offending law immediately or will order the parliament to correct it within a fixed time.⁹³

A court with these powers can backstop parliaments by making them take actions that require a longer view, when a momentary panic sparks an overreaction. For example, constitutional courts have been quite active in trimming back some of the expansive powers that legislatures gave to executives to fight terrorism after 9/11. The Federal Constitutional Court of Germany struck down as unconstitutional the parliamentary adoption of the European arrest warrant after 9/11, primarily on the grounds that the law had not taken into account the constitutional requirement that German citizens cannot be extradited to stand trial where they would not have German constitutional protections.⁹⁴ That same court also struck down post-9/11 data-mining laws that insufficiently protected the privacy of those whose files were reviewed.⁹⁵ The Constitutional Court of Indonesia struck down a post-9/11

⁹² The Hungarian Constitutional Court provides unusually broad access to abstract review. According to the Hungarian Constitution, “everyone” may file a complaint in the Constitutional Court challenging the constitutionality of a law. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 32/A(3) (Hung.), available at <http://www.mkab.hu/en/enpage5.htm>.

⁹³ When a constitutional court finds that a statute is unconstitutional, but voids the application of the statute only at some point in the future, this is called “prospective nullification.” See Kelsen, *supra* note 77, at 199. This practice is controversial because it allows unconstitutional laws to remain on the books for a transitional period, but it is used to avoid creating immediate gaps in the law that may have other dire consequences.

⁹⁴ See Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] July 18, 2005, 58 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 2289 (F.R.G.) (European Arrest Warrant Act Case), available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604en.html. For analysis of the judgment, see Simone Mölders, *European Arrest Warrant Act Is Void – The Decision of the German Federal Constitutional Court of 18 July 2005*, 7 GERMAN L.J. 45, 47 (2005), available at http://www.germanlawjournal.com/pdf/Vol07No01/PDF_Vol_07_No_1_45-58_Developments_Moelders.pdf.

⁹⁵ See Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] Apr. 4, 2006, 59 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1939 (F.R.G.) (Data Matching Act Case), available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20060404_1bvr051802.html; Ralf Bendrath, *German Constitutional Court Has Outlawed Preventative Data Screening*, EDRI-GRAM (European Digital Rights, Brussels, Belgium), May 24, 2006, available at <http://www.edri.org/edriagram/number4.10/datascreening> (summarizing the decision in English and explaining that according to the decision, a “general threat condition or foreign tensions like after 9/11 2001 are not sufficient” justification to use an indiscriminate system like data matching to find potential terrorists).

anti-terrorism law because it retroactively criminalized actions that were not crimes at the time they were committed.⁹⁶ In each of these cases, important principles were at stake – principles worth preserving for the long haul, but compromised by parliaments' quick reaction to the strong pressures for action.

In transitional situations as well, where a newly empowered democratic majority might want to seek retribution against those in the prior government, a constitutional court may slow the process so those newly in power may have a chance to reconsider revenge. The Hungarian Constitutional Court made the first democratically elected parliament in 1990 think twice about punishing those who played key roles in sustaining the prior communist government.⁹⁷ Once the immediate moment of high agitation over the past regime's crimes was over, the country went on without looking back.⁹⁸ In moments of panic, especially when responding to the threat of terrorist attacks or rapid political change, parliaments sometimes overreach, and courts can help them restore constitutional commitments that protect the population in the longer view.

B. *Central Banks*

In addition to constitutional courts, independent central banks can also force parliaments to act within the constraint of legitimate future demands. Central banks have become important institutions for linking states to the international economic system, and are essential for a state to maintain its role in global transactions.⁹⁹ Globalization may be unpopular, but states that want to maintain economic growth and stability can hardly do without this important link to the global financial system.¹⁰⁰ In addition, domestic economic stability relies on an institution above the political fray to monitor and control inflation,

⁹⁶ See Simon Butt & David Hansell, *The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003*, 6 AUSTL. J. ASIAN L. 176, 185 (2004), available at [http://www.federationpress.com.au/pdf/AJAL6\(2\)%20Butt.pdf](http://www.federationpress.com.au/pdf/AJAL6(2)%20Butt.pdf) (providing a translation and a detailed analysis of the decision).

⁹⁷ Magyar Közlöny [MK.] 11 (Alkotmánybíróság [Constitutional Law Court] 1992) (Hung.), translated in *On Retroactive Criminal Legislation*, in CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT, *supra* note 78, at 214, 214-28.

⁹⁸ See Gábor Halmai & Kim Lane Scheppele, *Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 155, 156 (A. James McAdams ed., 1997).

⁹⁹ Simone Polillo & Mauro F. Guillén, *Globalization Pressures and the State: The Worldwide Spread of Central Bank Independence*, 110 AM. J. SOC. 1764, 1767 (2005) (citing John Meyer, John Boli, George Thomas & Francisco Ramirez, *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997)).

¹⁰⁰ See ZYGMUNT BAUMAN, GLOBALIZATION: THE HUMAN CONSEQUENCES 1 (1998) (“‘Globalization’ is on everybody’s lips; a fad word fast turning into a shibboleth, a magic incantation, a pass-key meant to unlock the gates to all present and future mysteries. For some ‘globalization’ is what we are bound to do if we wish to be happy; for others, ‘globalization’ is the cause of our unhappiness.”).

even at the parliament's inconvenience.¹⁰¹ Controlling inflation almost always weakens the economy and produces unemployment.¹⁰² As a result, parliaments are persistently tempted to inflate their way toward robust economic performance, at least in the short term.¹⁰³

Central banks are typically given independent authority to control the money supply, and whatever relative independence they have under their respective regimes means that parliaments cannot easily override their decisions.¹⁰⁴ If parliaments could do so, they would be tempted to adopt policies that would allow governments to inflate their way out of debts and to renege on promises that are inconvenient for states to maintain when the financial climate is stable. Encouraging inflation by increasing the money supply, for example, may become a convenient way to outgrow debt.¹⁰⁵ Both international and domestic pressures coming from those whom inflation destabilizes (creditors and those whose assets are subject to inflationary devaluation) prevent certain key features of an economy from being overrun by populist pressures coming from those whom inflation benefits (debtors and the poor in general).

Like constitutional courts, central banks are also institutions that typically do not have a direct electoral mandate.¹⁰⁶ Instead, they are staffed by people with expertise in the field of economics, much as constitutional courts may be staffed by those with expertise in law.¹⁰⁷ As political institutions, central banks have a longer history than constitutional courts, since the first central banks were established in the seventeenth century.¹⁰⁸ The earliest central banks began as clearinghouses for commerce and to lend money to the governments of Sweden and England.¹⁰⁹ No one could have foreseen that they would act as bastions against populist pressures, in no small measure because, in the seventeenth century, broadly inclusive democracies simply did not exist. Moreover, until 1914, much of the world operated on the gold standard, which

¹⁰¹ Miller, *supra* note 50, at 433.

¹⁰² David A. Levy, *Does an Independent Central Bank Violate Democracy?*, 18 J. POST KEYNESIAN ECON. 189, 192 (1995-96).

¹⁰³ Miller, *supra* note 50, at 436-45.

¹⁰⁴ Polillo & Guillén, *supra* note 99, at 1767.

¹⁰⁵ Miller, *supra* note 50, at 436-45 (exploring possible rationales for pursuing an expansionary monetary policy).

¹⁰⁶ There is a substantial literature on central bank independence, which is achieved to a variable degree across countries. *E.g.*, Polillo & Guillén, *supra* note 99, at 1781-84.

¹⁰⁷ Scott M. Noveck, *Is Judicial Review Compatible with Democracy?*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 401, 425-27 (2008).

¹⁰⁸ MICHAEL BORDO, FED. RESERVE BANK OF CLEVELAND, A BRIEF HISTORY OF CENTRAL BANKS 1 (2007), available at <http://www.clevelandfed.org/Research/commentary/2007/1207.pdf>.

¹⁰⁹ *Id.*

set a fixed value for currencies that did not allow them to float.¹¹⁰ Central banks, like the general judiciary, were established under different institutional rationales in their early days than they came to have later. They were not created primarily as checks on the parliament. Even now, this checking function may not be the predominant reason for establishing these institutions.

The anti-populist function of central banks did not emerge until the wave of regulatory changes that came with the global depression in the late 1920s and 1930s.¹¹¹ In the 1920s, the Federal Reserve, the central bank of the United States, kept a “tight money” policy as a stock boom took place, thereby tipping the country into recession.¹¹² When the stock market crashed, and wealth disappeared, the Fed refused to act as a lender of last resort.¹¹³ The resulting collapse of the money supply led to serious deflation and ultimately to a long and painful depression.¹¹⁴ New banking regulation in the 1930s brought the Fed more under political control, from which it emerged as relatively independent again only in 1951.¹¹⁵ While the Fed has seesawed back and forth ever since that time between a policy that attempts to achieve low inflation and a policy that tries to generate high employment, Congress has kept open the option of intervening by regulating conditions of the bank’s existence by statute.¹¹⁶

When the fixed exchange-rate system ended in 1973, leading to a substantial period of world-wide instability in the financial markets, the advanced industrial economies attempted to find ways to coordinate their actions to keep the world economy stable.¹¹⁷ In the 1980s and 1990s, just as new constitutions were being drafted at a frenetic pace, central bank independence became a hot topic.¹¹⁸ The spread of neoliberalism, an economic theory in which a sharply smaller government footprint in the market economy is central, included increased pressures for more central bank independence.¹¹⁹ As Polillo and Guillén observed:

A central bank free from political contingencies is supposed to be in a position to pursue the goals of fiscal discipline and monetary stability by preventing the rest of the state from engaging in discretionary deficit

¹¹⁰ *Id.* at 1-2.

¹¹¹ *See id.* at 2.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* (explaining that The Banking Acts of 1933 and 1935 reorganized the Federal Reserve System, shifting power away from the Reserve Banks to the Board of Governors and making the Fed subservient to the Treasury).

¹¹⁶ *Id.* at 2-3.

¹¹⁷ Polillo & Guillén, *supra* note 99, at 1767.

¹¹⁸ *Id.* at 1767-68 (discussing the idea of central bank independence “as a safeguard against the alleged ill effects of fiscally expansionary policies”).

¹¹⁹ *Id.* at 1768.

spending. By controlling the inflation rate and preventing the government from causing inflationary shocks that could momentarily boost output, the central bank is heralded as a necessary check to self-interested politicians.¹²⁰

In addition to providing a check on politicians who might respond to immediate political demands instead of holding the line on currency control, central banks also provide multinational companies with a familiar institutional form that assures local economic conditions will not be idiosyncratic.¹²¹

Following the trajectory of judicial review, in which the U.S. was an early adopter but then made relatively few institutional changes, central banks have been lodged more firmly in the constitutions of other countries than they have been embedded in the constitutional structures of the United States and the United Kingdom. Many of the new constitutions include explicit provisions for central banks.¹²² While the degree of central bank independence varies

¹²⁰ *Id.*

¹²¹ *Id.* at 1769.

¹²² In fact, one of the most widely used measures of central bank independence codes whether the bank's protections are built into the constitution, enunciated through organic laws (that are harder for parliaments to change), or through ordinary statutes. Alex Cukierman, *Central Bank Independence and Monetary Control*, 104 *ECON. J.* 1437, 1438 (1994) ("Legal independence is a reasonable proxy for actual independence provided there is sufficient respect for the rule of law in the country under consideration."). As Polillo and Guillén explain, this is a reasonable measure of bank independence because "economists argue that the mere adoption of a legal statute guaranteeing central bank independence dampens inflationary expectations in the economy" because it creates a "regime of credibility." Polillo & Guillén, *supra* note 99, at 1782.

As for examples of the new constitutions that have built central banks in as constitutional institutions, the Russian Constitution says: "The protection and stability of the ruble is the main function of the Central Bank of the Russian Federation which it exercises independently from other bodies of state power." KONSTITUTSIIA ROSSIISKOI FEDERATSII [Konst. RF] [Constitution] art. 75(2) (Russ.), available at http://www.servat.unibe.ch/icl/rs00000_.html.

The Hungarian Constitution sets up the central bank directly as a constitutional institution:

- (1) The National Bank of Hungary is the central bank of the Republic of Hungary. The National Bank of Hungary shall define the country's monetary policy in accordance with the provisions of specific other legislation.
- (2) The President of the National Bank of Hungary is appointed by the President of the Republic for a term of six years.
- (3) The President of the National Bank of Hungary shall present the Parliament with a report on the activities of the National Bank once every year.

A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 32/D (Hung.), available at <http://www.mkab.hu/en/enpage5.htm>. Given that the term of the Hungarian president is five years, *id.* at art. 29/A(1), and the parliamentary term is only four years, *id.* at art. 20(1), this means the national bank president serves terms that are staggered compared with elected officials and thus cannot be completely controlled by them. The capacity of the parliament

across constitutional systems,¹²³ the tendency – at least until the current economic crisis the world is facing in 2009 – has been to increase legal protections for central bank independence.¹²⁴

During the 1990s, central bank independence was strengthened around the world as seventeen countries in Eastern Europe and the former Soviet Union, thirteen countries in Western Europe, eleven countries in Latin America, nine countries in Africa and four countries in Asia made legal changes to guarantee their central bank more independence.¹²⁵ Only twenty-four states that had central banks did not take steps to make them more independent in the 1990s and only one country – tiny Malta – reduced central bank independence during this period.¹²⁶ The trend toward increasing bank independence may be partially explained as the result of institutional isomorphism – that is, organizations imitate what they see as successful models.¹²⁷ But other explanations for this phenomenon have emphasized that central bank independence is likely to increase when countries have high political turnover¹²⁸ or have large degrees of party fractionalization in the parliament¹²⁹ – both political features that tend to reduce the stability of policy. Giving the central bank more independence frees it from political oscillation and puts monetary policy on a more stable footing. Meanwhile, countries whose economies were small and dependent on the economies of wealthier countries may have given their central banks more independence in order to enhance their international prestige.¹³⁰ In addition, peripheral countries were encouraged to increase the independence of their central banks in order to

to adjust the general terms of monetary policy by statute, however, gives some political control to the parliament.

¹²³ See William Bernhard, *A Political Explanation of Variations in Central Bank Independence*, 92 AM. POL. SCI. REV. 311, 311-12 (1998).

¹²⁴ See Polillo & Guillén, *supra* note 99, at 1771-76.

¹²⁵ *Id.* at 1770 n.3.

¹²⁶ *Id.*

¹²⁷ See, e.g., Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 147 (1983) (contending that “three isomorphic processes – coercive, mimetic, and normative” lead “rational actors [to] make their organizations increasingly similar as they try to change them”).

¹²⁸ DELIA M. BOYLAN, *DEFUSING DEMOCRACY: CENTRAL BANK AUTONOMY AND THE TRANSITION FROM AUTHORITARIAN RULE* 9 (2001); John B. Goodman, *The Politics of Central Bank Independence*, 23 COMP. POL. 329, 346 (1991); Polillo & Guillén, *supra* note 99, at 1772-73. *Contra* Jakob de Haan & Gert Jan van’t Hag, *Variation in Central Bank Independence Across Countries: Some Provisional Empirical Evidence*, 85 PUB. CHOICE 335, 346 (1995) (rejecting, inter alia, the hypothesis that central bank independence is positively correlated to political instability; instead, finding that “[i]f anything, central bank independence is negatively related to political instability”).

¹²⁹ Bernhard, *supra* note 123, at 324; Polillo & Guillén, *supra* note 99, at 1772-73.

¹³⁰ Polillo & Guillén, *supra* note 99, at 1773-76, 1793.

increase foreign direct investment and to comply with International Monetary Fund conditionalities.¹³¹

The United States and the other early movers – for example, England and Switzerland – were ahead of the rest of the world in relative central bank independence, just as the U.S. was with judicial review. But as the world economy changed, and as international pressures on newly marketizing economies increased, other countries have caught up to and sometimes even surpassed the level of independence accorded to central banks by the first adopters. One of the first countries with a central bank, Britain, has long been considered to have a “dependent” bank; by contrast, Germany is thought to have the most “independent” bank, even though its protections for bank independence are relatively new.¹³²

Why have so many countries developed a legal structure that enables their central banks to be politically independent? Parliaments may be tempted to pass laws that please particular domestic constituencies in the short term but those same policies may damage the country’s place in the international economic system. As a result, such policies are likely to lead to catastrophic results down the road.¹³³ As Geoffrey Miller has argued, being able to inflate one’s way out of prior deals is a very useful resource for politicians who can escape from the constraints of these deals by changing the value of the currency.¹³⁴ For politicians to make their bargains credible, they must make a commitment that they will not engage in currency manipulation after the bargain is struck. As a result, the politicians need to have a way to establish binding pre-commitments so their bargaining partners trust what they say.¹³⁵ The ability to make such pre-commitments allows governments to bargain off into the future in a way that is likely to produce more long-term benefits, even if it comes at the expense of possible short-term gain.

Both constitutional courts and central banks provide institutional heft in weighing the interests of future beneficiaries over present ones. A democratic parliament, in which elected politicians have mandates from present-day voters to resolve their current grievances, may require some supplement to take into account the future interests of present citizens, as well as the interest of future citizens. And these supplementary institutions help parliaments to perform better along these lines.

CONCLUSION: PARLIAMENTARY DEMOCRACY WITH THICK CONSTITUTIONS

Parliaments are widely regarded as broken, but as we have seen from our discussion of supplemental institutions, they may be pushed to overcome some of their limitations by having to work under the constraint of other

¹³¹ *Id.* at 1773-76.

¹³² Bernhard, *supra* note 123, at 311, 320-23.

¹³³ Miller, *supra* note 50, at 436-41.

¹³⁴ *Id.*

¹³⁵ *Id.* at 445-52.

constitutional bodies. While we have only considered constitutional courts and central banks and their roles in getting parliaments to consider the long-term effects of their policies, the number of such institutions and the functions they serve could be multiplied. Independent electoral commissions ensure that parliaments do not play fast and loose with the rules under which members of the parliament are elected. Human rights commissions and ombudspersons can provide important feedback to parliaments about the negative effects of their policies on the lives of actual people. State audit offices check expenditures for propriety and compliance with budgets. Independent commissions and public broadcasting boards make it more difficult for directly elected representatives to influence institutions that require both long-term stability and a distance from partisan jousting to perform their own democracy-maintaining functions. These and many other such institutions are increasingly being designed into constitutions precisely to bolster some parliamentary capacities, limit others, and prohibit still others. In short, parliaments must now operate in a complex institutional environment in many new constitutions. These complex institutional environments are designed to push parliaments toward fulfilling their democratic functions without overstepping them.

The United States Constitution, written in the eighteenth century, has few of these supplementary bodies included in the text, and so it is not surprising that American analysts typically do not see the American Congress in the context of a web of institutional constraint apart from the basic separation of powers. But newer constitutions have many state bodies that operate in conjunction with parliaments, enabling them to better perform their own democratically critical work.

The Basic Law of the Federal Republic of Germany,¹³⁶ often used as a model by other countries, has quite a few constitutionally specified public institutions that supplement, constrain, and ensure parliamentary action. In addition to a Constitutional Court¹³⁷ and a central bank,¹³⁸ the constitution also includes a defense commissioner whose job it is to ensure the parliament respects basic rights,¹³⁹ a petitions committee within the parliament to receive complaints,¹⁴⁰ a federal audit office,¹⁴¹ and more.

¹³⁶ GRUNDGESETZ [GG] [Constitution] (F.R.G.), available at http://www.servat.unibe.ch/law/lit/the_basic_law.pdf.

¹³⁷ *Id.* at arts. 93-94.

¹³⁸ *Id.* at art. 88. In 1992, the constitution was amended to permit the transfer of Bundesbank (central bank) functions to the European Central Bank in preparation for the launching of both the European Central Bank and the euro with German participation.

¹³⁹ *Id.* at art. 45b.

¹⁴⁰ *Id.* at art. 45c.

¹⁴¹ *Id.* at art. 114(2).

The 1996 South African Constitution,¹⁴² under Chapter Nine: “State Institutions Supporting Constitutional Democracy,” provides for a public protector, who is given the task to investigate improper conduct in state affairs;¹⁴³ a Human Rights Commission, which is empowered to promote, monitor and investigate abuses of human rights;¹⁴⁴ a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, which can “monitor, investigate, research, educate, lobby, advise and report on issues” within its subject-matter competence;¹⁴⁵ a Commission on Gender Equality, which has the same competencies on the subject of gender;¹⁴⁶ an auditor general, with the powers to review all of the government’s finances;¹⁴⁷ an electoral commission, which oversees elections;¹⁴⁸ and an independent broadcasting authority.¹⁴⁹ Elsewhere in the constitution there is a Public Service Commission,¹⁵⁰ a Financial and Fiscal Commission,¹⁵¹ and a Judicial Service Commission.¹⁵² The constitution regulates the military,¹⁵³ the police¹⁵⁴ and the intelligence services.¹⁵⁵ And of course there is a Constitutional Court¹⁵⁶ and a central bank.¹⁵⁷

If one looks at virtually any modern constitution adopted after World War II, one will find a plethora of state bodies that operate along with the parliament to make democratic government more likely both to protect the responsiveness of state bodies to the citizenry and to ensure that democratic values are upheld across the government. Generally speaking, the more recent the constitution, the more such bodies there are.

¹⁴² S. AFR. CONST. 1996, *available at* <http://www.info.gov.za/documents/constitution/1996/index.htm>.

¹⁴³ *Id.* §§ 182-183.

¹⁴⁴ *Id.* § 184.

¹⁴⁵ *Id.* §§ 185-186.

¹⁴⁶ *Id.* § 187.

¹⁴⁷ *Id.* §§ 188-189.

¹⁴⁸ *Id.* §§ 190-191.

¹⁴⁹ *Id.* § 192.

¹⁵⁰ *Id.* § 196.

¹⁵¹ *Id.* §§ 220-222.

¹⁵² *Id.* § 178.

¹⁵³ *Id.* §§ 200-204.

¹⁵⁴ *Id.* §§ 205-208.

¹⁵⁵ *Id.* §§ 209-210.

¹⁵⁶ *Id.* § 167. The South African Constitution requires the parliament to defend the independence of all courts, including the Constitutional Court: “Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.” *Id.* § 165(4).

¹⁵⁷ *Id.* §§ 223-225. In light of our discussion of central banks, it is particularly interesting that the South African central bank must – according to the Constitution – conduct its business “independently and without fear, favour or prejudice.” *Id.* § 224(2).

When we consider how parliaments operate in modern democratic governments, we can see that the “standard democratic story” is more of a fairy tale than a useful account of how parliaments really function. While the separation of powers between executive, legislature, and judicial institutions is still a crucial conceptual framework within which to understand checks on parliamentary conduct (though in parliamentarism, the separation between the legislature and executive is not very wide), the fixation on separation of powers as the key feature of parliamentary constraint tends to miss all of the other institutions that limit what parliaments can do, force them to act, and otherwise monitor their conduct for compliance with democratic norms. Parliaments have long been considered broken, and these new constitutional institutions are designed to make them better.

Can any institution live up to the advance billing that parliaments have had? Not without generating a sense of crisis when they fail to do all that their advocates want. The near-universal disappointment with parliaments indicates there may be some crucial democratic functions that parliaments are hard-pressed to achieve all by themselves no matter how well-functioning they are. Perhaps some of the responsibilities assigned by democratic theory to parliaments should be shared with other institutions that can augment, ensure, and even buffer parliaments. Democratic government is too important to invest in primarily one institution. Just as no one would design a crucial machine without building in a way for a failing part to be fixed, so should no one design a democratic order without redundancy, supplements, and back-ups. In most modern constitutional orders, parliaments no longer have to go it alone.