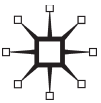
CONTENTS



REGIME TRANSITION AND THE JUDICIAL POLITICS OF ENMITY

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CHAPTER ONE

Interrogating Constitutional Justice: Contingency and Ambivalence of the South Korean Court's Role as Guardian of the Constitution

Among the societies that experienced a political transition away from authoritarianism in the 1980s, South Korea is usually described as a paragon of "successful democratization." This achievement is considered to be intimately tied to a new institution introduced with the 1987 revision of the constitution to safeguard fundamental norms and basic rights: the Constitutional Court of Korea. From a domestic viewpoint, the court's jurisprudence is largely celebrated for having fulfilled both purposes, thereby importantly contributing to the process of establishing the rule of law after the change of regime.[1] In a comparative perspective, the South Korean constitutional adjudicator is today identified as "the most important and influential" institution of its kind amid its counterparts in the Asian region.[2] The path epitomized by the Constitutional Court of Korea certainly merits recognition and appraisal, especially taking in account the doubts that initially surrounded its capacity to act as guardian of the constitution.[3] Yet, concentrating on the court's accomplishments may only shed partial light on the role it has assumed in the post-authoritarian era.

To interrogate this role, the present book focuses on one of the major issues in which the institution has had to intervene since its creation: reviewing the contours of enmity in South Korean democracy—that is, arbitrating the protracted and still ongoing disagreement between the state and various parts of civil society over what is legally sanctioned as "national" and "antinational." Such an issue can be said to pertain to

those "matters of outright and utmost political significance that often define and divide whole polities" and whose resolution is increasingly delegated to constitutional courts, a cross-national phenomenon captured by the concept of "judicialization of politics."[4] As a result of the contemporary magnitude of courts' involvement in public policy-making, considerable scholarly interest is dedicated to the variation that judicial institutions exhibit in terms of independence and strength—two dimensions along which the Constitutional Court of Korea is considered to score high.[5] Independent and strong courts' commitment to acting as guardians of the constitution, however, does not necessarily and exclusively translate into liberal outcomes, such as fortifying the rule of law and upholding the rights guaranteed to individuals. The common assumption that constitutionalism, liberalism, and democracy are bound to mutually reinforce one another has been questioned in a variety of contexts and deserves to be in the South Korean case.

This book's primary contribution therefore lies in comparative constitutional politics where heightened attention has been drawn in recent years to non-Western societies in general, and new democracies in particular.[6] In this respect, the relevance of a monographic study centered on contemporary South Korea is not only to empirically document a prominent case still relatively overlooked in the literature but also to formulate a theoretically provocative argument, excavating the two-sidedness of the court's mission to define and defend the post-authoritarian constitutional order. The notion of judicial politics of enmity that I propose aims at encapsulating the nature and ambivalence of this role discharged by the Constitutional Court of Korea as it has been asked to determine who is recognized a place in the community of national subjects by opposition to who is excluded from its scope as posing a threat since the regime change.

In itself, constructing and combating enmity does not contradict the function for which constitutional courts are believed to exist. Indeed, safeguarding the constitution does not merely entail for courts to protect the rights and freedoms that basic norms consecrate. As pointed out by John Finn, the task of "constitutional maintenance" involves a responsibility to preserve both the "constitutional" and "physical" integrity of the existing order.[7] In confronting those who endanger this order, some courts may come to grips with a greater predicament than weighing liberty against security in times of crisis. Cases such as the South Korean one indeed appear to exemplify a further puzzle and paradox of constitutional intervention: the illiberal component that can accompany courts' role when their commitment to defining and

defending constitutionalism institutionalizes a durable bias against specific segments of the polity.

This critical argument is not premised upon a culturalist postulate that would proclaim the incompatibility between so-called Western liberal values and Eastern forms of democratic and constitutional experiments (labeled as "Confucian" or otherwise).[8] If this disjunction exists in contemporary South Korea, as contended, for instance, by Choi Jang-Jip, it corresponds to the result of a particular historical and institutional trajectory rather than to the expression of an intrinsic inability to accommodate liberalism, conceived as "an emphasis on individual liberty both of the self's inner mind and conscience (including religious and political beliefs) and [on freedom] from restraints by external authority, either state or group."[9] Such a bifurcation cannot be separated from the domestic effects brought about by the Korean division on the South's political structures and cleavages.

Contrary to what may seem, the North-South border never stood as the sole marker of inclusion and exclusion in the peninsula. Its own coming into being has given birth to a more insidious line of separation than the 38th parallel, a division not only between but within both Koreas as each became obsessed with eliminating its "internal enemies." It has long been argued that these enemies, far from being confined to the groups or individuals threatening the security of the state, also encompassed different categories and successive generations of regime opponents under all South Korean authoritarian regimes.[10] This understanding of enmity still proves excessively narrow to comprehend post-1987 dynamics, in which the repressive instruments deployed in the name of national security have mainly served to police a certain and contentious sense of what the "national" is. It is in the frame of this state-society conflict opposing competing ways of imagining the contours of the body politic that the Constitutional Court of Korea has been asked to intervene and that its role must be interrogated.

Regime Change and the Politics of Constitutional Lawmaking

Since 1945, judicial review—or the establishment of courts in charge of checking the conformity of legislative statutes with constitutional norms and to strike down the former in case of conflict with the latter—has become a standard feature of transitions away from authoritarianism, in Europe and elsewhere.[11] Yet, the existence of institutions

in charge of constitutional adjudication is not restricted to democratic contexts. Courts may actually play important functions even in severe political settings.[12] The genealogy of judicial review in South Korea illustrates that mechanisms to uphold the supremacy of the constitution were available under all consecutive regimes since 1948, borrowing from various traditions and models.

By the late 1980s, three different systems were put to test: the constitutional committee (hŏnpŏp wiwŏnhoe) of the First, Fourth, and Fifth Republics (respectively in place between 1948–1960, 1972–1979, and 1980–1987); the constitutional court of the short-lived democratic Second Republic (1960–1961); and the decentralized model embraced by the Third Republic (1962–1972) in which constitutional adjudication was carried out through ordinary tribunals and the Supreme Court of Korea (taebŏbwŏn), as in the United States but in contrast to continental Europe where specialized constitutional courts prevail (see table 1.1). Even though judicial review was in existence during South Korea's authoritarian era (with the constitutional committee of the First Republic and the supreme court of the Third Republic having rendered a few rare decisions of unconstitutionality), it failed to fully develop given the absence of separation of powers and lack of independence plaguing the courts.[13]

As with most instances of regime change since the late eighteenth century and throughout South Korea's own history, the country's 1987 transition to democracy was accompanied by constitutional reform.[14] This episode took the form of a negotiated process between political elites, which resulted in the revision, rather than replacement, of the constitution adopted in 1948, in the context of the two Korean states' separate founding—with the Republic of Korea (taehanmin'guk) being established in the south of the peninsula on August 15, while the Democratic People's Republic of Korea (chosŏn minjujuŭi inmin konghwaguk) was proclaimed in the northern half on September 9.[15] In contrast to the constitution of North Korea, which was replaced for the first time in 1972, that of the South has endured since 1948 and undergone nine amendments.[16] While most of them centered on the issue of presidential power, only the 1987 one derived from a compromise among political elites rather than being engineered by the dominant party.[17] The South Korean transition of 1987 therefore fits within a larger universe of cases where political and constitutional change was the product of pact-making between the ruling and opposition forces. This being said, South Korea also belongs to a rare subclass of cases where democratization took place while the constitution of the ancien

Table 1.1 Systems of judicial review associated with successive South Korean political regimes

Date	*Constitutional and Political Events*	*Institution in Charge of Judicial Review*
July 17, 1948	Enactment of the constitution of the First Republic, President Rhee Syngman (1948–1960)	Constitutional Committee
July 7, 1952	Constitutional revision allowing for direct president elections	
November 29, 1954	Constitutional revision lifting the two-term limit on presidential office	
June 15, 1960	April 19, 1960, revolution, constitutional revision introducing the Second Republic, Premier Chang Myon (1960–1961)	Constitutional Court
November 29, 1960	Revision introducing ex post facto penalties for crimes of corruption under the previous regime and creating a special tribunal and prosecutor for those crimes	
December 26, 1962	May 16, 1961, coup d'état, constitutional revision introducing the Third Republic, General Park Chung-hee (1961–1979)	Supreme Court
October 21, 1969	Revision allowing the president to run for a third term after the two-term limit was reintroduced in 1962	
December 27, 1972	Authoritarian radicalization of the Park regime, constitutional revision introducing the Fourth Republic (so-called Yusin, or revitalization, constitution)	Constitutional Committee
October 27, 1980	December 12, 1979, coup d'état, constitutional revision introducing the Fifth Republic, General Chun Doo-hwan (1980–1987)	Constitutional Committee
October 29, 1987	1987 June Democratization Movement, constitutional revision introducing the Sixth Republic, Presidents Roh Tae-woo (1988–1993), Kim Young-sam (1993–1998), Kim Dae-jung (1998–2003), Roh Moo-hyun (2003–2008), Lee Myun-bak (2008–2013), Park Geun-hye (2013–)	Constitutional Court

Source: Author.

régime was kept and amended, as in Hungary, Chile, Peru, Indonesia, and the Republic of China on Taiwan—the sole other states in Eastern Europe, South America, and Asia that did not enact a new basic norm during the wave of democratization and constitution-making of the 1980s.[18]

The 1987 change of regime thus corresponds to what could be termed a "transition by amendment," in which democracy was institutionalized while retaining the constitution inherited from the previous regime. The nature of the South Korean process (swift and one-time) nonetheless seems to set it apart from other cases where constitutional revision followed a more gradual path (with multiple amendments unfolding over several years).[19] In other words, the South Korean trajectory can be described as transitioning by amendment rather than by amendments. Although none of these two paths has been fully theorized as a distinctive category or modality of regime change as of yet, the logic of their occurrence can be clarified thanks to the insights offered by the literature which, from both positive political science and normative political theory, increasingly takes into account the political dynamics and interests that pervade the constitution-making process. As described by Jon Elster,

> In idealized stories about constitution-making, impartial and rational framers design institutions that will reduce the scope for dangerous passions and channel the self-interest of future generations to promote the public good. Constituent assemblies are made up by saints or demigods who legislate for beasts. But this is nonsense. In general, framers are no less subject to interest and passion than those for whom they are legislating.[20]

In so far as the present analysis conceives of constitutional lawmaking, by legislators or judges, in this non-idealized way, it situates itself in the continuity of the realist tradition. This approach can be traced to the early twentieth century when the school of American legal realism rejected the classical idea—and ideal—of law as an autonomous field. The hallmark of the realist tradition that further developed in the late 1950s and 1960s around the seminal works of Robert Dahl and Martin Shapiro is to consider judicial review as "a form of politics by other means."[21] In recent years, this understanding of courts has been importantly extended to the political conditions and calculations surrounding their emergence as guardians of the constitution.

In this perspective, Melissa Schwartzberg has highlighted how entrenchment, or the insulation of certain parts of the constitution from the possibility of legal change, "serves as a means by which legislators can seek to protect not only those rules that they regard as most important or those that serve a 'constitutive' purpose—securing the conditions of democratic decision making, or preventing democracy from revising itself into tyranny—but as a means of preserving privileges and power asymmetries."[22] In her eyes, the risk ensuing from entrenchment is to render courts solely responsible for shaping the content of non-modifiable constitutional clauses and constructs such as "human dignity," the "basic order of free democracy," or the "republican form of government," that may thus be defined in ways that only judges themselves will be able to mend by reversing their own precedents.

According to Schwartzberg's reasoning, "we must bear in mind that entrenchment of a provision as vague as regime type may empower the constitutional court to determine the contours of what, precisely, a 'republic' entails, with the distributive consequences and the irreversibility such a decision might entail."[23] The scope of this argument can be expanded as courts in charge of judicial review engage in the task of articulating and therefore shaping the "basic structures" or "fundamental principles" that compose the constitutional order even in the absence of entrenchment. Indeed, specifying what these structures and principles are does not merely contribute to the historicization of law in the context of post-World War II legal systems' refoundation outside any meta-referentiality to philosophical norms or to nature.[24] Such an intervention by constitutional courts can also participate in the consolidation of non-inclusive arrangements when the meaning and contents of these "basic" and "fundamental" categories appear to be a source of society-wide disagreement.

In a work that sees itself as exemplary of the contemporary realist approach to comparative constitutional politics, Ran Hirschl analyzed the constitutionalization process undergone by countries such as Israel or Canada in the 1980s–1990s (i.e., in the absence of "transition scenario") as a form of self-interested preservation from threatened political, economic, and judicial elites with a shared interest in maintaining their hegemony.[25] For instance, Hirschl demonstrated how the hostile attitude of the elites toward judicial review started to evolve in Israel "as the secular Ashkenazi bourgeoisie and its political representatives increasingly lost their grip on Israeli politics."[26] The 1992 Basic Law on Human Dignity and Liberty was precisely enacted in the context of

shifting demographics associated with the growth of the religious and non-Ashkenazi segments of the Jewish population to compensate the corresponding erosion of traditional players' power and influence.

Rather than being the product of a progressive revolution, the constitutionalization of basic rights is here conceived as the outcome of a strategic interplay between elites with a convergent stake in preserving their vision of the nation-state. Because of the variety of actors taken into consideration, Hirschl characterized his strategic explanation as "thick" to distinguish it from the "thin" version mainly emphasizing the role of partisan interests and electoral competition in constitution-making. In the latter framework, the emergence of an effective mechanism for judicial review proceeds from a bargain among political parties that are not sure of winning the first elections after the change of regime. This logic has been notably elaborated upon by Tom Ginsburg in his comparative study of constitutional courts in new Asian democracies.[27]

Ginsburg's theory accounts for the introduction and variation in strength of the South Korean, Taiwanese, and Mongolian courts in relation to the degree of electoral uncertainty existing at the time of the constitutional reform process. Judicial review is supported when two or three political parties of roughly equal weight seek to "insure" themselves against the risk of losing the coming elections by introducing a mechanism that will constrain the policy-making power of the future majority. If electoral uncertainty is high (as was the case in South Korea), a strong court will be empowered by the framers to minimize the prospective costs of not being in power; on the contrary, if this uncertainty is weak (as in Mongolia and to a lesser extent Taiwan), the dominant political party does not have an incentive to bind its future policy-making capacity.

Hirschl's "thick" strategic explanation can be used to complement the "thin" theory of Ginsburg and bring attention to the broader range of interests than mere partisan ones involved in, and potentially sheltered through, the establishment of constitutional review. In the South Korean case, the transition to democracy was controlled by political elites from both the ruling and opposition parties sharing commonalities despite their electoral rivalry and divergent policy preferences. Whereas both sides are only presented as antagonistic in Ginsburg's account, they were also united around a consensual premise embodied in the closed format of their negotiations: resisting the pressure for systemic and substantive reform exerted by the popular democratization movement, composed of the various groups (mainly student

organizations, trade unions, and church activists) which were mobilized against authoritarian rule throughout the 1970s–1980s and prompted its collapse in June 1987.

In this perspective, Choi Jang-Jip has remarkably demonstrated how the modalities of the transition, and of its constitution-making moment in particular, made it possible for conservative forces (most prominently the authoritarian leadership) to survive and even reinforce themselves.

> The period from June 29, 1987, until the constitutional amendments were adopted in the National Assembly in October of the same year can be called the period of pact-making between the ruling and the democratic forces in Korea. The bilateral negotiations took the form of a political meeting between representatives of the ruling and opposition parties, participating on behalf of major political forces of the time. But these roundtables meetings for negotiating democratic institutions were a political game among the elites of institutional politics, and did not involve movement forces.[28]

With the exclusion of the student and labor movements' representatives, the institutionalization of South Korean democracy was clearly dominated by the kind of coalition Hirschl has stressed, with the interests of both organized political parties as well as economic elites (the chaebŏl or business conglomerates, partners of the developmental state since the 1960s) being secured to the detriment of the popular demands for transitional and social justice rooted in anti-regime activists' alternative vision of national identity and history. Yet, the strength that the constitutional court has displayed since the late 1980s cannot be automatically attributed to a calculated effort on the part of these elites to preserve the "conservative bias" of the new democratic order.[29] The institution introduced by the revised constitution of 1987 and the review mechanisms created by the Constitutional Court Act (hŏnpŏp chaep'ansopŏp) of 1988 did not necessarily bear the seeds of later developments. An accumulation of constraints related to the court's composition, jurisdiction, and adjudication could have severely impaired its ability to play an effective role in the post-authoritarian era.

While the next chapter offers a detailed overview of the 1987 negotiated constitutional revision, highlighting the contingency embedded in the court's coming into being, the following section discusses the need for contemporary scholarship to take into consideration not

only the political interests involved in constitutional design but also the absence of predetermination governing institutions' path.

Theorizing Uncertainty

The uncertainty that accompanies the birth of new institutions such as the Constitutional Court of Korea is poorly taken into account by theories of institutional design in general, and constitutional crafting in particular. Institutional analysis has known a revival since the 1980s, under the impulse of three methodological approaches: historical institutionalism, rational choice institutionalism, and sociological institutionalism.[30] It is in the wake of this renewed interest for institutions that courts emerged as an object of comparative political inquiry in the early 1990s.[31] The realm of comparative constitutional politics has thrived for the past two decades while the avenues for research diversified, especially in terms of geographical reach. The field can also be described as having experienced a new "realist turn" in the early 2000s, venturing beyond earlier works' postulate that "constitutional courts and their jurisprudence are integral elements of a larger political setting."[32]

When it comes to the establishment of constitutional courts, the main proposition of the recent realist literature lies in its claim that "post-World War II rights ideology alone simply cannot explain the tremendous variance in the institutional design, forms of constitutional review, scope of judicial activism, and above all, precise timing of constitutionalization."[33] Instead of arising from the dissemination of rights-promoting norms and discourses, the creation of institutions in charge of constitutional review is envisioned as the result of strategic decisions made by actors whose motivation rests in the pursuit of their own political interests. From realist scholars' viewpoint, constitution-making and constitutionalization are therefore never the work of altruistic framers willing to set constraints upon their future actions for the sake of the greater public good or general welfare. According to Tom Ginsburg, this alternative and ideational view of constitutionalism as a form of collective self-binding—or "precommitment"—veils the agency problem involved in any institutional design process.

> It is not sufficient to describe constitutional review as a device to protect citizens from future politicians without explaining why it serves the interests of present politicians who serve as a veto gate

> for the constitution. Although constitutional designers are subject to the same constraints of bounded rationality as everyone else, there are reasons for assuming that they consider their institutional choices carefully.[34]

While this point of departure—not to consider constitutional institutions as the outcome of disinterested choices on the part of their crafters—is a relevant one, strategic accounts such as Ginsburg's insurance theory nonetheless appear to provide too mechanistic an explanation of the dynamics at work in constitution-making. In the insurance theory, let us recall that two variables are critically important to account for differences in the design of judicial review across cases: the political uncertainty that exists before the constitutional bargain, and the political diffusion that reigns afterward. As previously exposed, if the prospective positions of political parties are unsure at the time of the transition and remain so in its aftermath, all the conditions are met for a strong constitutional system not only to develop but also to be intentionally designed and implemented.

This is where scholars associated with the precommitment theory—such as Jon Elster who first extended the metaphor of individual self-binding to constitutionalism before reconsidering it—may shed light upon institutional realities neglected by strategic explanations such as Ginsburg's.[35] As a matter of fact, taking into account framers' interests is not what distinguishes the positions of the two authors. While Elster's own work does not contradict the rational premise of Ginsburg's analysis, his approach to constitution-making contains a radical criticism of realists' current conceptualization of how interests matter. In the view of constitutionalization as a process orchestrated by elites in order to insure themselves against the risk of electoral loss or to preserve their threatened hegemony, institutional designers do not merely act strategically; the very strength of constitutional courts is the outcome of intentional choices on their part. Consequently, the success of judicial review appears largely predetermined by the will of political actors and their shared perception that a strong system of constitutional justice is the most desirable option in a context of partisan competition or declining legitimacy and influence.

Strategic accounts are particularly vulnerable to falling prey to a pitfall known as the functionalist fallacy, which Jon Elster condemns as the "appeal to beneficial but unintended consequences to explain behavior (or, alternatively, the inference from consequences to intention)."[36] In other words, this type of reasoning occurs when "the explanation of

institutional forms is to be found in their functional consequences for those who create them."[37] This criticism implies that, too often, intentions are derived from consequences while such consequences may have been entirely unintended or wrongly anticipated by actors, even when they benefit from them in retrospect. Similarly, strategic explanations leave no room for institutional design's unpredicted effects. Uncertainty itself is not absent from such theories, but it only features in their background as prompting risk-averse actors to shield themselves against the reversals of the democratic policy-making process when they cannot—or can no longer—expect to control it. The outcome of these political calculations, however, is not uncertain.[38] The strength of judicial review being the product of constitution-makers' deliberate crafting, a court will be strong where they want it strong, and weak where they want it weak.

The type of contextual uncertainty described by realist scholars is thus very different from the fundamental contingency surrounding the birth and trajectory of institutions. This contingency is erased when institutional outcomes are treated as the purposeful result of political actors' careful engineering. Such a straightforward cause-and-effect chain can happen, but its occurrence is likely to be very infrequent. According to Jon Elster, a rare example of it can be found in the reform of the French Constitutional Council masterminded by President Valéry Giscard d'Estaing in 1974.

> Up to that point, the council had mainly been an instrument of the government of the day in its dealings with unruly parliaments. The opposition had no power to call upon the council to scrutinize laws for their possible unconstitutionality. As president, Giscard d'Estaing handed this weapon to the opposition on a plate, by allowing any group of sixty deputies or senators to bring a law before the council. His motive, however, was not to restrict his own freedom of action. He foresaw, correctly, that the next parliamentary majority would be socialist; also, correctly again, that one of its priorities would be to nationalize important industries; and finally, once more correctly, that the council would strike down such legislation as unconstitutional. He very deliberately and successfully sought to restrain the freedom of actions of his successors.[39]

The congruence between actors' calculations and a given institution's path provided in this example of constitutional crafting is the exception

rather than the rule. Even when institutional designers obtain what they may have initially wanted for the protection of their interests, such consequences can result from other processes than the ones they intended to create, as illustrated by the making of the Constitutional Court of Hungary.

> As John Schiemann has shown, some Hungarian Communists were in favor of a strong constitutional court because they predicted, correctly, that if parliament were to adopt retroactive legislation or extend the statute of limitations for the purpose of bringing them to justice, the court would strike down these measures. One Communist delegate to the Round Table Talks said, "We thought that this was one of the institutions which would later be able to prevent a turning against the constitution, a jettisoning of the institution, the creation of all sorts of laws seeking revenge." One should add, however, that unlike Giscard d'Estaing they were proved right for the wrong reasons. The Hungarian Communists thought they would be able to appoint "reliable" judges as the first members of the court, as an insurance device in case they should become a minority in the new parliament. The court that was actually appointed had a quite different composition. The principle the judges invoked when striking down the retaliatory legislation, namely, that it violated the principle of legal certainty, was not in any way window dressing for Communist self-protection.[40]

Jon Elster's analysis therefore confirms that constitutional design can be the result of strategic decisions on the part of political elites but that their intentions, even when realized, do not predetermine the institutional effects that they seek to create. In the case of South Korea, the conception of a constitutional court during the 1987 revision of the constitution and later through legislation similarly suggests that the institution was not necessarily created to become what it is today given multiple restrictions that could have bound its capacity to act as guardian of the constitution. Other actors than its crafters actually played a crucial role in activating judicial review, such as human rights lawyers investing constitutional justice as a site for contesting the confines of the new democratic order. Yet, what the court has done is far from having been conditioned by their demands either.

The Paradox of Defending the Constitutional Order

The thesis following which jurisprudence is not only made by judges but also depends on the groups that have the ability to engage in sustained constitutional litigation was famously formulated by Charles Epp in the late 1990s. His comparative study of the "rights revolution" that several legal systems have undergone since the 1960s, most notoriously in the United States, led him to attribute such a phenomenon to the successful rights advocacy of civic associations, such as the American Civil Liberties Union, rather than to the activism of courts themselves.[41] Similarly, constitutional justice in post-authoritarian South Korea has been consistently resorted to by the parts of civil society that the institutionalization of democracy marginalized, especially thanks to human rights lawyers' mobilization against so-called evil laws. Over the years, these professionals have been involved in challenging many of the repressive mechanisms inherited from the authoritarian period, such as the National Security Act as developed in Chapter Three.[42]

The Constitutional Court of Korea's response to this appeal, however, has proved paradoxical. As this research argues, the institution's commitment to defining and defending the constitutional order has translated into both liberal and illiberal outcomes: curbing existing security instruments while confirming their contemporary relevance and functionality; setting bonds on the powers of government by dismantling a number of authoritarian remains while consolidating the non-inclusiveness of South Korean democracy. Unearthing the ambivalence with which the constitutional court has discharged its role as guardian of the constitution importantly sheds light upon the subtle solidarity between constitutionalism and the political alienation of certain segments of society in contemporary South Korea. This ambivalence does not epitomize the separation traditionally drawn between constitution and constitutionalism, according to which the former may exist without the latter if constitutional norms "are perceived mainly as policy tools or as instruments for short-term or partisan interests."[43] Constitutional democracy in South Korea is not a sham or façade, as illustrated by the vibrancy of constitutional adjudication and the court's contribution to promoting the rule of law and fundamental rights. The critical perspective adopted in this study does not aim at refuting that the court has acted as guardian of the constitution. Instead, it seeks to call attention to the exclusionary dimension of the South Korean court's intervention as it has performed the task of defining and defending the constitutional order.

The research thus concentrates on constitutional language to explore the ways in which an institutional-discursive formation thought to be liberal can nonetheless instantiate an illiberal component. While paying utmost attention to the words and reasonings articulated by the court, this approach does not revolve around an internal, juridical, or doctrinal understanding of rulings and their contents. The analysis is primarily interpretive, reconstituting the political dispute that underlies the legal one in each of the cases brought before the court by taking into account the text, context, and subtext of its decisions. In the selection of jurisprudence examined in this book, the overall underlying dispute staged and settled in the constitutional arena concerns delineating the boundaries of what constitutes enmity in South Korean democracy, of who counts as a "national" or "antinational" subject and is consequently included in or excluded from the body politic. Identifying the nature of this conflict makes it possible to uncover the paradox of the Constitutional Court of Korea's role: how its commitment to acting as guardian of the post-authoritarian constitutional order has led it to contain the demand for more inclusiveness emanating from various parts of civil society since the 1987 change of regime.

Although critical of South Korean constitutional justice in contending so, the present study does not entail a normative assessment about what the court should have done—additionally or dissimilarly. One of the reasons why the analysis refrains from this judgment stems from my belief that the court may not have had the possibility to act much differently than it did. Ultimately, the court indeed appears to have been constrained by the very nature of the paradox in which it has been caught: defining and defending the constitutional order when the foundations that it lays institutionalize a durable bias against certain segments of the polity. Such a position situates this work in between the optimistic view and the skeptic stance toward legal mobilization and constitutional intervention. The former emphasizes the compelling, and seemingly subversive, power of the constitutional stage: its apparent ability to give a voice to those who are being denied one by the very mechanisms of exclusion that judicial review offers the opportunity to contest, by raising the issue of their conformity to constitutional norms. By contrast, the latter questions the possibility to speak and to become visible, which the constitutional stage supposedly effectuates.

Indeed, this possibility only exists as long as individuals are able and willing to articulate a particular language and subjectivity, that of the right-claiming subject, which "as Kirstie McClure has argued . . . implies the modern constitutional state as 'a privileged expression of political

community and hence as the principal and necessarily privileged site of political action.'"[44] Moreover, although the individual gains derived from bringing one's case on the constitutional stage can be real, appealing to law and courts to denounce injustice also risks lending credibility to the order being opposed, thus producing a form of "involuntary legitimation."[45] Jacques Rancière's skepticism goes further when he argues that "the practice of the 'constitutionality checkup'" only amounts to the "transformation of the political dispute into a legal problem."[46] Constitutional justice is therefore not a stage where politics—conceived as disagreement (mésentente), that is, as "a dispute over the object of the discussion and over the capacity of those who are making an object of it"[47]—is likely to happen.[48]

In place of these two opposite approaches, the present research aims at highlighting the paradox inherent to South Korean constitutional justice as a site where the fundamental political disagreement of the post-authoritarian era—the contentious ascription of enmity—has been both unprecedentedly voiced by a variety of litigants and ambiguously resolved by the court. Analyzing its corresponding jurisprudence over the past three decades reveals how the institution, through its function of defining and defending the existing constitutional order, has been involved in the struggle over redrawing the contours of democratic inclusion and exclusion in an ambivalent way.

Collection and Presentation of the Jurisprudential Corpus

The total volume of decisions included in this study consists of close to 70 rulings delivered since the Constitutional Court of Korea began to operate, of which more than half have been partly or integrally translated into English by the institution while the rest are only accessible in Korean language.[49] In approaching these judgments, the analysis relies on both the original texts and, when available, their official translations, from which excerpts are reproduced unless otherwise indicated. Between September 1, 1988, and January 31, 2015, 26,943 cases were filed with the court, although less than 500 cases were annually received until the mid-1990s and more than 1,500 have been registered each year since the mid-2000s.[50] The overwhelming majority of affairs (over 96 percent) reaches the court through one of its two channels for submitting a constitutional complaint, especially through the procedure of article 68, section 1, of the Constitutional Court Act following which any person alleging a violation of his or her basic rights by

an exercise or non-exercise of governmental power can directly petition the court. Between late 1988 and early 2015, 21,139 complaints were filed through this mechanism, that is, 78 percent of the court's caseload (see table 1.2).

Approximately half of the cases received by the Constitutional Court of Korea are dismissed as nonjusticiable by a small bench of three justices (13,599 cases between 1988 and 2015). Out of the remaining 13,344 cases, 836 were still pending as of January 31, 2015, leaving the total of affairs decided by the court's full bench of nine justices to 12,508 over the past 27 years (which amounts to less than 500 cases settled a year). Most of the cases adjudicated by the full bench, however, are rejected (6,714), dismissed (1,775), or withdrawn (791). As a result, only a small proportion of cases (3,222) resulted in a decision of constitutionality, unconstitutionality, or another form of holding between September 1988 and January 2015: 1,961 were found constitutional, 497 unconstitutional, 164 nonconforming to the constitution, 69 only partly unconstitutional, 28 only partly constitutional, and 503 were upheld (a term used when the court accepts a constitutional complaint that does not include a constitutionality of law issue).

While the number of rulings included in this research only represents a minor fraction of all the cases ever adjudicated by the court, the selected corpus deals with one of the overriding issues in which the court has had to intervene since the change of regime: redrawing the boundaries of enmity in post-authoritarian South Korea. This issue encompasses most of the major matters examined by the court over the past three decades: reviewing the constitutionality of the main mechanisms of exclusion operating in the name of preserving the security of the state (such as the National Security Act, the ideological conversion policy, the criminal justice system, and compulsory military service); arbitrating which political actions and actors are compatible or incompatible with democracy; determining the contours of the national community through the assessment of nationality, citizenship, and immigration laws; as well as settling matters of war and peace.

The body of cases retained as relevant is therefore not limited to the rulings concerning the main security instruments that have remained deployed after the transition despite being inherited from the authoritarian era. The assembled corpus also interrogates the Constitutional Court of Korea's construction of enmity in relation to a broader set of issues that incorporates many of the court's most momentous and commented judgments, such as its 1995 series of rulings related to the prosecution of former dictators Roh Tae-woo (No T'aeu) and Chun

Table 1.2 Case statistics of the Constitutional Court of Korea between September 1, 1988 and January 31, 2015

Type		*Total*	*Constitutionality of Statutes*	*Impeachment*	*Dissolution of a Political Party*	*Competence Dispute*	*Constitutional Complaint*		
							Sub Total	*§68 I*	*§68 II*
Filed		26943	851	1	1	84	26006	21139	4867
Settled		26107	799	1	1	80	25226	20701	4525
Dismissed by small bench of three justices		13599					13599	11382	2217
Decided by full bench of nine justices	Unconstitutional	497	241				256	80	176
	Unconformable	164	56				108	46	62
	Conditionally unconstitutional	69	18				51	19	32
	Conditionally constitutional	28	7				21		21
	Constitutional	1961	296				1665	4	1661
	Upheld	503			1	16	486	486	
	Rejected	6714		1		20	6693	6693	
	Dismissed	1775	62			30	1683	1411	272
	Other	6					6	5	1
	Withdrawn	791	119			14	658	575	83
Pending		836	40			4	780	438	342

Source: Based on the statistics of the Constitutional Court of Korea.

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Doo-hwan, its 2004 verdict against the impeachment of President Roh Moo-hyun (No Muhyŏn), or its 2014 decision to dissolve the Unified Progressive Party (t'onghap chinbodang—UPP). These instances have been fully part of the dispute over which political actors, actions, and discourses count as "national" or "antinational" in democratic South Korea.

This book consequently spans over the constitutional court's first four terms and the beginning of its fifth one (see table 1.3), under the successive presidency of Justices Cho Kyu-kwang (Cho Kyukwang, 1988–1994), Kim Yong-joon (Kim Yongjun, 1994–2000), Yun Young-chul (Yun Yŏngch'ŏl, 2000–2006), Lee Kang-kook (Yi Kangguk, 2007–2013), and Park Han-Chul (Pak Hanch'ŏl, since 2013). Among some 40 individuals who have served as constitutional justices between September 1988 and January 2015, only two were women: Jeon Hyo-sook (Chŏn Hyosuk, 2003–2006) and Lee Jung-mi (Yi Chŏngmi, since 2011). Constitutional justices are usually former judges or prosecutors, a difference in terms of career and professionalization believed to weigh more on their sensibility than the branch of power (executive, judicial, or legislative) that appoints them.[51]

Yet, this book does not rely on a sociological approach to the court in order to explore its role in the reframing of enmity after the change of regime. The research is not either judge-based in the way exemplified by classical studies of the U.S. Supreme Court, focusing on justices' personal preferences or interactions as respectively advocated by the attitudinal model or the strategic framework.[52] Although this book admits that the trajectories, orientations, and calculations of the individuals sitting on the bench matter to understand the institution, it primarily adopts an interpretive approach to constitutional discourse as articulated in jurisprudence to analyze how the court has contributed to the construction of enmity since the late 1980s.

While it is possible to discern important contrasts in terms of decision-making among South Korean justices, there also exists among them a largely shared order of discourse when it comes to identifying and countering existing threats to the constitutional order. The commonality upon which the court's discourse ultimately rests is not merely produced by the fact that constitutional language emanates from a certain kind of elites—although, to be sure, the legal profession forms a close-knit elite community in South Korean society.[53] This shared discursivity is also premised upon the institutional nature of the constitutional court and the dual solidarity that binds it to the state, that is, not only to the state's physical integrity that the court is committed

Table 1.3 Constitutional appointments since 1988

Year	*Presidential Nominees*			*Chief Justice of the Supreme Court's Nominees*			*National Assembly's Nominees*		
	Court's President	*Justices*		*Justices*			*Justices*		
1988	Cho Kyu-kwang (September 1988–September 1994)	Choe Kwang-ryool (September 1988–September 1994)	Kim Yang-kyun (September 1988–September 1994)	Lee Seong-yeol (September 1988–August 1991) Hwang Do-yun (August 1991–August 1997)	Lee Shi-yoon (September 1988–December 1993)	Kim Moon-hee (September 1988–September 2000)	Byun Jeong-soo (September 1988–September 1994)	Han Byung-chae (September 1988–September 1994)	Kim Chin-woo (September 1988–January 1997)
1989									
1990									
1991									
1992									
1993									
1994	Kim Yong-joon (September 1994–September 2000)	Kim Chin-woo (September 1988–January 1997) Lee Young-mo (January 1997–March 2001) Choo Sun-hoe (March 2001–March 2007)	Chung Kyung-sik (September 1994–September 2000) Song In-jun (September 2000–September 2006)	Han Dae-hyun (August 1997–August 2003) Jeon Hyo-sook (August 2003–August 2006)	Lee Jae-hwa (December 1993–December 1999) Kim Young-il (December 1999– March 2005)	Koh Joong-suk (September 1994–September 2000) Kim Kyung-il (September 2000–September 2006)	Kim Moon-hee (September 1988–September 2000) Kwon Seong (September 2000–August 2006)	Cho Seung-hyung (September 1994–September 1999) Ha Kyung-chull (September 1999–January 2004)	Shin Chang-on (September 1994–September 2000) Kim Hyo-jong (September 2000–September 2006)
1995									
1996									
1997									
1998									
1999									
2000	Yun Young-chul (September 2000–September 2006)								
2001									
2002									
2003									

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2004							Lee Sang-kyung (February 2004–June 2005)	
2005					Lee Kong-hyun (March 2005–March 2011)			
2006			Kim Hee-ok (September 2006–December 2010)	Kim Jong-dae (September 2006–September 2012)		Min Hyeong-ki (September 2006–September 2012)	Mok Young-joon (September 2006–September 2012)	Cho Dae-hyen (July 2005–July 2011)	Lee Dong-heub (September 2006–September 2012)
2007	Lee Kang-kook (January 2007–January 2013)	Song Doo-hwan (March 2007–March 2013)							
2008									
2009									
2010									
2011					Lee Jung-mi (March 2011–)				
2012			Park Han-chul (February 2011–April 2013)	Kim Chang-jong (September 2012–)		Lee Jin-sung (September 2012–)	Kang Il-won (September 2012–)	Kim Yi-su (September 2012–)	Ahn Chang-ho (September 2012–)
2013	Park Han-chul (April 2013–)	Cho Yong-ho (April 2013–)	Seo Ki-seog (April 2013–)						
2014									

Source: Based on the records of the Constitutional Court of Korea.

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to defending but also to a certain way of envisioning the "national" that it seeks to safeguard.

This institutional-discursive element is itself an incomplete part or fragment of the larger and contentious text, context, and subtext in which the court's intervention is inscribed: the asymmetrical conflict between the state and diverse parts of civil society over the boundaries of political inclusion and exclusion in South Korean democracy. To better grasp how this multilayered textuality comes into play for each of the issues brought before the constitutional court, the research's in-depth reading of jurisprudence is supported by the use of secondary sources, newspaper articles, human rights reports, and the court's own publications. These materials are particularly helpful to identify the anonymous litigants and designated lawyers involved in a given case, as well as to reconstitute the events and debates surrounding the constitutional process, including the impact of verdicts once litigation is over. Additionally, the month I spent at the Research Institute of the Constitutional Court of Korea in September 2012 provided me with the opportunity to conduct informal interviews with constitutional research officers (hŏnpŏp yŏn'gugwan) from both the court (who perform research functions in relation to pending cases and whose role may be compared to law clerks) and its institute (who perform research functions on domestic and comparative topics of interest to the court), as well as to consult the records of some of the main cases on which this book focuses.

In the end, the value of an interpretive approach to jurisprudence is to expose the contemporary and domestic dimensionality of the challenges raised by the construction of enmity in post-1987 South Korea. Indeed, the dispute over who is recognized a place in the community of national subjects by opposition to who is considered as posing a threat cannot be reduced to a disagreement about the authoritarian past or the status of North Korea. Rather than referring to these dyschronic and dystopic alterities, the textuality through which constitutional justice proceeds both registers and regulates the dynamics of inclusion and exclusion shaping South Korea's democratic experiment.

INDEX