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ABUSIVE JUDICIAL REVIEW: COURTS AGAINST DEMOCRACY***

Both in the United States and around the world, courts are generally conceptualized as the last line of defense for the liberal democratic constitutional order. But this Article shows that it is not uncommon for judges to issue decisions that intentionally attack the core of electoral democracy. Courts around the world, for example, have legitimated antidemocratic laws and practices, banned opposition parties to constrict the electoral sphere, eliminated presidential term limits, and repressed opposition-held legislatures. We call this practice abusive judicial review. Would-be authoritarians at times seek to capture courts and deploy them in abusive ways as part of a broader project of democratic erosion, because courts often enjoy legitimacy advantages that make their antidemocratic moves harder to detect and respond to both domestically and internationally. This paper gives examples of abusive judicial review from around the world, explores potential responses both in domestic constitutional design and international law, and asks whether abusive judicial review is a potential threat in the United States.

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TABLE OF CONTENTS

INTRODUCTION

Many in the United States fear that the country is living a precarious moment, and is potentially in danger of democratic breakdown.[1] Constitutional democracy is in fact under threat worldwide, with leaders across a range of countries leading efforts to erode their liberal democratic orders.[2] As many have noted, a major hallmark of recent attacks on democracy is its legalist tinge: Rather than using extra-legal mechanisms such as military coups, the new authoritarians rely heavily on formal and informal constitutional change, as well as ordinary legal mechanisms, to remake the constitutional order in ways that rig the electoral game in their favor.[3] Several prominent recent books have argued that the United States is in many ways as vulnerable as many other countries to this wave of democratic erosion, and in fact that warning signs seen abroad are also present here.[4]

Both inside and outside of the United States, courts are often seen as one of the main defenses against the threat posed by the new authoritarians. Judges are increasingly being called upon to intervene to protect democracy or to engage in a form of democratic hedging.[5] Not every effort at democratic hedging by courts will succeed. But constitutional courts can, and do, play an important role in protecting democracy from the threat of democratic backsliding.[6]

In the United States, initial optimism that the Supreme Court, and federal courts more broadly, would play such a role has faded with time. In issuing decisions such as *Trump v. Hawaii*,[7] where the

1 *See* CASS R. SUNSTEIN, CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018) (containing a number of essays on whether authoritarianism is a realistic threat in the United States); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 1-5 (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 1 (2018); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 80 (2018).

2 *See, e.g.*, Annabelle Chapman, *Pluralism Under Attack: The Assault on Press Freedom in Poland*, FREEDOM HOUSE, June 2017, at 2; Andrew Byrne, *Hungarian PM's Media Clampdown Points to the Future for Poland*, FIN. TIMES (Jan. 19, 2016), https://www.ft.com/content/15899580-b9eb-11e5-bf7e-8a339b6f2164 [https://perma. cc/C7M3-36C7]; Editorial, *The Guardian View on Poland and Hungary: Heading the Wrong Way*, GUARDIAN (July 18, 2017, 3:15 PM), https://www.theguardian.com/ commentisfree/2017/jul/18/the-guardian-view-on-poland-and-hungary-heading-the- wrong-way [https://perma.cc/97TU-9C26] [hereinafter *Heading the Wrong Way*]; Stefani Weiss, *Rule of Law in Poland and Hundary: "Our Fundamental Values are Under Attack,"* BERTELSMANN-STIFTUNG (Sept. 20, 2017), https://www.bertelsmann- stiftung.de/en/topics/aktuelle-meldungen/2017/september/poland-and-hungary-our- fundamental-values-are-under-attack/ [https://perma.cc/83Y5-8FZY] (discussing how the European Union should respond to Poland and Hungary's violations of core principles of EU law).

3 *See* David Landau, *Abusive Constitutionalism*, 47 UC DAVIS L. REV. 189, 191 (2013) [hereinafter *Abusive Constitutionalism*]; Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 560-62 (2018); Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1676-77 (2015).

4 *See* GINSBURG & HUQ, *supra* note 1, at 1-5; LEVITSKY & ZIBLATT, *supra* note 1, at 1-10.

5 "Democratic hedging" refers to the use of courts "as a hedge against excessive concentration of power." Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 1002 (2011); *see also* Sujit Choudhry, "*He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 2-3 (2009). *See generally* SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015) (discussing the role of legal institutions in constitutional democracy).

6 *See* ISSACHAROFF, *supra* note 5, at 9-11; Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 612-13 (2015) [hereinafter *Transnational Constitutionalism*]; David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859, 860-62 (2015) [hereinafter *Constraining Constitutional Change*].

7 138 S. Ct. 2392 (2018).

Supreme Court upheld President Trump's travel ban, critics argue that the Court abdicated its responsibility to check a dangerously overreaching president and affirm constitutional values.[8] There is increasing concern among similar critics that the Court will not step in to prevent other acts of potential executive aggrandizement, such as Trump's recent emergency declaration to build a wall on the Mexican border.[9]

Based on comparative evidence, this Article shows that the fear espoused by critics of the Supreme Court — that it might stand by passively as democracy is dismantled — is a reasonable one. But the prospect of courts standing idly by in the face of an antidemocratic threat is not actually the worst-case scenario.

In fact, across a range of countries, would-be authoritarians have fashioned courts into weapons for, rather than against, abusive constitutional change. In some cases, courts have upheld and thus legitimated regime actions that helped actors consolidate power, undermine the opposition, and tilt the electoral playing field heavily in their favor.[10] In other cases, they have gone further and actively attacked democracy by, for example, banning opposition parties, eliminating presidential term limits, and repressing opposition-held institutions.[11] We label courts' intentional attacks on the core of electoral democracy "abusive judicial review," and we argue that it is an important but undertheorized aspect of projects of democratic erosion.

Regimes turn to courts to carry out their dirty work because, in doing so, they benefit from the associations that judicial review has with democratic constitutional traditions and the rule of law.[12] Having a court, rather than a political actor, undertake an antidemocratic measure may sometimes make the true purpose of the measure harder to detect, and at any rate it may dampen both domestic and international opposition. The nature of the practice of abusive judicial review, which masquerades as a legitimate exercise of an institution that is now almost-universally promoted, makes the practice challenging to prevent and respond to. Not all instances of abusive review will succeed, and not all courts will (willingly) engage in the practice. But, we suggest, the practice is likely to be a significant part of the authoritarian toolkit going forward.

The remainder of the Article is divided into seven parts, following this introduction. Part I draws out our definition of abusive judicial review — constitutional interpretation by judges that intentionally attacks the minimum core of electoral democracy — and situates it in the broader literature on democratic erosion and antidemocratic change. Part II explains the logic of abusive judicial review as a regime strategy; it emphasizes why and how regimes sometimes rely on courts to carry

8 *See, e.g.*, Adam Edelman, *Democrats, Civil Rights Groups Slam Supreme Court Ruling on Travel Ban*, NBC NEWS (June 26, 2018, 9:12 AM), https://www. nbcnews.com/politics/supreme-court/democrats-civil-rights-groups-slam-supreme- court-ruling-travel-ban-n886626 [https://perma.cc/J8XQ-UH57] (collecting criticism of the decisions from various political and social groups).

9 *See, e.g.*, Emily Stewart, *Why Trump Thinks a National Emergency Will Get Him His Border Wall*, VOX (Feb. 15, 2019, 11:31 AM), https://www.vox.com/policy-and- politics/2019/1/8/18172749/trump-national-emergency-government-shutdown-wall [https://perma.cc/X98R-4YAB] (quoting various scholars who think the declaration would likely be upheld by the Supreme Court).

10 *See infra* Part III.A (defining and giving examples of "weak" abusive judicial review).

11 *See infra* Part III.B (defining and giving examples of "strong" abusive judicial review).

12 *See infra* Part II.

out antidemocratic forms of constitutional change. Part III develops a basic typology of abusive judicial review, distinguishing two key forms of the phenomenon: a "weak" form where courts simply uphold and legitimate authoritarian moves, and a "strong" form where they actively work to dismantle democracy. Part IV gives two detailed examples of abusive judicial review in action: one a cross-national study of recent judicial efforts to loosen or eliminate presidential term limits in Latin America and Africa, and the other a study of Venezuela, where the Venezuelan Supreme Court in a series of decisions nullified the power of the national legislature after the opposition won overwhelming control of it in 2015.

Part V draws on these examples to explore the limits of the strategy of abusive judicial review, and the contexts in which it is likely to be successful or unsuccessful, while Part VI explores potential responses in both domestic constitutional design and transnational or international practice. On the first point, we argue that courts should be better designed to prevent regime capture in contexts where abusive judicial review is a significant threat. On the second, we consider ways for the international community to take a more skeptical, legal realist perspective on some high court decisions.

Finally, the Conclusion asks whether abusive judicial review is a realistic threat in the United States. We argue that there are at least hints of the weak form in the Court's consistent refusal to hear partisan gerrymandering claims and related issues,[13] and routes through which the strong form could at some point emerge, for instance centered around the "weaponization" of the First Amendment.[14] The United States in some ways would be a fertile ground for abusive judicial review: There is a history of judicial legitimacy on which authoritarians could draw, and the formal rules do not make the judiciary especially difficult to capture in comparative terms. At this point, the major impediment to review of this kind in the United States would seem to lie in informal norms, including norms of legal professionalism on the part of federal judges, and political norms of respect for the independence of the federal judiciary. But there are also signs that informal norms of this kind may be eroding.

I. DEFINING AND SITUATING ABUSIVE JUDICIAL REVIEW

It is by now well known that many countries around the world have experienced an erosion in their liberal democratic constitutional order.[15] Indeed, the topic has become a central preoccupa-

13 *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1922-23 (2018) (dismissing a partisan gerrymandering claim on the grounds of lack of standing).

14 *See, e.g.*, Janus v. Am. Fed'n of State, City, & Mun. Emp., 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (accusing the majority of "weaponizing" the First Amendment).

15 *See, e.g.*, Daniele Albertazzi & Sean Mueller, *Populism and Liberal Democracy: Populists in Government in Austria, Italy, Poland and*

tion of current comparative constitutional law scholarship. Would-be autocrats have a number of tools to carry out projects of democratic erosion. The tools of formal constitutional change, both amendment and replacement, have been important across many countries both to consolidate political power and to weaken checks on it.[16] For example, in a number of Latin American countries, would-be authoritarian leaders have carried out constitutional amendments to loosen or abolish presidential term limits, allowing them to remain in power indefinitely.[17] In Turkey, the increasingly authoritarian Erdogan regime used a series of constitutional amendments both to strengthen presidential power and to allow the regime to pack the Constitutional Court of Turkey.[18] In countries including Venezuela, Ecuador, and Hungary, new leaders replaced existing constitutions entirely, in processes through which they had near total control, as a way to perpetuate the power of the regime and to marginalize the opposition.[19] In prior work, one of us has labelled this phenomenon "abusive constitutionalism," and jointly we have sought solutions to the problem.[20]

Formal constitutional change is also only one tool in a much broader authoritarian toolkit. Would-be authoritarian leaders can also carry out changes via informal mechanisms, or at the sub-constitutional level. They can pass new "cardinal" or "organic" laws that reorganize major institutions such as courts and ombudspersons in a notably less democratic or independent way,[21] or they can put pressure on courts to engage in forms of 'common law' interpretation that reduces the force of existing democratic constitutional constraints.[22] Or they may seek to achieve change via sub-constitutional means, for example by changing statutes governing the regulation and oversight of

Switzerland, 48 GOV'T & OPPOSITION 343, 345 (2013); David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521, 521 (2018) [hereinafter *Populist Constitutions*]; Weiss, *supra* note 2; Nilüfer Göle, *Turkey is Undergoing a Radical Shift, from Pluralism to Islamic Populism*, HUFFINGTON POST (July 21, 2017, 1:13 PM), https://www.huffingtonpost.com/entry/turkey-coup-erdogan_us_ 596fcfcfe4b062ea5f8efa0f [https://perma.cc/F9V2-4PL5]; *Heading the Wrong Way*, *supra* note 2; Michaela Kollin, *The Rise of Stealth Authoritarianism in Cambodia*, DEMOCRATIC EROSION (Oct. 8, 2017), http://democratic-erosion.com/2017/10/08/the-rise-of-stealth-authoritarianism-in-cambodia/ [https://perma.cc/VH8A-NR5P]; Jan Surotchak & Daniel Twining, *The Fight Against European Populism Is Far from Over*, FOREIGN POL'Y (Feb. 1, 2018, 11:19 AM), http://foreignpolicy.com/2018/02/01/the-fight-against- european-populism-is-far-from-over/ [https://perma.cc/235A-JALA].

16 *See* Landau, *Abusive Constitutionalism*, *supra* note 3, at 191-92.

17 *See* David Landau, *Presidential Term Limits in Latin America: A Critical Analysis of the Migration of the Unconstitutional Constitutional Amendment Doctrine*, 12 LAW & ETHICS HUM. RTS. 225, 226 (2018) [hereinafter *Presidential Term Limits*].

18 *See* Hakki Tas, *Turkey — From Tutelary to Delegative Democracy*, 36 THIRD WORLD Q. 776, 788 (2015); Ozan O. Varol, Lucia Dalla Pellegrina & Nuno Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMP. L. 187, 187 (2017); Steven A. Cook, *How Erdogan Made Turkey Authoritarian Again*, ATLANTIC (July 21, 2016), https://www.theatlantic.com/international/archive/2016/07/how-erdogan-made-turkey- authoritarian-again/492374/ [https://perma.cc/6YZK-DDSN]; Maria Haimeri, *The Turkish Constitutional Court Under the Amended Turkish Constitution*, VERFASSUNGSBLOG (Jan. 27, 2017), https://verfassungsblog.de/the-turkish-constitutional-court-under-the-amended- turkish-constitution/ [https://perma.cc/3MS7-HA33].

19 *See, e.g.*, Gabriel L. Negretto, *Authoritarian Constitution Making: The Role of the Military in Latin America*, *in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 83 (Tom Ginsburg & Alberto Simpser eds., 2014); William Partlett, Opinion, *Hugo Chavez's Constitutional Legacy*, BROOKINGS (Mar. 14, 2013), https://www.brookings.edu/ opinions/hugo-chavezs-constitutional-legacy/ [https://perma.cc/B4QA-JQ5S]; NORWEGIAN HELSINKI COMM., DEMOCRACY AT STAKE IN HUNGARY: THE ORBÁN GOVERNMENT'S CONSTITUTIONAL REVOLUTION 5-9 (2012), https://www.nhc.no/content/uploads/2018/ 09/Rapport_1_12_web.pdf [https://perma.cc/SMA9-9ATQ].

20 *See* Dixon & Landau, *Transnational Constitutionalism*, *supra* note 6, at 606; Landau, *Abusive Constitutionalism*, *supra* note 3, at 189; Landau & Dixon, *Constraining Constitutional Change*, *supra* note 6, at 859.

21 *See, e.g.*, MIKLÓS BÁNKUTI ET AL., OPINION ON HUNGARY'S NEW CONSTITUTIONAL ORDER: AMICUS BRIEF FOR THE VENICE COMMISSION ON THE TRANSITIONAL PROVISIONS OF THE FUNDAMENTAL LAW AND THE KEY CARDINAL LAWS 4-7 (Gábor Halmai & Kim Lane Scheppele eds., 2012); *see also* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215-17 (2001).

22 See GINSBURG & HUQ, *supra* note 1, at 126-27 for a discussion on packing institutions.

the media, or by using existing legal tools, such as defamation laws and electoral registration rules, in selective ways to punish opposition to the regime and undermine independent elements of civil society.[23]

These tools often operate in an interdependent manner — efforts to undermine democracy in countries like Venezuela, Hungary, and Turkey seem to rely on a broad mix of them. Elsewhere, as in Poland, the route of formal constitutional change is closed off (because the ruling party lacks the votes to carry it out), but the regime is able to achieve similar ends by using other tools such as gaining control of the judiciary and passing new sub-constitutional legislation.[24]

What we emphasize here is the key role that courts sometimes play in advancing these anti-democratic projects. Our perspective is very different from the prevailing view, where domestic high courts are commonly conceptualized as one of the main defenses against abusive maneuvers, and for good reason. Constitutional courts can potentially conduct exercises of judicial review that will defend the constitutional rights of minority groups and ensure that political institutions do not overstep the boundaries of their power. And as we have argued in past work, courts can also exercise control over attempts to change or even replace the existing constitution, using tools such as the unconstitutional constitutional amendment doctrine.[25] In at least some cases, these tools can help act as a speed bump that will slow or otherwise hinder efforts at democratic erosion.

Existing scholarship takes quite different positions as to how readily courts can protect the liberal democratic order. Issacharoff, for example, while acknowledging the difficult political and legal tasks faced by courts in seeking to protect democracy, argues that they can nonetheless succeed in checking the monopolization of political power, and gives examples of successful tactics.[26] Choudhry also argues that courts can use various techniques to help prevent the consolidation of dominant party rule.[27]

Daly, in contrast, expresses more skepticism about whether courts can defend liberal democracy in these ways.[28] In past work, we have emphasized that the answers to these questions are likely contextual.[29] Courts are most likely to be successful when they are relatively strong and independent, and when political parties or civil society are sufficiently strong to support implementation of

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23 *See* Varol, *supra* note 3, at 1693-1707.

24 *See generally* Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding* (Sydney Law School Research Paper No. 18/01, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491 [hereinafter *How Democracy Dies (in Poland)*] (discussing political and legal changes in Polish constitutional politics after the victory of the populist Law and Justice party).

25 The unconstitutional constitutional amendment doctrine "holds that a constitutional amendment can itself be substantively unconstitutional under certain conditions." Landau, *Abusive Constitutionalism*, *supra* note 3, at 231.

26 *See* ISSACHAROFF, *supra* note 5.

27 *See* Choudhry, *supra* note 5, at 5-6.

28 *See* TOM GERALD DALY, THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS 1-2 (2017); Tom Gerald Daly, *The Alchemists*: *Courts as Democracy-Builders in Contemporary Thought*, 6 GLOBAL CONSTITUTIONALISM 101, 101 (2017); *see also* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) (critiquing the view of courts as protectors of rights).

29 *See* Landau & Dixon, *Constraining Constitutional Change*, *supra* note 6, at 870.

court decisions. At any rate, the scholarly conversation to date has focused mainly on the ways in which courts might or might not be able to *protect* liberal democratic constitutionalism.

However, with a few notable exceptions, the existing literature has given less consideration to what we see as the also-common phenomenon of courts actively working to *undermine* the liberal democratic order. Some important work, most notably by Moustafa and Ginsburg, looks at the functions played by courts in fully authoritarian regimes, and shows they can play a central role in advancing various goals of authoritarian leaders.[30] But this question of maintaining an already authoritarian regime is distinct from the process of creating one.

Varol has noted ways in which courts can use existing legal tools (like defamation and money laundering laws) to carry out the agendas of would-be authoritarian actors trying to consolidate power and repress the opposition.[31] And some authors have carried out invaluable case studies of individual countries. For example, Sadurski has highlighted the role of the Constitutional Court in Poland both as an initial site of resistance to the abusive small "c" constitutional changes introduced by the Law and Justice party ("PiS"), and later, as a tool used by PiS to promote such change;[32] likewise, Sanchez Urribarri has conducted a detailed look at the utility of the Venezuelan Supreme Court to the regime there.[33]

What we supply here is a more general, systematic treatment of the phenomenon of courts as agents, rather than opponents, of antidemocratic constitutional change. As noted above, our definition of abusive judicial review is judicial review that intentionally undermines the minimum core of electoral democracy. We first define the two key elements of our definition — effect and intent. Then we explore the logic of abusive judicial review as a regime strategy.

A. Abusive Change and Effect on the Democratic Minimum Core

Labelling some subset of constitutional amendments and replacements "abusive" begs the obvious question of how to distinguish "abusive" forms of constitutional change from other forms. We have elsewhere defined "abusive" constitutional change as change that makes the constitutional order meaningfully less democratic than it was initially.[34] In other words, it moves on a spectrum towards authoritarianism, even if the resulting regime will often be "hybrid" or "competitive au-

30 *See* Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1-2 (Tom Ginsburg & Tamir Moustafa eds., 2008).

31 *See* Varol, *supra* note 3, at 1687-1700, 1707-10.

32 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 18.

33 *See* Raul A. Sanchez Urribarri, *Courts Between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court*, 36 LAW & SOC. INQUIRY 854 (2011). With Yaniv Roznai, we recently explored similar dynamics in Honduras. *See* David Landau, Rosalind Dixon & Yaniv Roznai, *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras*, 9 GLOBAL CONST. (forthcoming 2019) [hereinafter *Lessons from Honduras*].

34 *See* Landau & Dixon, *Constraining Constitutional Change*, *supra* note 6, at 859.

thoritarian" rather than completely authoritarian.[35] In these kinds of regimes, elections continue to be held, but they are unfair and the rights of the opposition are not respected. Sometimes, elections may be manipulated through outright fraud, such as ballot stuffing or computer manipulation, but clever authoritarians often do their manipulation well before elections have actually been held, by consolidating power, stacking key institutions such as courts and electoral commissions, and harassing opposition parties and leaders.[36]

We have also argued that these shifts between democracy and authoritarianism must be measured by using a relatively minimalist definition of constitutional democracy that consists of free and fair elections, with a minimum set of independent checks and balances on the elected government, rather than more maximal definitions that might contain a range of richer but far more contestable commitments such as deliberation or substantive equality.[37] We have called this conception the "democratic minimum core."[38]

Our minimal definition of democracy is not as narrow as purely procedural or competitive accounts of democracy, such as those developed by Joseph Schumpeter.[39] It builds in additional commitments to constitutionalism and the rule of law, including commitments to a degree of protection for certain individual rights, such as freedom of expression, association and assembly, equality or universal access to the franchise, because these rights are closely bound up with electoral fairness, independent institutions capable of supervising the electoral process, and checking the arbitrary use of executive power.[40]

In this sense, it draws on broadly shared understandings of constitutional democracy at the transnational level, such as those embodied in the Copenhagen criteria for admission of the European Union — including a commitment to democracy, the rule of law, human rights, and respect for and protection of minorities.[41] The European Union has also noted that, at minimum, electoral democracy requires: free elections with a secret ballot, the right to establish political parties without any hindrance from the state, fair and equal access to a free press, free trade union organisations, freedom of personal opinion, and executive powers restricted by laws and allowing free access to judges independent of the executive.[42] The concept of the democratic minimum core also draws on

35 *See* Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13 J. DEMOCRACY 51, 52-53 (2002). *See generally* STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR (2010).

36 *See* LEVITSKY & WAY, *supra* note 35, at 3 (noting that the use of such mechanisms "skewed the playing field in favor of incumbents," and that electoral competition was "real but unfair").

37 *See* Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 469-70 (2018) [hereinafter *Tiered Constitutional Design*].

38 *See* Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional Minimum Core*, *in* ASSESSING CONSTITUTIONAL PERFORMANCE 268 (Tom Ginsburg & Aziz Huq eds., 2016) [hereinafter *Constitutional Minimum Core*].

39 *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 241-69 (2010); *see also* RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 14-15 (2003).

40 *See* Dixon & Landau, *Constitutional Minimum Core*, *supra* note 38, at 277.

41 *See Presidency Conclusions*, COPENHAGEN EUR. COUNCIL (June 21-22, 1993), http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf [https://perma.cc/38AU- NZDP].

42 *See generally* Geoffrey Pridham, *The European Union's Democratic Conditionality and Domestic Politics in Slovakia: The Mečiar and*

an overlapping consensus in the actual practice of the majority of (true) constitutional democracies worldwide.[43] And it is generally consistent with recent legal and social scientific work on democratic erosion of backsliding, where analysts have adopted similar criteria that focus on elections.[44]

But the minimum core definition is narrower than many broader definitions of democracy, which emphasize other commitments such as deliberation or substantive equality.[45] It thus has the advantage of avoiding contentious debates in political theory about what additional commitments democracy might require. The phenomenon we seek to highlight involves the erosion of democracy on almost *any definition* or measure, and thus is one which any democracy ought to agree is normatively problematic.[46]

We recognize, however, that even a minimal definition will be difficult to apply in some circumstances. One reason is because the effect of a given change will inevitably depend on how it interacts with other changes, political institutions, and the broader political and social contexts. That is, one cannot simply make a list of "abusive" changes in the abstract.[47] Changes to appointment procedures for courts or other independent bodies such as election commissions, changes to electoral rules, and extensions of presidential term limits are all the kinds of changes that *could* have a significant negative impact on the democratic minimum core, but that does not mean they will do so in every context. Such a judgment can only be made through close consideration of context, and perhaps sometimes only with the benefit of hindsight.[48]

Applying our definition of abusiveness, a judicial decision is an act of abusive judicial review if it has a significant negative impact on the minimum core of electoral democracy. This is a narrower question than whether a decision is partisan in the sense that it favors one party over another or even that it reflects partisan judicial motives. Partisan patterns of decision-making may reduce the legitimacy of the judiciary over time or reflect other problems, but they are abusive only if they make elections systematically unfair. Moreover, decisions that impact more maximalist democratic

Dzurinda Governments Compared, 54 EUR.-ASIA STUD. 203 (2002) (explaining the EU's democratic conditionality depends on candidate countries); Kristi Raik, *EU Accession of Central and Eastern European Countries: Democracy and Integration as Conflicting Logics*, 18 EAST EUR. POL. & SOCIETIES 567 (2004); Michael Emerson et al., *The Reluctant Debutante: The European Union as Promoter of Democracy in its Neighbourhood* (Ctr. for European Policy Studies, Working Document No. 223, 2005) (discussing whether the European Union is a coherent actor in pursuing its goal of democracy).

43 *See* Dixon & Landau, *Transnational Constitutionalism*, *supra* note 6, at 629-30 (arguing that transnational constitutional practice is a useful check for courts deploying the doctrine of unconstitutional constitutional amendment).

44 *See, e.g.*, GINSBURG & HUQ, *supra* note 1, at 14 (developing a definition of liberal democracy that includes "free elections, rights to speech and association, and a bureaucratic rule of law," and grounding the latter two elements largely in their importance for electoral democracy).

45 *See* POSNER, *supra* note 39, at 130 (noting that broader theories of democracies, which build in concepts like deliberation, are more contestable).

46 *See* Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1899 (2006).

47 *See* Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559, 559-60 (2013) (arguing that checklist approaches to rule of law norms can be evaded through manipulating the interaction effect between different norms or by transplanting norms into different contexts).

48 *See id.* at 562; Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANN. REV. L. & SOC. SCI. 199, 212-13 (2016) (calling for an approach to the rule of law that is more sensitive to context).

commitments, such as principles of deliberation and ideas of substantive equality, will not automatically be abusive in the sense we are using here. Such decisions must have a significant negative impact on electoral democracy in order to constitute abusive judicial review.

Of course, figuring out whether a given decision or line of decisions has a significant adverse effect on the democratic minimum core can be a difficult question. The problem is that the democratic effect of a decision will often depend on its interaction with political and social context, and with other constitutional and legal changes. Take, for example, a judicial interpretation that loosens or eliminates presidential term limits. This is clearly the sort of change that has the *potential* to undermine the democratic minimum core, and therefore might be viewed with suspicion.[49] But not all rulings of this sort actually *will* have a significant negative effect on electoral democracy. In some contexts, the increase in presidential power might be an isolated change that is checked by other institutional dynamics or features of the political party system.[50] In other cases, the change may greatly augment a president's ability to dominate the electoral system and may be accompanied by a series of other formal and informal constitutional changes that further centralize power.

Thus, in some cases, it will only be possible to verify the impact on the minimum core after the fact. But as with other variants of abusive constitutional change, one can think about whether such change is underway by focusing on key component elements — whether, for example, the changes a leader or movement are seeking to make through the courts are likely to undermine core aspects of liberal democracy such as judicial independence and fairness in the electoral playing field. Understanding the likely effect of a given change will often require careful attention to context and to other formal and informal changes occurring in a given country.

B. Intent and Abusive Judicial Review

Our definition of abusive judicial review requires that judges *intentionally* take aim at the democratic minimum core. As we explain below in Part II, judges usually do this after being either coerced or captured by antidemocratic actors, and thus become part of a regime strategy to undermine liberal democracy. Implicit in this concept of intent is some notion of bad faith, at least when abusive judicial review operates within constitutional orders with a liberal democratic starting point.[51] In issuing decisions with a heavily antidemocratic valence, judges distort constitutional meaning and often draw on concepts and doctrines designed to protect liberal democracy in an abusive way that subverts their underlying meaning and turns them into tools to attack liberal democracy.

49 *See* Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1816-17 (2011) (describing the benefits of presidential term limits in a democratic system).

50 *See id.* at 1832.

51 For an exploration of the use of bad faith in constitutional law and theory, see generally David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016).

An intent requirement is helpful in distinguishing abusive judicial review from several other related but distinct phenomena. Courts may at times render decisions that have antidemocratic effects without having an antidemocratic motive. For some purposes, such as empirical analysis of the damage done to democracy, motive may make little difference and the variants laid out below should be seen as close relatives to abusive judicial review. But the presence or absence of antidemocratic motive will at times be very relevant in determining the appropriate response by international actors and others. Harsh sanctions against judges or other measures may be in order when judges intentionally destroy their own democratic order; softer measures may make more sense when judges make antidemocratic decisions in error or for other reasons. Moreover, abusive judicial review is much more likely to form a coherent, long-term program to undermine democracy — and thus a problem for those interested in preserving liberal democracy — when it is intentional.

First, judges may render antidemocratic decisions because they genuinely believe that existing interpretive materials — such as constitutional text or precedent — require them to reach an antidemocratic result. Cases of this kind should be relatively rare in a constitutional democracy, since commitments to democracy will generally be reflected in both the text and structure of a written constitution. In particular, it should be unusual for a liberal democratic constitution to *compel* an antidemocratic outcome. But major constitutional questions allow for a range of possible interpretive choices, and at least some of those choices may impact the democratic minimum core.[52] In some cases, as Pozen has pointed out, genuinely- held beliefs may shade into a kind of bad faith, where actors engage in motivated reasoning and block out all competing evidence.[53] In those cases, the line between intentional attacks on democracy and genuine belief in constitutional meaning might become hard to discern.

Second, sometimes judges might choose to uphold antidemocratic action for prudential reasons. Courts may believe, for example, that in the long run, issuing such decisions will leave more space for the court to counter more serious threats to democracy. In the United States, there is a vast literature on the "prudential" virtues to judicial restraint by judges. From Bickel onwards, scholars have argued that judges should engage in restrained or weak forms of judicial review — or various forms of constitutional "avoidance" — wherever stronger forms of review are likely to provoke a direct confrontation with the political branches of government.[54] Gardbaum has recently extended

52 Take, for example, the United States Supreme Court case *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983), which struck down the line-item veto used by Congress to control executive action. Some commentators have argued that the decision had antidemocratic effect because it weakened congressional control over the president and further centralized power in the hands of an already-powerful presidency. The decision is best seen as a choice made by the Court from a number of constitutional possibilities, not as a decision compelled by the constitutional text. *See* E. Donald Elliott, INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125 (1983).

53 *See* Pozen, *supra* note 51, at 934-36 (referring to this phenomenon as "Sartrean bad faith," because of its emphasis on self-deception). Engagement with comparative materials may be useful as a check against behavioral biases towards motivated reasoning of this kind. *See, e.g.*, Dixon & Landau, *Transnational Constitutionalism*, *supra* note 6, at 629.

54 *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-12 (2d ed. 1986) (referring to the "passive virtues"); *cf.* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 257-59 (2005) (discussing the need for constitutional law theorists to embrace politics in theories of judicial review). In a comparative context, see Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 1-12 (2016).

this argument to a comparative context.[55] At times, he argues, strong forms of judicial review may simply provoke a confrontation between courts and the political branches, which leads to the political branches openly disobeying courts (i.e., undermining the rule of law) or attacking their independence and jurisdiction (thereby undermining judicial independence).[56] In certain contexts, such as dominant party rule, Gardbaum thus suggests that courts should exercise a form of prudential restraint that is designed to protect the rule of law in ordinary cases, or long-term judicial independence.[57] Similarly, one of us has argued (with Issacharoff) that courts should "defer" certain highly charged constitutional decisions, with a view to building the necessary legal *and* political authority to engage in effective forms of democratic hedging.[58] One can rightly ask, of course, about the extent to which strategic deference for institutional reasons is appropriate in the face of a significant threat to the minimum core of the democratic order. But it is clearly possible for judges to make a good faith judicial calculation that issuing an antidemocratic decision may at times be a lesser evil.

Third, in some cases judges may make errors about the likely effects of a given decision on the democratic order. For example, courts sometimes engage in forms of review that impose limits on constitutional amendment, or ordinary legislation, which unreasonably limit the scope for majorities to pursue their legitimate objectives. But judges may do so in good faith, out of a genuine (if mistaken) belief that the relevant arrangements threaten commitments to democracy. For example, judges in many systems possess power to ban "antidemocratic" political parties.[59] Many scholars now advocate that some parties in "fragile" democratic orders should be banned to protect the constitutional democracy itself,[60] but the exercise of this power is fraught with potential peril. Courts might ban political parties that they deem a threat to the democratic order because of their leadership, organization, or platform, but in so doing they might also constrict the democratic order, perhaps allowing other movements to monopolize power.[61] A court might make an incorrect calculation about the size of the threat posed by a given party, thus banning it even though the ban may pose a greater threat to electoral democracy than the allegedly antidemocratic party itself.

As an example of the complexities that sometimes attend efforts to discern judicial intent in this area, consider a line of cases by the Constitutional Court of Thailand that took aim at the populist leader Thaksin Shinawatra and his allies. The Constitutional Court and Constitutional Tribunal

55 *See* Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT'L L. 285 (2015).

56 *See id.* at 294-97.

57 *See id.* at 303. In the absence of self-restraint, Gardbaum calls for institutional design that creates weaker forms of judicial review less likely to spark backlash. *See id.* at 311.

58 *See* Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683, 699 (2016); *see also* Delaney, supra note 54, at 41-42.

59 *See* Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1447 (2009) (finding that twenty-eight percent of modern constitutions have party proscriptive provisions); Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1430 (2007) [hereinafter *Fragile Democracies*].

60 *See, e.g.*, Issacharoff, *Fragile Democracies*, *supra* note 59, at 1406.

61 *See id.* at 1411 (noting that "limiting the scope of democratic deliberation necessarily calls into question the legitimacy of the political process").

between 2005 and 2015 handed down decisions invalidating the 2006 parliamentary elections, removing three prime ministers, and disqualifying the largest political party in Thailand.[62] These events prevented most of its leadership from seeking political office and from enacting a range of key policies, including a series of constitutional amendments.[63] These decisions were interspersed with military coups in 2006 and 2014 against the elected democratic order, with the most recent coup resulting in a durable military regime.[64] Without much question, then, the long-term effect of this line of jurisprudence has been antidemocratic in nature: The court's decisions helped to create the climate that justified military rule.

Determining antidemocratic intent is trickier. Thaksin's populism posed its own kind of threat to the democratic order, as many comparative episodes have shown — populist leaders often gain power through free and fair elections, but then use it to craft new rules that may result in significant democratic erosion.[65] While those bringing cases against Thaksin may have had abusive motives from the start,[66] some have suggested that the decisions banning Thaksin's supporters may have been based on a good-faith (although ultimately erroneous) idea about which side posed the bigger threat to democratic constitutionalism.[67] The court, on this account, may have contributed to the suspension of the Thai Constitution and military rule, but this was an unintended consequence of a good-faith but clumsy effort to check Thaksin and the threat that his brand of electoral populism posed to constitutionalism and the rule of law.[68] Others have labelled the court's decisions a form of antidemocratic "judicial coup."[69] It is of course also possible that the nature of judicial intent

62 *See generally* Khemthong Tonsakulrungruang, *Thailand: An Abuse of Judicial Review*, *in* JUDICIAL REVIEW OF ELECTIONS IN ASIA (Po Jen Yap ed., 2016).

63 *See id.* at 1; Björn Dressel, *Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand*, 23 PAC. REV. 671, 671 (2010); Sarah Bishop, Balancing the Judicial Coup Myth: The Constitutional Court and the 2014 Coup (2017) (unpublished manuscript) (on file with author) [hereinafter Balancing the Judicial Coup]; Sarah Bishop, The Thai Administrative Courts and Environmental Conflicts: A Case Study of Map Ta Phut, Rayong (Oct. 28, 2011) (unpublished Honours Thesis, College of Asia and the Pacific, Australian National University) [hereinafter The Thai Administrative Courts]; *see also* ANDREW HARDING & PETER LEYLAND, THE CONSTITUTIONAL SYSTEM OF THAILAND: A CONTEXTUAL ANALYSIS 185-86 (2011).

64 *See* Jonathan Liljeblad, *The Efficacy of National Human Rights Institutions Seen in Context: Lessons from the Myanmar National Human Rights Commission*, 19 YALE HUM. RTS. & DEV. L.J. 95, 130 (2017).

65 *See* JAN-WERNER MÜLLER, WHAT IS POPULISM? 102 (2016) (stating that populists tend to write "partisan" or "exclusive" constitutions); Landau, *Populist Constitutions*, *supra* note 15, at 532.

66 Those bringing cases to the court were generally part of what Duncan McCargo labels the Thai "network monarchy" — the mix of military, political/bureaucratic, and business elites loyal to the King. *See* Duncan McCargo, *Thailand: State of Anxiety*, SE. ASIAN AFF. 333, 334 (2008) [hereinafter *Thailand: State of Anxiety*]. Some commentators argue that after 2006, these actors generally saw judicialization as a way to compensate for their electoral weaknesses relative to Thaksin's coalition. *See* Duncan McCargo, *Competing Notions of Judicialization in Thailand*, 36 CONTEMP. SE. ASIA 417, 419-22 (2014).

67 *See* Bishop, Balancing the Judicial Coup, *supra* note 63, at 4-6; Bishop, The Thai Administrative Courts, *supra* note 63, at 1-2.

68 On the threats posed by Thaksin in this context, see Michael K. Connors, *Article of Faith: The Failure of Royal Liberalism in Thailand*, 38 J. CONTEMP. ASIA 143, 143-44 (2008); Michael K. Connors, *Liberalism, Authoritarianism and the Politics of Decisionism in Thailand*, 22 PAC. REV. 355, 365-66 (2009); Thitinan Pongsudhirak, *Thailand Since the Coup*, 19 J. DEMOCRACY 140, 141-42 (2008).

69 *See* Eugénie Mérieau, *Thailand's Deep State, Royal Power and the Constitutional Court (1997-2015)*, 46 J. CONTEMP. ASIA 445, 449 (2016); Bishop, Balancing the Judicial Coup, *supra* note 63, at 1; Editorial, *A Coup By Another Name in Thailand*, N.Y. TIMES (May 8, 2014), https://www.nytimes.com/2014/05/09/opinion/a-coup-by-another- name-in-thailand.html [https://perma.cc/RGW5-QTJK]; *Thailand's Aristocratic Dead- Enders*, WALL ST. J. (May 7, 2014, 12:52 PM), https://www.wsj.com/articles/thailands- aristocratic-dead-enders-1399481518 [https://perma.cc/ADA9-GUEG]; *cf.* Dressel, *supra* note 63, at 687 (making a more tentative suggestion along the same lines).

changed over time and became closer to abusive judicial review as the military's end goals became clearer.[70]

Regardless of such complexities, analysts have a range of tools for determining when courts are likely intentionally subverting the democratic order. One kind of evidence focuses on significant intrusions on the independence of courts as institutions.[71] Since abusive judicial review is usually associated with captured (or at least cowed) judiciaries, one should look for evidence that the independence of courts and judges have been undermined. We examine these points in greater detail in Part II below, but evidence of both formal and informal moves to take over courts is often available: flimsy impeachment attempts or other irregular removals, changes to the rules for selecting and regulating judges, and similar measures.[72] Of course, not all forms of constitutional capture or coercion will be readily visible to outside observers. In some cases, would-be authoritarians may simply threaten to use these tools as a means of capturing or controlling a court — and do so behind closed doors.[73]

Other important indicators are significant procedural irregularities in the way an individual case is handled. In the United States, for instance, federal courts generally decline to hear petitions for review under federal law if there are "adequate and independent" state grounds for a decision.[74] The United States Supreme Court, however, has held that state grounds will not be "adequate" to prevent federal review in certain circumstances — including where there is evidence of bad faith, procedural irregularity, or a novel or bizarre approach to state law on the part of a state court.[75] A similar point applies comparatively. While procedural irregularity may not be the same as bad faith, it may be an important indicator of it. Thus, judges being mysteriously replaced, normal procedures deviated from, or decisions made under odd circumstances may all be potential red flags.

Take the 2009 Nicaraguan case, examined in more detail in Part IV.A below, where the Supreme Court of Justice of Nicaragua excised presidential term limits from the Nicaraguan Constitution. The decision was issued under extraordinary procedural conditions. The president of the court formally notified the other judges of the vote on the case only after normal business hours had ended, and thus judges and court personnel had gone home for the day.[76] Informally, only those judges affili-

70 *See generally* Tonsakulrungruang, *supra* note 62 (describing the expansion of judicial review in Thailand and its contribution to the constitutional crisis).

71 *See infra* Part II.B.

72 *See infra* Part II.B.

73 In Burundi, for example, allegations of coercion emerged only after the decision of the Constitutional Court in 2015 to allow the president to run for another term had already been handed down. *See Senior Burundi Judge Flees Rather Than Approve President's Candidacy*, GUARDIAN (May 4, 2015, 10:48 PM), https://www.theguardian. com/world/2015/may/05/senior-burundi-judge-flees-rather-than-approve-presidents- candidacy [https://perma.cc/6RL2-PGY2] (stating that judges had faced "enormous pressure and even death threats" after initially concluding that presidential re-election would be unconstitutional).

74 Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 977 (1985).

75 *See* Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1890 (2003) (noting that procedural review under the doctrine is "far more searching" than review of substantive grounds).

76 *See Nicaragua's Chief Justice Denounces Pro-Ortega Ruling*, LATIN AM. HERALD TRIB., http://www.laht.com/article.asp?CategoryId=23558&ArticleId=345896 (last visited Nov. 4, 2019) [https://perma.cc/9CAM-JKNH]; *see also* Rosalind Dixon & Vicki C. Jackson, *Consti-*

ated with the president's party were notified; naturally, the opposition judges on the court did not show up and were replaced by pro-regime substitutes.[77] Such extraordinary procedural irregularities are useful evidence of bad faith.[78]

In the same vein, the nature of legal reasoning may at times be helpful in discerning whether abusive judicial review is taking place. Courts in different constitutional systems have differing norms surrounding the degree to which they give reasons for their decisions or seek unanimity or joint judgments.[79] Given this variety in approaches, it will often be difficult to determine the abusive nature of judicial review based simply on the scope and nature of a court's reasoning. One needs to look at the context and effects of a judicial decision. But departure by a court from its *own* established practices and precedents may be one important sign that a court is in fact engaging in knowing forms of abusive judicial review: If a court fails to live up to its own ordinary standards of legal reasoning, this may be one relatively clear sign that it is engaged in abusive forms of review.

Where courts knowingly engage in antidemocratic forms of review, there may likewise be evidence of abusive forms of reasoning or "borrowing" by judges in the application of existing precedents. Elsewhere, we define abusive borrowing as the borrowing of liberal democratic ideas in one of the following ways: (i) highly superficial, or involves the form but not substance of constitutional democratic norms; (ii) highly selective, and picks and chooses certain elements of liberal democratic constitutionalism; (iii) highly acontextual, and ignores differences in political or social context; or (iv) that inverts the purpose of democratic norms and ideas so that they have the opposite effect to previously.[80] Courts engaged in knowing forms of abusive review may employ all of these techniques as a means of reconciling the demands of respect for precedent, and orthodox legal reasoning, with antidemocratic effects. Instead of simply ignoring existing doctrines, they will tend to cite them in an acontextual way — thus reusing doctrines found elsewhere in contexts where the absence of certain supporting legal, social, or political conditions would make that use problematic. Or they may make use of doctrine in a way that is patently selective, for example by wielding doctrines against political opponents but trying to protect allies. As Pozen emphasizes, highly inconsistent use of methodologies or extremely unreasonable interpretations of law are often taken as evidence of bad faith.[81]

tutions Inside Out: Outsider Interventions in Domestic Constitutional Contests, 48 WAKE FOREST L. REV. 149, 164 (2013) (noting that the panel that heard the case was composed only of pro-Ortega judges).

77 *See Nicaragua's Chief Justice Denounces Pro-Ortega Ruling*, *supra* note 76.

78 *See* Dixon & Jackson, *supra* note 76, at 203 (grounding the legitimacy of outsider interventions in domestic constitutional controversies in concerns about bad faith).

79 *See generally* MITCHEL DE S. -O. -L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY (2004) (comparing decision styles across countries).

80 *See* Rosalind Dixon & David Landau, *1989-2019: From Democratic to Abusive Constitutional Borrowing*, 17 INT'L J. CONST. L. 489, 489 (2019).

81 *See* Pozen, *supra* note 51, at 925, 933 (referencing "interpretive arguments that are so unreasonable as to betray a furtive design or malicious state of mind" as evidence of bad faith, although noting "the difficulties of determining what is objectively unreasonable in constitutional law") (emphasis omitted).

We expect these signs will usually be subtle. Courts engaged in intentionally antidemocratic forms of review have powerful incentives to obscure their motives. This is because, to succeed, antidemocratic forms of judicial review must ultimately be seen by the broader public as at least somewhat independent of the political branches. Courts themselves must therefore reason in a way that respects relatively orthodox processes of legal reasoning: The most transparent forms of abusive judicial review will be those that involve little or no attempt by judges to justify their conclusions by reference to orthodox legal processes of reasoning, or little or no citation of established or recognized constitutional modalities. But judicial review of this kind will also have limited value to would-be authoritarians — it may be so transparently abusive that it may do less to increase the perceived legitimacy of underlying attempts at abusive constitutional change. More effective forms of abusive judicial review, therefore, will tend to be better reasoned, and more orthodox in their approach to the legal reasoning process, in ways that make them harder to identify as having abusive motives. This mirrors broader findings by political scientists that courts tend to *increase* efforts at legal justification where they anticipate political opposition.[82]

II. ABUSIVE JUDICIAL REVIEW AS A REGIME STRATEGY

Most cases of abusive judicial review involve courts working as part of a broader regime strategy, led by would-be authoritarians, to undermine a country's liberal democratic order. In this sense, abusive judicial review can be conceptualized as one tool in the hands of antidemocratic political actors, alongside others such as formal amendment, sub-constitutional legal changes, and shifts in informal norms.

The idea of courts as agents of a regime is not, of course, an insight that is unique to contexts of democratic erosion. Indeed, a sizable literature views courts as part of their underlying political regime and looks at the functions that they can play for that regime.[83] What is distinctive about abusive judicial review is twofold. First, the particular functions played by courts in this context undermine the liberal democratic order, rather than simply redistributing power within it (for example, between subnational and the national government).[84] Second, judges carrying out abusive judicial

82 *See* Olof Larsson et al., *Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union*, 50 COMP. POL. STUD. 879, 896 (2017).

83 *See, e.g.*, Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 44 (1993) (arguing that U.S. politicians turn to courts when intra-party splits make the system unable to cope with an issue); Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 107 (2008) (considering the incentives for political actors to empower judges to decide core political issues); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584-85 (2005) (considering the political functions that judicial review in the United States has played over time).

84 *See* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-*

review are often not merely ideologically aligned with the political regime; they have been captured or cowed by it, as we explain below. The steps which would-be authoritarians use to take control over courts in this context may be especially aggressive because the rewards of that control are also potentially high.[85] This Part tackles two key questions regarding a regime strategy of abusive judicial review: why might regimes rely on courts to carry out antidemocratic constitutional changes, and how do they do so?

A. Why Would-Be Authoritarians Turn to Courts

Statistical studies have shown a sharp increasing trend in the percentage of constitutions providing for judicial review — the vast majority of texts around the world now do so.[86] The trend has exceptions, of course,[87] but it runs across all regions. Beyond this, inclusion of a court possessing powers of judicial review is now often seen as one of the canonical features of liberal democratic constitutionalism, and often included in recipes for new democracies.[88] When exercising powers of judicial review, most courts are also afforded a degree of presumptive legitimacy, as institutions acting "legally" rather than politically. Most constitutional scholars agree that there is some degree of choice, and thus political judgment, inherent in the process of constitutional construction.[89] But most also maintain there is still something distinctively legal to the process of constitutional construction, or that it involves a mix of legal and political judgment.[90] This understanding of the relative autonomy of law from politics means that judicial decisions enjoy a presumptive form of respect in most constitutional systems. Opposition legislators and civil society actors often agree to respect the decisions of courts, even when they strongly oppose the result reached by a court, or the effect of its decisions. And international actors often agree to respect the outcome of a constitutional decision, even where they disagree with the outcome, and might be inclined to criticize the government for engaging in equivalent forms of legislative or constitutional change.

1891, 96 AM. POL. SCI. REV. 511, 516 (2002) (arguing that the Republican party used the federal judiciary to pursue a policy of economic nationalism); Whittington, *supra* note 83, at 584.

85 *See* Maria Popova, *Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine*, 43 COMP. POL. STUD. 1202, 1205 (2010).

86 *See* Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. 587, 587 (2014) (finding that only thirty-eight percent of constitutions had constitutional review in 1951, but eighty-three percent by 2011).

87 *See, e.g.*, Jens Elo Rytter & Marlene Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, 9 INT'L J. CONST. L. 470, 470 (2011) (stating that Nordic countries have no such tradition of judicial review).

88 *See* Alec Stone Sweet, *Constitutional Courts*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 816, 816 (Michel Rosenfeld & András Sajó eds., 2012) (noting that by the 1990s, a "basic formula" including judicial review "had diffused globally").

89 *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 527-28 (2013) (conceding the impossibility of restraining modern judicial review to the understandings of those alive at the time of the framing and ratification of the relevant constitutional provision); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 104 (2010) (stating that construction cannot be "value neutral").

90 *Compare* THEUNIS ROUX, THE POLITICO-LEGAL DYNAMICS OF JUDICIAL REVIEW: A COMPARATIVE ANALYSIS 6 (2018) (stating this conventional wisdom that constitutional decisions have a political dimension but are still distinctly legal), *with* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1731-32 (1976) (challenging this view).

When regimes pursue a strategy of abusive judicial review, they are also attempting to play off the presumptive legitimacy accorded to judicial review in liberal democratic constitutionalism in order to blunt both domestic and internal opposition to authoritarian actions. Domestic constitutional cultures, as well as international norms, may make it difficult for executive or legislative officials to flagrantly disregard or violate constitutional norms. For example, and to take several examples drawn from recent comparative experience, political officials who disregard clear textual term limits on their mandates, who ban opposition parties, and who shut down or limit opposition- controlled institutions such as legislatures, may face a hostile domestic reception and swift sanctions from international or regional institutions.[91] Courts can cut through some of the constraints apparently posed by constitutional texts, in a way that may cause less of an outcry from international institutions, if they are the ones who carry out these actions.

At the very least, they can provide dominant elites with a means of achieving ends that would be far costlier if they were done through political routes. In the U.S. context, this is one of the key insights of "regime"-based theories of judicial review. Scholars such as Whittington and Gillman suggest that federal courts in the United States have at times performed critical functions, from "assist[ing] powerful officials within the current government in overcoming various structural barriers to realizing their ideological objectives through direct political action," in ways that explain why political leaders are often willing to support, or at least tolerate, strong forms of judicial review.[92] The main difference is that in the contexts being studied here, the functions played by courts involve attacks on the basic values of the democratic order.

There are also increasing costs from the international realm to pursuing openly authoritarian forms of change. In some regional contexts, regimes now face a set of potential sanctions for acting in a flagrantly unconstitutional or antidemocratic way. This is most obvious in Europe, where both the European Union and Council of Europe contain monitoring mechanisms and potential sanctions for antidemocratic moves.[93] Other regions of the world, including Latin America and Africa, have human rights courts with at least some interest in hearing cases touching on democratization issues and "democracy clauses" that contemplate sanctions for "unconstitutional" ruptures in the democratic order.[94] These clauses have mainly been deployed against coups, but a burgeoning literature and conversation also contemplates them as responses to subtler forms of democratic undermining.[95] By ensuring that relevant changes are carried out in part or whole through the acts

91 The potential international sanctions on flagrantly unconstitutional action have been strengthened in recent years in many regions of the world, including Latin America, Europe, and Africa, through "democracy" clauses that threaten consequences for regimes that carry out unconstitutional interruptions of the democratic order or other threats to the rule of law. *See* David Landau, *Democratic Erosion and Constitution- Making Moments: The Role of International Law*, 2 UC IRVINE J. INT'L TRANSNAT'L & COMP. L. 87, 100 (2017) [hereinafter *Democratic Erosion and Constitution-Making Moments*].

92 *See* Gillman, *supra* note 84, at 515; Whittington, *supra* note 83, at 584.

93 *See* Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, 21 EUR. L.J. 141, 144 (2015) (discussing a range of mechanisms under EU law).

94 *See* Landau, *Democratic Erosion and Constitution-Making Moments*, *supra* note 91, at 100; Jacob Wobig, *Defending Democracy with International Law: Preventing Coup Attempts with Democracy Clauses*, 22 DEMOCRATIZATION 631, 633-34 (2015).

95 *See* Theodore J. Piccone, *International Mechanisms for Protecting Democracy, in* PROTECTING DEMOCRACY: INTERNATIONAL RESPONSES 101, 102 (Morton H. Halperin & Mirna Galic eds., 2005).

of "independent" courts, however, would-be authoritarian actors may be able to blunt the force of both domestic and international criticism of their actions. Thus, international actors may sometimes be less willing to attack judicial decisions, or quick to perceive that a regime actually is exceeding its constitutional bounds. This may help to stave off sanctions or other consequences that would otherwise ensue from antidemocratic action. In short, judicial review may be a way to make democratic erosion both less visible and more legitimate, with potential benefits to the regime.

Abusive judicial review is usually part of a broader regime strategy of antidemocratic constitutional change, which includes a range of formal and informal tools.[96] In this sense, it may be both a substitute and complement for other forms of change. In some situations, actors may turn to courts precisely because other avenues of change, especially the tools of formal constitutional change, are blocked or would impose higher costs on the regime. For example, in Poland, analysts have noted that the ruling party has relied very heavily on capturing the Constitutional Tribunal, the nation's constitutional court, which has subsequently issued a number of favorable rulings allowing the regime to consolidate power, in part because it has lacked the votes needed for formal constitutional amendment.[97] Similarly, across several countries in Latin America, including Nicaragua, Bolivia, and Honduras, courts have utilized the unconstitutional constitutional amendment doctrine to abolish presidential term limits, precisely because presidents either lacked the means to carry out formal constitutional changes or feared the consequences of going that route.[98]

In other respects, abusive judicial review may be complementary to other tools. In Poland, the ruling party has also carried out a series of sub-constitutional changes. It passed a series of important laws, for example to change the organization of the judiciary and limit opposition speech.[99] These laws, however, are of dubious constitutionality, and thus government control over the Polish constitutional court has proven critical for allowing the regime to enact these laws. For related reasons, we would expect abusive judicial review to play an important role even in many contexts where other tools *are* available. Many of the examples of abusive constitutional change that have been most studied, such as Hungary, Venezuela, and Turkey, rely on a mix of tools, including formal constitutional change, statutory change, informal constitutional changes, and judicial review.[100] Each of these appears to play an important (and still not fully understood) role in eroding democracy across national contexts.

96 *See supra* Part I (describing other constitutional and sub-constitutional tools of change).

97 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 31.

98 *See infra* Part IV.A.

99 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 51-52.

100 *See* Landau, *Populist Constitutions*, *supra* note 15, at 532-33.

B. How Regimes Capture Courts

How can would-be authoritarians increase the chances of constitutional courts engaging in abusive forms of judicial review? They have many tools available to them. Some of these are informal, while others are formal. Also, some are obvious, while others are subtler forms of pressure that rely on the willingness of courts to "play along."

Informally, regimes sometimes rely on bribes and other inducements in order to garner favorable decisions or well-timed retirements from the bench.[101] Regimes can threaten the prestige or reputation of a court or its judges through public campaigns. Perhaps the most obvious informal tool is the threat of coercion, which is still clearly a tactic used by some nondemocratic governments today.

In Burundi, for example, there were several reports of direct interference by the president, and his supporters, with the independence of the Constitutional Court in 2015 in the context of its deliberations over the application of presidential term limits.[102] Likewise in Ecuador, Craig M. Kauffman and Pamela M. Martin have discovered evidence of threats by President Rafael Correa against various judges. They cite, for example, a 2010 memo that was supposedly sent to all judges by the National Judicial Secretary, where Correa stated that any judge who found a public works projects unconstitutional would be *personally* liable to the state for "damage and harm" caused by the lost opportunity to pursue the project.[103] Similar tactics were also reported in Fiji following a military coup by now-Prime Minister Josaia Voreqe Bainimarama in 2006 — judges reported their houses being burned, and property vandalised.[104]

Beyond coercion, regimes have a range of formal *legal* tools to influence the composition and powers of the judiciary. Most of these changes fall into one of two buckets: attempts to "pack" a court by influencing its composition and attempts to "curb" a court by threatening its institutional powers or resources.

The most orthodox way to influence the composition of a court, or to "pack" it, is to appoint a new set of judges to one or more vacant seats. But where this is not possible, would-be authoritarians may attempt to alter the size of a court, or the number of judges sitting on a court of specific judicial panel. For example, they might choose not to appoint a full quorum of judges to a court, or conversely, to increase the size of a court, with a view to appointing a new set of ideologically sympathetic judges.

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101 *See* GRETCHEN HELMKE, INSTITUTIONS ON THE EDGE: THE ORIGINS AND CONSEQUENCES OF INTER-BRANCH CRISES IN LATIN AMERICA 126-50 (2017) (discussing "judicial manipulation" in Latin America).

102 *See* Stef Vandeginste, *Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi*, 51 AFR. SPECTRUM 39, 56 (2016); Busingye Kabumba, *A Legal Expert's view on Burundi Term Limits Saga*, OBSERVER (May 13, 2015), http://observer.ug/viewpoint/37809-a-legal-expert-s-view-on-burundi-term-limits-saga [https://perma.cc/VW98-DE5Z].

103 Rosalind Dixon, *Constitutional Rights as Bribes*, 50 CONN. L. REV. 767, 800 (2018).

104 *See* INTERNATIONAL BAR ASSOCIATION, DIRE STRAITS: A REPORT ON THE RULE OF LAW IN FIJI 44 (2009).

Thus, in Venezuela, for example, the National Assembly of Venezuela, the nation's congress, passed the new Organic Law of the Supreme Court in 2004, expanding the size of the Venezuelan Supreme Court from twenty to thirty-two justices, and making it much easier for the congress to dismiss justices either through annulling their appointments or impeaching them.[105] These new dismissal powers were used to force several key changes, including the removal of the court's vice-president, so that after 2004, the regime effectively has exercised complete control over the court.[106] Similarly, in Hungary, the Fidesz- controlled parliament increased the size of the Constitutional Court of Hungary from eleven to fifteen justices as part of a broader effort to capture the court.[107]

Another mechanism for influencing the composition of a court involves attempts to remove existing allegations of misconduct against certain judges, including allegations of corruption, and following established procedures for removal, such as impeachment based on misconduct or corruption. Where regimes have sufficient support in the legislature, such removals may be fairly easy. In Bolivia, for example, the regime of Evo Morales has been aggressive in seeking to impeach hostile judges on flimsy grounds. In 2014, for example, impeachment proceedings were initiated against three justices of the Plurinational Constitutional Tribunal, the nation's constitutional court, after they ruled against the government, and all three were eventually removed from the court.[108]

A related way to remove hostile judges is to change the retirement age, effectively forcing older judges to leave the court and thus creating new vacancies that can be packed by regime loyalists. This tactic was used in both Poland and Hungary, although the European Court of Justice ("ECJ") in both cases struck down the lowered retirement age as a violation of EU law.[109]

A "softer" version of a similar technique is to manipulate the process of judicial promotion, either to higher courts or to the chief justiceship of a court. In India, for example, after the Indian Supreme Court issued its famous *Kesavananda* decision holding that a constitutional amendment of Indira Gandhi purporting to insulate certain issues from judicial review was an unconstitutional constitutional amendment,[110] Gandhi responded the very next day by flouting a long-accepted norm that promotion to the chief justiceship of the Court would be based solely on seniority. She passed

105 *See* Sanchez Urribarri, *supra* note 33, at 871-72.

106 *See id.* at 872-73.

107 *See* Zoltán Szente, *The Political Orientation of the Members of the Hungarian Constitutional Court Between 2010 and 2014*, 1 CONST. STUD. 123, 131 (2016).

108 *See El Senado Reactiva Juicio en Contra del Magistrado Gualberto Cusi*, LA RAZON (Nov. 24, 2016, 8:47 AM), http://www.la-razon.com/nacional/Senado-reactiva- magistrado-Gualberto-Cusi_0_2606739313.html [https://perma.cc/9T3J-3P56].

109 *See* Case C-286/12, Commission v Hungary, 1 C.M.L.R. 1243 (2012); Tamás Gyulavári & Nikolett H□s, *Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts*, 42 INDUS. L.J. 289, 291-92 (2013) (noting that the attempt to lower the Hungarian retirement age from seventy to sixty-two was struck down both by both the Constitutional Court and ECJ); *EU Court Orders Poland to Halt Court Retirements Law*, BBC NEWS (Oct. 19, 2018); https://www.bbc. com/news/world-europe-45917830 [https://perma.cc/DLU6-6WET]; Jennifer Rankin, *EU Court Rules Poland's Lowering of Judges' Retirement Age is Unlawful*, GUARDIAN (June 24, 2019, 10:45 AM), https://www.theguardian.com/world/2019/jun/24/eu-court-rules- polands-lowering-of-judges-retirement-age-unlawful [https://perma.cc/7NCS-K3CN].

110 *See* Kesavananda v. State of Kerala, (1973) SCR (Supp) 1 (India).

over three senior justices in the *Kesavananda* majority and promoted a more junior justice who had dissented from the *Kesavananda* decision.[111]

In Poland in 2015, the PiS also began its efforts to undermine judicial independence by refusing to seat judges appointed by the outgoing Sejm, the lower house of the Polish parliament, and electing five new judges.[112] When the Constitutional Tribunal ordered the government to seat three of the original judges (whom it held were properly appointed), the government brought the matter back before the court, now comprised of two irregularly appointed PiS judges, and the court "reinterpreted" its prior ruling to recognize all judges appointed by the old and new Sejm.[113] The government also then effectively sidelined non-PiS judges by challenging their ability to sit and requiring them to take forced annual leave.[114]

Attempts to alter the composition of a court may also focus more narrowly on a specific case. Would-be authoritarians may manipulate the composition of the panel allocated to hear a particularly important case. We already referred to the example of Nicaragua above — in the 2009 reelection case, regime allies used trickery to avoid notifying opposition judges on the Supreme Court of Justice, and then replaced those judges with pro-regime substitutes, resulting in a unanimous decision in favor of the incumbent president, Daniel Ortega.[115]

Instead of, or in addition to, seeking to pack a court, regimes may also target the court as an institution. For example, they may cut a court's budget or remove its access to necessary resources, strip a court's jurisdiction to hear some or all cases involving core constitutional disputes, decline to publish its judgments, or refuse to follow its judgments where the executive government is a party to the case.[116] By cutting a court's budget, or access to basic resources, would-be authoritarians can undermine courts in several ways. They can make it more difficult for judges to produce judgments in a timely way. They can also reduce the perceived power and prestige of the court in ways that affect the support for the court in the broader constitutional culture. And they can reduce the attractiveness of judicial office, or the caliber of judge, likely to take office in the future.

Likewise, refusing to publish a court decision or give it any authoritative effect reduces the practical effect of court decisions as a potential check on abusive constitutional change, and diminishes the perceived power and prestige of courts as important social actors in ways that undermine their effectiveness as institutions.

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111 *See* Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 481-82 (2003).

112 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 19; Hubert Tworzecki & Radoslaw Markowski*, Why Is Poland's Law and Justice Party Trying to Rein in the Judiciary?*, WASH. POST (July 26, 2017), https://www.washingtonpost.com/ news/monkey-cage/wp/2017/07/26/why-is-polands-law-and-justice-party-trying-to- rein-in-the-judiciary/?utm_term=.bc645112bcfa [https://perma.cc/LGB3-U3KR].

113 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 19-20.

114 *See id.* at 22.

115 *See supra* text accompanying notes 76–77.

116 For use of this tactic as a response to international courts, see, e.g., Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 293-94 (2016).

Attacking the jurisdiction of a court may have similar effects: It may reduce the standing and prestige of the court, and the effectiveness of judicial office. At a practical level it can also deprive courts of the capacity to invalidate some illiberal constitutional changes that effectively erode constitutional democracy.[117] Courts, of course, can find, and in some cases have found, ways to invalidate or evade these restraints on their jurisdiction.[118] But this move itself puts courts in a potentially difficult bind, requiring a choice between being respectful to formal legal constraints and their broader role as guardians of the political process. By forcing courts to sacrifice their commitment to legal form in order to preserve this broader role, would-be authoritarians may discredit courts in the eyes of key constituents.

In some cases, would-be authoritarians may also be able to secure a compliant or cowed judiciary simply by *threatening* to use both informal and formal tools of this kind. Judges may attempt to preempt threats to their individual safety or reputation, or the court's constitutional role, by "willingly" reaching decisions that advance the regimes' objectives. Threats of this kind may be especially powerful if they are directed toward the use of legal tools against individual judges as opposed to a court itself — for example, the use of anti-corruption laws or other criminal laws to threaten non-compliant judges with politically- motivated prosecutions. Yet the effect of such threats will often be hard to show in practice: Often there is little public evidence of when and how they are made, and if they are made public, on the thinking and responses of individual judges.

Table 1. Techniques for Controlling a Court

Composition of Court: Court-Packing	Court as an Institution: Court-Curbing
Altering court size (through non-staffing, or court-packing) Removing judges (via misconduct allegations, or new retirement norms)	Budget cuts Non-publication of decisions Non-compliance with decisions Jurisdiction stripping Altering the majority rule for invalidation of legislation Changing the order of court rulings

117 For example, after the Constitutional Court of Hungary struck down a law imposing a retroactive ninety-eight percent tax on severance payments, the Fidesz regime responded by stripping the court of the ability to review fiscal legislation. *See* Szente, *supra* note 107, at 132.

118 The *Kesavananda* case in India, for example, involved the court deploying the unconstitutional constitutional amendment doctrine to strike down purported restrictions on its jurisdiction. *See* Kesavananda v. State of Kerala, (1973) SCR (Supp) 1 (India). In Hungary, the Court declined to hold the amendment unconstitutional but held that it could still review fiscal or budgetary legislation on other grounds. *See* Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19 CONSTELLATIONS 182, 192 (2012); Szente, *supra* note 107, at 133.

Table 1 gives a summary of some major court-packing and court- curbing techniques. The various techniques to attack courts are not necessarily equivalent in purpose or effect, and some are more closely tied to a regime strategy of abusive judicial review than others. Of the two sets of techniques, court-packing may be more likely to produce a judiciary that is useful for carrying out regime tasks, since it leaves the powers of a court intact and tries to stack the court with regime loyalists. Court-curbing in contrast may be more effective for nullifying judicial power entirely, for cabining the court's jurisdiction over certain sensitive matters, or perhaps for producing a form of abusive judicial review that is weaker and merely about upholding (and thus legitimating) regime actions, rather than about actively aiding the regime. Ironically, a curbed court may actually be less valuable to a regime in carrying out abusive judicial review, since the court will have less power and prestige.

There is some evidence that regimes sometimes deploy these two techniques in sequence, as a kind of one-two punch. The first move is to disable or paralyze a hostile court by curbing it, while the second is to make the court a regime ally by packing it. In Hungary, after the Fidesz party took power in 2009, it began by attacking the jurisdiction of the country's previously independent and celebrated Constitutional Court.[119] An early move was to pass a constitutional amendment limiting the jurisdiction of the court, by preventing it from hearing classes of cases dealing with fiscal issues.[120] The regime also launched a harsh rhetorical attack against the court and, after it promulgated a new constitution, stripped the court's old jurisprudence of any force and effect[121] and restricted access to the court by getting rid of the old *actio popularis* mechanism that allowed any citizen to challenge laws.[122] Initially, while the judiciary was still in opposition hands, these court- curbing moves reduced its ability to check Fidesz.

At the same time, the regime was taking steps to pack the judiciary. It changed, for example, the method for appointment to the constitutional court, increased the size of the Court, altered the qualifications needed to be a justice, reorganized the judiciary to allow more political input into appointments and promotions, and lowered the retirement age for the ordinary judiciary.[123] By about 2013, the regime thus had a firm grip on the court.

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119 On the historical power and prestige of the court, see THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005, at 68 (David Dyzenhaus & Adam Tomkins eds., 2013); Jonathan Bond, *Concerning Constitutional Courts in Central and Eastern Europe*, 2 INT'L PUB. POL'Y REV. 5, 8-9 (2006); Rosalind Dixon, *Constitutional Design Two Ways: Constitutional Drafters as Judges*, 57 VA. J. INT'L L. 1, 27-28 (2017); Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1775-86 (2006); John W. Schiemann, *Explaining Hungary's Powerful Constitutional Court: A Bargaining Approach*, 42 EUR. J. SOC. 357, 357-58 (2001); Herman Schwartz, *Eastern Europe's Constitutional Courts*, 9 J. DEMOCRACY 100, 106 (1998).

120 *See* László Sólyom, *The Rise and Decline of Constitutional Culture in Hungary*, *in* CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA 5, 21 (Armin von Bogdandy & Pál Sonnevend eds., 2015) (discussing Law CXIX of 2010 on the amendment to Law XX of 1949 on the Constitution of the Republic of Hungary, *Magyar Kozlony*, Issue 177 (2010)); Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, *in* THE HUNGARIAN PATIENT: SOCIAL OPPOSITION TO AN ILLIBERAL DEMOCRACY 37, 38 (Péter Krasztev & Jon Van Til eds., 2015).

121 This amendment was struck down by the Constitutional Court of Hungary in 2016, but the Fidesz government refused to publish the decision.

122 *See* Bánkuti, Halmai & Scheppele, *supra* note 120, at 42.

123 *See id.* at 42-43.

In Poland, the PiS followed a similar strategy after coming to power in 2015.[124] The PiS engaged in a series of court-curbing measures that aimed to paralyze the Polish constitutional court before the party was able to take control of it. It introduced dozens of new laws limiting the jurisdiction of the court, raising the supermajority required to invalidate a law, limiting the scope for judicial dissent, making it easier to remove sitting judges, and giving the prime minister apparent discretion whether or not to publish decisions of the court. When the constitutional court itself struck down some of these laws as unconstitutional, the prime minister responded by declining to publish those decisions.[125] Over time, however, as Sadurski has pointed out, the regime used irregularities in the appointment process and the passage of time to gain a solid pro-regime majority of judges.[126] Since that has happened, the court has become a partner of the regime in helping to consolidate power.

III. A TYPOLOGY OF ABUSIVE JUDICIAL REVIEW: WEAK AND STRONG FORMS

The prior part demonstrated that antidemocratic actors have a number of tools available to co-opt courts, and once captured, judges may be turned into extremely valuable allies in undermining democracy. The tasks that judges perform for regimes take two major forms. "Weak" abusive judicial review occurs when courts uphold legislation or executive action that significantly undermines the democratic minimum core, thus legitimating damaging moves undertaken by political actors. "Strong" abusive judicial review occurs when courts themselves act to remove or undermine democratic protections.[127] The weaker or "rubber stamp" version of abusive judicial review is much more widely conceptualized than the strong, obstacle- clearing form, but both appear to be reasonably

124 *See* Bojan Bugari□ & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 J. DEMOCRACY 69, 73 (2016); Pablo Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 EUR. CONST. L. REV. 48, 57 (2019); Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 2; Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Government Enabler*, 11 HAGUE J. RULE L. 63, 82 (2018).

125 *See* CHRISTIAN DAVIES, FREEDOM HOUSE, HOSTILE TAKEOVER: HOW LAW AND JUSTICE CAPTURED POLAND'S COURTS (2019); MARCIN MATCZAK, POLAND'S CONSTITUTIONAL CRISIS: FACTS AND INTERPRETATIONS, FOUND. FOR L., JUST. & SOC'Y 2, 3 (2018); Tomasz Tadeusz Koncewicz, Marek Zubik, Magdalena Konopacka & Karol Sta□kiewicz, *Developments in Polish Constitutional Law: The Year 2016 in Review*, BLOG INT'L J. CONST. L. (Nov. 12, 2017), http://www.iconnectblog.com/2017/11/developments-in-polish-constitutional-law-the- year-2016-in-review/ [https://perma.cc/D5TM-25K8]; Christian Davies, *Poland Is 'On Road to Autocracy', Says Constitutional Court President*, GUARDIAN (Dec. 18, 2016, 2:24 PM), https://www.theguardian.com/world/2016/dec/18/poland-is-on-road-to-autocracy-says- high-court-president [https://perma.cc/C5A3-SK2Y].

126 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 31.

127 The distinction between weak and strong judicial review is now familiar in comparative constitutional law. *See, e.g.*, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 33-36 (2008) (contrasting weak-form and strong-form judicial review). Weak judicial interpretations or remedies are deferential and leave room for a range of political responses. Strong interpretations or remedies impose judicial decision-making more strongly on the political process. *See* Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form v. Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 402 (2007); Rosalind Dixon, *The Forms, Functions, and Varieties of Weak(ened) Judicial Review*, 17 INT'L J. CONST. L. 904, 904 (2019) [hereinafter *Forms, Functions, and Varieties*]; *cf.* Aileen Kavanagh, *What's So Weak About "Weak-Form Review"? The Case of the UK Human Rights Act 1998*, 13 INT'L J. CONST. L. 1008, 1034 (2015) (noting complexity but in a more critical vein).

common in projects of democratic erosion. In the remainder of this Part, we outline the distinction and give examples of both forms.

A. Weak Abusive Judicial Review

The weak form of abusive judicial review occurs paradigmatically when courts are asked to review new legislation or executive action that plausibly clashes with the constitutional text and undermines the democratic minimum core. By dismissing a constitutional challenge to this legislation or executive action, courts are often interpreted by the broader public to be affirming the legitimacy of those laws.[128] This is in large part the by-product of the respect which courts are given in many constitutional democracies. This kind of "legitimation effect"[129] may be especially valuable to would-be authoritarian actors seeking to engage in "stealth" forms of authoritarianism, or to achieve antidemocratic change while retaining the appearance of a commitment to constitutional democracy. If a would-be authoritarian actor can point to a court decision upholding those actions as plausibly constitutional, this can add an argument that the actions conform to generalized norms of democratic constitutionalism.

This weak variant of abusive judicial review has been a prominent feature of many of the well-studied cases of democratic erosion in recent years. In Venezuela, for example, the Supreme Court initially maintained some independence from the regime of Hugo Chavez, but was completely packed following the passage of new legislation in 2004, after a failed coup attempt against Chavez.[130] The court ruled in favor of the government in essentially all significant cases from that point forward.[131] In the process, it upheld a number of laws and actions that were both constitutionally problematic and which helped Chavez consolidate power. For example, it upheld electoral changes that greatly favored the incumbent regime, and it also legitimated the government's decision to strip an opposition-held TV station of its license.[132] It also further cleared the way for successive attempts at constitutional reforms that increased Chavez's power by, among other things, removing presidential term limits, as we explain in more detail below.[133]

One observes similar dynamics in Ecuador during the administration of Rafael Correa, which was also viewed by many observers as embarking on a project of democratic erosion. After winning office in 2006, Correa quickly replaced the constitution[134] Even though the new constitutional

128 *See, e.g.*, Moustafa & Ginsburg, *supra* note 30, at 6 (referring to the "veneer of legal legitimation" that courts can provide authoritarians).

129 *See id.*; Ronen Shamir, *"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 L. & SOC'Y REV. 781, 783 (1990).

130 *See* Sanchez Urribarri, *supra* note 33, at 871-72.

131 *See id.* at 878.

132 *See id.* at 876.

133 *See infra* Part IV.A.

134 *See* Catherine M. Conaghan, *Ecuador: Correa's Plebiscitary Presidency*, 19 J. DEMOCRACY 46, 46 (2008).

order contained a series of formal protections for judicial independence, Correa used his control of political institutions and supposedly independent bodies to gain a firm grip over the Constitutional Tribunal of Ecuador.[135] The institution in turn helped to legitimate consequential acts of the administration that helped push it in authoritarian directions. The most important cases involved proposed constitutional amendments that arguably clashed with a tiered amendment rule found in Ecuador's new constitution. Under this rule, sensitive amendments such as those affecting the "fundamental structure" or reducing "fundamental rights and guarantees" require more demanding procedures of change.[136] In one key case, the court allowed Correa to call a 2011 referendum on proposed changes that, *inter alia*, substantially weakened judicial independence by giving the regime far more power over the appointment of judges.[137] The consultation provided for a new Judicial Council, controlled by the Correa regime, which then appointed and removed hundreds of new judges, including the entire Constitutional Tribunal.[138] In a second case from 2015, analyzed in more detail below, the court permitted Correa to use the least demanding procedure for constitutional change (requiring only congressional approval) to undertake changes that completely eliminated presidential term limits.[139] Congress subsequently passed the changes and excised presidential term limits from the Ecuadorian constitution.[140]

Poland also offers an example of the weak form of abusive judicial review playing a meaningful role in democratic erosion. Shortly after the Law and Justice party won a majority of seats in the Parliament with a minority of votes, it began a project to take over the Constitutional Tribunal, which had previously been seen as a strong protector for the democratic order.[141] The new "captured" court has now become an important partner in the regime's overall project to consolidate power and weaken the opposition. For example, it issued a decision that upheld a law effectively prioritizing pro-government rallies over other assemblies, despite an obvious clash with freedoms of expression and association.[142] The Polish Constitutional Tribunal has been called upon to play this role particularly aggressively precisely because the Law and Justice Party lacks the parliamentary supermajority necessary to enact formal amendments to the constitution.[143] Thus, it has passed a number of laws — of dubious constitutionality — to effectively amend the Polish Constitution anyway, for example by reorganizing the constitutional court, the ordinary judiciary, and other sensitive

135 *See* José Luis Castro-Montero & Gijs van Dijck, *Judicial Politics in Unconsolidated Democracies: An Empirical Analysis of the Ecuadorian Constitutional Court (2008–2016)*, 38 JUST. SYS. J. 380, 383-85 (2017).

136 *See* CONST. OF THE REPUBLIC OF ECUADOR [CRE] arts. 441-44.

137 *See* Decision No. 008-11-DEE-CC, Sept. 29, 2011 (Ecuador).

138 *See* Castro-Montero & van Dijck, *supra* note 135, at 384.

139 *See infra* Part IV.A.

140 *See infra* Part IV.A.

141 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 17-18.

142 *See* Ref. No. Kp 1/17, Mar. 16, 2017 (Pol.).

143 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 11.

"control" institutions such as media regulators.[144] The court has played a role in legitimating these changes by generally upholding them.[145]

The "weak" variant of abusive judicial review is, at first glance, a simple phenomenon, seemingly captured with the metaphor of the court as rubber stamp, or as the proverbial "yes-man" or "yes-woman." But beneath the surface, there is more variation behind why regimes engage in this strategy and what they seek to attain. At a most basic level, judicial review of major changes might be an automatic requirement or at least an expected consequence of opposition lawsuits. When these inevitable challenges occur, of course, a yes vote will generally allow the change to proceed, while a no vote will stop or at least alter or slow it, unless the regime wants to be in the position of openly disregarding its own judiciary. Having a Court engage in weak abusive judicial review thus lowers the costs and risks of embarking on projects of constitutional change that take aim at the democratic minimum core.

But regimes may also seek the broader legitimacy benefits of a favorable decision. That is, in the face of an ambiguous or dubious legal situation, a favorable judicial decision may increase domestic and international acceptance that a given change is consistent with the existing constitutional order rather than a breach of it. This function, though, is more contextual than the one above: Not every favorable judicial decision is likely to provide substantial legitimacy benefits for a regime. Rather, the extent of those benefits potentially depends on the extent to which the court can plausibly be presented as something other than a mere rubber stamp or automatic regime vote. This may depend on the prior history of judicial independence in the country: Poland and (to a much lesser extent) Venezuela had such a history, while Ecuador did not.[146] It may also depend on the extent to which the regime continues to lose meaningful cases, at least sometimes. An interesting example is Hungary, where the Court has also been a fairly loyal partner of the Fidesz regime but has also issued several decisions that broke with the party in some major cases.[147] We return to these problems, which we think mark an important limit to abusive judicial review as a regime strategy, in Part V.

B. Strong Abusive Judicial Review

More interesting than mere legitimation of antidemocratic political decisions are cases where courts themselves are the ones actively undertaking antidemocratic changes. Courts in some cases may choose to engage in robust forms of review, which involve little or no deference to the constitutional judgments of legislators or executive actors. Judicial review of this kind is also often under-

144 *See generally id.* (discussing these transformations in detail).

145 *See, e.g.*, Emily Tamkin, *Polish Ruling Party Passed Unconstitutional Laws, Now Controls Constitutional Tribunal*, FOREIGN POL'Y (Dec. 19, 2016, 3:17 PM), https://foreignpolicy.com/2016/12/19/polish-ruling-party-passed-unconstitutional-laws- now-controls-constitutional-tribunal-trump-law-justice/ [https://perma.cc/RP5K-A9YX].

146 For further discussion on this point, see *infra* Part V.

147 *See, e.g.*, Szente, *supra* note 107, at 138 tbl.3 (finding that political ideology is a strong determinant of vote, but that even some justices affiliated with Fidesz and its allies sometimes vote against the government).

stood as a form of "strong" or "active" judicial review.[148] Courts may likewise rely on certain remedies, such as the immediate invalidation of an existing statute or executive decision, or a mandatory order directed at a specific government official requiring specific and immediate action, which tend to give judicial review a strong character.[149]

The co-optation of stronger or more active forms of judicial review may be especially valuable for would-be authoritarian actors. Democratic constitutions often limit the scope for would-be authoritarian actors to pursue their objectives in a range of ways: Federal structures may mean that the national legislature lacks power to enact desired legislation,[150] limits on executive power may constrain the power of the president to enact various policies, and entrenched term limits may prevent an elected president from remaining in office.[151] Finding ways either to change, or circumvent, these restrictions is a key part of any would-be authoritarian's agenda.

Furthermore, would-be authoritarians are increasingly faced with amendment rules that make formal change to such provisions quite difficult. Increasingly, provisions of this kind enjoy heightened protection via "tiered" approaches to constitutional design, which impose heightened requirements for amendment of these provisions.[152] In some cases, constitutional limits are even made formally unamendable by virtue of an "eternity clause."[153] The advantage of judicial review in this context is that it has the potential to circumvent these limitations. Strong forms of judicial review can provide would-be authoritarians with the means of achieving their objectives without being bound by the constraints of a federal division of power, the separation of legislative and executive powers, or even formal limits on constitutional amendment.[154]

Below, we discuss in detail several examples of strong abusive judicial review in which judges have removed presidential term limits and nullified the power of opposition-controlled legislatures.[155] Here, we also briefly give a couple of other examples of this kind of "active" or strong abusive judicial review.

A first involves the abuse of doctrines of militant democracy. Post- War Germany pioneered the concept that liberal democratic orders may be able to ban antidemocratic parties, movements, and politicians that would seek to undo that order if they succeeded in winning power.[156] As we have

148 *See* sources cited *supra* note 127. Other definitions, which are useful in other contexts, but less so in this one, focus on the finality of court decisions. *See* TUSHNET, *supra* note 127.

149 *See* Landau, *Forms, Functions, and Varieties*, *supra* note 127; Kent Roach, *Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response*, 66 U. TORONTO L.J. 3 (2016).

150 *See* Whittington, *supra* note 83, at 585 ("[T]he Court is able to do what national political leaders are either constitutionally incapable of doing or politically unwilling to do themselves.").

151 *See* Ginsburg et al., *supra* note 49, at 1816-18.

152 *See* Dixon & Landau, *Tiered Constitutional Design*, *supra* note 37, at 444 (giving numerous examples).

153 *See* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 5-6 (2017); Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 665 n.6 (2010).

154 *See infra* Part IV.A.

155 *See infra* Part IV.

156 *See* Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self- Determination*, 4 INT'L J. CONST. L. 488, 491

noted above, the constitutions of many countries around the world now give their high courts the power to ban parties, often on similar grounds that they are "antidemocratic" or otherwise anti-constitutional.[157]

Consider a 2017 decision by the Supreme Court of Cambodia, which banned the opposition National Rescue Party.[158] The decision was issued by a Court that is universally regarded as being controlled by the incumbent Cambodian People's Party ("CPP"),[159] and reasoned on extremely flimsy grounds that the party was allied with foreign interests (including the United States) and posed a threat of national breakup.[160] The relevant standards applied by the Court, which were found in the Law of Political Parties rather than the constitution itself, were themselves highly ambiguous and open to abuse.[161] And the case was brought by the government itself (i.e., the Ministry of the Interior), and decided by the Court after only five hours of hearing, and two hours of deliberation.[162]

The effect of the decision was dramatic: It decimated the major opposition party in the country, which had made extraordinary gains in the previous elections of 2013, almost winning control of the national parliament.[163] The Rescue Party was dissolved, lost all 55 of its seats (out of 125 total seats) in the parliament, and more than 100 of its leaders were banned from politics for 5 years.[164] In a subsequent election in July 2018 with no effective opposition, the CPP won all 125 seats in the parliament; the incumbent prime minister Hun Sen has now controlled the country since 1985.[165] The Supreme Court's decision banning the Rescue Party thus played a pivotal role in protecting a long-term authoritarian regime in Cambodia and in cutting off a likely process of re-democratization.

A second example of strong-form abusive judicial review stems, once again, from the Polish case. The Court there has not only legitimated key regime actions, but has also actively worked to destabilize the democratic order. One of its key decisions, for example, struck down the law regulating the country's Judicial Council, on the dubious ground that it discriminated against different

(2006).

157 Ginsburg & Elkins, *supra* note 59, at 1447.

158 *See* Ministry of Interior v. Nat'l Rescue Party, Verdict No. 340, Nov. 16, 2017, at 50 (S. Ct. Cambodia, Plenary of Trial Chamber) (translation on file with authors).

159 *See* Lucy West, *The Limits to Judicial Independence: Cambodia's Political Culture and the Civil Law*, 26 DEMOCRATIZATION 537, 537-38 (2019) (noting the "lack of judicial independence" in the country, and arguing it is a result of both the political context and design of the judiciary).

160 *See Nat'l Rescue Party*, Verdict No. 340, at 41-47.

161 *See id.* Indeed, the law had been amended earlier in 2017 to add broader grounds for party dissolution, and in an act of weak abusive judicial review, the Constitutional Council upheld the amendments. *See* Wendy Zeldin, *Cambodia: Supreme Court Dissolves Main Opposition Party*, GLOBAL LEGAL MONITOR (Dec. 6, 2017), http://www.loc.gov/ law/foreign-news/article/cambodia-supreme-court-dissolves-main-opposition-party/ [https://perma.cc/M6A8-ZCHT].

162 Kosal Path, *A Cambodian Fusion of Personality, Party, and the State*, 117 CURRENT HIST. 215, 215 (2018).

163 *See Cambodia Top Court Dissolves Main Opposition CNRP Party*, BBC NEWS (Nov. 16, 2017), https://www.bbc.com/news/world-asia-42006828 [https://perma.cc/P6Z8- CC93].

164 *Id.*

165 *See* Hannah Beech, *Cambodia Re-elects its Leader, a Result Predetermined by One*, N.Y. TIMES (July 29, 2018), https://www.nytimes.com/2018/07/29/world/asia/cambodia- election-hun-sen.html [https://perma.cc/H55R-HXLX]; Julia Wallace, *'Fireflies' and 'Ghosts' in Cambodia Prop up Facade of Real Election*, N.Y. TIMES (July 11, 2018), https://www.nytimes.com/2018/07/11/world/asia/cambodia-election-hun-sen.html [https://perma.cc/N9BM-76VX].

levels of the judiciary by prescribing different methods for their appointment to the Council, and also had improper terms for their mandates.[166] As Sadurski recounts, the decision was essentially "pretextual," but it served an important political function by creating a vacuum in which the Peace and Justice party could now introduce and pass a new law governing this matter.[167] The new law changed the appointment process from a judicial one to a political one, thus giving the ruling party an effective monopoly on appointments. It also dumped existing members of the Council out midway through their existing terms, which the party justified by pointing to the "defect" in appointments found by the Court in the existing law.[168] Effectively, the Court gave the party the tools it needed to capture the institution regulating the ordinary judiciary.

The concept of strong abusive judicial review dovetails nicely with other work that points out various ways in which courts carry out functions for authoritarian regimes or regimes whose leaders are seeking to become authoritarian. Much of this work identifies the ways in which leaders use a range of ordinary legal techniques such as libel lawsuits and anti-corruption investigations to harass, divide, and weaken opposition political movements.[169] The difference is that the functions carried out in those cases, which one might call the abuse of the rule of law, occur at the routine legal level rather than the extraordinary level of constitutional change. Regimes engaged in such strategies seek to lower the visibility of their actions and to present them as neutral rather than selective or distorted applications of rule of law principles. In contrast, the strong form of abusive judicial review involves cases that are generally far more salient to domestic and international observers. In using courts to carry out visible, sweeping, and problematic constitutional changes, regimes may help to blunt hostile responses or measures that might otherwise follow on steps to erode or limit liberal democracy.

IV. ABUSIVE JUDICIAL REVIEW IN ACTION: TWO EXAMPLES

In this Part, we seek to gain additional insight into the phenomenon of abusive judicial by exploring two important recent examples. The first is cross-national and looks at judicial decisions either legitimating the removal of presidential term limits, or actively removing them, across various countries in Latin America and Africa. The second is a single-country case study: We look at a series

166 *See* Decision K 5/17, Jun. 20, 2017 (C.C. Poland).

167 Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 31-32.

168 *See* Wojciech Sadurski, *Bad Response to a Tragic Choice: The Case of Polish Council of the Judiciary*, VERFASSUNGSBLOG (Apr. 16, 2018), https://verfassungsblog.de/bad- response-to-a-tragic-choice-the-case-of-polish-council-of-the-judiciary/ [https://perma.cc/8HRF-SQJR].

169 *See* Varol, *supra* note 3, at 1679; Alvin Y.H. Cheung, An Introduction to Abusive Legalism 1-2 (Feb. 22, 2018) (unpublished manuscript), *available at* https://osf.io/preprints/lawarxiv/w9a6r/.

of high court decisions in Venezuela to nullify the power of the elected National Assembly after the opposition won control of it in 2015.

A. Presidential Term Limits in Latin America and Africa

A number of recent judicial decisions on presidential term limits in both Latin America and Africa offer important examples of both the weak and strong forms of abusive judicial review. There are a few prominent and well-studied examples of courts defending the constitutional order against attempts by would-be authoritarians to eliminate or ease presidential term limits. Perhaps the most famous is a 2010 Colombian decision that used the unconstitutional constitutional amendment doctrine to stop President Alvaro Uribe from amending the Colombian Constitution to seek a third consecutive term in office.[170] The Court in that case held that allowing three presidential terms (consecutive or otherwise) would effectively transform the system of separation of powers by allowing an incumbent president to amass too much power.[171] But there are many more examples of courts wielding similar doctrines as a way to enable, or directly carry out, the elimination of presidential term limits.

We of course do not argue that all decisions allowing an easing of presidential term limits are abusive in character; some are pretty clearly democratically legitimate. First, there is a fairly broad, reasonable range of disagreement as to the scope of term limits in a presidential system.[172] For example, there are good arguments that some limits, such as those prohibiting any consecutive or non-consecutive re-election, are too strict, and movements certainly ought to be able to ease them.[173] Second, and relatedly, much depends on the political context in which changes are made, and the impact of changing term limits in light of other formal and informal changes.

Take as an example Costa Rica, where the Supreme Court in 2003 issued a decision excising an earlier term limit in the constitution, which prohibited any consecutive or non-consecutive re-election.[174] The Court's decision relied on problematic reasoning similar to that of many of the cases reviewed below. But the effect of the decision was quite different. The decision removed the amendment, but left a still- meaningful term limit found in the original constitution in place, which continued to prohibit *consecutive* reelection.[175] In addition, the context in which the decision was

170 *See* MANUEL JOSÉ CEPEDA-ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW 351-59 (2017) (discussing Decision C-141 of 2010 and providing a translation of the case).

171 *See id.*

172 *See* David Landau, Yaniv Roznai & Rosalind Dixon, *Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America*, *in* POLITICS OF PRESIDENTIAL TERM LIMITS 1 (Alexander Baturo & Robert Elgie eds., 2019).

173 *See id.* at 11; Jack M. Beermann, *A Skeptical View of a Skeptical View of Presidential Term Limits*, 43 CONN. L. REV. 1105, 1107 (2011); John M. Carey, *The Reelection Debate in Latin America*, 45 LATIN AM. POL. & SOC'Y 119, 130-31 (2003); Ginsburg et al., *supra* note 49, at 1813.

174 *See* Decision No. 02771, Apr. 4, 2003 (Const. Chamber, S. Ct.).

175 *See* COSTA RICA CONST. [CRC] art. 132.

made clearly served the political interests of one political party and ex-president seeking a return to office, but it did not pose a serious threat to liberal democratic constitutionalism because it was not coupled with other formal and informal changes to erode democracy.[176]

Our argument, therefore, is contextual — in the cases and contexts we review here, the decisions constituted abusive exercises of judicial review. All of these cases are ones where the changes did more than allow a single presidential re-election; they mostly eliminated presidential term limits entirely, or at least allowed three or more consecutive terms. Furthermore, the changes to term limits were coupled with other formal and informal measures, such as attacks on judicial independence and the media, or alterations to electoral rules, which also constituted attacks on the democratic minimum core. The different forms of change worked together, with the changes to term limits allowing presidents to increase their control over other institutions of the state, such as courts, that are supposedly in charge of checking them, and greater tenure in office allowing the president to tilt the electoral playing field ever more greatly against opposition figures. There is a cluster of "weak" abusive judicial review cases where courts held that political attempts to loosen or eliminate term limits were legitimate, even when they posed a risk of substantial democratic erosion.[177] Take a trio of cases from the Andes, in Venezuela (2009), Ecuador (2014), and Bolivia (2015).[178] In all three countries, presidents first replaced their constitutions, and then, as their final terms expired, sought to eliminate or extend presidential term limits in the constitutions they themselves had played a major role in drafting.[179] The three cases are especially interesting because all three contained a "tiered" constitutional design, where certain changes such as those to the "fundamental" or "basic" structure, or which infringed on basic rights and guarantees, would require a more demanding procedure for formal constitutional change.[180] There are compelling arguments that the elimination of presidential term limits is indeed the type of change that infringes on the basic structure, or infringes on the fundamental rights of the opposition.[181] Thus, a significant easing or elimination of term limits would appear to be the kind of change that would activate the defenses embedded in the constitutional text. Nonetheless, in all three cases, Presidents Chavez, Correa, and Morales, respectively, all sought to use the lowest level of constitutional change (the ordinary amendment

176 *See* Elena Martinez-Barahona, *Constitutional Courts and Constitutional Change: Analysing the Cases of Presidential Reelection in Latin America*, *in* NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES 289, 297 (Detlef Nolte & Almut Schilling-Vacaflor eds., 2012).

177 On "weak" abusive judicial review, see *supra* Part III.A.

178 *See* Decision 1974/07 (S. Ct. Ven.); Decision 1610/08 (S. Ct. Ven.); Decision 0001–14-RC (C.C. Ecuador 2014); Decision 0194/2015 (C.C. Bolivia); Decision R.A. L.P. 017/2015–2016 (S. Elect. Trib. Bolivia).

179 For an overview of the three decisions and their contexts, see Landau, *Presidential Term Limits*, *supra* note 17, at 234-38. For a focus on Ecuador, see Carolina Silva-Portero, *Chronicle of an Amendment Foretold: Eliminating Presidential Term Limits in Ecuador*, CONSTITUTIONNET (Jan. 20, 2016), http://www.constitutionnet.org/news/chronicle- amendment-foretold-eliminating-presidential-term-limits-ecuador [https://perma.cc/ W3BX-5EE4].

180 *See* VENEZ. CONST. [VC] arts. 340-49; ECUADOR CONST. [EC] arts. 441-44; BOL. CONST. [BC] art. 411; *see also* Dixon & Landau, *Tiered Constitutional Design*, *supra* note 37, at 440-50.

181 *See* Carlos Bernal Pulido, *There are Still Judges in Berlin: On the Proposal to Amend the Ecuadorian Constitution to Allow Indefinite Presidential Reelection*, BLOG INT'L J. CONST. L. (Sept. 10, 2014), http://www.iconnectblog.com/2014/09/there-are-still-judges-in-berlin-on-the-proposal-to-amend-the-ecuadorian-constitution-to-allow-indefinite-presidential- reelection/ [https://perma.cc/BR4P-D6V6].

tier) to eradicate term limits completely (in Venezuela and Ecuador) or to extend them to effectively allow four consecutive terms (in Bolivia).[182]

Courts in all three countries ratified these maneuvers.[183] In each case, the change was one of many undertaken by incumbents seeking to consolidate power and to tilt the electoral playing field sharply in their favor, such that observers of all three countries were already worried that there was a significant risk of democratic erosion.[184] And each decision was taken by a court that was clearly controlled by the regime.[185] The reasoning in each decision held that the easing or elimination of term limits advanced, rather than clashed with, the fundamental structure or fundamental rights found in the existing constitution because this easing or elimination vindicated the fundamental rights of voters and elected officials.

By failing to activate defense mechanisms found in the existing constitutional text, and by framing change as concordant rather than clashing with basic constitutional values, these three courts legitimated political projects that allowed incumbents to remain in power through relatively undemanding routes of constitutional change. In Ecuador, for example, the opposition to President Correa demanded that he at least put the change to a referendum, which they felt he might lose.[186] A popular referendum was required for the higher tiers of constitutional change, but not for an ordinary amendment.[187] The Court made it easier for Correa to achieve his goals by allowing him to avoid the need for a referendum. Similarly, in Bolivia, the only alternative route of change would have required a costly (and potentially unpredictable) constituent assembly, which the ruling allowed Morales to avoid.[188] Finally, in Venezuela, the Court's ruling that the lowest tier of change was appropriate helped Chavez avoid the charge that his successful 2009 referendum to remove presidential term limits was an unlawful rerun of a narrowly failed 2007 referendum that would have removed term limits but also carried out many other changes, and which had used the middle ("reform") tier of change.[189]

Not all these changes ultimately led to a long-term erosion in the democratic minimum core of each country: In Ecuador in particular, *popular* resistance to Correa's efforts at antidemocratic change — and the Court's role in going along with it — created strong pressure on Correa to step

182 In Bolivia, the literal effect of the proposal was to allow three consecutive terms in office, but the court had already held that the term Morales served before the 2009 Bolivian Constitution came into effect did not count towards the limit. *See Bolivia: New Law Backs President Evo Morales Third Term*, BBC NEWS (May 21, 2013) [hereinafter *Bolivia: New Law*], https://www.bbc.com/news/world-latin-america-22605030 [https://perma.cc/7LFG-8WYH].

183 *See supra* note 178.

184 *See* Steven Levitsky & James Loxton, *Populism and Competitive Authoritarianism in the Andes*, 20 DEMOCRATIZATION 107, 108 (2013).

185 *See* Landau, *Presidential Term Limits*, *supra* note 17, at 245 (noting that the high courts in each country were all "widely seen as controlled by the ruling party at the time key decisions were made").

186 *See id.* at 236-37.

187 *See* EC, *supra* note 180, arts. 441-42.

188 The prior constituent assembly in Bolivia, between 2006 and 2009, was a chaotic power struggle between contending political forces. *See, e.g.*, Fabrice Lehoucq, *Bolivia's Constitutional Breakdown*, 19 J. DEMOCRACY 110 (2008).

189 *See* Decision 1610/08 (Venez.) (rejecting this challenge).

aside, and not contest the 2019 presidential election.[190] The new President Lenin Moreno has taken a number of steps to assert his independence, including the re-imposition of term limits after a successful referendum on that issue.[191] In Bolivia, however, there are continuing concerns about the erosion of democracy,[192] and Venezuela has slid further, towards full-scale authoritarianism.[193]

Other examples can be found in Africa, though many African constitutions give more limited textual recognition to the idea of judicially enforceable limits on the constitutional amendment process. In Rwanda, for instance, when the Rwanda Patriotic Front-controlled Parliament proposed changes to the Rwandan Constitution in 2015 that effectively allowed President Kagame to serve a further 17 years in office,[194] the Rwandan Supreme Court declined to uphold a challenge to this proposal.[195] The court rejected the suggestion, by the Green Party, that the amendment power in Article 193 of the constitution was subject to implied restrictions necessary to protect democracy.[196] Instead, it upheld the validity of the relevant amendment.

Beyond these examples of weak-form abusive judicial review, there are a series of cases where courts carried out more active forms of abusive judicial review in order to allow would-be authoritarian leaders to remain in power. In these cases, courts went beyond merely legitimating political projects to carry out antidemocratic constitutional change and have in fact directly carried out these changes in ways that benefitted incumbents.

One form of this occurs where courts reinterpret existing presidential term limits in ways that permit incumbents to remain in office for longer than the constitutional text would appear to allow.[197] Some courts have held, for example, that amendments to add term limits do not cover incumbents but only apply prospectively; others that constitutional term limits do not count terms

190 *See* Dan Collyns, *Protests in Ecuador as Lawmakers Approve Unlimited Presidential Terms*, GUARDIAN (Dec. 3, 2015, 10:05 PM), https://www. theguardian.com/world/2015/dec/04/protests-in-ecuador-as-lawmakers-approve- unlimited-presidential-terms [https://perma.cc/9TW8-QUTA].

191 *See* Maggy Ayala & Marcelo Rochabrún, *Ecuador Votes to Bring Back Presidential Term Limits*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/world/ americas/ecuador-presidential-term-limits.html [https://perma.cc/VK35-SP22].

192 Oliver Della Costa Stuenkel, *Bolivia's Democracy at Risk: What Role for External Actors?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (June 20, 2017), https:// carnegieendowment.org/2017/06/20/bolivia-s-democracy-at-risk-what-role-for-external- actors-pub-71301 [https://perma.cc/5MZG-Z6WH].

193 *See* Max Fisher & Amanda Taub, *How Does Populism Turn Authoritarian? Venezuela Is a Case in Point*, N.Y. TIMES (Apr. 1, 2017), https://www.nytimes.com/ 2017/04/01/world/americas/venezuela-populism-authoritarianism.html [https://perma. cc/DB2X-KBFB].

194 *See Rwandans Vote on Allowing Third Kagame Presidential Term*, BBC NEWS (Dec. 18, 2015), http://www.bbc.com/news/world-africa-35125690 [https://perma.cc/NB5D- 3S23] [hereinafter *Rwandans Vote*].

195 Clement Uwiringiyimana, *Rwanda's Top Court Clears Way for Kagame Third Term*, REUTERS (Oct. 8, 2015, 4:12 AM), http://www.reuters.com/article/us-rwanda- president-idUSKCN0S21AI20151008 [https://perma.cc/BJV5-U5RT].

196 *See id.*

197 Sometimes, these kinds of exemptions for incumbents are done by formal amendment rather than judicial interpretation. In Rwanda in 2015, for example, amendments shortened presidential terms and created a two-term limit, but also created an explicit set of transitional arrangements whereby the winner of the 2017 presidential election would serve an initial transitional seven-year term, and then be eligible for two further five-year terms. In aggregate, these changes created the possibility for Kagame himself to stay in office until 2034, a total of thirty-one years. *See Rwandans Vote*, *supra* note 194. Likewise, in Namibia in 1999, parliament resolved not to apply term limits to President Sam Nujoma on the basis that he had not been directly elected in 1989. *See* Wachira Maina, *Drunk with Power: African Presidents Fight Term Limits*, DAILY MONITOR (Mar. 5, 2018), http://www.monitor.co.ug/SpecialReports/African-presidents-fight- term-limits/688342-4329366-11vd18j/index.html [https://perma.cc/WJ34-5Z7L].

begun before a new constitutional text was adopted.[198] Take Senegal: In 2012, in the face of attempts by President Abdoulaye Wade to run for a third term in office, the Supreme Court held that earlier changes to the Senegalese Constitution to introduce a seven-year (single) presidential term only applied to future presidents — and not to the then sitting president, even on a prospective basis. The Court was comprised of five judges, all of whom were appointed by Wade himself;[199] and reasoned in what one commentator called a "tortured" way.[200] The immediate effect of the decision was that Wade was empowered to stand for a third term, despite the apparent formal constitutional prohibition on him seeking re-election and his own public promises not to seek such a term- extension. Nonetheless, opposition to this move was sufficiently powerful that Wade was ultimately defeated in the relevant elections.[201] Leading opposition figures in fact publicly labelled the decision of the Court a "constitutional coup" and encouraged widespread public protest — first against the decision, and then later at the ballot box.[202]

Similarly, in 2015, the Burundi President's party asked the Constitutional Court to find that existing term limits did not prevent the President from seeking reelection because he was first elected under transitional provisions that provided for indirect, parliamentary election rather than direct elections. The Court accepted the argument, finding that the transitional provisions operated completely separately from the provisions imposing term limits.[203] This paved the way for President Pierre Nkurunziza to be reelected for a third term in office;[204] and subsequent changes have led to an even greater consolidation of presidential rule. In 2018, in the lead up to the 2020 presidential elections, President Nkurunziza successfully introduced changes to the Constitution of Burundi to allow himself to seek reelection for a fourth and fifth consecutive term.[205] The Burundi context has included extensive evidence of coercion against members of the Constitutional Court. The Vice-President of the Court refused to sign his name to the 2015 opinion of the Court, and immediately fled to Rwanda,[206] claiming that the Court had been subject to intense political pressure in the lead

198 Bolivia is an example of the latter dynamic. *See Bolivia: New Law*, *supra* note 182.

199 Catherine Lena Kelly, *Senegal: What Will Turnover Bring?*, 23 J. DEMOCRACY 121, 122 (2012); *Senegal's President Can Run for Third Term, Court Rules*, GUARDIAN (Jan. 30, 2012, 5:40 AM), https://www.theguardian.com/world/2012/jan/30/senegal-president-run- third-term [https://perma.cc/TP86-KXCD] [hereinafter *Senegal's President*]; *see* Lamin Jahateh, Opinion, *Controversy of Abdoulaye Wade's Presidential Bid*, AL JAZEERA (Jan. 28, 2012), https://www.aljazeera.com/indepth/opinion/2012/01/201212712295177724.html [https://perma.cc/P657-WR77].

200 Tom Ginsburg, *Senegal: Court Clears Wade for Third Term*, BLOG INT'L J. CONST. L. (Jan. 28, 2012), http://www.iconnectblog.com/2012/01/senegal-court-clears-wade- for-third-term/ [https://perma.cc/V4FB-CEFZ].

201 *See Senegal Court Confirms Third Term Bid for President Wade*, BBC NEWS (Jan. 30, 2012), http://www.bbc.com/news/world-africa-16784055 [https://perma.cc/9U26- FMY7]; Lansana Gberie, *Is Democracy Under Threat in West Africa?*, AFR. RENEWAL (Aug. 2012), https://www.un.org/africarenewal/magazine/august-2012/democracy-under-threat- west-africa [https://perma.cc/HXM9-S7YV].

202 *See Senegal's President*, *supra* note 199.

203 *See* Vandeginste, *supra* note 102, at 52.

204 *See id.*; Clement Manirabarusha, *Burundi President's Commission Says People Want Term Limits Removed*, REUTERS (Aug. 25, 2016, 1:26 AM), https://www.reuters.com/ article/us-burundi-politics/burundi-presidents-commission-says-people-want-term- limits-removed-idUSKCN1100O1 [https://perma.cc/4CHX-W7Q5].

205 *See* Jina Moore, *Burundi's Leader Can Extend his Term. His African Peers Take Notes.*, N.Y. TIMES (May 17, 2018), https://www.nytimes.com/2018/05/17/world/africa/ burundi-president-nkurunziza-referendum.html [https://perma.cc/6MSV-7HR2].

206 *See* Vandeginste, *supra* note 102, at 52; Kabumba, *supra* note 102.

up to its decision, and that several judges had received death threats, before changing their vote to uphold the constitutionality of the President's third term.[207]

An even stronger version of the same approach has taken hold recently in Latin America, where courts in several countries have used the unconstitutional constitutional amendment doctrine to uproot, rather than to protect, presidential term limits.[208] We focus on two countries here — Nicaragua and Bolivia. The two cases share some key similarities of context. In both, observers raised concerns about the erosion of the liberal democratic order led by the same incumbents who sought to change the term limits. Moreover, courts in both countries were under the control of the regime by the time these decisions were issued.

In Nicaragua, the incumbent president, Daniel Ortega, sought potential reelection in 2011 after winning the presidency in 2007. However, an article of the existing constitution prohibited consecutive reelection and limited presidents to serving only two terms in their lifetimes.[209] This provision had been added to the 1987 constitution as part of a major package of amendments in 1995 that helped to negotiate an end to domestic conflict.[210] Because Ortega had earlier served as president in the 1980s, he ran up against not only the consecutive limit, but also the lifetime limit for exercising the presidency. Ortega at the time lacked the necessary supermajority in Nicaraguan congress to pursue a constitutional amendment that would have eliminated the term limit, and his attempt to push a change through the congress failed.

In this context, Ortega's allies brought a case in the Constitutional Chamber of the Supreme Court, arguing that the term limit itself was an unconstitutional constitutional amendment.[211] The court agreed with the petitioners and voided the term limit, holding that the amendment adding the term limit violated fundamental rights and thus was an unconstitutional constitutional amendment. As noted above, the decision was issued under extraordinary procedural conditions that sidelined all of the opposition members of the court.[212] Through subterfuge, three opposition members of the six-member Constitutional Chamber were replaced by pro-government judges, leading to a unanimous decision in favor of the regime.[213] At any rate, the result of the case was that Ortega was thus able to run for (and win) a new term. After winning that term and the necessary supermajority

207 *See* Vandeginste, *supra* note 102, at 52; Kabumba, *supra* note 102.

208 We do not discuss a similar Honduran decision also abolishing term limits, which shares similarities of reasoning. The Honduran case is somewhat less clearly "abusive" in the sense of impacting the democratic minimum core. For a discussion of this decision, see Landau, Dixon & Roznai, *Lessons from Honduras*, *supra* note 33, at 67, 69.

209 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] art. 147, LA GACETA, DIARIO OFICIAL [L.G.] 1995.

210 *See* Lee Demetrius Walker and Philip J. Williams, *The Nicaraguan Constitutional Experience: Process, Conflict, Contradictions, and Change*, *in* FRAMING THE STATE IN TIMES OF TRANSITION 483, 496 (Laurel E. Miller ed., 2010).

211 *See* Decision 504 of 2009, Oct. 19, 2009 (S. Ct. Nicaragua).

212 *See id.*

213 *See supra* text accompanying notes 76–77; *see also* Dixon & Jackson, *supra* note 76, at 203; *European Parliament resolution of 26 November 2009 on Nicaragua* (2009) P7_TA 0103 final (Nov. 26, 2009), *available at* http://www.europarl.europa.eu/ sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0103+0+DOC+XML+V0//EN [https://perma.cc/S2XF-LDQP] ("[O]n 19 October 2009 the Nicaraguan . . . member judges, who were not invited and who were replaced by three pro-government judges . . .").

in the congress, he passed a formal amendment removing the term limit, ran again and won reelection, and remains in power today.[214]

In Bolivia, President Morales narrowly lost a 2016 constitutional referendum that would have allowed him to run for a fourth consecutive term in office,[215] and which had been legitimated by the 2015 decision of the Plurinational Constitutional Tribunal, Bolivia's constitutional court, noted above.[216] The result of the referendum suggested that while Morales himself was popular, his plans to extend term limits were not. Rather than risk another popular referendum that would motivate the opposition (and would have been of dubious legality), Morales's allies instead switched from a strategy of weak abusive judicial review to one of strong abusive judicial review. Thus, they approached the constitutional court with a new argument that the presidential term limits found in the original 2009 constitution, written and promulgated during Morales's own presidency, should be set aside because they clashed with international human rights law.

The constitutional court accepted the argument in late 2017, holding that the domestic constitution itself had to be compliant with international human rights law as found in the Inter-American System and elsewhere, and moreover that the term limits clashed with international law and thus must be disregarded.[217] While the justices of the court are elected in popular elections, the electoral lists are composed by the congress, which has been dominated by Morales's Movement Toward Socialism (Movimiento al Socialismo, or "MAS").[218] The opposition has also frequently called for boycotts of the judicial elections because they have considered them unfair, leaving only MAS supporters to participate.[219] Four of seven justices elected to the court in 2011, which was the one deciding the cases discussed here, previously held posts in the Morales administration.[220] The practical result of the decision is to eradicate all presidential term limits from Bolivia, allowing Morales to run for a fourth five-year term in 2019.

Aside from irregularities in process and signs of regime control over the judiciaries to achieve key political goals, these two decisions show signs of problematic reasoning, in particular the misuse of transnational constitutional principles and international human rights law. A running thread in the Latin American term limits cases is the argument that presidential term limits violate fundamental rights of both voters and elected officials, which is often based on jurisprudence and

214 *See* Nicolas Cherry, *The Abolition of Presidential Term Limits in Nicaragua: The Rise of Nicaragua's Next Dictator?*, CORNELL INT'L L.J. ONLINE (Mar. 13 2014), http://cornellilj.org/the-abolition-of-presidential-term-limits-in-nicaragua-the-rise-of- nicaraguas-next-dictator/ [https://perma.cc/VA8W-GCJZ].

215 Nicholas Casey, *Bolivian President Concedes Defeat in Term-Limit Referendum*, N.Y. TIMES (Feb. 24, 2016), https://www.nytimes.com/2016/02/25/world/americas/bolivian- president-evo-morales-concedes-defeat-in-term-limit-referendum.html [https://perma.cc/VS5J-LW6B].

216 *See supra* text accompanying notes 178–182.

217 *See* Decision N. 84 of 2017, Nov. 28, 2017 (C.C. Bolivia).

218 *See* Amanda Driscoll & Michael J. Nelson, *The 2011 Judicial Elections in Bolivia*, 30 ELECTORAL STUD. 1, 2 (2012).

219 *See id.*

220 *See id.* at 3-4. The administration has also relied heavily on impeachment, for example suspending and eventually impeaching three justices after they made a ruling against the administration in a case involving the Notary Law, on charges that were widely seen as trumped up. *See supra* text accompanying note 108.

principles supposedly found in international human rights law in the Inter- American System. But the argument that a constitutional term limit violates international or regional human rights law (or other fundamental rights principles) is strikingly ill-founded. The Organization of American States recently asked the Venice Commission (the "Commission") to issue a report on the issue, and the Commission concluded that there was no support for the position that presidential term limits violated international law.[221] The Commission noted wide variance surrounding state practice on presidential term limits, precluding any claim that there was a customary international law norm on this issue.[222] And it found that any restriction placed by presidential term limits on the rights of political participation of voters and elected officials was highly likely to be justified by the known risks posed by indefinite continuance in office.[223] The problematic reasoning of all of these courts suggests the immense political pressure that these courts were under to eradicate term limits, or to permit incumbents to do so.

B. Suppressing the Congress in Venezuela

The Venezuelan Supreme Court has long been interesting as an example of the role of the judiciary during an increasingly authoritarian regime. As Sanchez Urribarri has documented in detail, the court initially preserved a significant space of independence after Hugo Chavez came to power and replaced the Venezuelan constitution in 1999, especially as the original Chavista coalition fragmented.[224]

However, following a failed coup attempt against Chavez, the National Assembly of Venezuela passed a law allowing his regime to take full control of the court.[225] It broadly maintained the powers of the court over other institutions while allowing the regime to exert near-complete control over it. The new Organic Law of the Supreme Court in 2004 expanded the size of the Venezuelan Supreme Court from twenty to thirty-two justices and made it much easier for the congress to dismiss justices by annulling their appointments or by impeaching them.[226] These dismissal powers were used to force several key changes, including removing the court's vice-president. Thus, after 2004, the regime effectively has exercised complete control over the court.[227] Indeed, a study found that

221 *See* COUNCIL OF EUROPE, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW; REPORT ON TERM-LIMITS PART I - PRESIDENTS 24-25 (2018) [hereinafter REPORT ON TERM- LIMITS], https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)010-e [https://perma.cc/93ZD-36SY].

222 *See id.* at 3-10.

223 *See id.* at 19 ("Term limits which most representative democracies put on the right of the incumbent president are a reasonable limit to the right to be elected because they prevent an unlimited exercise of power in the hands of the President and protect other constitutional principles such as checks and balances and the separation of powers.").

224 *See* Sanchez Urribarri, *supra* note 33, at 867-71.

225 *See id.* at 871-72.

226 *See id.*

227 *See id.* at 872-73.

after the law was passed, not a single Venezuelan Supreme Court ruling went against the national government between 2005 and 2014.[228]

Instead, the court has been a consistently reliable and valuable partner of an increasingly authoritarian government. Much of what it has done has been the "weak" form of abusive judicial review, where it has legitimated a series of regime actions of questionable constitutionality. For example, it upheld a series of laws passed by the regime that were dubious because of their effects on freedom of speech, freedom of the press, and other constitutional values, and which were then used as instruments of repression.[229] It upheld electoral changes that greatly favored the incumbent regime, and it also legitimated the government's decision to strip an opposition-held TV station of its license.[230] As noted above, it upheld efforts by Chavez to change the constitution in order to eliminate all term limits.[231] Furthermore, when a series of sweeping constitutional reforms narrowly failed in a 2007 referendum, the Chavez government and the legislature repackaged many of the changes as organic laws, despite the fact that the constitution had not been changed.[232] The Supreme Court upheld these changes against challenges, effectively allowing the Chavez regime to circumvent the procedure for passing constitutional amendments.[233]

The strong form of abusive judicial review became more prominent after the opposition won control of the National Assembly in December 2015. Chavez died in 2013; his hand-picked successor (and vice- president) Nicolas Maduro won an election shortly thereafter. Maduro governed in a sharply deteriorating economic environment and without the charisma or political skill of Chavez.[234] In the face of this, a well- organized opposition won an overwhelming electoral victory in 2015, winning about two-thirds of seats in the National Assembly.[235] The overwhelming opposition victory seemed to signal that the regime of Chavez's less-charismatic successor, Nicolas Maduro, would transition back towards a more democratic endpoint. But the role of the Venezuelan Supreme Court changed in this period — it has no longer been just a passive legitimator of dubious regime actions, but instead began playing an active role in nullifying the electoral power of the opposition and allowing President Maduro to rule unilaterally. Right after the 2015 election, the lame-duck congress re-packed the court in an emergency session by naming twelve new justices to it after a number of justices resigned or retired en masse, which prevented the National Assembly from gaining any ability to appoint new justices and kept the Court firmly in the hands of the regime.[236]

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228 *See* Javier Corrales, *Autocratic Legalism in Venezuela*, 26 J. DEMOCRACY 37, 44 (2015).

229 *See* Sanchez Urribarri, *supra* note 33, at 876.

230 *See id.*

231 *See supra* Part IV.A.

232 *See* Sanchez Urribarri, *supra* note 33, at 876-77.

233 *See id.*

234 *See* David Landau, *Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 161, 168 (Mark A. Graber, Sanford Levinson & Mark Tushnet, eds., 2018).

235 *See id.* at 169.

236 *See* Andres Cervantes Valarezo, Constitucionalismo Abusivo Y Amnistía En Venezuela, 17 REVISTA DE ESTUDIOS JURIDICOS 1, 5-6 (2017).

The newly-packed Venezuelan Supreme Court set out to prevent the new opposition-controlled Assembly from wielding any power or from being able to check Chavez. For example, the Supreme Court and other institutions effectively blocked the opposition's plans to legally remove Maduro from power. When the opposition suggested a constitutional amendment that would cut the length of presidential terms, the Supreme Court held that such an effort would constitute an unconstitutional constitutional amendment.[237] And when opponents attempted to recall Maduro (a mechanism explicitly called for in the Venezuelan constitution, and which Chavez had previously faced and won), electoral bodies effectively set impossible conditions for the recall before suspending it altogether due to supposed concerns of fraud found by regional courts in earlier stages of the process.[238] The Supreme Court also issued legally dubious decisions broadening the scope of the president's emergency powers, effectively allowing Maduro to bypass the National Assembly. For example, in February 2016, the Supreme Court held that even though the Assembly has explicit constitutional powers to disapprove economic emergency decrees issued by the president and thus exercise constitutional control over them, those actions by the Assembly nonetheless did not impact the "legitimacy, validity, state of being in force, or legal efficacy" of the decrees.[239] The decision effectively nullified the congressional power of political control over presidential emergency powers, and opened the door for the president to simply bypass the legislature.

The Supreme Court similarly struck down the important amnesty law passed by the new National Assembly in March 2016.[240] The law attempted to give amnesty to political opponents of the regime — those who had been convicted both of political crimes and closely related common crimes such as criminal defamation — and who had been locked up or threatened with charges by the regime.[241] The Supreme Court held that the law was unconstitutional because it transgressed the allowable limits on political amnesty under international human rights law and international humanitarian law.[242] Those limits have played a major role in contemporary Latin American law and politics, but their main use has been to stop outgoing military governments from putting self-amnesties in place that prevent prosecution of the most serious violations of international law, such as torture, grave war crimes, and crimes against humanity, that these regimes often committed.[243] The limits on amnesty, in these cases, are about avoiding impunity for the worst atrocities, and arguably are part of the longer democratization process by providing accountability for the most significant abuses by agents of the authoritarian regime.[244]

237 *See* Decision 274 of 2016 (TSJ, Constitutional Chamber) (Venez.).

238 *See* Albinson Linares, *Autoridades Electorales de Venezuela Paralizan el Proceso Revocatorio Contra Maduro*, N.Y. TIMES (Oct. 21, 2016), https://www.nytimes.com/es/ 2016/10/21/autoridades-electorales-de-venezuela-paralizan-el-proceso-revocatorio- contra-maduro/ [https://perma.cc/6W4R-HZR2].

239 *See* Decision 7 of 2016 (S. Ct. Venez., Const. Ch.).

240 *See* Cervantes Valarezo, *supra* note 236.

241 *See id.*

242 *See* Decision N. 16-0343, Apr. 11, 2016 (Venez.).

243 *See, e.g.*, Alexandra Huneeus, *Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn*, 35 LAW & SOC. INQUIRY 99, 104-05 (2010) (describing a Chilean judge's holding that an amnesty decree did not apply to the criminal actions of Augusto Pinochet).

244 *See* Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1203, 1227 (2011) (arguing that jurisprudence by the Inter- American Court regarding amnesty laws contributed to democratization in Latin American states).

The Venezuelan Supreme Court relied heavily on this jurisprudence. But it took it out of context, and indeed effectively inverted its purpose, by using it instead to overturn an amnesty law designed to aid resisters of an authoritarian regime in avoiding prosecution for (often trumped up) political crimes. International law of course does not limit amnesties for political crimes, in fact, it tends to encourage the broadest possible amnesties for political acts in order to incentivize reconciliation and democratization.[245] The decision was beset by procedural irregularities: it was issued only four days after the petition was presented, an extraordinary timeframe for such a significant decision.[246] The heavy reliance on Inter-American case law was peculiar because the Venezuelan government had withdrawn from the American Convention on Human Rights in 2013, at the behest of the Venezuelan Supreme Court itself, after losing a key decision regarding the dismissal of three judges from the bench.[247] The Supreme Court also ignored a report of the UN High Commissioner on Human Rights, issued around the same time and at the behest of the Venezuelan government itself, which found the amnesty law to be consistent with international law.[248] The amnesty decision is part of a larger attempt to completely prevent the opposition-controlled Assembly from legislating and to transfer its powers to the president. Immediately after the December 2015

elections, regime allies filed a number of suits in electoral courts challenging individual election results on the grounds of fraud. Most of these were dismissed, but the Electoral Chamber of the Supreme Court upheld three challenges drawn from remote areas of the country.[249] These three cases were significant because they would determine whether the opposition would have the requisite two-thirds majority in the Assembly to amend the constitution, amend organic laws, and carry out certain other key acts. The Assembly refused to comply with the decision and swore in the three contested deputies anyway.

At that point, the Supreme Court began to hold the Assembly in contempt. It held that laws passed by the Assembly were unconstitutional while the state of contempt persisted, preventing it from carrying out its powers. The court thus struck down the major laws passed by the National Assembly during this period. And it held that the president could exercise powers unilaterally as a result. For example, in late 2016 the court held that the president had the power to pass the national budget using emergency powers, even though the constitution gives the Assembly explicit powers to discuss and approve the budget.[250] It justified this decision because of the ongoing state of contempt in which it held the entire legislature, which it in turn held stripped it of any power to make laws. This created, according to the court, a "legislative omission" that had to be filled, given

245 *See id.* at 1225.

246 *See* Cervantes Valarezo*, supra* note 236, at 10.

247 *See* Alexandra Huneeus & René Urueña, *Treaty Exit and Latin America's Constitutional Courts*, 111 AM. J. INT'L L. UNBOUND 456, 456-57 (2018).

248 *See* Press Release, U.N. High Commissioner for Human Rights, ACNUDH: Sobre Declaración de Inconstitucionalidad de ley de Amnistía en Venezuela (Apr. 12, 2016), http://acnudh.org/acnudh-sobre-declaracion-de-inconstitucionalidad-de-ley-de-amnistia- en-venezuela [https://perma.cc/3D3V-PJPP].

249 *See* Decision 260 of 2015 (S. Ct. Venez., Elect. Ch.).

250 *See* Decision 810 of 2016 (S. Ct. Venez., Const. Ch.).

the constitutional duty to pass a budget. The court thus held that the president had to have the power to promulgate a budget unilaterally, which was then presented to the Court and approved.[251]

The most extraordinary decision in this line occurred in March 2017, when the Constitutional Chamber of the Supreme Court issued a decision nullifying all of the powers of the National Assembly and allowing them to be transferred to any other body.[252] In particular, the court held that "while the situation of contempt and invalidity of the actions of the National Assembly persists, this Constitutional Chamber will guarantee that the parliamentary powers will be exercised directly by this Chamber or the organ that it chooses, in order to ensure the rule of law."[253] The Supreme Court thus extended the reasoning of its earlier budget decision, holding that the situation of contempt created a "legislative omission" involving all of the Assembly's powers, which could be filled by transferring those powers to the Court or the president.[254]

The Supreme Court suffered fairly unusual domestic and international consequences for issuing such a brazen decision. The national Attorney General, who had been a regime loyalist, denounced it.[255] The United States issued direct sanctions on the Supreme Court justices for "consistently interfering with the legislative branch's authority."[256] The court ultimately backed down from its extraordinary position — a little bit. In the face of domestic and international condemnation, the court issued a "clarification" withdrawing the part of the decision allowing it to transfer legislative powers to itself or any other institution of its choosing.[257] But this clarification left intact the parts of the decision (and prior decisions) that held the Assembly in contempt and thus prevented it from passing any laws.

The Supreme Court's reasoning is notable for being rooted in the concept of "legislative omission." In regional Latin American doctrine, this occurs when the legislature violates a constitutional duty through inaction, rather than through action. Doctrine holds that in some limited cases (often where omissions are merely "relative"), courts may be able to fill them directly by adding language to a statute — for example where a statute exists that provide protections to certain groups but omits others.[258] In other cases, where the omission is "absolute" because no regulation at all exists, the Supreme Court cannot correct the omission itself, but is limited to exhorting or requiring the

251 *See id.*

252 *See* Decision 156 of 2017 (S. Ct. Venez., Const. Ch.).

253 *See id.* § 4.4.

254 *See id.*

255 Rafael Romo, *Venezuelan Attorney General Breaks with Maduro, Slams Court Ruling*, CNN (Mar. 31, 2017, 4:46 PM), https://www.cnn.com/2017/03/31/americas/ venezuela-attorney-general-supreme-court/index.html [https://perma.cc/U94X-CLQE].

256 Joshua Goodman & Christine Armario, *US Imposes Sanctions on Venezuela Supreme Court*, AP NEWS (May 18, 2017), https://apnews.com/ ed1a50389be74af799f4613caf1e4b1a [https://perma.cc/33NG-T5V8]; *see also* Gabriela Baczynska & Girish Gupta, *EU Confirms New Sanctions on Seven Senior Venezuela Officials*, REUTERS (Jan. 22, 2018, 4:46 AM), https://www.reuters.com/article/us- venezuela-politics-eu/eu-confirms-new-sanctions-on-seven-senior-venezuela-officials- idUSKBN1FB1L0 [https://perma.cc/DV6W-T3Z2] (noting EU sanctions on the Chief Justice).

257 *See* Decision 158 of 2017 (TSJ, Const. Ch.) (Venez.) (clarification of Decision 156).

258 *See, e.g.*, CEPEDA-ESPINOSA & LANDAU, *supra* note 170, at 139, 143-44 (discussing the distinction in Decision C-728 of 2009, a case about conscientious objection to military service).

legislature to take action within a certain period of time.[259] The legislative omission doctrine is thus about the realization of a constitutional project within a liberal democracy: It allows the court to make the separation of powers somewhat more flexible, or at least to exhort the legislature to carry out its constitutional duty, in cases where the latter institution has failed to protect constitutional rights.

But the doctrine of "legislative omission" does not allow the Supreme Court to arrogate all legislative power to itself, or to transfer that power to another body. Indeed, the constitutional text on which the court relied gave it the power "[t]o declare the unconstitutionality of omissions on the part of the municipal, state, national or legislatures, in failing to promulgate rules or measures essential to guaranteeing compliance with the constitution, or promulgating it in an incomplete manner; and to establish the time limit and, where necessary, guidelines for correcting the deficiencies."[260] The constitutional text thus fit within the existing regional tradition of omission, but the court's opinion distorted that concept. Indeed, the court's decision effectively inverted the purpose of the doctrine by transforming it from one that is about channelling legislative deliberation into one that disabled the legislature as a democratic organ.

In Venezuela, the Chavez and Maduro administrations both relied heavily on the instrument of judicial review to carry out core tasks undermining liberal democracy. In the case of the Chavez regime, this mostly involved the judiciary upholding, and thus legitimating, constitutionally dubious laws and executive actions — what we have called weak abusive judicial review. During the Maduro regime (and especially after the 2015 elections), the court shifted to stronger forms of abusive judicial review, using a number of different doctrines, in order to prevent the opposition from enjoying the electoral power that it had won. In so doing, the Venezuela Supreme Court has turned doctrines designed to enhance democratization and constitutionalism, such as the limits on amnesty and the legislative omission doctrine, into tools of authoritarianism.

V. THE LIMITS OF A STRATEGY OF ABUSIVE JUDICIAL REVIEW

If the control of a constitutional court offers such large potential benefits to a would-be authoritarian regime, one might ask about the limits of such a strategy: When might would-be authoritarians choose not to deploy it, and when might it fail? Abusive judicial review appears to be a fairly common but not universal strategy, and as the examples above suggest, it is not always successful.

259 *See id.*

260 CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CRBV] Dec. 1999 art. 336, cl. 7, *translated in Venezuela (Bolivarian Republic of)'s Constitution of 1999 with Amendments through 2009*, CONSTITUTEPROJECT, https://www.constituteproject.org/ constitution/Venezuela_2009?lang=en (last visited Nov. 27, 2019) [https://perma.cc/ 653S-NKDT].

To briefly outline three alternative (and not mutually exclusive) strategies: Authoritarian actors may (a) leave relatively independent courts intact; (b) retain considerable judicial independence but take steps to restrict courts from deciding politically sensitive matters; and

(c) try to sideline judiciaries entirely. If the control of a constitutional court offers such large potential benefits to a would-be authoritarian regime, when might would-be authoritarians choose not to deploy it?

Both the benefits and costs of abusive judicial review vary across cases. On the benefit side, some regimes need to rely more on judicial review than others to achieve their goals. This of course depends on other avenues, such as formal amendment and informal constitutional change, that are available in a given context. Poland, for example, offers a case where the regime put a substantial premium on capturing the court because it has lacked the votes to wield the power of formal amendment.[261] We should observe more exercises of abusive judicial review (especially of the strong form) in cases where political leaders lack other attractive avenues to achieve their goals.

For similar reasons, we may be more likely to observe abusive judicial review in transitional contexts where actors are actively trying to dismantle liberal democracy, as compared with stable authoritarian regimes. Courts operating in transitional or "hybrid" regime types may be very valuable tools for leaders who are attacking liberal democracy but who do not yet have full control over their countries, as the examples above show. In fully authoritarian regimes, in contrast, political leaders may have more levers to pull precisely because they control the entire state. Some evidence for this is provided by the work of Popova, who finds that in Eastern Europe in the 1990s the normal relationship between political competition and judicial independence was inverted.[262] In these transitional contexts with high authoritarian risks, she finds that greater political competition was associated with less rather than more judicial independence because the political pressure posed by rivals increased the need of would-be authoritarians to capture the court. In contrast, work on courts in fully authoritarian regimes has found a range of relationships between courts and regimes: Sometimes courts are highly weaponized, but in other cases they may be complete non-entities or imbued with a surprising amount of judicial independence so long as they avoid political issues and cases.[263]

The effectiveness of abusive judicial review may depend in part on domestic and international perceptions that judges have some degree of independence from the political branches of government, and that judges are engaged in a process that is "legal" rather than wholly political in nature. If the non-independence or political nature of a court is wholly transparent, a court may lose its

261 *See generally* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24.

262 *See* MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE 3-4 (2012); *see also* Alexei Trochev, *Less Democracy, More Courts: A Puzzle of Judicial Review in Russia*, 38 LAW & SOC'Y REV. 513, 513 (2004) (finding that stronger courts were associated with less political competition in post- Soviet Russian states).

263 *See* GINSBURG & MOUSTAFA, *supra* note 30, at 4; TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 6 (2007) [hereinafter THE STRUGGLE FOR CONSTITUTIONAL POWER] (arguing that the Egyptian constitutional court was given considerable power during Egypt's authoritarian regime to attract foreign investment).

capacity to contribute to the perceived legitimacy of "informal" court-led or sanctioned change. Perceptions of independence, in this context, may ultimately be influenced by three broad factors: (a) explicit and implicit signs of political influence or control over a court; (b) the way in which judges themselves approach the task of constitutional reasoning; and (c) the prior history of judicial review within a country.

Some countries have no history of independent courts. Co-opting judicial review in this context may be relatively easy since the judiciary will enjoy little external support, but may also offer relatively modest benefits to a regime since other actors will view the actions as merely political rather than legal. Other courts may have a stronger history of independent judicial review. These courts should be more difficult to capture, since they may have an internal culture that encourages resistance to outside political pressure, and broader support in civil society and among the public. But the benefits of capturing such a court may also be greater, since both local and international actors are likely to give courts of this kind the benefit of the doubt, helping to legitimate abusive actions. A reputation for judicial independence may take some time to decay.

An attempt to co-opt a court with a history of judicial independence can also carry with it potential risks for would-be authoritarians. In attempting to influence such a court, they may seek to maintain the appearance of respect for judicial independence in order to maximize the legitimacy benefit of judicial review. This may mean appointing judges with some existing reputation for judicial independence or legal skill — both attributes that can effectively be weaponized or turned against a regime, should a judge in fact prove to be politically independent of the regime. By preserving a strong but unsympathetic court, would-be authoritarians may thus create the conditions for undermining their broader efforts at abusive constitutional change.[264]

In response to this risk, as we noted above in Part II, some regimes have chosen to adopt a two-part strategy that involves, first, an attempt to undermine the credibility of courts, and second, an attempt to rebuild their power only if and when dominant elites are confident they control the court.[265] But such a strategy carries its own risks. If the first stage of the process is successful, it may then be quite difficult for political actors to rehabilitate public faith in the standing of a newly appointed court. Public faith in the court may be too badly damaged for a new court to exercise abusive judicial review effectively, especially of the strong form. But if it is not fully successful, and a regime moves too quickly to the second stage of seeking to deploy judicial review to its own ends, it may find that it faces a quite hostile court, which retains at least some capacity to engage in effective forms of pro-democratic strong form review.

Attacking courts in a more transparent or open way can also have significant costs. For example, a line of scholarship suggests that even authoritarian actors sometimes empower independent

264 *Cf.* MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER, *supra* note 263, at 1-2 (finding that the Egyptian constitutional court was staffed with high-capacity judges who sometimes ruled against the government in important cases).

265 *See supra* text accompanying notes 119-125.

courts as a way to attract or retain foreign investment.[266] But for this strategy to work, regimes must make at least a credible commitment to judicial independence. Openly packing a court may have value in political cases, but may undermine the utility of the court as a signal to outside investors. Similarly, Ginsburg has posited that courts can have value as an insurance mechanism for out of power political forces.[267] Here too, regimes must consider that an unsuccessful attempt to grab power through the judiciary may backfire: It may make the judiciary less useful as a trusted form of insurance in the event the regime were later to lose power.

Moreover, even where a regime is willing to run these risks and attempt to capture (or coerce or intimidate) a court, it may ultimate fail to produce the desired legitimation benefit. That is, observers of the court may conclude the courts are no longer independent, but have instead been captured by would-be authoritarian actors, such that their actions are no longer seen as the regime acting "legally." The abusive nature of judicial review may thus become so obvious or transparent that it loses its capacity to add to the perceived legitimacy of abusive constitutional change.

The prior Parts give some illustrations of attempts at abusive judicial review in circumstances where courts are widely distrusted and seen as mere extensions of political power. Term limits decisions in Senegal and Ecuador, for example, were met with significant resistance, in part due to perceptions that courts were clearly rigged against incumbents.[268] Neither country has had any history of judicial independence. Distrust in the courts may have contributed to the ultimate failure of both attempts to retain power. In Senegal, President Wade lost the subsequent election. In Ecuador, the opposition continued to gain traction by demanding a popular referendum, and Correa eventually was forced to accede to a temporary provision that lifted all presidential term limits, but nonetheless prevented him from standing for reelection in 2017. His handpicked candidate won that election but has since turned against Correa and reinstated term limits.[269]

In Venezuela, the Supreme Court decision holding that all legislative power could be transferred to the court or another institution of its choosing because of a "legislative omission" was met with massive domestic and international resistance, such that some important regime allies broke with Maduro, and the court was forced to issue a clarification.[270] By 2017, the non-independence of the court was arguably so severe, and transparent, that the court suffered unusual domestic and international consequences. International actors such as the United States sanctioned the justices of the court directly.[271]

266 *See* MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER, *supra* note 263, at 6.

267 *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 18 (2003); Rosalind Dixon & Tom Ginsburg, *Constitutions as Political Insurance: Variants and Limits*, *in* COMPARATIVE JUDICIAL REVIEW 36 (Erin F. Delaney & Rosalind Dixon eds., 2018) (expanding on the insurance argument).

268 *See supra* Part IV.A.

269 *See supra* text accompanying note 191.

270 *See supra* text accompanying notes 255-257.

271 *See supra* text accompanying notes 255-257.

Despite all this, the court's line of decisions succeeded in the more basic sense that it prevented the opposition-controlled legislature from legislating. Thus, while abusive judicial review is likely most effective under circumstances where courts are perceived as retaining "law-like" features, an important question for future work may be examining its function and degree of success even where this condition is not present and the court is perceived by most actors as fully politicized.

VI. PREVENTING AND DETERRING ABUSIVE JUDICIAL REVIEW ALTHOUGH ABUSIVE JUDICIAL REVIEW IS NOT INEVITABLY SUCCESSFUL, IT DOES

pose a major challenge to comparative constitutional law and theory, at least for the large subset of actors who are interested in preserving liberal democracy. The specter of courts destroying, rather than protecting, liberal democracy poses a daunting challenge. In this Section, we first explore the implications of the practice for domestic constitutional law and design, and then we turn to potential responses in the international realm.

A. Responses in Domestic Constitutional Design

The practice of abusive judicial review naturally focuses attention on the design of judiciaries, especially high courts. This, by itself, is not new — scholars have long recognized that courts play an important role in protecting democracies and are often vulnerable to attack or backlash.[272] But our analysis here changes the nature of the threat. Rather than simply facing the possibility of becoming a weaker institution or even null entity, courts under certain conditions may be transformed into wrecking balls turned against the democratic order. This, we think, highlights the importance not merely of protecting courts, but doing so in particular ways that are sensitive to this risk.

As noted above in Part II.B, existing work distinguishes two broad routes to attacking a judiciary.[273] The first involves "curbing" the court by attacking its jurisdiction and powers; the second, "packing" it by adding a large number of regime allies.[274] Either route may succeed in weakening or nullifying it a court, making it less of an obstacle to the goals of antidemocratic actors. But they are not equally likely to lead to abusive exercises of judicial review. Regimes that have relied on abusive

272 *See, e.g.*, Gardbaum, *supra* note 55, at 285-86; Issacharoff, *Fragile Democracies*, *supra* note 59, at 13-14.

273 *See supra* Part II.B.

274 *Cf.* Daniel M. Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15 INT'L J. CONST. L. 296, 297 (2017) (separating power from independence).

forms of judicial review seem to lean very heavily on strategies of court- packing.[275] Abusive judicial review, especially in its strong form, requires muscular but controlled courts. Thus, the usual strategy seems to be court-packing, coupled with untouched capacity, strengthened capacity, or initial court-curbing, then followed by later attempts to strengthen judicial power once control has been achieved. The strong form of abusive judicial review may, in turn, be especially damaging to democracy. As we showed above, courts can use constitutional "reinterpretations" to run rough-shod over constitutional protections of democracy, shutting down legislatures, banning opposition parties, and eliminating presidential term limits, among other measures.

This point highlights not just the importance of protecting judicial independence in contexts where liberal democracy is unstable, but the way in which this might best be done. Protecting against court-packing is quite difficult. In some circumstances, would-be authoritarians may be able to use the natural turnover on a court to wrest control over it.

Given enough time in power, virtually any actor or movement may be able to gain control over the judiciary. Also, a range of informal factors, such as threats and bribes, may have an influence on judicial appointments, and it may be relatively difficult for constitutional design to deal with these issues.

Still, some designs will likely much function better during periods of antidemocratic threat than others. And a good design may act as a speed bump, slowing efforts to consolidate power by at least lengthening the amount of time needed for would-be authoritarians to take over a court.[276] At least three techniques seem important in doing this. The first is fragmentation of the appointment process, so that no single actor or movement can easily control it. Of course, it is probably not enough to divide power among a few different political institutions — as examples show, a surging antidemocratic movement may easily win the presidency and an overwhelming congressional majority.[277]

A second useful technique will thus be to give some appointment powers to other independent institutions, such as ordinary courts, merit commissions, ombudspersons, and similar actors. These institutions, too, can eventually be captured by an authoritarian regime,[278] but the capture process is likely to take longer, in turn slowing the process of packing a high court. Institutions of this kind might select a list from whom other institutions choose, or they might make appointments directly. As an example, consider the Constitutional Court of Colombia, where three different institutions — the president, Council of State or high administrative court, and Supreme Court of Justice — all compose three-member lists for one-third of the vacancies on the constitutional court.[279] The Sen-

275 *See, e.g.*, Sanchez Urribarri, *supra* note 33, at 878-79 (providing such an account in Venezuela).

276 *See* Dixon & Landau, *Transnational Constitutionalism*, *supra* note 6, at 613-14.

277 Most of the cases studied above in Part IV involved movements that controlled both the executive and legislative branches.

278 *See, e.g.*, DAVID KOSA□, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES: HOLDING THE LEAST ACCOUNTABLE BRANCH TO ACCOUNT 2-3 (2016).

279 *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [CP] July 4, 1991, art. 239, *translated in Colombia's Constitution of 1991 with Amendments through 2005)*, CONSTITUTEPROJECT, https://www.constituteproject.org/constitution/Colombia_2015?lang=en (last visited Nov. 25, 2019) [https://perma.cc/6EZ7-FL95].

ate of Colombia then makes the final selection by plurality vote, from each list.[280] The system both fragments appointment power, and gives independent institutions (in this case, courts), a high degree of power over the process by giving them control of two-thirds of the lists. The result is a court that is quite difficult to pack by comparative standards.[281]

The third technique is the staggering of terms on a court. Few systems outside of the United States provide for life tenure for justices on an apex constitutional court — the majority view instead is to provide terms that are longer than those for political actors, often around eight to ten years, and which are ordinarily made non-renewable.[282] Most important, from this perspective, is that all or most of the slots on the court should not open up at once. Instead, ideally, a few vacancies would occur every few years. Again, given enough time, incumbents will likely be able to capture a court regardless, but staggering vacancies should at least slow the process, and in the meantime, political power may change hands.

The examples explored in this Article show though that regimes rarely leave capture of a court to the mere progression of time and natural turnover on the court. In addition, they *change* the existing rules, for example by making courts bigger, altering appointment or removal processes, or shortening the terms of existing justices. This has meaningful implications for the ways in which protections of appointment procedures should be entrenched. First, sensitive provisions dealing with appointment, removal, and tenure of high courts should be included in the constitution, rather than left to ordinary law. In a range of countries (including the United States), key details such as the size of a court are left to ordinary law.[283] This lowers the cost of making changes that may make a court easier to pack by allowing such changes to be made by law rather than constitutional amendment.

In Venezuela, for example, a 2004 law made major changes to the size of the Supreme Court and removal procedures through this route, and these changes rapidly tightened the grip of the regime over the court.[284] In Poland, the PiS government has likewise attacked the independence of the constitutional court via a range of formal and informal means — for example, restrictions on the jurisdiction, voting rules and scope for dissent on the court, and the publication of its decisions — but all the relevant formal changes occurred via legislation rather than constitutional amendment.[285] The same is true for attacks by the Polish government on the ordinary courts, which have involved the lowering of the mandatory retirement age for judges (including sitting judges), increasing the size of

280 *See id.*

281 *See* David Landau, Beyond Judicial Independence: The Construction of Judicial Power in Colombia 316 (2015) (unpublished Ph.D. dissertation, Harvard University), *available at* https://dash.harvard.edu/bitstream/handle/1/14226088/LANDAU- DISSERTATION-2015.pdf?sequence=10 [https://perma.cc/D3F9-64ZV].

282 *See, e.g.*, ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 49 (2000) (giving examples from European courts).

283 *See infra* Conclusion.

284 *See* Sanchez Urribarri, *supra* note 33, at 871-72.

285 *See supra* text accompanying notes 124-126.

the Supreme Court of Poland, and the creation of a new court chamber with special responsibility for "extraordinary control and public affairs," including election disputes.[286]

In some cases, merely including these protections in the constitution may not be enough, because powerful movements may gain sufficient legislative power to pass amendments to the constitution without difficulty. In Hungary, for example, the Fidesz party came to power in 2010 with over two-thirds of seats, after winning only a bare majority of votes.[287] The two-thirds supermajority was sufficient for the party to amend or replace the constitution unilaterally — it did both, in the process increasing the size of the court and changing the appointment procedure both for the justices and for the court's president.[288] These changes allowed Fidesz to gain control over the court more quickly than it would have been able to otherwise.

A further response to this problem, therefore, is to adopt what we have elsewhere called a "tiered" constitutional design, or a system of amendment that makes changes to certain provisions or principles especially difficult, by adding requirements such as a heightened supermajority or referendum.[289] It may be both impracticable and unwise to place all provisions related to the judiciary (or even high court) on a higher tier, but it may be sensible at least to protect those provisions that deal in a core way with the composition of a constitutional court, such as size, appointment rule, and removal.

These design suggestions, of course, hold contextually. They make sense, for example, only from a liberal democratic starting point. In an authoritarian or competitive authoritarian regime, in contrast, protections for appointment and removal may instead be used to insulate antidemocratic judges and thus prevent democratization. By the same token, we are not saying here that all attempts to pack a court will likely spark abusive judicial review. Some such efforts will be neutral from the standpoint of the democratic minimum core, although they may involve crucial disputes over broader substantive values. This is probably the best read, for instance, of Franklin Delano Roosevelt's infamous court-packing plan after his victory in the 1936 election.[290] Others may actually be beneficial for the democratic minimum core, particularly where, we repeat, a court has previously been captured by would-be authoritarians.

The relationship between court-curbing and abusive judicial review is, as we have seen, even more complex. Would-be authoritarians engaged in a strategy of abusive judicial review may prefer to leave the power of a court the same, or even strengthen it, because a more powerful court may be more helpful in carrying out tasks for the regime. Or, as we have seen, actors may seek a sequential strategy of first weakening a court, then capturing it and building its powers back up. From the standpoint of those interested in protecting liberal democracy, the broad point is that "backlash"

286 *See* Sadurski, *How Democracy Dies (in Poland)*, *supra* note 24, at 146.

287 *See* Bánkuti et al., *supra* note 120, at 138.

288 *See id.* at 139-40.

289 *See* Dixon & Landau, *Tiered Constitutional Design*, *supra* note 37, at 474-76.

290 *See infra* Conclusion.

against a court that weakens it, although a problematic outcome, may in fact be less bad than an attack that preserves or strengthens judicial power *and* captures the court.

The implications of this point for constitutional design are, however, murky and highly context sensitive. In some contexts, it may be that designers should worry less about protecting against court-curbing than court-packing, and thus for example might feel comfortable leaving provisions dealing with judicial power or budget less entrenched than those dealing with appointment and similar issues. Such an approach might allow for democratic input against overreaching or out of touch judges, while protecting against the potent threat posed by abusive judicial review.

More counterintuitively, in some especially precarious contexts designers may choose to construct weaker courts than they might otherwise, as a way to lessen the potential risks posed by abusive judicial review. Gardbaum has recently argued that in new democracies, weaker courts may be a good idea because this lessens friction with political actors, and thus the risk of backlash against a new court.[291] Our point here is different: In some contexts, creating a very strong court may risk handing opponents a loaded weapon that, if captured, can be turned into a devastating tool to attack the democratic order. It is true, of course, that antidemocratic actors may try to strengthen a previously weak court *after* capturing it, but given that abusive judicial review seems to trade off of a prior reputation for judicial legitimacy, such a strategy may be harder to pull off successfully.[292] It is too soon to draw firm conclusions about court-curbing for constitutional designers based on the phenomenon of abusive judicial review, but we have flagged issues that demand further attention.

Finally, we briefly note that although this Article focuses on courts, much of what we say here also has implications for the non-judicial independent institutions that have now cropped up in many constitutional systems, including anti-corruption commissions, ombudspersons, human rights commissions, media watchdogs, and electoral courts and commissions.[293] These institutions, too, are envisioned as core protections for the liberal democratic order, and they too are not uncommonly captured by antidemocratic regimes and turned into instruments that undermine liberal democracy. Anti- corruption commissions can be made to target political opponents, electoral commissions to rig elections or weaken opposition movements, media watchdogs to shut down or harass opposition outlets, and human rights commissions to limit rather than protect core political rights such as speech and association. Thus, much of what we have said here about the design of courts may apply to non-judicial institutions as well, especially regarding the importance of crafting and entrenching rules that raise the costs of capture.

291 *See* Gardbaum, *supra* note 55, at 311-12.

292 *See supra* Part V.

293 *See* Mark Tushnet, *Institutions Protecting Democracy: A Preliminary Inquiry*, 12 LAW & ETHICS HUM. RTS. 181, 181 (2018).

B. Responses from the International Community

A second set of implications focuses on the role of "outside" observers, such as international institutions and foreign countries, in the face of courts issuing decisions that undermine core democratic commitments.[294] Abusive judicial review often seems to trade on a reluctance on the part of those observers to question the propriety or legitimacy of court decisions.[295] The rule of law has been a central commitment of the international community in the post-Cold War era.[296] Building respect for court decisions has also been an integral part of many international rule of law programs, and this has led to a reluctance on the part of many international actors to criticize or attack the decisions of courts.

In many cases, of course, this international reverence for courts has been very helpful, for example, by allowing courts to push back against international actors and insist on compliance with core democratic or constitutional commitments. Scheppele has noted how courts sometimes give democratic actors the space to resist impositions by international actors and organizations, like harsh austerity measures, that are opposed by the vast majority of the domestic population.[297] But this asymmetry between the approach of outsiders to political and legal actions is also a contributor to abusive judicial review. If courts have the capacity to do things which the political branches cannot do as easily, then the institution of judicial review will have added value for would-be authoritarians. Courts will thus become more frequent targets for antidemocratic co-optation.

One response to the phenomenon of abusive judicial review, therefore, is for the international community to take a more nuanced, contextual approach to its commitment to the rule of law. On the one hand, recent attacks on the role and independence of constitutional courts in many democracies suggest the need for the international community to redouble its efforts to support the rule of law and democratic constitutionalism at a domestic level.[298] But on the other, the rise of abusive forms of judicial review suggests the need to weaken the current presumption that constitutional courts are always acting in ways that advance or embody these commitments. In effect, we suggest, to combat the danger of abusive judicial review, outside actors must adopt a deeper, more critical form of engagement with the decisions of a constitutional "court" — before determining whether the institution in fact has the hallmarks of independence to be worthy of the general form of deference that attaches in liberal democracies to court decisions. This more nuanced approach to judicial decisions would build on practices that may already be emerging. For example, consider the rejection by many outside observers that the Venezuelan decision on "legislative omission" (or

294 *See* Dixon & Jackson, *supra* note 76, at 149-50.

295 *See id.*

296 *See, e.g.*, Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, 2 UC IRVINE J. INT'L, TRANSNAT'L & COMP. L. 57, 61 (2017); Maartje de Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 AM. J. COMP. L. 963, 966- 67 (2015).

297 *See* Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1941-46 (2004) (explaining how the Hungarian constitutional court gave domestic institutions space to resist international austerity).

298 *See, e.g.*, Aziz Z. Huq, *Democratic Erosion and the Courts: Comparative Perspectives*, 93 N.Y.U. L. REV. ONLINE 21, 21-22 (2018).

its antecedents) deserved respect as a "court- like" decision or interpretation of the Venezuelan Constitution.[299] External observers instead tended to denounce the decision for what it was — an extension of the Maduro regime, aimed to repress an opposition-held institution won through recent democratic elections, and with a clearly authoritarian purpose and effect. The United States and European Union went so far as to impose direct sanctions on judges involved in the case.[300] The distortion of doctrine, evidence of court- packing, and antidemocratic effect of the Venezuelan decisions were particularly clear and egregious. But such an approach, or at least softer forms of critique, will likely be appropriate in other cases as well.

We do not suggest that international actors should adopt a "unity of state" principle, which makes no distinction at all between courts and the political branches of government in assessing abusive processes of constitutional change.[301] That approach would go too far. It would threaten to undermine transnational supports for the institution of judicial review, which has had a beneficial impact on liberal democracy and other values in many countries around the world. Moreover, such an extreme approach would fail to respect the difficulties inherent in acts of constitutional interpretation by outside observers. Our recommendation is therefore more modest, although still significant: In cases where the antidemocratic effect of a decision is quite clear, and where context, legal reasoning, and procedural irregularities offer strong evidence that that effect is intended, transnational observers should be more willing to adopt a critical stance towards the decision, similar to what they would adopt it were undertaken by non-judicial actors.

Furthermore, we note that there are strategic considerations involved in outsider interventions of this type. There are contexts where aggressive outsider interventions or critiques may backfire, by allowing authoritarian leaders to claim charges of western "imperialism."[302] This problem necessitates careful attention to context, in order to figure out when and how such interventions should occur. In some contexts, the best responses may be softer or more advisory. A recent example is the report commissioned by the Organization of American States from the Venice Commission on presidential term limits in Latin America.[303] The report found that there was no plausible support for a right to reelection in international law, thus exposing an argument that had been emphasized by many of the high court decisions surveyed in the previous part.[304] In other cases, a more robust response (as in Venezuela) may be warranted.

299 *See supra* text accompanying notes 250–260.

300 *See* Romo, *supra* note 255.

301 *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, ch. II art. 4 (2001); *see also* André J.J. de Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadi□ Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia*, 72 BRIT. Y.B. INT'L L. 255, 257 (2002).

302 *See, e.g.*, Aria Bendix, *U.S. Sanctions Venezuela's Supreme Court*, ATLANTIC (May 19, 2017), https://www.theatlantic.com/news/archive/2017/05/us-sanctions-venezuelas- supreme-court-judges/527358/ [https://perma.cc/KE69-KUSF] (quoting Venezuelan Foreign Minister Delcy Rodriguez as saying "[i]t's outrageous and unacceptable for the United States to impose sanctions on a sovereign and independent nation in violation of Venezuelan and international laws").

303 *See generally* COUNCIL ON EUROPE, REPORT ON TERM-LIMITS, *supra* note 221.

304 *See id.* at 17.

At a most general level, outside observers would do well to adopt a more skeptical, "realist" response to the actions of constitutional courts under conditions of democratic erosion. In the United States, the legal realist movement has taught us that the line between constitutional law and politics is in fact quite fine.[305] The embrace of a form of global legal realism toward the actions of constitutional courts may be similarly helpful in combatting the spread of abusive judicial review.

CONCLUSION: COULD IT HAPPEN HERE?

This Article defines and analyzes the phenomenon of abusive judicial review — judges issuing decisions that intentionally attack the minimum core of electoral democracy. The examples above have aimed to show that the phenomenon is an important, and undertheorized, aspect of democratic erosion or backsliding around the world. It has also tried to say something about the circumstances in which abusive judicial review is likely to be successful, and about how domestic and international actors can formulate a response.

A recent volume edited by Cass Sunstein, provocatively titled "Can it Happen Here?" asks whether authoritarianism could occur in the United States.[306] One might ask the related question of abusive judicial review: Are there elements of the practice already in the United States? Could it emerge?

Such a regime strategy seems to be largely absent from U.S. history. One moment frequently talked about in those terms is Roosevelt's "court-packing" plan to vastly expand the size of the U.S. Supreme Court.[307] But while the tactic of court-packing is commonly used by would-be authoritarians seeking to engage in a strategy of abusive judicial review, Roosevelt's aims were to resolve a broader dispute regarding the constitutionality of interventionist socio-economic policies, and not to attack the democratic minimum core.[308] Thus, even had the court-packing plan succeeded, it probably would not have led to abusive judicial review.

But the court-packing episode does highlight one key point: The formal defenses in the U.S. Constitution against the kind of judicial capture that usually forms part of a regime strategy of abu-

305 *See, e.g.*, Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1474 (2007) (noting the distinction in modern U.S. Law is "ragged and blurred").

306 *See* SUNSTEIN, *supra* note 1.

307 *See, e.g.*, Laura A. Cisneros, *Transformative Properties of FDR's Court-Packing Plan and the Significance of Symbol*, 15 U. PA. J. CONST. L. 61, 67-77 (2012) (exploring how the court-packing plan subsequently became a powerful symbol of an out of bounds attack on judicial independence).

308 *See* Franklin D. Roosevelt, Fireside Chat 9: On "Court-Packing" (Mar. 9, 1937), *available at March 9, 1937: Fireside Chat 9: On "Court-Packing,"* U. VA. MILLER CENTER https://millercenter.org/the-presidency/presidential-speeches/march-9-1937-fireside- chat-9-court-packing (last visited Jan. 3, 2020) [https://perma.cc/8F7X-632C] (discussing these disagreements as motive).

sive judicial review are not especially strong. The Constitution is very hard to amend in comparative terms, and replacement of the existing Constitution in the near term is unlikely.[309] The text provides certain key protections, such as life tenure, guarantees of a fixed salary, and a requirement of impeachment for removal.[310] But other routes to capture the judiciary, including altering the size of the Supreme Court, are left to ordinary law.[311]

To the extent that the United States has any special protections against the threat of capture, these are probably found not in the constitutional text, but in informal norms surrounding it.[312] And commentators have argued that these norms may be eroding for a number of reasons, including the politicization of the judiciary as a whole and of appointment processes.[313] Indeed, as we suggested above, in some ways the history of judicial independence in the United States may actually create an incentive to commit abusive judicial review, since courts would be able to draw off of a substantial well-spring of legitimacy in issuing antidemocratic decisions.[314]

Many modern decisions that have been heavily criticized are not plausible exercises of abusive judicial review. The *Bush* v. *Gore*[315] decision, for example, could plausibly have been motivated by good- faith prudential grounds (a desire to resolve a messy political crisis) or, more darkly, partisan grounds (a desire to hand Bush the election).[316] Even if motivated by partisan values, the case did not have a significant negative impact on the democratic minimum core — it may have resolved an extraordinarily close election on dubious grounds, but it did not permanently tilt the electoral playing field or marginalize the opposition. The recent decision in *Trump v. Hawaii*,[317] likewise, has been criticized as an abdication to a president with authoritarian leanings.[318] But while the case certainly

309 *See* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 144 (2018) (arguing that the difficulty of amendment in the United States largely "takes off the table" routes to constitutional retrogression that require formal constitutional change); *see also* Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362 (1994).

310 *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

311 *See* Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2134 (2002) (arguing that court-packing is not unconstitutional).

312 *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269-84 (2017) (arguing that court-packing was understood as a question of constitutional convention); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 467- 68 (2018) (arguing that protections for judicial independence in the United States are primarily a matter of informal norms rather than law).

313 *See* Grove, *supra* note 312, at 543 (noting that there are "reasons today to worry about a change in the protections for judicial independence").

314 *See supra* Part V (arguing that abusive judicial review is more likely to succeed in contexts where courts have a history of legitimacy in the country).

315 531 U.S. 98 (2000).

316 For a leading pragmatic defense of the decision as a way to avoid political chaos, see RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 4 (2001).

317 138 S. Ct. 2392 (2018).

318 *See* Shirin Sinnar, Trump v. Hawaii*: A Roadmap for New Racial Origin Quotas*, STAN. L. SCH.: SLS BLOGS (June 26, 2018), https://law.stanford.edu/2018/06/26/trump-v- hawaii-a-roadmap-for-new-racial-origin-quotas/ [https://perma.cc/9K84-EN6Q]; *see also* Dahlia Lithwick & Mark Joseph Stern, *Anthony Kennedy Stands Down*, SLATE (June 26, 2018, 4:13 PM), https://slate.com/news-and-politics/2018/06/anthony-kennedys- travel-ban-vote-shows-hes-done-playing-the-wise-centrist.html [https://perma.cc/L25L- DX8N].

dealt with issues, such as inclusion and equality, that are relevant to broader understandings of democracy, it did not undermine the minimum core.

Perhaps closest to the "weak" conception of abusive judicial review are the line of cases, culminating in *Rucho* v. *Common Cause*,[319] where the Supreme Court refused to adjudicate any partisan gerrymandering claims, no matter how egregious. These cases can, of course, be plausibly defended on pragmatic grounds or conceptions of judicial role, rather than as *intentional* attacks on the democratic minimum core.[320] But state-by-state partisan gerrymandering certainly can become a significant threat to tilt the electoral playing field nationwide, especially if (as has been argued in recent years) one party is playing the game far more effectively or more often than the other.[321]

Hints of the stronger form of the phenomenon are more difficult to find in the United States. Some scholars, and even judges, have argued that the First Amendment is becoming "weaponized" in order to intervene in economic and social policy on behalf of favored interests.[322] Effectively, this work argues that the First Amendment is ceasing to be a tool used by vulnerable individuals to resist governmental power, and has instead become an instrument of powerful economic interests seeking to pursue a deregulatory agenda. In the recent *Janus* case, for example, the Court overruled its own precedent and used the first amendment to disallow mandatory union dues for non-members of public-sector unions.[323] In *Citizens United v. Federal Election Commission*,[324] of course, the Court used the same tool to strike down campaign finance legislation. Most recently, following President Trump's calls to "open up" defamation law, Justice Thomas issued a concurrence from a denial of certiorari to argue that *New York Times* Co. v. *Sullivan*,[325] which protects journalists from defamation lawsuits brought by public figures without evidence of "actual malice," should be reexamined, and he suggested that it lacked a solid constitutional foundation.[326]

319 139 S. Ct. 2484 (2019) (holding partisan gerrymandering claims to be political questions); *see also* Gill v. Whitford, 138 S. Ct. 1916, 1933-34 (2018) (dismissing a partisan gerrymandering claim for lack of standing); Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (holding a partisan gerrymandering case to be a non-justiciable political question).

320 *See, e.g.*, *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring) (arguing that making partisan gerrymandering claims justiciable would commit the courts to "unprecedented intervention in the American political process").

321 *See* Huq & Ginsburg, *supra* note 309, at 158-59. The Court also struck down the pre-clearance regime of the Voting Rights Act of 1965, which made it easier for states to adopt changes to voting rules that might be motivated by racially discriminatory intent or have discriminatory effects. *See* Shelby Cty. v. Holder, 570 U.S. 529, 556-57 (2013).

322 *See* Janus v. Am. Fed'n of State, City, & Mun. Emps., 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (arguing that the majority opinion "weaponize[es] the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy"); Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (Jun. 30, 2018), https://www.nytimes.com/2018/06/30/us/ politics/first-amendment-conservatives-supreme-court.html [https://perma.cc/JG9Z- ULWM]; *see also* Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2230 (2018) (arguing that after the Warren Court, "free speech law took a sharp right turn" and "the first amendment became a sword used by people at the apex of the American power hierarchy").

323 *See Janus*, 138 S. Ct. at 2485-86.

324 *See* 558 U.S. 310, 329 (2010).

325 376 U.S. 254 (1964).

326 *See* McKee v. Cosby, 874 F.3d 54 (1st Cir. 2017), *cert. denied*, 139 S. Ct. 675, 678, 682 (2019) (Thomas, J., concurring) (arguing that "[t]he constitutional libel rules adopted by this Court in *New York Times* and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law," that "[t]he States are perfectly capable of striking an acceptable balance," and calling for *New York Times* to be "reconsider[ed]").

There is scant evidence that these cases represent an intentional attack on the democratic minimum core. To the extent that they represent a political strategy, they are more readily explained via a deregulatory economic agenda rather than a desire to entrench one party in power. Similarly, not all of the "weaponization" cases would plausibly have a significant negative effect on the democratic minimum core of electoral democracy — some of them instead represent disputes about broader economic and social values.

Still, looking at these cases in conjunction, and from a comparative perspective, helps to give some insight into how such a strategy might emerge in the United States: Constitutional rules could be used to selectively strengthen one party while weakening the other, and increased allowance for defamation suits could likewise allow incumbents to harass and undermine opposition leaders, media outlets, and interests. Similar judicial actions have significantly undermined liberal democracy elsewhere.

A passive judiciary in the face of illiberal or antidemocratic action would be a perilous outcome for U.S. constitutionalism. But there is in fact an even more troubling possibility, illuminated through the cases explored in this Article: Courts may go so far as to become active participants in the destruction of the liberal democratic order. Thankfully, current U.S. constitutional practice remains some distance from such an outcome. But we should not take for granted this will always be true. Comparative experience teaches us that under the right conditions, previously independent courts can quite quickly and effectively become the enemies, rather than allies, of democracy.