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### Democratic Erosion and the Courts: Comparative Perspectives

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# DEMOCRATIC EROSION AND THE COURTS: COMPARATIVE PERSPECTIVES

AZIZ Z. HUQ\*

*Can national judiciaries play a role in resisting democratic backsliding? This essay explores the role of courts in the context of democratic erosion by examining case studies from South Africa and Colombia that showcase positive models of judicial intervention. Such positive results are not pervasive—Hungary’s and Poland’s experiences, for example, cut in the other direction. But by examining the institutional and political conditions under which national judiciaries have impeded, if not prevented, backsliding, it is possible to gain some insight into how courts can play a role in supporting democratic practice.*

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## INTRODUCTION

Since late 2016, scholars and public intellectuals have expressed increasing worry about a perceived fraying of democratic institutions in the United States and beyond.<sup>1</sup> In an article and forthcoming book concurring in that assessment, Tom Ginsburg and I catalog a global deterioration of a distinctive kind of liberal, democratic constitutionalism that since the 1990s seemed hegemonic.<sup>2</sup> Democracies today, we suggest, rarely end in a crisp caesura. More common is a slow molting of democratic accouterments.<sup>3</sup> Incremental declines in the quality of democratic competition, liberal rights to election-related speech and association, and the administrative rule of law add up over time to yield a less democratic, more authoritarian, polity.<sup>4</sup> Hungary, Poland, Turkey, Venezuela, Bolivia, India, and Russia serve as

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<sup>1</sup> See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 80, 163–64 (2018) (discussing concerns over democratic backsliding under President Trump).

<sup>2</sup> Huq & Ginsburg, *supra* note 1; TOM GINSBURG & AZIZ HUQ, *HOW TO SAVE YOUR CONSTITUTIONAL DEMOCRACY* (forthcoming September 2018) (on file with author).

<sup>3</sup> GINSBURG & HUQ, *supra* note 2 (manuscript at 66).

<sup>4</sup> Huq & Ginsburg, *supra* note 1, at 123–43.

key examples.<sup>5</sup> Understanding such democratic erosion requires a many-pronged inquiry. Macroeconomic structure; the social determinants of tolerant political cultures; the resilience of legal checks on elected leaders—all of these matter when answering the question of what causes democracies to decline. Legal scholars should be cognizant of the limits of their expertise, aware that democratic erosion is associated with structural changes in public psychology, geopolitics, and economic dynamics that law can do little to reformulate.<sup>6</sup> They should also be aware that while diagnoses of democratic decline’s causes may be helpful, they cannot fully answer the distinct and different question of whether law and institutional design can help mitigate that risk in practice.

This Essay is focused on a narrow question of constitutional design related to democratic erosion: What is the role of a national judiciary in the defense against democratic erosion? Ginsburg and I have developed one perspective on this question elsewhere, focusing on the federal judiciary’s limited institutional incentive to defend democratic institutions.<sup>7</sup> I won’t repeat that analysis here. Instead, I draw on comparative experiences of democratic erosion to explore how different elements of the judiciary’s design—and in particular the constitutional election between what the British legal theorist A.V. Dicey called “convention” rather than “law”<sup>8</sup>—influences the rate of democratic decline. This question, I should stress at the outset, stands independent of the question of whether courts can vindicate individual rights imperiled by such erosion.<sup>9</sup> I am concerned with a system-level quality (democracy) not the rate of individual rights violations.

## I

### COURTS AND DEMOCRATIC BACKSLIDING

Comparative study of democratic backsliding reveals the complexity of potential interactions between courts and partisan formations pressing an antidemocratic agenda. These interactions, critically, are not instantaneous: They unfold over time as sequential, strategic games (in the game-

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<sup>5</sup> See *id.* (referencing democratic regressions in these, and other, countries). The article and book use the terms “retrogression” and “erosion” interchangeably. See GINSBURG & HUQ, *supra* note 2; Huq & Ginsburg, *supra* note 1.

<sup>6</sup> Cf. Paul Howe, *Eroding Norms and Democratic Deconsolidation*, J. DEMOCRACY, Oct. 2017, at 15, 23 (identifying a link between a broader set of “self-interested and antisocial attitudes” and “indifferent feelings toward democracy”).

<sup>7</sup> Huq & Ginsburg, *supra* note 1 (manuscript at 59–60).

<sup>8</sup> A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 277–78 (Macmillan ed. 1915).

<sup>9</sup> See Huq & Ginsburg, *supra* note 1 (manuscript at 31) (discussing instances in which constitutional design promotes democratic stability at the cost of individual rights, and suggesting that these ends can sometimes be in tension).

theoretical sense). The terms of institutional conflict, moreover, are dynamic. Neither the powers of the judiciary nor the instruments of concurrent partisan control of the bench remain constant over time. In consequence, the equilibrium outcomes of interbranch battles over democratic norms are endogenous to initial entitlements of formal legal entitlements, options to modify those entitlements, and the iterative, strategic choices by judges and elected leaders about how formal and informal (persuasive) powers are employed. Stated less formally, the rules of the game determine in large measure the results of the game—in particular when one of the prizes in the game is the ability to change those rules on the fly. Both the game, and the rules of the game, as a result, are in constant flux.

Some examples of judicial success and failure may help render this less opaque. I rely here on examples because there are only a limited number of democratic erosions, and econometric analysis is unhelpful.<sup>10</sup>

Consider first instances in which apex courts have resisted democratic erosion. In a pair of decisions in 2005 and 2010, the Colombian Constitutional Court first allowed President Álvaro Uribe Vélez to set aside a one-term limit, but then barred him from abrogating a new two-term limit through constitutional amendment.<sup>11</sup> In the latter decision, the court reasoned that a second extension of the presidential term would effectively be a “substitution” of the constitution since it would allow the President to “name members of the central bank, the attorney general, the ombudsman, the chief prosecutor, and many members of the Constitutional Court.”<sup>12</sup> This second decision is thought to have “prevent[ed] a significant erosion of democracy by preventing a strong president from holding onto power indefinitely.”<sup>13</sup> In effect, the decision enabled other oversight institutions to operate effectively in ways that helped promote democratic practices.<sup>14</sup> The decision, however, was only possible because the court had initially avoided a confrontation with Uribe, and instead had delayed intervention until it would have maximum effect and might generate more public support.

A second example of successful judicial resistance to backsliding comes from South Africa, where the hegemonic African National Congress

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<sup>10</sup> See GINSBURG & HUQ, *supra* note 2 (manuscript at 143–68) (presenting existing findings of correlations between constitutional design decisions and rates of democratic decline).

<sup>11</sup> See, e.g., Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683, 717–19.

<sup>12</sup> *Id.* at 718.

<sup>13</sup> David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 203 (2013).

<sup>14</sup> David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C. L. REV. 1501, 1524 (2014) (“[T]he Court at times has sought to prop up other control institutions in order to make them more effective at their tasks of checking the executive.”).

(ANC) has slipped into endemic self-dealing, undermining democratic competition in favor of a spoils system.<sup>15</sup> In its March 2016 *Nkandla* judgment,<sup>16</sup> the Constitutional Court ordered President Jacob Zuma to repay millions of rand used to refurbish a private residence.<sup>17</sup> The decision was said to “de-legitimiz[e]” the president as a leader who relied on the spoils system.<sup>18</sup> As former Deputy Chief Justice Dikgang Moseneke later explained, it was “a wonderful moment to lecture each other about . . . the kind of Commander-in-Chief that we hoped for.”<sup>19</sup> In a forthcoming book chapter, Ros Dixon and Theunis Roux contend that the *Nkandla* judgment was a surgical judicial attack on a systemic threat to democracy—insufficient to stem that threat completely, but enough to show the court’s continued, albeit incremental, efficacy as a democratic safeguard.<sup>20</sup> Dixon and Roux underscore the long-term nature of the conflict between the ANC and the court, and praise the latter for its strategic foresight in choosing a narrow issue on which it could prevail with positive effects for the democratic role of law.<sup>21</sup> Whether that sort of surgical strike proves commensurate to the threat of democratic backsliding in South Africa, however, is a separate and far more troublesome question.

Finally, let me offer one rather more ambiguous example. Samuel Issacharoff has argued that judiciaries can respond to the threat to democracy posed by the rise of anti-system movements. In postwar France and Germany, he notes, “independent judicial review” of party bans constrained the misuse of associational regulations meant to protect the public sphere, thereby legitimating prophylactic instruments of militant

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<sup>15</sup> See Alexander Beresford, *Power, Patronage, and Gatekeeper Politics in South Africa*, 114 AFR. AFF. 226, 226–27 (2015) (“Political leaders are said to derive support and legitimacy by distributing patronage.”).

<sup>16</sup> *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC) (S. Afr.).

<sup>17</sup> Kingsley Chiedu Moghalu, *Africa’s Leadership Conundrum*, FLETCHER F. WORLD AFF., Summer 2017, at 171, 187 & 191 n.17 (discussing impact of the scandal); Jessica Elgot, *Jacob Zuma Breached Constitution over Home Upgrades, South African Court Rules*, GUARDIAN (Mar. 31, 2016, 7:14 AM), <https://www.theguardian.com/world/2016/mar/31/jacob-zuma-ordered-repay-upgrades-nkandla-home-south-african-state-funds>.

<sup>18</sup> Moghalu, *supra* note 17, at 187.

<sup>19</sup> Lizeka Tandwa, *Nkandla Judgment Exemplary of ConCourt—Moseneke*, NEWS24 (Jan. 28, 2017, 11:01PM), <https://www.news24.com/SouthAfrica/News/nkandla-judgment-exemplary-of-concourt-moseneke-20170128>.

<sup>20</sup> Rosalind Dixon & Theunis Roux, *Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa*, in FROM PARCHMENT TO PRACTICE: CHALLENGES OF IMPLEMENTING NEW CONSTITUTIONS (Tom Ginsburg & Aziz Huq eds., forthcoming 2019) (manuscript at 7–9) (on file with authors) (arguing that the court’s *Nkandla* judgment showed that the court was prepared to criticize a senior national leader and partner with other institutions to support constitutional democracy).

<sup>21</sup> *Id.*

democracy.<sup>22</sup> I am more skeptical than Issacharoff, however, of these tools. In practice, they have been employed against politically marginalized immigrant and religious groups that have no chance of capturing state power and used in ways that have no tangible positive impact on the performance of democracy. In particular, the use of militant democratic tools against Muslim and Middle Eastern minorities in Europe—minorities who are not poised to gain political or demographic majorities in the near or even medium-term future—has been a way to close off political space for especially vulnerable sectors of society who are subject to a good deal of discrimination.<sup>23</sup> To the contrary, the recent exemplars of European militant democracy strike me as clear examples of anti-democratic practices aimed at eliminating minority groups' voices from political debates.

Clearly on the other side of the ledger are a series of counterexamples in which national judiciaries have failed to prevent backsliding. Such failures, as much as successes, help us understand when and why courts resist democratic erosion, and it would be a serious mistake to look at successes without also accounting for failures.<sup>24</sup> The latter suggest in particular that where a political coalition anticipates judicial resistance, it can try *ex ante* to disarm judges via constitutional change, statutory reform, constitutional change, or sheer bullying. Where courts are caught off guard by such aggressive initiatives, they are unlikely to impose much by way of friction on democratic backsliding.

Thus, in Hungary the Fidesz party in 2013 took advantage of an unexpected legislative supermajority to alter the constitution so as to abrogate prior judicial precedent *en masse* and limit judicial review to procedural (as distinct from substantive) questions of legality and constitutionality.<sup>25</sup> Its most important consequential change, however, concerned the confirmation process: A system by which a majority of parliamentary parties had to endorse a candidate for the Supreme Court was

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<sup>22</sup> Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1453–56 (2007).

<sup>23</sup> See Aziz Huq, *The Uses of Religious Identity, Practice, and Dogma in 'Soft' and 'Hard' Counterterrorism*, in SECURITY AND HUMAN RIGHTS (Liora Lazarus & Benjamin Goold eds., forthcoming 2018) (manuscript at 6–10) (describing U.S. and European immigration and profiling regulations that have targeted Islam). On the presence of discrimination against Muslims in Europe, see Aziz Z. Huq, *What Is the Case Against Muslims?*, in “THE EMPIRE OF DISGUST”: PREJUDICE, STIGMA, AND DISCRIMINATION IN INDIA AND THE U.S. (Martha Nussbaum et al. eds.) (forthcoming 2018) (manuscript at 2–6) (on file with author).

<sup>24</sup> See Tom Ginsburg, Aziz Z. Huq & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, 85 U. CHI. L. REV. (forthcoming 2018) (manuscript at 15) (discussing how scholars' case-selections have affected the outcome of studies of democratic erosion).

<sup>25</sup> Keno Verseck, *Hungary Steps Away from European Democracy*, SPIEGEL ONLINE (Mar. 11, 2013, 6:00 PM), <http://www.spiegel.de/international/europe/hungary-constitutional-reforms-signal-drift-away-from-democracy-a-888064.html>.

abandoned in favor of one in which Fidesz has plenary control of who sits on the court.<sup>26</sup>

This dynamic can take a statutory as well as a constitutional form where a political coalition has sufficient majorities. In Poland, for example, after the populist Law and Justice Party (PiS) won a plurality of seats in October 2015 legislative elections, it refused to seat the Constitutional Tribunal Justices who had been selected by other parties but awaited commissions; amended the statutory framework for judicial appointments to centralize control in the PiS-controlled Sejm, the lower house of the Polish Parliament, changed the voting rule in constitutional cases to make invalidations less frequent, and rejiggered the flow of cases to the court.<sup>27</sup> Further centralization of appointments powers was derailed by an unexpected demurrer by the PiS-aligned president—a response, perhaps, to popular and international pressure.<sup>28</sup> In December 2017, however, a new slate of judicial reforms were passed by the Sejm that, in the words of the Council of Europe, once again “put[] at serious risk the independence of all parts of the Polish judiciary.”<sup>29</sup> A third possibility is that courts will fail to resist democratic erosion even without de jure change. In Venezuela, the government of Hugo Chávez relied first on its appointments power.<sup>30</sup> When judges continued to resist his agenda, Chávez leveraged street protests against the court and “strong rhetoric” in public speeches to undermine the judiciary.<sup>31</sup> In Turkey, in a variant on this dynamic, the Constitutional Court in 2008 permitted criminal indictments against the ruling Justice and Development (AK) Party to proceed based on party leaders’ public condemnations of a ban on religious garb in public universities.<sup>32</sup> But less than a decade later, a resurgent and popular AK Party was able to purge and neuter the judiciary by rallying public opinion against it.<sup>33</sup> (Note here

<sup>26</sup> Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Hungary’s Illiberal Turn: Disabling the Constitution*, J. DEMOCRACY, July 2012, at 138, 139.

<sup>27</sup> Huq & Ginsburg, *supra* note 1 (manuscript at 42–43).

<sup>28</sup> See Rick Lyman, *Poland’s President Vetoes 2 Proposed Laws Limiting Courts’ Independence*, N.Y. TIMES (July 24, 2017), <https://www.nytimes.com/2017/07/24/world/europe/poland-president-duda-veto-courts.html>.

<sup>29</sup> Christian Davies, *Polish MPs Pass Judicial Bills amid Accusations of Threat to Democracy*, GUARDIAN (Dec. 8, 2017, 9:58 AM), <https://www.theguardian.com/world/2017/dec/08/polish-mps-pass-supreme-court-bill-criticised-as-grave-threat>.

<sup>30</sup> See Matthew M. Taylor, *The Limits of Judicial Independence: A Model with Illustration from Venezuela Under Chávez*, 46 J. LATIN AM. STUD. 229, 251 (2014).

<sup>31</sup> *Id.* at 251–53.

<sup>32</sup> Anayasa Mahkemesi [Constitutional Court] Oct. 24, 2008, Esas No. 2008/1 (SPK), Karar No. 2008/2 (Resmi Gazete, No. 27034) (Turk.), <http://www.resmigazete.gov.tr/eskiler/2008/10/20081024-10.htm>.

<sup>33</sup> See *Turkey’s Purges Are Crippling Its Justice System*, ECONOMIST (May 20, 2017), <https://www.economist.com/news/europe/21722200-president-erdogans-drive-power-includes-putting-judges-under-his-thumb-turkeys-purges-are> (discussing the AK Party’s use of failed

the contrast to Colombia: Moving too sharply too soon, the Constitutional Court failed to check the AK Party's antidemocratic impulses and exposed itself to undermining countermoves.) These cases suggest that whatever reservoir of diffuse support a constitutional court has,<sup>34</sup> elected actors typically have access to a wider range of media to shape and mobilize public opinion. Their narrower public-facing toolkit—and the demand for formality that is nominally the courts' strong suit—ultimately leaves judiciaries more vulnerable.

Comparative experience, to summarize this whistle-stop tour of global examples, yields no easy or comforting instruction as to courts' role at moments of democratic erosion. More modestly, we might observe that a common feature of these case studies is that they unfold over time.<sup>35</sup> Courts and elected actors alike engage in repeated interactions with evolving hands of cards. Their tactical options vary as formal rules, electoral alignments, and tacit understandings change. The nature of such conflict will hinge first on the extent to which judges' preferences are already correlated with those of elected officeholders. Its end result will likely be a function of complex interactions between institutional and political forces. At best, as in the Colombian and South African cases, courts delay backsliding. At worst, they are captured or eviscerated in backsliding's opening gambit. All this suggests a judiciary committed to democracy should mimic La Fontaine's reed rather than his oak,<sup>36</sup> carefully playing a moderating function at pivotal moments in the course of democratic backsliding, in the hope, perhaps, that exogenous political developments enable rather than erode the presuppositions of democracy's continued operation.

## II

### BRINGING BACKSLIDING HOME

What does this comparative experience entail for the American context? Drawing lessons from comparative analysis is always difficult. The small number of cases here and their internal heterogeneity are limiting factors. With appropriate caution, though, we might draw two broad implications.

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coup).

<sup>34</sup> For the distinction between specific and diffuse support, see Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992).

<sup>35</sup> Cf. Dixon & Issacharoff, *supra* note 11, at 685, 688 (discussing judicial deferral—or constitutional decisions that do not have immediate effect—and celebrating the various strategies of judicial deferral in defense of democracy).

<sup>36</sup> JEAN DE LA FONTAINE, *The Oak and the Reed*, in THE COMPLETE FABLES 25, 25–26 (Norman R. Shapiro trans., 2007).

To begin with, experience in Hungary, Poland, Venezuela, and Turkey suggests that methods of judicial appointment are critical: Absent the appointment of judges willing to resist democratic erosion, the judiciary will not help sustain continued democratic competition. So it is telling that the Colombian Constitutional Court is “relatively difficult to ‘pack’” because a plurality of institutions are involved in appointments, which last only eight years.<sup>37</sup> As illuminating in my view is the fact that Fidesz’s first strike against judicial autonomy from political control focused on the appointment mechanism. Rather strikingly, I think it is profitable to see Fidesz as choosing an appointment mechanism that is functionally indistinguishable from the U.S. Constitution’s process during periods of unified government as a tool for exercising hegemonic control over the courts. Contrary the prevailing nostrums of judicial independence, the U.S. has what is inevitably a politically framed judiciary.

The appointment mechanism of Article II, section 2, does not merely concentrate authority in elected, nonprofessional hands. It is also silent as to whether federal judges must be lawyers,<sup>38</sup> let alone be predisposed to rule-of-law values or the protection of democracy-related rights. The considerable predictive power of the attitudinal model of judicial behavior<sup>39</sup> suggests that judicial appointments approach a partisan spoils system. So while lifetime tenure creates a lag in judicial appointments in the U.S. context, a sufficient number of vacancies means that a political coalition disdainful of democracy can minimize the risk of judicial impediment by relying on Article II.<sup>40</sup>

Even if a tribunal is inclined to resist erosive developments, it cannot do so absent formal and informal resources. Hence, the Colombian high court is by formal design “one of the most powerful courts in the world,” able (among other things) to “step[] in and perform[] core legislative functions” as a way of checking the executive.<sup>41</sup> It has also successfully cultivated a reputation as a legitimate and robust protector of rights.<sup>42</sup>

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<sup>37</sup> David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT’L L.J. 319, 339–40 (2010).

<sup>38</sup> Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1570 (2007).

<sup>39</sup> See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993) (putting forward the attitudinal model—that Supreme Court Justices reach their decisions based on “ideological attitudes and values”—to explain the Court’s decisions).

<sup>40</sup> With only a little squinting, one can see something analogous happening in the United States. See Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here’s How.*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html> (discussing the Trump administration’s efforts to quickly confirm young, conservative judges to federal appeals courts).

<sup>41</sup> Landau, *supra* note 37, at 343.

<sup>42</sup> See *id.* at 328 (noting the Colombian Court’s “extraordinarily high institutional popularity”).

While the South African high court does not enjoy the same popular support,<sup>43</sup> specific judges maintain strong reputations and support within the ANC,<sup>44</sup> and much of its jurisprudence coheres with the latter's agenda,<sup>45</sup> arguably vesting it with a measure of discretion.

The U.S. Supreme Court maintains a tolerably large reservoir of public support, but lacks the formal protections of the Colombian Court. To the contrary, I think it is profitable to understand that the federal judiciary's autonomy from concurrent partisan control is largely a matter of what the British constitutional theorist A.V. Dicey called convention rather than law. Diceyan conventions comprise a class of "customs, practices, maxims, or precepts" that compose "the constitutional morality of modern England."<sup>46</sup> In Britain, they are distinctly oriented by the goal of "determining the mode in which the discretionary powers of the Crown . . . ought to be exercised."<sup>47</sup> In the "long run," conventions ensure that Parliament and the cabinet honor "the true political sovereign of the State—the majority of the electors or . . . the nation."<sup>48</sup>

Conventions of judicial autonomy from political control matter because textual and precedential protections of courts' autonomy are exiguous.<sup>49</sup> For instance, Article III allocates a "judicial power," but does not define it.<sup>50</sup> Precedential delineation of the term largely hinges on a rather obscure, and not obviously consequential, distinction between public and private rights.<sup>51</sup> The Constitution is also notoriously silent in respect to the extent of legislative authority to control or restrict lower-court or Supreme Court appellate jurisdiction. Marshall Court precedent upholds radical excision of entire limbs of the judiciary.<sup>52</sup> More recent precedent even allows extensive ex ante control by specific case outcomes.<sup>53</sup> Finally,

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<sup>43</sup> James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 J. POL. 1, 3 (2003).

<sup>44</sup> See Rosalind Dixon, *Constitutional Design Two Ways: Constitutional Drafters as Judges*, 57 VA. J. INT'L L. 1, 32–33 (2017) (discussing trust existing between the ANC and original members of the Constitutional Court of South Africa).

<sup>45</sup> See Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106, 138 (2009) (discussing "mutually beneficial relationship" between the ANC and the constitutional court).

<sup>46</sup> DICEY, *supra* note 8, at 277–78.

<sup>47</sup> *Id.* at 280–81.

<sup>48</sup> *Id.* at 285.

<sup>49</sup> For a historical treatment of the same point, see Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018).

<sup>50</sup> U.S. CONST. art. III, § 1.

<sup>51</sup> See Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1190–95 (2015) (discussing how the public right/private right distinction has been used to define the bounds of bankruptcy courts' authority as non-Article III courts).

<sup>52</sup> See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803) (holding Congress can make outcome determinative changes to laws affecting pending cases).

<sup>53</sup> See *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (upholding against separation of

the text assures judges of maintenance in office “during good Behaviour” with undiminished compensation (albeit unsheltered from inflation),<sup>54</sup> but does not say in what court, or with what jurisdiction.

Rather than its weak textual carapace, Diceyan conventions shelter the federal judiciary from concurrent political influence. Hence, whereas text and historical practice can be read to allow for fairly expeditious removal of federal judges,<sup>55</sup> there is a convention that impeachment is the sole appropriate removal mechanism. This promotes judicial insulation from political control as much as the “good behavior” language of the Constitution. Or consider the resolving power of judicial orders. Nothing in the Constitution speaks to their scope or obligating force. There are colorable arguments to the effect that some final judgments do not even have a dispositive force of law in respect to the federal government.<sup>56</sup> Since the 1980s, legal scholars documented the “pervasiveness of nonacquiescence” with judicial orders by federal agencies.<sup>57</sup> More recent scholarship has documented the frailty of judicial will to enforce final judgments against recalcitrant federal officials, and emphasized judicial reliance on convergent norms of legality and “shaming” effects.<sup>58</sup> Even where overt noncompliance is not observed, foot-dragging or counter-campaigns against judicial opinions in the legislative and public sphere can rob a judgment of much effectual power.<sup>59</sup> The norm of official compliance with specific injunctive directives is hence, in practice, quite tenuous.

The conventional nature of judicial autonomy means that the federal courts are vulnerable to a wide array of lawful countermeasures designed to limit their autonomy from concurrent political control. In an extended interbranch conflict over democratic erosion, this means that judges have a weak and limited hand to play—one unlikely to prevail against a sufficiently determined political coalition.

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powers challenges the Iran Threat Reduction and Syria Human Rights Act of 2012, which identified assets available for execution in a particular District Court action, identified by docket number).

<sup>54</sup> U.S. CONST. art. III, § 1.

<sup>55</sup> See Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 88–92 (2006) (discussing the historical meaning of “good behavior” as broader than its current definition).

<sup>56</sup> For a summary of scholars’ positions to this effect, see Jennifer Mason McAward, *Congress’s Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. 1319, 1359, 1363–64 (2008).

<sup>57</sup> Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 692 (1989).

<sup>58</sup> See Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 697–98 (2018).

<sup>59</sup> See Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499, 572–73 (2017) (noting how “prestige concerns” contributed to many federal judges’ reluctance to issue controversial rulings in Guantánamo habeas cases despite legal authority to do so).

## CONCLUSION

Democratic backsliding can involve prolonged abrasive contact between the judiciary and the elected branches. In the United States context, many of the claims that the federal bench can tender in self-defense have more of a conventional than a legal character. Thus, they are not likely to prove durable. For those interested in the defense of democratic institutions against erosion, this result may have practical implications. It suggests that trial balloons floated in the academy and the public sphere imagining new limits on judicial autonomy are more important than they might first seem: Such proposals can undermine conventional understandings of such autonomy. This analysis might also push toward more purposive and holistic forms of legal argument that resist the decomposition of judicial autonomy into granules vulnerable to the first political storm. Instead, infused by a Diceyan spirit, defenders of democracy might recognize that the latter is a system-level quality that rests not just about specific clauses or propositions of law: It is a matter of supervening constitutional and conventional morality—a morality that must be articulated, justified, and defended as a predicate to democracy's preservation.