The Colombian Court, for example, cannot rely on the institutional separation of powers to discipline its work because the legislature does not have a clear role within the political system. Instead, the Court has to be evaluated based on whether it is helping to achieve constitutional transformation, moving Colombian politics and society closer to the order envisioned in the 1991 text. There are two basic ways by which the Court might do this: first, it could attempt to substantively transform aspects of the social order to make them correspond with the constitutional vision; or second, it could attempt to transform political institutions, which would then be in a better position to achieve constitutional transformation.

...[The Court has made some progress in achieving both goals. It has achieved a fair amount of policy change directly, and most of these changes seem consistent with the vision of the 1991 Constitution. At the same time, its high-profile interventions seem to have spread constitutional norms both to the public and to an increasingly powerful group of watchdog government institutions and civil society groups. Additionally, the Court's work in helping traditionally disadvantaged groups gain access to the system may be increasing the legitimacy of the democracy....] Some scholars have suggested that the Court's work is counter-productive for building better political institutions because it crowds out the possibility of democratic debate on controversial constitutional issues. This strikes me as doubtful for present-day Colombia because political actors have little interest in the Constitution. But the concern could be relevant in the long run, and would point toward a Hungarian-like reduction in the Court's role through time.

The goal...is not to give a definitive assessment of the Court's work...The point, instead, is to debate the legitimacy of judicial review and constitutional jurisprudence in new democracies on their own terms and not with ideas borrowed from American constitutional theory. Comparative constitutional scholars can play an important role in this task by identifying the kinds of tasks that courts can perform under institutional conditions that look very different from our own. Building a comparative theory of judicial role is not easy and will not lead to clear answers, but it can help guide our assessments of constitutional design and the tasks of constitutional courts in new democracies.

* [Editors' Note: Earlier in his article Landau explains why the judicial role that has been necessary in Colombia has not been followed by two other strong courts, the Hungarian and South African Constitutional Courts, which have operated in different institutional contexts: The Hungarian Constitutional Court...in the 1990s took on a role similar to the Colombian Court, but only for a brief time—as the party system improved in the post-communist period, the need for extraordinary judicial activism declined. For its part, the South African Constitutional Court has taken a more dialogical and deferential stance relative to the political branches, the existence of a single dominant party rather than the incoherent set of political actors renders this role inapplicable. For additional discussion of recent developments in Hungary, see Chapter IV above.]

**QUESTIONS AND COMMENTS**

1. In India, could one say that the judges, acting in the "common law" tradition, are trying to create the conditions for "intermediary societies" that can focus on litigation as a tool for social justice?
2. In Colombia, could one say that judges, acting in service of a new constitutional commitment to transforming society in accord with international human rights, are working to fulfill those rights while also trying to create the conditions for effective governance?
3. In either India or Colombia, are these approaches appropriate for courts? Is such judicial action likely to be as effective as other organizing and political strategies? What risks are posed by reliance on "intermediary" societies? Why are there objections to "ideological parties" as a return to feudalism?

4. The role of civil society in adjudication is only part of their role in constituting and maintaining a democratic constitutional state. Consider Anne Applebaum, IRON CURTAIN: THE CRUSHING OF EASTERN EUROPE 1944–1968 (2012), which argues that it is characteristic of totalitarian governments to repress churches, associations, youth groups, societies, and universities; correspondingly, building democratic societies requires not only elections and political parties but also a much wider array of organizations from the ground up in civil society. Attacks on individual dissenters and on civic organizations continue to be tools used by authoritarian regimes, sometimes through legal tools, sometimes through "disappearances" and violence. See William J. Dobson, THE DICTATOR'S LEARNING CURVE (2012) (describing such techniques in Russia, Egypt, Venezuela, and elsewhere). As such studies suggest, law can make it more difficult for civil society organizations to function, what can they mean that they would realize their organization and action. But even if distinct civil society organs are a necessary predicate for democratic constitutionalism, is it also necessary to their role in sustaining constitutional democracy to enable elements of civil society to have standing to bring actions in the public interest in the courts? Does Landau's work suggest that the answer may depend on the political institutions? Or ease of access for individual complainants?

**3. COURTS IN TRANSITIONAL SOCIETIES: ACTIVISM, BACKLASH AND THE PROTECTIVE FUNCTION OF JUSTICIABILITY LIMITS**

In Allen v. Wright, the Court wrote that U.S. conceptions of standing and justiciability relate to the "article III notion that federal courts may exercise power only as a last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and the [dispute is one] traditionally thought to be capable of resolution through the judicial process." Herman Schwartz notes that in the United States, justiciability requirements "enable the federal courts to avoid deciding many questions of major constitutional significance—a goal frequently invoked in American constitutional jurisprudence"; in Europe, he points out, constitutional courts were "created for the express purpose of deciding constitutional issues, not creating them."

Herman Schwartz, The New East European Constitutional Courts, 13
Mich. J. Int'l L. 741, 752–73 (1992). As he summarizes the situation in the early 1990s in Europe (especially in Eastern Europe): "Standing is not based solely on the adversary process; abstract judicial review is welcomed, rather than avoided; questions may be considered both before the question arises as well as after it has been rendered moot; and finally, political questions lie well within the European court's judicial authority.

For example, he notes, in Hungary anyone was permitted to challenge existing legal rules and statutes, though a mere limited list of parties could challenge bills or treaties not yet enacted or implemented; in 1992, Romania and Hungary allowed review of unimplemented laws, and the Russian Constitutional Court act specifically provided that a court proceeding should be completed even if the challenged act had been repealed or had expired. At that time, moreover, the Russian, Romanian, and Hungarian courts could in some cases begin a proceeding sua sponte, without a complaint being filed.

It can be difficult, ex ante, to determine whether according a constitutional court great powers, or the aggressive use of such powers to oppose current governments, will increase a court's legitimacy or lead instead to judicial incapacitation or silencing. Earlier materials (see Chapter IV) suggested that constitutional courts may sometimes participate in (arguably) helpful ways to forming a new constitutional regime. Two brief case studies are illustrative of the pitfalls, as well as possible benefits, of activist judges, as we examine the Russian Constitutional Court, particularly in its initial period of activism between 1991–8, and the Supreme Court of Pakistan, in a period of activism between 2005–07. Do their experiences stand as a caution about the risks to constitutional courts of having, or exercising, some of the powers with which they were initially provided?

a. Russia

The Soviet constitutional tradition has been described as one that "rejected genuine control over legislative powers ... as an unnecessary reflection of the bourgeois idea of separation of powers." Lawyers Committee for Human Rights, Justice Delayed: The Russian Constitutional Court and Human Rights 1 (March 1998); see also Herman Schwartz, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 110–12 (2000) (describing absence of legal or constitutional traditions in pre-Revolutionary Russia and continued "legal nihilism" after the 1917 Revolution). The USSR's Constitution of 1977 provided for political review of constitutional issues by the Presidium of the Supreme Soviet. In late 1988, this was changed to provide for a Committee of Constitutional Supervision. While the Lawyers Committee regarded establishment of the Committee for Constitutional Supervision as a step forward for the enforcement of human rights, several shortcomings were noted; the Committee for Constitutional Supervision could not receive individual petitions (though it could and did act on its own in apparent response to complaints), and its decisions on human rights norms were often ignored. See Schwartz (2000), at 114.

When the Russian Federation emerged from the fall of the Soviet Union, it established a Constitutional Court, along the lines of the European model of centralized review but permitting individuals to file petitions. Although it received hundreds of petitions dealing with human rights issues under the Russian Constitution, this Court, much of its time dealing with questions of separation of powers and federalism, a course which, according to the Lawyers Committee, "eventually led to its destruction." See also Lee Epstein, The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government, 35 Law & Soc'y Rev. 117 (2001) (offering a formal model to account for this failure, suggesting that structural issues involved much less overlapping tolerance of the relevant political organs than existed for human rights issues).

Writing in the Spring of 1993, one observer described the Chief Justice of the Russian Constitutional Court as being "at the center of the country's ongoing constitutional crisis," and questioned whether his "extrajudicial activity has ... damaged the credibility the Court needs if it is to carry out judicial review of executive and legislative acts." Robert Sharlet, Chief Justice as Judicial Politician, 2 East European Constitutional Review 32 (Spring 1993). As he explains, the Constitutional Court convened for the first time in late December 1991, just after the Soviet Union collapsed. Sharlet describes the nine cases the Court decided in its first term and Chief Justice Zorkin's unusual resort to extra-judicial comments:

In its first decision ... the Constitutional Court ruled unconstitutional Yeltsin's executive order merging the police and security ministries into a single superministry. The President was taken aback, and Zorkin reportedly spent an hour in private cajoling Yeltsin into accepting the decision. Yeltsin's lawyer in the case, Deputy Prime Minister Sergei Shakhray, was less restrained, criticizing the Court for deciding the case on political rather than legal grounds. The Chief Justice reacted immediately.... He spoke from the podium of the Russian Supreme Soviet, appeared on TV and gave interviews to the print media, all in defense of the judicial character of the Court's first ruling. To deter further criticism from the President's entourage, Zorkin publicly threatened to review the constitutionality of Shakhrai's actions "in accordance with impeachment procedures," and led the Court as if it had a prominent editor whose newspaper was obliged to publish the ruling, but had instead printed misleading comments on the case.

A few months later, ... the Court took up ... the Tatarstan Referendum case. ... The Tatar Autonomous Republic of the Russian Federation, a large and populous territory on the middle Volga, had announced its intention to hold a referendum on whether it should become a separate associate state within the federation. The Russian Federation Constitutional Commission petitioned the Court to assess the constitutionality of Tatarstan's plans. The Court promptly did so, ordering the referendum canceled. Tatarstan, defying the Court, continued to plan for the ballot. The Chief Justice, particularly concerned over the secessionist implications of the
move, strove hard from both on and off the bench to obtain Tataristan’s compliance, issuing court pronouncements with personal threats. Zorkin even went on nationwide television, darkly forecasting that Tatarstan’s defiance could lead to a situation “a hundred times worse than Yugoslavia.” It was all to no avail. Chief Justice Zorkin had overreached himself.

The referendum was held, in the teeth of the judicial ban, and 82% of eligible voters turned out; 61% of them opted for sovereignty.

Shariat describes Zorkin’s public conflict with former President Mikhail Gorbachev over the constitutionality of certain of Russian President Yeltsin’s decrees, designed to disable the Communist party and Gorbachev’s obligation to testify in those proceedings. Shariat also described Zorkin as commenting on matters not before the court, and focusing on separation of powers, federalism, and the role of the Court itself. In so doing, Zorkin injected himself and the Court in disputes between Yeltsin and Ruhuan Khasbulatov (head of the legislature). For example, Shariat reports, after making public speeches on the subject, Zorkin summoned the two leaders to a meeting to pressure them to resolve the crisis, threatening them with Constitutional Court proceedings against them based on their failures to fulfill their constitutional duties. The resulting deal between the two leaders to hold a referendum did not last, however. In Spring 1995, the Court nullified several orders issued by Khasbulatov but Zorkin also held a press conference expressing concern that Yeltsin might not impeach improperly to invoke emergency powers. Actions and threats by the President and by Zorkin escalated, and led eventually to the downfall of the first Constitutional Court, as described further below.


On September 21, 1993, when President Boris Yeltsin issued the Decree on Step-by-Step Constitutional Reform in the Russian Federation disarming the Russian Parliament and calling for new elections, the Supreme Soviet, under ... Speaker Ruhuan Khasbulatov, immediately countered with a resolution which declared the powers of the President terminated under Article 121.6 of the Constitution. At the Parliament’s request, Constitutional Court Chairman Vladimir Zorkin called an emergency session of the Court, although the President’s decree had “instructed” the Court not to convene any sessions. On the night of September 21, the Constitutional Court decided by a majority of nine to four that the President’s violation of the Constitution provided grounds for his removal from office under either Constitution Article 121.10 (impeachment proceedings) or 121.6 (automatic termination).

As the power struggle continued, the parliamentary leadership, under Speaker Khasbulatov ... found themselves on September 28 isolated in the “White House” (the Russian parliament building) by police and army forces loyal to President Yeltsin and his government. On October 3, anti-Yeltsin demonstrators, encouraged by Vice

President Rutskoi, attacked the Moscow mayor’s office and the Ostankino television station. In the course of this raid, sixty-two people were killed. On October 4, Yeltsin’s troops stormed the White House and arrested Khasbulatov and Rutskoi.

On October 6, Constitutional Court Chairman Zorkin, under pressure from the President’s office, resigned his chairmanship but remained a Court member. On October 7, President Yeltsin signed the Decree on the Constitutional Court of the Russian Federation, accusing the Court of flagrant violations of its duties and suspending its decisionmaking process until the adoption of the new Constitution. ... In preparing the Draft Constitution, which was published on November 10, 1993, and adopted by popular referendum on December 12, 1993, President Yeltsin chose not to abolish the Constitutional Court. On the basis of Article 125 of this new Constitution, the Russian Parliament promulgated the Federal Constitutional Law on the Constitutional Court and by February 7, 1995, six additional justices had been appointed. ...

1. The Zorkin Court (1991–1993): An Obituary ...

A. Jurisdiction of the Constitutional Court ...

1. Citizens’ Complaints

Like the German constitutional complaint, after which the Russian instrument was modeled, a complaint expressed an opinion of citizens’ complaints was an extraordinary remedy to secure the protection of civil rights. ... As the law empowered the Constitutional Court ... to reject a complaint if it considered such examination “inadvisable” (недееспособимо), the Court enjoyed great latitude in accepting or rejecting individual complaints. In the course of 1992, the Court received no fewer than 1700 citizens’ complaints, most of them without merit but a good number seeming to have deserved more attention than the Court was able or willing to devote. ... [Only] six individual complaints ... [were] heard and decided by the Court in the first sixteen months of its activity (between January 1992 and April 1993). ... In the months leading up to the suspension of the Court on October 6, 1993, the justices did little to improve the skimpy record in this area. Instead, they handed down only one opinion based on an individual complaint. ... A minority of the justices were critical of the fact that the Court did not devote sufficient attention to human rights questions. ... But the Court majority, led by Chairman Zorkin, rejected this criticism and insisted that the role of the Court in the ongoing constitutional crisis, produced by the confrontation between the President and the Parliament, should be to focus its attention on eroding of jurisdiction and unconstitutional enactments by state organs.

B. Review of Constitutionality of Legal Enactments...

Through the end of April 1993, the Court handed down eleven opinions on the constitutionality of legal enactments, all of which declared the examined legal enactments (or parts of such)
The focus of the Court's decision was on the constitutionality of the referendum laws. The court found that the laws at issue did not violate the Constitution, as they were within the power of the legislature to make. The court ruled that the referendum laws were constitutional, and that the court had no role in reviewing the legality of the laws. The court also noted that the referendum laws were in line with established precedents, and that they were consistent with the overall goal of ensuring the participation of citizens in the political process.

The court further noted that the referendum laws were necessary to ensure the proper functioning of the legislative process. The court ruled that the referendum laws were constitutional, and that the court had no role in reviewing the legality of the laws. The court also noted that the referendum laws were in line with established precedents, and that they were consistent with the overall goal of ensuring the participation of citizens in the political process.

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that speech the President explained his decision to order a referendum concerning the question of confidence in the President and Vice-President. The main reason for the political crisis in the country, he said, was not a conflict between the Congress and the President, but a conflict between the people and the Bolshovik system. The Congress, Yeltsin claimed, had manipulated the Constitution and blocked the referendum on land ownership and constitutional principles. Yeltsin argued that as the possibility of agreement with the conservative majority in Parliament had been exhausted, the President would assume direct responsibility for the fate of the country. It was his duty to guarantee the observance of fundamental constitutional principles such as popular government, federalism, separation of powers, human rights, and basic freedoms. Yeltsin continued:

Today I have signed a decree on a special administrative regime until the resolution of the crisis of power. On the basis of this decree a referendum is ordered for April 35 concerning confidence in the President and Vice-President of the RF. The people must decide... who should rule the country: the President and Vice-President or the Congress of People's Deputies.

... Under the Constitution and the new electoral law which you will approve there will be no elections to Congress but to a new Russian parliament. Under the new Constitution there will be no Congress. Until new elections can be held, Congress and the Supreme Soviet will not be dissolved, their work will not be suspended. The people's deputies will retain their mandates. But on the basis of the decree all decisions of organs or functionaries that aim at abolishing or suspending decrees and orders of the President or ordinances of the government will be without legal effect.

Constitutional Court Chairman Zorkin considered this television statement an attempted coup d'état. The Court, on its own initiative (which was subsequently endorsed by a request from the Supreme Soviet), examined the television clip in an emergency session. President Yeltsin refused to attend this session or to submit documents requested by the Court, including the text of his decree.

In its nine-to-three opinion of March 23..., the Court found seven violations of the Constitution and the Union Treaty in the President's address. The Court, however, remained silent on the question of impeachment. Justices Ametistov and Morschikova wrote dissenting opinions which considered the speech a mere declaration of political intent that was not subject to legal evaluation. Justice Alekseyev also correctly criticized as illegal the various public statements made by Chairman Zorkin in a press conference, on television, and in the Supreme Soviet prior to the Court's deliberations [under Art. 203] of the then-Law on the Constitutional Court, prohibiting judges from publicly voicing an opinion on a question under review except at a session of the Constitutional Court.

D. Critique of the Zorkin Court's Judicial Activity

In the first sixteen months of its activity, from November 1991 to April 1993, the Court issued seventeen decisions... From May to September of 1993, the Court added eight more opinions to its record, thereby barely exceeding the meager record of its predecessor, the Committee of Constitutional Supervision of the USSR. A partial explanation of this limited accomplishment may be found in the Court's rules of procedure. These rules, written into the Law by an inexperienced draftsman... forced the Court to: 1) take all decisions in plenary meetings; 2) decide all cases after extensive trial-type public oral hearings; and 3) abstain from dealing with other cases as long as an ongoing proceeding was not finished.

Yet perhaps the focus should be less on the number of cases decided than on the vision projected by the Court, its public image, and its power of legal and political persuasion. Given the lack of enforcement of the Court's opinions, the decision to refrain from publishing a great number of inessential decisions may have been wise. But one could certainly argue that the Court should have made its legal points more guarded and selectively, and that it could have built a more impressive record in the field of civil rights protection.

There was certainly legitimate frustration on the part of the Court over the widespread neglect of its decisions. This frustration may help explain Chairman Zorkin's excessive language and public posturing... However, more restraint might have preserved a higher degree of Court authority.

Initially, the substance of the Court's opinions reflected a fair amount of solid legal work, political sensitivity, and capacity for compromise on the part of the justices. However, since the Communist Party case, the growing influence of the Court's judicial decision-making became increasingly troubling.

E. Critical Remarks Concerning the Court's Nonjudicial Activities

There is no doubt that the Court's exercise of nonjudicial functions led to excessive political involvement outside the Court's core function of judicial review... and certainly did not add to the Constitutional Court's legal authority and prestige...

...Zorkin... developed a kind of political activism that was at times clearly in violation of the law and at least improper for a neutral arbiter of constitutional conflict. But, if it really permissible in an extraordinary situation of this type to evaluate the Russian Constitutional Court on the basis of those standards that apply to Western Constitutional Courts in normal times? Many observers agree that in December 1992 the Chairman of the Constitutional Court justifiably received ample public praise for assuming the role of referee in a dramatic struggle between the legislature and the President and for substantially contributing to the finding of a compromise. However, Zorkin extensively enjoyed the limelight and the power involved in playing this active role. He did not hide by the agreement, formalized in a resolution adopted by the Congress on December 13, 1992. As early as January, Zorkin was among the first to join Speaker Khasbulatov in voicing doubts and
criticism concerning the constitutional referendum scheduled for April 11, 1993.

In the eyes of a critical and liberal Russian intelligentsia, this support for Speaker Khakushin was an unforgivable betrayal . . . because Zorkin had . . . aligned himself politically with a reactionary parliament in its struggle against a reform-minded President . . . But any gains . . . should be mindful of the fact that Zorkin, for most of his activities, enjoyed the support of a solid Court majority.

In their struggle with Parliament, President Yeltsin and his supporters frequently insisted that without radical economic reform a viable democratic society cannot develop, and that without a democratic society no functioning rule of law can exist. Did this perspective give legitimacy to the President's revolutionary transformation that disregarded the existing Constitution, the elected Parliament, and a lawfully appointed and functioning Constitutional Court?

President Yeltsin's supporters have argued that the Constitutional Court majority employed legal formalism to aid an illegitimate parliament to the detriment of a reformist executive. There is some truth in this charge. It may be explained in part by the formalist tradition in Soviet jurisprudence, in part by the political preferences of the justices, and also on a reaction to the arrogant behavior of Yeltsin and his team . . . and the poor legal quality of many of his decrees [which] increasingly alienated Yeltsin from the Russian legal community, including the justices of the Constitutional Court . . .

V. Evaluation of the New Legislation on the Constitutional Court . . .
A. Continuity of Personnel and Functions
After Valeri Zorkin's reluctant resignation as Chairman on October 6, 1993, the Court . . . kept a low profile . . .

All thirteen justices from the Old Court retained their "life tenure" (until age sixty-five) and benefits. These thirteen had been nominated by the Chairman of the Supreme Soviet (Ruslan Khakushin) and appointed by secret election in the Congress of People's Deputies on October 29, 1991 . . . With one exception . . . all thirteen justices had been members of the CPSU . . . [Nine of these justices consistently opposed President Yeltsin in the past . . .]

Of the six new appointees, four possess the highest academic qualification (the doctorate of law), and two are former judges. Some observers may consider these appointments a correction of a weakness of the Old Court. One of the six new appointees is a woman and none represent an ethnic minority, while at least two (the two former judges) come from cities other than Moscow . . .

Russian Constitutional Court justices are products of the Communist nomenclatura system. They would not have reached their positions without the political loyalty and adaptability required by that system. Some of them may have retained some of these beliefs, while others may have developed progressive views. As long as it appeared possible, or even likely, that the Parliament would emerge victorious from its struggle with the President, the conservatives on the Court could well afford to challenge the President in the name of "constitutional legality." Once the President had consolidated his power, political opposition became self-destructive. In a system that continues to be based on quasi-feudal alliances and opportunism, it will not be surprising to find a more cooperative attitude on the part of the President's former opponents on the Court as long as the President appears to have firm control of the vast powers allocated to his office under the new Constitution . . .

B. Learning from the Past
The New Law . . . makes several promising attempts to reinforce the independence of the justices and to depoliticize the activities of the Court. The most obvious step in the direction of depoliticization is the elimination of the Court's right to take the initiative in impeachment proceedings . . .

Unfortunately, the Russian legal and political establishment retained a major obstacle to efficient constitutional review: the obligatory public hearing, which involves elaborate and immensely time-consuming adversarial fact finding and pleading procedures, from which the Law contains no escape clause . . .

C. Learning from Foreign Experience . . .
Arguably, the introduction of twelve-year terms and two panels, as in Germany, may enhance quality and speed in the Court's work. However, the reservation of important functions to a nineteen-member plenum— including the adoption and assignment of every individual case for examination—shows that profound political distrust overwhelms considerations of professional efficiency . . .

A negative development is that the Court no longer has the right to examine the constitutionality of political parties. It is with good reason that the German Constitution assigns this politically sensitive task to the Constitutional Court rather than the regular court system. The same observation applies to electoral disputes.

QUESTIONS AND COMMENTS
1. How much was the demise of the first court the responsibility of the justice (or of the Chief Justice's extrajudicial activities), how much of the elected officials; and how much of a Constitution that, in the Lawyers' Committee's words, was "inherited from the Soviet era . . . [and] so heavily amended . . . that it filled with internal contradictions..."? The Court was unable to resolve [including for example, that] the Constitution stressed the principle of separation of powers but went on to guarantee parliamentary supremacy . . .

2. Professor Epstein argues that the success of constitutional courts in democratic societies results from strategic interactions between the court, the executive, and the chambers of the national legislative branch. Epstein, supra, 52 Law & Soc'y Rev. 117. This interaction, in turn, is conditioned by case salience (how much it matters to political actors), case