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CONSTITUTIONAL DESIGN AFTER BACKSLIDING: ONE-TIME MAJORITIES AND THE DEMOCRATIC CORE

ABSTRACT

The experience of democratic backsliding counsels the need to reevaluate the design of constitutional systems and their institutions. Academia, however, has focused too myopically on counter-majoritarian institutions, and in particular the courts, as the primary bulwarks against democratic decay. In designing more resilient systems, this article argues for more focus on constraining the ability of one-time majorities from altering the constitutional minimum core—those institutions, procedures, and rights necessary to maintain a competitive, liberal democracy. This approach aims to prevent a transient majority from changing the ‘rules of the game’ without hindering their ability to deliver on policy agendas, which itself feeds the very disillusionment that gives rise to illiberal populist backsliders. This guiding principle leads toward more nuanced approaches to constitutional design, three examples of which are discussed here. First, the use of time rules such as staggered amendment procedures to structure, protect, and, where necessary, slow the pace of government action; second, incorporating the opposition as a constraint—but not a veto—on the majority beyond using supermajorities as a proxy for consensus; and third, nuancing constitutional entrenchment and constitutional protections like amendment thresholds, to guard the democratic core without preventing effective governance or necessary change.

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I. INTRODUCTION

Between 2015 and 2019, the majority party in the Polish parliament, the Law and Justice party (PiS), re-shaped the constitutional system of Poland (Sadurski 2019). PiS was able to render a strong and independent judiciary into a government enabler, to coopt the prosecutorial system, and to bring the civil service and much of the media under its political control (Sadurski 2018). What is remarkable about the Polish case is that—unlike in Hungary, with Fidesz’s overwhelming supermajority, in Venezuela, with its constitutional overhaul, or in Turkey, with its slow shift from a parliamentary to a presidential system—PiS accomplished this all with a simple majority, without a single constitutional amendment, and in the span of a single term (Haggard and Kaufman 2021).

Democratic backsliding presents a puzzle to the field of constitutional design. As the success of PiS demonstrates, it seems to elude the traditional strategies of constitutional entrenchment. Indeed, some of the strategies which appear as obvious candidates for the prevention of backsliding can, paradoxically, simultaneously contribute to the very problems which give rise to backsliding in the first place. Strengthening the judiciary to strike down backsliding attempts can spark backlash against counter-majoritarianism (Klarman 1994); making it harder to change the constitutional system for the worse sows frustration as government cannot make changes for the better (Passchier 2015:6, 16); and forcing government to move slowly and cautiously fosters disillusionment as government cannot keep up with the speed of modern life (Issacharoff 2023:42; Rosa 2005).

It would appear, then, that constitutional design is in need of a more nuanced approach. This is what this article seeks to provide. In a 2023 report for International IDEA, we amassed a catalogue of specific backsliding tactics that have been used to erode democratic institutions, undermine checks, and tilt the electoral playing field, to better understand the mechanics of backsliding and lessons learned for the field of constitutional design (Bisarya and Rogers 2023). In this article, we argue that one of the lessons we identified can be used as a guiding principle for identifying institutional design choices aimed at resilience against backsliding. This lesson and proposed framework are that, rather than focusing on the blunt instruments of judicial review, constitutional entrenchment, and the like, those seeking to build institutions more resilient against backsliding in the future should be guided by the principle of *constraining the ability of one-time majorities to change the constitutional core*. By this, we mean removing from the hands of transient, fleeting majorities the ability to change the ‘rules of the game’ during their ‘turn’, by constraining their ability to make changes to core institutions, procedures, and rights before winning the ongoing support of the electorate under the rules in place when they entered office.

The article proceeds as follows: Part II lays out our definition of democratic backsliding and overviews the “backsliders’ toolkit” by identifying the major thematic trends and tactics backsliders employ. Part III then turns to lessons learned from this toolkit for constitutional design. Using the above principle as a guide, it highlights considerations that the study and practice of constitutional change should keep in mind, and draws out observations of the dangers of certain traditional strate-

gies and the promise of some lesser-studied constitutional mechanisms. In so doing, it breaks the goal of constraining the ability of one-time majorities to alter the constitutional minimum core into its parts for more concrete analysis: the “one-time” aspect—the importance of time and time rules in structuring government decisionmaking; the “majority” aspect—how to foster opposition inclusion without opening the door to tyranny of the minority; and the “minimum core” aspect—how best to fortify those key parts of the constitutional system which require careful protection. Part IV concludes.

II. DEMOCRATIC BACKSLIDING AND THE BACKSLIDER’S TOOLKIT

Backsliding broadly refers to the “state-led debilitation or elimination of any of the political institutions that sustain an existing democracy” (Bermeo 2016). Building from Bermeo, Choudhry (2018), and Huq and Ginsburg (2018), we refine this definition slightly by adding three more specific criteria. First, democratic backsliders come to power through elections which were contested and competitive (though not all of them may have met international standards of ‘free and fair’), as opposed to, for example, a military coup or revolution. Second, backsliding occurs through legal means, both in that backsliders act within the formal constraints of law, and in that backsliders *instrumentalize* the law—whether by wielding the power of existing laws, exploiting loopholes in the law, or enacting new laws—to manipulate democratic institutions and the ‘rules of the game’ which structure political competition. And third, the ultimate end of this manipulation involves the aggrandizement and entrenchment of the backslider’s power. In speaking of *democratic* backsliding, we refer to attacks on what Huq and Ginsburg identify as the three core pillars of democratic functioning: elections (through manipulating the electoral playing field), first generation political rights (stifling the liberties required for the healthy functioning of a competitive political process), and constitutional governance subject to the rule of law (by eroding or removing institutional checks and balances).

In the report which inspired this article, we developed a comprehensive ‘toolkit’ of tactics used by democratic backsliders across global episodes, spanning tactics from lowering the judicial retirement age, to subjecting civil society to ‘foreign agent laws’, to changing appointment procedures to ‘independent’ institutions. From this catalogue, we then identified twelve major trends in the strategies used:

1. *Draining, packing, and instrumentalizing the judiciary*: including purging the court’s personnel or limiting its jurisdiction, packing the court, and then reinstating its power and wielding it as an arm of the state.

2. *Tilting the electoral playing field*: for example, by manipulating the electoral system (such as by gerrymandering), limiting the ability of opposition parties to participate, or ‘curating’ the electorate through selective enfranchisement or disenfranchisement.

3. *Weakening the power of the existing opposition*: undermining the power of the opposition currently sitting in the legislature to check the majority, whether by reducing their powers or by silencing members using tactics like disciplinary proceedings.

4. *Creating a democratic shell*: incorporating seemingly democratic measures into the constitution or legal system, which do not actually function democratically in practice in the domestic context.

5. *Shifting competencies/creating parallel institutions*: this generally includes transferring the powers or jurisdiction of an independent institution to a less independent one, or setting up new, majority-packed institutions with mandates that mirror existing, independent institutions, and then draining the funding or capacity of the independent institution.

6. *Political capture: realigning chains of command and accountability*: changing appointment procedures, chains of command, or other structural aspects of institutions to create a direct channel of political control over supposedly non-political actors.

7. *Selective prosecution and enforcement*: particularly through the avid or over-enforcement of seemingly neutral laws which are not enforced against loyal party members. These can be used against opposition members, as well as critics in the media or other vocal dissidents.

8. *Evasion of term limits*: This takes several forms, including promulgating a new constitution and arguing that it ‘restarts the clock’, moving from one position of power to another (i.e., from the Presidency to the Prime Ministry), or having a captured court declare the term limit to be unconstitutional.

9. *Expanding executive power*: while eroding *checks* on executive power forms the backbone of democratic backsliding, actively increasing the powers of the executive, such as by expanding their decree or emergency powers, complements this strategy.

10. *Temporal entrenchment*: a practice we term ‘harpooning’, which refers to the ability of backsliders to make major changes to the political system and then sealing those changes in by making them nearly impossible to undo—for example, through a combination of requiring a supermajority to reverse the changes, and using gerrymandering to ensure the opposition would find it nearly impossible to achieve a supermajority in the future.

11. *Shrinking the civic space*: this involves both curtailing the core political rights mentioned in our definition of backsliding, as well as targeting civil society and even the media, such as through capture of media boards, control through cronyism, or using restrictive measures like increasingly-popular ‘foreign agent’ laws.

12. *Non-institutional strategies*: while our definition of backsliding focuses on institutional means, it is important to note that non-formal strategies, such as breaking longstanding political norms and using populist rhetoric to increase support for oppressive or discriminatory policies, are also staple aspects of the backslider’s playbook.

Evaluating these themes and the specific tactics that fall under them throws light on democratic backsliding in ways that are important to consider in thinking about how to build constitutional institutions that are more resilient against backsliding in the future. In the remainder of this article, we extract key considerations that, we argue, have not received sufficient attention in the analysis of backsliding or its intersection with design.

III. LESSONS LEARNED FOR INSTITUTIONAL RESILIENCE: ONE-TIME MAJORITIES AND THE MINIMUM CORE

Prefatory note: Avoiding the countermajoritarian trap

A glaring danger in considering the intersection between backsliding and government institutions is to place too much emphasis on the judiciary. A strong and independent judiciary, characterized by judicial review, acts as the primary check on actors in the political branches from undermining democratic institutions. Thus, it is easy to conclude that a strong and independent judiciary is the primary bulwark against institutional decay. Judicial review is, by its nature, countermajoritarian. It seeks to enforce constraints on the majority’s ability to rule as it sees fit. As backsliding represents one form of “tyranny of the majority,” in which a transient majority tramples the checks on its will to expand and entrench its own power, fighting backsliding is, in a technical sense, a counter-majoritarian endeavour. Thus, it might be argued, protecting and empowering countermajoritarian institutions—particularly the courts—is the centre of guarding against backsliding.

A strong and independent judiciary is, indeed, critical to institutional resilience, as is perhaps best demonstrated by the fact that backsliders consistently consider it their first and primary target. However, focusing too centrally and exclusively on the judiciary places outsized emphasis on a single institution while inviting risks of its own.

One of the major problems with over-reliance on countermajoritarian institutions is that they can stoke the very coals that give rise to the populist, illiberal leaders who are prone to backslide in the first place. Striking down popular laws comes to be perceived as blocking the will of the people, stirring a movement to ‘take back’ the country for the majority. Additionally, judicial review or other countermajoritarian vetoes contribute to a perception of government ineffectiveness, as the court

stands in the way of the Government as it tries to deliver on its platform. This, in turn, sows frustration with government and government structures—even, possibly with democracy itself. Such disillusionment is expertly stoked by populist, illiberal leaders, who promise to push past the bureaucracy and ‘get things done.’

A second problem with over-reliance on the courts is that much of democratic backsliding, our review illustrates, is done through perfectly “legal” means. It is not that the constitution is being broken, such that the Court can simply reject the changes. Rather, backsliding entails what András Sajó calls “ruling by cheating”: perverting the rules in a way which undermines their spirit, and thus the rule *of* law, without acting counter to the rule *by* law. Courts have developed interesting doctrines in attempting to account for this issue—such as with the unconstitutional constitutional amendment doctrine, or by putting individual changes in the context of a backslider’s broader scheme (Tommasini 2024; Roznai 2021)—but in doing so risk over-politicizing the judiciary.

We argue that, to increase institutional resilience to backsliding without falling into this trap, a more nuanced approach is merited. Specifically, we argue that a key guiding principle in designing resilience is to focus on constraining the ability of one-time majorities to make changes to the democratic core. In the remainder of this Part, we will illustrate certain under-explored constitutional technologies that hold promise in pursuing this goal.

Defining the concept

Dixon and Landau define the “constitutional minimum core” (which we also refer to as the “democratic core”) as those institutions, procedures, and rights “necessary to maintain a system of multiparty competitive democracy.” What, precisely, falls within this core will vary by country and context, but tends to include basic protections for elections, the judiciary, public administration, and civil and political rights; an effective parliament; and effective safeguards and oversight mechanisms trained on the political actors in the legislature and, particularly, the executive.

Where a one-time majority is able to make changes to this core, they are able both to immediately benefit from their own, self-interested decisions, and to change the ‘rules of the game’ governing political competition on ‘their turn,’ as it were, such that subsequent elections are held on the playing field as they’ve designed it. Protecting the minimum core is not simply a matter of building a constitutional fence around everything important (although constitutionalization is a key component of this strategy). In the section below, we offer some more refined mechanisms for consideration. Particularly, we encourage thinking about the use of time rules (the ‘one-time’ in ‘one-time majority’), methods of empowering the opposition as a more effective constraint on the majority, and how to fortify the minimum core such that the governing majority is constrained in its ability to make destructive changes but empowered to deliver on policy.

A. The “One-time” Aspect: Thinking About Time

A core premise of constitutional democracy is that the will of the majority should, at the end of the day (and subject to certain constraints), win out. What we are concerned with, however, is the ability of a fleeting majority to enter office and lock the doors behind them, by aggrandizing power and tilting the electoral playing field before the opposition has had the opportunity to contest (and the electorate to judge that contest), based on the original rules. In addition to the fear of shutting out the possibility of alternation in office is the more general concern of a majority being able to make major changes to its benefit before that majority has gained the sustained support of the electorate. Here we call to mind the formulation by Ackerman (2000): “[h]ow many elections should a political movement win before gaining how much authority?” For this reason, time rules—rules which structure the tempo at which major political changes can be made—are one key strategy in building safeguards.

Time rules may also be important because of the ways in which backsliders use speed and the manipulation of political tempo to carry out backsliding projects. Backsliding is *gradual* but *rapid*. While it appears to take place quite slowly—and compared to a coup d’etat, it certainly does—this is mostly a byproduct of the fact that backsliders often use small, incremental changes to sneak large degradations of democratic institutions in under the radar (Grabenwarter 2018). While it is thus ‘gradual’ in the sense of gradations, on the scale of normal political change, it happens quite quickly, with backsliding regimes often successfully aggrandizing power and tilting the electoral playing field in the space of a single term. In examining the backslider’s toolkit, one consistent theme is that backsliders are remarkably adept at using political tempo to their advantage, accelerating change by rattling off incremental changes in rapid succession. This often occurs by rushing legislation through the legislative process, such as by using fast-track procedures, or introducing legislation as private members’ bills to circumnavigate procedural steps. In the first 100 days of Slovakian Prime Minister Robert Fico’s term beginning in 2023, over seventy-two percent of bills were passed using fast-track procedures, including one abolishing the Office of the Special Prosecutor. Using these tactics to speed up the rate at which changes can be made allows backsliders to cram a large number of changes in before they have to face an election, helping them lock themselves in before there is a chance to contest them.

However, while backsliders’ manipulation of political time has primarily manifested in an increased political tempo, the response cannot simply be to slow politics down across the board (Issacharoff 2023: 37-42). First, requiring everything to move more slowly exacerbates what Rosa (2005) calls political ‘desynchronization,’ where a difference in the pace of modern life and of democratic decisionmaking has come largely out of synch, leading the electorate to feel impatience and frustration with government, which threatens a relapse into populism. Similarly, slowing down politics such that the party in power is unable, due to procedural barriers, to effectively deliver on their campaign promises risks creating fierce backlash against the system, as blocking the will of the majority. Further, simply slowing everything down is itself normatively undesirable: as the areas in which government is involved proliferate, slowing the legislative process risks creating a crippling

backlog, and may also hinder government when it has a legitimate need to respond quickly to threats or other emergencies. Instead, using specific triggers for time rules or tailoring their application helps provide a more targeted approach.

Two examples of time rules that might be useful in this regard are staggered amendment procedures and delay mechanisms that can be triggered by the opposition or an oversight body in specific circumstances. Concerning the former, in Sweden and the Netherlands,¹ Constitutional amendment procedures require a proposed amendment to first be passed by parliament, and then, following an intervening election, to be ratified by the subsequent parliament. This gives the electorate the ability to either a) vote in a new government, which by definition eliminates the ability of the previous, now one-time majority to change the rules of the game, or b) re-elect the same majority in favour of ratification, in which case it is no longer a ‘one-time,’ but rather a sustained majority. This process, theoretically at least, allows the political ‘whims’ and ‘passions’ of an impassioned majority to cool, and creates intertemporal deliberation between the people (and/or their representatives) at T1 and T2. But it also prevents a majority from ‘locking the door behind them’ by changing the rules before the public has a chance to hold them accountable based on those same rules. Staggered amendment procedures are not the only option in this regard—other procedures that can be used to deter self-serving amendments and fixing the rules of the game — might include deferred implementation (The 27th Amendment to the U.S. Constitution, for example, stipulates that Congressional salary raises only go into effect the next term), or explicitly forbidding, as the constitution of Haiti does, the “President under the Government that approved [an] amendment benefit[ting] from any advantages deriving therefrom” (Art. 284(2)).

A second time rule of value, in particular when dealing with legislative as opposed to constitutional changes, is to give the opposition, or independent regulatory or oversight bodies, the ability to trigger a delay in certain circumstances. In Sweden, for example, as few as ten Members of Parliament can force a twelve-month pause on legislation which affects enumerated “fundamental human rights” (Art. 20-22). The ability to slow down legislative changes has proven crucial in stemming backsliding efforts in practice. In Poland, for example, the Senate — which cannot veto legislation it receives from the lower chamber of parliament — *does* have a thirty-day window in which to debate this legislation before returning it to the lower chamber. When the opposition gained a majority in the Senate in 2019, this time window became a critical tool for the opposition coalition, which was able to use this time to ask for and receive opinions from the Venice Commission, liaise with civil society, and mobilize public opposition.

Another important example to note is Colombia. Gamboa (2022) illustrates the ways in which the Colombian opposition used parliamentary procedure to slow down legislative initiatives and ultimately prevent President Álvaro Uribe from cementing himself in power. By creating a delay, the opposition was able to, first, allow public enthusiasm for reforms to flag (in the case of one important referendum, public support dropped from 81% in July 2002 to 46% in January 2023), and

¹ The constitutions of Georgia and Ukraine also contain variations on this theme

simultaneously extract concessions from the majority as they realized they were running against the clock. Importantly, however, Colombian parliamentary procedure *lacked* time rules to allow the opposition to slow the process. Instead, they turned to obstructionist tactics like engineering procedural irregularities and abusing procedural loopholes precisely as has been done by many backsliding parties. This underscores the need for structured rules to protect and provide for how time is used, lest the game become one of “good guys” and “bad guys” arguing that their ends justify their means.

B. The “Majority” Aspect: Separation of Parties, not Powers

Contrary to Montesquieu and Madison’s conception of the separation of powers, the development of political party systems has shifted the principal source of checks and balances from ‘jealous’ institutions to competing parties (Levinson and Pildes 2006). Empowering the opposition to effectively play a role in scrutinizing government and holding it to account can thus provide a key countervailing force against backsliding parties.

Supermajority requirements are standardly used as a proxy for cross-party consensus, but can be problematic as well. Firstly, they are poor help where, as in Hungary, the backsliding party enjoys a supermajority. In that circumstance, “there is likely to be little actual control on a one-time majority’s ability to alter the democratic core” (Bisarya and Rogers 2023). Other problems can arise as well. Also in Hungary, the majority Fidesz party made major changes to the constitutional system and then sealed those changes in by requiring a supermajority for them to be undone. In combination with electoral manipulations which make it nearly impossible for the opposition to ever achieve a majority—much less a supermajority—such changes act like a harpoon, with Fidesz able to easily pierce the armour of the constitutional system and make the weapon impossible to wrench back out. Thirdly, supermajority requirements can have the perverse effect of giving a small minority a full veto in the face of a sustained majority, which encourages obstructionism and cripples governance. The trick, then, is to enable the opposition to scrutinize, mobilize, or delay changes without having the power to outright block or veto them.

One possible strategy in this regard is to require a more tangible form of cross-party consensus for particularly momentous changes. One such example is what Adem Abebe (2020) calls, in the African context, “inclusive majoritarianism.” This scheme requires an overall majority of parliamentary votes, inclusive of a predetermined number or proportion of votes from non-government parties. A similar example is Thailand, where the Constitution provides that amendments require the consent of 20 percent of the opposition party (Art. 256(6)). Another approach that brings out the ability of the opposition to act as a democratic bulwark but not a block is to provide *alternatives* as a sort of ‘safety valve.’ For example, such a scheme could allow for a law or amendment affecting the minimum democratic core to be passed either (a) by a majority of legislators including X percent of the opposition, or (b) through a majority of legislators in one parliament and a majority or supermajority of the successive parliament following elections.

A separate source of empowerment might involve proactive involvement in deliberation, such as through reserving particular roles to opposition members, like designating chairmanship of certain parliamentary committees or earmarking a certain number of nominations for judicial positions or independent commissions. These powers may be marginal: Ginsburg and Versteeg note that they ‘might do little in the face of a majority intent on pushing through its agenda by dismantling...checks’ (Ginsburg and Versteeg 2018:249). They are not, however, merely nominal, and in combination may accrue into meaningful involvement. Other examples range from the minor—such as question time or leading debates on votes of no confidence—to the more impactful—such as giving the opposition outsized representation on countermajoritarian bodies like courts and oversight institutions. In the Seychelles, for example, the president and the leader of the opposition “have parity of representation on the Constitutional Appointments Authority, appointing two members each; these then appoint an impartial chair” (Bulmer 2021:30; Constitution of Seychelles Ch. 9). The ideal recipe for empowering the opposition in meaningful ways without leading to politicization of ideally neutral offices or undue gridlock will vary by context; the two guiding principles, we would argue, should be to aim for cross-party involvement rather than using supermajorities as proxy, and to focus on opportunities to delay, scrutinize, and mobilize, without handing the opposition an outright veto.

C. The “Minimum Core” Aspect: Fortifying the Core

Finally, there is the question of protecting the constitutional core itself from manipulation. While no fortress can be erected to fully shield these components from a determined backslider, fortification can make backsliding harder at the margins, raising the difficulty and heightening the political cost of each change.

As with time rules, however, the answer is not simply to constitutionalize everything. Nor is it necessarily advisable to ‘stop the holes in the dam’ by observing where backsliders have made changes and constitutionalizing any crack in the edifice they were able to exploit. One foremost takeaway from a careful study of the backslider’s toolkit is the degree of flexibility and creativity backsliders demonstrate in finding means to implement their agendas. Further, simply making everything more difficult to change runs the risk of overly burdening the majority’s ability to deliver on their policy agendas and electoral promises. As discussed above, when the government is overly constrained such that it becomes ineffective, frustration mounts and sours into resentment, spurring backlash and boosting the appeal of illiberal populist backsliders. The balance is to empower the Government to govern, whilst barring the unilateral manipulation of democratic safeguards.

Nevertheless, reflecting on the common strategies used by backsliders does counsel in favour of giving constitutional protection to certain areas which have, heretofore, often been left to statute. The widespread use of lowering the judicial retirement age to pack apex tribunals, for example, suggests that certain manipulable aspects of the judiciary, like term lengths and limits, retirement ages, and the boundaries of a court’s jurisdiction, should be seriously-considered candidates for constitutionalization. Recent constitutional review processes in Germany, Norway, and Sweden have come to the same conclusion. Other issues that are often left to statute by constitutions, and perhaps shouldn’t be, include some fundamental features of the electoral system or electoral administra-

tion, legislative powers of the opposition, and the tenure and terms of members of public administration and oversight institutions (a more comprehensive checklist of considerations is expanded upon in our report).

Second is the issue of how heavily to armour those aspects that are put in the constitution. The point of constitutionalization may be to guard such provisions from change, but making them too stringent may be a cure that's worse than the disease. At one extreme, there are eternity clauses, which, while attractive, run the risk of entrenching issues that require modification over time. In the Central African Republic, for example, an eternity clause prohibiting the amendment of presidential term limits plunged the country into a constitutional crisis when the end of a presidential term coincided with the Covid-19 pandemic, in which holding elections was not possible.

One increasingly common trend is to include gradations in the difficulty of constitutional amendment, as by using tiered amendment thresholds (Buchanan and Tullock 1962). The constitution of Jamaica, for example, requires a higher threshold for changes to areas such as the Judicial Service Commission (Art. 49), and Ghana requires an elaborate procedure including consultation with the Council of State, a referendum, Parliamentary ratification and executive assent is required for "entrenched provisions," including fundamental rights (Art. 290) (Landau and Dixon 2018).

Still, protecting any aspect of the Constitution with thresholds that are *too* high presents a problem of its own. Creating too many barriers to change can make the entire system brittle, lowering the breaking point at which a backslider opts instead to replace the entire system—or to act illegally instead—rather than try to change just one part. The ability to change acts as a sort of safety valve in order to relieve some of this pressure. (Conversely, a system that's impossible to change could "lose its legitimacy and then could simply not be complied with" (Guttman and Voigt 2019)).

Term limits, for example, have been described by Ginsburg, Melton, and Elkins as a "blunt instrument," because they allow for no leeway in how long an executive can stay in power and thus incentivize evading or deconstructing the entire system (Ginsburg et al 2011). Instead, using 'softer' strategies—such as non-consecutive terms, which require an executive to leave office but hold open the possibility of a future return to power—helps weaken the incentive to eliminate term limits altogether (Ginsburg et al 2011; Dixon and Landau 2020).

These considerations may counsel in favour of more nuanced approaches than focusing solely on constitutionalization. As Guttman and Voigt (2019) put it, the goal is to optimise, not maximise, the difficulty of amending the constitution. To continue with the term limits example, one approach is to focus on countering the political advantage that incumbents tend to hold in re-election campaigns (e.g., Cover 1977) to try to make it more difficult *politically* for backsliders to stay in power. One mechanism for taming the incumbency advantage commonly used in Latin American constitutions is to prohibit incumbents from using state resources during an election campaign, to prevent them from coopting taxpayer money to advantage themselves on the electoral field. Ginsburg, Melton, and Elkins also suggest (drawing from a Vermont state law which was later struck down) a) imposing lower campaign spending limits for incumbents than challengers, or b) allowing more media

time for challengers to help compensate for the boosted platform incumbents enjoy by occupying the government stage.

IV. CONCLUSION

In October of 2023, Poland elected the Civic Coalition in the lower house of Parliament—a group of liberal parties that ran on a platform of reversing the damage done by PiS to democratic institutions. One daunting task this Government faces is how to adjust its institutional structures in order to be more resilient against backsliding should a populist, illiberal party like PiS again take power. With any luck, other countries currently in the throes of backsliding will, someday soon, face a similar task. When that day comes, those leading institutional reform efforts will need to think carefully about which adjustments and strategies will be helpful in that pursuit, and which may result in contributing to the emergence—or reemergence—of populist backsliders. In our view, traditional assumptions and facially attractive blunt instruments should be handled delicately, and more nuanced considerations, like the principle we put forth here, should be used as guiding principles. We hope that constitutional design will come away from backsliding with a more sophisticated understanding that institutional *strength* is just one ingredient in pursuing institutional *resilience*.

WORKS CITED

Abebe, A., 'The vulnerability of constitutional pacts: Inclusive majoritarianism as protection against democratic backsliding', in Adem Abebe, Sumit Bisarya, Elliot W. Bulmer, Erin C. Houlihan and Thibaut Noel (eds), *Annual Review of Constitution-Building: 2019* (International IDEA 2020)

Ackerman, B., 'The New Separation of Powers' *Harvard Law Review* 113/3 (2000) 63

Bermeo, N., 'On democratic backsliding', *Journal of Democracy*, 27/1 (2016) 5

Bisarya, S. and Rogers, M., 'Designing Resistance: Democratic Institutions and the Threat of Backsliding', *International IDEA* (2023)

Buchanan, J. and Tullock, G. *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press 1962).

Bulmer, W. E., *Opposition and Legislative Minorities: Constitutional Roles, Rights and Recognition*, International IDEA Constitution-Building Primer 22 (International IDEA, 2021)

Cover, A., 'One Good Term Deserves Another: the Advantage of Incumbency in Congressional Elections', *American Journal of Political Science* 21/3 (1977) 523

Choudhry, S., 'Will democracy die in darkness? Calling autocracy by its name', in M. A. Graber, S. Levinson and M. Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018)

Dion, D., *Turning the Legislative Thumbscrew: Minority Rights and Procedural Change in Legislative Politics* (University of Michigan Press 2001)

Dixon, R. and Landau, D., 'Competitive democracy and the constitutional minimum core', in T. Ginsburg and A. Huq (eds), *Assessing Constitutional Performance* (Cambridge University Press, 2016)

Elkins, Z., 'Militant democracy and the pre-emptive constitution: From party bans to hardened term limits', *Democratization*, 29/1 (2022) 174

Ferejohn, J. 'Judicializing politics, politicizing law.' *Law and Contemporary Problems* 65/3 (2002) 41

Gamboa, L., *Resisting Backsliding: Opposition Strategies against the Erosion of Democracy* (Cambridge University Press, 2022)

Ginsburg, T., Melton, J. and Elkins, Z., 'On the evasion of executive term limits', *William & Mary Law Review*, 52/6 (2011) 1807

Grabenwarter, C., 'Constitutional resilience', *Verfassungsblog*, 6 December 2018, <[https:// verfassungsblog.de/constitutional-resilience](https://verfassungsblog.de/constitutional-resilience)>

Haggard, S. and Kaufman, R., *Backsliding: Democratic Regress in the Contemporary World* (Cambridge University Press, 2021)

Huq, A. and Ginsburg, T., 'How to lose a constitutional democracy', *UCLA Law Review*, 65 (2018) 78

Huq, A., Ginsburg, T. and Versteeg, M., 'The coming demise of liberal constitutionalism?', *UCLA Law Review*, 85/2 (2018) 239

Issacharoff, S., *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty* (OUP 2023)

Kis, J., 'Introduction: From the 1989 Constitution to the 2011 Fundamental Law', in G. A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press, 2012)

Klarman, M., 'How *Brown* Changed Race Relations: The Backlash Thesis' *Journal of American History* 81 (1994)

Landau, D. and Dixon, R., 'Tiered Constitutional Design', *George Washington Law Review*, 86 (2018) 438

Levinson, D. J. and Pildes, R. H., 'Separation of parties, not powers', *Harvard Law Review*, 119/8 (2006)

Passchier, R., *The Constitution of the Netherlands at 200: Adaptive Capacity and Constitutional Rigidity* (International IDEA 2015)

Rosa, H., "The Speed of Global Flows and the Pace of Democratic Politics," *New Political Science* 27/4 (2005) 445

Roznai, "The Straw that Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendment" in eds. Alejandro Linares Cantillo, Camilo Valdivieso-León, and Santiago Garcia-Jaramillo, *Constitutionalism: Old Dilemmas, New Insights* (OUP 2021)

Sadurski, W., 'Constitutional crisis in Poland', in M. A. Graber, S. Levinson and M. Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018)

—, *Poland's Constitutional Breakdown* (OUP 2019)

Sajó, A., *Ruling By Cheating: Governance in Illiberal Democracy* (Cambridge 2021).

Tommasini, A., 'Judicial self-empowerment and unconstitutional constitutional amendments', *International Journal of Constitutional Law* 22/1 (2024) 161

Uitz, R., 'Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary', *International Journal of Constitutional Law*, 13/1 (2015) 279