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### The Jurisprudence of Anti-Erosion

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# THE JURISPRUDENCE OF ANTI-EROSION

*Tom Ginsburg\**

## ABSTRACT

*Democracy seems to be in trouble around the world through processes that Professor Aziz Huq and I have labeled democratic erosion. Unlike sudden democratic collapse, erosion proceeds slowly in a series of small steps. What, if anything, should courts do about the risk of democratic erosion? Do courts have any role in preventing democratic backsliding? This Article answers in the affirmative and provides numerous examples of courts that helped to prevent democratic erosion at particular points in recent history.*

*Courts are particularly important because the threats to constitutional democracy today tend to take a legal form. Authoritarians have learned to use the law and to leverage the rule-of-law discourse that has spread around the world in recent decades. Law, then, is not a neutral technology but takes its life and direction from the broader political environment.*

*Drawing on a framework I previously developed with Professor Huq, this Article examines what steps courts can take to limit various modalities of democratic erosion. This Article recognizes that courts are unlikely to be sufficient to accomplish this task on their own, but they can contribute to a broader institutional structure that can prevent democratic backsliding.*

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## I. INTRODUCTION

It is well-known that we are in an era of democratic recession and backsliding. The facts are stark: the number of democracies has declined every year since 2006.<sup>1</sup> Roughly three times as many countries have experienced declines in the quality of democracy as have experienced advances during the same period.<sup>2</sup> High-profile, long-enduring democracies such as Venezuela have become dictatorships, while countries like the Philippines and Indonesia flirt with intolerance and authoritarianism.<sup>3</sup> Even in established democracies, the rise of populist and right-wing parties suggests the traditional mechanisms of democratic representation are under threat.<sup>4</sup> The causes of this phenomenon are complex and contested, but common diagnoses include rising inequality, the weakening of political parties, and globalization of neoliberal policies.<sup>5</sup>

The United States is not immune from the phenomenon. Indeed, the publication of books with titles such as *Can it Happen Here?*, *How Democracies Die*, *The People vs. Democracy*, and *How to Save a Constitutional Democracy* (the last, a shameless plug for my recent book with my colleague Aziz Z. Huq) suggests there is significant public concern, much of it motivated by the election of President Donald Trump with his authoritarian and divisive style.<sup>6</sup> No doubt, by the time this Article is

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1. *Populists and Autocrats: The Dual Threat to Democracy*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2017> (last visited Sept. 24, 2018).

2. *Id.* The Freedom House organization's metrics show that in 2016 alone 67 nations saw declines in political and civil rights while only 36 nations saw gains. *Id.*

3. *See id.*

4. *See generally* Kim Lane Scheppele, *The Party's Over*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 495 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

5. *Id.*; David Schneiderman, *Disabling Constitutional Capacity: Global Economic Law and Democratic Decline*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 4, at 551, 552 (ascribing the ills of democracies to the rise of neoliberal policies and institutions bent on "insulat[ing] markets from ordinary politics"); Ganesh Sitaraman, *Economic Inequality and Constitutional Democracy*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 4, at 533, 534–36 (arguing that the gains of globalization are concentrated in the hands of an elite few at the expense of the greater global community).

6. *See generally* CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY: WHY OUR

published, there will be further literature on this matter.

It is also apparent that the threats to democratic practice today are not the same as those which have been the focus of our constitutional imagination.<sup>7</sup> As Huq and I argue, the risk in our current environment is not so much the sudden collapse of democracy but rather its erosion in small individual steps that, each on their own, may not appear alarming.<sup>8</sup> The gradual erosion of democracy, the death by a thousand cuts, is especially dangerous because it is hard to identify a single point at which it succeeds.<sup>9</sup> As Professor Sadurski notes:

[I]t is difficult to identify a tipping point during the events: no single new law, decision or transformation seems sufficient to cry wolf; only ex-post do we realise that the line dividing liberal democracy from a fake one has been crossed: threshold moments are not seen as such when we live in them.<sup>10</sup>

Like the proverbial boiling frog, we may only notice our peril when it is too late.<sup>11</sup>

While much of the literature focuses on militant democracy as a constitutional solution for anti-democratic movements, Huq and I argue the tools of militant democracy are not designed to deal with the current threats to democracy.<sup>12</sup> The new threats are not from a hostile force ending elections but rather the takeover of the system by a democratically-elected incumbent, who then manipulates the electoral system itself to keep power. The new antonym of democracy is not so much a dictatorship as it is a competitive authoritarianism that maintains democratic forms.<sup>13</sup> Indeed, some of the

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FREEDOM IS IN DANGER AND HOW TO SAVE IT (2018).

7. See, e.g., Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 82–86, 163–65 (2018).

8. *Id.* at 78, 92–98; see, e.g., GINSBURG & HUQ, *supra* note 6, at 35–47.

9. Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding* 5 (Univ. of Sydney Law School, Legal Studies Research Paper No. 18/01, 2018).

10. *Id.*

11. See *id.*

12. See GINSBURG & HUQ, *supra* note 6, at 78; Huq & Ginsburg, *supra* note 7, at 158 (noting that with the use of the Constitution, the legislature, election law, gerrymandering, and the courts, “there is no shortage of ways in which constitutional retrogression might be pursued”).

13. See, e.g., STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 5 (Keith Darden & Ian

tools available for militant democracy may be used to *consolidate* power by the forces of democratic erosion.<sup>14</sup>

The question posed in this Article is what, if anything, should courts do about the risk of democratic erosion? There is now a small collection of literature on the role of constitutional courts and supreme courts in the consolidation of constitutional democracy.<sup>15</sup> But few, if any, have asked the reverse question: Do courts have any role in preventing democratic backsliding? This Article answers in the affirmative and provides numerous examples of courts that helped to prevent democratic erosion at particular points. An examination of these cases reveals a loose set of principles which ought to be taken into account when courts are confronted with anti-democratic threats.

Courts are particularly important because the threats to constitutional democracy in our current moment tend to take a legal form. Authoritarians have learned to use the law and to leverage the rule-of-law discourse that has spread around the world in recent decades.<sup>16</sup> Law is, it seems, a double-edged sword.<sup>17</sup> While in an authoritarian regime, law can facilitate challenges that expand democratic space;<sup>18</sup> in a democratic regime, law can also facilitate the use of democratic forms to undermine political competition.<sup>19</sup> Law, then, is not a neutral technology but takes its life and direction from the broader political environment.

This Article is organized as follows: first, I lay out in a bit more detail the evidence for democratic decline and show that it is applicable to the United States. Next, I draw on other work to articulate five channels of

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Shapiro eds., 2010) (defining “competitive authoritarianism” as regimes where civilians participate in seemingly traditional democratic institutions only to see a regime gain power and then abuse that power (and those institutions) to stay in power).

14. Huq & Ginsburg, *supra* note 7, at 166–69.

15. See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015); Tom Ginsburg, *Courts and New Democracies: Recent Works*, 37 LAW & SOC. INQUIRY 720 (2012) [hereinafter Ginsburg, *Courts and New Democracies*].

16. TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 20 (2007).

17. *Id.*

18. *Id.*

19. See *id.* at 25–31 (illustrating how the ruling Communist Party in China has relied on administrative courts to “reign in” local authorities and challenges from the “periphery” in order to maintain an orderly status quo).

democratic erosion. Each of these, in turn, suggests an opportunity for judicial defense of democracy, as well as a set of principles that courts can follow in combatting erosion. Most importantly, courts must begin to develop jurisprudential techniques to recognize when democratic erosion is a clear and present danger. Unless the systemic risk is identified clearly, there is a risk that courts conducting business as usual will be excessively deferential to anti-democratic forces and ultimately to their own marginalization. The final section concludes.

## II. THE RISK OF BACKSLIDING

### *A. Erosion*

The sense that we are in “democratic recession” has been building for some time, even before recent high-profile instances of democratic failure.<sup>20</sup> The very term *recession*, however, invokes the business cycle and suggests that perhaps the problem is short term. Unfortunately, this is not the case. Just as the “third wave” of democratization spread all over the world,<sup>21</sup> we are now at the point at which, according to some calculations, more countries are nondemocracies than are democracies.<sup>22</sup> And earlier eras, such as the 1930s, witnessed the very real possibility of the triumph of authoritarian rule over vast parts of the world.<sup>23</sup> That fascist wave was only defeated with the massive use of force by democracies. In short, there is nothing automatic about the spread of democratic rule; instead, it must be constantly defended.

Recent cases of backsliding that have garnered a good deal of attention include those in Hungary and Poland, where populist leaders have taken charge and sought to remake their political systems so as to entrench power. Hungarian Prime Minister Viktor Orbán sees this “illiberal state” as a scheme in which the majority and the government become intertwined and

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20. Larry Diamond, *Facing Up to the Democratic Recession*, 26 J. DEMOCRACY 141, 144 (2015); see also Schneiderman, *supra* note 5, at 552–54 (discussing how the onset of neoliberal economic regimes have resulted in a democratic “malaise”).

21. Diamond, *supra* note 20, at 141.

22. *Democracy Continues Its Disturbing Retreat*, ECONOMIST (Jan. 31, 2018), <https://www.economist.com/graphic-detail/2018/01/31/democracy-continues-its-disturbing-retreat>.

23. ROBERT O. PAXTON, *THE ANATOMY OF FASCISM* 55–75 (2004) (detailing the rise of fascism not only in Axis belligerents like Nazi Germany and Mussolini’s Italy but also other fascist movements in other parts of Europe and the world).

operate to insert their interests over the rights of minorities.<sup>24</sup> In established democracies, like Japan, we see some efforts by the ruling conservative party to bend, if not break, certain constitutional norms in interest of self-preservation.<sup>25</sup> And in India, a governing political party has alliances with Hindu nationalist groups that occasionally engage in extralegal violence and intimidation.<sup>26</sup> State violence is the mechanism used to intimidate opponents in the Philippines, where Rodrigo Duterte has declared war on drug dealers and jailed political opponents.<sup>27</sup> Venezuela, a country with several decades of democratic history, is perhaps the case that is most stark.<sup>28</sup> After a failed coup attempt in 1992, Populist firebrand Hugo Chávez won election in 1998 and began a series of steps to remake democracy in a Bolivarian model.<sup>29</sup> His political idiom was borrowed, although surely with less repressive results, by Rafael Correa in Ecuador and Evo Morales in Bolivia.<sup>30</sup> Of the three, only Morales is still in power, having just ignored a loss in an election to see if he could have a fourth term in office.<sup>31</sup> In short, democracy seems to be in retreat on every major continent and in a wide array of countries.

In our prior work, Aziz Huq and I have identified five modalities of democratic backsliding.<sup>32</sup> One, which actually encompasses the other

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24. Gábor Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 4, at 243, 245–46; Jan-Werner Mueller, *Taking “Illiberal Democracy” Seriously: Responding to Jeffrey C. Isaac’s Illiberal Democracy*, PUB. SEMINAR (July 21, 2017), <http://www.publicseminar.org/2017/07/taking-illiberal-democracy-seriously/> (noting authoritarian regimes like Orbán’s show us that “liberalism and democracy are not the same thing”).

25. Koichi Nakano, Opinion, *The Death of Liberalism in Japan*, N.Y. TIMES (Oct. 15, 2017), <https://www.nytimes.com/2017/10/15/opinion/liberalism-japan-election.html>.

26. Huq & Ginsburg, *supra* note 7, at 28–30.

27. *Id.* at 29–30.

28. See, e.g., Daniel Lansberg-Rodríguez, *Why Venezuela Needs an Exorcism*, FOREIGN POL’Y (Mar. 3, 2016), <https://foreignpolicy.com/2016/03/03/why-venezuela-needs-an-exorcism/>.

29. *Left-Wing Populist Chavez Wins Venezuela Presidency*, CNN (Dec. 6, 1998), <http://www.cnn.com/WORLD/americas/9812/06/venezuela.results/index.html> (referencing Simon Bolivar, a hero of the nation’s independence movement).

30. See Steve Ellner, *The Distinguishing Features of Latin America’s New Left in Power: The Chávez, Morales, and Correa Governments*, LATIN AM. PERSP., Jan. 2012, at 96, 101–05.

31. See Nicholas Casey, *Bolivia Tells President His Time Is Up. He Isn’t Listening.*, N.Y. TIMES (Jan. 28, 2018), <https://www.nytimes.com/2018/01/28/world/americas/bolivia-evo-morales-elections.html>.

32. Huq & Ginsburg, *supra* note 7, at 123–42.

modalities at times, is the use of a constitutional amendment to rig the rules for one party.<sup>33</sup> For example, Viktor Orbán parlayed a single election in 2011 with a constitutional majority to remake the Constitution.<sup>34</sup> This change to the fundamental law facilitated many other changes that, in turn, entrenched Orbán's coalition into power.<sup>35</sup>

A second modality is to bypass the institutions of checks and balances.<sup>36</sup> For example, if the courts are proving to be a barrier, politicians can seek to pack and purge the judges to appoint favored jurists. Again, Hungary provides a nice example. Orbán, after taking power, reduced the retirement age for judges on the Constitutional Court, giving him the opportunity to appoint a majority.<sup>37</sup> He later passed a statute voiding the entire earlier jurisprudence of the Constitutional Court.<sup>38</sup> With the courts safely in control, lots of other moves are possible.

In some countries, courts are not the primary check on potential anti-democrats. What happens if the putative autocrat does not control the legislature? In such instances, one common strategy is to bypass the legislature. Hugo Chávez and his successor, Nicolás Maduro, used this to great effect most recently in Maduro's creation of a constituent assembly to rule directly after they had lost legislative elections.<sup>39</sup> Another mechanism of bypassing the legislature is to rely heavily on executive lawmaking, which of course is a common feature of functioning democracies. But when executive lawmaking is used to undermine democracy in significant ways, structurally, it is worth identifying as a tool of backsliding.<sup>40</sup>

A third modality of backsliding is the undermining of the rule of law and its associated institutions.<sup>41</sup> Here a critical institution besides the courts is the bureaucracy, which is, of course, necessary for the implementation of

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33. *Id.* (using the example of Vladimir Putin who, facing a term limit as Russia's president, pushed for a constitutional amendment to expand the powers of the Prime Minister, a position he took before returning as President).

34. *Id.* at 125.

35. *Id.*

36. *Id.*

37. Halmai, *supra* note 24, at 246.

38. *See id.* at 247.

39. *See, e.g.,* David Landau, *Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 4, 161, 171–74.

40. *See id.* at 171–72.

41. Huq & Ginsburg, *supra* note 7, at 128–29.

democratically enacted policy.<sup>42</sup> A neutral bureaucracy, protected by civil-service protections, has sometimes been identified as a threat to the rule of law.<sup>43</sup> But in another sense, it is itself a democratic institution.<sup>44</sup> First, it may in fact be a more representative institution than the legislature, at least in contexts where economic elites have a good deal of power.<sup>45</sup> Bureaucrats are more likely to be drawn from broad social strata than are legislators. Second, a neutral bureaucracy reduces the stakes of controlling the government: if winning power means the ability to distribute a large number of government jobs, the stakes of controlling government become higher, and the risks of losing are also higher.<sup>46</sup> This may induce parties to defect from democratic alternation and hold on to power. Third, a neutral expert bureaucracy, following the law, can in an ideal world help politicians deliver on campaign promises and so make democracy more responsive.<sup>47</sup>

If this is what is at stake, it is also what is at risk. Putative dictators will often seek to purge the bureaucracy to fill it with supporters. A good example is Recep Tayyip Erdoğan, who after the failed coup of summer 2016 decided to purge public prosecutors, academic administrators, and bureaucrats.<sup>48</sup> Decrying a “bureaucratic oligarchy,” he sought centralized control over all government institutions within the Presidency through his successful constitutional reform of April 2017.<sup>49</sup>

Contracting the public sphere is another modality. It is well-known that civil society has been under attack in many countries, creating what the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has called an “ideological pandemic.”<sup>50</sup> According to one account, core

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42. *Id.*

43. *Compare id.* (illustrating how bureaucracies can serve as a barrier to overreach by executive powers), with F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 195–96 (1960) (noting the administrative state could be used to secure greater power for an executive figure).

44. Huq & Ginsburg, *supra* note 7, at 128–29.

45. *See id.*

46. *See id.* at 129.

47. *See id.* at 128–29.

48. Selim Koru, *Erdogan Goes for Death Blow Against Turkey's Bureaucracy*, FOREIGN POL'Y (Apr. 14, 2017), <http://foreignpolicy.com/2017/04/14/erdogan-goes-for-the-death-blow-against-turkeys-bureaucracy/>.

49. *Id.*

50. *UN Expert Raises Alarm at Global Trend of Restricting Civil Society Space on Pretext of National Security and Counter-Terrorism*, OHCHR (Oct. 26, 2015),

freedoms of association and speech were violated in more than half the world's countries in 2015.<sup>51</sup> The techniques for doing so are myriad and can be subtle. Critics of the government can be subjected to libel prosecutions—even as the government itself can attack individuals' reputations without punishment.<sup>52</sup> Nongovernmental organizations can be subjected to tax audits, registration requirements, and restrictions on funding.<sup>53</sup> Media companies can be restricted; they can also be pressured into oligarchic concentration.<sup>54</sup> Weaponizing information can undermine the very concept of facts. The law, too, can be used to restrict the public sphere, in particular, through the abuse of anti-terrorist legislation.<sup>55</sup> For example, when the Maldives imprisoned its Chief Justice for failing to follow the government line against its political opponents, it accused him, *inter alia*, of terrorism.<sup>56</sup>

Finally, and most directly, backsliding involves the manipulation of elections themselves. Restricting candidates from running or voters from voting are ways of maintaining the form of elections without the substance.<sup>57</sup> But there are subtler ways to influence the process: control of campaign advertising, subtle and targeted enforcement of campaign finance laws, and drawing of district boundaries in ways that favor those in power.<sup>58</sup> All of

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<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16653&LangID=E> (detailing the abuse of so-called antiterrorism measures by governments, which has the result of stifling expression and rights to assembly).

51. See TELDAH MAWARIRE, INES POUSADELA & CATHAL GILBERT, CIVICUS, CIVIL SOCIETY WATCH REPORT 1 (2016), [http://www.civicus.org/images/CSW\\_Report.pdf](http://www.civicus.org/images/CSW_Report.pdf) (noting there were human rights abuses in at least 109 nations in 2015).

52. See *id.* at 5 (discussing efforts by the Algerian government to suppress speech, vilify human rights advocates, and arrest journalists).

53. See *id.* at 19 (discussing administrative and financial constraints imposed on a human rights organization in Tajikistan).

54. See, e.g., *id.*; see also John Nichols, *Donald Trump's FCC Is a Clear and Present Danger to Democracy*, NATION (Nov. 20, 2017), <https://www.thenation.com/article/donald-trumps-fcc-is-a-clear-and-present-danger-to-democracy/> (detailing the perils of media consolidation incentivized by the current presidential administration).

55. See MAWARIRE, POUSADELA & GILBERT, *supra* note 51, at 1–2.

56. *Jail Sentence Reduced for Supreme Court Judges*, MALDIVES INDEP. (June 3, 2018), <https://maldivesindependent.com/crime-2/jail-sentence-reduced-for-supreme-court-judges-138625>.

57. See Huq & Ginsburg, *supra* note 7, at 135–36.

58. See Edward B. Foley, *Constitutional Preservation and the Judicial Review of Partisan Gerrymanders*, 52 GA. L. REV. (forthcoming 2018) (manuscript at 27–30, 49) (on file with author).

these mechanisms can allow electoral incumbents to maintain power and erode the quality of democratic competition.

### B. *Relevance to the United States*

Are these mechanisms relevant to the United States? Surely our country, with its long democratic tradition and an ideology of U.S. exceptionalism, should be immune from any risk of backsliding. However, this is an empirical question.

One of the great environmental conditions of our time is partisan polarization. It is well-known that partisan polarization in the United States is reaching extreme proportions. My favorite statistic in this regard is the following: today, more Americans care about whether their child marries someone of a different political party than a different race.<sup>59</sup> In 1960, Americans were basically indifferent in regard to interparty marriages, even as they disapproved of interracial marriages.<sup>60</sup> By 2008, the number of people who cared had risen to roughly a quarter of Americans.<sup>61</sup> By 2010, the numbers had climbed to one-third of Democrats and roughly half of Republicans who would disapprove a child's interpolitical marriage.<sup>62</sup> Meanwhile, less than a tenth of the country disapproves of black-white marriages, once forbidden by law and norms.<sup>63</sup>

One way to understand the quality of democracy is to ask the public about their perceptions of it. A group of political scientists called Bright Line Watch has, since the election of Donald Trump, been surveying members of the elite and the public about various indicators of democracy.<sup>64</sup> Their findings after one year, incorporating four waves of surveys, are disturbing

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59. Ezra Klein & Alvin Chang, "Political Identity Is Fair Game for Hatred": How Republicans and Democrats Discriminate, VOX (Dec. 7, 2015), <https://www.vox.com/2015/12/7/9790764/partisan-discrimination>.

60. *Id.*

61. *Id.*

62. *Id.*; Emily Badger & Niraj Chokshi, *How We Became Bitter Political Enemies*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/upshot/how-we-became-bitter-political-enemies.html>.

63. *Loving v. Virginia*, 388 U.S. 1 *passim* (1967); see also Gretchen Livingston & Anna Brown, *Intermarriage in the U.S. 50 Years After Loving v. Virginia: Public Views on Intermarriage*, PEW RES. CTR. (May 18, 2017), <http://www.pewsocialtrends.org/2017/05/18/2-public-views-on-intermarriage/> (illustrating that public polling shows only 9 percent of Americans see racial intermarriage as a "bad thing").

64. BRIGHT LINE WATCH, <http://brightlinewatch.org/> (last visited June 23, 2018).

but nuanced.<sup>65</sup> They find that, on many dimensions considered important to democracy, experts are more sanguine than the general public.<sup>66</sup> Only a minority of members of the public think elections are generally fraud free in the United States today.<sup>67</sup> Experts tend to believe the Judiciary can constrain the Executive, while the public is more skeptical.<sup>68</sup> On the other hand, less than 10 percent of experts think voting district lines are unbiased, while roughly 30 percent of the public does.<sup>69</sup> The two sets of respondents are closer together, although equally skeptical, in their opinion that campaign contributions do not influence policy in the United States.<sup>70</sup> These features of democracy, along with the idea that there is a common interpretation of facts among the electorate, are all considered by respondents to be very important to the functioning of democracy. This is true even if the United States performs poorly along many of these dimensions.<sup>71</sup>

Bright Line Watch has also found that a significant minority of Americans would support a military takeover of the government when there is significant corruption or disorder.<sup>72</sup> This data is perhaps the most disturbing, although also more abstract and remote. In our recent book, Professor Huq and I argue that the probability of a military coup in the United States is very low indeed.<sup>73</sup> There is little need for a coup, given high military budgets and commitments on the part of senior military officials to the continuation of democracy.<sup>74</sup> It also seems unlikely to us that line-level officers and soldiers—steeped in American virtue—would support such an effort.

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65. John Carey et al., *Searching for the Bright Line: The First Year of the Trump Presidency 3* (Mar. 15, 2018) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3142310](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3142310).

66. *Id.* at 12.

67. *Id.*

68. *Id.* at 13.

69. *Id.* at 13–14.

70. *Id.* at 13.

71. *Id.* at 13–14.

72. German Feierherd, Noam Lupu & Susan Stokes, *A Significant Minority of Americans Say They Could Support a Military Takeover of the U.S. Government*, WASH. POST (Feb. 16, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/16/a-significant-minority-of-americans-say-they-would-support-a-military-takeover-of-the-u-s-in-the-right-circumstances/?utm\\_term=.955e62b36e9f](https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/16/a-significant-minority-of-americans-say-they-would-support-a-military-takeover-of-the-u-s-in-the-right-circumstances/?utm_term=.955e62b36e9f).

73. *See generally* GINSBURG & HUQ, *supra* note 6, at 56.

74. *Id.* at 62–64 (arguing that cooperative, non-antagonistic relationships with the military can forestall or prevent military coups).

But if sudden democratic collapse seems unlikely in the United States, the risk of erosion seems real. Leadership matters, and poll data suggests that President Trump's attacks on the media, the courts, and other essential institutions in democracy are having an effect.<sup>75</sup> Such attacks, combined with partisan domination, means the possibility of backsliding cannot be ruled out. At the time of the writing of this Article, one party dominates U.S. electoral politics. In 32 states, the Republican Party has majorities in both (or all) state houses, and in 26 of these, it also holds the governorship.<sup>76</sup> Democrats control 14 legislatures and, in 8 of these states, have the governorship as well.<sup>77</sup>

While the situation may change by the time this Article is published, there is a genuine risk of democratic erosion when one party controls all institutions.<sup>78</sup> Consider some recent disturbing examples in which political figures seem to be defecting on democracy. In North Carolina, after losing a hotly contested race for the governorship in 2016, state legislators moved to strip the Governor's office of many powers.<sup>79</sup> Though these efforts were eventually rebuffed by courts (and commentators note that similar techniques had been used at one point by the Democrats),<sup>80</sup> they evince a willingness to ignore the will of the people.

Another example comes from Wisconsin, a state with an extreme partisan gerrymander favoring Republicans that was recently the subject of litigation before the Supreme Court (along with an extreme gerrymander in Maryland executed by Democrats).<sup>81</sup> The Brennan Center recently described Wisconsin as:

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75. *Id.* at 123–26 (discussing how Trump's assault on media, elites, and other institutions by populist means corrodes the democratic firmament).

76. See NAT'L CONFERENCE OF STATE LEGISLATURES, 2018 STATE & LEGISLATIVE PARTISAN COMPOSITION 1 (2018), [http://www.ncsl.org/Portals/1/Documents/Elections/Legis\\_Control\\_041118\\_26973.pdf](http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_041118_26973.pdf); *Partisan Composition of Governors*, BALLOTPEDIA, [https://ballotpedia.org/Partisan\\_composition\\_of\\_governors](https://ballotpedia.org/Partisan_composition_of_governors) (last visited June 23, 2018); *Partisan Composition of State Legislatures*, BALLOTPEDIA, [https://ballotpedia.org/Partisan\\_composition\\_of\\_state\\_legislatures](https://ballotpedia.org/Partisan_composition_of_state_legislatures) (last visited June 23, 2018); *State Government Trifectas*, BALLOTPEDIA, [https://ballotpedia.org/State\\_government\\_trifectas](https://ballotpedia.org/State_government_trifectas) (last visited June 23, 2018).

77. See *Partisan Composition of Governors*, *supra* note 76; *State Government Trifectas*, *supra* note 76.

78. Huq & Ginsburg, *supra* note 7, at 84–85.

79. *Id.* at 161–62.

80. See *id.*

81. *Gill v. Whitford*, 138 S. Ct. 1916, 1922–23 (2018).

[A] quintessential battleground where races are often decided by only a few percentage points. Contrast that to the state assembly map the Republicans drew: In 2012, they won 60 of the 99 seats in the Wisconsin Assembly despite winning only 48.6 percent of the two-party state-wide vote; in 2014, they won 63 seats with only 52 percent of the state-wide vote.<sup>82</sup>

Gerrymanders reduce the quality of democracy, but at least the forms of elections are still observed. A more extreme example, in my view, is when state actors refuse to hold elections at all. After appointing two state senators to his administration, Wisconsin Governor Scott Walker opted to leave their seats vacant for more than a year.<sup>83</sup> Walker argued he was justified to do so because the seats were vacated in a year in which no election had been scheduled.<sup>84</sup> On February 26, 2018, Walker was sued for this decision in *Newton v. Walker*.<sup>85</sup> Although the plaintiffs in the case were eight voters from the two districts in question, the National Democratic Redistricting Committee did much of the filing work and paid for all of the legal fees. Because Eric Holder is the chairman of the organization, media reporting framed the case as a dispute between the former Attorney General and Governor Walker.<sup>86</sup> Plaintiffs relied on Wisconsin statutory law to argue the Governor was obligated to call a by-election.<sup>87</sup> Further, they argued the vacancies deprived them of representation not just in regular legislative sessions<sup>88</sup> but in the many extraordinary sessions Walker said he would convene. Walker and Wisconsin Attorney General Brad Shimel contended that only extraordinary circumstances could necessitate special elections.<sup>89</sup>

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82. Michael Li & Thomas Wolf, *5 Things to Know About the Wisconsin Partisan Gerrymandering Case*, BRENNAN CTR. FOR JUST. (June 19, 2017), <https://www.brennancenter.org/blog/5-things-know-about-wisconsin-partisan-gerrymandering-case>.

83. Jason Stein, *Gov. Scott Walker Calls Special Elections; Senate Chief Drops Bill to Sidestep Court Order*, MILWAUKEE J. SENTINEL (Mar. 29, 2018), <https://www.jsonline.com/story/news/politics/2018/03/29/wisconsin-gov-scott-walker-calls-special-elections-senate-leader-drops-bill/469000002/>.

84. *Id.*

85. Scott Gordon, *What's at Issue in Wisconsin's Special Elections Lawsuit*, WISCONTEXT (Mar. 20, 2018), <https://www.wiscontext.org/whats-issue-wisconsins-special-elections-lawsuit>.

86. *See id.*

87. *Id.*

88. *Id.*

89. *Id.*

Dane County Circuit Court Judge Josann Reynolds, a Walker appointee, ruled that Walker was bound under state law to call a special election.<sup>90</sup> She ordered him to do so by March 29th, seven days after the ruling.<sup>91</sup> Two days before this deadline, Walker filed for an appeal to delay for eight days, so he could call on the state house to change state statutes governing the timing of special elections.<sup>92</sup> His appeal was denied the next day, and he issued a call for special elections only a few hours before the deadline.<sup>93</sup> The next week, the special-election legislation was rejected by the state senate.<sup>94</sup> Eventually Walker complied, but the GOP lost the election.<sup>95</sup>

The story is a small one, and there are ample historical examples of such efforts coming from both sides of the political aisle.<sup>96</sup> But this Article's point is not to document the threats, so much as to illustrate the centrality of courts in the policing of democratic contestation in the United States. Without judicial oversight, there is a risk that political forces could engage in partisan takeover, leading to the erosion of democracy.<sup>97</sup>

### III. THE ROLE OF COURTS IN DEMOCRACY

Before turning to the question of what, if anything, courts can do about all this, it is worth noting that many authors, myself included, have celebrated the role of constitutional courts in consolidating democracy.<sup>98</sup> While courts were not typically the actors to trigger democratic change

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90. Order Granting Plaintiffs' Petition for Writ of Mandamus at 2–3, *Newton v. Walker*, No. 18-CV-0519 (Wis. Cir. Ct. Mar. 22, 2018).

91. *Id.* at 3.

92. See Stein, *supra* note 83.

93. Shawn Johnson, *Judge Rejects Walker's Request to Delay Election Order*, WISC. PUB. RADIO (Mar. 27, 2018) <https://www.wpr.org/judge-rejects-walkers-request-delay-election-order>.

94. See Stein, *supra* note 83.

95. Tara Golshan, *Democrats Just Won a Special Election Scott Walker Didn't Want to Have*, VOX (June 12, 2018), <https://www.vox.com/2018/6/12/17455922/wisconsin-special-elections-results-june>.

96. See, e.g., *Texas Democrats Return Home*, CNN (May 16, 2003), <http://www.cnn.com/2003/ALLPOLITICS/05/16/texas.legislature/index.html> (chronicling the resistance from Texas Democrats to a power move made by state Republicans to redistrict the state's congressional seats in favor of Republicans).

97. See LEVITSKY & ZIBLATT, *supra* note 6, at 115–17.

98. See generally ISSACHAROFF, *supra* note 15, at 12–13; Ginsburg, *Courts and New Democracies*, *supra* note 15, at 720–21.

during the third wave of democratic expansion, they played a critical role in helping cement it by removing vestiges of authoritarianism, resolving blockages in the political system, and in some cases, importing a robust jurisprudence of protection of fundamental rights.<sup>99</sup> In the context of more established democracies, a longstanding normative theory of the U.S. context is that courts are to protect those who cannot succeed through the political process.<sup>100</sup> John Hart Ely famously argued for a special role in defense of minorities who are unlikely to be protected through the political process.<sup>101</sup> Courts were to police the process so as to allow democratic dialogue and deliberation to function.<sup>102</sup> This is perhaps a more modest role than that in the context of a new democracy when courts confront weak democratic traditions and may have important work to do with regard to vestiges of the old regime. Nonetheless, it is an important role in terms of preserving the quality of democratic competition.

The literature on the jurisprudence of democratic consolidation suggests that we now need to think about a specific jurisprudence of anti-erosion. This jurisprudence may be even more modest than that offered in the context of a mature democracy. In a mature democracy, courts can act to protect participation, to secure a robust set of rights for citizens, and to make sure that competition is ensured. An anti-erosion jurisprudence, by contrast, is targeted at a relatively narrow set of systematic threats that seek to undermine democratic competition itself.<sup>103</sup> In this sense, it is a particular strain of the law of democracy, designed only to ensure maintenance of a minimal threshold of democratic quality.<sup>104</sup>

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99. See Ginsburg, *Courts and New Democracies*, *supra* note 15, at 729–31.

100. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 218 (1980).

101. *Id.* at 135–36; see also Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1826–27 (2016).

102. See ELY, *supra* note 100, at 181–83 (concluding with an overarching imperative that courts police matters of procedure and participation over the “substance” of the policies involved).

103. See, e.g., SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 547, 618 (1998) (discussing the negative effects of gerrymandering and money in campaigns).

104. See, e.g., *id.* at 547, 618; Pamela S. Karlan, *New Beginning and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 746, 766 (2007) (arguing that courts intervene for both anti-entrenchment and anti-discrimination purposes); Nathaniel Persily, *The Law of Democracy*, 153 U. PA. L. REV. 1, 1–3 (2004) (introducing symposium).

Why should courts bear this burden? Courts are, of course, not democratic actors per se. Courts are part of the unelected apparatus that makes democracy work, but they are rarely accountable to the public in countries around the world. Courts can provide some of the background apparatus to police democratic processes and clear channels for democratic participation, but they are not themselves democratic bodies in form or function.<sup>105</sup>

Democracy, in an ideal sense, is sustained by norms whose enforcement in turn depends on reciprocity.<sup>106</sup> Knowing that a particular party may be out of power one day, one may decide not to push advantage too far. But this political process-based view can, at times and places, break down. One side or the other might defect from rules that sustain reciprocity, seeking to take over the system in its entirety. The literature on democratic and constitutional stability emphasizes a distinct role for courts in identifying such violations of rules.<sup>107</sup>

A key mechanism in accomplishing this is called coordination.<sup>108</sup> The logic derives from a model in which a ruler conspires with some citizens to dominate other citizens, using a combination of repression and selective incentives for regime insiders.<sup>109</sup> The dominated group can be very large but can only limit the ruler if it can coordinate internally to overturn the narrow ruling coalition.<sup>110</sup> Coordination is very difficult to achieve because citizens may not agree on what exactly constitutes a violation of the rules and may not know whether other citizens will join in an effort to take power.<sup>111</sup> Any subset of citizens thinking of rising up to challenge the regime can only succeed if others join them.<sup>112</sup> Otherwise, the opponent ends up in jail—or worse—and the regime maintains power.<sup>113</sup>

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105. David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 730–31 (2009).

106. LEVITSKY & ZIBLATT, *supra* note 6, at 125–26.

107. Law, *supra* note 105, at 747–54.

108. *Id.* at 729; ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 35–37 (Jon Elster & Michael S. McPherson eds., 1991); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 247–48 (1997).

109. Weingast, *supra* note 108, at 248–51.

110. *Id.* at 246.

111. *See id.*

112. *See id.*

113. *See id.* at 249.

Court decisions can provide a focal point for citizen coordination for at least three reasons. First, a court decision can help citizens agree that the government has actually violated the rules.<sup>114</sup> Without agreement on exactly what the rules are, regime opponents will disagree about whether a violation occurred, which makes enforcement very unlikely.<sup>115</sup> A court can create common knowledge that a violation of the rules has occurred.<sup>116</sup> Second, a court decision against the government signals that the government apparatus is not completely unified—after all, judges are government officials themselves.<sup>117</sup> Furthermore, it lets the public know judges do not believe their personal safety is in jeopardy from deciding against the government, and this may allow opponents to update their own assessments of the risks of confrontation.<sup>118</sup> Third, a court decision may help regime opponents rally supporters to their cause.<sup>119</sup>

Those concerned with democratic stability might all agree that protecting the rules is important. But they need some mechanism to coordinate their understanding of what the rules require, when a violation has occurred, and how to respond. Without agreement on these things, there is a risk that enforcement efforts can break down with insufficient participation in enforcement.

In light of coordination theory, the potential power of courts becomes clear.<sup>120</sup> A judicial decision finding that a particular contested action is a violation of the rules can facilitate coordination of a response. In contrast, a decision that finds the action is legal will undermine efforts to challenge the rule. A key mechanism in ensuring coordination is common knowledge generated through the publicity of court decisions.<sup>121</sup> Because court decisions finding violations are public, everyone knows the violation has occurred, and

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114. *See id.* at 254 (using President Franklin Delano Roosevelt’s effort to “pack” the U.S. Supreme Court as an example of political action that backfired as it ran afoul of widely accepted social norms and standards).

115. *See id.* at 253–55 (noting weaker democracies in Latin America fluctuate more in absence of more established democratic norms).

116. *See* MICHAEL SUK-YOUNG CHWE, *RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE* 7–8 (2001).

117. *See* Ginsburg, *Courts and New Democracies*, *supra* note 15, at 724–25.

118. *Id.*

119. *Id.*

120. *See* Law, *supra* note 105, at 778–80.

121. *See* CHWE, *supra* note 116, at 7–8.

crucially, everyone knows that everyone else knows. Without this second-order common knowledge, enforcement activity is unlikely.<sup>122</sup>

It is worth noting that courts are not great heroes here. Their role in saving democracy is a limited one. The view of the role of courts in this account is essentially an informational one. Courts operate by providing high-quality information to publics and elites.<sup>123</sup> But the action taken to protect democracy from erosion is taken by other actors, not courts themselves. What judges can do is speak truth to power, allowing *other* actors to step up.

#### IV. THE JURISPRUDENCE OF ANTI-EROSION

With this theoretical background established, this Article now returns to the five modalities of democratic backsliding and examines what, specifically, courts can do about each one of them. This Article provides illustrative examples from existing literature to inform the deeper principles considered.

##### A. Amendment

Constitutions always require some mechanism of constitutional amendment, and putative authoritarians often seek to lock in their power through constitutional amendment.<sup>124</sup> When such cases involve serious transformations of the constitutional order, they can even amount to constitutional “dismemberment.”<sup>125</sup> This is a process whereby formal procedural rules may be complied with, but the intentions or spirit of the democratic constitution suffers. It is obviously an attractive model for illiberal regimes.<sup>126</sup>

In recent years, a doctrine has spread around the world that allows courts to do something about this. This is the doctrine of “unconstitutional

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122. *See id.*

123. *See* Carles Boix & Milan W. Svobik, *The Foundations of Limited Authoritarian Government: Institutions, Commitment, and Power-Sharing in Dictatorships*, 75 J. POL. 300, 307 (2013) (noting courts prevent autocratic domination by ensuring symmetrical lines of information); Clifford J. Carrubba, *Courts and Compliance in International Regulatory Regimes*, 67 J. POL. 669, 671 (2005).

124. *See* Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. 1, 61–62 (2018) (discussing authoritarian efforts to use democratic processes for anti-democratic ends).

125. *Id.* at 64–65.

126. *Id.* at 60–62.

constitutional amendments,” in which courts have held that amendments passed in a procedurally correct way may nevertheless violate a basic structure of a constitution and hence are unconstitutional.<sup>127</sup> As recently elaborated upon by Professor Roznai, this doctrine has spread around the world, across all kinds of legal traditions, and seems to invite judges to articulate a constitutional core that goes beyond what is set out in positive law.<sup>128</sup> Courts are speaking in the name of the deeper democratic will—the *pouvoir constituant*—rather than the temporary majority that happens to be in power.<sup>129</sup>

The doctrine has deep origins, but in modern times it is sometimes attributed to the Supreme Court of India’s decisions articulating a “basic structure” to the Constitution of India, which would provide substantive limits on the amendment power.<sup>130</sup> In the famous case of *Golaknath v. State of Punjab*, the Supreme Court of India first asserted that the constitutional amendment power could not be used to undermine fundamental rights.<sup>131</sup> This led to a backlash by the government of Indira Gandhi, and the overruling of the case in *Kesavananda Bharati v. State of Kerala* in 1973.<sup>132</sup> In holding that Parliament could amend any part of the Constitution and that there was not a categorical exclusion of fundamental rights, several of the judges argued the power of amendment is limited and cannot impinge on the basic structure of the Constitution.<sup>133</sup> This doctrine has subsequently been borrowed wholesale in other countries throughout South Asia.<sup>134</sup>

In the context of democratic erosion, another recent example comes from Colombia, under President Alvaro Uribe who served 2002–2010.<sup>135</sup> Uribe was elected on a promise to get tough with rebels who had engaged in

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127. YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 6–7 (Martin Loughlin, John P. McCormick & Neil Walker eds., 2017).

128. *Id.* at 180–83.

129. Tamara El Khoury, *Pouvoir Constituant*, OXFORD CONST. L. ¶ 12, <http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e709> (last updated Dec. 2017).

130. ROZNAI, *supra* note 127, at 42–45.

131. *See* *Golaknath v. State of Punjab*, (1967) 2 SCR 762, ¶¶ 16–19 (India).

132. *See* *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 225 (India).

133. *Id.* at 315–29.

134. *See* ROZNAI, *supra* note 127, at 46–58.

135. Rosalind Dixon & David Landau, *Transitional Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 606, 615–16 (2015).

a long-running civil war against the Colombian state, and he successfully fought groups such as the Revolutionary Armed Forces of Colombia (FARC).<sup>136</sup> In 2004, Uribe's allies in Congress passed an amendment to the Constitution of 1991 to allow a second term.<sup>137</sup> In 2005, the Colombian Constitutional Court had to decide whether this amendment was legal.<sup>138</sup> The Court upheld the amendment, but it also articulated some limits to such reforms for the future.<sup>139</sup> Specifically, it imported a doctrine of a basic core of the constitutional order, which would be protected from amendments even if they were adopted in a procedurally correct manner.<sup>140</sup> It did not at this time specify exactly what might violate this "basic core."

After he won re-election, Uribe consolidated power, and in 2010, a still-popular Uribe attempted to pass another constitutional amendment to seek a third term—this time through a referendum.<sup>141</sup> This time, the Constitutional Court (with four out of nine members having been appointed by Uribe) rejected the proposed referendum on procedural grounds, asserting that it would mark an extraconstitutional replacement of the constitutional scheme as a whole.<sup>142</sup> Professor Dixon and Professor Landau, commenting on the case, observe that the Court "noted in detail how a president with twelve consecutive years in power would have tremendous power over various institutions of state, including those institutions charged with checking him."<sup>143</sup> The Court further noted the possibility that a three-term President would be able to "dominate the media," shifting the balance of power in the society.<sup>144</sup> Accepting the Court's decision, Uribe did not run, designating his Defense Minister, Juan Manuel Santos, as his successor.<sup>145</sup> Santos subsequently served two terms and has now ceded power.<sup>146</sup> Arguably, one can point to the 2010 decision of the Constitutional Court as marking a critical juncture in Colombian democracy.

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136. GINSBURG & HUO, *supra* note 6, at 187.

137. Dixon & Landau, *supra* note 135, at 616.

138. *Id.*

139. GINSBURG & HUO, *supra* note 6, at 188.

140. Dixon & Landau, *supra* note 135, at 616 (noting the amendment allowing for the president's second term strained the design of the constitution but did not break it).

141. *Id.* at 617.

142. MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 351–54 (2017).

143. Dixon & Landau, *supra* note 135, at 617.

144. *Id.*

145. *Id.*

146. *Id.* at 617–18.

The doctrine of unconstitutional constitutional amendments has been issued in many other countries as well on topics ranging from the design of the legislative bodies to the location of the capital city to a ban on headscarves.<sup>147</sup> Clearly, a court that is attuned to the risk of democratic backsliding ought to strongly consider a version of this doctrine, specifically with regard to the consolidation of power in a single individual or a party that seeks to exclude others from competition. Term limits are a frequent focus of such efforts, and this Article now turns to the various attempts to extend terms of chief executives.

### *B. Bypassing Checks and Balances: Term Limits*

What should courts do about term limits? The extension of term limits is often a critical point for democracy, as it can mark the point at which an incumbent seeks to take over the entire political system. To be sure, not every extension of term limits is a threat to democracy. At a theoretical level, of course, term limits are not unproblematic, in that they operate by *restricting* the people from exercising a democratic choice they might otherwise make. The counterargument is that without such restrictions, a single individual can essentially dominate the entire political system. Democracy, it is argued, is more about parties and policies than personalities, and term limits help ensure this is the case.<sup>148</sup>

Constitutional courts in recent years have become extensively involved in the adjudication of term limits, whether adopted by constitutional amendment or other means.<sup>149</sup> In some cases, courts will strike term limits as being incompatible with democracy.<sup>150</sup> Arguments in this regard take two forms. In some cases, the courts focus on the people, whose democratic choice is unreasonably restricted.<sup>151</sup> In other cases, they focus on the personal rights of the candidate to run for office.<sup>152</sup> An example of the former

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147. See generally ROZNAI, *supra* note 127.

148. See Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1822–23 (2011). The following paragraphs draw on the forthcoming chapter, co-authored with Zachary Elkins. Tom Ginsburg & Zachary Elkins, *One Size Does Not Fit All: The Provision and Interpretation of Presidential Term Limits*, in THE POLITICS OF PRESIDENTIAL TERM LIMITS (Alexander Baturo & Robert Elgie eds.) (forthcoming 2019) (on file with author).

149. Ginsburg & Elkins, *supra* note 148 (manuscript at 6).

150. *Id.*

151. See *id.* (manuscript at 13–14).

152. *Id.* (manuscript at 16).

came in 2015 in Guyana, where the High Court of Guyana struck a 2001 constitutional amendment limiting the President to two terms in office.<sup>153</sup> Because the amendment was part of the democratic core of the Constitution, the Court ruled the amendment would require a referendum.<sup>154</sup> Similarly, in Bolivia, President Evo Morales's attempted to maintain power after three full terms by urging his supporters to turn to the Constitutional Court, *Tribunal Constitucional Plurinacional* (TCP), to declare term limits unconstitutional.<sup>155</sup> In November 2017, the TCP obliged, relying on Article 23 of the American Convention on Human Rights, and allowed Morales to take power again.<sup>156</sup> Since he ignored the results of a referendum, this move raised serious concerns among observers of democracy that Morales was taking over the system.<sup>157</sup>

The saga of term limits in Honduras has also involved arguments about the democratic nature of term limits. When the sitting President, Manuel Zelaya, proposed a nonbinding referendum on the *idea* of constitutional change, the Supreme Court of Honduras held he had violated the terms of Article 374 of the Constitution, which provided that term limits were unamendable and anyone proposing a change would immediately lose office. Zelaya was sent out of the country by the military and never returned to office.<sup>158</sup> But in 2015, the Constitutional Chamber of the Supreme Court reversed itself.<sup>159</sup> In a unanimous decision, the Court not only ruled against the concept of non-amendability but also annulled the very provisions that constrained presidential re-election, finding these provisions conflicted with

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153. See Ariana Gordon, *Term Limits Case for CCJ*, GUY. CHRON. (Feb. 23, 2017), <https://guyanachronicle.com/2017/02/23/term-limit-case-for-ccj>.

154. *Id.*

155. Laurence Blair, *Evo for Ever? Bolivia Scraps Term Limits as Critics Blast 'Coup' to Keep Morales in Power*, GUARDIAN (Dec. 3, 2017), <https://theguardian.com/world/2017/dec/03/evo-morales-bolivia-president-election-limits>.

156. *Id.*

157. *See id.*

158. Alvaro Vargas Llosa, *Honduras's Coup Is President Zelaya's Fault*, WASH. POST (July 1, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/01/AR2009070103210.html>.

159. David Landau, *Honduras: Term Limits Drama 2.0—How the Supreme Court Declared the Constitution Unconstitutional*, CONSTITUTIONNET (May 27, 2015), <http://www.constitutionnet.org/news/honduras-term-limits-drama-20-how-supreme-court-declared-constitution-unconstitutional>.

the core values of freedom of speech and thought, as well as electoral choice.<sup>160</sup>

Similarly, in Nicaragua, President Daniel Ortega in 2009 sought elimination of constitutional term limits but lacked the support in Congress needed for a constitutional amendment.<sup>161</sup> The Constitutional Chamber of the Supreme Court annulled the term limits based on its finding that they violated principles of equality before the law and equality in exercise of political rights of officeholders to participate in political affairs of the country, among other reasons.<sup>162</sup> The Court reasoned that the constitutional provisions amounted to unequal treatment of Ortega himself, since under the Constitution the only grounds for limiting the re-election bid of elected officials are age, criminal conviction, or civil interdiction.<sup>163</sup> This decision ultimately enabled Daniel Ortega to run for and win re-election to a third term in 2011, and he remains president today—with term limits having been removed entirely from the Constitution in 2014.<sup>164</sup>

On the other hand, sometimes courts decide to uphold term limits. In Niger in 2009, President Mamadou Tandja sought to hold a referendum for a new constitution to allow himself a third term and disbanded the Constitutional Court when it ruled against his proposal.<sup>165</sup> With echoes of Honduras circa 2009, the Court based its decision on the unamendability of the provision prohibiting any amendment concerning presidential term limits.<sup>166</sup> The referendum would have suspended the Constitution and allowed the President to continue in office as an interim president for three years.<sup>167</sup> In February 2010, there was a coup d'état deposing Tandja, which settled matters more directly.<sup>168</sup> That November, a new Constitution

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160. *See id.*

161. 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/>.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Upholding Niger's Constitution*, GLOBALIZATION 101 (May 20, 2010), <http://www.globalization101.org/upholding-nigers-constitution-2/>.

166. *See id.*

167. *Id.*

168. *Id.*

restored civilian power and restated the absolute two-term limit on the presidency.<sup>169</sup>

More recently, in Benin in 2011, President Yayi explored options to eliminate term limits near the end of the second of his two five-year terms.<sup>170</sup> The Constitutional Court found that presidential terms are among the provisions of the Constitution that cannot be changed through a referendum, meaning the president would need 80 percent legislative majority for an amendment to be passed.<sup>171</sup>

These initial examples illustrate the active role of courts in eliminating term limits (Bolivia, Honduras, Guyana, or Nicaragua) or in upholding them in the face of attempts to replace them (Benin and Niger).<sup>172</sup> A third dynamic is when a court allows a constitutional amendment or referendum to replace term limits, as in the 2005 Colombian case cited in the previous section.<sup>173</sup>

This pattern, whereby courts will sometimes facilitate removal of term limits and other times enforce the very same limits, was also found in Sri Lanka.<sup>174</sup> In 2010, when Mahendra Rajapaksa sought to pass an amendment removing presidential term limits from the constitution (previously limited to two six-year terms), the country's Supreme Court held such a change did not require a referendum.<sup>175</sup> Three years later, Rajapaksa removed the Chief Justice, and the Supreme Court then dismissed legal concerns about

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169. See, e.g., Lisa Mueller & Lukas Matthews, *4 Things You Should Know About Niger's Recent Elections*, WASH. POST (Apr. 17, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/17/4-things-you-should-know-about-nigers-recent-elections/?utm\\_term=.2271d48cd0e6](https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/17/4-things-you-should-know-about-nigers-recent-elections/?utm_term=.2271d48cd0e6).

170. Sophia Moestrup, *Benin—Debating the Benefits of a One-Term Presidency*, PRESIDENTIAL POWER (Mar. 14, 2017), <http://presidential-power.com/?cat=348/>.

171. *Id.*

172. See David Landau, *Term Limits Manipulation Across Latin America—And What Constitutional Design Could Do About It*, CONSTITUTIONNET (July 21, 2015), <http://www.constitutionnet.org/news/term-limits-manipulation-across-latin-america-and-what-constitutional-design-could-do-about-it>.

173. See GINSBURG & HUQ, *supra* note 6, at 187.

174. Lydia Polgreen, *Sri Lanka Ends Presidential Term Limits*, N.Y. TIMES (Sept. 8, 2010), <https://www.nytimes.com/2010/09/09/world/asia/09srilanka.html>; *Sri Lanka Court Dashes President Sirisena's Hope of Extending His Term in Office*, SOUTH CHINA MORNING POST (Jan. 15, 2018), <https://www.scmp.com/news/asia/south-asia/article/2128367/sri-lanka-court-dashes-president-sirisenas-hope-extending-his>.

175. See Neil DeVotta, *Sri Lanka: From Turmoil to Dynasty*, J. DEMOCRACY, Apr. 2011, at 130, 130–44.

President Rajapaksa's eligibility to seek a third term.<sup>176</sup> In 2015, however, Rajapaksa lost to an ex-ally, and within a few months, the Constitution was again amended to restore term limits.<sup>177</sup>

One common issue for courts to decide is whether a limit imposed by a previous Constitution extends to a new one. In Senegal, President Wade was first elected in 2000 for a seven-year mandate, and re-elected in 2007 under a new Constitution (2001) for a five-year mandate.<sup>178</sup> After his re-election, he revised the Constitution again to allow for two seven-year terms from 2012 and in some sense "reset" the clock.<sup>179</sup> The Constitutional Court allowed him to run again, accepting Wade's argument that he was eligible because his initial term came under the prior Constitution. Although the Court allowed him to run, he was rejected by voters.<sup>180</sup>

A more complicated version of this dynamic arose in Burundi in 2015, when the Constitutional Court ruled that President Pierre Nkurunziza could run for a third term, despite the two-term limitation in both the Constitution and the Arusha peace deal which preceded it.<sup>181</sup> The Constitutional Court said "renewal of the presidential term through direct universal suffrage" is permitted, contrasting that with the parliamentary vote that granted Nkurunziza his first term under the transitional provisions of the Constitution.<sup>182</sup> Thus, the Court's decision was based on the fact that Nkurunziza served only one term as a result of winning a general election and should be able to seek re-election according to those terms.<sup>183</sup> This

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176. Neil DeVotta, *A Win for Democracy in Sri Lanka*, J. DEMOCRACY, Jan. 2016, at 152, 155–56.

177. *Id.* at 160.

178. J. Peter Pham, *Senegal Consolidates Its Constitutional Democracy*, ATLANTIC COUNCIL (Mar. 29, 2016), <http://www.atlanticcouncil.org/blogs/africasource/senegal-consolidates-its-constitutional-democracy>.

179. *See id.*

180. *See id.*

181. Kelsey Lilley, *Burundi's Flawed Constitutional Referendum*, ATLANTIC COUNCIL (May 16, 2018), <http://www.atlanticcouncil.org/blogs/africasource/burundi-s-flawed-constitutional-referendum>.

182. *See id.*; *see also* Patrick Nduwimana, *Burundi Court Clears President to Run Again, Despite Protestors*, REUTERS (May 5, 2015), <https://www.reuters.com/article/us-burundi-politics/burundi-court-clears-president-to-run-again-angers-protesters-idUSKBN0NQ0KT20150505>. *See generally* BURUNDI CONST. art. 96 (universal suffrage), art. 302 (transitional provision).

183. *See* Lilley, *supra* note 181.

183. *See id.*; *see also* BURUNDI CONST. art. 96 (universal suffrage), art. 302

decision presaged Nkurunziza's eventual push for a new Constitution, which was adopted in 2018 and should allow him to remain in office for many years to come.<sup>184</sup>

### 1. *Defending the Courts Themselves*

Because recent decades have seen a surge in judicial power around the globe, it is not surprising that putative backsliders will target the courts themselves. In this instance, the role of courts is to defend themselves and their own independence—something that comes fairly naturally. For example, in Romania, the government sought greater control over the courts, seeking to be able to discipline judges who had committed “a judicial error emanating from bad faith or serious negligence.”<sup>185</sup> This prompted a statement from the European Commission, warning the government against the reform.<sup>186</sup> In the end, the country's Constitutional Court ruled the attempts unconstitutional.<sup>187</sup>

But in other cases, the courts have been unable to effectively defend themselves. The long saga of the Polish Constitutional Tribunal illustrates this. When the Law and Justice Party was elected, the prior government tried to pack the courts by adding new seats and making appointments.<sup>188</sup> When Law and Justice ascended to power, it refused to seat those new appointees and raised the quorum for decisions of unconstitutionality.<sup>189</sup> The government cleverly passed a law, seemingly innocuous, which required the Tribunal to consider cases in the order in which they appeared on the

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(transitional provision).

184. *Burundi Backs New Constitution Extending Presidential Term Limits*, AL JAZEERA (May 22, 2018), <https://www.aljazeera.com/news/africa/2018/05/burundi-backs-constitution-extending-presidential-term-limits-180521134736408.html>.

185. *Government's Legal Reforms Are Unconstitutional, Rules Romania's Top Court*, EURACTIV (Jan. 31, 2018), <https://www.euractiv.com/section/justice-home-affairs/news/governments-legal-reforms-are-unconstitutional-rules-romania-top-court/>.

186. *European Union Warns Romania over Judicial Reforms, Corruption*, REUTERS (Jan. 24, 2018), <https://www.reuters.com/article/us-eu-romania-court/european-union-warns-romania-over-judicial-reforms-corruption-idUSKBN1FD1PS>.

187. *Government's Legal Reforms Are Unconstitutional, Rules Romania's Top Court*, *supra* note 185.

188. Sadurski, *supra* note 9, at 18–20.

189. Maciej Kisilowski, Opinion, *Poland's Democracy Is Crumbling*, POLITICO (Dec. 24, 2015), <https://www.politico.eu/article/polands-court-international-help-democracy-reform-rights-rule-of-law/>.

docket.<sup>190</sup> This meant any challenges to new laws to pack the court could not be heard right away since the Tribunal had a backlog of three years.<sup>191</sup>

In Hungary, Orbán's 2011 Constitution included a transitory provision reducing the retirement age for judges on ordinary courts from 70 to 62.<sup>192</sup> This not only forced many older judges into retirement but also created new opportunities for political patronage through new appointments.<sup>193</sup> Naturally, the older judges included many of the most senior and experienced judges in the country, including numerous county court presidents, appeals court presidents, and Hungarian Supreme Court Justices.<sup>194</sup> The government also packed the Constitutional Court, restricted its jurisdiction, and eliminated its ability to rely on the prior jurisprudence of the 1990s and early 2000s.<sup>195</sup>

Courts tend to be fairly active in defending their own institutions. But there are limits to their ability to do so. The judiciaries in both Hungary and Poland were considered widely successful, and some had argued the Hungarian Constitutional Court was in fact more "democratic" than the legislature itself.<sup>196</sup> But both of these super judiciaries provoked backlash and were ultimately transformed by illiberal forces. Finding the right balance between judicial independence and accountability is, in the best of times, a difficult project. But in the face of sustained attacks, accountability becomes a synonym for capture.

## 2. *The Rule of Law*

Defending the rule of law is a broad concept that goes beyond just defending the courts. The rule of law is an ideal that implicates not just courts and lawyers but any government agent whose actions must be constrained by legal authority. A good example of courts stepping up to ensure the rule

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190. *See id.*

191. *See id.*

192. Halmai, *supra* note 24, at 246.

193. *See id.*

194. *Id.*

195. *Id.* at 247; *see* Paul Krugman, *Hungary's Constitutional Revolution*, N.Y. TIMES: THE SCIENCE OF A LIBERAL (Dec. 19, 2011, 10:31 AM), <https://krugman.blogs.nytimes.com/2011/12/19/hungarys-constitutional-revolution/>.

196. *See generally* Kim Lane Scheppele, *Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)* (2001) (unpublished manuscript), <https://law.wustl.edu/harris/conferences/constitutionalconf/ScheppelePaper.pdf>.

of law is provided by the recent role of the South African Constitutional Court in the removal of President Jacob Zuma.

Zuma was a notoriously corrupt politician whose personal approach was embodied by his use of state funds to improve his private home.<sup>197</sup> Perhaps more problematically, his rule coincided with a massive increase in corruption in the country generally, which led to the so-called “hollowing-out” of the state.<sup>198</sup> Zuma was enabled by the African National Congress (ANC), which he headed and which resisted attempts to hold him accountable.<sup>199</sup> Without an internal check inside his party and with that party playing a dominant role in the country’s politics, there was a real risk of the erosion of democracy itself. But the prosecuting and investigating institutions of the state were not particularly active in seeking to hold Zuma accountable.<sup>200</sup> Only the Public Protector, an ombudsman-like body with relatively weak powers, seemed to be willing to challenge Zuma’s behavior.<sup>201</sup>

In this context, the Constitutional Court played an interesting and important role. It acted several times throughout the Zuma saga to not only protect opposition rights within the Parliament but also to require the Parliament itself to act in order to have mechanisms for accountability.<sup>202</sup> For the first issue, the Court strongly suggested that votes of no confidence in the President had to be secret;<sup>203</sup> it also insisted that minority rights in Parliament not be squelched.<sup>204</sup> It also held the Speaker of the House could

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197. See *Jacob Zuma—The Survivor Whose Nine Lives Ran Out*, BBC NEWS (Apr. 6, 2018), <https://www.bbc.com/news/world-africa-17450447>; see also James Fowkes, *Zuma’s South Africa: A Constitutional Post-Mortem*, INT’L J. CONST. L. BLOG (Mar. 28, 2018), <http://www.iconnectblog.com/2018/03/zumas-south-africa-a-constitutional-post-mortem-i-connect-column/>.

198. Daniel de Kadt, Evan Lieberman & Philip Martin, *South Africa’s Healthy Democracy*, FOREIGN AFF. (Feb. 20, 2018), <https://www.foreignaffairs.com/articles/south-africa/2018-02-20/south-africas-healthy-democracy>.

199. *Id.*

200. *See id.*

201. *See* Fowkes, *supra* note 197.

202. *See id.*

203. *United Democratic Movement v. Speaker of the Nat’l Assembly* 2017 (5) SA 300 (CC) ¶ 2 (S. Afr.).

204. *Democratic Alliance v. Speaker of the Nat’l Assembly* 2016 (3) SA 487 (CC) ¶ 14 (S. Afr.); *Mazibuko v. Sisulu* 2013 (6) SA 249 (CC) ¶¶ 59–60 (S. Afr.); *Oriani-Ambrosini v. Sisulu* 2012 (6) SA 588 (CC) ¶ 51 (S. Afr.); see generally Fowkes, *supra* note 197.

not simply ignore motions for no confidence.<sup>205</sup> Parliament had a duty to hear such motions, which it considered “a vital tool to advance our democratic hygiene.”<sup>206</sup> The Court supported its findings by referring to the practice of executive removal in India, Canada, the United Kingdom, and several other Commonwealth jurisdictions which possess parliamentary democracies.<sup>207</sup>

In March 2017, the President dismissed the relatively independent Finance Minister, which prompted global rating agencies to downgrade the country’s bonds to “junk status.”<sup>208</sup> In response, three minority parties in Parliament requested that the Speaker of the National Assembly schedule a motion of no confidence in the President.<sup>209</sup> One of the parties also requested that the vote be conducted by secret ballot,<sup>210</sup> but this request was refused by the Speaker, who was one of Zuma’s close allies. The Speaker’s reason for her refusal was that she had no legal power to direct a secret ballot.<sup>211</sup> The minority party then brought an application to the Constitutional Court challenging the Speaker’s decision.<sup>212</sup> The Court again highlighted the importance of the motion of no confidence as a means for Parliament to hold the President accountable.<sup>213</sup> The Court held the motion of no confidence acts to “strengthen regular and less ‘fatal’ accountability and oversight mechanisms.”<sup>214</sup>

In a critical decision, the Court empowered the Public Protector, whose findings were given legal force, to resolve an ambiguity in the Constitution.<sup>215</sup> The Public Protector issued a report following an investigation into the use of public funds for the improvement of the President’s personal residence.<sup>216</sup> The report concluded that money misspent on portions of the upgrades were

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205. *Mazibuko v. Sisulu* 2013 (6) SA 249 (CC) ¶ 32 (S.Afr.).

206. *Id.* ¶ 43.

207. *Id.* ¶ 46.

208. *United Democratic Movement v. Speaker of the Nat’l Assembly* 2017 (5) SA 300 (CC) ¶ 13 (S. Afr.).

209. *Id.* ¶ 14.

210. *Id.*

211. *Id.* ¶ 18.

212. *Id.* ¶ 19.

213. *Id.* ¶ 32.

214. *Id.* ¶ 34.

215. *Econ. Freedom Fighters v. Speaker of the Nat’l Assembly* 2016 (3) SA 580 (CC) ¶ 105 (S. Afr.).

216. *Id.* ¶ 10.

to be repaid by the President.<sup>217</sup> The President failed to comply with the findings, claiming they constituted mere “recommendations.”<sup>218</sup>

The Court held such findings *were* legally binding and the President was not entitled to disregard them.<sup>219</sup> This decision meant President Zuma had to follow the Protector’s order that he repay state monies spent on his private home.<sup>220</sup> Finally, the Court held Parliament had to come up with a mechanism to hold the President accountable.<sup>221</sup> Importantly, the Public Protector’s report concluded that, in receiving undue benefits from the state, the President had “breached his constitutional obligations.”<sup>222</sup> Many regarded this statement, now with the force of law, as fulfilling the criteria for impeachment in terms of Section 89(1) of the Constitution.<sup>223</sup> This decision was, in timing, the final blow that led the ANC to jettison Zuma as its leader in favor of Cyril Ramaphosa, who replaced Zuma midterm as President. In short, the South African Constitutional Court forced the political system to act: it did not directly remove the President, but it ensured the processes of democratic accountability could not be ignored.

#### V. CONCLUSION

This Article has provided several examples in which courts seemed to step in to constrain potential democratic backsliding. But we should not consider these as foregone conclusions or assume courts will always be successful in this regard. Court decisions provide information for other actors to coordinate on; they do not in and of themselves enforce their own decisions. And if the backsliding government acts incrementally and slowly, it will be difficult for other actors to coordinate behavior.<sup>224</sup> This is what Professor Ozan Varol calls “stealth authoritarianism,”<sup>225</sup> and this type of

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217. *Id.* ¶ 105.

218. *Id.* ¶ 70.

219. *Id.* ¶ 105.

220. *Id.* ¶ 2.

221. *Id.* ¶ 22.

222. *Id.* ¶ 7.

223. Geoff Hill, *South Africa’s New President Has a Small Amount of Time to Make a Big Difference*, WASH. TIMES (Feb. 15, 2018), <https://www.washingtontimes.com/news/2018/feb/15/cyril-ramaphosa-replaces-jacob-zuma-south-africa-p/>.

224. *See, e.g.*, David A. Strauss, *Law and the Slow-Motion Emergency*, in CAN IT HAPPEN HERE?, *supra* note 6, at 365.

225. *See* Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1677–78 (2015) (describing the effect as a “way to protect and entrench power when direct repression is not a viable option”).

authoritarianism forms the greatest risk to democracy in our era.

In light of this risk, courts should focus on the systematic structures of democracy and the profound risks to them that can arise from myriad sources. This is both a narrower and broader mandate than that within the traditional scope of the “law of democracy,” as conceived in the literature.<sup>226</sup> The law of democracy is the law of democratic competition and focuses on electoral processes and machinery.<sup>227</sup> It considers the conduct of elections and collateral rules that affect individual rights, group representation, and many other aspects on which democracies might vary.<sup>228</sup> Not every violation of law in this area poses a systematic threat to democracy itself; although some, such as the partisan gerrymander, surely do.<sup>229</sup> In this sense, the law of democracy is broader than the putative law of anti-erosion.

In other ways, however, the jurisprudence of anti-erosion is broader than the law of democracy. This is because threats to democracy can arise outside the electoral sphere per se. The various cases canvassed here suggest that threats to democracy can arise outside the traditional scope of electoral contestation. They can involve not only the fundamental rights to organize, to speak, and to criticize but also the partisan capture of bureaucratic machinery and the bypassing of checks and balances.

A court concerned with maintaining democracy has a tough challenge in terms of discerning true systemic threats from the normal give and take of democratic competition. Courts are institutionally weak and even in the best of times can only provide resources for other actors to work with. Because of the boiling-frog syndrome, there is a real risk that small steps, each apparently legal, can in aggregate lead to the takeover of a system. The identification of erosion as a specific risk to democracy suggests courts should be aggressive in identifying systemic challenges.

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226. *See, e.g.*, Persily, *supra* note 104, at 2.

227. *Id.*

228. *See id.* at 2–3.

229. *Id.* at 3.

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