Strong Courts: Judicial Statecraft in Aid of Constitutional Change

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Strong courts have the capacity to issue powerful and effective orders that create wide-ranging legal and constitutional change. But what determines institutional strength of this kind? The external legal and political environments for judicial review are both clearly important. But so too is a court's own approach to the scope and substance of its rulings, the giving of reasons, and the framing of its decisions.

Strong courts, this Article argues, tend to frame decisions in ways that effectively deploy various tools and techniques of judicial "statecraft"—i.e. that adopt a form of: (1) democratically sensitive timing; (2) a judicial voice that speaks directly to the losing party in a case; (3) a narrative that combines global and local elements; (4) reasoning that shows a posture of respect toward the losing party; and (5) engagement with government and civil society actors as partners in the implementation of constitutional requirements. Weaker or less effective courts, in contrast, often overlook the importance of these same considerations of judicial

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timing, authorship, narrative, comity, and collaboration in framing their reasons and orders.

To make this argument, this Article draws on social science literature, as well as a comparison of two well-known decisions in which the Supreme Courts of South Africa and India attempted reform customary or personal laws in a more gender-equal direction: the Bhe *and* Shah Bano *cases. In* Bhe*, the South African Constitutional Court effectively enforced relevant constitutional commitments and remained sensitive to considerations of timing, judicial voice, narrative, comity, and collaboration. In* Shah Bano*, by contrast, the Indian Supreme Court was both less effective in promoting relevant legal change and less sensitive to these same kinds of concerns. These distinct outcomes cannot solely be attributed to differences in background contexts, as there were in fact significant similarities between the two cases and their legal and political contexts. The lesson for constitutional judges, this Article suggests, is that judicial strategy and statecraft matter—and that there are valuable lessons to be learned from the South African Constitutional Court's approach for courts seeking to create a strong and effective constitutional jurisprudence.*

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INTRODUCTION

In the United States today, as in 1835, “[s]carcely any political question arises . . . that is not resolved, sooner or later, into a judicial

question."[1] But the U.S. Supreme Court is far from alone in exercising broad powers of judicial review in politically charged cases. Courts worldwide are frequently called upon to assume an active role in interpreting democratic constitutions to safeguard a wide range of constitutional values: from federalism and separation of powers,[2] to individual rights,[3] and even the constitutional democracy itself.[4]

Deciding such cases often puts courts on a direct collision course with the political branches of government. Yet courts worldwide vary greatly in their capacity to withstand this kind of conflict or prevail in such face-offs. Strong courts across the globe generally exercise strong powers of judicial review[5] *and* have an "actual impact on social and political outputs" in line with the outcome intended by the court. Weaker courts often decline to exercise such powers, or if they do, find that their decisions ultimately have limited—or even counterproductive—effect.[6]

1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (Phillips Bradley ed., 1945) (1835).

2. *See, e.g.*, Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 10–11 (2016); Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 32–33 (2001).

3. *See, e.g.*, Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275, 267–77 (2002); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2567 (2003); Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1023–24 (2004).

4. *See, e.g.*, SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 191 (2015). See also Sujit Choudhry, *"He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 18 (2009); Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015). For an extremely useful survey of the various functions of constitutional courts in different political contexts, see generally CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (Diana Kapiszewski et al. eds., 2013) [hereinafter CONSEQUENTIAL COURTS]; Robert A. Kagan, Diana Kapiszewski & Gordon Silverstein, *New Judicial Roles in Governance*, *in* COMPARATIVE JUDICIAL REVIEW 142 (Erin F. Delaney & Rosalind Dixon eds., 2018).

5. Some strong courts exercise weaker powers of judicial review. One such example is the Supreme Court of Japan. *See* Mark Tushnet & Rosalind Dixon, *Weak-Form Review and Its Constitutional Relatives: An Asian Perspective*, *in* COMPARATIVE CONSTITUTIONAL LAW IN ASIA 103 (Rosalind Dixon & Tom Ginsburg eds., 2014); *but see* David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425 (2011).

6. *See* Stephen Gardbaum, *What Makes for More or Less Powerful Constitutional Courts?*, 29 DUKE J. COMPAR. & INT'L L. 1, 13–15 (2018) [hereinafter Gardbaum, *What Makes*

What determines whether courts are "strong" or "weak"? To a large extent, the answer depends on the broader political environment: Courts in some cases enjoy a wide political "tolerance interval" that allows them to engage in judicial review without meaningful political opposition,[7] whereas they may face far greater opposition which limits the scope of effective review in other cases.[8] A court's influence may likewise depend on the previous history of judicial review or the trajectory of judicial power in that country: A history of independent judicial review may foster public acceptance or even an expectation of similar forms of review, whereas its absence may make it much harder for a court to engage in such review.[9] Judicial strength may beget future strength, and weakness continued irrelevance or ineffectiveness.

A court's influence, however, may also be affected by contemporaneous *choices* a court makes about both the substance of its orders and reasons, and the framing of its decisions. How courts approach the *timing, authorship, narrative*, and *tone* of decisions, as well as *engagement* with civil society in their *enforcement,* the article suggests, can affect both elite and popular responses to those decisions.

Decisions that involve a form of (1) democratically sensitive timing, (2) judicial authorship that speaks directly to the losing party in a case, (3) "glocal" narrative that combines global and local elements, (4) reasoning that shows respect toward the losing party, and (5) engagement with government and civil society actors as partners in

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for More] (arguing that a court cannot be considered strong if it never uses its formal powers); Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies*, 53 COLUM. J. TRANSNAT'L L. 285, 294–305 (2014) [hereinafter Gardbaum, *Are Strong Constitutional Courts Always a Good Thing*] (discussing judicial weakness in the context of backlashes against court decisions). On the categorization of the U.S. Court as effective, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 10 (2008).

7. Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC. REV. 117, 128–29 (2001).

8. This is also especially true where political actors are seeking to entrench their own hold on power—and courts are seen to be the main obstacle to this form of democratic backsliding, or "abusive constitutional" action. *See, e.g.*, WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 100 (2019); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 213 (2013); Kim Lane Scheppele, *Democracy by Judiciary: Or, Why Courts Can Be More Democratic than Parliaments*, *in* RETHINKING THE RULE OF LAW AFTER COMMUNISM 25 (Adam Czarnota et al. eds., 2005).

9. *Cf.* THEUNIS ROUX, THE POLITICO-LEGAL DYNAMICS OF JUDICIAL REVIEW: A COMPARATIVE ANALYSIS 37 (2018) (summarizing rational choice institutionalist and historical institutionalist accounts of institutional path dependence in law and politics).

the implementation of constitutional requirements, are generally more likely to be implemented and respected than those that do not.

While judges themselves may not consciously focus on these aspects of decision-making as "strategic" in nature,[10] strong courts will generally deploy the tools and techniques—of timing, authorship, narrative, tone, and engagement—in a principled but strategic way, or a manner that involves an appreciation of the value of judicial statecraft.[11]

In making this argument, the article draws on a range of social science literature, as well as two well-known cases from South Africa and India that involve the relationship between constitutional commitments to gender equality, human dignity and customary/religious laws regarding inheritance and divorce: *Bhe v. Khayelitsha Magistrate*[12] and *Mohd. Ahmed Khan v. Shah Bano Begum*.[13] In *Bhe*, the Constitutional Court of South Africa (CCSA) held that existing customary norms of male primogeniture were inconsistent with the 1996 South African Constitution's commitment to dignity and equality, and it ordered a mix of immediate and delayed relief for the petitioners.[14] The CCSA's decision also led to a broad-ranging and largely successful review of existing customary law norms. In *Shah Bano*, the Supreme Court of India (SCI) held that Muslim personal laws on divorce and spousal maintenance were inconsistent with constitutional commitments to equality and non-discrimination.[15] The result of the SCI's decision, however, was quite different than that of the CCSA's decision in *Bhe*, or even than that of the SCI's subsequent decisions several decades later[16]: The decision in *Shah Bano* created an immediate backlash against the SCI and did not, as envisaged by the Court, create momentum for reforming Muslim personal law.[17]

10. *See* Roni Mann, *Non-Ideal Theory of Constitutional Adjudication*, 7 GLOB. CONSTITUTIONALISM 18 (2018); Roni Mann & Conrado Hübner Mendes, *What Judges Don't Say: Judicial Strategy and Constitutional Theory*, 2015 WZB REPORT 21.

11. *See* Mann, *supra* note 10.

12. Bhe v. Khayelitsha Magistrate, 2005 (1) SA 580 (S. Afr.).

13. Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 (India).

14. *See Bhe*, 2005 (1) SA 580.

15. *See Shah Bano*, (1985) 2 SCC 571–72.

16. Shayara Bano v. Union of India, (2017) 9 SCC 1 (India). *See* discussion *infra* Section III.C.2.

17. *See infra* notes 179–185 and accompanying text.

This contrast could be explained by a variety of factors, including differences between the two countries and between the issues at stake, but this Article highlights five broad differences in judicial strategy or statecraft. The CCSA decision reflected a time-sensitive, relatable, glocal, respectful and collaborative approach. The decision in *Shah Bano*, in contrast, was neither time-sensitive, relatable, global, respectful in tone, or collaborative in approach: It was handed down at a time of significant Hindu–Muslim conflict; it was delivered by an all-Hindu bench; it emphasized universal secular notions of equality and protection over more particularized understandings of maintenance within the Muslim tradition; and it showed a distinct lack of respect for, and unwillingness to engage with, Muslim religious authorities.

Of course, the CCSA is not alone in adopting an approach that shows sensitivity to the timing, tone, or narrative used in its decisions. Indeed, the SCI itself has at times taken an approach that mirrors that of the CCSA in cases such as *Bhe*.[18] And numerous other courts—including the U.S. Supreme Court—have adopted a similar approach.[19] In the United States, however, there are numerous factors other than judicial statecraft that help guarantee at least minimal respect for decisions of the Supreme Court. It can therefore be difficult to draw clear inferences as to the causal impact of the Court's framing of judicial decisions on constitutional outcomes. By contrast, in many newer or more fragile democracies, there is far less history of independent, powerful, and effective judicial review.[20] In those countries, the choices judges make about the substance, scope, and framing of their decisions will have a much greater capacity to influence respect for, or implementation of, their orders. Because of this, a comparative study of these strategic choices can provide valuable insights into how courts—in newer and consolidated democracies alike—can most effectively promote respect for court decisions and thereby achieve effective forms of constitutional change. A comparison between South

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18. *See Bh*e, 2005 (1) SA 580.

19. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015). For further discussion, see *infra* Part IV.

20. *See, e.g.*, Roberto Gargarella, Pilar Domingo & Theunis Roux, *Courts, Rights and Social Transformation: Concluding Reflections*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 255, 256 (Roberto Gargarella et al. eds., 2006); Bojan Bugaric & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 J. DEMOCRACY 69, 70 (2016).

Africa and India is especially illuminating in this context, given the similarities between both the two countries and the issues addressed in the *Bhe* and *Shah Bano* cases.

The lessons from this comparison are notable. Sensitivity on the part of the CCSA to questions of *timing*, *authorship*, *narrative*, *tone*, and *engagement* in its decision was followed by respect for, and implementation of, that decision. But in India, the SCI's apparent insensitivity to the strategic or context-sensitive use of these tools was followed by non-implementation and backlash. Courts worldwide would do well to take a leaf out of the CCSA's handbook, or that of other courts that take a similar approach, and craft their opinions in ways that consciously deploy the tools and techniques of judicial statecraft that have helped the CCSA develop effective constitutional jurisprudence in South Africa's young democracy.

The remainder of the article is divided into four parts. Part I sets out the existing literature on strong courts, and the legal and political determinants of overall court strength versus weakness. Part II summarizes arguments from the social sciences that support the idea that choices about timing, voice, narrative, tone, and enforcement may significantly affect the ultimate impact of a court's decision. Part III sets out the two case studies of judicial attempts by the CSSA and SCI to reform customary or personal laws in a more gender-equal direction—and the apparent success and failure of these respective attempts. Outlining the contrast between the two cases along with the five key dimensions of timing, voice, narrative, respect, and collaboration, it suggests how the differences in judicial framing could—at least in part—help explain the quite different response each case elicited. Part IV considers potential limits and cautions that these techniques may not be normatively desirable in other contexts.

I. Strong Courts: Legal and Political Context

The concept of "strong" versus "weak" *judicial review* was first developed by Mark Tushnet and Stephen Gardbaum, independently, as a means of describing the formal finality of judicial decisions under a written constitution.[21] Courts engaging in strong

21. Mark Tushnet, *Weak-Form Review: An Introduction*, 17 INT'L J. CONST. L. 807, 807 & n.1 (2019).

judicial review, they argued, issue decisions that are formally difficult for the political branches of government to reverse. Weak review, in contrast, is far more open to legislative override. The quintessential example of weak review is that outlined by the UK Human Rights Act 1998, according to which judicial decisions can be overridden by way of legislative repeal or amendment.[22]

By comparison, the concept of "strong" versus "weak" *courts* is far less well-developed. Gardbaum argues that "strength" is best understood in this context in terms of judicial "power." Strong constitutional courts, he suggests, are those that: (1) have "international influence;" (2) regularly "exercise their powers of judicial review against the government of the day, especially where this involves invalidating legislation;" and (3) have an "actual impact on social and political outputs," or make a "concrete difference."[23] For present purposes, I put aside the question of international influence. Although an important dimension of influence, it is one that can only be assessed on a truly global scale, and one where problems of endogeneity or circularity are especially large.[24] Instead, I focus on Gardbaum's second and third criteria: the extent to which courts exercise strong powers of judicial review, and in doing so, have some "actual impact on social and political outputs" in line with the outcome intended by the court.[25]

This impact could, of course, differ over the short or long term: In the short run, there could be little willingness on the part of relevant political actors to implement a court decision, yet over time, a decision might still provoke political action or help reshape broader political attitudes or priorities in ways that lead to long-term change. Conversely, some decisions might lead to short-run compliance but generate a broader backlash against a court or set of constitutional requirements, indicating a gradual erosion in support for implementation of a court decision and the relevant constitutional mandate it seeks to

22. *See, e.g.*, Gardbaum, *What Makes for More*, *supra* note 6; MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2009).

23. *See* Gardbaum, *What Makes for More*, *supra* note 6, at 4–7; Gardbaum, *Are Strong Constitutional Courts Always a Good Thing*, *supra* note 6, at 315 (suggesting that judicial constraint may strengthen courts in transitional democracies).

24. It may be, for example, that courts that are deemed powerful by scholars are most likely to be cited by other courts, yet by Gardbaum's definition this is an independent indicator of judicial power.

25. Gardbaum, *What Makes for More*, *supra* note 6, at 6.

enforce. The relevant time horizon for measuring court effectiveness, therefore, should always be carefully identified and justified.

But with that caution in mind, the definition of a "strong" court is relatively clear and simple to apply, and it aligns with understandings in both law and political science. Lee Epstein and Jack Knight, for instance, adopt a similar concept of "efficacious judging" as judging that involves not only important legal and political questions but also "efficacious decisions—[or decisions that] relevant external actors will respect and with which they will comply."[26]

What can one say about the general determinants of judicial strength, or efficaciousness, versus weakness? Two important factors are the background *legal* and *political* contexts.

With respect to the legal context, the formal features of a constitutional system affect the scope of judicial review in a range of ways. Notably, whether a constitution explicitly provides for judicial review, leaves the question unstated, or prohibits judicial review, is likely to affect a court's perceived authority to issue strong judicial orders. And a court's authority to do so may further be affected by whether the constitution expressly gives courts strong remedial powers, such as the ability to strike down legislation or read language into its terms, or conversely, places express limits on the scope or strength of the court's remedial powers.[27]

The effective scope of judicial review may likewise be shaped by the scope of a constitution's *substantive* provisions, as well as whether they are written and entrenched, include broad or narrow structural and/or rights guarantees, apply to a wide or limited range of actors, or envisage a transformative or preservative role for the constitutional court.[28] It may also be influenced by formal provisions governing access to a court, and its procedures.[29] And *ex post,* the strength or finality of court decisions may be influenced by constitutional norms governing legislative override, legislative control of a court's jurisdiction, and procedures for constitutional amendment.[30]

26. Lee Epstein & Jack Knight, *Efficacious Judging on Apex Courts*, *in* COMPARATIVE JUDICIAL REVIEW, *supra* note 4, at 272, 272–73.

27. *See* Gardbaum, *What Makes for More*, *supra* note 6, at 10–11.

28. *See id.* at 10.

29. *See id.* at 16.

30. *Id.* at 10–13. *See also* Rosalind Dixon, *The Forms, Functions, and Varieties of Weak(ened) Judicial Review*, 17 INT'L J. CONST. L. 904 (2019).

The *effect* of these formal provisions, however, ultimately depends on the prevailing legal culture.[31] Courts, as Gardbaum notes, may interpret their formal legal powers quite narrowly, or adopt a largely deferential approach to reviewing the actions of legislative or executive actors, or else interpret those powers broadly.[32] They may likewise give broad effect to any attempt at legislative override or modification of their decisions, or give them only narrow effect, and seek to reassert their own preferred approach to constitutional construction.[33] This, in turn, may create a legal culture that prizes judicial restraint, or is hostile to strong or bold assertions of judicial power, or alternately produces a gradual acceptance of strong judicial power.

A range of other formal constitutional design features may affect the likelihood of a court adopting a strong versus weak approach in this context. For example, if a court enjoys insulation from partisan pressures in the appointments process, or judges are appointed for long terms as opposed to shorter ones, the court may skew towards strength.[34] But ultimately, a court's response to these features will be a product of how judges themselves understand their role—and how they anticipate that a broader set of political actors will react to assertions of strong judicial power. As Theunis Roux notes, legal tradition and culture are often strongly path-dependent:

> Each society . . . has its own, idiosyncratic tradition of thinking about law and its relationship to politics. The adoption of a system of judicial review will both influence that tradition and be influenced by it—in the institutional form that it takes and the constitutional politics to which it gives rise.[35]

Thus, political context may be as strong a determinant of a court's strength as legal context, if not a stronger one. In some cases, political context may provide *affirmative* support for the exercise of strong forms of review by a court. National political elites, for example, may benefit from limits on the actions of executive officials, or

31. For a useful account of the notion of legal culture in this context, see ROUX, *supra* note 9.

32. Gardbaum, *What Makes for More*, *supra* note 6, at 13–14.

33. *See, e.g.*, Rosalind Dixon, *Constitutional 'Dialogue' and Deference*, *in* CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS 161 (Geoffrey Sigalet et al. eds., 2019); Dixon, *supra* note 30.

34. *See, e.g.*, Gardbaum, *What Makes for More*, *supra* note 6, at 12–14.

35. ROUX, *supra* note 9, at 2.

sub-national actors, which effectively reduce agency-costs for these actors.[36] Or they may benefit from the enforcement of constitutional constraints—as effectively providing a form of political "insurance."[37] One of the functions served by judicial review, Tom Ginsburg and I have argued elsewhere, is to provide a form of insurance of this kind for political actors against a variety of risks associated with a potential loss in electoral power—i.e., the risk of criminal prosecution, or deprivation of rights to life, liberty and property ("personal" risk), loss of future access to power and influence ("power-based" risk), and loss of influence over policy ("policy-based" risk).[38]

But the demand for insurance of this kind will clearly vary across contexts: It will depend on whether powerful political actors perceive there to be any real risk to their existing position, power or policy. Over time, it may also depend on whether those actors perceive there to be any reason to *preserve*, rather than nullify or cancel, any previously negotiated or agreed upon "insurance."[39] In some cases, elites may, therefore, see few benefits to maintaining constitutional limitations on their power. They may also see real costs—because constitutional limits inevitably make it more difficult, or at least time-consuming, to achieve certain preferred policy outcomes.

In these cases, Lee Epstein, Jack Knight and Olga Shvetsova argue, the strength of judicial review will be influenced by the political tolerance interval for judicial review.[40] According to their theory, legislative and executive actors have certain "ideal points" or "most preferred" policy positions, any deviation from which will be costly for these actors.[41] But any decision to challenge a court decision will also be costly, so that a tolerance interval exists "around each of their ideal

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36. On constitutions and agency costs, see, for example, Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583 (2010).

37. *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); *see also* Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 INT'L J. CONST. L. 988 (2017).

38. *See* Rosalind Dixon & Tom Ginsburg, *Constitutions as Political Insurance: Variants and Limits*, *in* COMPARATIVE JUDICIAL REVIEW, *supra* note 4, at 36; Dixon & Ginsburg, *supra* note 37; *see also* GINSBURG, *supra* note 37.

39. Dixon & Ginsburg, *supra* note 37; GINSBURG, *supra* note 37.

40. *See* Epstein et al., *supra* note 7.

41. *Id.* at 128.

points such that they would be unwilling to challenge a [c]ourt decision placed within that interval."[42]

Further, several factors may affect that cost-benefit calculus, and therefore the tolerance interval. One is the public's perception of a court, and of specific court decisions.[43] Another is the salience of the case, and the degree to which there are authoritative past decisions on a topic.[44] A third is the degree to which political actors are unified or divided in their approach: If political parties, or entire branches of government, have different ideal points, this may increase the tolerance interval for court action, compared to a situation in which political actors are more unified in approach.[45]

Together these factors also suggest three broad possibilities: (1) political actors, including the public, may be unified in their approach to an issue, and therefore a court may enjoy a quite small tolerance interval; (2) public, and prior legal support, for a court's approach may mean that political actors have good reason *not* to attack a court decision, and courts will enjoy a quite wide political tolerance interval for strong forms of review; or (3) political actors may be close to *indifferent* towards attacking a decision or acquiescing in it.[46] For example, if courts intervene to counter legislative "burdens of inertia" or "blind spots," and therefore implicitly command broad majority support, political actors may see little benefit to attacking a court—even if they personally disagree with its approach.[47]

But a court's strength is not purely determined by legal and political factors beyond its control; a court itself may also contribute to its overall strength or effectiveness through the choices it makes across numerous dimensions. Perhaps the most important choices a

42. *Id.* at 128–29.

43. *Id.* at 129–30.

44. *Id.*

45. *Id.* at 130–31.

46. *Id.* at 130.

47. *See* Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007); Rosalind Dixon, *The Supreme Court of Canada*, *Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235 (2009). For similar ideas about potential sources and varieties of democratic dysfunction, see also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); William N. Eskridge, Jr., *The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785 (2009); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2004).

court can make in this context concern the scope or substance of their decisions. Courts may interpret formal powers of judicial review quite narrowly, or they may broaden the scope of existing formal powers. They may decide specific cases narrowly or broadly, or in a way that is more—or less—deferential to the actions of various political actors ("choices about scope").[48] They may avoid certain constitutional questions.[49]

Or, as Lee Epstein and Jack Knight note, courts may tailor the scope of their rulings to (a) "the preferences and likely actions of the contemporaneous government," (b) the preferences or likely actions of an "incoming regime," or (c) public preferences or attitudes, either in the sense of following the "election returns," "protect[ing] or entrench[ing] rights that have broad appeal," or explicitly incorporating community standards into constitutional doctrine (choices about "substance" or "democratic alignment").[50] Similarly, they may issue decisions that affect a variety of different actors, in ways that reduce the perception of judicial review as effectively targeting only one political group or faction, and which build support for judicial review from a variety of actors.[51]

But courts may also influence the response to their decisions in other ways that do not play to, or insure against, perceived preferences. The quality of their legal reasoning process, or the legal reasons they offer, will inevitably affect the response to their decisions from other legal actors—including practicing lawyers, judges and legal scholars.[52] Courts will also inevitably make choices about the *framing* of

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48. *Compare* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–23 (2001) (discussing judicial narrowness and shallowness as potential forms of judicial minimalism) *with* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (discussing substantive deference to political decision-makers' reasonable interpretations of constitutional norms).

49. *See* Delaney, *supra* note 2.

50. *See* Epstein & Knight, *supra* note 26, at 275–85. On supporting incoming political regimes, see also Alexei Trochev, *Fragmentation? Defection? Legitimacy? Explaining the Judicial Roles in Post-Communist "Colored Revolutions," in* CONSEQUENTIAL COURTS, *supra* note 4, at 67.

51. *See, e.g.*, Dixon & Ginsburg, *supra* note 37, at 990 (on judicial review and two-sided insurance political insurance); Heinz Klug, *Constitutional Authority and Judicial Pragmatism: Politics and Law in the Evolution of South Africa's Constitutional Court*, *in* CONSEQUENTIAL COURTS, *supra* note 4, at 93, 100; Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, *in* CONSEQUENTIAL COURTS, *supra* note 4, at 262, 264–65.

52. *See* ROUX, *supra* note 9, at 78–79.

their decisions in ways that may impact on the reception or effectiveness of those decisions.

These choices about framing may or may not be self-consciously *strategic* choices on the part of relevant judges. But they can have a significant impact on the degree of support for, or opposition to, a decision in ways that mean they may be regarded as part of either a court's explicit or *implicit* strategy.[53]

This does not mean they are purely political choices, or "strategic" choices in the sense used by political scientists, meaning choices designed simply to maximize certain policy preferences, taking into account "the positions and expected behavior of other players."[54] In some ways, they resemble strategies adopted by successful political actors.[55] But choices of this kind also have a distinctive logic and focus in a judicial context. Even if self-conscious on the part of judges, such choices are not designed to maximize the personal power or popularity of judges, or even courts as institutions; they are designed to maximize the effectiveness of orders a judge believes are required or supported by law. They do not seek to change or reshape the nature of those legal judgments; they seek to time, frame, or explain those judgments in ways that increase the chances of their acceptance by a range of audiences, and therefore aid their implementation in challenging political conditions.

In some ways, such framing decisions may even be seen as a reflection of a principled commitment on the part of courts to reasoning in way that shows respect for the audience of court decisions, especially those on whom those decisions bear most harshly—i.e., the losing party in a particular case, individuals or groups who will be similarly affected, and those broader social movements most disappointed by a decision.

53. *See, e.g.*, Mann, *supra* note 10; Mann & Mendes, *supra* note 10.

54. Mann*, supra* note 10, at 29.

55. In *The Prince*, for example, Machiavelli highlighted the importance of political actors being sensitive to questions of timing, and prevailing political conditions. NICCOLÒ MACHIAVELLI, THE PRINCE 125–30 (Ninian Hill Thomson trans., Oxford Univ. Press, 1913) (1532). He likewise noted the importance of norms of comity or reciprocity as a key to political power: "[I]t is the nature of men to incur obligation as much by the benefits they render as by those they receive." *Id.* at 76.

One of the defining features of the rule of law, as Lon Fuller has argued, is the message of respect it sends to citizens.[56] For judges, a willingness to frame their reasoning in light of the perspectives and commitments of those disappointed by a decision can be seen as a similar showing of respect—for the dignity, or standing, of those citizens. Such framing arguably recognizes all citizens' right to be heard in constitutional debate.

According to Alon Harel, Adam Shinar, and Tsvi Kahana, the "right to be heard" requires three key things: (1) the opportunity for an individual to voice a grievance; (2) a willingness on the part of the tribunal hearing the grievance to engage in "meaningful moral deliberation" or give "good" reasons for the decision; and (3) for a decision-maker to reconsider its decision, or action, in light of the grievance and that process of reasoning.[57] Each of these stages shows respect for the dignity of those adversely affected by a decision. Indeed, one reason political theorists argue that judicial review has important procedural virtues is that by providing individual litigants with the right to challenge decisions adversely affecting them, and make arguments as to why those decisions are not, in fact, justified in the circumstances, court hearings provide citizens with the right to be heard. To do so effectively, however, courts must ultimately offer reasons that could reasonably satisfy "the *individual* that his or her matter has been considered" in a fair and impartial manner.[58]

Judicial attempts to tailor the timing, authorship, narrative, tone, or enforcement of their decision to the particular context and litigants in a case, therefore, can be viewed as an efforts to respect the particular position, experience, and perspective of those most directly disappointed by or opposed to a particular constitutional outcome. And in this sense, it could be considered a form of what Roni Mann

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56. *See* Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 LAW & PHIL. 239, 250 (2005); Jeremy Waldron, *Why Law – Efficacy, Freedom, or Fidelity?*, 13 LAW & PHIL. 259, 278–79 (1994) (discussing LON L. FULLER, THE MORALITY OF LAW (1969)). I am indebted to Kevin Walton for this suggestion.

57. Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227 (2010); Alon Harel & Adam Shinar, *The Real Case for Judicial Review*, *in* COMPARATIVE JUDICIAL REVIEW, *supra* note 4, at 13, 17–27; *see also* Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 INT'L J. CONST. L. 950 (2012).

58. Harel & Shinar, *The Real Case for Judicial Review*, *supra* note 57, at 26.

calls a *principled* judicial strategy[59]—or commitment to *judicial* craft or statecraft,[60] rather than to non-legal policies or priorities.

II. Why Timing, Authorship, Narrative, Tone, and Engagement (May) Matter

In this part, I explore five dimensions of the framing of a judicial decision—distinct from the substance of a court's decisions, or the quality of judicial reasons—that may affect how either elite or popular audiences, or the parties in a case, react to a court decision: (1) the timing of a decision; (2) the person who authors it; (3) the kind of global and local values or narrative to which a court appeals; (4) the tone of a court decision, or degree of respect toward affected parties; and (5) the engagement with government and civil society actors as partners in the implementation of constitutional requirements.

The timing of a court decision may affect both the political and legal context in which it is delivered. The identity of a judge may affect public perceptions of the arguments a judge has been willing to consider as part of her process of reasoning. A public show of respect toward certain parties may encourage reciprocal respect from those parties. And involving additional actors in the process of constitutional litigation may broaden the pool of actors willing and able to support the implementation of a court's decision.

Not all courts are able to frame their decisions in this way. There may be important variation across countries in the degree to which the size and composition of the bench, and norms of judicial authorship (i.e., those relating to concurrence and dissent), allow full use of these tools and techniques.

Some courts have historically been quite diverse and included judges from a range of different backgrounds—including judges from different professional backgrounds; judges of different races, genders, sexual orientations, and religions; and judges who are HIV positive or

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59. Mann, *supra* note 10, at 38–41.

60. *Id.* at 18–19, 32–33. Mann, in this context, criticizes the notion of "judicial statesmanship" as overly vague and offering insufficient critical bite in assessing judicial behavior. *Id.* However, in this article, I attempt to overcome that by developing an account of judicial statecraft that is closer to Mann's notion of "principled strategy" in terms of its specificity. As Part III shows, in the context of the critique of *Shah Bano*, it also provides at least some real degree of critical bite.

have lived experience with disability. Other courts may have a much more limited history of diversity, or a system of judicial appointment that does far less to produce diversity of this kind. Without some minimum degree of visible or professional diversity on the bench, however, it will be almost impossible for a court to ensure that its opinion is authored by a judge whose life experience speaks directly to the parties, or to the broader public.

Similarly, some courts may have a quite high degree of diversity, but a history of political or ideological polarization that limits the scope for the chief justice (or senior judge in the majority) to choose from among the entire bench when deciding who should write for the court.

Some courts may have a convention of randomly assigning responsibility for opinion-writing to certain judges.[61] And others, especially those in the continental civil law tradition, may have a convention of unsigned or unanimous opinions, or convention against judges issuing dissents and concurrences by name.[62] Concurring and dissenting opinions can also play an important role in expanding the scope for a court to frame the authorship of different opinions in ways that speak directly to the losing party, or those in civil society disappointed by a court decision—including in cases where the court lacks discretion over the allocation of the lead author of an opinion.

There may also be differences in the degree to which individual judges are known to the public. Some judges are widely known among lawyers and politicians and even among the broader public.[63] This may be because these judges occupy a specific institutional role (as president or chief justice of a court), or because of the substance and significance of their decisions. Or it may be a product of the media attention given to those decisions, or the televising of court

61. JOHNATHAN M. COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 72–73 (2002).

62. *See, e.g.*, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990); Rosa Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States*, Pol'y Dept. C. Citizens' Rights and Const'l Affairs, PE 462.470 (Nov. 2012); Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 14 GERMAN L.J. 1345 (2013).

63. The late Justice Ginsburg, for example, achieved considerable status in popular culture. *See, e.g.*, Sara Aridi, *How Ruth Bader Ginsburg Lives on in Pop Culture*, N.Y. TIMES (Oct. 15, 2020), https://www nytimes.com/2020/09/26/at-home/ruth-bader-ginsburg-pop-culture-rbg html [https://perma.cc/A2F8-TC7X].

proceedings. But public knowledge of a judge's identity and background is important for the capacity of that judge to speak to disadvantaged parties or groups.

Courts worldwide will also vary in the degree to which they issue lengthy opinions, accompanied by extensive reasons, or provide much shorter judgments with only abstract justifications. In India, for example, opinions of the Supreme Court sometimes exceed 1,000 pages, whereas in France, the decisions of the Conseil Constitutionnel are often less than a page.[64] This also implies quite different opportunities for courts to use a mix of global and local narratives, or different persuasive techniques.

There may likewise be differences across countries in the degree to which there is public and media attention directed towards courts and court decisions, and thus obvious channels of influence for different approaches to judicial reasoning.[65] In the United States, for instance, Nathaniel Persily suggests there is often little public awareness of court decisions, and even less of the reasons behind those decisions.[66] There are clearly multiple publics for a court's decision, and certain elites—and the media—can play an important role as intermediaries between the court and these diverse public audiences. But there may still be limits on the capacity of courts to persuade the public of certain positions.

Even where it is possible, not all courts will necessarily be willing to engage in this kind of judicial statecraft. Some judges may consciously embrace the need to make strategic choices as part of promoting their preferred constitutional construction or vision, or Mann's idea

64. *See, e.g.*, Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India); Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2020-806DC, Aug. 7, 2020 (Fr.).

65. For discussion of public opinion influence on U.S. court decisions, see, for example, PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., 2008). For other countries, see FLORIAN SAUVAGEAU, DAVID SCHNEIDERMAN & DAVID TARAS, LAST WORD: MEDIA COVERAGE OF THE SUPREME COURT OF CANADA (2011); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343 (1998); Jay N. Krehbiel, *The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court*, 60 AM. J. POL. SCI. 990 (2016); Joshua Rozenberg, *The Media and the UK Supreme Court*, 1 CAMBRIDGE J. INT'L & COMP. L. 44 (2012).

66. *See* Nathaniel Persily, *Introduction* to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 65, at 9.

of a “principled strateg[ic]” approach.[67] But others may regard them as inconsistent with the notion of the court as “a forum of principle.”[68] This is especially true for strategic judgments by courts that go to the scope and substance of judicial review. But it may also apply to other aspects of a court’s approach—and especially the timing of a court’s decision.

Judges may also vary in their capacity to successfully deploy these strategies. Applied poorly, some of these tools or techniques may in fact undermine rather than enhance respect for a court as a forum of principle.[69] Not all judges, as previously noted, have equal capacity to combine legal skill with judicial statecraft: Some judges are clearly capable of building relationships with other branches of government and communicating with the public, whereas other judges lack both experience and skill in these areas.[70]

But existing social science literature suggest that there is good reason to think that techniques of this kind will have the capacity to increase support for a court, and its jurisprudence, in at least some circumstances. How courts choose to combine, or prioritize, these different tools or techniques is a much more complex question.[71] But all of these tools have the capacity to aid in creating effective constitutional change.

A. Timing

As Samuel Issacharoff and I have noted previously, one of the key decisions facing a court concerns the timing of certain decisions.[72] Courts must not only choose whether to decide or avoid certain constitutional questions; they must also decide *when* to decide them, or whether to decide certain constitutional questions in the case before

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67. Mann, *supra* note 10, at 41.

68. *See* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 516 (1981); Mann, *supra* note 10, at 28.

69. Dworkin, *supra* note 68, at 516–18; *see also* Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT’L J. CONST. L. 106.

70. Rosalind Dixon, *Constitutional Design Two Ways: Constitutional Drafters as Judges*, 57 VA. J. INT’L L. 1, 3 (2017).

71. I am indebted to Evelyn Douek for pressing me on this point.

72. *See generally* Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683.

them or rather delay or "defer" certain questions for later resolution.[73] And there is increasingly powerful evidence that courts do, in fact, make decisions about deferral of this kind in light of strategic concerns.[74]

Delay of this kind can affect both the legal and political contexts for judicial review. It can provide courts with an opportunity to lay down certain "doctrinal markers" or statements in dictum that foreshadow or provide legal support for later forms of constitutional enforcement.[75] Legal support of this kind can also increase the perceived legitimacy of a court's decision in the eyes of ordinary judges and lawyers, so that by the time courts directly confront the executive or legislative majority on a question, they enjoy greater support for their authority.

Delay can allow time for political conditions to shift, and either popular or elite opinion to shift in favor of constitutional enforcement.[76] Shifts of this kind do not always occur. Sometimes, opposition to a given constitutional approach may increase, rather than decrease, with time. Or delay may signal to opponents that they have an opportunity to prevent the implementation of a decision. This, for example, is one way of understanding the effects of the U.S. Supreme Court's adoption of a delayed remedy in *Brown v. Board of Education of Topeka*: The notion of "all deliberate speed" may have signaled to opponents of racial desegregation that they had an opportunity to resist its implementation.[77]

But often, delay can mean that political conditions do shift, and there is greater political tolerance for judicial intervention when constitutional enforcement ultimately occurs. Thus, as Issacharoff and I have observed, by deferring or delaying the most politically sensitive

73. *Id.*; *see also, e.g.*, Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636 (2011).

74. Epstein & Knight, *supra* note 26, at 79–88 (discussing strategic denials that allow judges to deny cert to cases that they believe would not prevail at the merits stage).

75. *See* Rosalind Dixon & Theunis Roux, *Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa*, *in* FROM PARCHMENT TO PRACTICE: IMPLEMENTING NEW CONSTITUTIONS 53 (Tom Ginsburg & Aziz Z. Huq eds., 2020).

76. Dixon & Issacharoff, *supra* note 72, at 703–06, 718–19.

77. *See, e.g.*, MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 319 (2004); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION*, at xiii, 11 (2004); Jim Chen, *With All Deliberate Speed: Brown II and Desegregation's Children*, 24 LAW & INEQ. 1, 3 (2006).

constitutional decisions to a later date, strong constitutional courts will generally "liv[e] to fight another day."[78]

Moreover, judicial delay or deferral of this kind can take several different forms, or be first- or second-order in approach.[79] First-order deferral will involve an explicit decision by a court to delay the effect of a remedial order (e.g., by issuing a suspended declaration of invalidity), give a ruling purely prospective effect, or endorse a substantive constitutional standard of delayed or "progressive" realization.[80] Second-order deferral will be more implicit, and involve a mix of *Marbury*-style "breadth in reasoning and narrowness in result"—or "partial confrontation of an issue by a court, combined with partial avoidance or delay at the level of a concrete legal remed[y], or the immediate legal and political consequences of a ruling."[81]

Delay may likewise be short- or long-term. Short-term delay will often be associated with formally sanctioned delays in responding to a court order, or with administrative forms of backlog or process that can delay the process of effective implementation.[82] Long(er)-term delay, in contrast, will tend to be linked to more informal, political or structural conditions, which limit either the state's capacity or government's willingness to take action to implement certain constitutional requirements.

As Erin Delaney notes, delay is closely related to a range of other modes of judicial "avoidance"—including U.S.-style limits on justiciability (such as doctrines of mootness, ripeness, standing, and political questions), and substantive doctrines of deference, such as the margin of appreciation doctrine in Europe.[83] These other modes of avoidance, however, are distinct from delay in one important respect: they can often involve permanent avoidance, rather than simply the temporary judicial avoidance of a question. Delay is incompatible with such permanent tactics. Indeed, "[o]nce the necessary degree of political or legal support exists for compliance with court decisions, and that support remains stable, to make sense, second-order deferral

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78. Dixon & Issacharoff, *supra* note 72.

79. *Id.* at 687.

80. *Id.* at 700–07.

81. *Id.* at 699; *see also* Epstein & Knight, *supra* note 26, at 79–88 (discussing defensive denials).

82. I am indebted to Mark Tushnet for pressing me on this point.

83. Delaney, *supra* note 2.

is an approach that courts must ultimately abandon, in favor of a stronger, more immediate attempt to protect and promote democracy."[84]

This understanding also suggests certain limits on deferral as a judicial strategy. In some cases, a repeated history of prior deferral may mean that a court has little choice but to confront a question, or risk creating a political understanding, or even perceived legal precedent, that prevents later consideration of an issue. Alternatively, an immediate threat to constitutional democracy may be so great that failure by courts to promptly enforce constitutional constraints may risk permanently undermining constitutional commitments.

B. Authorship

Courts that are sensitive to *who writes* for the court, or the majority, may likewise enjoy greater perceived—or "sociological"—legitimacy than courts that overlook considerations of voice or authorship in the framing of their decisions.[85]

On one level, the right to be heard is a matter of fundamental justice or fairness.[86] But it is also an important determinant of the perceived legitimacy or fairness of a decision, and therefore the willingness of those disappointed by it to abide by or adhere to relevant orders and outcomes. Social science evidence suggests a powerful relationship between opportunities for voice in decision-making processes and the perceived fairness or legitimacy of decisional outcomes.[87] That is, there are powerful instrumental as well as relational rationales for a right to be heard: Ensuring a right to be heard promotes compliance

84. Dixon & Issacharoff, *supra* note 72, at 723.

85. On sociological legitimacy, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1803–06 (2005).

86. Harel & Shinar, *The Real Case for Judicial Review*, *supra* note 57, at 13–14.

87. *See, e.g.*, Derek R. Avery & Miguel A. Quiñones, *Disentangling the Effects of Voice: The Incremental Roles of Opportunity, Behavior, and Instrumentality in Predicting Procedural Fairness*, 87 J. APPLIED PSYCH. 81 (2002); E. Allan Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCH. 952 (1990) (summarizing existing studies finding a "voice effect," relational and instrumental accounts, and providing additional evidence as to the two effects).

with court orders, as well as a sense of dignity and respect on the part of citizens.[88]

Both accounts further emphasize the notion that voice involves being *listened to*—if not followed in subsequent processes of decision-making. And judges who share the same background, or experience, as litigants can send a powerful, if unstated, message to those litigants: that they understand their perspective, and where it originates. This, in effect, suggests that this perspective has been understood and *heard*, even if it is ultimately rejected.

Of course, sharing the same background does not always mean sharing the same experience, let alone perspective.[89] These benefits, therefore, will only arise in some cases. And in others, there may even be a sense of betrayal that certain judges do not seem to share the same experience or perspective as the plaintiff, or disappointed litigant.[90]

Judges also need not always write the opinion of a court to convey this message; sometimes the very act of joining or concurring in another judge's opinion may be enough to send this message. And there are likely to be important benefits to judges *sharing* responsibility for judicial authorship. Doing so creates a fairer and more efficient allocation of a court's workload. It can also increase the degree to which a court's perceived authority is linked to the entire court, rather than a single judge, and is thus capable of withstanding changes to a court's membership.[91]

There may also be cases in which *unanimity* in a court's voice is more important than any single decision-writer's proximity to a

88. Bruce Barry & Debra L. Shapiro, *When Will Grievants Desire Voice?: A Test of Situational, Motivational, and Attributional Explanations*, 11 INT'L J. CONFLICT MGMT. 106, 119 (2000); *see also* Avery & Quiñones, *supra* note 87; Lind et al., *supra* note 87.

89. *See, e.g.*, Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examinatio*n, 21 YALE J.L. & FEMINISM 297 (2009) (challenging the assumption that a judge's gender necessarily predicts a particular judicial philosophy or worldview).

90. This, for example, has arguably been the case for some Black litigants and observers of the U.S. Supreme Court in relation to the jurisprudence of Justice Thomas. *See, e.g.*, KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS (2004); U.W. Clemon & Stephanie Y. Moore, *Justice Clarence Thomas: The Burning of Civil Rights Bridges*, 1 ALA. C.R. & C.L. L. REV. 49 (2011); A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405 (1994); Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323 (2004).

91. *See* Rosalind Dixon, *Towering versus Collegial Judges: A Comparative Reflection*, *in* TOWERING JUDGES: A COMPARATIVE STUDY OF CONSTITUTIONAL JUDGES 308 (Iddo Porat & Rehan Abeyratne eds., 2020).

disappointed party. For instance, where a court fears non-compliance with its orders, it may be especially important for the court to write in a single voice—or issue a *per curiam* opinion—in order to signal that the court is putting its full institutional authority behind a decision.[92] Or if a court fears political interference writing in a single voice may allow a court "to maintain a veil of ignorance between its members and government re-appointers or potential employers."[93]

But a court attentive to concerns of judicial statecraft will pay close attention to the identity of the judge who authors its opinion, even as it acknowledges the value of unanimity in certain exceptional cases. Judicial authorship is more likely to attract public attention than co-authorship. Judicial authorship can be shared across cases, even with appropriate attention to questions of judicial identity. And the power of a *per curiam* opinion itself largely depends on the contrast it draws with other opinions—in which a court speaks in multiple voices.[94]

C. Narratives

Similarly, current public policy scholarship emphasizes the power of different *narratives* to shape public attitudes or responses to certain ideas or issues.[95] Survey evidence suggests that citizens in

92. *See, e.g.*, Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010); Andrew Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, 27 MELB. U. L. REV. 724 (2003)

93. Gardbaum, *What Makes for More*, *supra* note 6, at 15.

94. This is less true for the veil of ignorance argument Gardbaum makes above. But on *per curiam* opinions and a court's authority, see, for example, Cooper v. Aaron, 358 U.S. 1 (1958); Tony A. Freyer, Cooper v. Aaron *(1958): A Hidden Story of Unanimity and Division*, 33 J. SUP. CT. HIST. 89 (2008); Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387; Bush v. Gore, 531 U.S. 98 (2000); Laura Krugman Ray, *The Road to* Bush v. Gore*: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517 (2000); Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001); Stephen L. Wasby et al., *The* Per Curiam *Opinion: Its Nature and Functions*, 76 JUDICATURE 29 (1992); Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and* Per Curiam *Opinions*, 86 TUL. L. REV. 1197 (2012).

95. *See, e.g.*, Brett Davidson, *The Role of Narrative Change in Influencing Policy*, ON THINK TANKS (July 20, 2016), https://onthinktanks.org/articles/the-role-of-narrative-change-in-influencing-policy/ [https://perma.cc/3VBV-YWRY]; *see also* Alexander B. Murphy, *Advancing Geographical Understanding: Why Engaging Grand Regional Narratives Matters*, 3 DIALOGUES HUM. GEOGRAPHY 131 (2013) (discussing narrative as an influence on human geography); Robert J. Shiller, *Narrative Economics*, 107 AM. ECON. REV. 967 (2017) (examining narrative as an influence on public perceptions about economic growth and outcomes, and therefore also economic behavior).

most democracies have some commitment to global or universal values, including in the form of international law, but also commitments to more specific national or local values and priorities.[96] Courts that are mindful of this, and deploy a variety of different narratives—combining global and local, or universalist and particularist, modes of reasoning—may therefore also have greater capacity to build public support for their decisions, than courts that adopt a more singularly global or local narrative in support of their decisions.

Philosophers, such as Thomas Nagel, further suggest that this reflects an inherent tension in the nature of political obligations in a constitutional democracy: Individuals in a political community have both impartial and partial obligations, or impersonal and personal perspectives on questions of justice.[97] Part of the role of political institutions is to mediate this tension between the demands of impersonal and personal notions of justice, or obligation—or to allow individuals to integrate impersonal and personal perspectives, or understand notions of political obligation through the notion of what is reasonable according to both perspectives.[98]

Courts that appeal to both universalist and particularized notions of constitutional values will also have the capacity to do just this: They can provide forms of justification for legal outcomes that appeal to both impersonal and more personal values, in the sense of national or local values.[99] And in doing so, they can do more to appeal to a broad range of viewpoints *and* citizens than courts that employ a more singularly global or local approach.

Of course, there will inevitably be significant variation across countries in the degree to which this in fact helps build support for a court, or its decisions. Global norms have traditionally enjoyed quite high degrees of support in most countries. But some countries are witnessing a turn toward a nationalistic form of politics, or constitutional culture, which openly rejects the idea of shared global norms.[100]

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96. *See* Mark A. Pollack, *Who Supports International Law, and Why? The United States, the European Union and the International Legal Order*, 13 INT'L J. CONST. L. 873 (2015).

97. THOMAS NAGEL, EQUALITY AND PARTIALITY 14–15 (1995).

98. *Id.* at 17–18; *see also id.* at 142, 172.

99. *Id.* at 14 (identifying personal values as including national identity), 142 (discussing the nature and demands of liberal political justification).

100. See, for example, the discussion on Zimbabwe and Venezuela in David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859 (2015).

Equally, other countries are witnessing increasing internal divisions that threaten the entire notion of shared national or local values. Courts may play some role in constructing a notion of shared values—for example, by persuading either a public or elite audience that there is a connection between highly abstract national commitments (such as the repudiation of apartheid) and more controversial, concrete values (such as a repudiation of separate systems of customary law, the death penalty, bans on gay sex, or unaddressed homelessness). But there may still be limits to courts' capacity to generate this sense of shared values, while at the same time relying on those values to build support for their decisions.

In general, however, a multiplicity of overlapping but complementary narratives will help increase public support for the outcome of court decisions, and this extends to different narratives that transcend or crosscut the global and local divide. Courts that use different narratives will therefore also have greater capacity to build public support for their decisions than courts that seek to explain or justify those decisions in more singular terms.

D. Tone, Respect, and Comity

This greater capacity to grow public support also extends to courts that demonstrate respect for the motives or perspectives of constitutional losers. Some constitutional scholars suggest that courts should adopt a posture of respect, or "comity," as a matter of legal or political obligation. In private international law, the idea of comity involves "the recognition and implementation of the decisions of courts belonging to other systems."[101] It derives from principles of "courtesy," "mutual respect," and "mutual convenience" among nation states, but is also a means of creating a stable and seamless (or gap-free) global legal order.[102] In this sense, it serves important political

For the U.S. context and the recent rise of "economic nationalist" rhetoric, see, for example, Monica de Bolle, *The Rise of Economic Nationalism Threatens Global Cooperation*, PETERSON INST. FOR INT'L ECON. (Sept. 4, 2019), https://www.piie.com/blogs/realtime-economic-issues-watch/rise-economic-nationalism-threatens-global-cooperation/ [https://perma.cc/BR83-BKKX]; Adam Harmes, *The Rise of Neoliberal Nationalism*, 19 REV. INT'L POL. ECON. 59 (2012).

101. Elisa D'Alterio, *From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?*, 9 INT'L J. CONST. L. 394, 401 (2011).

102. *Id.* at 398, 400, 423.

objectives.[103] But it is also understood by many international lawyers and scholars as a matter of (at least qualified) legal obligation.[104]

In constitutional theory, scholars such as Aileen Kavanagh likewise argue for comity as a matter of political obligation—or a principle that should guide our understanding of the relationship between courts and legislatures. According to Kavanaugh, comity is simply "that respect which one great organ of the State owes to another."[105] But it arises because of the inter-dependent relationship between courts and other (primarily legislative) actors, which entails requirements of "mutual self-restraint and mutual support."[106]

Reciprocity is also a close corollary of this notion of interdependence.[107] But again, reciprocity is understood as a matter of legal obligation—as necessary to ensure "the ongoing success" of a system characterized by shared responsibility and interdependence.[108] From a strategic perspective, showings of comity or respect also have a distinct, if related purpose: Where Kavanagh's notion of comity *requires* reciprocity, strategic displays of respect simply aim to *encourage* it—through something like the dynamics of "gift exchange."

The basic idea behind gift exchange is simple: Those who receive a gift appear to feel a moral obligation to reciprocate in some way, by giving a return gift or benefit of comparable value.[109] This pattern has been found to apply across time and cultures, and in a

103. *Id.* at 400, 423.

104. *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) (suggesting that it is "neither a matter of *absolute* obligation, on the one hand, nor of mere courtesy and good will, upon the other") (emphasis added); *see also* D'Alterio, *supra* note 101, at 400.

105. Aileen Kavanagh, *Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication*, *in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 184, 188 (Grant Huscroft ed., 2008) (citing Buckley v. Att'y Gen. [1950] IR 67, 80 (Ir.)).

106. AILEEN KAVANAGH, THE COLLABORATIVE CONSTITUTION (forthcoming 2021) (manuscript at ch. 3) (on file with author).

107. Aileen Kavanagh, *The Constitutional Separation of Powers*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 221, 228–235 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

108. *Id.* at 237–38.

109. *See, e.g.*, George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543 (1982); Armin Falk, *Gift Exchange in the Field*, 75 ECONOMETRICA 1501 (2007); Sebastian Kube, Michel André Maréchal & Clemens Puppe, *The Currency of Reciprocity: Gift Exchange in the Workplace*, 102 AM. ECON. REV. 1644 (2012).

variety of social and economic settings.[110] It even extends to intangible "gifts" such as demonstrations of respect or trust: Workers who are given more autonomy and shown more trust tend to work harder than those who are closely controlled or monitored.[111] Trust begets trustworthiness, and respect generates reciprocal forms of respect or co-operation.

On this logic, courts that demonstrate respect toward a losing party are also more likely to see their own decisions respected than are courts that show contempt or disregard for a losing party.[112] The relationship between a court and parties to litigation is not identical to that between a gift giver and a recipient, or an employer and an employee.[113] It is more indirect and impersonal, and mediated by a range of constitutional structures and duties. But it is still a relationship with potential communicative and expressive dimensions.[114] And some parties may be especially sensitive to the expressive dimensions to constitutional litigation: They may not experience high levels of respect in democratic debate, and therefore they may place special weight on demonstrations of respect in a judicial setting, which provide them with a right to be heard.[115]

Comity, in this sense, is more about increasing the *perceived* legitimacy of judicial decisions, or compliance with those decisions, than about ensuring their actual legitimacy. And it may apply among institutions that are unequal in power, not simply those that enjoy a "heterarchical" relationship.[116]

It is also important to note, however, that there may be limits to comity even of this more strategic kind. It is only in cases of doubt that a court should assume, at least publicly, that the conduct of parties

110. *See, e.g.*, Akerlof, *supra* note 109; Falk, *supra* note 109; Ernst Fehr, Georg Kirchsteiger & Arno Riedl, *Gift Exchange and Reciprocity in Competitive Experimental Markets*, 42 EUR. ECON. REV. 1 (1998).

111. *See, e.g.*, Akerlof, *supra* note 109; Noel D. Johnson & Alexandra A. Mislin, *Trust Games: A Meta-Analysis*, 32 J. ECON. PSYCH. 865 (2011).

112. *Cf.* Rosalind Dixon, *Constitutional Drafting and Distrust*, 13 INT'L J. CONST. L. 819 (2015) (discussing trust in the judiciary in the context of constitutional drafting).

113. *Id*.

114. On expressive effects in constitutional law, see generally, for example, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L. REV. 1503 (2000).

115. Harel & Shinar, *The Real Case for Judicial Review*, *supra* note 57, at 17–27; Harel & Kahana, *supra* note 57, at 240–41.

116. *See* KAVANAGH, *supra* note 106.

is not motivated by good faith. But in some cases, there may be little room for doubt of this kind: Parties before a court may have engaged in sufficiently bad faith conduct that it would be patently inappropriate for a court to impute good faith to them.[117] Doing so would simply add to the perceived legitimacy of that conduct, when in fact, it is conduct that a court needs to directly confront and challenge if it is to protect and promote constitutional democratic norms.[118]

E. Engagement

Finally, courts that engage a broad range of actors in the process of constitutional litigation may gain further advantages: They may acquire useful information about facts or opinions relevant to the process of constitutional construction,[119] and they may increase the number of actors committed to implementing their orders.

The traditional model of constitutional litigation involves a dispute between an individual and some part of the government. Many courts, however, are increasingly allowing a much broader range of actors to join constitutional litigation either as interveners or parties, or as amicus curiae or "friends of the court."[120] This includes other levels of government, or government actors, and a wide range of civil society or non-government actors.[121]

117. On bad faith generally in a constitutional context, see David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2015).

118. For example, Roux and I argue that this is exactly what occurred in South Africa in the *Nklanda* case, necessitating the CCSA's shift in approach from an earlier posture of comity and deference to one of more direct confrontation with the threat of democratic backsliding. Dixon & Roux, *supra* note 75.

119. *See, e.g.*, Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 987 (2009); James F. Spriggs II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365 (1997); Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807 (2004).

120. *See generally, e.g.*, Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901 (2016); Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for Amicus Curiae in the Supreme Court Reflects New Norm*, NAT'L L.J. (Aug. 19, 2015); Evan H. Caminker, *A Glimpse Behind and Beyond Grutter*, 48 ST. LOUIS U. L.J. 889 (2004); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014); Steven Kochevar, *Amici Curiae in Civil Law Jurisdictions*, 122 YALE L.J. 1653 (2012); Christina Murray, *Litigating in the Public Interest: Intervention and the Amicus Curiae*, 10 S. AFR. J. HUM. RTS. 240 (1994).

121. *See, e.g.*, Larsen & Devins, *supra* note 120; Collins, *supra* note 119.

Parties (or amici) of this kind have a much greater capacity than an individual litigant to help enforce a court order: They have greater resources, media profile, and experience with running political or advocacy campaigns. And being joined as a party, or amicus, can give civil society actors greater power and incentive to engage in enforcement action: If a group is allowed to intervene in a case, or join as a party, they will often have automatic standing to bring further litigation designed to enforce a court order.[122] They may also be more motivated to bring such proceedings because they are more likely to identify and tie their own success to the success of the court's order.

For this reason, as scholars such as Charles Epp have shown, civil society can provide a crucial support structure for successful rights-based litigation, or judicial rights enforcement.[123] In some cases, courts may even be able to rely on this support structure without civil society, or other government actors, being joined as a party. As Landau and I have proposed elsewhere, constitutional designers can often strengthen judicial review by "splitting" the responsibility for enforcing constitutional constraints between judicial and non-judicial bodies.[124] Doing so can create a broader set of institutions and actors committed to enforcing the constitution. It can also make it more difficult for the executive to capture *all* the independent bodies charged with upholding constitutional checks and balances, or the rule of law.

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122. *See, e.g.*, Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (S. Afr.); Minister of Health v. Treatment Action Campaign (No 2), 2002 (5) SA 721 (S. Afr.). *See also* David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189 (2015); David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance*, 119 S. AFR. L.J. 484 (2002); Siri Gloppen, *Social Rights Litigation as Transformation: South American Perspectives*, (Chr. Michelsen Institute Working Paper WP 2005: 3) https://www.cmi no/publications/file/1965-social-rights-litigation-as-transformation.pdf/ [https://perma.cc/CD32-CN27]. Whether this is true will depend on the specific rules of standing in a constitutional system, but most systems recognize the standing of prior parties to bring follow-up proceedings.

123. CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVES (1998); *see also* Michael W. McCann, *How Does Law Matter for Social Movements?*, *in* HOW DOES LAW MATTER? 76 (Bryant Garth et al. eds., 1998); Alyssa Brierley, PUCL v. Union of India*: Political Mobilization and the Right to Food*, *in* A QUALIFIED HOPE 212 (Gerald N. Rosenberg et al. eds., 2019); Rosalind Dixon & Rishad Chowdhury, *A Case for Qualified Hope? The Supreme Court of India and the Midday Meal Decision*, *in* A QUALIFIED HOPE, *supra*, at 243.

124. ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION & THE SUBVERSION OF LIBERAL DEMOCRACY (forthcoming 2021) (manuscript at 166) (on file with author).

Courts themselves can also promote a principle of diffuse or dispersed institutional authority by interpreting a constitution to promote overlapping rather than separate spheres of authority or jurisdiction.[125] They can also issue decisions that deliberately rely on, or pick up on, the findings of other independent bodies, and thereby enlist the authority or standing of those bodies in support of the implementation of the court's own decisions.

In some cases, there may be limits to the scope of this kind of collaboration: Civil society may be relatively weak or may have limited capacity to engage with courts. There may likewise be few truly independent agencies or agencies with significant independent power or standing. The scope for enlisting civil society or other government actors in the implementation of a constitutional judgment may therefore also be limited.

But as David Landau argues, courts are also often in a position to influence the "shape and strength" of those support structures.[126] According to Landau, court decisions can "influence the cohesion of civil society groups, as well as those groups' leverage over states officials and their willingness to rally behind the court or its agendas."[127] In this sense, how courts themselves engage with civil society can also influence the willingness of civil society to take actions designed to defend a court from political attack.

III. TWO CASE STUDIES IN JUDICIAL INTERVENTION

In this part, I explore two comparative case studies of judicial intervention—the decision of the Constitutional Court of South Africa (CCSA) in *Bhe* and that of the Supreme Court of India (SCI) in *Shah Bano*—as illustrations of the potential power of these five dimensions of judicial framing or statecraft.

125. *See, e.g.*, Rosalind Dixon & Felix Uhlmann, *The Swiss Constitution and a Weak-Form Unconstitutional Amendment Doctrine?*, 16 INT'L J. CONST. L. 54 (2018).

126. David Landau, *Courts and Support Structures: Beyond the Classic Narrative*, *in* COMPARATIVE JUDICIAL REVIEW, *supra* note 4, at 226, 226.

127. *Id.*

A. Approaching Case Studies of Judicial Statecraft

1. Why a Comparative Approach?

Why look to comparative sources for this analysis? The U.S. Supreme Court is arguably a leading example of a court that at least occasionally makes use of exactly these same kinds of tools of judicial statecraft. As Samuel Issacharoff and I have contended, politically sensitive timing has been a key hallmark of judicial review by the U.S. Supreme Court from *Marbury v. Madison* onward.[128] And the modern Supreme Court frequently shows at least implicit attention to questions of *timing*, *voice*, *narrative*, *tone*, and *engagement.*

The Court's approach to recognition of a constitutional right to same-sex marriage provides a good example. While controversial, the decision of the Court in *Obergefell v. Hodges* was clearly effective in bringing about broad legal change in the recognition of same-sex marriage in the United States.[129] And the Court's opinion had many of the hallmarks of strategic judicial choices about how to frame its reasoning. In *Obergefell*, a majority of the Court interpreted the Fourteenth Amendment as extending protection to gays and lesbians in the context of rights of political equality, sexual privacy, and marriage equality.[130] The case was decided in 2015, when the President and a majority of U.S. states favored the recognition of same-sex marriage.[131] It was written by Justice Kennedy, who was not only appointed by a Republican president but was himself a member of the Republican party, which continued to oppose same-sex marriage. Kennedy's opinion

128. Marbury v. Madison, 5 U.S. 137 (1803). *See* Dixon & Issacharoff, *supra* note 72.

129. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

130. *Id.*

131. *See* Jessica Walthall & Joanna Piacenza, *Attitudes on Same-Sex Marriage in Every State*, PRRI (Apr. 20, 2015), https://www.prri.org/spotlight/map-every-states-opinion-on-same-sex-marriage/ [https://perma.cc/4D8R-SGK4]; Justin McCarthy, *U.S. Support for Gay Marriage Stable, at 63%*, GALLUP (May 22, 2019), https://news.gallup.com/poll/257705/support-gay-marriage-stable.aspx [https://perma.cc/Q4U7-ADVD]; Scott Clement & Robert Barnes, *Poll: Gay-Marriage Support at Record High*, WASH. POST (Apr. 23, 2015), https://www.washingtonpost.com/politics/courts_law/poll-gay-marriage-support-at-record-high/2015/04/22/f6548332-e92a-11e4-aae1-d642717d8afa_story html [https://perma.cc/62GP-BLW5]. For comments praising the Court for avoiding deciding the issue at an earlier time, see David Cole, *Gay Marriage: A Careful Step Forward*, N.Y. REV. BOOKS (June 27, 2013), https://www nybooks.com/daily/2013/06/27/gay-marriage-careful-step-forward/ [https://perma.cc/BU9M-WQTV]; David Cole, *A Surprise from the Court on Gay Marriage*, N.Y. REV. BOOKS (Oct. 6, 2014), https://www nybooks.com/daily/2014/10/06/no-news-good-news-gay-marriage/ [https://perma.cc/Q7XC-69Z9].

combined references to universal and American values,[132] and comparative and state-level legislative trends within the United States.[133] It explicitly affirmed the good faith of those who disagreed with its decision, especially religious believers.[134] And the Court engaged with a range of civil society actors, as well as lower courts, in the course of hearing and implementing its decision.[135]

In the United States, however, there are numerous factors other than judicial strategy or statecraft that help guarantee at least minimal respect for Supreme Court decisions. The Court has a long history of strong and at least minimally effective judicial review.[136] And as noted in Part I, a history of successful judicial review can often beget further success by conditioning public acceptance of strong review and an expectation of at least minimal government compliance with court decisions. In the United States, it will therefore often be quite difficult to draw clear inferences as to the causal impact of judicial strategy on constitutional outcomes.

In many newer or more fragile democracies, in contrast, judicial authority is far less secure. The choices a court makes are therefore more likely to play a role in shaping the impact of court decisions. Because of this, in such democracies, court decisions and the political responses to them are more likely to provide reliable insights as to how courts can most effectively shape the contours of their own power. The comparison made in this Article represents an attempt to apply something like the "most similar cases" principle identified by Ran Hirschl.[137] Based on the approaches to case selection developed in fields such as comparative politics, Hirschl's principle seeks to identify cases in which there is some important difference across a key dimension of interest, but a high degree of similarity in the background legal and socio-political context. In this way, the principle seeks to "control for" or hold "constant" the relevant background factors, and

132. *Obergefell*, 576 U.S. at 655–59.

133. *Id.* at 648.

134. *Id.* at 679.

135. *See* Obergefell v. Hodges, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/obergefell-v-hodges/ [https://perma.cc/RXN2-3V68].

136. The degree to which the Court has succeeded in bringing about broad social change is more disputed. *See, e.g.*, ROSENBERG, *supra* note 6.

137. RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 245–46 (2014).

thereby better understand the causal origins or effects of different constitutional design or constructional choices.[138]

2. South Africa and India as (Similar) Cases

Why specifically look to South Africa and India—or South African and Indian court decisions—in this context? Many other courts could arguably serve as a testing ground for predictions about the effect of judicial statecraft on constitutional outcomes. Indeed, there are numerous courts worldwide that have a long history of issuing powerful and effective decisions in aid of constitutional change, and that have relied on tools and techniques of judicial statecraft. Examples arguably include the apex courts of Canada, Colombia, Germany, Hungary, Israel, Indonesia, Korea, and Taiwan.[139]

The reason to focus on South Africa and India for this analysis, however, lies in the unusually high degree of similarity between South Africa and India, both generally and in the specific context of the issues at stake in *Bhe* and *Shah Bano*. The cases were decided at very different historical moments, and in different contexts, but there were nonetheless important structural and topic-specific similarities across the two sets of cases.

The first set of similarities is that between the two country-specific legal frameworks in which the cases arose. In South Africa, the scope of independent judicial review was limited under apartheid.[140] While there is a longer history of independent review in India, some scholars suggest that such review was quite limited during the 1975–77 Emergency, when Prime Minister Indira Gandhi declared a state of

138. *Id.*

139. *See, e.g.*, Dixon, *supra* note 70; Gardbaum, *Are Strong Constitutional Courts Always a Good Thing*, *supra* note 6, at 295–98; Susan Alberts, Chris Warshaw & Barry R. Weingast, *Democratization and Countermajoritarian Institutions: The Role of Power and Constitutional Design in Self-Enforcing Democracy*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 69, 74 (Tom Ginsburg ed., 2014); Andrew Arato & Zoltán Miklósi, *Constitution Making and Transitional Politics in Hungary*, *in* FRAMING THE STATE IN TIMES OF TRANSITION 350, 369 (Laurel E. Miller ed., 2010).

140. For more on the limited scope of judicial review in apartheid-era South Africa, and also on the exceptions in which courts have exercised independent review, see DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY 43–54 (2010).

emergency and suspended a range of constitutional guarantees.[141] However, both countries had some history of independent judicial review at the time they heard the cases. The apex courts in India and South Africa also both enjoy strong powers of judicial review and frequently use those powers to invalidate legislation.[142]

In addition to sharing a similar history of judicial review, the two countries have legal systems that are common law-influenced but pluralistic. South African private law combines aspects of common law and Roman-Dutch tradition, and the South African legal system recognizes customary law as a source of law in addition to common law and statutes. India likewise combines a system of common law and statutory norms with a system of "personal laws" developed and applied by each religious community.

As polities, South Africa and India have each had a long history of formalized discrimination based on race or religion/caste. At the same time, the petitioners in *Bhe* and *Shah Bano* invoked a formal constitutional commitment to equality and non-discrimination.[143] By the time of each case, both countries had also made significant progress in overcoming a legacy of formalized racism and caste-based discrimination—but today, both have witnessed a resurgence of forms of nationalist rhetoric and politics that threatens these ideals.[144]

141. *See, e.g.*, Anuj Bhuwania, *Courting the People: The Rise of Public Interest Litigation in Post-Emergency India*, 34 COMP. STUD. S. ASIA, AFR. & MIDDLE E. 314 (2014); Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. DEMOCRACY 70 (2007); Ved P. Nanda, *The Constitutional Framework and the Current Political Crisis in India*, 2 HASTINGS CONST. L.Q. 859 (1975).

142. For more on India, see Mehta, *supra* note 141; Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 485–95 (2003). On South Africa, *see* Gardbaum, *Are Strong Constitutional Courts Always a Good Thing*, *supra* note 6, at 297–98; Roux, *supra* note 69, at 118–33.

143. S. AFR. CONST. 1996, §§ 9(1), (3); INDIA CONST. 1950, arts. 14–16.

144. *See generally* Brenda Cossman & Ratna Kapur, *Secularism's Last Sigh? The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 HARV. INT'L L.J. 113 (1997); Sandy Gordon, *Indian Security Policy and the Rise of the Hindu Right*, 17 S. ASIA 191 (1994); THE CRISIS OF SECULARISM IN INDIA (Anuradha Dingwaney Needham & Rajeswari Sunder Rajan eds., 2007). In South Africa, a similar if lesser threat is arguably also posed by the Economic Freedom Fighters (a Black nationalist group) and the Freedom Front Plus (a white nationalist party). *See* Verashni Pillay, *South Africa is the Latest Country to See a Democratic Swing to Populism over Liberal Politics*, QUARTZ AFR. (May 12, 2019), https://qz.com/africa/1617273/south-election-eff-rise-leaves-democratic-alliance-down/ [https://perma.cc/9S43-9U7C]. Note, however, that in both cases the rise of these groups substantially post-dated the *Bhe* and *Shah Bano* decisions.

Similarly, both countries have a clear history of sex- and gender-based discrimination at odds with constitutional commitments to equal protection and benefit of the law. In South Africa, Section 1 of the Constitution states that "non-racialism and non-sexism" are founding values of the South African constitutional democratic order. Section 9 states that "everyone has the right . . . to equal protection and benefit of the law," and that the state "may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . gender [or] sex."[145] In India, Article 14 of the Constitution provides that the state shall "not deny to any person equality before the law or the equal protection of the laws,"[146] and Article 15(1) prohibits discrimination on the grounds of "religion, race, caste, sex or place of birth."[147]

The notion of "equality" is further complicated in both countries, albeit for different reasons. In South Africa, Black South Africans remain socially and economically disadvantaged in many contexts compared to white South Africans, even though they now comprise the clear political majority.[148] In India, both the Muslim minority and lower-caste Hindus have experienced longstanding discrimination and persecution.[149]

More broadly, South Africa and India share certain political and economic challenges—including challenges of poverty and development. They are both among the BRICS countries, a group of five of the world's largest emerging economies. Within the group—which also includes Brazil, Russia, and China—India and South Africa are the closest both in terms of raw GDP per capita and GDP per capita adjusted for the cost of living, or purchasing power parity.[150]

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145. S. AFR. CONST. 1996, §§ 9(1), (3).

146. INDIA CONST. 1984 Art. 14.

147. *Id.* Art. 15(1).

148. *See, e.g.*, City Council of Pretoria v. Walker, 1998 2 SA 363, ¶¶ 45–48 (S. Afr.).

149. *See, e.g.*, Jim Yardley, *India Eyes Muslims Left Behind by Quota System*, N.Y. TIMES (Mar. 9, 2012), https://www.nytimes.com/2012/03/10/world/asia/india-eyes-affirmative-action-for-muslims.html [https://perma.cc/EW7P-88DR].

150. South Africa has a GDP per capita of $6,460, or $13,840 in purchasing power parity terms, while India has a GDP per capita of $2,130 or $7,780 in purchasing power parity terms). *See South Africa vs BRIC Countries – Average Salaries, GDP and Unemployment Compared*, BUS. TECH (July 25, 2018), https://businesstech.co.za/news/business/260855/south-africa-vs-bric-countries-average-salaries-gdp-and-unemployment-compared/ [https://perma.cc/E3VH-K499].

Thus, while differences in the courts' strategies may not wholly explain the difference in outcome between *Bhe* and *Shah Bano*, the similarity in legal and political background conditions in the two countries allows for an interesting comparison.

B. Case Studies

1. South Africa: *Bhe*

In *Bhe*, the applicant was a Black South African woman whose *de facto* husband had died intestate. Section 23 of the apartheid-era Black Administration Act of 1987 (BAA) provided that the administration of her husband's estate was governed by customary law.[151] Customary law in turn required that the decedent's father be appointed representative of the estate, and that the decedent's father be the sole heir, to the exclusion of the applicant and her two daughters with the decedent.[152] On behalf of her daughters, the applicant challenged both the automatic application of customary law under the BAA as well as the customary norms of primogeniture and exclusion of extra-marital children from inheritance as violations of the requirement of equality under Section 9 of the South African Constitution.[153]

The Constitutional Court of South Africa (CCSA) sustained both arguments, holding that the automatic application of customary law based on the race of the decedent made Section 23 of the BAA a patently "racist provision . . . fundamentally incompatible with the Constitution" and its guarantee of equality.[154] Further, the CCSA held that the customary norms of succession, which Section 23 of the BAA called on a magistrate to apply, were themselves in breach of Section 9(3) of the Constitution.[155] The CCSA held that a rule that excluded women from inheritance based on gender involved "a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group," and furthered "old notions of patriarchy and male domination" in a way that constituted a "clear violation" of the guarantee of

151. Bhe v. Khayelitsha Magistrate, 2005 (1) SA 580, ¶ 35 (S. Afr.).
152. *Id.* ¶¶ 15, 35.
153. *Id.* ¶ 47.
154. *Id.* ¶ 60.
155. *Id.* ¶¶ 107–08.

gender equality in Section 9(3).[156] "By implying that women are not fit or competent to own and administer property," the statute was also in breach of the constitutional commitment to human dignity.[157] Further, the CCSA held, this discrimination was not justified under Section 36 of the Constitution[158]—the provision which authorizes reasonable limitations on rights—and it was equally unfair and unjustified for customary law norms to wholly exclude extra-marital children from inheriting from their father's estate.[159] Further, Deputy Chief Justice Langa held that in the future, customary law would need to be applied on a consensual basis[160] and in a manner that conformed to the constitutional requirements of equality or non-discrimination.[161]

The only disagreement among members of the court was about the appropriate remedy for these constitutional violations. Writing for the majority, Deputy Chief Justice Langa held that Section 23 of the BAA should be declared invalid, and all intestate estates (including Black estates and those involving Muslim *de facto* marriages) should be governed in the interim by the terms of Section 1 of the Intestate Succession Act of 1987 (IAA),[162] with magistrates to be empowered to administer such estates.[163] A minority of judges on the CCSA, however, would not have applied the IAA and would have instead taken the opportunity to develop customary law as part of the remedy issued by the court.[164] The majority declined to adopt this approach and Langa suggested that the legislature was in the "best position" to develop the law.[165]

The case ultimately resulted in the adoption of significant legislative changes to customary law. In 2006, the South African Parliament passed the *Repeal of the Black Administration Act*, and associated legislation, formally ratifying the choice of law rules adopted by

156. *Id.* ¶ 91.

157. *Id.* ¶ 92.

158. *Id.* ¶¶ 69–74.

159. *Id.* ¶¶ 59, 73, 93.

160. *See id.* ¶¶ 228–231.

161. *See id.* ¶¶ 184–199.

162. *Id*. ¶ 105.

163. *Id.* ¶¶ 229–236.

164. *See id.* ¶ 166. (Ngcobo, J., dissenting); *see also* Chuma Himonga, *Reflection on* Bhe v. Magistrate Khayelitsha*: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa*, 32 S. AFR. PUB. L. 1 (2017).

165. *Bhe*, 2005 (1) SA 580, ¶ 115.

the CCSA in *Bhe*.[166] And in 2009, Parliament passed the *Reform of Customary Law of Succession and Regulation of Related Matters Act*, which abolished the practice of male primogeniture and established the "recogni[tion] of equal inheritance rights for all surviving children and spouses."[167] While some scholars have lamented a lack of further development of customary law[168] and the ongoing development of a gap between formal and informal custom,[169] the decision in *Bhe* achieved significant and enduring change in the direction envisaged by the Court.

2. India: *Shah Bano*

In *Shah Bano*, the Supreme Court of India (SCI) considered an appeal from a magistrate's order for spousal maintenance under of India's Code of Criminal Procedure (ICCP). Section 125(1) of the ICCP provided that a magistrate was empowered to make an order for maintenance, up to an amount of 500 rupees per month, "if any person having sufficient means neglects or refuses to maintain . . . his wife, unable to maintain herself"—and that breach of such order could attract criminal penalties.[170]

The question for the SCI was whether the magistrate issuing the order had the power to do so, given that the divorced couple were married under Muslim personal law. The appellant, who was the divorced husband, argued that the term "wife" in Section 125(1) did not include a former or divorced wife, and that in any event, the order should be discharged under Section 127(3)(b) of the ICCP, which provided for orders to be cancelled where a woman had "received . . . the whole of the Sum which, under any customary or personal law

166. Repeal of the Black Administration Act and the Repeal of Certain Laws Act, 2005 (Act No. 28/2005) (S. Afr.). For further discussion, see MC Schoeman-Malan, *Recent Developments Regarding South African Common and Customary Law of Succession*, 10 POTCHEFSTROOM ELEC. L.J., no. 1, 2007, at 1, 24.

167. Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009 (Act No. 11/2009) (S. Afr.). For the quoted text in context, see John Cantius Mubangizi, *A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions*, 13 J. INT'L WOMEN'S STUD. 33, 46 (2012).

168. *See generally* Himonga, *supra* note 164.

169. *See generally* Sindiso Mnisi Weeks, *Customary Succession and the Development of Customary Law: The* Bhe *Legacy*, 2015 ACTA JURIDICA 215.

170. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556, 560–61 (India).

applicable to the parties, was payable on such divorce."[171] The appellant had divorced the respondent through a "triple *talaq*" (i.e. immediate divorce effected by the repeat of certain words) and subsequently paid maintenance for two years before making a final payment (known as a *mahr*) of 3,000 rupees.[172]

The SCI dismissed the appeal and held that the appellant was liable to an order for maintenance under Section 125(1) and could not rely on Section 127 to cancel that order. The text of Section 125, the court suggested, was "too clear and precise to admit of any doubt or refinement" in light of the religion or personal law of the parties concerned.[173] Section 125(1)(b) expressly provided that the term "wife" included "a woman who has been divorced by, or has obtained a divorce from, her husband [and] has not remarried."[174] Other provisions, such as Section 125(3), also contemplated the application of Section 125(1) to potential polygamous—and therefore Muslim[175]—marriages.[176] Moreover, the court held that the purpose of Section 125(1) supported this construction: It was intended to protect those unable to maintain themselves and applied equally across religions.[177]

With respect to Section 127, the SCI further held that under Muslim law, the *mahr* payment should not be considered to have been "payable . . . on divorce"; rather, it was a general "mark of respect" to a woman, and not specifically connected to divorce.[178]

The ultimate result of *Shah Bano*, however, was not an expansion of the protection of women under Section 125(1) of the ICCP. Instead, the Code was amended to expressly exempt Muslim marriages. One year after the decision, the Indian Parliament passed the Muslim Women (Protection of Divorce) Act of 1986 (MWPDA), which excluded from the scope of Section 125 women married and divorced according to Muslim personal law, except by consent of the

171. *Id.* at 564–66.

172. *Id.* at 559.

173. *Id.* at 562.

174. *Id.*

175. The prohibition of polygamy under the Hindu Marriage Act of 1955 did not apply to India's Muslim citizens. *See* WERNER F. MENSKI, MODERN INDIAN FAMILY LAW 139–47 (2013).

176. *Shah Bano*, (1985) 2 SCC 563–64.

177. *See id.* at 562–63.

178. *Id.* at 565–66

husband.[179] In place of the maintenance obligations imposed by Section 125, the Act created a new regime requiring a man to make a payment of *mahr* upon divorce and to pay maintenance only during a period of *iddat*—generally three months from the date of divorce.[180] The Act also gave these provisions retrospective effect.[181] Thus, although the SCI perhaps intended to expand women's rights in divorce, the legislative response to the decision may actually have weakened them relative to the prior status quo.

The Indian Parliament, controlled by the Congress Party, passed the MWPDA on a party-line vote.[182] The Act was also widely seen as a retreat by the Congress's leader, Prime Minister Rajiv Gandhi, from modern, secular ideals of gender equality and non-discrimination.[183] Gandhi initially welcomed the *Shah Bano* decision and declined to support any attempt to override it.[184] However, after the Congress Party sustained major electoral losses at the by-elections held in December 1985, Gandhi shifted the party's position to supporting the MWPDA.[185]

The changes under the Act also had lasting costs for the project of Muslim feminist family law reform. Some later decisions by lower courts have adopted a generous view of the requirements of maintenance during the *iddat* period under the MWPDA, and some of these developments were later ratified by the SCI itself.[186] Muslim feminist

179. *See* Nawaz B. Mody, *The Press in India: The* Shah Bano *Judgment and Its Aftermath*, 27 ASIAN SURV. 935, 949 (1987); *see also* Sheena Jain, *Bourdieu's Theory of the Symbolic and the* Shah Bano *Case*, 56 SOC. BULL. 3, 8–9 (2007); Rasheed Kidwai, *Who Really Influenced Rajiv Gandhi to Act Against* Shah Bano *Judgment?*, PRINT (July 24, 2018), https://theprint.in/opinion/who-really-influenced-rajiv-gandhi-to-act-against-shah-bano-judgment/87263/ [https://perma.cc/Z2BB-HQ5W].

180. Mody, *supra* note 179, at 949.

181. *Id.*

182. *Id.* at 950.

183. *Id.* at 952.

184. Jain, *supra* note 179, at 8.

185. *Id.* at 8–9.

186. *See* Flavia Agnes, *From* Shah Bano *to* Kausar Bano: *Contextualizing the "Muslim Woman" within a Communalized Polity*, *in* SOUTH ASIAN FEMINISMS 32, 39 (Anita Loomba & Ritty A. Lukose eds., 2012); Saumya Uma, *Muslim Women's Right to Maintenance in India*, DAILY STAR (Jan. 30, 2005), https://www.thedailystar net/law/2005/01/04/vision.htm [https://perma.cc/RZN8-BCHB]; Abdulla v. Saiyadbhai, AIR 1988 Guj 141 (Gujarat H.C.); Aliyar v. Pathu, 1998 KHC 564 (Kerala H.C.); Ahammed v. Aysha, ILR 1990 (2) (Kerala H.C.); Haji v. Amina, 1995 Cri LJ 3371 (Kerala H.C.); Zunaideen v. Begum, 1998 (1) CTC 566 (Madras H.C.); Shaikh v. Shaikh, 2000 Cri LJ 3560 (Bombay H.C.); Kaka v. Hassan Bano

law reformers have also made progress in other areas.[187] But the immediate reactions to *Shah Bano* from the Hindu and Muslim communities arguably led to long-term damage to the project of reform. As Christophe Jaffrelot notes, "[t]he militancy" of some minorities in India in the 1980s, including members of the Muslim community opposed to decisions such as *Shah Bano*, "evoked a new feeling of vulnerability within Hinduism, and many religious leaders responded to it by joining the Hindu nationalist movement" that has only become stronger since.[188] Today, that nationalist movement clearly poses a threat to attempts to achieve true equality for Muslim women.[189]

C. Explaining Different Judicial Outcomes: The Importance of Judicial Authorship, Narrative, Respect, and Collaboration

What can we observe about the different outcomes in the *Bhe* and *Shah Bano* cases? This Article argues that the different outcomes engendered by the decisions may plausibly be attributed, in part, to differences between the way in which the courts in each case approached the *timing*, *authorship*, *narrative* and *tone* of their decisions, as well as *engagement* with civil society. Differences in judicial framing alone cannot explain the differences in outcome; but they may have played some role in supporting the perceived sociological legitimacy, and thus the effectiveness, of the decision in *Bhe*—and undermining perceived sociological legitimacy of the decision in *Shah Bano*. A secondary comparison between *Shah Bano* and a similar, more recent decision by the SCI, *Shayara Bano v. Union of India*,[190] points to the same conclusion: Differences in judicial statecraft may have an effect on judicial outcomes.

(1998) 118 PLR 1 (Punjab-Haryana H.C.); Shaikh v. Shaikh, 2000 (1) BomCR 696 (Bombay H.C.). *See generally* Ali v. Sufaira, 1988 (3) DMC 147 (Kerala H.C.). *See also* discussion accompanying *infra* notes 244–253.

187. Agnes, *supra* note 186, at 44.

188. CHRISTOPHE JAFFRELOT, THE HINDU NATIONALIST MOVEMENT AND INDIAN POLITICS: 1925 TO THE 1990S, at 9 (1999).

189. *See generally* Agnes, *supra* note 186, at 33; Cossman & Kapur, *supra* note 144, at 116; Ayelet Harel-Shalev, *Policy Analysis Beyond Personal Law: Muslim Women's Rights in India*, 41 POL. & POL'Y 384, 392 (2013); Zoya Hasan, *Gender, Religion and Democratic Politics in India*, 31 THIRD WORLD Q. 939, 942 (2010).

190. Shayara Bano v. Union of India, (2017) 9 SCC 1, 293–94 (India).

1. *Bhe* and *Shah Bano*

a. Contextual Similarities and Differences

As discussed in Section III.A.2., there were, of course, important differences in the context of the two decisions that surely helped shape them: They were rendered by different courts and at different times, each operating in their distinctive legal and political contexts. The two cases were heard against the background of distinct political climates separated by nearly two decades. *Bhe* was heard and decided in 2004, at a time of relative stability in South African democratic politics.[191] On the other hand, *Shah Bano* was decided in 1985, at a time of much greater political turmoil in India, and when there were fewer well-developed models of pluralistic governance.[192] These differences may also be attributed in part to choices made by each court, and as such were not wholly exogenous factors beyond the courts' control.

There were also differences in the issues at stake: Customary and religious law are distinct in their scope and logic, though these kinds of law both raise issues of legal pluralism. The two countries have quite different histories of colonization, and deployment of customary law norms and systems by the prevailing colonial administration.[193] And in South Africa, customary law is associated with the traditions of the political majority, whereas in India, Muslim personal law is the law of the political minority. Accordingly, in South Africa, debates over the reform of customary law are often internal to the Black community, whereas in India, they are freighted with inter-religious meaning and tension. Indeed, the reform of Muslim personal law is

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191. *See generally* Jeffrey Herbst, *Mbeki's South Africa*, FOREIGN AFFS. (Nov./Dec. 2005), at 93.

192. See *infra* notes 195–202 and accompanying text on timing. *See generally* AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001).

193. *See generally, e.g.*, Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 15 TUL. J. INT'L & COMP. L. 49 (2007); SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA (Reinhard Zimmermann & Daniel Visser eds., 1996); Sandra Fullerton Joireman, *The Evolution of the Common Law: Legal Development in Kenya and India*, 44 COMMONWEALTH & COMP. POL. 190 (2006); William R. Roff, *Customary Law, Islamic Law, and Colonial Authority: Three Contrasting Case Studies and Their Aftermath*, 49 ISLAMIC STUD. 455 (2010).

often seen as a project directed *against* the Muslim community by an increasingly nationalist Hindu government and majority.[194]

But there were also similarities: Both customary and religious law raise common issues of legal pluralism and the accommodation of legal and cultural diversity, and both cases raised issues about the legal and institutional basis for, and pace of, legal change. The courts in both cases also had the choice to rely on constitutional norms, or else reinterpret existing statutes or customary or personal law so as to achieve a more gender equal outcome.

b. Timing

The CCSA handed down the *Bhe* decision in 2004, amid a period of relative economic and political stability in South Africa.[195] Four years earlier, the South African Law Reform Commission (SALRC) had recommended changes to the law similar to those achieved in *Bhe*, but those proposed changes had been "met with so much hostility from traditional leaders that [their] enactment was not pursued further."[196] By the time of the *Bhe* case, however, these dynamics had shifted significantly. The House of Traditional Leaders, the formal body representing traditional leaders on these questions, declined an invitation from the Court's registrar to make submissions to the Court in part because they no longer sought actively to oppose relevant change.[197]

Shah Bano, in contrast, was decided at a time of significant tension between the Hindu majority and Muslim minority in India. In the same month the case was decided, a Hindu petitioner filed a petition in the Calcutta High Court asking the Court to ban the Quran "on

194. *See, e.g.*, Arsalan Iftikhar, *India's New Anti-Muslim Law Shows the Broad Allure of Right-Wing Islamophobic Policies*, NBC NEWS (Jan. 14, 2020), https://www nbcnews.com/think/opinion/india-s-new-anti-muslim-law-shows-broad-allure-right-ncna1112446 [https://perma.cc/T8YA-CLWA]; Danish Raza, *What the Criminalization of Instant Divorce Means for India's Muslims*, ATLANTIC (Aug. 4, 2019), https://www.theatlantic.com/international/archive/2019/08/india-triple-talaq/595414/ [https://perma.cc/Z3C2-J9ZQ].

195. Herbst, *supra* note 191.

196. Christa Rautenbach, *South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition*, 3 J. COMP. L. 119, 128–29 (2008).

197. Bhe v. Khayelitsha Magistrate, 2005 (1) SA 580, ¶ 4 (S. Afr.). See discussion in Rautenbach, *supra* note 196, at 128–30.

the ground that it preached violence against non-Muslims."[198] It also coincided with disputes over the re-opening of the Ram Janmabhoomi temple at Ayodha, which Hindus claimed to be the birthplace of Rama, but Muslims claimed as the site of the Barbi Masjid mosque.[199] Both events led to widespread violence and unrest.[200]

The SCI, however, ignored this broader context in the timing and scope of its decision. The SCI did not need to decide the case in 1985: at the time, it had a large backlog of cases and therefore broad discretion as to when to deliver particular judgments.[201] But it did not use that discretion to delay or defer making a decision on the sensitive question *Shah Bano* posed until a future time, which might have been more conducive to its resolution. To the contrary, the SCI accepted the petition for special leave and took the opportunity to reconsider its own prior case law on the topic.[202]

c. Authorship

The justice who authored the opinion of the CCSA in *Bhe* had a similar background to those who stood to lose most from the Court's decision—i.e. the father of the deceased, traditional leaders, other Black South Africans committed to customary law norms and practices, and even potentially the magistrates required to administer even more complex cases and estates under the terms of an expanded IAA. Deputy Chief Justice Langa was a Black South African man who was sixty-five at the time of the *Bhe* decision.[203] He was born in what is

198. Mody, *supra* note 179, at 945.

199. *Id.*

200. *Id.*

201. On the Court's caseload and backlog, see generally, for example, Aparna Chandra, William H.J. Hubbard & Sital Kalantry, *The Supreme Court of India: A People's Court?*, 1 INDIAN L. REV. 145 (2017); Rishad Ahmed Chowdhury, *Missing the Wood for the Trees: The Unseen Crisis in the Supreme Court*, 5 NAT'L U. JURID. SCIS. L. REV. 351 (2012).

202. Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556, 560, 571–72 (India) (discussing Bai Tahira A v. Ali Hussain Fissalli Chothia, (1979) 2 SCR 75 (India) and Fazlunbi v. K. Khader Vali, (1980) 3 SCR 1127 (India)).

203. *Pius Langa is Born*, S. AFR. HIST. ONLINE (Sept. 30, 2019), https://www.sahistory.org.za/dated-event/pius-langa-born [https://perma.cc/C3SJ-7K6A]. For a broader biographical background to Chief Justice Langa and his institutional and jurisprudential approach, see *Tribute to the Late Chief Justice Pius Langa*, 30 S. AFR. J. HUM. RTS. 211 (2014); Theunis Roux, *The Langa Court: Its Distinctive Character and Legacy*, 2015 ACTA JURIDICA 33; James Fowkes, *The People, the Court and Langa Constitutionalism*,

now Mpumalanga, one of the six provinces that has a provincial House of Traditional Leaders.[204] Justice Langa had previously served as a court messenger, interpreter, prosecutor, and magistrate.[205] Langa's background therefore allowed him to speak to those parties with an intimate understanding of their concerns.

The SCI in *Shah Bano* took a far less sensitive approach to the authorship of its opinion. The SCI has long had a tradition of having at least one Muslim judge on the SCI at any given time.[206] This is a substantial under-representation of the country's Muslim population. Muslims made up 11.4 percent of the population according to India's 1981 census— which would correspond to three of the twenty-six seats on the SCI at the time *Shah Bano* was decided.[207] But the tradition provides some degree of representation, and allows for a Muslim judge to be present on any panel hearing issues of special significance to the Muslim minority. In 1985, the Court's membership included a distinguished Muslim judge, Syed Murtaza Fazl Ali, who had expertise in Muslim personal law.

Yet in *Shah Bano*, Chief Justice Chandrachud chose not to assign Judge Ali to the bench. He also chose to write the decision himself and, more strikingly, to interpret the content of Muslim personal

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2015 ACTA JURIDICA 75; Jeff Radebe, S. Afr. Minister of Energy, Chief Justice Pius Langa Memorial Lecture (Mar. 16, 2019), http://www.energy.gov.za/files/media/speeches/2019/PiusLanga-Memorial-Lecture-by-Minister-16March2019.pdf [https://perma.cc/FDQ6-S5SE]; Sipho Kings, *Langa: A Sober, Kind and Humble Revolutionary*, MAIL & GUARDIAN, (July 26, 2013), https://mg.co.za/article/2013-07-26-00-a-sober-kind-and-humble-revolutionary [https://perma.cc/XF43-KHEH].

204. Lulamile Ntonzima & Mohamed Sayeed Bayat, *The Role of Traditional Leaders in South Africa—A Relic of the Past, or a Contemporary Reality?*, 1 ARABIAN J. BUS. & MGMT. REV. 88, 90–91 (2012).

205. *See* Sanele Sibanda & Tshepo Bogosi Mosaka, Bhe v. Magistrate Khayelitsha*: A Cultural Conundrum, Fanonian Alienation and an Elusive Constitutional Oneness*, 2015 ACTA JURIDICA 256, 260.

206. *See* Neuborne, *supra* note 142, at 480–81; Ashutosh Bhardwaj, *No Muslim Judge in Supreme Court, First Time in 11 Years*, INDIAN EXPRESS (Sept. 6, 2016), https://indianexpress.com/article/india/india-news-india/first-time-in-11-years-no-muslim-judge-in-supreme-court-3015555/ [https://perma.cc/W4BV-NWF7].

207. O.P. Sharma, *Change Comes Slowly for Religious Diversity in India*, POPULATION REFERENCE BUREAU (Mar. 11, 2009), https://www.prb.org/indiareligions/ [https://perma.cc/Z3UB-AB4V]. At present, around fifteen percent—14.2, according to the country's 2011 census figures—of India's population is Muslim, which would translate to five of the now thirty-four seats on the SCI. *Hindu Population Declined, Muslims Increased: 2011 Census*, INDIA TODAY (Aug. 25, 2015), https://www.indiatoday.in/india/story/hindu-population-declined-muslims-increased-2011-census-290227-2015-08-25 [https://perma.cc/H6EC-WDG6].

law in two respects: first, in finding that a payment of *mahr* was a payment in honor of a woman and not payable upon divorce within the meaning of Section 127; and second, in holding that there was no conflict between Muslim personal law and the provisions governing spousal maintenance in Section 125(1) of the Criminal Code. The Quran, the Chief Justice held, "show[ed] that according to the Prophet, there is an obligation on Muslim husbands to provide for their divorced wives."[208] This was arguably unnecessary to the Court's ultimate finding that Section 125(1) applied to the case. Moreover, it was based on the distinctly problematic idea that a Hindu judge, without extensive training in Islamic law, was able to interpret the content of Muslim personal law. Indeed, the Chief Justice reached this conclusion based largely on his own textual reading of the Quran rather than the weight of secondary authority (for example, the views of Islamic law scholars) as to its scope or meaning.[209] This approach would turn out to be fatally tone deaf.

Critics claimed that the Court had "imposed its own 'arbitrary' interpretation" of the Quran and did "not possess the requisite competence to interpret religious scriptures."[210] The very act of the Court purporting to interpret Islamic law was also seen as a threat to the ongoing autonomy and status of Islamic Law. As Nawaz Mody notes, the Muslim Personal Law Board argued that "once the courts start interpreting the Quran there is every danger of the Muslim personal law being wiped out."[211]

d. Narratives

In *Bhe*, the CCSA grounded its understanding of the requirements of equality and dignity in a way that was both global and local. It noted that the right to equality was found in "the constitutions and the jurisprudence of many open and democratic societies" and that a "number of international instruments, to which South Africa is a party also underscore the need to protect the rights of women, and to abolish all laws that discriminate against them, as well as to eliminate any

208. Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556, 566–67 (India).

209. *Id.* at 12–14.

210. Mody, *supra* note 179, at 940–41.

211. Mody, *supra* note 179, at 940.

racial discrimination in our society."[212] It also noted that the 1996 South African Constitution made "the achievement of equality one of the founding values of the Constitution" and committed South Africa to the achievement of an "egalitarian and non-sexist society."[213]

Similarly, in stressing the importance of the rights of the child in the interpretation and application of customary law, the CCSA cited the International Convention on the Rights of the Child, the jurisprudence of the European Court of Human Rights, and the African Charter on the Rights of the Child, as well as the express commitment to the rights of the child under Section 28 of the South African Constitution.[214]

It likewise suggested that ending discrimination of all kinds, in this context, was linked to the specific aspirations of Black South Africans to move away from the history and legacy of apartheid, noting its "abhorrence of discriminatory legislation and practices which were a feature of [South Africa's] hurtful and racist past."[215] Further, it stated that what the BAA "had in fact achieved was to become a cornerstone of racial oppression, division and conflict," and to provide a platform for the proponents of apartheid to "perfect a system of racial division and oppression that caused untold suffering to millions of South Africans."[216]

In *Shah Bano*, by contrast, the SCI downplayed the significance of Muslim and other personal law as having normative weight under the Constitution, or as a *particularized* source of constitutional morality in dialogue with more universal notions of gender equality, economic security, fairness, and obligation.[217] The liability imposed by Section 125(1), the SCI suggested, was "founded upon the individual's obligation to the society to prevent vagrancy and destitution" and was "truly secular in character."[218] Religious notions of obligation had no relevance or role to play. Indeed, religion was treated as a threat to

212. Bhe v. Khayelitsha Magistrate, 2005 (1) SA 580 (S. Afr.), ¶ 51.

213. *Id.* ¶ 50.

214. *Id.* ¶¶ 53–56.

215. *Id.* ¶ 60.

216. *Id.* ¶ 61.

217. *See* Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556, 559 (India) (noting that the case raised issues of "interest not only to Muslim women, not only to women generally but, to all those . . . aspiring to create an equal society").

218. *Id.*

the realization of this broader secular objective: the "moral edict of the law and morality . . . cannot be *clubbed* with religion."[219] By singularly focusing on a set of secular values without recognizing their complex interplay with deeply personal religious customs, this narrative undermined potential support for the decision, including among religious Muslims otherwise sympathetic to calls for reform of personal laws.

e. Tone, Respect and Comity

In *Bhe*, the CCSA was at pains to show the utmost respect for the role of customary law under the Constitution, and for the motives and attitudes of traditional leaders with respect to its development. The CCSA noted the numerous provisions of the Constitution affirming the role of customary law[220] and suggested that appropriately recognizing the role and value of customary law was itself an important part of overcoming the legacy of apartheid.[221] The CCSA noted the benefits of customary law in providing a flexible model of dispute resolution "contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*."[222]

The Court further suggested that it was apartheid policy and law—not traditional leaders—that were responsible for the failure to develop customary law in a more inclusive and egalitarian direction. Apartheid, the Court held, had "distorted" customary law from its true path of a living and inclusive law and deprived it of the opportunity or "space to adapt and to keep place with changing social conditions and values."[223] And given that opportunity, the Court implied it was to be assumed that traditional leaders would develop the law in good faith.

The approach of the SCI in *Shah Bano* was quite different. There, the Court adopted a distinctly disrespectful approach to the development of Muslim personal law in a more gender-equal direction. It repeatedly criticized, rather than underscored, both the capacity of

219. *Id.* (emphasis added).

220. *Bhe*, 2005 (1) SA 580, ¶ 41 (citing S. AFR. CONST., 1996).

221. *Id.* ¶¶ 41, 43.

222. *Id.* ¶ 45.

223. *Id.* ¶ 82, 89.

Islamic law to evolve in this way and the arguments and approaches of key Muslim institutions, such as the All India Muslim Personal Law Board. For instance, in the opening to his judgment, Chief Justice Chandrachud noted the allegation that "the fatal point in Islam is the 'degradation of women.'"[224] He further suggested—contrary to much Islamic law authority on the question—that "the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all."[225] And in considering the arguments of the All India Muslim Personal Law Board as to a woman's capacity to rely on her broader family for support, the Court further suggested that the Board's arguments were "*deep[ly] regret[table]*," displayed "*an unwarranted zeal*," were "*facile*" and adopted an "*unreasonable* view of law as well as life."[226]

These statements about Muslim attitudes to women, and Muslim husbands' attitudes to divorce, were seen by critics as not only "in bad taste but also contrary to historical fact."[227] Critics stressed that "though divorce is recognized in Islam, it is subject to certain well-defined regulations and resort to divorce without rhyme or reason is forbidden," and that there are strong notions of obligation on parents, brothers and other close relatives of a divorced woman to provide for her economic security.[228]

f. Engagement

In crafting a remedy that required further legislation, the CCSA emphasized the value of a process of legal change that was maximally inclusive and participatory. The CCSA allowed numerous parties to intervene in the *Bhe* case (including the South African Human Rights Commission and the Women's Legal Centre Trust), but did not have the benefit of hearing from traditional leaders.[229] However, by remanding the reform of customary law to the legislature, the Court

224. Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556, 558–59 (India). *See* Mody, *supra* note 179, at 942.

225. *Shah Bano Begum*, (1985) 2 SCC 559–60; *see* Mody, *supra* note 179, at 942.

226. *Id.* at 572 (emphasis added).

227. Mody*, supra* note 179, at 942.

228. *See id.* at 942–43.

229. Bhe v. Khayelitsha Magistrate, 2005 (1) SA 580, ¶ 7 (2005) (S. Afr.).

allowed for a process that again brought in the SALRC. In doing so, the Court triggered a course of structured consultation that engaged with "a variety of interested parties, including prominent non-governmental and community-based organizations concerned with women's issues and customary law" and that included a series of workshops attended by traditional leaders in every province.[230]

In contrast, the remedy adopted by the SCI in *Shah Bano* left little room for ongoing dialogue between the SCI and the All India Muslim Personal Law Board, or statutory law and Muslim personal law.[231] Counsel in the case suggested that "the Muslim community [should take the] lead in the matter of reforms of their personal law," but the SCI dismissed the suggestion as insufficient to ensure justice in the circumstances.[232] Further, in the course of its decision, the SCI took the opportunity to comment broadly on the relationship between civil and personal law, suggesting that it was "a matter of regret that Article 44 of [the] Constitution ha[d] remained a dead letter," and that justice required Parliament to make "a beginning" by adopting a uniform civil code, as contemplated under Article 44.[233] But in its ultimate holding, the SCI simply held that Section 125(1) applied to all Muslim marriages, without modification, and thus limited the value and scope of any potential ongoing dialogue over to the content of Muslim personal law in this context.

Many of these dimensions to the Court's approach attracted an adverse reaction from leaders of the Muslim community. As Sheena Jain notes:

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230. Press Release, S. Afr. Reform Comm'n, Media Statement on Investigation into Customary Law of Succession (Project 90), (Mar. 7, 2008), https://www.justice.gov.za/Salrc/media/2008%2003%2007%20Media%20statement%20Customary%20Law%20Succession%20Report%20_2_.pdf [https://perma.cc/R8E5-5WVL].

231. On constitutional dialogue generally, see CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS, *supra* note 33; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007); Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997).

232. Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556, 572–73, (India).

233. *Id.* Article 44 states: "The State shall endeavour to provide for its citizens a uniform civil code (UCC) throughout the territory of India." INDIA CONST. art. 44. For further discussion of Article 44, see generally Shabbeer Ahmed, *Uniform Civil Code (Article 44 of the Constitution) A Dead Letter*, 67 INDIAN J. POL. SCI. 545 (2006).

> The judgment provoked widespread consternation in the Muslim community in the country. The ulema (Muslim clerics) condemned the judgment as an attempt to undermine the Shariat, the source of Islamic law [and] [a] large number of Muslims took to the streets to register their protest, accusing the Supreme Court of trespassing on their domain.[234]

Muslim organizations even eventually persuaded the petitioner herself to hold a press conference by "demanding that the Supreme Court withdraw its verdict . . . as . . . an interference in the Muslim personal law."[235]

2. *Shah Bano* and *Shayara Bano*

It is also striking to compare the difference in judicial framing and outcomes between *Shah Bano*, and later decisions by the SCI where it has shown greater sensitivity to questions of judicial authorship, narrative, and tone. *Shayara Bano v. Union of India*,[236] in which a majority of the SCI held a Muslim divorce based on a triple *talaq* was invalid, is one such case.

In *Shayara Bano*, two members of the Court (Judges Nariman and Lalit) held that Muslim personal law was subject to the Constitution by virtue of the Muslim Personal Law (Shariat) Application Act of 1937, which recognized the ongoing effect and operation of such law.[237] Further, by allowing for an immediate divorce without the possibility of reconciliation, the two judges held the process of triple *talaq* constituted an arbitrary interference with the right to equal protection of the laws under Article 14 of the Indian Constitution.[238] Three judges, Chief Justice Khehar, and Judges Nazeer and Joseph, disagreed, holding that personal laws were preserved but not operative by virtue of the 1937 Act, and therefore not subject to the Constitution.

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234. Jain, *supra* note 179, at 6.

235. *See id.* at 7 (citing ASGHAR ALI ENGINEER, THE *SHAH BANO* CONTROVERSY (1987)).

236. Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).

237. *Id.* at 65.

238. *Id.* at 80. *See* Saptarshi Mandal, *Out of* Shah Bano*'s Shadow: Muslim Women's Rights and the Supreme Court's Triple* Talaq *Verdict*, 2 INDIA L. REV. 89, 98–100 (2018); Tanja Herklotz, *Shayara Bano Versus Union of India and Others: The Indian Supreme Court's Ban of Triple* Talaq *and the Debate around Muslim Personal Law and Gender Justice*, 50 VERFASSUNG IN RECHT UND ÜBERSEE [VRÜ] 300, 307–10 (2018) (Ger.).

But one of those three, Judge Joseph, also held that the proper construction of Muslim personal law did not allow for divorce by triple *talaq*.[239] As a result, a majority of the five-member panel declined to recognize triple *talaq* as a valid or effective mode of divorce under Indian law.[240] Even the two dissenting judges (the Chief Justice and Judge Nazeer, the sole Muslim on the bench), who held that the practice was "integral" to relevant Sunni Muslim religious practice,[241] would also have suspended the application of the practice for six months—to allow time for Parliament to work with the All India Muslim Personal Law Board to reform the relevant personal laws, while still respecting the Board's autonomy.[242]

In contrast to the earlier experience following *Shah Bano*, the Indian Parliament responded to *Shayara Bano* by formally ratifying the SCI's decision in the Muslim Women (Protection on Rights of Marriage) Act of 2019, rather than seeking to displace the effect of its findings.[243] Although there were notable differences in the background socio-political context of the two decisions, there were also important similarities in the relevant issues at stake—which suggest that differences in the impact of the two decisions could be attributed, at least in part, to differences in the Court's approach in the two cases. Although *timing* cannot be viewed in *Shayara Bano* purely as a matter of judicial framing, the Court made highly divergent choices in how it used *voice*, *narrative*, *tone* and *engagement* which may go a long way in explaining why *Shayara Bano* was well received where *Shah Bano* was not.

239. *See* Mandal, *supra* note 238, at 96–100; Herklotz, *supra* note 238, at 308.

240. *See* Mandal, *supra* note 238, at 102; Bhagirath Ashiya, *Triple* Talaq *and Women's Rights in the Indian Supreme Court*, OXFORD HUM. RTS. HUB (Oct. 13, 2017), https://ohrh.law.ox.ac.uk/triple-talaq-and-womens-rights-in-the-indian-supreme-court/ [https://perma.cc/9RFL-D2P7]; Herklotz, *supra* note 238, at 307–10.

241. *Shayara Bano*, (2017) 9 SCC at 293–94 (India) (Khehar, C.J., dissenting).

242. *Id.* at 297–98. *See* Namita Bhandare, *Triple* Talaq *Verdict: What Empowerment of Muslim Women Really Means*, HINDUSTAN TIMES (Aug. 25, 2017) https://www hindustantimes.com/columns/triple-talaq-verdict-what-empowerment-of-muslim-women-really-means/story-PLo56wnSS2G65p7bgrCLgO html/ [https://perma.cc/V4NB-NN67]; Herklotz, *supra* note 238, at 308.

243. Justin Jones, *India: Why a New Law Criminalising Muslim 'Instant Divorce' Has Divided Feminists*, CONVERSATION (Sept. 3, 2019), https://theconversation.com/india-why-a-new-law-criminalising-muslim-instant-divorce-has-divided-feminists-122687 [https://perma.cc/4XAN-QDP6].

a. Timing as an Exogenous and Endogenous Factor

By the time *Shayara Bano* landed on the SCI's docket more than thirty years after Chief Justice Chandrachud wrote the incendiary opinion in *Shah Bano*, Indian society and politics were much changed. Although this change in the background of the case was, to some extent, an exogenous factor beyond the Court's control, it must also be viewed as somewhat endogenous: Regardless of the background, the SCI still made the decision to take up the case when it did. And doing so put it in a very different position than it had been in when it decided *Shah Bano* in 1985.

By 2017, when *Shayara Bano* was decided, public support had shifted significantly towards reforming either the application or the substance of Muslim personal law.[244] Because of this shift in public opinion, the federal government chose to intervene in the case *in support* of the petitioner. Emphasizing comparative developments which pointed to the abolition of triple *talaq*, the government invited the SCI to reconsider its prior finding in *State of Bombay v. Narasu Appa Mali*,[245] which held that personal laws were not subject to the Constitution. And while the All India Muslim Personal Law Board initially opposed the petitioner's claims, it shifted its position in the course of hearing, adopting the position that the practice was "undesirable" and that those practicing it would face "social sanction."[246]

As demonstrated by the Indian government's intervention on behalf of the petitioner, the immediate political context for the two decisions was also quite different. In 1986, the Congress Party had suffered significant electoral losses and was seeking to reverse those losses by winning back electoral support from the Muslim community. In 2017, in contrast, the Bharatiya Janata Party (BJP) enjoyed a comfortable majority in the Indian Parliament and was seeking to consolidate that hold on power through an appeal to Hindu nationalism—not

244. It is important to note, however, that popular support for the outcome in *Shah Bano* was in fact reasonably high. *See* P. Koteswar Rao, Shah Bano*'s Case and Uniform Civil Code: A Survey of Public Opinion Among Muslim Community at Tirupati*, 27 J. INDIAN L. INST. 572, 573–574 (1985).

245. State of Bombay v. Narasu Appa Mali, AIR 1952 Bombay 84 (1951) (India).

246. *Supreme Court Scraps Instant Triple* Talaq*: Here's What You Should Know About the Practice*, HINDUSTAN TIMES (Aug. 22, 2017), https://www hindustantimes.com/india-news/ahead-of-supreme-court-verdict-on-triple-talaq-here-s-a-primer-on-the-case/story-OJ6jjgGTRR988PfbNDpJ5I html/ [https://perma.cc/BQK9-UWQQ] [hereinafter *Supreme Court Scraps Instant Triple Talaq*].

through a more secular, pluralistic coalition.[247] As several commentators noted, it was quite easy to reconcile the Muslim Women Act which Parliament enacted in the wake of *Shayara Bano* with some forms of Hindu nationalism. Indeed, some have suggested that in purporting to criminalize, rather than simply deny recognition to, the practice of triple *talaq*, the BJP-controlled Parliament is pursuing a distinctly anti-Muslim agenda.[248]

There are even suggestions that the SCI itself has adopted a form of Hindu nationalism in some cases, especially those where it has disturbed longstanding compromises between religious groups. In 2005, for example, the Court was accused of adopting a distinctly more pro-Hindu, anti-Muslim stance when it absolutely prohibited the slaughter of cows.[249] Cases such as *Shayara Bano* could be seen as part of this trend, rather than as part of a more context-sensitive, sociologically legitimate approach to constitutional decision-making.[250]

By virtue of writing decades after *Shah Bano*, the SCI in *Shayara Bano* was also able to take advantage of "doctrinal markers" supporting its decision that had been laid down during the intervening years. In *Shah Bano*, there were some state high court and Supreme Court decisions supporting the SCI's ruling, but limited doctrinal

247. Pradeep K. Chhibber & Susan L. Ostermann, *The BJP's Fragile Mandate: Modi and Vote Mobilizers in the 2014 General Elections*, 2 STUD. INDIAN POL. 137, 139–140 (2014). For example, in the 2019 national parliamentary elections, the BJP even fielded a candidate who was accused of terrorist charges for his alleged involvement in a plot targeting Indian Muslims. Tariq Thachil, *India's Election Results Were More than a 'Modi Wave,'* WASH. POST (May 31, 2019), https://www.washingtonpost.com/politics/2019/05/31/indias-election-results-were-more-than-modi-wave/ [https://perma.cc/5M54-C34R].

248. Jones, *supra* note 243; Yuksel Sezgin & Mirjam Kunkler, *Regulation of "Religion" and the "Religious": The Politics of Judicialization and Bureaucratization in India and Indonesia*, 56 COMP. STUD. SOC. & HIST. 448, 461 (2014). For broader discussion, see generally GARY J. JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT (2009).

249. *See, e.g.*, State of Gujarat v. Mirzapur Moti Kureshi, (2005) 8 SCC 534. See also the discussion thereof in Sambaiah Gundimeda & V.S. Ashwin, *Cow Protection in India: From Secularising to Legitimating Debates*, 38 S. ASIA RSCH. 156, at 167 (2018). It should be noted, however, that in 2017, the Court reversed that specific trend/line of cases and struck down a complete ban on cow slaughter. All India Jamiatul Quresh Action Committee v. Union of India, (2018) 5 SCJ 545 (India). *See also India's Supreme Court Suspends Ban on Sale of Cows for Slaughter*, N.Y. TIMES (July 11, 2017), https://www.nytimes.com/2017/07/11/world/asia/india-cows-slaughter-beef-leather-hindu-supreme-court-ban.html [https://perma.cc/T398-YPHA].

250. As a third possibility, the case may also reflect the Court's attempt to tailor its opinion to "the preferences and likely actions of the contemporaneous government." Epstein & Knight, *supra* note 26, at 276.

support for the approach it ultimately took.[251] In *Shayara Bano*, however, there were numerous lower court decisions upholding the rights of Muslim women to some form of ongoing financial support upon divorce, as well as the SCI's own decision sixteen years earlier in *Danial Latifi v. Union of India*, in which it upheld this right as a matter of statute, constitutional right, and Islamic law.[252] Although Chief Justice Khehar was the only judge to refer explicitly to this judicial history,[253] the opinion by Judges Nariman and Lalit was also in the vein of the earlier decisions.

b. Authorship

Whereas Chief Justice Chandrachud chose not to appoint Judge Ali, the only Muslim on the Court, to the panel hearing *Shah Bano*, *Shayara Bano* was heard by a multi-faith panel comprised of judges from each of India's five major religious groups.[254] The panel was widely recognized in the press for its religious diversity.[255] Judge Nariman, who wrote for himself and Judge Lalit (the only Hindu on the bench), is a Parsi priest with a clear record of respect for religion, and has stated his opposition to the "Hinduization" of his Zoroastrian

251. *See, e.g.*, Bai Tahira v. Ali Hussain Fidaalli Chotia, (1979) 2 SCR 75; Fazlunbi v. K. Khader Vali & Anor, (1980) 3 SCR 1127; Siobhan Mullally, *Feminism and Multicultural Dilemmas in India: Revisiting the* Shah Bano *Case*, 24 OXFORD J. LEGAL STUD. 671, 679 (2004); Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33 LAW & SOC. INQUIRY 631, 644–45 (2008).

252. Danial Latifi v. Union of India, (2001) 7 SCC 750 (India). *See* Mullally, *supra* note 251, at 684–85; Subramaniam, *supra* note 251, at 647–48.

253. Shayara Bano v. Union of India, (2017) 9 SCC 1, 185–86 (India) (Khehar, C.J., dissenting).

254. *See* Herklotz, *supra* note 238, at 304–06.

255. *Ayodhya Case: Who is Justice UU Lalit, Who Recused Himself from the Hearing*, INDIA TODAY (Jan. 10, 2019), https://www.indiatoday.in/fyi/story/who-is-justice-uu-lalit-1427788-2019-01-10 [https://perma.cc/4HNC-AMX5] (discussing the multi-faith nature of the bench); *5 Judges of 5 Faiths on Supreme Court's Triple* Talaq *Bench*, TIMES INDIA (May 11, 2017), https://timesofindia.indiatimes.com/india/5-judges-of-5-faiths-on-supreme-courts-triple-talaq-bench/articleshow/58618935.cms [https://perma.cc/2N63-2TSS]; *Supreme Court Scraps Instant Triple Talaq*, *supra* note 246.

faith.[256] Judge Joseph is Christian.[257] Further, two out of three judges in the majority (Nariman and Lalit) did not base their decision on an interpretation of Muslim personal law—but rather on the requirements of Article 14 of the Constitution. In interpreting the effect of a triple *talaq*, both they and Judge Joseph also largely relied on agreement between the parties, and secondary sources, rather than their own interpretation of the Quran.[258]

c. Narrative

The SCI also relied on a mix of universalist and particularist narratives in resolving *Shayara Bano*. The most developed reasoning of the Court was found in the judgment of the Chief Justice, in dissent. In the course of his opinion, the Chief Justice affirmed the importance of comparative practice (noting that a large number of other Islamic countries had abolished the practice),[259] and international human rights law,[260] but also the significance of Article 25 of the Constitution in recognizing rights to religious freedom, and therefore personal laws, under the Constitution.[261] As part of the majority, Judges Nariman and Lalit also expressly endorsed this reasoning as to the importance of religious freedom under the Constitution.[262] They simply held that triple *talaq* was not an "integral part" of Muslim religious practice.[263]

256. Utkarsh Anand, *'Even My Religion Has been Hinduised,' Says Justice Rohinton F Nariman*, NEWS 18 (Aug. 16, 2018), https://www news18.com/news/india/even-my-religion-has-been-hinduised-says-justice-rohinton-f-nariman-1846315 html [https://perma.cc/M2GE-4MNN].

257. Samanwaya Rautray, *Justice Kurian Joseph Retires; Says Judges Must Protect Democracy, Diversity of Court*, ECON. TIMES (Nov. 30, 2018), https://economictimes.indiatimes.com/news/politics-and-nation/justice-kurian-joseph-part-of-controversial-january-12-presser-retires/articleshow/66870574.cms?from=mdr [https://perma.cc/5NWC-XYET].

258. *Shayara Bano*, (2017) 9 SCC at 40–47, 56–61, 139–41, 145. (India).

259. *Id.* at 124–36 (Khehar, C.J., dissenting).

260. *Id.* at 286–88 (Khehar, C.J., dissenting).

261. *Id.* at 254–65 (Khehar, C.J., dissenting).

262. *Id.* at 67–70 (Nariman, J., joined by Lalit, J., concurring). Judges Nariman and Lalit also drew from comparative law, citing the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), for the proposition that constitutional courts should vindicate basic rights, even absent legislative intervention. *Shayara Bano*, (2017) 9 SCC at 70–71 (India) (Nariman, J., joined by Lalit, J., concurring).

263. *Id.* at 69–70 (Nariman, J., joined by Lalit, J., concurring).

d. Tone

Outwardly, at least, the Court in *Shayara Bano* also adopted a posture of respect toward religious authority and institutions. Justice Joseph, for example, suggested that "[t]he *Holy* Quran has *attributed sanctity and permanence to matrimony*. However, in extremely *unavoidable* situations, Talaq is permissible."[264] He further suggested that while religion and constitutional rights were often "pitted" against each other in this context, he believed that "reconciliation" or "harmonising different interests" was possible—via legislation.[265] Judges Nariman and Lalit also emphasized "marital tie[s] [as] fundamental to family life in Islam,"[266] and suggested that while recognizing triple *talaq* as permissible, Hanafi (Sunni) jurisprudence itself treated the practice as "sinful."[267] In no sense, therefore, did the SCI criticize Muslim authority or institutions, or suggest (as it did in *Shah Bano*) that Muslim religious practice failed to respect women, or family life.

e. Engagement and Collaboration

In the process of hearing *Shayara Bano*, the Court also engaged a far larger number of non-governmental or civil society actors than it had in *Shah Bano*. It granted leave to intervene to the Indian Muslim Women's Movement, an "autonomous, secular, rights-based mass organization led by Muslim women which fights for the citizenship rights of Muslims in India," to a group bringing together numerous Muslim women's groups, and to the Centre of Study of Society and Secularism—a group formed after the 1992–1993 Mumbai riots to promote "communal harmony."[268] All these groups supported the petitioner's argument.[269]

The Court also engaged in a much narrower—or weaker—form of review than in *Shah Bano*. The Court in *Shayara Bano* did not go beyond the specific issue at stake in the case, and so declined to directly consider broader issues such as spousal

264. *Id.* at 7 (emphasis added).

265. *Id.* at 8.

266. *Id.* at 57 (Nariman, J., joined by Lalit, J., concurring).

267. *Id.* at 69 (Nariman, J., joined by Lalit, J., concurring).

268. Mandal, *supra* note 238, at 95.

269. *Id.* at 94–95.

maintenance or a uniform civil code, or indeed the validity of the associated practices of polygamy and *nikah halala* that were also being challenged.[270] It thus created a "small reform, without creating a polarizing debate on the question of personal law."[271]

f. Similarities and Differences in Judicial Approach

There were, of course, some commonalities between the SCI's approach in *Shah Bano* and *Shayara Bano*. Indeed, Judge Joseph, a Christian,[272] rested his decision on an interpretation of Muslim law in much the same way as the non-Muslim majority of the Court did in *Shah Bano*. The SCI also has a long history of venturing into questions internal to various faiths, including a history of relying on Hindu interpretations of Muslim law. One stark example of this, which occurred well before *Shah Bano*, was the SCI's reliance in *Quareshi v. State of Bihar* on a *Hindu* group's amicus submission as to whether slaughtering a cow was an integral part of *Muslim* religious practice.[273] There is also significant debate within India about the SCI's consideration of such religious questions.[274]

One view is that this "internal" approach is more respectful than an approach that requires religious norms to give way to conflicting constitutional norms.[275] Indeed, such an approach is consistent with an "insider methodology" within the Muslim feminist law reform movement.[276] But another view is that—at least when practiced by those outside a religious tradition—the internal approach fails to

270. *See Supreme Court Scraps Instant Triple* Talaq, *supra* note 246.

271. Pratap Bhanu Mehta, *Small Step, No Giant Leap*, INDIAN EXPRESS (Aug. 23, 2017), https://indianexpress.com/article/opinion/columns/supreme-court-verdict-on-triple-talaq-small-step-no-giant-leap-4808945/ [https://perma.cc/32LD-6PEB].

272. Rautray, *supra* note 257.

273. Mohd. Hanif Quareshi v. State of Bihar, 1959 SCR 629 (India). *See, e.g.*, Gundimeda & Ashwin, *supra* note 249; Shraddha Chigateri, *Negotiating the Sacred Cow: Cow Slaughter and the Regulation of Difference in India*, *in* DEMOCRACY, RELIGIOUS PLURALISM AND THE LIBERAL DILEMMA OF ACCOMMODATION 137, 147 (Monica Mookherjee ed., 2011). I am indebted to Gautam B. for pressing me on this point.

274. *See generally* JACOBSOHN, *supra* note 248.

275. *See, e.g.*, *id.* at 98; Rajeev Dhavan & Fali S. Nariman, *The Supreme Court and Group Life: Religious, Freedom, Minority Groups, and Disadvantaged Communities*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 256, 263–64 (B.N. Kirpal et al. eds., 2004).

276. *See, e.g.*, Mullally, *supra* note 251, at 684 n.58.

respect religious autonomy and authority in ways that make it more problematic.[277] This would seem especially true for internal engagement with Muslim law by Hindu judges—as was the case in *Qureshi* and *Shah Bano*, but not *Shayara Bano*.

IV. LIMITS AND CAUTIONS

What, if any, limits are there to deploying these tools of judicial statecraft? Should they be extended beyond the confines of judicial opinions to judicial communication with the public more generally?

Some judges have sought to communicate directly with the public by means other than their written opinions. These judges engage in a wide array of activities, such as giving speeches, issuing media releases, granting media interviews and authoring opinion pieces explaining their decisions.[278]

Two leading examples are Justice Sólyom of the Constitutional Court of Hungary and Justice Asshiddiqie of the Constitutional Court of Indonesia. In Hungary, following the Constitutional Court's controversial decision in the *Welfare Benefits Case* in 1995,[279] Sólyom gave a number of interviews to Hungarian magazines and newspapers defending the Court and the degree to which it was acting as "a guardian over basic rights and institutions" in the face of actions by the political branches involving "the use" of "rights and freedoms" as "tools . . . for their own interests."[280] Sólyom regularly made such comments in response to the Court's politically controversial decisions. In Indonesia, soon after the Constitutional Court was created, Asshiddiqie created a weekly program on national television and radio designed to explain the workings of the Constitutional Court and particular decisions of the Court.[281] Asshiddiqie also gave numerous

277. *See, e.g.*, Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, 2017 BYU L. REV. 915, 938.

278. JEFFREY K. STATON, JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO 57–62 (2010); Epstein & Knight, *supra* note 26, at 284–85; Dixon, *supra* note 70, at 34.

279. Alkotmánybíróság (AB) [Constitutional Court] June 30, 1995, 43/1995 (VI.30) (Hung.).

280. Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PENN. L. REV. 1757, 1783–84 (2006).

281. Stefanus Hendrianto, *The Rise and Fall of Heroic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia*, 25 WASH. INT'L L.J. 489, 520–21 (2016).

press conferences following controversial decisions, such as the *Communist Party Case* allowing former communist party members to retain office[282] and the *Bali Bombing Case* finding that the retrospective application of anti-terrorist legislation was unconstitutional.[283]

There is also a strong argument for courts framing communications of this kind in a way that is mindful of considerations of authorship, narrative and tone. Well-executed framing increases the chances that relevant judicial communications are in fact effective in helping build support for the court as an institution, or achieve the purpose they are designed to serve. That certainly seems to have been the case for many of the extra-curial communications by Sólyom and Asshiddiqie.

Whether courts should in fact engage in these sorts of unofficial communications in the first place, however, is less clear. Such judicial outreach is inconsistent with a traditional view of judicial independence,[284] although it is largely consistent with evolving conceptions of the separation of powers in the Global South.[285] The harder question is whether it is in fact likely to bolster a court's sociological legitimacy. There are clearly benefits to courts publicizing their opinions, especially when it comes to putting pressure on executive actors to comply.[286] Over time, actions of this kind can also help build awareness of, and support for, a court's role in a new democracy.[287] This was certainly true, for example, in Hungary and Indonesia in the early years of their constitutional courts' operation.

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282. *Id.* at 521 n.139.

283. Stefanus Hendrianto, *The Puzzle of Judicial Communication in Indonesia: The Media, the Court, and the Chief Justice*, *in* JUSTICES AND JOURNALISTS: GLOBAL PERSPECTIVES 141, 145–46, 151–52, 154–56 (Richard Davis & David Taras eds., 2017) (describing Asshiddiqie's communication strategy after the Constitutional Court struck down the law permitting retroactive application of the 2003 Anti-Terrorism Law).

284. *See generally, e.g.*, Randall T. Shepard, *Telephone Justice, Pandering, and Judges Who Speak Out of School*, 29 FORDHAM URB. L.J. 811 (2002); William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPP. L. REV. 227 (1980); LORD DYSON, JUSTICE: CONTINUITY AND CHANGE 31–32 (2018).

285. On new separation of powers ideas and theories, developed with special attention to the Global South, see generally THE EVOLUTION OF THE SEPARATION OF POWERS: BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH (David Bilchitz & David Landau eds., 2018).

286. STATON, *supra* note 278.

287. *See, e.g.*, Hendrianto, *supra* note 281, at 510–11, 520–24; Dixon, *supra* note 70 at 33.

But communication of this kind can also embroil courts and judges in broader media and political controversies to which they may be poorly equipped to respond. And for some judges, it may encourage an expanded conception of their own role in ways that are ultimately dangerous to the courts' perceived independence and institutional standing.

Consider recent experience in Russia.[288] The first chairman of the Russian Constitutional Court, Chairman Zorkin, was quite active in promoting knowledge of the Court—including by issuing high-profile public statements. Initially, this helped build the profile and sociological legitimacy of the Court as a principled but effective guardian of democratic constitutional values. Zorkin himself was widely credited as helping broker a compromise between the Parliament and President Yeltsin, which helped narrowly avert a constitutional crisis.

Over time, however, that compromise broke down. When the Speaker of the Parliament withdrew his support for the proposed constitutional referendum, which formed a key part of the relevant compromise, Chairman Zorkin became involved in the ensuing controversy in a way that tainted the public perception of his own independence—and that of the Court.[289] In 1993, President Yeltsin declared a state of emergency and indicated that he would rule by decree until a referendum was held, and that in the meantime, decisions of the court would have no force and effect.[290] Zorkin, however, responded by authoring an opinion for the Court declaring the decree invalid (even before it was formally promulgated), and joining the Speaker of Parliament, the Vice President and Procurator-General at a press conference condemning the President's actions.[291] Yeltsin's response was to attack both Zorkin and the Court. He ordered the Court's phone lines to be cut and its security withdrawn, pressured Zorkin to resign, and effectively prevented the Court from sitting for sixteen months.[292] This may not have happened had Chairman Zorkin

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288. *See* Robert Sharlet, *The Russian Constitutional Court's Long Struggle for Viable Federalism*, *in* RUSSIA AND ITS CONSTITUTION, PROMISE AND POLITICAL REALITY 29, 35 (Gordon B. Smith & Robert Sharlet eds., 2008); Scheppele, *supra* note 280, at 1793–95; Dixon, *supra* note 70, at 39–42.

289. Scheppele, *supra* note 280, at 1808–10.

290. *Id.* at 1812.

291. Robert Sharlet, *Chief Justice as Judicial Politician*, E. EUR. CONST. REV., Winter 1993, at 32, at 36–37.

292. Scheppele, *supra* note 280, at 1822, 1824, 1827–39.

not assumed the role of political moderator—a role linked to the kind of political statecraft associated with the public defense of court decisions beyond the confines of a judicial opinion itself.[293]

Clearly, judges should not always engage in such extra-official communications with the public. Whether the benefits of doing so outweigh the risks will depend entirely on the specific socio-political context, and judges should carefully weigh the consequences before deciding to engage in such practices. However, where the practice is employed, judges can promote the effectiveness of their communications by framing them in light of concerns about judicial authorship, narrative and tone.

CONCLUSION

What does this suggest for constitutional courts worldwide as they contemplate how to exercise their powers of judicial review? An analysis of two cases, *Bhe* and *Shah Bano*, does not provide courts with anything like a complete guide to building effective judicial review—or strong courts.

For one thing, it is impossible to draw any definitive conclusions from a comparison of this kind. The nature of the two cases means that by definition we cannot assess the ways in which choices about judicial deference, or avoidance, may affect a court's authority.

For another, it does not allow us to understand the relative significance of judicial choices compared to background legal and political conditions in shaping the response to court decisions. Indeed, it does not allow us even to assess the relative significance of different dimensions to the CCSA's approach in a case such as *Bhe*, as potentially contributing to the successful implementation of the decision.

A focus on two specific cases likewise does little to help us understand the relationship between a court's general authority and its authority in specific cases. Courts in some cases clearly enjoy a general "reservoir of public support" that can allow them to engage in successful forms of strong review even in the face of quite real public

293. President Yeltsin, for example, initially accused Judge Zorkin of reneging on support for the proposed referendum, and "the plan that he himself had proposed." Sharlet, *supra* note 291, at 36.

opposition to a specific ruling.[294] Conversely, courts may have such a low degree of general perceived legitimacy that even highly strategic decisions do not meet with strong executive or legislative compliance.

There are, therefore, numerous caveats to the lessons we can draw from both social sciences, and the South African and Indian experiences in this context. They are lessons that must be understood as necessarily tentative and provisional in nature, calling for judges to exercise significant judgment about how best to apply these strategies in light of the substantive demands of particular constitutional controversies. They may have important limits, not evident in the cases themselves.

Framing techniques of this kind may also ultimately be deployed in aid of democratic constitutional commitments, as well as judicial approaches that either help protect or erode democracy. In the case of constitutional commitments, framing techniques may assume a distinctly troubling cast—as effectively co-opting members of disadvantaged groups, or the specific narratives that speak to those groups in aid of the legitimation of that disadvantage, rather than the promotion of legal or political legitimacy.[295]

In embracing the tools set out in Part II, judges aiming to create a "strong" court should therefore keep sight of the substantive values that strong judicial review of this kind is designed to serve, or the need to tether these techniques to an appropriately pro-democratic and rights-protective approach to constitutional construction.

And the international community should be sure to make careful judgments about whether these strategies are being used in the service of pro-constitutional or democratic ends, or rather as part of a practice of abusive judicial review.[296]

Yet with all these caveats, the lessons from both social science and the South African experience—both in *Bhe* and beyond—still offer valuable insights for a court seeking to create meaningful constitutional change. The overwhelming lesson from these experiences is that questions of judicial statecraft, as well as substance, matter. Courts seeking to create both a powerful and effective constitutional

294. *See* Epstein et al., *supra* note 7, at 127.

295. One potential example is Justice Frankfurter's opinion in Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

296. *See generally* Rosalind Dixon & David Landau, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313 (2019).

jurisprudence would do well to pay close attention to the timing, authorship, narrative and tone of their decisions, as well as the way in which they engage with both parties before them and third parties as potential partners in the implementation of legal and constitutional requirements.