How Judges Can Challenge Dictators and Get Away with It: Advancing Democracy while Preserving Judicial Independence

SERGIO VERDUGO*

The literature on constitutional courts in authoritarian or hybrid regimes typically suggests that judges who challenge such regimes in high-stakes cases risk substantial political backlash. Accordingly, some comparative constitutional law scholars argue that courts should develop strategies such as judicial avoidance or weak judicial review practices to prevent a clash with the governing regime. This Article suggests that those strategies are unnecessary where courts are able to preserve or promote democratic values without incurring backlash, and proposes one alternative strategy. Where feasible, judges should prefer this case-specific confrontational tactic to survival strategies, such as weak judicial review or constitutional avoidance. For this strategy to be successful, judges must identify and predict the regime's expected costs of disobeying a judicial decision. If the projected costs are high enough, the regime's leaders might prefer to comply with the ruling.

One way in which this judicial strategy can work is by triggering a constitutional paradox. This term describes the dilemma dictators face when they are forced to decide whether to support the constitutionally-rooted

*Associate Professor of Law, Universidad del Desarrollo, Chile. JSD, New York University. LLM, University of California, Berkeley. LLB, Universidad del Desarrollo. Email: sergio.verdugo@law.nyu.edu. I thank John Ferejohn, Sam Issacharoff, David Landau, Pasquale Pasquino, Rehan Abeyratne, Iddo Porat and José Manuel Díaz de Valdés, for comments on earlier versions or parts of this article. I would also like to thank Matthew C. Clifford from the *Columbia Journal of Transnational Law* for excellent help editing this paper.

institutions they themselves established, or to disobey the unfavorable decision while risking to divide the regime's supporting coalition, harm their own credibility, or weaken the legitimacy or authority of their regime's institutions. As a tool of judicial statecraft, the well-crafted paradox raises the costs to the regime of ignoring any single judicial decision, and those costs may be sufficiently high to pressure autocrats into acquiescence. This Article uses the Chilean Constitutional Court during the Pinochet Dictatorship (1973–1990) to show how the constitutional paradox can push dictators to respect adverse judicial rulings in high-stakes scenarios, and to identify the preliminary conditions in which judges may be able to successfully deploy this strategy against the regime.

INTRODUCTION

It is common knowledge that constitutional courts are generally unlikely to challenge authoritarian or hybrid regimes to advance a democratization agenda.[1] One reason for this is the risk of political backlash against them.[2] And although the exceptional heroic (or

1. For the purposes of this Article, I use the term *hybrid regime* to describe a system characterized by the combination of both authoritarian and democratic elements. Types of hybrid regimes include competitive authoritarian and electoral authoritarian systems, as well as flawed or defective democracies. Because transitional democracies in fragile settings also face authoritarian risks, I include them in the concept as well. The literature additionally recognizes other political forms that typically relate to hybrid regimes, such as dominant-party democracies and delegative democracies. These can move in an authoritarian direction, remain stable, or move in a democratic direction. For a fuller account, see generally, for example, STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR (2010); Matthijs Bogaards, *How to Classify Hybrid Regimes? Defective Democracy and Electoral Authoritarianism*, 16 DEMOCRATIZATION 399 (2009); David Collier & Steven Levitsky, *Democracy with Adjectives: Conceptual Innovation in Comparative Research*, 49 WORLD POL. 430 (1997); Larry Diamond, *Election Without Democracy: Thinking About Hybrid Regimes*, 13 J. DEMOCRACY 21 (2002). Although I focus on constitutional courts, the framework proposed in this Article could be applicable to any court that both possesses some degree of formal judicial independence and has the power to challenge a regime to advance democratic values. This may include apex courts with judicial review power, specialized constitutional courts, or even administrative or electoral courts.

2. For the purposes of this Article, I refer to the idea of *political backlash* in a broad sense, including formal and informal attacks against courts or individual judges. Those attacks need to come from politicians posing a credible threat. I discuss examples in Section I.A. On the idea of political backlash or backlash politics more generally, see Karen J. Alter & Michael

perhaps foolish) judge who challenges those types of governments does exist,[3] it is still unlikely that those judges will be able to compel authoritarian leaders to comply with their rulings.

Perceiving the limited possibilities of advancing a democratization agenda in that context, and recognizing the vast potential harm to judicial independence that could result from such a challenge to the regime, some scholars suggest that judges should develop safe strategies—such as judicial avoidance[4] and weak judicial review[5]—to avoid direct confrontation with the regime. These kinds of recommendations represent a unique brand of institutional self-preservation for courts in the context of authoritarian and hybrid systems which I call *survival strategies*. The core idea behind them is that courts should aim to preserve some measure of judicial power or independence by developing a cautious and non-confrontational attitude vis-à-vis the governing regime. Through employing these strategies, judges can prevent a political backlash by, in Yaniv Roznai's words, "go[ing] down the bunker" and avoiding conflict with the regime until such a time when political backlash is no longer likely.[6]

Zürn, *Theorising Backlash Politics: Conclusion to a Special Issue on Backlash Politics in Comparison*, 22 BRIT. J. POL. & INT'L. REL. 739 (2020) (discussing general concepts, not necessarily in the context of attacks against courts); Mikael Rask Madsen et al., *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L. J.L. CONTEXT 197 (2018) (distinguishing between mere pushbacks and backlash within a framework of institutional resistance); Mikael Rask Madsen, *Two-Level Politics and the Backlash Against International Courts: Evidence from the Politicisation of the European Court of Human Rights*, 22 BRIT. J. POL. & INT'L. REL. 728 (2020) (describing backlash politics in the context of the European Court of Human Rights); Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L. L. 293 (discussing backlash in the context of African regional courts).

3. See examples, such those of Colombia and Hungary, in TOWERING JUDGES: A COMPARATIVE STUDY OF CONSTITUTIONAL JUDGES (Iddo Porat & Rehan Abeyratne eds., 2021) [hereinafter TOWERING JUDGES]. For Colombia, see David Landau, *Justice Cepeda's Institution-Building on the Colombian Constitutional Court: A Fusion of the Political and the Legal*, *in* TOWERING JUDGES, *supra*, at 215. For Hungary, see Gábor Attila Tóth, *Chief Justice Sólyom and the Paradox of "Revolution under the Rule of Law," in* TOWERING JUDGES, *supra*, at 255.

4. *See generally, e.g.*, Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016); Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683 (2016).

5. *See generally* Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT'L L. 285 (2015) (arguing that, in emerging democracies, courts that exercise "strong-form" judicial review may, in fact, undermine judicial independence).

6. Yaniv Roznai, *Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy*, 29 WM. & MARY BILL RTS J. 327, 328 (2021).

The preference for survival strategies among academics rests on a generally pessimistic evaluation of the capacity of constitutional court judges to prevent or delay the processes of democratic decay, as well as the corollary likelihood that judges who dare to directly confront an autocrat or strongman will suffer reprisals.[7] The relative pessimism shared by many scholars in this field likely stems from a number of examples of backlash that have occurred in recent years.[8] Essentially, these scholars might ask, if judges lack the tools to successfully stand up to authoritarian regimes, then why should they oppose democratic regression at all?

But the blanket pessimism which underlies the strong preference for survival strategies is unwarranted—and survival strategies, although sometimes useful, are not always necessary. Sometimes, constitutional judges can in fact challenge authoritarian or hybrid regimes without risking significant political backlash. Where possible, I suggest that it is normatively desirable for judges to do so in order to preserve or protect at-risk democratic principles.

In determining when to forgo survival strategies in favor of challenging the regime, judges should consider the interplay of two factors that can help predict whether political backlash is likely. First, they must determine whether the case before them involves a high-stakes question for the regime. Examples of cases presenting high-stakes questions include those where a ruling against the regime would threaten an incumbent's office or the survival of policies that are crucial for justifying the regime's political narrative. If the stakes are high, sitting dictators or strongmen will have strong incentives to ignore unfavorable judicial decisions or attack the courts. Second, judges must estimate the political costs to the regime of ignoring judicial decisions or targeting the courts for reprisals. Costly consequences for the regime come in different forms, such as dividing the ruling coalition or damaging the regime's credibility with crucial allies. The higher the costs of noncompliance, the less willing a rational dictator or a strongman will be to disobey a judicial order, or take other action against the courts. The higher the stakes, the greater the costs such autocrats will be ready to accept; the lower the stakes, the lesser the costs they will be willing to pay. Constitutional courts can sometimes even make regimes obey an unfavorable decision in high-stakes scenarios by crafting an opinion that creates substantial costs of noncompliance for the regime. The key to successful court challenges to

7. *See, e.g.*, TOM GERALD DALY, THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS 246–301 (2017) (discussing various strategic models for judiciaries in new democracies).

8. See discussion *infra* Section I.A.

authoritarian and hybrid regimes, then, is for judges to identify the costs of noncompliance—and to increase them.

The *constitutional paradox* is one way in which judges can raise the regime's costs of noncompliance in high-stakes cases. The paradox takes the form of a judicial decision that offers two tragic options for the regime: (1) obey the unfavorable outcome, or (2) reject or ignore the ruling but incur an additional cost. More precisely, the cost of noncompliance in the second option involves putting at risk a long-term interest of the regime or its leaders by forcing the regime to delegitimize an institution or norm that is essential for the regime's plans—either because it is key to the regime's self-legitimizing narrative, the regime's leaders remaining in power, preserving cohesion within the regime's supporting coalition, or maintaining a policy fundamental to the regime.

For the constitutional paradox to work, the costs of the second option need to be higher than the costs of losing the particular case. The crucial question for judges is how they can assemble their legal rationales to trigger the possibility of a regime-threatening risk in the case of non-compliance. If judges are able to develop that framework—which, of course, will not be possible in every case—there is no need for them to employ survival strategies. However, in those situations where it is possible, judges should attempt to protect, promote, or preserve democratic values, even if that means confronting the regime.

This Article uses the Chilean Constitutional Court of the 1980s as an example of court that succeeded in advancing its country's democratization process through the use of constitutional paradoxes. The Constitutional Court—itself a creation of the Pinochet regime's 1980 Constitution—interpreted political principles included in Pinochet's Constitution against his own political ambitions.[9] In doing so, the judges of the Constitutional Court raised the costs of noncompliance for the regime by cornering the Junta and Pinochet into making a hard choice. They could have respected the authority of their own regime's constitution and constitutionally-prescribed Court, making the regime's institutional promises credible to both the public and to the supporting coalition.[10] On the other hand, they could have

9. See discussion *infra* Part II. This is not to say that the Court was a champion of democracy. The Court also developed a jurisprudence that served the regime's interests. Eduardo Aldunate Lizana, *Chile*, *in* THE "MILITANT DEMOCRACY" PRINCIPLE IN MODERN DEMOCRACIES 59, 63–65 (Markus Thiel ed., 2009); Sergio Verdugo, *Making Sense of the Chilean 1980 Constitutional Court* (manuscript at 11–16) (on file with author (2021).

10. On the importance of the divergent views within the regime's supporting coalition in explaining how the Chilean 1980 Constitution constrained the dictatorship's power, see

disobeyed the Court's rulings at the cost of debasing or delegitimizing a core instution of their regime—and by extension, the Constitution which gave it life—and dividing the regime's supporters. The cases where the Court challenged the Pinochet regime involved high stakes because they concerned the rules for Chile's transition to democracy. Nevertheless, the political costs of ignoring those decisions or taking action against the Court were too high for the regime to tolerate. These costs are key to explaining why the regime ultimately followed the Court's rulings against its interests.

The experience of the Chilean Constitutional Court during this period contributes to the contemporary literature on judicial strategies under authoritarian and hybrid regimes by offering an alternative to the recommendations for survival strategies. The Chilean example demonstrates that constitutional court judges do not need to use survival strategies if they can raise the costs to the regime of disobeying a ruling that will help advance democratic values. As in the Chile of the 1980s, judges in authoritarian and hybrid regimes today must identify those costs. Research on this point may also be useful to constitutional judges in jurisdictions that have experienced democratic erosion or an authoritarian turn, or that are in moving in that direction, over the past few years.[11] Indeed, democracy's recent regression in several countries makes this literature on judicial strategy more critical now than ever before.[12]

This article comprises six sections. Part I considers the strategies that judges can employ in authoritarian or hybrid settings, and situates this Article within the extant literature. It opens with an exploration of political backlash against judges, and the contexts that make backlash more likely (Part I, Section A.). It then discusses the

generally ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION (2002); Robert Barros, *Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile*, *in* DEMOCRACY AND THE RULE OF LAW 188 (José María Maravall & Adam Przeworski eds., 2003) [hereinafter Barros, *Dictatorship and the Rule of Law*]; Robert Barros, *Personalization and Institutional Constraints: Pinochet, the Military Junta, and the 1980 Constitution*, 43 LAT. AM. POL. & SOC'Y 5 (2001) [hereinafter Barros, *Personalization and Institutional Constraints*].

11. For examples of countries that have experienced democratic regression, see discussion *infra* Section I.A.

12. The literature is too extensive to cite fully. For an overview, see generally TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019); Tom Gerald Daly, *Democratic Decay: Conceptualising an Emerging Research Field*, 11 HAGUE J. RULE L. 9 (2019); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018); Martin Loughlin, *The Contemporary Crisis of Constitutional Democracy*, 39 OXFORD J. LEGAL STUD. 435 (2019); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

strategies that scholars have recommended courts employ to minimize political backlash by avoiding direct confrontation with the governing regime (Part I, Section B.). Building on game theory literature focused on separation of powers, it develops the theoretical framework based on stakes and costs that makes the constitutional paradox possible (Part I, Section C.). Part II contextualizes the Chilean case and briefly discusses the establishment and evolution of the Pinochet dictatorship. Part III summarizes the Constitutional Court's jurisprudence that succeeded in advancing Chile's democratization agenda. Part IV explains how the Court was able to push the regime to obey those rulings. Finally, the Article concludes by offering some preliminary insights into which conditions may be necessary for a constitutional paradox to be possible.

I. JUDICIAL STRATEGY IN AUTHORITARIAN AND HYBRID REGIMES

The literature on how judges can advance democratic values in the context of authoritarian or hybrid regimes often points to political backlash as an example showing that judges' capacity to do so is generally limited. Although examples of political backlash abound, judges are likely to be more vulnerable in non-democratic contexts. Especially in authoritarian and hybrid systems, there are many ways in which a regime can undermine judicial independence, discipline judges, or strip courts of their authority—with possibilities ranging from subtle and informal reprisals or threats to explicit legal reforms aimed at severely curtailing courts' authority, or even dismantling them.

Political backlash against judges has motivated scholars to suggest solutions aimed at preventing decisions that may backfire on them. Although this literature has yet to map out all of the options that judges have in their toolkit when facing leaders with authoritarian inclinations, it is understandable that many scholars have generally preferred to advance strategies that aim at keeping judges safe instead of protecting democracy. After all, a judge who challenges an authoritarian or hybrid regime is likely to suffer significant reprisals, which may circumscribe her authority to the merely inconsequential or leave her out of a job entirely. Scholars advancing survival strategies are correct in that we generally cannot expect authoritarian leaders to comply with adverse judicial decisions.

Where the literature falls short, however, is in considering those cases where judges may be able to advance a democratization agenda without sacrificing judicial authority and/or independence. That is why we need a theory identifying the risks of noncompliance

in order to understand when judges can rule against the regime and, so to speak, *get away with it*. Developing such a theory leads to the constitutional paradox as an alternative that, although not available to judges in every case, contributes to expanding the set of tools that judges can consider when deciding whether to challenge an authoritarian or hybrid regime on democratic principles.

A. Political Backlash in Authoritarian and Hybrid Regimes

What are the kinds of political backlash that judges may expect if they decide to challenge an authoritarian or hybrid regime? A judge who considers advancing democratic values in those contexts should be aware of the tools that those regimes have or may develop. As this section shows, backlash in practice is diverse in both type and degree. It may target the courts' powers or independence, target or threaten individual judges, and/or target the specific adverse ruling. The literature on judicial independence and judicial strength is helpful for identifying the ways in which judges can protect themselves, and the literature focusing on competitive and stable democracies can provide a useful point of comparison to help understand the limited possibilities of judicial independence in non-democratic contexts.

Authoritarian or hybrid regimes have at least a few reasons to control constitutional courts and constitutional judges. One is that they can use them to advance their own authoritarian goals.[13] This was the case in Bolivia, where the Constitutional Court removed presidential term limits to allow former President Morales to be reelected indefinitely.[14] This is also the case in the Russian Federation today, where Vladimir Putin has used the country's federal courts to invalidate regional laws, allowing him to concentrate political power by reducing vertical constraints posed by the regional governments.[15] In general, the existence of courts can also be beneficial for the regimes by gathering information, maintaining the regimes' cohesion, facilitating some intra-regime coordination, dealing with power-sharing problems, helping to make their programs credible, or serving to stamp some sort

13. *See generally* David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313 (2020) (discussing the role of courts in legitimizing authoritarian leaders and undermining democratic institutions).

14. *See generally* Sergio Verdugo, *The Fall of the Constitution's Political Insurance: How the Morales Regime Eliminated the Insurance of the 2009 Bolivian Constitution*, 17 INT'L. J. CONST. L. 1098 (2019). On the importance of term limits for democratic regimes, see generally Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807 (2011).

15. Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1689 (2015).

of legal legitimacy on their actions.[16] Courts can also be used prospectively as "insurance" to prevent future reversals of the regime's key policies after the regime is no longer in power.[17]

Similarly, hybrid and authoritarian-leaning democratic regimes may seek to use the legal system to entrench their power and "pave the way for the creation of a dominant-party or one-party state."[18] Such regimes often seek to use legalistic means to dismantle constraints on their power,[19] and may have a similar, if not greater, interest in capturing or controlling constitutional courts than their full-fledged authoritarian counterparts because the policy they seek to advance is the establishment of a more authoritarian-friendly set of public institutions.

Individual authoritarian regime leaders may also seek to establish friendly courts to protect themselves against personal risks,[20] such as future prosecution at a point in time when they are no longer in power.[21] For example, such out-of-power leaders can rely on their regime's judges who remain in office to protect them by ensuring the enforcement of amnesty laws.

Finally, and most importantly for the purposes of this Article, authoritarian or hybrid regimes may seek to control courts in order to prevent challenges from independent judges from rising to the level of potential threats to those regimes. Historical examples abound of such threats from the judiciary: the Hungarian Constitutional Court under

16. Courts can also be useful when they serve as pawns of the regimes and help to create a form of social control, among other possible functions. *See* Julio Ríos-Figueroa & Paloma Aguilar, *Justice Institutions in Autocracies: A Framework for Analysis*, 25 DEMOCRATIZATION 1, 4–7 (2018). For a useful map of these functions, see generally Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1 (Tom Ginsburg & Tamir Moustafa eds., 2008) [hereinafter RULE BY LAW]; Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281 (2014).

17. *See* Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 INT'L. J. CONST. L. 988, 997 (2017)

> For military elites, independent courts may in fact be the only reliable means of protecting certain preferred policies once they 'retreat to the barracks.' Thus in Turkey, for example, both the military and political opposition at various times have sought to promote the role of the constitutional court as a guardian of secular constitutional values, in the face of the increasing role of religious parties in Turkish politics.

18. Varol, *supra* note 15, at 1679.

19. Scheppele, *supra* note 12, at 549.

20. *See* Dixon & Ginsburg, *supra* note 17, at 994–96.

21. *See* Brad Epperly, *Political Competition and* De Facto *Judicial Independence in Non-Democracies*, 56 EUR. J. POL. RSCH. 279, 283 (2017); Brad Epperly, *The Provision of Insurance? Judicial Independence and the Post-tenure Fate of Leaders*, 1 J. L. & CTS. 247, 250 (2013) [hereinafter Epperly, *The Provision of Insurance*].

Chief Justice László Sólyom's leadership in the 1990s,[22] the Guatemalan Constitutional Court's preventing former President Jorge Serrano from dissolving the legislature and attacking key institutions like the Supreme Court in 1993,[23] and the Colombian Constitutional Court's preventing former President Álvaro Uribe from amending the Colombian Constitution in order to run for a third term in 2010.[24] Cognizant of these examples, hybrid regimes may have a strong interest in capturing the judiciary to avoid such challenges to their own power.

Examples of political backlash abound in the literature. A challenged regime may respond in several non-mutually exclusive ways.[25] First, it may ignore the judicial decision. Second, it may overrule the judicial decision, either by enacting statutory legislation or reforming the constitution. Third, it may punish the individual judges and assert its control over the courts with a variety of tactics, including substituting judges, curbing courts' authority, initiating impeachments, reducing judges' remunerations, cutting the judicial budget (or not increasing it with inflation), and so on. Regimes can also deploy these strategies prospectively, before judges become a threat to them.

Subtler means and informal practices also exist. These generally involve threats, bribery, or pressure, including "telephone law"

22. Kim Lane Scheppele, *Democracy by Judiciary. Or, Why Courts Can be More Democratic than Parliaments*, *in* RETHINKING THE RULE OF LAW AFTER COMMUNISM 25, 53 (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 2005).

23. President Serrano tried to make both the Supreme Court and the Constitutional Court inoperative. He also attempted to remove key public officers such as the attorney general, suspend part of the Constitution, use emergency powers to suspend the protection of certain fundamental rights, and call for a constituent assembly. Alfredo Bruno Bologna, *Los Autogolpes en América Latina. EI Caso de Guatemala (1993)*, 29 ESTUDIOS INTERNACIONALES 3, 15 (1996) (Chile); Francisco Fernández Segado, *La Jurisdicción Constitucional en Guatemala*, 31 VERFASSUNG UND RECHT IN ÜBERSEE [V.R.Ü.] 33, 47 (1998) (Ger.); Carmen Fernández Camacho, *La Oposición del Autogolpe de Serrano Elías: Eficacia de las Felaciones Públicas Políticas*, 11–12 ÁMBITOS 237, 246 (2004) ("[T]he quick and on point reaction of the Constitutional Court was the first milestone to prevent the consolidation of a de facto government.").

24. Uribe was a popular and strong president who controlled the Colombian Congress. The Court managed to prevent him from serving twelve years in the presidency "despite the pressure of the public opinion, and also the links of several of its judges to the executive branch." Mario Alberto Cajas-Sarria, *Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016*, 5 THEORY & PRACT. LEGIS. 245, 261–62 (2017). *See also* Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Coctrine*, 11 INT'L J. CONST. L. 339, 346 (2013); Samuel Issacharoff et al., *Judicial Review of Presidential Re-Election Amendments in Colombia*, *in* MAX PLANCK ENCYCLOPEDIA COMPAR. CONST. L., ¶ 13 (2020).

25. *See* Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT'L J. CONST. L. 446, 448 (2003).

practices in which influential politicians without formal authority over judges ask them to decide cases in certain ways.[26] Informal practices such as disregarding judges' tenures can make even formal guarantees of judicial independence irrelevant.[27] In Argentina, these practices became the norm in the 1950s and 1960s as the political branches coordinated to punish judges and push the courts not to challenge the president.[28] A regime may also use informal practices in conjunction with formal action against the judiciary. For example, several Argentinian Supreme Court judges also became the targets of impeachment trials after issuing unfavorable rulings.[29]

Outside of Argentina, Latin American countries in general have a long history of political backlash against the judiciary. The Chilean strongman Carlos Ibáñez purged a considerable part of the judiciary between 1927 and 1932.[30] In Bolivia, the Evo Morales regime gradually dismantled the Constitutional Tribunal through political harassment, impeachments, resignations, and its refusal to fill judicial vacancies.[31] In Peru, Alberto Fujimori's allies took a similar course of action in 1997, when they impeached the three judges that had opposed

26. Kathryn Hendley, *'Telephone Law' and the 'Rule of Law': The Russian Case*, 1 HAGUE J. ON RULE L. 241, 241 (2009) (describing telephone law as "a practice by which outcomes of cases allegedly come from orders issued over the phone by those with political power rather than through the application of law").

27. Rebecca Bill Chávez et al., *A Theory of the Politically Independent Judiciary: A Comparative Study of the United States and Argentina*, *in* COURTS IN LATIN AMERICA 219, 220–21, 234–36 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011); *see generally* ANDREA CASTAGNOLA, MANIPULATING COURTS IN NEW DEMOCRACIES: FORCING JUDGES OFF THE BENCH IN ARGENTINA (2018).

28. Chávez et al., *supra* note 27, at 235 ("Argentinean presidents began to use their discretion over the number of justices as a means of subordinating the court. Perón reduced the number of justices from eight to five in 1950. In 1958, Frondizi raised the number from five to seven. After the 1966 coup, the size fell to five . . . From 1963 to 1966, President Arturo Illia faced divided government, which prevented him from subordinating the courts.").

29. *Id.* at 236 ("[T]he court experienced purges in 1946, 1955, 1966, 1973, 1976, and 1983. Perón embraced the practice of dismissing judges. In response to unfavorable rulings, the PJ-controlled senate impeached four justices in 1947. The only justice who retained his seat was a militant supporter of Perón. In 1973, the PJ government dismissed the entire court. After the coups of 1955, 1966, and 1976, the de facto governments bypassed constitutional channels to purge the court.").

30. ARMANDO DE RAMÓN, LA JUSTICIA CHILENA ENTRE 1875 Y 1924, at 58–59 (1989); ELIZABETH LIRA & BRIAN LOVEMAN, PODER JUDICIAL Y CONFLICTOS POLÍTICOS (CHILE: 1925–1958), at 24–27, 41–46 (2014). General Ibáñez managed to remove all the judges that were appointed by previous administrations through a variety of means, such as declaring judicial vacancies and deporting judges, while the remaining judges "kept silent and waited out the storm." LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE 60 (2007).

31. Andrea Castagnola & Aníbal Pérez-Liñán, *Bolivia: The Rise (and Fall) of Judicial Review*, *in* COURTS IN LATIN AMERICA, *supra* note 27, at 278, 299–302.

the President's plan for reelection.[32] Years earlier, during the country's 1992 constitutional crisis, Fujimori had temporarily shuttered Peru's highest courts.[33] In Ecuador, the 2008 constituent assembly dissolved both the Constitutional Tribunal and the Supreme Court while replacing them with new courts that were friendlier to President Rafael Correa.[34]

Political backlash also appears in other parts of the world. In Niger, President Mamadou Tandia disbanded the Constitutional Court and appointed new judges after the Court invalidated a plebiscite on extending his term.[35] In Thailand, Prime Minister Thaksin Shinawatra influenced the Constitutional Court with "a combination of appointments, intimidation, and bribery, particularly focusing on the Senate, which played the linchpin role in appointments."[36]

The most famous contemporary cases, however, have taken place in Eastern Europe.[37] In Hungary, for example, Prime Minister Viktor Orbán lowered the mandatory retirement age for judges, and packed the country's Constitutional Court with judges friendly to his regime.[38] In Poland, the PiS regime targeted the Constitutional Tribunal "as its first and foremost enemy,"[39] and took actions such as refusing to recognize appointed judges, enacting statutes to exempt new laws passed by the PiS-controlled legislature from constitutional review, requiring the Tribunal to adopt its decision by qualified majorities, and refusing to publish judicial decisions.[40] When President Boris

32. LEVITSKY & WAY, *supra* note 1, at 80, 166–67.

33. Eduardo Dargent, *Determinants of Judicial Independence: Lessons from Three 'Cases' of Constitutional Courts in Peru (1982–2007)*, 41 J. LAT. AM. STUD. 251, 252–53 (2009).

34. Aníbal Pérez-Liñán & Andrea Castagnola, *Judicial Instability and Endogenous Constitutional Change: Lessons from Latin America*, 46 BRIT. J. POL. SCI. 395, 398 (2016).

35. Mila Versteeg et al., *The Law and Politics of Presidential Term Limit Evasion*, 120 COLUM. L. REV. 173, 219 (2020).

36. *See* Tom Ginsburg, *Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution*, 7 INT'L J. CONST. L. 83, 96–97 (2009).

37. For some examples of political backlash against courts in Eastern Europe, see generally Bojan Bugarič & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 J. DEMOCRACY 69 (2016).

38. David Kosař & Katarína Šipulová, *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law*, 10 HAGUE J. ON RULE L. 83, 84; Kriszta Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland–and the European Union*, 51 COMMUNIST & POST-COMMUNIST STUD. 189, 192 (2018).

39. Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, 11 HAGUE J. ON RULE L. 63, 64 (2019).

40. *See* SADURSKI, *supra* note 12, at 58–88.

Yeltsin was "frustrated" with the Constitutional Court in the nascent Russian Federation, he used the 1993 constitutional convention as an opportunity to promote the reduction of judicial powers.[41] Although the Court's final design was not the one Yeltsin proposed,[42] the 1993 Constitution still expanded the size of the Court, which allowed Yeltsin to appoint judges friendly to him.[43]

To be sure, despite its proliferation in authoritarian and hybrid regimes around the world, political backlash against constitutional court judges can also exist in truly competitive democracies as well.[44] For example, evidence suggests that the U.S. Supreme Court may refrain from striking down federal laws as unconstitutional when it faces a hostile Congress that could compromise its authority.[45] Although the most high-profile example of political backlash in a democratic context is President Franklin Roosevelt's court-packing plan for the U.S. Supreme Court in the 1930s,[46] lawmakers in democratic settings also have other means to reprimand an oppositional court, such as

41. ALEXEI TROCHEV, JUDGING RUSSIA: CONSTITUTIONAL COURT IN RUSSIAN POLITICS 1990–2006, at 73–79 (2008).

42. *Id.* at 79.

> President Yeltsin agreed to keep a separate Court because he seriously weakened the tribunal, muted his opponents on the bench, received the opportunity to staff it with his supporters, and preserved an international image of Russia's commitment to the rule of law.

43. *Id.* at 76 ("Adding six judges to a thirteen-member Court would provide a minimal pro-Yeltsin majority on the bench"). *See also* William Partlett, *Courts and Constitution-Making*, 50 WAKE FOREST L. REV. 921, 928, 935 (2015); Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1837 (2006).

44. There is an extensive literature on the subject of sanctioning constitutional courts using a model that fits better with the U.S. political system. *See generally, e.g.*, Whittington, *supra* note 25; William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. LAW REV. 1479 (1987); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992) (arguing that political actors' capacity to react to judicial decisions can influence judicial interpretation and that rulings that fail to take the political environment seriously are unlikely to stand for long); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) (discussing evidence of judicial voting behavior to test whether judges tend to defer to Congress' positions or whether judges vote sincerely).

45. For example, Tom Clark has shown that the Supreme Court invalidates Congressional statutes less frequently when there is a strong ideological divergence between it and Congress. Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 984 (2009).

46. Note, however, that FDR's court packing plan was not an isolated event in the history of the United States. Stuart Nagel identified seven periods of "high-frequency court-curbing" in the country's history. Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925, 926 (1965).

legislative override of judicial decisions or even constitutional amendments aimed at reversing judicial doctrines.[47]

Judicial passivity, which is most likely to exist in an authoritarian and hybrid setting, is also more likely to occur in non-competitive democracies than competitive democracies. The Japanese Supreme Court, which has consistently refused over six decades to enforce the country's Kenpō Constitution against legislation enacted by the hegemonic ruling party, is a prime example. Commentators have suggested numerous reasons for this: that the ruling party had pushed for deferential judicial behavior, harmed judicial independence,[48] made judges fear negative consequences for their careers,[49] and provided incentives for judges to align themselves with the party's interests.[50] The Japanese case should come as no surprise. Judges in democratic settings that are not sufficiently competitive can also be exposed—albeit to a lesser degree—to the same dangers they face in hybrid regimes.

Although present in both democratic and non-democratic systems, political backlash is more costly for elected presidents or legislators working in competitive electoral democracies than for autocrats in authoritarian and hybrid settings. Thus, backlash against judges is less likely to happen in consolidated democracies than in authoritarian or hybrid regimes. Some autocrats do not need to persuade an institutionally independent legislative branch to override a judicial decision and, where a separate congress or parliament even exists, it is usually firmly under their control. Strongmen in hybrid regimes, where control over the legislature is not yet institutionally guaranteed, typically manage to muster the legislative coalitions necessary to control the courts, or find other ways to secure their influence over them.[51]

47. *See generally* William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (examining congressional decisions to override the Court's statutory interpretations); Roger Handberg & Harold F. Hill Jr., *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court versus Congress*, 14 LAW & SOC'Y REV. (1980) (analyzing the history of conflicts between the Supreme Court and the Congress).

48. David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1586–88 (2009); *see generally* J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEG. STUD. 721 (1994).

49. Joseph Sanders, *Courts and Law in Japan*, *in* COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 315, 326 (1996).

50. For example, many judges seek for the Ministry of Justice to recruit them. Yasuo Hasebe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms*, 5 INT'L J. CONST. L. 296, 300 (2007).

51. A useful example is the way Maduro has controlled the legislative branch in Venezuela by formal and informal means, including the creation of a constituent assembly

Autocrats and strongmen are also subject to fewer political checks than politicians in competitive democracies, as crucial freedoms such as freedom of speech and association are typically undermined, public information can be controlled, and the political process can be more obscure. Thus, the number of options that leaders of non-democratic regimes have in their toolkit to deal with the judiciary—including both formal and informal powers—is likely be more significant than the array of measures that an accountable and elected incumbent politician can implement. The opposition—if it exists—is weaker in authoritarian and hybrid regimes, and accountability is seriously reduced. Consequently, the levels of political fragmentation and rotation of elected officials that can help ensure judicial independence and preserve judicial authority in stable competitive democracies with strong judiciaries are less likely to exist in non-democratic contexts. Factors such as the existence of a competitive political opposition and electoral uncertainty, which the literature usually associates with judicial empowerment,[52] judicial independence,[53] and even the creation of constitutional courts,[54] are uncommon in hybrid or authoritarian regimes, so judges are more vulnerable to attacks by the regime.

working simultaneously with the legislative assembly, and even prosecuting members of the opposition. *See* Landau, *supra* note 12, at 162. In other countries, like Poland under PiS rule, Bolivia under Evo Morales, or Orbán's Hungary, the regimes control a large majority of the legislative seats. Hybrid regimes can also capture the electoral processes and manipulate the electoral rules to maintain legislative majorities and exclude or reduce the influence of their opponents. *See* Kovács & Scheppele, *supra* note 38, at 190; Verdugo, *supra* note 14, at 1000.

52. *E.g.*, Chávez et al., *supra* note 27, at 220–23. *But see* Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 91 (2000) (arguing that judicial empowerment is the result of threatened elites seeking to preserve their hegemony). For an in-depth discussion of judicial empowerment as a consequence of struggles for hegemony among elite social groups in the context of Israel's 1992 judicial revolution, see generally. Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel's Constitutional Revolution*, 33 COMPAR. POL. 315 (2001).

53. *See generally* Ramseyer, *supra* note 48 (offering a historical perspective on the impact of competitive electoral markets on the independence of the Japanese judiciary); J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331 (2001) (performing a quantitative analysis of political influence in Japanese courts); Raphael Franck, *Judicial Independence Under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959–2006*, 25 J. LAW ECON. ORGAN. 262 (2008) (using evidence from the French Constitutional Court to argue that politicians' ability to influence courts hinges on the level of political unity).

54. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 35–40 (2003); Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG.. 587, 588 (2014); *see also* JODI FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S 14 (2008); Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 46 LAT. AM.

To understand courts' strength, and thus the ways courts can be less vulnerable to attacks, it is useful to consider Stephen Gardbaum's work. Gardbaum has proposed that judicial strength is the result of three variables: formal rules, legal practices, and political context.[55] In authoritarian systems, even those where formal rules actually promote judicial independence, it is unlikely that legal practices and political contexts will establish fertile ground for judicial empowerment. Thus, even though political backlash against the judiciary cannot be exclusively related to authoritarian or hybrid regimes, we should expect the *threat* of judicial capture and court-packing maneuvers to be higher in those kinds of settings than in competitive democracies.

And mere threats against the judiciary may be salient in their own regard in non-democratic contexts. Imminent and credible threats of political backlash do not need to materialize in order to harm judicial independence and manipulate or control courts. In other words, an authoritarian regime will rarely need to target the judges in explicit terms and will often find subtler ways to influence them. A regime's apparent passivity does not necessarily mean that it is not willing to attack its country's constitutional court. The threat that authoritarian and hybrid regimes represent against courts can be credible even if the regimes do nothing. Of course, in cases where judges are aligned with them, even threats are unnecessary. For example, after the military coup put an end to the socialist government of Salvador Allende in 1973, the Chilean Supreme Court—an institution that had previously opposed Allende—quickly recognized the Junta's government as the legitimate one and avoided investigating its human rights abuses.[56] The Pinochet regime had no need to threaten those judges.

In authoritarian contexts, pro-democracy judges are usually left with only tragic choices. They can either collaborate with the autocrat's goals, or become inconsequential actors reduced to making weak or non-essential rulings in low-stakes cases. If judges decide to

POL. & SOC'Y 87, 88 (2005); Jodi Finkel, *Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change*, 39 LAT. AM. RSCH. REV. 56, 61 (2004). *But see generally* THE POLITICAL ORIGINS OF CONSTITUTIONAL COURTS: ITALY, GERMANY, FRANCE, POLAND, CANADA, UNITED KINGDOM (Pasquale Pasquino & Francesca Billi eds., 2009) (arguing that electoral uncertainty and the insurance model cannot fully account for the judicial transformation process, albeit in the context of certain stable democracies).

55. Stephen Gardbaum, *What Makes for More or Less Powerful Constitutional Courts*, 29 DUKE J. COMPAR. & INT'L L. 1, 4 (2018).

56. Jorge Correa Sutil, *The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence During the Transition to Democracy*, *in* TRANSITION IN LATIN AMERICA: THE ROLE OF THE JUDICIARY, 89, 90–91 (Irwin Stotzky ed., 1993); *see also* HILBINK, *supra* note 30, at 1–2; Lisa Hilbink, *Agents of Anti-Politics: Courts in Pinochet's Chile*, *in* RULE BY LAW, *supra* note 16, at 102, 102–03.

champion democracy or protect human rights against the interests of the regime, their choice may very well result in the court losing authority.

B. Judicial Survival Strategies

In response to the pressure of the political branches of government, scholars have long advocated for creating rules that secure judicial independence. The literature stretches from Alexander Hamilton[57] to contemporary scholarship on constitution-making or democratization processes.[58] However, as discussed in the previous section, formal approaches to judicial independence focusing on those rules may be useful in certain regards, but are insufficient to understand whether a court can be protected against the threat of political backlash.[59] After all, judicial strength is not explained by formal rules alone,[60] but by the features of the political system and the political process,[61] as well as by the internal dynamics of courts and their audiences.[62] In other words, institutional design matters, but it is not the only factor that should be considered. Indeed, focusing on reshaping rules to protect judicial independence has the potential to become self-defeating: constitutional reform focused on the design of the judiciary may turn into an opportunity for a regime to manipulate and capture the courts.[63] As constitutional court judges are particularly vulnerable in authoritarian or hybrid contexts, understanding the available judicial strategies those

57. THE FEDERALIST NO. 78 (Alexander Hamilton).

58. *See generally* SUJIT CHOUDHRY & KATHERINE GLENN BASS, CTR. FOR CONST. TRANSITIONS & INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, CONSTITUTIONAL COURTS AFTER THE ARAB SPRING: APPOINTMENT MECHANISMS AND RELATIVE JUDICIAL INDEPENDENCE (2014); MARKUS BÖCKENFORDE, NORA HEDLING & WINLUCK WAHIU, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, A PRACTICAL GUIDE TO CONSTITUTION BUILDING (2011); Donald Horowitz, *Constitutional Courts: A Primer for Decision Makers*, 17 J. DEMOCRACY 125 (2006).

59. For example, consider the formal approach to judicial independence partly used by Daniel Brinks and Abby Blass. *See* Daniel M. Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15 INT'L J. CONST. LAW 296, 297–299 (2017).

60. Gardbaum, *supra* note 55 at 3 ("[I]t seems clear that formal powers do not tell the whole story…").

61. See discussion *supra* Section I.A.

62. *See* Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 ARIZ. J. INT'L COMPAR. L. 539, 540 (2011).

63. Pérez-Liñán & Castagnola, *supra* note 34, at 396 ("[T]he alteration of institutional arrangements undermines the stability of justices because, irrespective of their stated goals, constitutional amendments and replacements offer a window of opportunity to reorganize the composition of the judiciary.").

judges can employ to retain their authority without rubberstamping democratic regression becomes a crucial—albeit largely pragmatic—task.

Scholars promoting survival strategies often couch their arguments in the context of institutional fragility in democratizing states or fledgling democracies. The general recommendation in those settings is that courts should only engage with cases that do not directly harm the regime, and thus avoid confrontation with it. That way, judges can minimize the possibility of backlash. The key assumption underlying this recommendation is that courts often do not possess the necessary tools to challenge authoritarian or hybrid regimes and *get away with it*—that is, to survive the encounter unscathed. As a result, arguments for survival strategies focus more on the need for judicial authority and independence—period—than on the actual cases and issues that judges need to avoid in order to maintain them. The cost of avoidance to democratic systems and associated fundamental rights is an unfortunate repercussion of this conservative uniform approach to preserving judicial authority across a wide variety of case types in a myriad of possible contexts.

Despite their recent proliferation in the literature, however, survival strategies are not a conventional answer to the question of how courts *should* act where democratic values are on the line. Scholars like Roberto Gargarella,[64] Kim Lane Scheppele,[65] and Samuel Issacharoff[66] have advanced normative arguments on the role that courts should play in order to safeguard such values. Gargarella suggests that judges in Latin America should pay special attention to (1) the protection of civil liberties such as freedom of speech and (2) restricting presidential attempts to expand executive power at the expense of the other branches of government.[67] Issacharoff argues that, in fragile

64. *See generally* Roberto Gargarella, *In Search of a Democratic Justice—What Courts Should Not Do: Argentina, 1983–2002*, *in* DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 181 (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., 2004).

65. *See generally* Scheppele, *supra* note 22.

66. *See* SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 278–82 (2015).

67. Gargarella, *supra* note 64, at 183.

> Civil liberties deserve an additional protection given the essential role they play in guaranteeing an expansion of the whole system of liberties. . . . [J]udges should be especially attentive to limit the president's attempts to expand his or her own capacities at the expense of the other branches of power. . . . [J]udges should be exceptionally alert against manoeuvres aimed at discontinuing the democratic regime.

Id.

institutional contexts, courts can help to define the limits of political competition, facilitate democratic transitions, help to resist majoritarian abuses, and stop efforts that seek the permanence of rulers in power, for example.[68] Scheppele, meanwhile, uses the early 1990's Hungarian Court to advance the argument that a "courtocracy" can be democratic by forcing elected but unresponsive politicians to live up to the expectations of the voters.[69] Issacharoff, Scheppele, and Gargarella all seem to assume that judges are able to preserve or protect democratic values in institutionally fragile democracies. But survival strategies make a contrary assumption: Where a court challenges the regime, backlash is likely to follow.

Stephen Gardbaum's survival strategy is indicative of the recent shift in the literature. After examining several cases of political backlash, Gardbaum suggests that in the context of new democracies looking for stability and hoping to avoid the establishment of a dominant-party system, courts should develop a temporary weak judicial review power strategy.[70] For Gardbaum, courts' primary task should be the preservation of judicial independence—and a weak judicial review power can help courts avoid dangerous confrontations and reduce the tensions between themselves and regimes in ways that a robust version of the judicial review power may not be able to provide.[71] Thus, as the argument goes, weak review offers courts a way to ensure their judicial independence.[72]

Gardbaum's preferred method of weak review is to use the judicial "interpretive power"[73] to read statutes in ways that make them consistent with constitutional rights in order to avoid invalidating laws under review. However, this type of strategy can also be risky for judges if the interpretation goes against the interests of the regime in high-stakes cases. After all, a court's decision may constitute a

68. Issacharoff, *supra* note 66, at 278–82.

69. Scheppele, *supra* note 22, at 39–45.

70. Gardbaum, *supra* note 5, at 309–315.

71. *Id.* at 303–09.

72. *Id.* at 311.

73. *Id.* at 313–314. Gardbaum notes:

> [T]he (weak-form) interpretive power probably reduces the tension between courts and elective institutions the most, and more than the (strong-form) technique of the suspended declaration of invalidity. This is because the former effectively involves a judicial offer of a rights-consistent reading of the statute in question, which can either be accepted by legislative inactivity or rejected by affirmative amendment. By contrast, the suspended declaration of invalidity is less an offer of compromise, declinable by the legislature, than the marginally improved terms of legislative defeat. It forces the legislature to act consistently with the judicial view or else have the original law invalidated.

challenge to a regime even where it does not invalidate any statute.[74] In those cases, regimes can ignore the interpretation given by judges and instead act on an alternative interpretation that is more consistent with their interests. This type of reaction to a judicial decision may weaken the court's authority.[75] Regimes may also take formal and informal repercussive measures against courts that challenge them through statutory interpretation. But even though the "interpretative power" strategy has its shortcomings, it can still be useful as a means of signaling to the community that something in the statute under review is constitutionally defective, and may be successful in low-stakes cases.

Another survival strategy frequently cited in the literature is the deliberate judicial *avoidance* of issues that are too contentious.[76] Permanent avoidance is, of course, difficult to justify—conceptually, judicial independence may as well not exist if judges never exercise it.[77] But *temporary* avoidance may help preserve judicial authority for a later day when it can amount to a successful challenge to the regime.

In this vein, Erin Delaney has suggested that courts may be able to avoid contentious issues by not issuing decisions that may backfire and should instead promote dialogue with sitting politicians.[78] Relatedly, Issacharoff and Dixon speak about judicial *deferral.*[79] Not all types of deferral function well as strategies for protecting courts. Still, some of them may be useful examples of survival strategies that can help courts prospectively assert their power for another day without actually confronting the regime.

One such example is Chief Justice Marshall's decision for the U.S. Supreme Court in *Marbury v. Madison*, in which he laid the groundwork in broad dicta that would later justify the Court's exercise

74. Whittington, *supra* note 25, at 453 ("Rather than striking down one set of statutory provisions as unconstitutional, the Court creatively reinterpreted those provisions in order to make them consistent with the constitutional requirements. The resulting decisions were exercises in judicial review in all but name.").

75. DALY, *supra* note 7, at 269 ("It is hard to see how political actors who refuse to submit to strong judicial review would submit to the softer touch of weak review. Surely, where courts and such actors have divergent views, the latter would easily discard any weak review constraints.").

76. Whittington, *supra* note 25, at 447 ("Courts may avoid confronting the other branches of government when they anticipate that such a confrontation could result in the loss of judicial independence.").

77. DALY, *supra* note 7, at 270 ("[W]hat worth judicial independence has if a court cannot use it to engage in assertive adjudication when the occasion so requires.").

78. *See* Delaney, *supra* note 4, at 4–5.

79. *See* Dixon & Issacharoff, *supra* note 4, at 686–88.

of robust judicial review.[80] The *Marbury* strategy has been promoted by some comparative constitutional scholars in non-American contexts.[81] When I refer to the *Marbury* strategy, I do not mean the specific decision written by Chief Justice Marshall, but rather a two-step maneuver that judges can use, which was inspired by the famous decision.

For the *Marbury* strategy to work, after a court has asserted its power in a case where the outcome does not immediately challenge the regime, it then needs to identify the proper time to capitalize on that earlier assertion and confront the regime head-on. Thus, the full *Marbury* strategy is a two-step maneuver which includes (1) an avoidance decision that also asserts a court's power and (2) the eventual and actual use of that power.[82] Of course, just as the step-one decision avoids a direct challenge to the government through avoidance, so too may the step-two decision avoid such a challenge if the court waits long enough for a receptive atmosphere before issuing its decision. And, if the step-two decision does constitute a direct confrontation, the court's success in ordering compliance by the political branches will depend not only on how established the doctrine laid down in the step-one decision has become, but on political factors as well.[83]

There is no hard and fast rule for when courts should embrace these tactics. The literature generally acknowledges that judges need

80. *Id.* at 686. The Supreme Court's decision suited Jefferson's government but, at the same time, provided a rationale in dicta to solidify the judicial review mechanism that the Court would later use to police the legislative and executive branches.

81. *See* Dixon & Issacharoff, *supra* note 4, at 687 (discussing the *Marbury* strategy as a "second-order" function of judicial deferral). Dixon and Issac assert that this function

> [I]s more strategic or Marbury-like in aspiration: it is designed to temporize, to allow courts to assert themselves short of a frontal confrontation with the political branches. Time may increase the degree of background political or legal support for a court's reasoning before a court seeks fully to implement it.

See also John Ferejohn, *Judicial Power: Getting It and Keeping It*, *in* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 353 (Diana Kapiszewski et al. eds., 2013). As Ferejohn notes, in a *Marbury*-style case,

> [A] high court asserts new jurisdiction or claims powers to control elected officials but does so in a subtle or strategic way that makes it hard for politicians to reject it. Moreover, this innovation tends, for some reason, to 'stick' and mark a decisive and more or less permanent turn in the legal/constitutional order.

82. Another alternative strategy is the one promoted by Yaniv Roznai, who suggests that courts should act as "business-as-usual." This later strategy could be useful for justifying the court's legitimization narrative in cases where the stakes are not too high. However, it is unlikely to suffice when upholding democratic principles means confronting the regime in a case in which the regime has a strong preference. After all, Roznai presents his suggestion as an alternative to direct confrontation. Roznai, *supra* note 6, at 27–30.

83. See discussion *infra* Section I.C.

to pay attention to the scope, timing,[84] and even candor—i.e., whether the court explicitly acknowledges the avoidance—of their decisions.[85] As Tom Daly—a scholar generally skeptical of the capabilities of courts to help to advance democratization processes—has proposed, courts could pick their battles selectively, seek to collaborate with other institutions, and find the correct timing to release their decisions.[86]

The diverse types of avoidance and deferral strategies that courts can employ come in many forms and many fora.[87] In the United States, for example, strategies have long included ideas such as the political question doctrine, the passive virtues doctrine,[88] judicial self-restraint,[89] or judicial minimalism,[90] all of which might be invoked in order to avoid deciding a case on the merits. However, the further one ventures from mature democracies, the more clearly based on power politic pragmatism and less plausibly rooted in philosophical notions the strategies become. In the hybrid regime of the Russian Federation, for example, the judges of the Constitutional Court have a reputation for being independent but need the political branches to secure the implementation of their rulings. They are aware of this political context and must navigate these non-ideal waters with pragmatism.[91] We can also find examples in countries with relatively competitive yet still fragile democracies, such as Chile's judiciary before Pinochet. In

84. Gardbaum, *supra* note 5, at 318; Delaney, *supra* note 4, at 12–16; s*ee also* Rosalind Dixon, *Strong Courts: Judicial Statecraft in Aid of Constitutional Change*, 59 COLUM. J. TRANSNAT'L. L. (forthcoming 2021) (discussing how strong courts frame their decisions in terms of *timing, tone, respect, engagement with other actors,* and *authorship*).

85. Delaney, *supra* note 4, at 62–64.

86. DALY, *supra* note 7, at 280–86.

87. There is evidence suggesting that international courts can employ similar strategies. Jed Odermatt, *Patterns of Avoidance: Political Questions Before International Courts*, 14 INT'L J. L. CONTEXT 221, 221 (2018); Lewis Graham, *Strategic Admissibility Decisions in the European Court of Human Rights*, 69 INT'L COMPAR. L. Q. 79, 102 (2020).

88. *See generally* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–99 (2d ed.1962).

89. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138 (1893).

90. *See generally* Cass Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

91. Peter H. Solomon, Jr., *Judicial Power in Authoritarian States: The Russian Experience*, *in* RULE BY LAW, *supra* note 16, at 261, 279. Solomon notes:

> There is every indication that they think strategically, looking beyond individual cases to the larger matter of their courts and judicial authority. In recent years the court has not opposed the president on important issues. . . . kPolitical tact aside, the record of the Russian Constitutional Court overall is admirable, especially given the conditions under which it works.

Chile, the Supreme Court did not produce a politically relevant jurisprudence before the 1970s.[92] It shied away from flexing its judicial review muscles,[93] even upholding the legislature's plan to ban a political party and strip its members of their political rights,[94] because "deference to the political branches was rooted in the fear of getting involved in the messy—and dangerous—world of politics."[95]

Assuming that a court has some judicial authority or independence in the first place, survival strategies may succeed in preserving some small part of that. But whatever the benefits of survival strategies may be, they inevitably fail in protecting democracy against regressive actions by the political branches of government. Nevertheless, if courts have the opportunity to advance democratic values or protect fundamental rights without generating backlash, it is normatively desirable that they do so. Although the academic research on survival strategies is helpful, it should not be understood as suggesting that courts not engage in confrontation when it may actually be successful. More research is needed in order to identify the circumstances in which courts can successfully confront anti-democratic regimes and to understand how courts can do so without inviting certain and devasting backlash. The *Marbury*-style, two-step strategy is one exception—so long as judges are able to use the doctrine established in the step-one decision to successfully confront the regime in the step-two decision. The constitutional paradox is another.

C. Judicial Strategy and the Constitutional Paradox

Although the literature has proposed modest solutions to safeguard courts where conflicts with the regime are likely to result in

92. The Chilean Supreme Court had the power to review legislation, but its decisions were only applicable to the specific case and lacked stare decisis. Thus, even though the Supreme Court could declare that a legal provision was not applicable to a particular controversy, it could not remove that provision from the legal system, and other judges were still able to use it in different cases. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 86 (1925).

93. See Julio Faúndez, *Chilean Constitutionalism Before Allende: Legality Without Courts*, 29 BULL. LAT. AM. RSCH. 34, 46 (2010) Sergio Verdugo, *How Constitutional Review Experiments Can Fail? Lessons from the Chilean 1925 Constitution*, 19 INT'L J. CONST. LAW 1 (forthcoming 2021) (manuscript at 15–18) (on file with author).

94. *See* RAÚL BERTELSEN REPETTO, CONTROL DE CONSTITUCIONALIDAD DE LA LEY 165–166 (1969); Fernando Saenger Gianoni, *Veinte Años de Recurso de Inaplicabilidad por Inconstitucionalidad*, 7 ANUARIO IBEROAMERICANO DE JUSTICIA CONSTITUCIONAL [ANU. IBEROAM. JUSTICIA CONST.] 401, 421–25 (2003) (Spain).

95. Javier Couso & Lisa Hilbink, *From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile*, *in* COURTS IN LATIN AMERICA, *supra* note 27, at 99, 104

backlash, what is missing from it is a theoretical framework which judges can use to determine *when* cases are likely to generate political reprisals. Despite judges' limited capabilities of prognostication, they can still reasonably anticipate possible reactions to their decisions and plan accordingly.[96] And even though judges' predictions will not always be accurate—and courts working under authoritarian or hybrid regimes may not have access to all relevant information—judges can still analyze the regime's tolerance levels and act in strategic ways.

The literature on the separation of powers games can help explain how this judicial strategy functions.[97] Lee Epstein, Jack Knight, and Olga Shvetsova have showed how tolerance intervals work in the case of centralized constitutional courts. Like other scholars' models,[98] theirs assumes the existence of multiple institutional actors. The issue around which these authors build their model is whether a bicameral parliament and an executive branch can decide on "whether to modify, override, evade, or otherwise disregard the [Constitutional Court's] decision or harm the [Court] in some other way."[99] Assuming that (1) different policies could be adopted, (2) each actor has a preferred policy, and (3) identifying each actor's tolerance interval might help to identify the non-ideal policies that can be adopted, the question becomes how each of these actors can identify the tolerance level of the others and pursue the mutually agreeable non-ideal policy closest to their ideal preferences.[100] Courts are part of this game and also have an ideal outcome they want to reach, but they need to predict what the tolerance intervals of the other actors are so that those judges can make sure to get as close to their ideal outcome without fearing their decision will backfire. In other words, if judges want to secure the effectiveness of their rulings and prevent the political branches of government from

96. *See* Ferejohn & Weingast, *supra* note 44, at 275.

97. *See generally, e.g.*, Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decision-Making*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 34 (Gregory A. Caldeira et al. eds., 2008) (providing an overview of different stategic models for judicial decision-making).

98. *See, e.g.*, John A. Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 566 (1992) ("[L]egislatures, executives, and courts act within an interconnected system . . . it is impossible to assess the actions of one constitutional actor without contemplating the reactions of the others.").

99. Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 128 (2001).

100. *See id.* at 130. Epstein, Knight and Shvetsova note:

> For policies falling within their tolerance interval, the actors have calculated that the benefits of acquiescing to the Court's decision override the cost of an attack; for policies falling outside the interval, they have determined that the benefits of an attack outweigh the costs of acquiescence; and for policies at the extreme ends of the interval, they are indifferent between attacking and not so doing.

reversing or ignoring their decision or responding with backlash, judges need to identify the tolerance levels of the other actors.

Models like the one I just described frequently assume that all the actors are present in the game. However, in actuality, these games often involve an actor that no longer exists or that has lost influence. In that case, the tolerance intervals that a judge may identify may be greater than they would be otherwise. Imagine, for example, a court that is reviewing an executive order from a president that is no longer in office, or evaluating a piece of legislation enacted by a legislative faction that has lost its majority in the legislature.[101] For this reason, judges may think that a sitting legislator—in the legislature of a hybrid regime, for example—may be more willing to accept a decision striking down a statute enacted by past legislators that do not belong to the regime.

The tolerance level of a regime is dependent on two factors: (1) whether the stakes of any particular case are high or low;[102] and (2) the costs of non-compliance for the regime. The lower the stakes for the government, the higher the tolerance level will be for an unfavorable judicial decision. Conversely, the higher the stakes for the regime, the lower the tolerance level will be for an adverse ruling. An example from Hong Kong illustrates this point. Eric Ip's research on the Hong Kong Court of Final Appeal, the apex court within the Hong Kong special administrative region, shows that (at least at the time when he wrote his articles) some of the Court's decisions have been enacted against the interests of the Chinese Communist Party (CCP) regime, which has consistently augmented its legal and political power within the administrative region of Hong Kong.[103] The Court decisions

101. For an analysis of judicial decision-making and statutory interpretation in the context of a dynamic political process, where the enacting Congress is different from the sitting Congress, see generally Ferejohn & Weingast, *supra* note 44; Ferejohn & Weingast, *supra* note 98.

102. Julius Yam distinguishes three levels of stakes in his analysis of the Hong Kong judiciary's independence: *high* (cases involving the core interests of China and the Communist Party); *medium* (cases where political implications are limited to Hong Kong); and *low* (cases with no or minimal political implications). I only distinguish high- and low-stakes because I do not consider non-politically salient cases of the type that compose Yam's medium-stakes category. *See* Julius Yam, *Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts*, 46 LAW & SOC. INQUIRY 153, 162 & n.14 (2021).

103. Eric C. Ip, *The Politics of Constitutional Common Law in Hong Kong Under Chinese Sovereignty*, 25 WASH. INT'L L.J. 565, 590–93 (2016). *Cf.* Cora Chan, *Reconceptualising the Relationship between the Mainland Chinese Legal System and the Hong Kong Legal System*, 6 ASIAN J. COMPAR. L. 1, 26–29 (2011) (arguing that the 'One Country, Two Systems' model implies some sort of legal pluralism that could be connected to the levels of internal fragmentation).

include, for example, rulings protecting detained people, non-permanent residents, and LGBTQ rights.[104]

Even though the CCP can use the Standing Committee of the Chinese National People's Congress (NPCSC) to declare its own interpretation of Hong Kong's Basic Law—undermining the Hong Kong Court's authority to do so for itself—it generally has not done so. As Ip explains, both the NPCSC and the Hong Kong Court have succeeded in coexisting without confrontation because (at least up until the time Ip wrote his paper), both the Court and the NPCSC were reluctant to trigger a constitutional crisis,[105] and the Court has used the elite fragmentation within the CCP regime in its favor.[106] Nevertheless, in contrast to cases concerning detained persons, non-permanent residents, and LGBTQ+ rights, Ip believes that the Court should not engage in cases that involve democratic electoral reform.[107] This is supported by Julius Yam's research, which uses the idea of "stakes" to identify tolerance levels in China.[108] When a Hong Kong court challenged the anti-mask law in the context of the 2019 protests, the NPCSC "issued a statement slamming the Court's ruling."[109]

The second factor explaining the probability of political backlash is the potential cost of non-compliance that the regime may incur if it disobeys an unfavorable judicial decision. In order for judges to predict the potential for political backlash generated by a given adverse ruling, they must assess whether the associated costs outweigh the

104. Ip, *supra* note 103, at 566.

105. Eric C. Ip, *Constitutional Competition Between the Hong Kong Court of Final Appeal and the Chinese National People's Congress Standing Committee: A Game Theory Perspective*, 39 LAW & SOC. INQUIRY 824, 829 (2014).

106. *See* Ip, *supra* note 103, at 594 (2016). According to Ip,

> [I]nternal regime fragmentation and state-society discord in Hong Kong since the resumption of Chinese sovereignty that crucially created conditions favorable for the impunity of an independent judiciary and constitutional common law in the shadow of an authoritarian sovereign.

Id.

107. *See id.* at 595.

> [D]emocratic electoral reform is one area in which the Court of Final Appeal must ideally avoid. Any substantive interpretation of the Basic Law's electoral reform provisions must deeply unsettle either rulers or the ruled, causing them to withdraw their acquiescence in or support from the Court regardless of transaction costs, an outcome that is sure to weaken the political foundations of constitutional common law, to devastating effect.

108. *See* Yam, *supra* note 102, at 162–70.

109. Julius Yam, *Hong Kong's Anti-Mask Law: A Legal Victory with a Disturbing Twist*, IACL-AIDC BLOG (Dec. 3, 2019), https://blog-iacl-aidc.org/2019-posts/2019/12/3/hong-kongs-anti-mask-law-a-legal-victory-with-a-disturbing-twist [https://perma.cc/LTA8-7S4U].

utility—as perceived by the regime—of accepting the decision and showing respect for judicial authority. These costs may involve mobilizing political capital that could be used for advancing other activities, breaking a power-sharing institution, reducing the credibility of the regime with its supporting coalition, or harming the regime's narrative or veneer of legitimacy. For example, a government trying to attract foreign investors or obtain an international loan may wish to show that property rights will be respected and that courts are independent enforcers of contracts. Consequently, targeting the courts may harm the regime's ability to convince investors.[110] The costs increase if judges have some degree of public support. So too if the government cares about the perceptions of an international audience. A regime that plans to attack a court will need to consider whether these types of costs are low enough to accept.

To sum up, the strategic prediction that judges need to make need to understand the probability of backlash is rooted in the interplay of two factors: (1) the stakes for the regime and (2) the expected costs of its noncompliance. Although these factors vary from issue to issue and case to case, it is also possible that judges can exercise judicial statecraft in order to predictably affect the costs to the regime. The two-step *Marbury* strategy described above represents one such possible paradigm. In the first part of the *Marbury* maneuver, the regime's tolerance level is high because the court is not immediately challenging the government, and the costs of noncompliance are irrelevant because the court is upholding, if only temporarily, the regime's legislative agenda. A subsequent case revisiting or following up on a *Marbury*-style decision will be dependably different in two regards: although the regime's tolerance interval will be narrower where the court confronts it directly on a high-stakes question, the cost of noncompliance will be higher—if only marginally so—because the court has already seeded authority for its challenge to the regime in the earlier decision.

Although developed as a tool of U.S. jurisprudence, the *Marbury* two-step strategy can also be used by constitutional courts around the world. In Colombia, for example, the Constitutional Court appeared to use a *Marbury*-like strategy to successfully prevent former President Álvaro Uribe from staying in power for a third term. In 2005, the Constitutional Court allowed Uribe to run for a second term when it upheld a constitutional amendment that lifted the one-term

110. *See e.g.*, Whittington, *supra* note 25, at 459–61.

restriction in the 1991 Colombian Constitution.[111] However, the Court also asserted its authority to review a future constitutional amendment further expanding the number of terms a president could serve.[112] Features of the *Marbury* maneuver were present in this decision as the Colombian Court asserted its review power while avoiding conflict by conceding the immediate controversy.[113] Acting on the legal groundwork laid in that opinion, the Court then held in 2010 that an additional amendment purporting to allow Uribe a third presidential term was unconstitutional.[114]

It is extremely rare that a constitutional court is successful in preventing an executive from extending his or her term in office,[115] and Uribe, who was a popular leader at the time[116] and his proposed amendment authorizing the new reelection would likely have passed, had the Court allowed the referendum on the amendment to proceed.[117] So why did Uribe accept the unfavorable ruling? As Dixon and Issacharoff have argued, two factors typically help explain why a decision like this one is accepted: "carefully drafted local doctrines and the

111. *See* Issacharoff et al., *supra* note 24, at para. 26 ("[T]he Court reasoned that one extra presidential term does not necessarily undermine separation of powers as it neither creates new presidential powers nor enlarges the range of existing powers.").

112. *See* Dixon & Issacharoff, *supra* note 4, at 687.

> Deferral puts the onus on the political branches to initiate a confrontation against a still unrealized potential for declaration of constitutional invalidity by a constitutional court. This creates a natural window of opportunity for political conditions to change in the court's favor or for increased support among lawyers for a court's reasoning in ways that ultimately significantly increase the chances of a court imposing effective limitations on democratic actors.

113. *Id.* at 686 (arguing that the second order deferral was "perhaps *the* defining feature of *Marbury*," and discussing the Uribe case as an example of a second order deferral). *See also,* Issacharoff et al., *supra* note 24, at paras. 26–27 (arguing that the case was "pushed into the terrain of a '*Marbury* strategy'" and that "the Constitutional Court did assert its competence to address whether the amendment replaced the principle of democracy, concluding in *Marbury* fashion that this was not the case with one additional term of office.").

114. *See* Issacharoff et al., *supra* note 24, at para. 42.

> The Court showed that its constitutional jurisprudence could bend to accommodate the great successes of Uribe's first term, but it could also set out a principled constitutional vision of political competition and accountability in a democracy. The 2010 decision then had the force of reasoned deliberation and not an ad hoc reaction to the political winds. The result was perceived not just as a triumph for democracy, but for wise judicial stewardship.

115. Versteeg et al., *supra* note 35, at 179 (arguing that "the Colombian Constitutional Court is the only court that has ever halted an evasion attempt" and that courts mostly "act as agents of the incumbent and actually help him to serve beyond the original expiration date."); *see also* Issacharoff et al., *supra* note 24, at para. 10.

116. Versteeg et al., *supra* note 35, at 218.

117. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 202 (2013).

existence of certain favorable political conditions."[118] Although it is possible that Uribe's personal willingness to acquiesce was a factor,[119] his decision not to disregard the Court's order can also be characterized as a rational response to the governing political conditions—i.e., the stakes and costs involved—the balance of which tilted away from his favor. For Uribe, the cost of accepting the unfavorable judicial decision—which would effectively oust him from the presidency—was high, so his tolerance level was low. However, the costs of disregarding the decision were also high: Uribe would need to confront a court that had not only grounded its judgement in an already-established legal doctrine previously beneficial to him, but had also significantly elevated its own status in so doing.[120] There was also the additional risk of criticism from his opponents—and perhaps even from his allies.[121] Although Uribe could plausibly have become an autocratic *caudillo*,[122] Colombia's relatively mature political institutions[123] and the state's independent checks on political power may have counterbalanced the president's authoritarian ambitions.[124] Essentially, in the context of Colombian government and society at that time, it would have been

118. Dixon & Issacharoff, *supra* note 4, at 692.

119. *Id*. at 719.

120. Cajas-Sarria notes:

> With this decision, the Court not only raised its legitimacy but was taken in as an independent tribunal that, despite the pressure of the public opinion, and also the links of several of its justices to the executive branch, has slowed the bid for re-election of a president who aspired to be in power for 12 consecutive years.

Cajas-Sarria, *supra* note 24, at 262. *See also* Vicente Benítez-Rojas, *We the People, They the Media: Judicial Review of Constitutional Amendments and Public Opinion in Colombia*, *in* CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA 160 (Richard Albert, Carlos Bernal-Pulido, & Juliano Zaiden Benvindo eds., 2019).

121. On the effects of public support on constitutional courts in their interactions with the political branches of government, see generally Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 AM. J. POL. SCI. 346 (2001). *See also* Whittington, *supra* note 25, at 458–460.

122. Dixon & Issacharoff, *supra* note 4, at 692.

123. *Id.* at 718 ("The maturing of the political institutions meant that the choice was not Uribe or the prior chaos.").

124. Landau, *supra* note 117, at 203. In Landau's words:

> It is probably too much to say that the Court succeeded in preventing Colombia from becoming a competitive authoritarian regime; unlike Hugo Chavez in Venezuela or Rafael Correa in Ecuador, Uribe did not launch all-out attacks against most of the horizontal checks on his power, or threaten to remake the entire institutional order. Further, the Colombian regime contains a high number of relatively autonomous checking institutions, and it would not have been easy for Uribe to pack all of these institutions. But the Court probably did prevent a significant erosion of democracy by preventing a strong president from holding onto power indefinitely.

costly for Uribe not to accept the Court's decision. In the end, he chose to respect the Court, and support another presidential candidate from his political coalition instead of running himself.

Of course, tolerance intervals and costs do not always tip in courts' favor. In Bolivia, Evo Morales dismantled the country's Constitutional Tribunal before voters approved the new Constitution in 2009.[125] Similar to Uribe, Morales was a popular leader who commanded a broad supporting coalition that was becoming hegemonic in Bolivian politics. However, the Bolivian judiciary did not have the institutional strength which supported the Colombian Court in its challenge to Uribe.[126] And, unlike in Chile, where the Constitutional Court was able to pressure Pinochet into accepting its pro-democracy decisions because of his regime's interests in perpetuating its constitutional scheme, the Bolivian judiciary was part of the constitutional scheme that Morales was trying to replace. Thus, the costs of challenging the Court were not sufficiently high to deter the government.

As these examples indicate, if judges predict that there is a high probability of backlash based on the regime's tolerance levels and the expected costs of noncompliance, then following a survival strategy will make more sense than directly confronting the government. If a *Marbury*-style decision is possible, judges have more to gain by pursuing the first step of that strategy than by avoiding the case entirely, or acquiescing to the regime's position. However, if judges predict that the tolerance levels are sufficiently high or that the costs are sufficiently low, they should not follow a survival strategy and should instead confront the regime.

One way to do that is through what I call the *constitutional paradox.* The paradox is an important strategy for judges because it affords them one way to successfully challenge the regime in high-stakes cases where the regime's tolerance interval is narrow. In order for the paradox to achieve this result, judges need to increase the costs of disobeying or rejecting their decision, and push the regime to accept the unfavorable judgment. In order to trigger the paradox, judges must issue a decision that is unfavorable for the regime and which implicates an essential norm or institution that the regime will break if disobeys the decision. That norm or institution needs to be connected to a long-term goal, such as maintaining the credibility of the regime's promises,

125. *See* Castagnola & Pérez-Liñán, *supra* note 31, at 296–302.

126. *Id.* at 293.

[T]he combination of weak public support for the judiciary, fledgling activism on the part of the constitutional tribunal, and legislative deadlocks preventing the appointment of justices produced an explosive mix that led to the rapid downfall of the new model of judicial review less than a decade after its inauguration.

the consistency of the regime's self-legitimization narrative—which might be relevant for keeping the regime's supporters on board—or otherwise avoiding in the risk of losing power. If the regime chooses to exact reprisal against the judges or the court, it will need to find a way of doing so without compromising the long-term goal—and because that simply may not be possible in some cases, the constitutional paradox can reduce the possibility of political backlash.

Judges will not be able to trigger a constitutional paradox in every case. Indeed, the specific conditions under which they did in the example from Chile, discussed in the following Parts, are unlikely to be closely replicated elsewhere. Nevertheless, when feasible, the paradox remains a useful strategy for judges seeking to enforce democratic values against sitting or aspiring authoritarians.

II. THE PINOCHET DICTATORSHIP AND THE CHILEAN CONSTITUTIONAL COURT

The Pinochet Dictatorship governed Chile between September 1973 and March 1990. When a military coup put an end to the administration of the democratically elected socialist President Salvador Allende, the Congress and the recently created Constitutional Court were shuttered as well.[127] Instead of democratic governance, a Junta composed of all the commanders of the armed forces and the police took control of the country.[128] General Augusto Pinochet, the army's commander, was the head of the executive branch, while the legislative and constitution-making powers resided in the Junta more generally. Although the military regime neither replaced sitting judges nor made any changes to the Supreme Court,[129] judges quickly recognized the dictatorship's authority. Those judges were not a threat to the regime.[130]

127. The Chilean Constitutional Court was created in 1970 by an amendment to the 1925 Constitution. Partly based on the European model of judicial review, the Court was not part of the judiciary, but rather specialized body focused on reviewing legislation. On this first version of Chile's Constitutional Court, see ENRIQUE SILVA C., EL TRIBUNAL CONSTITUCIONAL DE CHILE (1971–1973) 38 (2d ed. 2005); see also generally Sergio Verdugo, *Birth and Decay of the Chilean Constitutional Tribunal (1970–1973): The Irony of a Wrong Electoral Prediction*, 15 INT'L J. CONST. L. 469 (2017).

128. On the judiciary during this period, see generally HILBINK, *supra* note 30, at 102–76.

129. Not to be confused with the distinct Constitutional Court, the Chilean Supreme Court was the apex court of the judiciary.

130. *See supra* Section I.A.

The Supreme Court tended to avoid reviewing the regime's decrees,[131] and the Supreme Court and the lower appellate courts frequently declined the thousands of *habeas corpus* petitions presented to them by Chileans who had been subjected to arbitrary prosecution and detention by the regime.[132] When the dictatorship systematically violated human rights and neutralized the political opposition, judges generally abdicated their role in defending democratic values.[133]

The Pinochet regime was a right-wing dictatorship that promised to end Marxism, restore order, and then send the military back to its barracks once the job was done so that a new form of democracy—a *protected* democracy—could begin anew. The regime initially presented itself, albeit not explicitly, as a sort of commissarial dictatorship[134] that aimed to use the military to protect individual rights and restore the rule of law. Nevertheless, the regime quickly assumed real constituent power, closed key institutions of the 1925 Constitution, and modified the Constitution by issuing decrees (*decretos leyes*) instead of following the Constitution's amendment procedures.[135] The dictatorship frequently used the language of "democracy" and the "law" to legitimize its authoritarian rule, which—despite the seventeen years during which Pinochet remained in power—was typically

131. Renato Cristi, *The Metaphysics of Constituent Power: Schmitt and the Genesis of Chile's 1980 Constitution*, 21 CARDOZO L. REV. 1749, 1770 (2000).

132. *See* COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, INFORME DE LA COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, 87–91 (1991) (Chile). [hereinafter INFORME RETTIG].

133. On the role ordinary judges played during the dictatorship in connection with human rights violations, see *id.* at 85–93.

134. Of course, the Junta was not a true commissarial dictatorship. *See* Renato Cristi, *supra* note 131, at 1769. The idea of a "commissarial dictatorship" is widely discussed in the literature. Despite criticisms I cannot examine here, the commissarial dictatorship can be seen as a republican instrument to temporarily empower an authority to take measures that would be unconstitutional during normal times in order to pursue a specific task aimed at putting an end to a crisis. On the idea of the commissarial dictatorship, see CARL SCHMITT, DICTATORSHIP: FROM THE ORIGIN OF THE MODERN CONCEPT OF SOVEREIGNTY TO PROLETARIAN CLASS STRUGGLE (Michael Hoelzl & Graham Ward trans., 2014).

135. Renato Cristi argues that the influence of Jaime Guzmán, a leading advisor of Pinochet, was crucial for understanding how the regime assumed constituent power. Cristi, *supra* note 131, at 1767–72; *see* generally RENATO CRISTI, EL PENSAMIENTO POLÍTICO DE JAIME GUZMÁN: UNA BIOGRAFÍA INTELECTUAL (2d ed. 2011). For an alternative view, see Fernando Atria Lemaitre, *Sobre la Soberanía y lo Político*, 12 DERECHO & HUMANIDADES 47,48–51 (2006) (Chile) (arguing, among other things, that there were reasons to think that, in the beginning, the dictatorship may have been, or understood itself as, a commissarial dictatorship.).

presented as temporary.[136] This characterization of the dictatorship as a transitional caretaker between democratic regimes was frequently used by the dictatorship's leaders to defend the regime, to justify the role of the armed forces as guardians of the Chilean republic, and maintain the cohesion of the regime's supporting coalition.[137]

Although a significant part of the regime's supporters expected the military to fulfill its promise and eventually put an end to the dictatorship, the Junta refused to set a clear timetable for a future transition to democracy. In Pinochet's words, the government "only had goals, not deadlines."[138] However, when the Junta and some of its advisors were considering an early draft of a constitutional provision which would have given Pinochet the title of "President of the Republic" for a sixteen-year term, its advisors noted that empowering Pinochet for such a long period could be seen as breaking the promise that the regime had made to restore democracy.[139] After listening to one of his advisors, Pinochet decided that it would be better to have a plebiscite in the middle of that period so that citizens could confirm his mandate. Thus, the final version of that constitutional provision stated that Pinochet was going to serve for eight years beginning in 1980, and that a plebiscite would be held in 1988 to confirm his "presidency" for another eight-year term.[140]

136. *See, e.g.*, Memorandum, Comisión de Estudios de la Nueva Constitución Política de la República de Chile [Comission on the Study of the New Political Constitution of the Republic of Chile], *Metas u Objetivos Fundamentales para la Nueva Constitución* [Fundamental Goals or Objectives for the New Constitution] (Nov. 26 1973), paras. 2, 4, 5 (describing the importance of human rights, democracy, and popular participation in drafting the Junta's new constitution); Augusto Pinochet, Discurso en Cerro Chacarillas, con Ocasión del Día de la Juventud [Speech in Cerro Chacarillas, on the Occasion of Youth Day] (July 9, 1977) (affirming the Junta's project of creating "a new democracy that is authoritarian, protected, inclusive, technified and with authentic social participation . . . . ").

137. Supporting coalitions typically play a crucial role in understanding the politics of authoritarian regimes. For example, authoritarian regimes need supporters to enforce their policies, keep control of the population, build and run governmental institutions, among many other tasks. On the politics of authoritarian regimes, see generally MILAN W. SVOLIK, THE POLITICS OF AUTHORITARIAN RULE (2012).

138. *See* Verónica Valdivia Ortiz de Zárate, *"¡Estamos en Guerra, Señores!" El Régimen Militar de Pinochet y el "Pueblo", 1973–1980,* 43 HISTORIA 163, 167 (2010) (Chile) ("[el] gobierno…solo había metas, no plazos") (translation is my own).

139. *See* ASCANIO CAVALLO, MANUEL SALAZAR & OSCAR SEPÚLVEDA, LA HISTORIA OCULTA DEL REGIMEN MILITAR. HISTORIA DE UNA ÉPOCA, 1973–1988, at 272 (1997).

140. *Id.* at 272–73; HERALDO MUÑOZ, THE DICTATOR'S SHADOW: LIFE UNDER AUGUSTO PINOCHET 127–28 (2008).

The constitutional plan was designed to help Pinochet to win the 1988 plebiscite,[141] mirroring the tightly controlled 1980 plebiscite approving the regime's Constitution in the first place.[142] Pinochet probably envisioned repeating the 1980 strategy for the 1988 plebiscite, which he also expected to win.[143] Indeed, the electoral regulations enacted by the Junta, which were vital for understanding the conditions under which the 1988 plebiscite was going to take place, severely limited the political rights of the opposition and, as I will explain later,[144] prevented any judicial supervision of the electoral process.

However, as the episode with Pinochet and his advisors illustrates, maintaining the regime's self-legitimization narrative was important for keeping Pinochet's supporting coalition together. After all, the coalition included both soft-liners like former President Jorge Alessandri and hard-liners like Hugo Rosende, a conservative politician and legal scholar who served in different positions within the regime, including as Secretary of Justice. The self-legitimization narrative was helpful for maintaining cohesion amongst the diverse views that existed within the regime. It is important to bear in mind that some of the disagreements that existed within the regime were between the main leaders of the regime—even between the members of the Junta. However, the regime's strategy also included decision-making procedures that could show a unified front. Thus, the Junta was supposed to make its decisions unanimously. As Robert Barros' work has shown, these dynamics and decision-making procedures led to an institutional model with internal checks.[145] Although Barros probably goes too far in claiming that Pinochet's government was constrained

141. GENARO ARRIAGADA, PINOCHET: THE POLITICS OF POWER 46 (Nancy Morris et al. trans.,1988).

142. The 1980 plebiscite failed to meet minimum democratic guarantees. *See generally* CLAUDIO FUENTES, EL FRAUDE (2013).

143. Although many polls showed that Pinochet was likely to lose the election, he "dismissed them as deliberatively slanted, clinging instead to more optimistic official data and the high number of voters who described themselves as "undecided". PAMELA CONSTABLE & ARTURO VALENZUELA, A NATION OF ENEMIES: CHILE UNDER PINOCHET 305 (1991). For discussion of some of the polls that Pinochet dismissed, see CARLOS HUNEEUS, THE PINOCHET REGIME 420 (2007); Roberto Méndez et al., *¿Por Qué Ganó el "No"?*, 33 REVISTA DE ESTUDIOS PÚBLICOS [ESTUDIOS PÚBLICOS] 83, 85–89 (1989) (Chile).

144. *See infra* Part II.

145. *See* BARROS, *supra* note 10, at 255–307; Barros, *Dictatorship and the Rule of Law*, *supra* note 10, at 196–203; Barros, *Personalization and Institutional Constraints*, *supra* note 10, at 16–18;

by institutional limits that resembled the idea of constitutionalism,[146] his account of some of the Junta's disagreements is still useful because those constraints also partly shaped the regime's constitutional plans. Indeed, members of the regime's supporting coalition were divided about how the transition to democracy should operate, and they reminded each other that the dictatorship's project included, eventually, the goal of restoring civilian rule. Episodes such as General Leigh's resignation from the Junta, the departure of former right-wing President Jorge Alessandri from the dictatorship's State Council, and the agreement that many right-wing party leaders made with the opposition—an agreement that proposed significant constitutional changes[147]—reveal that many members of the regime's supporting coalition took the promise of returning to civilian rule seriously. Even though Pinochet disagreed with them, he needed to maintain the regime's narrative as a temporary dictatorship and therefore never stopped promising an eventual transition to democracy.

The 1980 Constitution played an important role in building the credibility of the regime's promise to return to democracy, and both the regime and many of its supporters considered it to be the regime's most important legacy.[148] Written by a committee composed of legal scholars and revised by the State Council and the Junta's advisors, the Constitution was also the principal legal instrument regulating, coordinating,[149] and providing an outward appearance of legal legitimacy

146. BARROS, *supra* note 10, at 72. Although the idea of constitutionalism can be understood in different ways, it should be understood in the context of Barros' argument as associated with the idea of a limited government where political power is constrained. *See* Jeremy Waldron, *Constitutionalism: A Skeptical View*, *in* CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 267, 270–73 (Thomas Christiano & John Philip eds., 2009) (discussing and criticizing constitutionalist approaches that focus primarily on constraints on the state that). For a modest defense of using the idea of constitutionalism where some norms reflect its commitments in authoritarian settings, see generally Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015).

147. For important testimonies assessing the National Agreement for the Transition to a Full Democracy and its meaning, see generally ACUERDO NACIONAL: SIGNIFICADOS Y PERSPECTIVAS (Matías Tagle D. ed., 1995) (compiling the testimonies of individuals involved in the drafting and signing of the agreement).

148. CONSTABLE & VALENZUELA, *supra* note 143, at 311 (1991); J. Samuel Valenzuela, *La Constitución de 1980 y el Inicio de la Redemocratización en Chile* 24, (Kellog Inst. Int. Stud., Working Paper No. 242, 1997), https://kellogg.nd.edu/sites/default/files/old_files/documents/242_0.pdf [https://perma.cc/N6T4-FD7E].

149. The regulatory and coordinative nature of the 1980 Constitution aligns well with some of the constitutional functions identified in the literature on constitutions in authoritarian regimes. For example, Tom Ginsburg and Alberto Simpser use Barros' work to argue that the 1980 Constitution "facilitated coordination among the various military branches that composed the junta" and that coordination "is a ubiquitous need of government that can be

for the regime's institutions.[150] The Constitution also provided critical rules for the country's transition to democracy, and placed restrictions on the way the future democratic system would operate. One of the ways in which it did so was by including a set of *authoritarian enclaves*, or provisions designed to ensure that future legislation would be compatible with the dictatorship's main policies and that the military would keep some control over the country even after the dictatorship ended.[151] Those enclaves included, for example, established unelected positions in the senate, an electoral system that gave advantages to the right-wing coalition,[152] supermajority rules for modifying amnesty laws, and barriers to removing the commanders of the armed forces without the consent of the National Security Council, among others.[153]

facilitated by formal written constitutions, facilitating elite cohesion." Tom Ginsburg & Alberto Simpser, *Introduction* to CONSTITUTIONS IN AUTHORITARIAN REGIMES 3 (Tom Ginsburg & Alberto Simpser eds., 2013). They explain that constitutions in authoritarian regimes can also serve as "operating manuals," "billboards," "blueprints," and "window dressing." *Id.* For a useful overview of these functions, see Tushnet, *supra* note 146, at 422–431.

150. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–95, 1803–06 (2005) (discussing the idea of legal legitimacy of a constitution and its connections with other types of legitimacy).

151. There is an extensive literature criticizing these enclaves. *See generally, e.g.*, Grupo de los 24, *Las Críticas del Grupo de los 24*, APSI, Mar. 10 to 23, 1981 (Chile), at 1; Grupo de los 24, *Informe del Grupo de "Los 24,"* REVISTA HOY, Oct. 17 to 23, 1979 (Chile), available at https://www.archivochile.com/Partidos_burguesia/doc_gen/PBdocgen0013.pdf [https://perma.cc/VBP9-T2GV] [hereinafter Grupo de los 24, *Informe*]; GRUPO DE LOS 24, LAS PROPUESTAS DEMOCRÁTICAS DEL GRUPO DE LOS 24 (Patricio Chaparro ed., 1992); FRANCISCO CUMPLIDO, ¿ESTADO DE DERECHO EN CHILE? (1983); Christian Suárez, *La Constitución Celda o "Straightjacket Constitution" y la Dogmática Constitucional*, 24 UNIVERSUM 248 (2009) (Chile); Eric Palma, *De la Carta Otorgada de 1980 a la Constitución Binominal de 2005*, 13 DERECHO & HUMANIDADES 41 (2008); Javier Couso & Alberto Coddou, *Las Asignaturas Pendientes de la Reforma Constitucional Chilena*, *in* EN EL NOMBRE DEL PUEBLO: DEBATE SOBRE EL CAMBIO CONSTITUCIONAL EN CHILE 191 (Claudio Fuentes ed., 2010); FERNANDO ATRIA, LA CONSTITUCIÓN TRAMPOSA (2013).

152. Gideon Rahat & Mario Sznajder, *Electoral Engineering in Chile: The Electoral System and Limited Democracy*, 17 ELECTORAL STUD. 429, 430–30 (1998); Daniel Pastor, *Origins of the Chilean Binominal Election System*, 24 REVISTA DE CIENCIA POLÍTICA 38, 39–42 (2004) (Chile).

153. Some of the authoritarian enclaves were softened or eliminated through the 1989 constitutional reforms, while others were eliminated by later reforms in 2005. On the 1989 reforms, see generally CARLOS ANDRADE GEYWITZ, REFORMA DE LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE DE 1980 (1991); Fredrik Uggla, *"For a Few Senators More"? Negotiating Constitutional Changes During Chile's Transition to Democracy*, 47 LAT. AM. POL. & SOC'Y 51 (2005); Claudia Heiss & Patricio Navia, *You Win, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy*, 49 LAT. AM. POL. & SOC'Y 163 (2007); Claudio Fuentes, *Shifting the Status Quo: Constitutional Reforms in Chile*, 57 LAT. AM. POL. & SOC'Y 99 (2015); CLAUDIO FUENTES SAAVEDRA, EL PACTO (2012).

The Constitution also established a seven-member Constitutional Court with ex ante judicial review powers. Based partly on the European model of judicial review, the Court was not part of the judiciary, but rather a separate institution with special functions. The Court was intended to serve at least four purposes for the regime.[154] First, as a sort of one-sided constitutional insurance favoring the regime,[155] it had a long-term mission to guarantee that legislation enacted by any future elected congress would be in line with the Pinochet Constitution.[156] Second, it had a short-term mission to rubberstamp legislation enacted by the Junta[157] and provide legal legitimacy to the government. Third, if appropriate, it could help to solve legal disagreements that might arise within the Junta when it was considering legislation. Fourth, it could ban unconstitutional political associations and even punish political leaders of the opposition.[158]

The Constitution limited the Court's independence by controlling the appointment of all the judges and providing for renewable judicial terms that lasted eight years.[159] Further, unlike in other civil law countries,[160] judicial dissenting opinions are published in Chile and so

154. I have elaborated on each of these goals elsewhere. *See generally* Verdugo, *supra* note 9.

155. For more indepth discussion of judicial review as political insurance, see generally Epperly, *The Provision of Insurance*, *supra* note 21; Dixon & Ginsburg, *supra* note 17.

156. *E.g.*, Grupo de los 24, *Informe*, *supra* note 151, ¶ 10; Javier Couso, *The Judicialization of Chilean Politics: The Rights Revolution that Never Was*, *in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 105, 109 (Rachel Sieder et al. eds., 2005); Amaya Alvez Marín, *Forcing Consensus: Challenges for Rights-Based Constitutionalism in Chile*, *in* RIGHTS IN DIVIDED SOCIETIES 245, 252 (Colin Harvey & Colin Schwartz eds., 2012); Felipe Meléndez Ávila, *La Influencia del Control Preventivo en el Diseño Normativo del Régimen Presidencial Chileno*, 21 ANUARIO IBEROAMERICANO JUSTICIA CONSTITUCIONAL 81, 96 (2017); FRANCISCO ZÚÑIGA URBINA, ELEMENTOS DE JURISDICCIÓN CONSTITUCIONAL: TOMO II 77 (2002).

157. Patricio Navia, *The History of Constitutional Adjudication in Chile and the State of Constitutional Adjudication in South America*, 2 ASIAN J. LAT. AM. STUD. 1, 27 (1999).

158. Aldunate, *supra* note 9, at 59.

159. The Supreme Court—which had proven its loyalty to the dictatorship—appointed three of its judges to the Constitutional Court, serving both courts simultaneously. Pinochet and the Junta appointed one judge each, and the National Security Council—an institution led by Pinochet and composed of the Junta members and other close collaborators—appointed two other judges. The regime controlled all the appointment mechanisms. *See* Grupo de los 24, *Informe*, *supra* note 151, ¶ 7; Alejandro Silva Bascuñán, *Las Fuerzas Armadas en la Constitución*, 37/38 REVISTA DE DERECHO PÚBLICO [DERECHO PÚBLICO] 137, 155 (1985) (Chile) (arguing against giving the National Security Council the power to appoint judges to the Constitutional Court).

160. On the diverse ways in which constitutional courts are allowed—or not—to release dissenting opinions, see Pasquale Pasquino, *E Pluribus Unum—Disclosed and Undisclosed Vote in Constitutional/Supreme Courts*, *in* SECRECY AND PUBLICITY IN VOTES AND DEBATES

everyone—including the regime's leaders—could know how an individual judge voted. These rules might strengthen the regime's control over the appointed judges.[161] As such, the regime was able to monitor judges' voting behavior and, if the voting record strayed too far from the regime's interests, the regime had the option of not renewing the judge's tenure.

Because the elections for the future Congress were slated to occur in 1989, the eight-year terms for Constitutional Court judges gave the regime the opportunity to review all of the judges' terms before the elected legislature came into being. Judges were aware of this implicit Damocles' sword of non-reappointment which hung over their heads. The judges of the Constitutional Court were also vulnerable to influence by the regime because, unlike other judges who served full-time in the judiciary, they were only needed part-time in order to adjudicate the low volume of cases which fell within the Court's jurisdiction. Because of this, some of them could continue to serve in other positions either in the private sector or within the regime, such as legal advisors to the Junta. These positions could be quickly withdrawn because these positions were generally not subject to the protected tenures of judicial office.[162]

Even though the dictatorship expected the Court to be complicit[163] because it had designed it as a right-wing institution,[164] the Court would play an essential and unexpected role in the design of the electoral rules for the 1988 plebiscite. The 'No' vote, which was a vote to remove General Pinochet from the 'presidency,' finally won that plebiscite, and Pinochet and the Junta were forced to go back to the barracks. Part III, which follows, explains how the Court challenged the Pinochet regime, and Part IV elaborates on why the regime chose to abide by those unfavorable rulings.

196 (Jon Elster ed., 2015); KATALIN KELEMEN, JUDICIAL DISSENT IN EUROPEAN CONSTITUTIONAL COURTS: A COMPARATIVE AND LEGAL PERSPECTIVE (2018).

161. Teodoro Ribera, *Función y Composición del Tribunal Constitucional de 1980*, 27 ESTUDIOS PÚBLICOS 77, 105-106 (1987); Gastón Gómez Bernales, *La Reforma a la Jurisdicción Constitucional: El Nuevo Tribunal Constitucional Chileno*, *in* REFORMA CONSTITUCIONAL 651, 660 (Francisco Zúñiga Urbina ed., 2005). *See also* Grupo de los 24, *Informe*, *supra* note 151, ¶ 7.

162. One exception to this rule were the judges of the Supreme Court who simultaneously served on the Constitutional Court, and whose tenures in both positions were protected. *See supra* note 159 and accompanying text.

163. HUNEEUS, *supra* note 143, at 399.

164. LOIS HECHT OPPENHEIM, POLITICS IN CHILE: DEMOCRACY, AUTHORITARIANISM, AND THE SEARCH FOR DEVELOPMENT 129 (2d ed. 1999); CARLOS HUNEEUS, LA DEMOCRACIA SEMISOBERANA: CHILE DESPUÉS DE PINOCHET 201 (2014).

III. CHALLENGING THE PINOCHET DICTATORSHIP

The Constitutional Court established by the Pinochet dictatorship evinced a largely authoritarian predisposition that was useful for the regime in achieving its goals.[165] The Court used the "militant democracy" clause that the constitutional drafters had borrowed from the German Constitution to ban political organizations,[166] provide legal legitimacy for the Junta's legislation,[167] and generally develop a judicial posture that was deferential to the regime.[168] However, despite this track record, the Court also helped advance the democratization agenda in Chile through a string of cases in which it established the conditions that would help the "No" campaign defeat Pinochet in the 1988 plebiscite.[169]

The first, and arguably most important, case involved the organic statute establishing and regulating the Electoral Court, which was the only court that could provide judicial oversight of the plebiscite.[170] The Constitutional Court was set to review the draft law automatically because the 1980 Constitution, partly following the French model of ex-ante review,[171] *required* that the Court approve all the

165. Sergio Verdugo, *The Civil Law Tradition, the Pinochet Constitution and Judge Eugenio Valenzuela*, *in* TOWERING JUDGES, *supra* note 3, at 290, 300.

166. Aldunate, *supra* note 9, at 66.

167. Navia, *supra* note 157, at 27.

168. Teodoro Ribera, *El Tribunal Constitucional y su Aporte al Desarrollo del Derecho. Aspectos Relevantes de sus Primeros 59 Fallos*, 34 ESTUDIOS PÚBLICOS 195, 210 (1989); Patricio Zapata, *¿Alternativas Menos Drásticas? Notas Sobre el Uso y Abuso de Prevenciones, Exhortaciones y Consejos por el Tribunal Constitucional Chileno*, 63 DERECHO PÚBLICO 601–611 (2001).

169. Constitutional judges were divided into two groups, and the group led by Judge Eugenio Valenzuela—who had been appointed by the National Security Council—managed to enact the rulings that ordered the regime to hold the plebiscite under fairer conditions. *See*, Verdugo, *supra* note 165, at 301–03; *see also*, Marisol Peña T., *El Perfil de un Juez Constitucional: El Ejemplo de Eugenio Valenzuela Somarriva*, *in* GRANDES JUECES CHILENOS 107, 119–23 (José Francisco García G. & Rafael Pastor B. eds., 2017); Sergio Verdugo, *Limited Democracy and Great Distrust. John Hart Ely in Latin America*, INT. J. CONST. L. (forthcoming 2021) (manuscript at 10–12) (on file wwith author).

170. Tribunal Constitucional [T.C.] [Constitutional Court], 24 septiembre 1985, "Control de Constitucionalidad del Proyecto de Ley Orgánica Constitucional Sobre Tribunal Calificador de Elecciones" [Constitutionality Review of the Draft Constitutional Organic Law on the Qualifying Electoral Court], Rol de la causa: 33-1985, JURISPRUDENCIA CONSTITUTIONAL [J.C.] vol. I & II, p. 202 (Chile).

171. On the French constitutional review model of the organic laws, see generally Hubert Amiel, *Les Lois Organiques*, REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER [RDP], no. 2, Mar.-Apr. 1984, at 405 (Fr.); Jean-Pierre Camby, *La Loi Organique Dans a Constitution de 1958*, RDP, no. 5, Sept.-Oct 1989, at 1401; *see also*, ALEC

organic laws enacted by the Junta. The Junta proposed that the Electoral Court should be implemented after, and not before, the 1988 plebiscite, and the regime expected the Court to rubber-stamp the draft law. This was a significant decision because the Electoral Court would have been the only institution which could have provided judicial oversight of the plebiscite under the Pinochet Constitution. Unsurprisingly, the Junta wanted the plebiscite to be held without judicial oversight. This outcome would have harmed the transparency of the electoral process and the chances of the regime's political opponents to prevent irregularities, and improved the capabilities of the regime's agents to engage in illegal practices that could tilt the outcome of the plebiscite. To be sure, the 1980 Constitution had a provision authorizing the way the Junta regulated the establishment of the Electoral Court,[172] and one can make a strong argument that the Junta's bill was merely detailing and enforcing the Constitution.

But instead of rubberstamping the law and permitting an unsupervised vote, the Court creatively interpreted the Constitution and challenged the regime by holding that electoral principles in the Constitution required the creation of the Electoral Court before the 1988 plebiscite.[173] In the majority opinion, the Court explicitly decided not to follow the literal meaning of the constitutional provision.[174] The Court instead identified a tension between the literal meaning of the constitutional provision and the principles of the "public electoral system" included in Article 18 of the Constitution,[175] and found that a "systematic" interpretation of the Constitution required enforcing the democratic principles.[176] The Court argued that having an electoral court was an essential requirement of the electoral process, and that the plebiscite could not be legitimate without one.[177] It also declared that the plebiscite was supposed to be "the expression of the will of the people, who, exercising sovereignty, will make a decision on the most

STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE. THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (1992); Marie-Claire Ponthoreau & Fabrice Hourquebie, *The French Conseil Constitutionnel: An Evolving Form of Constitutional Justice*, 3 J. COMPAR. L. 269 (2008); Alec Stone, *The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe*, 19 POL'Y STUD. J. 81 (1990).

172. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 11.

173. T.C., 24 septiembre 1985, Rol no. 33-1985, J.C. vol. I & II, p. 202.

174. *Id.* at 204.

175. *Id.* at 204–05.

176. *Id.* at 207 ("The Constitution is an organic whole and the meaning of its provisions should be determined in such a way that proper concordance and harmony exist between them, excluding any interpretation that might lead to nullifying or rendering ineffective any provision of it.") (Translation is my own). *See also*, Ribera, *supra* note 168, at 213, 217.

177. T.C., 24 septiembre 1985, Rol no. 33-1985, J.C. vol. I & II, pp. 202, 205.

important political act with which there will begin the period in which all the permanent provisions of the Constitution come into full effect."[178] It then insisted that a contrary interpretation would violate "not only the spirit of the Constitution but also common sense, which is the basis of all logical interpretation," since such an interpretation that would amount to harming the plebiscite's legitimacy.[179]

The majority opinion was surprising, not only because it defied the regime's expectations, but also because its reasoning diverged sharply from the originalist and literalist tradition of constitutional interpretation in Chile.[180] However, despite this break in jurisprudential methods, the ruling could nonetheless be readily defended within the framework of the Constitution because it helped implement the Electoral Court, which was itself an institution envisioned and regulated by the Constitution. The Court's decision was also welcomed by some supporters of the Pinochet regime who thought that the ruling was essential to legitimizing the plebiscite's outcome and the extension of the Pinochet administration.[181] Judge Valenzuela, who wrote the majority decision, later gave the names of scholars who supported the decision, and claimed that a majority of legal academics agreed with the ruling.[182]

The decision that forced the Junta to implement the Electoral Court before the plebiscite helped create fairer electoral conditions, which reduced the regime's options to influence the electoral process. This was a "decisive step towards the transition" to democracy.[183] Indeed, because of the Court's decision, the dictatorship failed to secure

178. *Id.*at 205–06 (Translation is my own).

179. *Id.* (Translation is my own.).

180. PATRICIO ZAPATA LARRAÍN, JUSTICIA CONSTITUCIONAL 203–09 (2008). The dissenting judges, in contrast, embraced that tradition, and aligned themselves with the dictatorship's plan to regulate the plebiscite with favorable rules for the regime.

181. For example, consider the defense made by one of the regime's legal advisors, who argued that others within the regime had a similar interpretation. *See* Carlos Cruz-Coke, *La Sentencia del Tribunal Constitucional de 24 de Septiembre de 1985*, 37/38 DERECHO PÚBLICO 143–48 (1985).

182. EUGENIO VALENZUELA SOMARRIVA, CONTRIBUCIÓN DEL TRIBUNAL CONSTITUCIONAL A LA INSTITUCIONALIZACIÓN DEMOCRÁTICA 24–25 (2003). For examples of academic discussion of the Constitutional Court's ruling, see generally Mario Verdugo Marinković, *Notas a un Fallo del Tribunal Constitucional*, 16 REVISTA CHILENA DE DERECHO 391 (1989); José Luis Cea Egaña, *Influencia del Tribunal Constitucional en el Proceso de Institucionalización Política*, 15 REVISTA CHILENA DE DERECHO 205 (1988); PATRICIO ZAPATA LARRAÍN, LA JURISPRUDENCIA DEL TRIBUNAL CONSTITUCIONAL: PARTE GENERAL (2002); ZAPATA LARRAÍN, *supra* note180.

183. Óscar Godoy Arcaya, *La Transición Chilena a la Democracia: Pactada*, 74 ESTUDIOS PÚBLICOS 79, 92 (1999).

the favorable conditions that benefited it during the 1980 plebiscite,[184] and the judges of the Court were aware that their decision would make the 1988 plebiscite more competitive.[185] However, this was merely the beginning of the Court's pro-democracy work, and it would continue to improve electoral conditions through other cases.

Just the following year, in 1986, the Court reviewed the draft law that would regulate the electoral registration process and establish the electoral service agency or *Servicio Electoral*. In that case, the Court used an expansive interpretation of its own power to review organic laws to evaluate the constitutionality of many of the organic statute's provisions[186] and struck down twelve provisions as violating constitutional principles, such as equality and due process.[187] Also, within the ruling, the Court stated that the procedure to register citizens and foreigners in the electoral registrar should be limited to a mere formal review of whether those people fulfilled the specific constitutional requirements, as opposed as a more substantive review of the conditions that allowed each citizen to participate in the plebiscite.[188] As a result, the Court managed to reduce the discretion of the director of the electoral agency to cancel the citizens' voter registrations.

The judges went one step further in 1987, when the Constitutional Court prevented the Junta from promulgating a set of provisions included in the bill establishing the regulations for the creation and internal organization of political parties.[189] The Court again took an expansive approach to its jurisdiction,[190] and used that opportunity to strengthen the political rights contained in the Constitution by

184. CONSTABLE & VALENZUELA, *supra* note 148, at 303. According to Judge Valenzuela, Hugo Rosende—the Minister of Justice and an influential advisor of the dictatorship—wanted the 1988 plebiscite "to be like the 1980 plebiscite, and he thought that he could manipulate [the Court]." The Court, however, pushed back and "argued that the plebiscite had to be transparent to be constitutional." *Id.*

185. As Judge Valenzuela stated, "[w]e made the process something people could believe in." *Id.* at 304 (Translation is my own).

186. T.C., 8 septiembre 1986, "Control de Constitucionalidad del Proyecto de Ley Orgánica Constitucional Sobre Sistema de Inscripciones Electorales y Servicio Electoral" [Constitutionality Review of the Draft Constitutional Organic Law on the Electoral Registration System and Electoral Service], Rol de la causa: 38-1986, J.C. vol. I & II, pp. 222, 223, 224–25, 227 (Chile).

187. *Id.* at 225–26.

188. *Id.* at 223–24. *See also* Ribera, *supra* note 168, at 225–26.

189. T.C., 24 febrero 1987, "Control de Constitucionalidad del Proyecto de Ley Orgánica Constitucional de Partidos Políticos" [Constitutionality Review of the Draft Constitutional Organic Law on Political Parties], Rol de la causa: 43-1987, J.C. vol. I & II, p. 242 (Chile).

190. *Id.* at 244–45.

adopting a broad understanding of the rights of association, political equality, and due process, which were explicitly recognized in Article 19. The Court also used its power to improve the electoral conditions for the 'No' supporters by adopting a series of holdings. First, the Court found that a provision seeking to expand the Court's authority to postpone the creation of a political party was unconstitutional because the Constitution did not include that possibility among the Court's enumerated powers.[191] Second, the Court also enhanced funding opportunities for the opposition by striking down a provision that implicitly forbade non-natural persons—such as NGOs and other associations—from funding political parties.[192] Third, it interpreted the requirements for establishing new political parties in a narrow way,[193] so that others in the future could not interpret them in a way that would expand their meaning, and reaffirmed that independent candidates would be treated equally when registering their candidacies for legislative office.[194] Fourth, the Court invalidated a provision that temporarily barred party organizers from advertising the platform and agenda of newly created political parties in the media because it infringed upon the Constitution's guranteed right of association.[195] Fifth, it struck down the power of the director of the electoral service agency to declare that proposals to establish new political parties were based on documents that were intentinally altered, which would void the proposals, because it violated the Constitution's due process clause.[196] Finally, the Court also invalidated seven provisions that limited the autonomy of political parties in determing their internal organizational structure.[197]

Also in 1987, the Court reviewed the Junta's draft law for regulating the country's electoral system. The Court again took an expansive approach to its jurisdiction,[198] declared six provisions included in that bill unconstitutional,[199] and interpreted two other

191. *Id*. at 250–51. *See also* Ribera, *supra* note 168, at 198–99; Zapata, *supra* note 168, at 606–09.

192. T.C., 24 febrero 1987, Rol no. 43-1987, J.C. vol. I & II, pp. 242, 253.

193. *Id.* at 250.

194. *Id.*

195. *Id.* at 251–52.

196. *Id.* at 257–58.

197. *Id.* at 255–56.

198. T.C., 5 abril 1988, "Control de Constitucionalidad del Proyecto de Ley Orgánica Constitucional Sobre Votaciones Populares y Escrutinios" [Constitutionality Review of the Draft Constitutional Organic Law on Popular Voting and Ballots], Rol de la causa: 53-1988, J.C. vol. I & II, pp. 341, 343–44 (Chile).

199. *Id.* at 354–55.

provisions narrowly.[200] The regulations the Court reviewed took aim at voters who were not members of any political party. For example, the law forbade them from registering as supervisors during the voting and counting process. The Court ruled that some of provisions limiting the rights of independent citizens violated the principle of political equality.[201] It also pushed the Junta to indicate the precise date of both the plebiscite[202] and the presidential elections that would need to be held were Pinochet to lose the plebiscite. The Junta had previously established a range of dates for the plebiscite: between thirty and sixty days after the Junta had announced the dictatorship's candidate. The Junta obeyed the Court's decision and amended the electoral regulation accordingly.[203] This last decision helped the 'No' campaign to organize itself more efficiently.[204]

All three of these important Constitutional Court decisions contributed to securing more favorable electoral conditions for Pinochet's opponents, who organized a successful 'No' campaign and ultimately defeated him in the plebiscite.[205] Although the dictatorship still had some advantages over its opponents,[206] the Court's strategy substantially leveled the playing field.[207] So, given the high stakes for the

200. *Id.*at 351–52, 353.

201. *Id.* at 344–45.

202. *Id.* at 348–49.

203. Ribera, *supra* note 168, at 220. The Court reviewed the modification in T.C., 5 abril 1988, "Control de Constitucionalidad del Proyecto que Modifica la Ley No. 18.700, Orgánica Constitucional Sobre Votaciones Populares y Escrutinios" [Constitutionality Review of the Draft Amendment to the Constitutional Organic Law on Popular Voting and Ballots], Rol de la causa: 56-1988, J.C. vol. I & II, p. 369 (Chile).

204. CAVALLO, SALAZAR, AND SEPÚLVEDA, *supra* note 139, at 477–479.

205. See Eduardo Engel & Achilles Venetoulias, *The Chilean Plebiscite: Projections Without Historical Data*, 87 J. AM. STAT. ASSOC. 933–41 (1992).

206. For example, the regime decided that the electoral platforms would be broadcast on TV during a low-audience time of the day. Arturo Arriagada & Patricio Navia, *La Televisión y la Democracia en Chile, 1988–2008*, *in* COMUNICACIÓN POLÍTICA Y DEMOCRATIZACIÓN EN IBEROAMÉRICA 169–194 (C. Rodríguez & C. Moreira eds., 2009). Also, the regime controlled the agency in charge of supervising the television. Lucas Sierra, *Hacia la Televisión Digital en Chile. Historia y Transición*, 103 ESTUDIOS PÚBLICOS 111, 124 (2006).

207. There are other decisions from the Constitutional Court that also helped the opposition run a more effective campaign, although not all of them implicated challenges to the regime. The Court also rejected arguments made by a TV channel that had petitioned the Court to declare the rule forcing channels to transmit electoral propaganda to be unconstitutional. T.C., 5 abril 1988, Rol no. 56-1988, J.C. vol. I & II, pp. 369, 372–74; *see also* Sierra, *supra* note 206, at 123–24. The 'Yes' campaign had already been running political advertisements on TV, but the 'No' campaign could not access the broadcast TV market until the rule was passed. The importance of TV to the 'No' campaign should not be understated: It allowed Pinochet's opponents to reach a wider audience and the polls showed that the public

dictatorship, why did the Pinochet regime not strike back against the Court?

IV. WHY DID THE PINOCHET REGIME COMPLY WITH THE COURT'S ORDERS?

As discussed above, authoritarian and hybrid regimes possess many tools to influence and manipulate courts—and the Pinochet dictatorship exercised some of them against Chile's Constitutional Court.[208] After obviating the previous Constitutional Court, the dictatorship designed a new one that it envisioned would align with its goals.[209] But, contrary to the regime's expectations, the new Court challenged the government in the high-stakes electoral cases discussed in Part III.[210] Although the dictatorship ultimately complied with the unfavorable rulings, it was not without alternatives. It could have ignored those rulings, threatened and pressured judges to amend their judgments, questioned the Court's jurisdiction, or used other legal institutions—such as the Supreme Court or the Comptroller General—to develop a legal doctrine that would have allowed the regime disregard the Constitutional Court's orders.[211] Because the regime did not in fact use any of these alternatives to complying with the Court's decisions, the model proposed in this Article suggests that the costs involved were too high for the regime to tolerate.

More precisely, the regime complied with the Court's decisions because the expected costs of disobeying them were higher than the costs of compliance. In other words, the utility of preserving the authority of the Constitutional Court outweighed the political risks associated with obeying the Court's decisions. By complying with the

was generally more receptive to the 'No' campaign than to its counterpart. 'As some commentators have suggested, the 'No' campaign's access to TV was "the determinant factor in the outcome of the electoral process." Eugenio Tironi & Guillermo Sunkel, *Modernización de las Comunicaciones y Democratización de la Política. Los Medios en la Transición a la Democracia en Chile*, 52 ESTUDIOS PÚBLICOS 215, 239 (1993).

208. *Supra* Section I.A.

209. *Supra* Part II.

210. *Supra* Part III.

211. The regime did take one action against the Court that may be described as a sanction. When Judge Valenzuela's term expired, the National Security Council chose to not renew it. SERGIO DÍEZ, REFLEXIONES SOBRE LA CONSTITUCIÓN DE 1980, at 391 (2013). Instead, it filled his seat with a right-wing replacement. MARY HELEN SPOONER, THE GENERAL'S SLOW RETREAT: CHILE AFTER PINOCHET 26 (2011). This reprisal is also a form of political backlash, even though a softer one, as it was taken after the regime accepted the unfavorable rulings, in a time when was clear that elected institutions led by civilians will replace the military regime.

Court's orders, the regime secured the effectiveness and authoritativeness of a constitution that included asymmetrical preferences in favor of the regime and the military—e.g., the powers of the National Security Council and supermajoritarian voting requirements for modifying crucial laws approved by the regime—while keeping its supporting coalition together by acting consistent with its self-legitimization narrative that placed emphasis on building solid institutions on the bedrock of a respectable constitution. The political risks consisted of short-term and long-term repercussions. In the short-term, Pinochet risked losing the plebiscite; in the long term, he probably understood that weakening the Constitution may have triggered a chance of prosecution for human rights abuses. Having observed how other former authoritarian leaders in Latin America were prosecuted—in particular, high-ranking officers in Argentina[212]—Pinochet likely understood that no legal or constitutional document could immunize him for long once he was out of power.

Two explanations may help to clarify why the regime acquiesced with the Court's rulings. First, historical evidence suggests that Pinochet expected to win the 1988 plebiscite despite the unfavorable rulings—probably influenced by his advisors and by some polls favorable to the regime the regime that were conducted at that time[213]—which lowered the stakes. Pinochet's mistaken electoral prediction may have lasted until 1988 when some opposition-run polls showed mixed results for the regime.[214] Nevertheless, Pinochet seemed not to trust those polls,[215] preferring instead to rely on the official polls that showed that he was going to win.[216] Some authors have claimed that Pinochet's conviction was, "[i]ronically, the most important guarantee

212. Brian Loveman, *Military Dictatorship and Political Opposition in Chile, 1973–1986*, 28 J. INTER-AM. STUD. & WORLD AFF. 1, 30 (1987).

213. J. Esteban Montes & Tomás Vial, *The Constitution-Building Process in Chile: The Authoritarian Roots of a Stable Democracy*, 12 (Int'l Inst. for Democracy & Electoral Assistance, Working Paper No. S-103 34, 2005); Roberto Garretón, *Chile: Perpetual Transition Under the Shadow of Pinochet*, *in* NEOLIBERALISM'S FRACTURED SHOWCASE 73, 78 (Ximena Barra ed., 2011); PATRICIA ARANCIBIA CLAVEL, CARLOS F. CÁCERES: LA TRANSICIÓN A LA DEMOCRACIA 1988–1990, at 58–59 (2014).

214. For example, a June 1988 poll showed 41% support for the 'No' campaign while only 37% of those polled indicated an intention to vote for Pinochet. The proportion of undecided citizens remained high until the moment of the plebiscite. Tironi & Sunkel, *supra* note 207, at 238.

215. CONSTABLE & VALENZUELA, *supra* note 148, at 305.

216. *Id.* Polls consistently showing victories for the regime were Gallup, Universidad de Chile and Skopus. *See* Maximiliano Jara, *Las Encuestas del Centro de Estudios Públicos en la Coyuntura Plebiscitaria, 1987–1988: Surgimiento, Crítica y Valoración de un Insumo Político*, 26 REVISTA DE HISTORIA (CONCEPCIÓN) 149, at 168 (2019) (Chile).

of a clean vote."[217] However, if Pinochet believed that he was going to remain ruling the country, why would he worry about possible human rights trials that would have become more likely as a result of his undermining the Constitution and the courts? This is the reason why another explanation is needed.

The second possible explanation assumes that Pinochet was aware that the regime's supporting coalition was divided as to how to regulate the transition to democracy. Thus, political and judicial actors could defend the Court's jurisprudence from *within* the regime's coalition. Had Pinochet ignored the Court's rulings, he would have faced the likely cost of dividing the coalition or, at least, harming the interests of a substantial part of the civilians that were supporting the dictatorship. Thus, the Junta had incentives to honor the constitutional arrangements.[218] Disobeying the Constitutional Court could have delegitimized a vital institution of the legal instrument that was keeping the supporting coalition together: the 1980 Constitution. The Constitution was the regime's primary legacy, and the regime needed to secure its implementation before the transition to democracy began. It was also critical for making sure that the authoritarian enclaves were going to stay in place when the civilian government started. The Constitution was a legitimization device that helped to strengthen the credibility of the regime's central promise: that the military will abandon political power once the conditions for a safe return to democracy were met.[219] Risking the effectiveness and legitimacy of the Constitution while risking the authoritarian enclaves was a cost that the Junta was unlikely to pay.

Had either of these two explanations not been present, the regime would have had greater incentives to disregard the Court's decision.

The cost of harming the regime's legacy became higher as fragmentation which already existed within the regime's supporting coalition accelerated.[220] Many members of the regime were supportive of a genuine transition to democracy, and divisions existed even among

217. CONSTABLE & VALENZUELA, *supra* note 148, at 304.

218. *See, e.g.*, Susan Alberts et al., *Democratization and Countermajoritarian Institutions: Power and Constitutional Design in Self-Enforcing Democracy*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 69, 87–94 (Tom Ginsburg ed., 2012).

219. MUÑOZ, *supra* note 140, at 127–28; JEFFREY M. PURYEAR, THINKING POLITICS: INTELLECTUALS AND DEMOCRACY IN CHILE, 1973–1988, at 128–29 (1994).

220. *See* BARROS, CONSTITUTIONALISM AND DICTATORSHIP, *supra* note 10, at 306; Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMPAR. POL. STUD. 189, 196 (2005).

the members of the Junta.[221] As discussed above,[222] the itinerary charted out in the Constitution for returning Chile to a democratic system of government was part of the regime's self-legitimizing narrative. In preparing the 1988 plebiscite, disagreements inside the regime's coalition grew. One example is the way Air Force Commander Matthei, who was also a Junta member, publicly declared that the *Acuerdo Nacional* was "interesting."[223] Because the *Acuerdo Nacional* was a bipartisan agreement between the regime soft-liners and opponents to the dictatorship that aimed to advance the transition in a different way than the one imposed by the 1980 Constitution,[224] Commander Matthei's words were meaningful. Some factions wanted to distance themselves from the dictatorship to "appear eligible to participate in any transition coalition formed when Pinochet might pass from the scene."[225] Consequently, many civilian right-wing politicians emphasized their independence from the regime,[226] and the government started to lose support.

Against this backdrop, some right-wing politicians even suggested that the regime's candidate should be a civilian instead of Pinochet.[227] Admiral Merino, a Junta member, agreed with this approach.[228] Taking the middle ground, Commander Matthei suggested that Pinochet should resign from the military and run as a civilian.[229] Pinochet, however, did not accept these suggestions, just as he had also refused the soft-liners' *Acuerdo Nacional*.

Pinochet could not contradict the Court's rulings because the Court itself was a cornerstone institution of the constitutional order he intended to perpetuate.[230] Recall that some of the regime's supporters

221. Barros, *Personalization and Institutional Constraints*, *supra* note 10, at 16–18.

222. *See* discussion *supra* Part II.

223. MUÑOZ, *supra* note 140, at 153; *see also* OPPENHEIM, *supra* note 164, at 173; José Zabala de la Fuente, *Entretelones del Acuerdo Nacional (Apuntes para Cuando se Escriba la Historia)*, *in* EL ACUERDO NACIONAL: SIGNIFICADOS Y PERSPECTIVAS, *supra* note 147, at 79, 123 (Chile).

224. ACUERDO NACIONAL PARA LA TRANSICIÓN A LA PLENA DEMOCRACIA (1985) (Chile). For further discussion, see generally, EL ACUERDO NACIONAL: SIGNIFICADOS Y PERSPECTIVAS, *supra* note 147.

225. Loveman, *supra* note 212, at 19.

226. Carlos Huneeus M., *La Inauguración de la Democracia en Chile: ¿Reforma en el Procedimiento y Ruptura en el Contenido Democrático?* [*The Inauguration of Democracy in Chile: Reform in the Procedure and Rupture in the Democratic Content?*], 8 REVISTA DE CIENCIA POLÍTICA 22, 77 (1986) (Chile).

227. SPOONER, *supra* note 211, at 14.

228. MUÑOZ, *supra* note 140, at 185.

229. SPOONER, *supra* note 211, at 14.

230. Valenzuela, *supra* note 148.

saw the Court's ruling on the Electoral Court in 1985 as key to legitimizing the 1988 plebiscite,[231] and that the regime's legitimacy depended on a narrative built around the rule of law and focused on creating robust and stable institutions capable of containing abusive or demagogic legislators by strengthening the presidential regime.[232] This strategy relied heavily both on the regime operating within the legal norms it had laid out in the Constitution, and the appearance of judicial independence. The Court itself was a critical part of that strategy, and ignoring its rulings—especially on such an important topic as Chile's eventual return to democracy—would have deepened divisions within the regime's supporting coalition.

Overall, even though key figures within the dictatorship disagreed on how the transition should proceed, they all publicly endorsed the Constitution and the regime's legitimization strategy. Had the dictatorship challenged the Court's interpretation of the Constitution, disobeying or attacking the Court, it would have harmed the legitimacy of the institutions that the regime created to buttress its own legitimacy.[233] Although the stakes were high—the 1988 plebiscite on the regime's continuation would be held under conditions other than those endorsed by Pinochet or his regime—the cost of harming the constitutional order was too high for the dictatorship to accept.

The Court elevated those costs in its electoral case decisions by using the Pinochet Constitution against the regime and taking advantage of constitutional principles that were vital the dictatorship's self-legitimization. By using an institution and a mechanism created by the regime—the Constitutional Court and its mandatory review of organic statutes—and rooting its decisions in norms included in the 1980 Constitution, the Court raised the cost of noncompliance for the regime. The Court's rulings thus forced Pinochet and the Junta into a constitutional paradox: should they challenge the Court on the plebiscite rules and risk the cohesion of the regime and their constitutional plan, or respect those decisions and risk facing the plebiscite in non-ideal conditions? Even though the regime could have ignored or attacked the rulings with legal arguments—e.g., that the Court had exercised its jurisdiction in an irregular way, or interpretated the Constitution in ways that were unfaithful to its authors' intent—the regime would nonetheless have needed to explain to its supporters why it was

231. Indeed, political actors of diverse ideologies and the "immense majority of constitutional scholars" were supportive of the Court's position. VALENZUELA SOMARRIVA, *supra* note 182, at 23; *see also* Cruz-Coke Ossa, *supra* note 181, at 148.

232. Cea Egaña, *supra* note 182, at 208.

233. Montes & Vial, *supra* note 213, at 12.

undermining its own institutions with arguments that were difficult—if not impossible—to square with its legitimization strategy.

Ultimately, after the regime lost the 1988 plebiscite, Pinochet had no choice but to accept defeat and prepare for the return to democracy. However, the Constitution—whose legitimacy the regime chose not to endanger through challenging the Constitutional Court in the electoral cases—would help preserve parts of the dictatorship's influence, and the 1989 constitutional reforms strengthened certain prerogatives for the military in exchange for softening some of the authoritarian enclaves, for example, by lowering the supermajority rules required to approve the organic laws that the Junta had enacted in previous years.[234]

The way in which the Chilean Constitutional Court challenged the Pinochet regime, and came through the experience with its authority intact, shows that certain conditions need to exist in order for a constitutional paradox to work. Although more research is needed in order to understand how the constitutional paradox can function across the board, the example from Chile suggests two preliminary conditions. First, there needs to be an institutional arrangement or norm that is key, or perceived by the regime to be key, to preserving the regime's supporting coalition. Second, judges must be capable of identifying this institutional arrangement or norm, and crafting a judicial decision based on it which forces the regime to challenge the arrangement or norm itself when it challenges the decision.

The more heavily the decision relies on an institutional arrangement or norm that is crucial for the regime's cohesion, the more costly it will be for autocrats or strongmen to disobey it. If the costs are high enough, then the Court can force the government to respect its pro-democracy decisions, even in high-stakes cases. Thus, judges seeking to preserve or advance democratic values should prefer the constitutional paradox strategy to the survival strategies that have become the mainstay of today's literature.

CONCLUSION

Courts in authoritarian or semi-authoritarian regimes can advance different strategies to promote a democratization agenda. However, the judicial strategies which are most commonly invoked in the literature focus primarily on maximizing judicial survival rather than on directly improving democratization goals. Although surivival

234. Uggla, *supra* note 153, at 65; Heiss & Navia, *supra* note 153, at 164.

strategies can be useful—and are sometimes essential—for preserving some small degree of judicial authority, they almost always come at a high price: tolerating an authoritarian policy that harms a crucial principle of democracy or severely damages fundamental rights.

It is rare to encounter a judicial strategy that allows judges to confront authoritarian or hybrid regimes in high-stakes cases without sacrificing judicial independence. The literature typically suggests judges should identify the regime's tolerance levels and limit themselves to confronting it in low-stakes cases. However, under certain conditions, judges can develop strategies to elevate the costs of noncompliance in order to successfully challenge the regime in high-stakes cases. The constitutional paradox, illustrated through the Chilean Constitutional Court's string of decisions concerning the 1988 plebisicte, is one such maneuver.

The ambit of strategies which the constitutional paradox represents broadens the options that constitutional courts have to confront regimes in adversarial settings. To date, the literature on judicial strategy in authoritarian and hybrid regimes principally recognizes that judges can either confront a regime over democratic backsliding at the cost of judicial independence, or develop a survival strategy to preserve judicial independence at the cost of democratic backsliding. So, while there is no guarantee that novel strategies developed beyond the constrains of this false dichotomy will always—or even ever—be successful, strategic approach like triggering a constitutional paradox provide another option for judges who wish to more finely calibrate their concerns with protecting democracy and protecting the courts.

Of course, and unfortunately, it is not always feasible for judges to trigger a constitutional paradox. In Chile, the paradox was made possible because of the regime's expected costs, including the risk of accelerating fragmentation of the regime's supporting coalition. It is also likely that Pinochet's incorrect electoral prediction influenced the decision to abide by the Court's rulings. If the regime had been monolithic in its support of Pinochet, a longer itinerary for the democratic transition, and its conception of how the plebiscite should occur, there would have been significantly more pressure for the regime to ignore or organize a reprisal against the Court. It unlikely that these exact features can present themselves in other settings.

Although the specific context in which the Chilean Constitutional Court's challenge arose is unlikely to be replicated elsewhere, experience in other regimes confirms the underlying logic of the constitutional paradox. Where strongmen or autocrats have disobeyed or attacked courts over adverse judicial decisions, they did so because the expected costs—to their coalitions or key institutions—were more marginal. In Bolivia, the judges of the dismantled Constitutional

Tribunal were not able to confront the government with a constitutional paradox partly because the Morales regime intended to replace the Constitution, and its institutions, entirely.[235] In Venezuela, the Supreme Court supported Chávez's plan to replace the previous Constitution through a constituent assembly,[236] but later failed to impose limits on the constitution-making process.[237] The judges of the Court were unable to trigger a constitutional paradox there because Chávez did not intend to defend the previous Constitution, and the Court had already explicitly supported the regime's plan for a constitutional replacement. Unlike Pinochet, both Morales and Chávez had disciplined supporting coalitions, and were in the process of creating a dominant-party regime. However, were they placed in Pinochet's position, where the coalition was vulnerable to fragmentation and the existing Constitution was critical to the regime's legitimacy, their respective high courts may have been able to successfully challenge them through the constitutional paradox.

Nevertheless, although unlikely, it is possible that a constitutional paradox would have been possible in both Maduro's Venezuela and Morales' Bolivia at later points in time. In the case of Venezuela, the Court may have been able to find a way to use the political principles and structures enshrined in the Chávez Constitution to enforce limits to the constituent assembly that the Maduro regime established between 2017 and 2020.[238] In the case of Bolivia, the Court could have used the text of the 2009 Constitution to prevent President Morales from breaking the Presidential term limits.[239] Of course, the lack of sufficient judicial independence in both countries made it hard for judges to try challenge their regimes, even though the tool of the constitutional paradox was arguably available; in both cases, the courts

235. *See* Landau, *supra* note 12, at 24–31; Martín Mendoza-Botelho, *Revisiting Bolivia's Constituent Assembly: Lessons on the Quality of Democracy*, 29 ASIAN J. LAT. AM. STUD. 19 (2016).

236. *See* Joel I. Colón-Ríos, *Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia*, 18 CONSTELLATIONS 365, 369–72 (2011).

237. Landau, *supra* note 12, at 164; *see generally* Raul A. Sanchez Urribarri, *Courts Between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court*, 36 LAW & SOC. INQUIRY 854 (2011).

238. *See generally* Allan R. Brewer-Carías, *La Inconstitucional Convocatoria de una Asamblea Nacional Constituyente en 2017 Como una Muestra Más de Desprecio a la Constitución*, *in* ESTUDIOS SOBRE LA ASAMBLEA NACIONAL CONSTITUYENTE Y SU INCONSTITUCIONAL CONVOCATORIA EN 2017, at 27 (Allan R. Brewer-Carías & Carlos García Soto eds., 2017) (discussing the unconstitutional features of the 2017 constituent assembly).

239. For critiques of the Bolivian Plurinational Tribunal, see generally, for example, Alan E. Vargas Lima, *La Reelección Presidencial en la Jurisprudencia del Tribunal Constitucional Plurinacional de Bolivia*, 19 REVISTA BOLIVIANA DE DERECHO 446 (2015); Verdugo, *supra* note 14; Landau & Dixon, *supra* note 13.

could have used the constitutions and mechanisms created by the regimes, which also supported the institutional bases of those regimes, to claim that an unconstitutional action had occurred. If the courts had triggered constitutional paradoxes, it is possible that pro-democracy judicial decisions against those regimes would have survived—and the courts with them.

Only further research will illuminate how much can be generalized from the Chilean example, what other sorts of third-way strategies—including variants on the constitutional paradox—may exist, and how other jurisdictions may benefit from these ideas. But for judges, the experience of the Chilean Constitutional Court during the Pinochet dictatorship is already salient: when provided with the proper conditions, judges can escape the false dichotomy of choosing between advancing or preserving democratic norms and values and judicial independence, and pursue the former without sacrificing the latter.