JUDICIAL OVERSIGHT OF POLITICAL PARTIES IN NEW DEMOCRACIES: THE CASES OF SOUTH KOREA AND TAIWAN

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ABSTRACT

Courts use judicial review to adjudicate, among other things, issues that pertain to political parties. However, courts are not always functionally suited to formulate the rules that govern political parties, and this is especially the case in countries transitioning from authoritarian rule to democracy. Without assistance from legislators and professional administrative staff, a strong court often fails to consider the practicalities of party governance. In this study, I show that the constitutional courts in South Korea and Taiwan have adopted the useful method of moderate judicial review to oversee the design and operations of political parties. Unlike strong judicial review, moderate judicial review encourages the other branches of government to reconsider, debate, reform, create, and implement relevant laws. I argue that, through this method, the courts in South Korea and Taiwan have played a crucial role in consolidating the democratic governance of political parties and electoral systems in their respective countries. The findings of

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this study suggest that moderate judicial review can, in various circumstances, promote considerably better outcomes than strong judicial review.

I. INTRODUCTION

Students of judicial politics have long grappled with the role of the judiciary in facilitating constitutional democracy. New democracies have been of special interest, particularly those participating in the third wave of democratization, which began in the mid-1970s and includes South Korea and Taiwan.[1] The rapid and comprehensive transformation of new democracies' constitutional, political, and social institutions can teach us a great deal about the potential of courts as "democracy-builders."[2] Courts, especially constitutional courts, are seen as facilitators of democracy insofar as they can overturn laws and policies that lead to the self-entrenchment of political actors and the "lock-up" of political processes.[3] When political parties fail to reflect the will of the electorate, judges can act assertively to enhance human rights[4] and stoke healthy partisan competition, the two of which are prerequisites for governmental accountability and responsiveness.[5]

Strong judicial review, as has often been illustrated, is a critical method by which judicial institutions can adjudicate, among other issues, those pertaining to political parties.[6] However, judiciaries are not always functionally suited to formulate and adjudicate the rules of political parties.[7] Due to judges' lack of professional training in areas such as campaign finance and election administration, courts that decide firmly on these matters do not necessarily produce better political outcomes than would be the case with courts practicing judicial restraint.[8]

Party governance is complex and daunting for courts in large part because political parties frequently attempt to entrench their power by capturing government institutions. Take, for instance, the Fidesz Party in Hungary and the Law and Justice Party in Poland: these parties, backed by electoral victories, incrementally

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[1] *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

[2] TOM GERALD DALY, THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS 60-61 (2017).

[3] Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Proces*s, 50 STAN. L. REV. 643, 645-47 (1998); Richard Pildes, *The Constitutionalization of Democratic Politics,* 118 HARV. L. REV. 25, 28 (2004).

[4] Kim Lane Scheppele, *Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments*, *in* RETHINKING THE RULE OF LAW AFTER COMMUNISM 52 (Adam Czarnota, Martin Krygier & Wojciech Sadurski eds., 2005).

[5] Issacharoff & Pildes, *supra* note 3, at 646.

[6] DALY, *supra* note 2, at 249-53.

[7] *See* Saul Zipkin, *Administering Election Law*, 95 MARQ. L. REV. 641, 644 (2011).

[8] Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND L. REV. 768, 769 (2022).

undermined media institutions, judicial systems, and the autonomy of civil society.[9] Even in established democracies such as the United States, the rise of populism has shifted the control of political parties from centrists to demagogues and has led wide swaths of the political class to challenge the results of free and fair elections.[10] The disturbing phenomenon of democratic backsliding has been accompanied by a growing distrust of government institutions.

With all this turmoil, courts are increasingly being called upon to rule on matters of great political salience. Nevertheless, courts are not always competent to structure political parties or establish and administer their rules. Courts are designed to oversee government actions in an *ex post* manner, whereas the functions and activities of political parties are inextricably tethered to elected officials and government institutions—including the political branches of government. Thus, judiciaries seem ill-suited for taking on the regulatory roles that other parts of government can effectively carry out regarding party apparatuses.

Recent accounts of judicial politics have endeavored to revitalize the "supremacy" of strong judicial review and have analyzed the conditions in which courts might successfully contribute to government oversight of parties.[11] The literature, however, has paid little attention to the roles, be they politicized or impartial, that legislatures, governmental electoral institutions,[12] and administrative agencies can play in formulating and enforcing the rules of political parties.[13] How judiciaries handle government institutions tasked with regulating political parties is thus an important topic in need of scholarly attention.

This study analyzed the moderate way in which the South Korean and Taiwanese judiciaries have adjudicated the governance of political parties. Having transitioned from authoritarianism to democracy in the late 1980s, South Korea and Taiwan possess similar approaches to adjudicating party-governance matters despite differences between the two countries' constitutional cultures, political structures, and authoritarian legacies.[14] Indeed, it is because of these similarities and differences that South Korea and Taiwan can shed considerable light on how the judiciaries in newly democratized countries handle controversial issues related to government oversight of political parties.

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[9] TOM GINSBURG & AZIZ HUQ, HOW TO SAVE CONSTITUTIONAL DEMOCRACY? 98-99, 105-06 (2018).

[10] SAMUEL ISSACHAROFF, DEMOCRACY UNMOORED: POPULISM AND THE CORRUPTION OF POPULAR SOVEREIGNTY 7, 98-100 (2023).

[11] *See* Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT'L L. 285 (2015); Samuel Issacharoff, *Constitutional Courts and Consolidated Power*, 62 AM. J. COMP. L. 585, 588, 592-94 (2014); Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 73 CURRENT LEGAL PROBS. 89, 112 (2020).

[12] Mark Tushnet, *Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries*, 70 U. TORONTO L.J. 95, 97-98 (2020); Tarunabh Khaitan, *Guarantor Institutions*, 16 ASIAN J. COMP. L. 40, 57 (2021).

[13] Zipkin, *supra* note 7, at 644; Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1423 (2008).

[14] PO YEN YAP, COURTS AND DEMOCRACIES IN ASIA 7-10 (2017).

In 1987, South Korea rewrote its constitution, marking a new era of constitutional rule known as the Sixth Republic.[15] The constitution was adopted within the context of a highly fragmented and hyperflexible political system.[16] Since then, the country's political parties have constantly split, reorganized, and merged with other parties, creating the appearance of weak party politics.[17]

One reason for this phenomenon is the country's authoritarian legacy. From 1960 until 1987, South Korea was led by authoritarian regimes in which military leaders monopolized political power. There was thus no opportunity for political parties to operate as intermediaries between the public and the state.[18] Against this backdrop, post-authoritarian South Korea has tended to embrace the idea that government should institutionalize a system of political competition, especially for minority parties, whose survival depends on the functionality of a free and fair party system. To achieve this institutionalization, many minority parties have demanded that the Constitutional Court of Korea (KCC) reform the laws governing political parties.[19]

By contrast, in Taiwan, known formally as the Republic of China (ROC), a single constitution has been in place since 1947—though it should be noted that seven rounds of constitutional amendments between 1991 and 2005 substantially changed the document's content.[20] The incremental path of constitutional change in Taiwan is rooted in the island's authoritarian rule, which lasted from 1949 until 1987. Throughout these decades, a single party—the Kuomintang (KMT)—forged a one-party legacy so durable that rapid changes to the legal framework of government proved very difficult and, in many cases, impossible.[21] Indeed, political parties in post-authoritarian Taiwan have operated under many of the institutionalizing norms and rules that were first established under the KMT regime, the "pioneer of electoral authoritarianism."[22] To counter this institutionalized conservatism, the Constitutional Court of Taiwan (TCC) has sometimes facilitated the reform of political parties, for example by integrating marginalized political actors into the wider political process.[23]

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[15] TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES CONSTITUTIONAL COURTS IN ASIAN CASES 215-16 (2003).

[16] YAP, *supra* note 14, at 109-10; Youngmi Kim, *Evolution of Political Parties and the Party System in South Korea*, *in* ROUTLEDGE HANDBOOK OF CONTEMPORARY SOUTH KOREA 74-75 (Sojin Lim & Niki J. P. Alsford eds., 2021).

[17] *See* YAP, *supra* note 14, at 109-10; Kim, *supra* note 16, at 74-75; Olli Hellmann, *The Developmental State and Electoral Markets in East Asia: How Strategies of Industrialization Have Shaped Party Institutionalization*, 53 ASIAN SURV. 653, 655-60 (2013).

[18] GINSBURG, *supra* note 15, at 208-09.

[19] *See* discussion *infra* Part III.

[20] Chien-Chih Lin, *Book Review: The Constitution of Taiwan: A Contextual Analysis*, 16 INT'L J. CONST. L. 702, 703 (2018).

[21] GINSBURG, *supra* note 15, at 107.

[22] Yen-Tu Su, *Angels Are in the Details: Voting System, Poll Workers, and Election Administration Integrity in Taiwan from Authoritarian-Era Foundations for the Transition to Democracy*, *in* AUTHORITARIAN LEGALITY IN ASIA 284 (Weitseng Chen & Fu Hualing eds., 2020); Hellmann, *supra* note 17.

[23] *See infra* Part IV.

Both the KCC and the TCC have been widely recognized as active courts, so it stands to reason that the courts would be unafraid to exercise strong judicial review when adjudicating matters involving political parties.[24] Contrary to this conjecture, however, the two constitutional courts have adopted a particularly moderate stance in response to the many controversies that have beset political parties in the two countries. The courts have been notably deferential to election laws and administrative rules forged by other members of government. Regarding election laws that the KCC found objectionable or even unconstitutional, it would often propose a particular time and request that the National Assembly adjust the laws in question before the deadline. Such mild responses are also evident in cases concerning administrative agencies' discretion to make specific decisions affecting political parties: both the KCC and the TCC have recognized the agencies' competence in these matters and have thus narrowed the courts' own opportunity to exercise judicial scrutiny therein. This hands-off approach manifested itself not only in cases concerning decisions made by independent electoral institutions (e.g., South Korea), but also in cases concerning special administrative agencies in charge of party issues (e.g., Taiwan).

In short, the KCC and the TCC have created incentives for legislatures, electoral institutions, and administrative agencies to regulate political parties. For example, both South Korea and Taiwan have proposed, debated, and passed legislation aiming to modify various aspects of the political process.[25] Moreover, the courts have allowed electoral institutions and administrative agencies to base their enforcement of legislation on policy goals and practical needs rather than on dictates issued by the courts. Thus, to a certain extent, the courts, by monitoring the behavior of legislators and administrators, have held them accountable to the people.[26]

In exploring the two courts' moderate approach to the governance of political parties, I will strive to complicate some of the conventional—and oftentimes oversimplified—accounts of strong judicial review and judicial oversight regarding the governance of political parties. Existing literature usually discusses strong judicial review in contexts where self-interested political actors fail to cultivate sufficient political competition. A point that the literature often ignores, however, is that the erosion of political entrenchment is not the only purpose of political-party governance. Accordingly, the literature fails to recognize that strong judicial review cannot always facilitate important aims of party governance. This weakness in the literature has become more glaring in light of the growing body of scholarship recognizing the various methods that courts use when practicing

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[24] YAP, *supra* note 14, at 7-8; Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8 INT'L J. CONST. L. 885, 910 (2010); Jiunn-rong Yeh, *Presidential Politics and the Judicial Facilitation of Dialogue Between Political Actors in New Asian Democracies: Comparing the South Korean and Taiwanese Experiences*, 8 INT'L J. CONST. L. 911, 911 (2010); BJÖRN DRESSEL, THE JUDICIALIZATION OF POLITICS IN ASIA (1st ed. 2012).

[25] *See* discussion *infra* Part V.

[26] *See* Zipkin, *supra* note 7, at 670.

oversight of party governance.[27] A central point in the scholarship is that even though a strong court may be desirable in some contexts, the democratic governance of political parties consists primarily of complex normative tasks requiring diverse considerations in diverse contexts.[28]

The judiciaries of South Korea and Taiwan have treated party governance as a pro-democracy regulatory matter concerning professional expertise, legislative practicalities, and so on. These judiciaries have offered the political branches of government a good deal of room in which to make and implement the rules governing political parties. This stance recognizes that party governance should not only combat the bad motives of political actors, but also enhance public policies. For this reason, research on party governance in democracies should address the issues from a regulatory perspective, focusing on matters impacting the governance of political parties.[29] Regarding judicial review of party governance, there are various approaches that courts can take, and these different approaches often reflect different political contexts. By analyzing this topic in relation to South Korea and Taiwan, I hope to expand and deepen scholarly dialogue about the relationship between political parties and judicial politics.

The remainder of this study is structured as follows. Part II analyzes theoretical accounts of judiciaries' oversight of political parties in new democracies, showing that apart from invalidating statutes immediately, courts can engage in forms of oversight that do not involve the immediate invalidation of statutes. Parts III and IV examine the cases of South Korea and Taiwan, respectively, focusing on the KCC's and TCC's approaches to both party governance and the surrounding dynamics, which include such extralegal factors as governmental institutions and political climates.[30] Part V offers a comparative analysis of moderate judicial review in South Korea and Taiwan to show how these two new democracies converge with each other in this area. Part VI concludes the study by explaining why researchers should explore moderate judicial oversight of party governance in light of various contextual factors. Just as strong judicial review is context dependent, so too is moderate judicial review, and future research should broaden and deepen its analysis of these topics.

II. THE JUDICIARY AND POLITICAL PARTIES

A. Revisiting Strong Judicial Review and Its Dependence on Context

Since the Second World War, scholars exploring comparative constitutional law have paid considerable attention to the ways in which judiciaries

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[27] *See* Gardbaum, *supra* note 11; Issacharoff, *supra* note 11; Khaitan, *supra* note 11.
[28] *See* Gardbaum, *supra* note 11; Issacharoff, *supra* note 11; Khaitan, *supra* note 11.
[29] *See* Zipkin, *supra* note 7, at 644; Dawood, *supra* note 13, at 1441.
[30] A wide array of laws directly and indirectly impacts party governance, but the focus of the present study is directly impactful laws; indirect impacts are, of course, crucial to party governance, but are beyond the scope of this study.

might facilitate democracy.[31] Most of this scholarship has focused on the U.S. context and specifically on the U.S. Supreme Court's landmark decision *Marbury v. Madison* (1803), which has made the judiciary the locus of constitutional analysis.[32] Especially after the fall of the Soviet Union, scholars became attentive to whether or not—and if so, how—a strong court could facilitate democratic governance in a newly democratized regime.[33] The typical conception of a court practicing strong judicial review paints the court as a body of judges that successfully constrains anti-democratic actors by unapologetically striking down legislation inconsistent with democratic principles.[34]

Strong judicial review is considered a valuable method for ensuring the establishment and preservation of democratic principles.[35] Comparing the early practices of the Hungarian Constitutional Court with those of elected representatives, Kim Lane Scheppele argues that the judiciary was a more "popularly responsive, democratically thoughtful body" regarding the protection of citizens' constitutional rights.[36] This perspective resonates with discussions about American constitutional law. John Ely's canonic work *Democracy and Distrust* posits that the U.S. judiciary should eliminate intensive legal barriers preventing citizens from influencing politics.[37] Similarly, in their landmark work *Politics as Markets*, Samuel Issacharoff and Richard Pildes argue that judiciaries, including those steeped in German constitutional law, should not shy away from overseeing and resisting the entrenchment of political parties.[38] Political parties are motivated by self-interest; that is, they strive to maximize their political advantages, secure public institutions, and undermine democratic accountability.[39] In this light, judiciaries should firmly establish the "playground rules" of democracy to promote political competition and representation.[40]

Judges who practice strong judicial review are expected to strengthen the performance of political parties by creating contexts in which parties progressively mediate the complex relationship between the will of the public and the will of the state.[41] Nevertheless, strong judicial review, as Jeremy Waldron points out,

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[31] *See* DALY, *supra* note 2, at 249.
[32] *Id.*
[33] *See id.* at 256.
[34] *See id.* at 249-50.
[35] *See id.* at 248.
[36] Scheppele, *supra* note 4.
[37] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). *But see* Doerfler & Moyn, *supra* note 8, at 769.
[38] Issacharoff & Pildes, *supra* note 3, at 646; Dawood, *supra* note 13, at 1423.
[39] *See* Issacharoff & Pildes, *supra* note 3, at 644; Dawood, *supra* note 13, at 1423; Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 400 (2015).
[40] Issacharoff & Pildes, *supra* note 3, at 646.
[41] Richard Pildes, *Political Parties and Constitutionalism*, *in* COMPARATIVE CONSTITUTIONAL LAW 254 (Tom Ginsburg & Rosalind Dixon eds., 2011); Pildes, *supra* note 3, at 101; 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, 20, 63 (2009);

presupposes that judicial institutions are better than other governmental institutions at protecting constitutional rights, even though "there is no reason to suppose" such a claim.[42] Further, more than a few judiciaries have rendered decisions that are clearly undemocratic.[43] In a similar vein, Mark Tushnet challenges the idea that "courts have general authority to determine what the Constitution means" and that their "constitutional interpretations are authoritative and binding on the other branches."[44] In place of this "strong-form judicial review," he proposes "weak-form judicial review": a set of practices wherein a judiciary refrains from authoritative declarations and, instead, offers suggestions and issues rulings that may be open to revision. Legislatures can "displace judicial interpretation" because they possess stronger democratic legitimacy than courts.[45]

Some comparative scholars have also contested the long-standing partiality for strong judicial review considering the particular political and cultural contexts of new democracies. Stephen Gardbaum, for instance, argues that using weak-form judicial review in an unstable political environment prevents political departments from attacking the judiciary—an outcome that helps the latter to establish independent authority under the new constitutional framework.[46] Likewise, other scholars have considered the various tools that a court can use to buttress democracy without permanently striking down statutes. As Samuel Issacharoff observes, some judiciaries in new democracies can adjudicate matters concerning political parties in ways that avoid direct confrontation with the other branches of government.[47]

In sum, the debate over the relative merits of strong and weak judicial review has focused not only on the constitutional tools, powers, and limits of judiciaries but also on the wider contextual circumstances with which judiciaries should contend when exercising power. Strong judicial review suggests that a powerful court can strengthen democracy by unilaterally and conclusively constraining political parties. Opponents of strong judicial review are skeptical about whether it is grounded in robust theory and empirical realities. The following section reviews the criticism of strong judicial review and considers the ability of courts to adjudicate highly sensitive regulatory matters concerning political parties in new democracies. When scrutinizing issues related to the governance of political parties, judiciaries should employ "different thinking" and should carefully heed specific political contexts.[48]

JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (Taylor & Francis e-Library 2003) (5th ed. 1976).

[42] Jeremy Waldron, *The Core of the Case Against Judicial Review,* 115 YALE L.J. 1346, 1346 (2006).

[43] *Id.*

[44] Mark V. Tushnet, *Alternative Forms of Judicial Review,* 101 MICH. L. REV. 2781, 2784 (2003).

[45] *Id.* at 2785-86.

[46] *See* Gardbaum, *supra* note 11, at 285-86.

[47] *See* Issacharoff, *supra* note 11, at 585, 607.

[48] Dawood, *supra* note 13, at 1423-24.

B. Against Strong Judicial Review: A Regulatory Perspective

Supporters of strong judicial review presuppose that in democracies, judiciaries are more competent than the other branches of government at ensuring the accountability of political parties. These supporters further argue that in emerging democracies, which lack political protections, a strong judiciary improves political participation and competition.[49] However, although it is widely accepted that the proper functioning of political parties requires judicial vigilance against the self-entrenchment of political elites, courts are not necessarily capable of designing and enforcing rules that would ensure these desirable ends.[50] Designed to oversee government actions in an *ex post* manner, judiciaries are notably ill-equipped to make policy judgments proactively.[51] A strong court's adjudication of matters pertaining to the governance of political parties is likely to create more problems than it resolves. This undesirable outcome is due to courts' lack of professional training on these matters.

Political parties specialize in public governance, such as organizing coalitions of voters and amplifying the voices of diffuse groups.[52] The rules governing political parties serve, at least in theory, to balance the competing interests of diverse political parties, legislators, and the voters they represent. These rules affect not only political parties but also elected officials who are affiliated with these parties. These elected officials—particularly legislators—are strongly motivated to create rules and laws that strengthen their party but also appear politically neutral ("domination-minimizing") and constitutionally legitimate.[53] In new democracies, newly elected political representatives race to establish their personal legitimacy and their political party's legitimacy in the eyes of recently enfranchised voters. Thus, these representatives propose rules and laws that enhance political competition not only because this is what the public demands but also because doing so helps the representatives survive and thrive in a democratized state.[54]

There is no doubt that publicly elected officials engage in party-affiliated, highly politicized activities. Nevertheless, as Yasmin Dawood acknowledges regarding the issue of redistricting, legislative bodies are "better equipped to balance all the competing considerations that are at stake . . . than are other institutions such as courts."[55] To this point, courts that exercise strong judicial review are unafraid to block legislative decisions that shape the rules and norms

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[49] Ran Hirschl, *The Strategic Foundations of Constitutions*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 158-61 (Denis J. Galligan & Mila Versteeg eds., 2013).
[50] Dawood, *supra* note 13, at 1423-24, 1441-42.
[51] *Id.* at 1443.
[52] Pildes, *supra* note 41, at 254; Zipkin, *supra* note 7, at 691-92.
[53] Dawood, *supra* note 13, at 1441.
[54] Hirschl, *supra* note 49, at 166.
[55] Dawood, *supra* note 13, at 1423; Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U.L. REV. 667, 691 (2014).

governing political parties.[56] That is to say, legislatures should not be seen exclusively as an illegitimate and nefarious tool used by political parties seeking to entrench their power; rather, legislatures are a forum, albeit a flawed one, that allows for debate and compromise between competing interpretations of rights, responsibilities, powers, and constraints. Democracies, including those that are newly established, should strive "to address the deficiencies in these institutions, not to bypass them entirely."[57]

A second important feature of party governance is expertise, particularly as it applies to the administration of electoral laws.[58] Legislatures enact laws that govern elections, and the executive branch enforces the laws through administrative and independent agencies.[59] The executive branch is traditionally considered a branch possessing a high degree of professional, technical, and managerial knowledge capable of delivering specific policy goals, and this type of knowledge is especially useful in the areas of campaign finance, vote counting,[60] and voter registration.[61] By contrast, as noted by Felix Frankfurter, lawsuits and other legal actions give courts an opportunity to familiarize themselves with technical matters, but the resulting knowledge is fragmented and sporadically acquired.[62] In short, regarding party governance and related matters, the legislative and executive branches possess considerably more expertise than the judicial branch.

The link between expertise and public governance of party-related matters such as elections is uniquely critical to new democracies. Societies transitioning from non-democratic to democratic regimes lack efficient mechanisms to ensure democratic accountability, and electoral systems in these contexts are often plagued by problems of clientelism and outright corruption.[63] Thus, how a newly democratizing government can insulate itself from undue influence is a question of public governance that deserves great focus. Tools that can offset these threats include independent constitutional or regulatory institutions and experienced staff or experts who are familiar with the political-economic complexities of the given issue. Of course, these action-takers may "game" the rules for personal, political, and party profit.[64] Nevertheless, if actors of goodwill participate in the process, they stand a reasonable chance of achieving impartiality and independence in electoral matters, and there is little reason why courts in these contexts should not recognize and not be deferential to the process.[65]

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[56] Waldron, *supra* note 42, at 1403.
[57] DALY, *supra* note 2, at 271.
[58] Dawood, *supra* note 13, at 1443-44.
[59] Lisa Marshall Manheim, *Presidential Control of Elections*, 74 VAND. L. REV. 385, 387-88 (2021).
[60] *See generally* Su, *supra* note 22.
[61] Jennifer Nou, *Constraining Executive Entrenchment*, 135 HARV. L. REV. F. 20, 25 (2021).
[62] FELIX FRANKFURTER, PUBLIC AND ITS GOVERNMENT 72-73, 81-122, 149 (1930); Jeffrey D. Hockett, *Justices Frankfurter and Black: Social Theory and Constitutional Interpretation* 107 POL. SCI. Q. 479, 487(1992).
[63] Isacharoff, *supra* note 11, at 585.
[64] Kim Lane Scheppele, *Autocratic Legalism,* 85 U. CHI. L. REV. 545, 569 (2018).
[65] Nicholas Stephanopoulos, *Depoliticizing Redistricting*, *in* COMPARATIVE ELECTION LAW 467, 470 (2022).

These considerations highlight the limits of a strong court. Courts practicing strong judicial review should immediately invalidate statutes perceived to be unconstitutional, but this decisive mode of conduct does not necessarily produce good regulatory outcomes. Without a fine-grained understanding of regulatory frameworks, courts may inadvertently deprive citizens of certain constitutional rights afforded by an original statute, rule, or policy. To avoid this type of situation, courts may understandably want to devote more time and energy to examining the issue at hand. Nevertheless, in many cases, no additional amount of time and energy can compensate for the fact that courts are non-experts in policymaking issues. Essentially, there is no way to guarantee that courts can make enough reasonable judgments regarding party-governance issues in emerging democracies.

C. Moderate Judicial Review

The courts of newly democratized states are likely to do more harm than good when they invariably practice strong judicial review. A better course of action is for courts to adopt a more flexible approach to judicial review—an approach that encourages the other branches of government to reassess and refine some problematic law or policy related to any of several issues, including party governance. One way to accomplish this goal, as Dawood suggests, is to have courts "create an incentive structure that would foster legitimate and principled decision-making by political actors when they formulate the rules of democracy."[66] When political actors attempt to manipulate the political process in a way that favors their political party, courts should confront the attempted manipulation and eliminate its threat to democratic principles and practices.[67] Nevertheless, not all court rulings need to be inflexible orders given from on high. Cass Sunstein proposes that courts should get in the habit of "imposing good incentives on elected officials, incentives to which they are likely to be responsive."[68] This suggestion that courts should rely on incentivizing, pro-collaborative rulings rather than on unilateral rulings takes into account the fact that most political institutions, even in newly democratized states, are reasonably capable of implementing democratic rules of governance and of opposing entrenchment in political processes.[69] Smart judiciaries, rather than proactively intervene in policy formulation, embrace the art of encouragement when other institutions are better equipped to engage in these activities.[70]

A moderate judicial approach to matters concerning political parties requires that courts make "cautious, measured judgments, rather than bold and proactive ones."[71] To do so, courts must evaluate the capacity of political

[66] Dawood, *supra* note 13, at 1440.
[67] Khaitan, *supra* note 11, at 105-07.
[68] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM: ON THE SUPREME COURT 57 (1st ed. 1999).
[69] Pildes, *supra* note 3, at 98; Dawood, *supra* note 13, at 1440.
[70] Khaitan, *supra* note 11, at 154.
[71] Gardbaum, *supra* note 11, at 309.

institutions to formulate constitutionally sound, administratively executable laws and rules affecting party governance. In the case of legislatures, if there is no clear evidence of constitutional or ethical wrongdoing, judges should leave room for the legislatures to formulate the rules and laws in question. Similarly, in the case of governmental administrative bodies, judges should acknowledge administrators' important contribution to remedying problems of state and should carefully factor this variable into court rulings. The same humility can serve courts well when they are dealing with the executive branch.

A specific moderate approach to judicial review is "the suspended declaration of invalidity."[72] With it, judges can "suspend" a ruling of invalidity for a time, during which a legislature or some other governmental body can take steps to remedy the problem that led to the ruling in the first place. There is pressure on the governmental body to act: for example, if a legislature does not remedy the problem within the prescribed time, the court's initial ruling will go into effect.[73] In these ways, moderate courts can incentivize democratic governmental institutions to update laws, policies, and rules that were constitutionally problematic.[74] This judicial flexibility applies to the legal rules governing the operation and arrangement of political parties.[75]

Moderate judicial review assumes that the judiciary plays a crucial role in consolidating democracy. Therefore, even though tools like the suspended declaration of invalidity involve a reciprocal—perhaps even a collaborative—relationship between the judiciary and other governmental bodies, a ruling by a moderate court "is still very much an order of the court."[76] This point deserves further explanation because the present study proposes that moderate judicial review is notably different from the weak-form judicial review discussed by Mark Tushnet, who criticizes the traditionally authoritative way in which courts dictate the meanings of constitutions. In Tushnet's proposal, legislatures can temporarily override a court's decision when law permits, meaning that legislatures should have the power to negotiate constitutional meaning with judiciaries.[77] By contrast, moderate judicial review requires that legislatures obey all court rulings, be they flexible or rigid. A moderate court still has the final say in interpreting a constitution and thus plays an essential—and rather active—role in monitoring a panoply of issues, including party-governance issues.

Table 1 summarizes the differences between strong and moderate judicial review. Of course, courts may adopt strong judicial review for some cases and moderate judicial review for others. Indeed, this is the case with the Constitutional Courts of South Korea and Taiwan. Therefore, this study does not reject strong judicial review generally, but articulates the benefits of a moderate approach, especially in newly established democracies.

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[72] *Id.* at 313.
[73] *Id.* at 309.
[74] John Rappaport, *The Second-Order Regulation of Law Enforcement*, 103 CAL. L. REV. 205, 210 (2015).
[75] Pildes, *supra* note 3, at 98; Tushnet, *supra* note 44, at 2792.
[76] Gardbaum, *supra* note 11, at 310; Tushnet, *supra* note 44, at 2792-97.
[77] Tushnet, *supra* note 44, at 2787.

Table 1. Judicial Oversight of Political Parties

	Strong Judicial Review	**Moderate Judicial Review**
Purposes	Redress political entrenchment by self-interested actors	Provide an incentive for democratic institutions to formulate the law
Tools	Immediately invalidate statutes	Suspend declarations of invalidity Relax levels of judicial scrutiny

III. JUDICIAL REVIEW IN A FLEXIBLE POLITICAL SYSTEM: SOUTH KOREA

The Republic of Korea, or South Korea, was founded in 1948, following the defeat of imperial Japan three years earlier and the subsequent division of the Korean peninsula into the communist north and the anti-communist south. Following the declaration of statehood and years of political struggles, South Korea entered a military dictatorship led by Park Chung-hee in 1961, succeeded by Chun Doo-hwan in 1979. It was not until the late 1980s that the country moved toward democratization. Under authoritarian rule, no meaningful elections were held, as public affairs were controlled by the military system headed by the president. Nevertheless, in 1987, as a result of democratic movements, the Constitution of South Korea was promulgated. The document marked the creation of a new democratic regime, the Sixth Republic, which committed itself to constitutionalism.[78]

Against this transformative backdrop, the new government introduced direct presidential and legislative elections. Only recently authoritarian, South Korea now enjoyed a political space in which individual citizens, interest groups, and other organizations could voice their concerns and compete for power without having to contend with the formal constraints of a military dictatorship. Thus, new political parties mushroomed rapidly, only to split and reconfigure in a manner intended to maximize their political prospects in the game of democracy. South Korean society was suddenly an open, versatile environment where the "fission and fusion" of political parties was formulated and operated by an association of political actors loosely bound to one another more by short-term political imperatives than by long-term ideological commitments or institutional interests.[79] The widespread defections from and formations of new parties and new political

[78] GINSBURG, *supra* note 15, at 206-07.
[79] Kim, *supra* note 16, at 74-75; *See generally* Jin-young Kwak, *Why Do Parties Split and Merge in South Korea*, *in* THE NEW DYNAMICS OF DEMOCRACY IN SOUTH KOREA 116 (2021).

alignments reflected the weak institutionalization of political parties in the country.[80] The "fission and fusion" pattern was observable at the outset of South Korean democratization when the liberal opposition leader, Kim Young-sam, won the 1992 presidential election by successfully attracting support from conservative elements in order to maximize his electoral odds. Thus, the following year, he became South Korea's first civilian president in over thirty years and succeeded President Roh Tae-woo, who, as an army general, had provided critical support to Chun's authoritarian reign.

Many political leaders felt that South Korea needed an independent, neutral institution governing the country's increasingly complex electoral issues. The 1987 constitution established the National Election Commission (NEC), which has served as a constitutional institution comprising nine members: three appointed by the president, three selected by the National Assembly, and three chosen by the Chief Justice of the Supreme Court.[81] The NEC was not a new invention, as it had first been introduced in 1950 and had been elevated to the level of a constitutional institution in 1960.[82] Nevertheless, it was never a neutral or independent institution under South Korea's authoritarian regimes.[83] Thus, the question of whether or not the NEC has developed into an independent institution is carefully studied and hotly debated among students of South Korea's post-transition party governance.

Established under the Constitution of 1987, the KCC was highly attentive to the electoral dynamics of post-transition South Korea. The court was envisioned as an institution "[embodying] a new dedication to constitutionalism."[84] Its nine justices are appointed by the president, each three of whom are nominated, respectively, by the president, the National Assembly, and the Supreme Court's Chief Justice. Under the new constitutional framework, both political parties and their affiliated actors have sought legal protections from the KCC.[85] Consequently, the court has often involved itself in matters concerning the organization and operation of political parties and political activities.[86]

Despite its reputation for activism, the KCC did not always exert its judicial power by immediately invalidating statutes. Indeed, the justices recognized

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[80] Yoonkyung Lee, *Diverging Patterns of Democratic Representation in Korea and Taiwan: Political Parties and Social Movements*, 54 ASIAN SURV. 419, 429 (2014).

[81] DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 4 (S. Kor.).

[82] Sun-woong Choi, 독립적 헌법기관으로서 선거기관의 탄생 : 제2공화국 중앙선거위원회의 창설과 폐쇄 [*The Birth of an Election Body as an Independent Constitutional Institution: The Creation and Closure of Central Election Commission in the Second Republic*], 1 STUDY ELECTION 77, 80 (2018) (S. Kor.).

[83] Erik Mobrand, *Authoritarian Legality after Authoritarianism: Legal Governance of Parties and Elections before and after Democratic Transition in South Korea*, *in* AUTHORITARIAN LEGALITY IN ASIA, *supra* note 22, at 371-77.

[84] Chien-Chih Lin, *Pace of Constitutional Transition Matters: The Judicialization of Politics in Indonesia and Korea,* 20 UCLA J. INT'L L. FOREIGN AFFS. 275, 301 (2016).

[85] *Id.* at 307.

[86] YAP, *supra* note 14, at 110; *See generally* Björn Dressel, *The Judicialization of Politics in Asia: Toward a Framework of Analysis*, *in* THE JUDICIALIZATION OF POLITICS IN ASIA, *supra* note 24; Björn Dressel, *Courts and Governance in Asia: Exploring Variations and Effects,* 42 HONG KONG L.J. 95, 102 (2012).

that the national legislature and the NEC played important roles in making and implementing election-related regulations. Specifically, the KCC developed a set of rationales allowing the legislature and the NEC to exercise their power more broadly. To respect their discretion, the KCC usually sided with these institutions or, if it did not, employed interpretative tools ensuring that any requested revisions or actions would not excessively burden the institutions.

For example, in 2001, the KCC considered a dispute about whether a redistricting program had been violating the one-person-one-vote principle (*National Assembly Election Redistricting Plan Case*).[87] Finding that several elements of the program depended on an excessive disparity between the country's largest electoral constituency and the country's smallest electoral constituency, the KCC thus concluded that the program violated "the constitutional order and citizens' basic rights," yet the KCC did not declare the entire program invalid. Instead, the KCC declared the program to be "non-conforming" in relation to the constitution.[88] The court ordered the program to remain effective until December 31, 2003, by which time the National Assembly would need to have revised the districting plan.

The KCC was concerned that its invalidation of statutes would further complicate the already problematic and time-consuming lawmaking process of redistricting. This process, by its very nature, depended on compromises hewn out of competing interests.[89] Thus, had the KCC struck down the entire redistricting program, officials would likely have faced considerable difficulties arising from a nearly total lack of guidance for the management of elections. More profoundly, as districting is supposed to channel the public will into an official arena of collective decision-making, the absence of a districting program might confuse and anger the electorate. Thus, the KCC's decision accounted for all these political and practical factors and reflected the justices' desire to "maintain homogeneity in the composition of the National Assembly" and "prevent confusion caused by changes in the electoral district."[90]

The KCC took a similar stance in a 2015 case concerning the Political Funds Act's prohibition on political contributions to political parties (*Prohibition of Political Contributions Case*). A provision under the Political Funds Act prohibited citizens and "supporters' associations" from making donations to political parties.[91] The aim of the provision was to counter political corruption, and

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[87] National Assembly Election Redistricting Plan Case [Const. Ct.], Oct. 25, 2001, 13-2 KCCR 502, 2000 Hun-Ma 92, 2000 Hun-Ma 240 (consol.) (S. Kor.); YAP, *supra* note 14, at 113-14. The court distinguished its ruling in this case from a previous one, in which the court had struck down an entire redistricting program immediately on the grounds that the program violated the principle of one-person-one-vote; One Person One Vote [Const. Ct.], July 19, 2001, 13-2 KCCR 77, 2000 Hun-Ma 91, 2000 Hun-Ma 112, 2000 Hun-Ma 134 (consol.) (S. Kor.).

[88] YAP, *supra* note 14, at 111.

[89] *Id.* at 114-18.

[90] *Id.*; Kuk-Woon Lee, *The Constitutionalisation of the Representative System in Korea*, *in* LAW AND SOCIETY IN KOREA 172, 187 (Hyinah Yang ed., 2013).

[91] Prohibition of Political Contributions Case [Const. Ct.], Dec. 23, 2015, 27-2(B) KCCR 511, 2013 Hun-Ba 168 (S. Kor.).

according to the KCC, this aim was legitimate, but the prohibition itself unconstitutionally violated citizens' right to make political contributions. Instead of striking the act down immediately, the KCC allowed the provision to remain up until June 30, 2017.[92] In a similar 2018 case, *Prohibition of Supporters' Associations Case*, the KCC considered a challenge to the Political Funds Act concerning a technical electoral matter: the act forbade supporters' associations from assisting the political campaigns of preliminary candidates in elections of local government heads. The KCC declared that the act created a substantial disparity between candidates and preliminary candidates and that this disparity could infringe on the constitutional rights of the latter. Preliminary candidates were mostly tied to marginal political actors, including small political parties, which were being denied access to critical campaign assistance.[93] Following the KCC's ruling, the controversial provision of the Political Funds Act nevertheless remained in force, awaiting further modification. Once again, the KCC's ruling encouraged the National Assembly to arrive at a new, constitutionally acceptable arrangement—in this case, an arrangement that would provide constitutional protections to all political candidates, including those on the margins of power.

The concept of legislative discretion was a crucial point that the KCC cited in justifying its tendency to lower the level of scrutiny applied to cases involving political parties. The court allowed the legislature to improve South Korea's inefficient party system, although sometimes at the cost of minority parties' political opportunities. In 2004, the National Assembly amended the Political Parties Act (PPA) so that it would better address both the "high cost" of managing a political party and the "low efficiency" of these managerial efforts.[94] According to the amended PPA, every political party in South Korea must have a central chapter located in the capital city, Seoul, in addition to at least five provincial or municipal secondary chapters. The National Assembly's reform of legislation targeting the chapters of political parties was part of a broader effort to institutionalize political parties and to reduce political fragmentation in an erstwhile authoritarian country transitioning to democracy.[95]

The PPA's provision stipulating both the number and the locations of party chapters led the South Korean government to strip a minor political party of its formal status. In response, the party challenged the PPA in front of the KCC, arguing that the provision effectively shut minor political parties out of the political process. The decision rendered by the KCC (*Party Chapter Case*) in 2004 reflected the court's flexible stance toward matters of party governance, as the court made clear in the comment below:

> The question of whether to improve [the situation of the plaintiff] is a question concerning not the law but the legitimacy of

[92] *Id.*
[93] Prohibition of Supporters' Associations Case [Const. Ct.], Dec. 27, 2019, 2018 Hun-Ma 301 (S. Kor.). The court ruled that for elections of local legislative councils, restricting preliminary candidates from receiving these associations' support was constitutional.
[94] Party Chapter Case [Const. Ct.], Dec. 16, 2004, 2004 Hun-Ma 456 (S. Kor.).
[95] *Id.*

> legislators' judgments under the constitutional framework. As long as it does not act beyond the constitutional framework, the legislature is empowered to make judgment calls . . . . Thus, [the judiciary] must relax the levels of judicial scrutiny it uses when reviewing whether the [PPA-based] revocation of party registration was an appropriate tool.[96]

A similar set of circumstances arose in March 2004, when both the newly amended Act on Political Funds and the National Assembly Act established conditions governing the subsidies available to political parties. According to these conditions, political parties had to have at least twenty seats in the National Assembly for them to receive subsidies from the government. In a case entitled *the National-Subsidy Levels Shared with or Allocated to Political Parties,* the KCC issued the following statement:

> The legislature has the discretion to formulate the criteria for allocating subsidies to political parties. As long as the content does not significantly change the current state of competition among each political party, sufficient reasonableness can be recognized.[97]

In other words, the KCC again deferred to the legislative branch in matters concerning party governance and state oversight of parties. Both the *Party Chapter Case* and the *Case of National-Subsidy Levels Shared with or Allocated to Political Parties* are worth noting for the methods that the KCC employed when deciding the cases. The National Assembly passed the concerned provisions in March 2004, when relations between that institution and the Blue House (i.e., the president) were highly contentious. Indeed, the National Assembly was under the control of the conservative National Grand Party, which firmly opposed the liberal coalition led by President Roh Moo-hyun. In April, one month after the passage of the provisions, Roh's party, the Uri Party, defeated the National Grand Party in a definitive legislative election, marking the first time that liberals, rather than conservatives, controlled the South Korean legislature. These shifting power dynamics contributed enormously to the KCC's involvement in cases where core political issues, such as the impeachment of Roh in 2004, were at stake. For example, in the impeachment case, the KCC cautiously navigated three critical and competing areas: party politics, public opinion concerning (and largely against) the impeachment, and the National Assembly's institutional authority to impeach presidents.[98] The KCC eventually invalidated the impeachment, "yielding to the public will."[99]

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[96] *Id.*

[97] National-Subsidy Levels Shared with or Allocated to Political Parties [Const. Ct.], July 27, 2006, 2004 Hun-Ma 655 (S. Kor.).

[98] Impeachment Case [Const. Ct], May 14, 2004, 16-1 KCCR 609, 2004 Hun-Na 1 (S. Kor.).

[99] *Id.*; YAP, *supra* note 14, at 119-20.

The KCC adopted a markedly different approach to the legislative branch's handling of political parties, even though the court could have sided with public opinion in striking down many of the contested laws that were associated with ostensible self-entrenchment. In fact, critics of the court's decision in the *Party Chapter Case* insisted that the court was failing to sufficiently protect small political parties' autonomy and their ability to participate in politics.[100]

The contrast between the impeachment case (active judicial review) and the party-governance cases (moderate judicial review) suggests that, in the latter cases, the KCC was focused on issues other than the control of self-entrenchment per se. Several factors likely contributed to the KCC's approach to party-governance issues. First, in this period of South Korea's history, the National Assembly frequently amended party-governance laws to experiment with new and hopefully superior forms of electoral regulations. For instance, after hearing the concerns laid out in the *Party Chapter Case*, the KCC chose not to invalidate the offending law but to push for its revision, and the National Assembly concurred: it revised the PPA by cutting back its restrictions on local political organizations.[101] In light of South Korea's highly contentious political environment, the KCC perceived itself as a facilitator of political institutions' continued efforts at policymaking. The KCC in these cases was concerned not with invalidating laws, but with preserving and bolstering the self-correcting mechanisms employed by the legislative and even the executive branches.

South Korea experienced a new primary system in the 2002 presidential election.[102] The system stipulated that a combination of party members and everyday citizens would determine presidential candidates.[103] Contrary to the old system, in which the selection of candidates was monopolized by influential party members, the new system greatly expanded the participation of both citizens and party members in the selection of presidential candidates.[104] Political candidates also actively sought to mobilize their support base at both regional and national levels.[105] This finding suggests that the intra-party reforms not only reinforced the democratic nexus between politicians and citizens, but, in so doing, fostered the state's democratic legitimacy, thus justifying the court's less assertive approach.

President Roh Moo-hyun, elected in 2002, was the first president who benefited from the new primary system. A few years later, in 2007, the NEC issued notices requesting that he comply with the law's requirement of impartiality toward political parties after he had commented on the Grand National Party at a public

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[100] *See generally* Hannes Mosler, *Judicialization of Politics and the Korean Constitutional Court: the "Party Chapter Abolition Case*, 47 VERFASSUNG UND RECHT IN ÜBERSEE/L. POLS. AFR., ASIA & LAT. AM. 293, 293-318 (2014).

[101] *Id.* at 302.

[102] DAE-KYU YOON, LAW AND DEMOCRACY IN SOUTH KOREA: DEMOCRATIC DEVELOPMENT SINCE 1987 82 (2010).

[103] *Id.* at 82-83.

[104] *Id.*

[105] Kim, *supra* note 16, at 70.

event.[106] This was not the first time Roh triggered such a controversy. In the above-mentioned case of impeachment, he was similarly alleged to have violated the obligation of impartiality, and the KCC eventually agreed with the National Assembly's findings that Roh had indeed violated the law.[107]

In the 2007 dispute, the KCC determined that the notices issued by the NEC were constitutional.[108] "Given the special nature of campaign work," the court declared, "the NEC should make prompt decisions in cases involving a violation of election law."[109] The court went on to explain that the NEC's decision to issue the notices before giving the president a chance to respond to the accusations was not a violation of the president's constitutionally protected right to due process.[110] The KCC, practicing a relaxed level of scrutiny, further determined that the legal provision serving as the basis of the notices was not unconstitutionally vague: the court concluded that, as the leader of the executive branch, the president should have been able to comprehend the concerned provision, which therefore constituted a sound legal basis for the notices issued by the NEC.[111]

A similarly moderate level of scrutiny was adopted by the KCC when it reviewed a 2005 amendment to the Public Officials Election Act (*Election Expense Reimbursement Case*).[112] The amendment controversially stipulated that, in national elections, the number of votes obtained by candidates would determine the extent to which the government would reimburse political parties for their expenses spent in campaign activities.[113] The amendment thus resulted in significant disparities among parties regarding their reimbursements.[114] In the *Election Expense Reimbursement Case* (2010), the court exercised judicial restraint by adopting a relaxed level of judicial scrutiny to review the case.[115] The court stated that the formation of electoral mechanics, including the arrangement of expense reimbursements, necessarily varied across territorial boundaries, historical trajectories, and political cultures.[116] These contextual particularities justified legislators' decision to formulate concrete policies that resulted in the disparities so long as the disparities contributed to a free and fair electoral system. Therefore, the court was in no position to overrule legislators' arrangement of party affairs.[117]

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[106] Presidential Duty of Impartiality [Const. Ct], Jan. 17, 2008, 20-1(A) KCCR 139, 2007 Hun-Ma 700, at 1 (S. Kor.).
[107] Impeachment Case (Ryu Moo-hyun), *supra* note 98.
[108] Presidential Duty of Impartiality, *supra* note 106.
[109] *Id.* at 28-29.
[110] *Id.* at 27.
[111] *Id.* at 19.
[112] Election Expense Reimbursement [Const. Ct.], May 27, 2010, 2008 Hun-Ma 491 (S. Kor.).
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] Election Expense Reimbursement [Const. Ct.], May 27, 2010, 2008 Hun-Ma 491 (S. Kor.).

IV. JUDICIAL REVIEW IN A STABLE POLITICAL SYSTEM: TAIWAN

In the pre-democratic 1980s, Taiwan—unlike South Korea—possessed a stable political system. It was controlled by the KMT, which combined aspects of Leninism, personalism, and military rule.[118] For 38 years (1949–1987), the KMT exercised unilateral, highly centralized control over the political process in Taiwan.[119] To this end, the KMT used various tools to entrench its influence in the political process.[120] For instance, the KMT suspended national elections for the tricameral legislative system's three bodies: the National Assembly, the Control Yuan, and the Legislative Yuan.[121] An ideological reason for the suspension was to legitimate the representatives who had been elected in mainland China before 1949.[122] In that year, which marked the end of the Chinese Civil War, communist military forces expelled the KMT from the mainland of China, essentially exiling the party, its supporters, and the national entity known as the ROC to the island of Taiwan.[123] As a matter of power dynamics, the suspension allowed the KMT to extend its near monopolization of the nation's legislative decision-making, as most of the representatives were sympathetic toward the KMT.[124] Interestingly, in contrast to the suspended national elections, local elections were regularly held.[125] And given its financial and media resources obtained through one-party governance, the KMT enjoyed an undue advantage in these elections. Accordingly, Taiwan's highly coordinated, if not entirely seamless, political system favored the governing party and allocated the country's ideological and material resources to the party, resulting in a basic framework governing the operation of political parties in post-authoritarian Taiwan.[126] Nevertheless, international and domestic pressures led to preliminary electoral reform in Taiwan: most notably, in 1980, the government passed the Elections and Recalls Act During the Period of National Mobilization for the Suppression of the Communist Rebellion (the Elections Act), which, though criticized by progressives, signaled a shift away from authoritarian governance and toward electoral democracy.[127]

This political reality made the legal reforms of the party system sensitive in Taiwan, partly because of the KMT's persistent popularity, even after democratization. It was not until 1986 that the KMT in Taiwan faced their first significant threat from an organized opposition party: the Democratic Progressive Party (DPP)— hewn together from disparate anti-KMT elements (known as

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[118] GINSBURG, *supra* note 15, at 107.
[119] Su, *supra* note 22, at 285.
[120] *Id.* at 286-287.
[121] GINSBURG, *supra* note 15, at 128-29.
[122] *Id.* at 129-30.
[123] Cheng-Yi Huang, *Unpopular Sovereignty: Constitutional Identity through the Lens of the Sunflower and Umbrella Movements*, *in* LAW AND POLITICS OF THE TAIWAN SUNFLOWER AND HONG KONG UMBRELLA MOVEMENTS 120 (Brian Christopher Jones ed., 2017).
[124] GINSBURG, *supra* note 15, at 128-29.
[125] Lee, *supra* note 80, at 429.
[126] *Id.* at 437-38.
[127] Su, *supra* note 22, at 291-92.

Tangwai, or "outside the KMT")—proved formidable despite an existing ban on opposition parties.[128] The following year, the ban ended when the KMT government lifted the island-state's martial law, which had been in place for nearly four decades (since 1949).[129] This transformative event, together with public activism such as the Wild Lily Student Movement in 1990, compelled the TCC to rule that the decades-old suspension of national legislative elections should come to an end.[130] In 1991 and 1992, the National Assembly and the Legislative Yuan (Taiwan's two national legislative bodies at the time) held their first elections since 1948, marking the renewal of their democratic legitimacy.[131]

In 1996, citizens elected the KMT presidential candidate Lee Teng-hui to the highest office in the ROC.[132] He became the first democratically elected president in Taiwan's history.[133] In 2000, Chen Shui-bian, the DPP candidate, won the presidential election, which marked the first such victory scored by an opposition party.[134] These elections signaled the ongoing consolidation of Taiwanese democracy.

Despite being the principal architect of the now-defunct authoritarian system of government in Taiwan, the KMT has remained a powerful political contender in the country's democratic political arena. Indeed, during Chen Shui-bian's two terms in office (2000–2008), the KMT controlled the Legislative Yuan.[135] And in 2008, Ma Ying-jeou, the KMT candidate for president, defeated his DPP rival and served in that office until 2016.[136] The KMT also won landslide victories in 2022's local elections.[137] In other words, even though the DPP has solidified itself in the public's mind as one of Taiwan's two major political parties, the DPP's rise to power was profoundly challenging in the aftermath of the KMT's thirty-eight year monopolization of power.

As Taiwan democratized, judicial intervention became highly intricate with respect to party-governance issues. The TCC, in particular, delicately navigated political and constitutional constraints. Established in 1948 under the Constitution of the ROC, the TCC, formerly known as the Council of Grand Justices, was inactive during Taiwan's authoritarian period.[138] Nevertheless, after martial law was lifted, the TCC evolved into an "instrument for democracy and

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[128] GINSBURG, *supra* note 15; Lee, *supra* note 79, at 439.
[129] Su, *supra* note 22, at 285.
[130] *Id.* at 286.
[131] J.Y. Interpretation No. 261 [translated by Nigel N. T. LI], (decision rendered on June 21, 1990) (1990), which demanded elections of all national legislatures to update the democratic legitimacy of these institutions.
[132] Su, *supra* note 22, at 286.
[133] *Id.*
[134] YAP, *supra* note 14, at 98.
[135] *Id.* at 105.
[136] Ernest Caldwell, Transitional Justice Legislation in Taiwan Before and during the Tsai Administration, 27 WASH. INT'L L.J. 449, 471 (2018).
[137] Brian Hioe, Once Again, KMT Scores Big in Taiwan's Local Elections, DIPLOMAT (Nov. 22, 2022), https://thediplomat.com/2022/11/once-again-kmt-scores-big-in-taiwans-local-elections/.
[138] YAP, *supra* note 14, at 94-95.

human rights," a guardian of constitutionalism, and an adjudicator of political disputes.[139] The TCC garnered this reputation by invalidating a statute regarding election deposits (J.Y. Interpretation No. 340).[140] Election deposits are a form of payment used by Taiwan's election administration to ensure that candidates have the actual intention and substantial financial strength to run for elections.[141] Deposits will be returned only if candidates follow all requirements under the election laws; and sometimes, election laws require the deposits to be confiscated if the candidates do not obtain a sufficient rate of voter turnout under the law.[142] In J.Y. Interpretation No. 340, the disputed statute required independent candidates (i.e., candidates not endorsed by any political parties) to make a deposit two times higher than the deposit requirement for candidates endorsed by political parties.[143] The court found this requirement disproportionately high and invalidated it.[144] In another case, the TCC invalidated the Civil Associations Act's provision that forbade Taiwanese citizens from espousing communist or separatist ideologies.[145]

However, apart from these cases, which exemplified the TCC's reliance on strong judicial review, several cases exemplified the TCC's explicit recognition that the right to formulate election rules belonged to the Legislative Yuan, which became Taiwan's sole national legislative body in 2005.[146] In J.Y. Interpretation No. 468, the TCC recognized the Legislative Yuan's power to enact laws governing presidential and vice-presidential elections, including election-finance issues.[147] More specifically, the TCC found that the statute constitutionally required presidential and vice-presidential candidates not endorsed by political parties to make a deposit of $30,000 (U.S.) to the government.[148] The purpose of the deposit was to ensure that serious candidates were running for office.[149] According to the law, these candidates also needed to solicit signatures from more than 1.5% of the

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[139] GINSBURG, *supra* note 15, at 106.

[140] J.Y. Interpretation No. 340 [translated by Vincent C. Kuan], (decision rendered on February 25, 1994) (1994).

[141] Wang Yu-pei, Abolishing Election Deposits Not the Answer, TAIPEI TIMES (Mar. 4, 2021), https://www.taipeitimes.com/News/editorials/archives/2021/03/04/2003753200.

[142] Presidential and Vice Presidential Election and Recall Act, Art. 31 https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0020053.

[143] J.Y. Interpretation No. 340 [translated by Vincent C. Kuan], (decision rendered on February 25, 1994) (1994).

[144] *Id.*

[145] J.Y. Interpretation No. 644 [translated by Any Y. Sun], (decision rendered on June 20, 2008) (2008).

[146] Taiwan went from having a tri-cameral national legislature to a bicameral one to the current unicameral incarnation. Prior to 1991, Taiwan had a tricameral legislative system consisting of the Legislative Yuan, the National Assembly, and the Control Yuan, but in that year, revisions to the constitution canceled the legislative functions of the Control Yuan. Taiwan's subsequent bicameral system lasted until 2005 (as noted above), when a constitutional amendment dissolved the National Assembly and thus left all national law-making matters to the Legislative Yuan (hence, Taiwan's current unicameral system).

[147] J.Y. Interpretation No. 468 [translated by Vincent C. Kuan], (decision rendered on October 22, 1998) (1998).

[148] *Id.*

[149] *Id.*

total voters in national elections to prove that the candidates possess a certain degree of public support or at least public recognition.[150] Candidates make the deposit prior to obtaining the signatures, and the only way a candidate can receive a deposit back is to obtain the required number of signatures.[151] The TCC considered the constitutionality of these requirements and found the legislature had been justified in establishing them.[152]

The TCC also practiced moderate judicial review in J.Y. Interpretation No. 721, which dealt with the constitutionality of the 2005 constitutional amendment regarding the electoral rules for the Legislative Yuan.[153] The 2005 amendment comprehensively reformed not only Taiwan's entire electoral system but also the procedures for constitutional amendments.[154] Interestingly, the 2005 amendment was proposed in 2004 by the Legislative Yuan and promulgated by the National Assembly, with the members of both bodies having been directly elected by the people.[155] According to the amendment, the Legislative Yuan would comprise 113 members, of whom seventy-three representatives would represent local constituencies elected through the First-Past-the-Post system, thirty-four would receive their seat according to the rules of proportional representation, and the remaining six would represent indigenous people.[156] In particular, the thirty-four members owing their seats to proportional representation would be selected from a list of political parties: the proportions of votes allocated to specific parties would determine how many individuals would be selected from each party on the lists; however, parties that obtained less than five percent of the total votes would be excluded from the calculations.[157]

The five-percent threshold proved to be highly controversial, as it excluded from government the members of small political parties. Two small parties thus challenged the constitutionality of both the offending article (Article 4) in the 2005

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[150] *Id.*

[151] *Id.* In 2020, roughly 18.81 million votes were cast in the Legislative Yuan elections. This means that a person hoping to be a presidential or vice-presidential candidate, but without party endorsement, would first have needed to obtain at least 282,000 signatures and to make a deposit of US$30,000. Only in this way could the person demonstrate his or her "genuine" and "realistic" intention to run for office.

[152] J.Y. Interpretation No. 468 [translated by Vincent C. Kuan], (decision rendered on October 22, 1998) (1998).

[153] J.Y. Interpretation No. 721 [translated by Eleanor Y. Y. Chin], (decision rendered on, June 6, 2014) (2014).

[154] Hsien Fa Tseng Hsiu T'iao Wen [Additional Articles to the Constitution], art. 4 & 12, https://www.constituteproject.org/constitution/Taiwan_2005; *see also* Yen-tu Su, https://constitutionnet.org/news/amendability-taiwans-constitution-put-test.

[155] *Constitutional Changes Approved in Taiwan*, N.Y. TIMES (June 8, 2005), https://www.nytimes.com/2005/06/08/world/asia/constitutional-changes-approved-in-taiwan.html.

[156] Hsien Fa Tseng Hsiu T'iao Wen [Additional Articles to the Constitution], art. 4.

[157] J.Y. Interpretation No. 721 [translated by Eleanor Y. Y. Chin], (decision rendered on, June 6, 2014) (2014).

amendment and several relevant provisions in the Election Act.[158] The TCC dismissed the challenges and insisted that the current electoral system did not violate the one-person-one-vote principle.[159] To be sure, the TCC did not dismiss the challenges by stating that it lacked the authority to review the constitutionality of constitutional amendments, as this authority had long been recognized in a famous precedent established by the TCC itself.[160] Rather, the TCC fully acknowledged that these challenges fell under its jurisdiction, but then deferred to the legislature's authority and ability to formulate constitutional regulations about elections.[161]

In J.Y. Interpretation No. 721 (2014), the TCC asserted that there is no universally correct design of an electoral system: each system reflects the political culture of a country.[162] The TCC further asserted that the electoral system being challenged by the two small political parties reflected the will of the Taiwanese people to combine the First-Past-the-Post system with proportional representation, and thus the complainants had no constitutional ground to stand on.[163] Consequently, the five percent threshold did not violate minor parties' constitutionally protected right to participate in politics and to compete for office.

The TCC's decision in this case triggered a good deal of criticism from legal scholars, including some who argued that the TCC had carelessly considered alternative institutional mechanisms that could have improved party competition and party governance in post-authoritarian Taiwan.[164] The criticism, though compelling, failed to explain how the TCC could have accurately calculated the right level of political competition, the actual impact of various electoral mechanisms, and the appropriate balance between these two factors—all within the framework of the ROC constitution.

After the TCC's decision in J.Y. Interpretation No. 721, the government slowly reformed the party operations. In 2016, the DPP, for the first time in Taiwan's history, won both the presidency and a relative majority of the legislative seats. It is true that the DPP had controlled the presidency between 2000 and 2008, but the KMT's continued control of the Legislative Yuan during those years had prevented progressive reforms to Taiwan's party-governance system. As a result of the startling power shift in 2016, the Legislative Yuan that year passed the Act Governing the Settlement of Ill-gotten Assets by Political Parties and Their Affiliate

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[158] J.Y. Interpretation No. 721 [translated by Eleanor Y. Y. Chin], (decision rendered on, June 6, 2014) (2014), *see also* https://cons.judicial.gov.tw/docdata.aspx?fid=100&id=310902.

[159] J.Y. Interpretation No. 721 [translated by Eleanor Y. Y. Chin], (decision rendered on, June 6, 2014) (2014).

[160] J.Y. Interpretation No. 499 [translated by Ming-Sung KUO and Hui-Wen CHEN], (decision rendered on, March 25, 2000) (2000).

[161] J.Y. Interpretation No. 721 [translated by Eleanor Y. Y. Chin], (decision rendered on, June 6, 2014) (2014).

[162] J.Y. Interpretation No. 721 [translated by Eleanor Y. Y. Chin], (decision rendered on, June 6, 2014) (2014).

[163] *Id*.

[164] Wen-Sheng Hsiao, *The Constitutionality of the Five Percent Threshold for Political Parties: The Analysis of J. Y. Interpretation No. 721*, 252 TAIWAN L. J. 33, 39-40 (2014).

Organizations (the Ill-gotten Assets Act). It was a transitional-justice law aiming to rectify the authoritarian legacy that was still poisoning party politics in democratic Taiwan.[165]

Accompanying the Legislative Yuan's passage of the Ill-gotten Assets Act was the Legislative Yuan's creation of the Ill-gotten Assets Settlement Committee under the Executive Yuan. This body consists of eleven to thirteen members, not more than one-third of whom can belong to any single party.[166] The committee was charged with investigating and settling "ill-gotten assets acquired by the political parties, their affiliated organizations and trustees" and with thus establishing "a fair environment for competition among political parties."[167] The focus of the committee was on properties obtained during the authoritarian era, by either the KMT or its "affiliated organizations," in violation of both "the nature of political parties" and the "principles of the rule of law."[168] Assets deemed to have been acquired through unacceptable means would have to be returned to the state.

The committee, in conjunction with the Ill-gotten Assets Act, determined that several KMT-affiliated organizations had to hand over certain assets to the government. In response, the organizations petitioned the TCC to determine the constitutionality of the Ill-gotten Assets Act.[169] First, the claimants argued that the act violated the separation of powers by granting to the executive branch the authority to determine matters of great constitutional salience, including property rights, which should be exclusively resolved by the judiciary. The TCC considered this argument and concluded that, under the Ill-gotten Assets Act, the corresponding committee could exercise its power proactively and comprehensively under the law and handle any assets identified as having been ill-gotten. Hence, the TCC concluded that the act had in no way violated the constitution's separation-of-powers provision.[170] Moreover, a moderate form of judicial review characterized the TCC's decision that the legislative branch had a substantial interest in protecting and promoting "the robust operation of partisan politics and fair competition of political parties."[171]

V. MODERATE JUDICIAL REVIEW FROM A COMPARATIVE PERSPECTIVE

The case studies above demonstrate how the constitutional courts of post-authoritarian South Korea and Taiwan used a moderate approach to judicial review

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[165] Ernest Caldwell, *Transitional Justice Legislation in Taiwan Before and during the Tsai Administration,* 27 WASH INT'L L. J. 449, 472-80 (2018).
[166] *Id.* at 476.
[167] The Act Governing the Settlement of Ill-gotten Properties by Political Parties and Their Affiliate Organizations, art. 1.
[168] *Id.* art. 4.
[169] J.Y. Interpretation No. 793 (Aug. 28, 2020).
[170] *Id.*
[171] *Id.*

to encourage legislatures, governmental electoral institutions, and administrative agencies to formulate and renovate the rules governing political parties. In South Korea, the KCC allowed the National Assembly and the NEC to construct the rules and norms of elections as long as the disputed provisions did not substantially compromise the opportunities for citizens or political parties to participate in elections. The electoral sphere thus became relatively stable and competitive. While there were two majority coalitions dominating the political process, many minority parties were evident and vocal in the multi-party system.[172] In Taiwan, the TCC emphasized that adjustments to the post-authoritarian party system should be made by democratic institutions—namely, the Legislative Yuan and administrative agencies. Without resorting to inflexible rulings, the TCC helped instill a political equilibrium between the established parties and new political forces, allowing all of them to adapt gradually to Taiwan's evolving democracy.

A moderate approach to judicial review can encourage democratic institutions within government to transform how political parties manage their internal operations, interact with the electorate, compete for power, and assume control once their members are elected to office. In the cases of South Korea and Taiwan, had the KCC and TCC adopted a strong, not a moderate, approach to judicial review, the two courts could easily have been drawn into complicated judgments about, for example, how to determine the appropriate amounts of political donations, the precise allocations of legislative power, and the non-judicial tools most suitable for redressing past authoritarian problems. Lacking the skill to deal with these highly complicated electoral affairs, the courts might have embarked upon decision-making efforts that would have resulted in excessively high information costs. Therefore, by allowing and indeed encouraging other parts of government to undertake the finer points of these decision-making processes, the KCC and TCC reduced the various costs that would have been incurred had the courts themselves made these judgments. By playing the role of a supportive guardian, these judiciaries thus moderated the law of democracy in a reasonably efficient manner.

Of considerable importance to the development of courts' decision-making approaches was the backdrop against which these choices were made. First, the KCC and TCC engaged in moderate judicial review at a time when the citizens of the two countries were highly engaged in politics and when democratically elected representatives were frequently proposing, debating, and delivering inventively crafted electoral legislation. This dynamic and vibrant environment would not likely have supported authoritative courts handing down inflexible rulings based on a strong approach to judicial review. Moreover, some of the electoral frameworks discussed above had been put together through high-profile constitution-making processes that further reflected and accommodated the public demand for democracy (J.Y. Interpretation No. 721 in Taiwan). The implementation of these legal instruments thus signaled the public's thirst for a legal system that would reinforce a participatory, representative, and competitive

[172] Kim, *supra* note 16, at 65, 74-75.

democratic regime guided chiefly by the constitutional principle of popular sovereignty.

A second element of the backdrop to judicial decision-making was the post-authoritarian evolution of government institutions in South Korea and Taiwan. Not just legislatures and presidencies but also administrative agencies and independent governmental electoral institutions were becoming more independent, neutral, and impartial as the two countries democratized. And even though there were debates about the quality of democratization, great efforts were being made to address these concerns. The NEC, for example, was faced with questions about just how genuinely free from political interference the NEC was when it monitored and investigated electoral fraud, the South Korean agency expanded its authority, strengthened its accountability, and thus proved its independence.[173] For example, suspicions swirled around the integrity of authoritarian-era administrative agencies operating in post-authoritarian Taiwan, so the legislature passed the Administrative Procedures Act and pursued other reforms that went far in establishing, in the eyes of the people, the trustworthiness and accountability of the agencies' decision-making processes.

A third contextual factor influencing judicial decision-making in South Korea and Taiwan was the relationship between the constitutional courts and the citizenry. Both the KCC and TCC cautiously yet eagerly adopted a mix of approaches to the governance of election law.[174] As a result of these choices, the courts made progressive decisions that helped resolve the political conflicts between presidents and legislatures, among other issues pertaining to the structure of governments and political parties. By employing a wide array of legal techniques to handle intricate political issues, the two courts increasingly enjoyed widespread trust among the people, a fact that further reinforced the courts' authority in adjudicating matters of great political salience.[175]

Growth in people's political engagement, improvements in the quality of government services, and widespread trust in constitutional courts are just three contextual factors that help explain why, in post-authoritarian South Korea and Taiwan, the courts successfully adopted moderate judicial review. This success, however, is not proof that constitutional courts must *always* avoid flexing their muscles when issuing decisions about party governance; nor does this success suggest that courts should reject strong judicial review generally. After all, curbs on political self-entrenchment remain critical elements in the effort to prevent the despotic rule of ambitious individuals and ruthless political parties. In these instances, courts should not be afraid to exert muscular authority so long as they do it wisely. By thoughtfully gauging the breadth, depth, and contours of a given constitutional matter, judiciaries can successfully impose rigorous checks and balances on governmental and political institutions alike.

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[173] Choong-Sang Lee, *Measures for Stronger Neutrality of the National Election Commission*, 63 L. REV., INST. LEGAL STUD., BUSAN UNIV. 37, 71-72 (2022).

[174] YAP, *supra* note 14, at 8-10; Chang, *supra* note 24, at 885, 902; Yeh, *supra* note 24, at 914.

[175] YAP, *supra* note 14, at 8-10; Chang, *supra* note 24, at 885, 902; Yeh, *supra* note 24, at 914.

The proper functioning of political parties relies upon how—against a unique backdrop—legislative and administrative elements of government visualize and implement the state's constitutional commitment to healthy political competition, representation, and participation. Judiciaries overseeing administrative law, which includes the government's oversight of party operations, have a responsibility "to funnel political decisions to democratically accountable actors and to ensure that instrumental decisions are made based on demonstrable evidence that furthers the ends specified by those actors."[176] This responsibility essentially boils down to a single question: how can and should government oversight of political parties foster democracy?

VI. CONCLUSION

Adam Przeworski once asserted that "political parties forge collective identities, instill commitments, define the interests on behalf of which collective actions become possible, offer choices to individuals, and deny them."[177] In light of this complexity, one would be justified in concluding that governance of political parties must be well thought out. In concurring with this conclusion, I have explored an important question: how have the constitutional courts in South Korea and Taiwan adopted moderate judicial review in order to oversee the design and operations of political parties? Through their application of moderate judicial review to this realm of governmental oversight, the KCC and TCC have given legislative and administrative elements of government an opportunity to reconsider, debate, reform, create, and implement relevant laws.

I have argued that the moderate judicial review used by the KCC and TCC played a crucial role in consolidating the democratic governance of political parties and electoral systems in South Korea and Taiwan as the two countries transitioned from authoritarian rule to democracy. Moderate judicial review encouraged legislatures to craft the rules of political parties in line with the preferences of the electorate. Moderate judicial review similarly encouraged administrative elements of government to rely on their own expertise when finetuning and implementing these legislated rules. The actions by the KCC and TCC have promoted political competition in the new democracies of South Korea and Taiwan.

The current field of comparative constitutional law has tended to focus on strong judicial review instead of on other approaches to the adjudication of matters pertaining to political parties. Indeed, strong courts can and do remedy instances of political self-entrenchment, especially when the self-serving actions of political elites prevent small political parties from exercising their constitutionally guaranteed rights to participate in politics. Nevertheless, by relativizing the supremacy of strong judicial review, I have sought to complicate our current understanding of these matters so that this understanding better reflects the actual functions and salience of a moderate approach to judicial review. Such an approach

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[176] Zipkin, *supra* note 7, at 661.

[177] ADAM PRZEWORSKI, CAPITALISM AND SOCIAL DEMOCRACY 101 (1985).

can shape and reinforce the laws governing political parties and can thus strengthen democracy in ways that strong judicial review cannot. My findings, I hope, will invite more dialogue about how judiciaries, as constitutional institutions, interact with and respond to a host of contextual factors ranging from the dynamics of political parties to the preferences of electorates to political structures writ large.