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WHO WILL SAVE THE REDHEADS? TOWARDS AN ANTI-BULLY THEORY OF JUDICIAL REVIEW AND PROTECTION OF DEMOCRACY

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Dedicated in memory of Israeli Supreme Court Justice Mishael Cheshin, a brilliant jurist; bold protector of democracy and judicial independence; and a redhead.

Democracy is in crisis throughout the world. And courts play a key role within this process as a main target of populist leaders and in light of their ability to hinder administrative, legal, and constitutional changes. Focusing on the ability of courts to block constitutional changes, this Article analyzes the main tensions situated at the heart of democratic erosion processes around the world: the conflict between substantive and formal notions of democracy; a conflict between believers and non-believers that courts can save democracy; and the tension between strategic and legal considerations courts consider when they face pressure from political branches.

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Using comparative examples, the Article demonstrates how courts can indeed function as a useful stop sign or speed bump against attempts to erode the constitutional order. Since a central feature of democratic erosion is court-capturing, -packing, or -threatening, this Article builds on anti-bully theories to propose an "anti-bully theory of judicial review," which posits that the judiciary should neither go down the bunker nor retaliate the confrontation but try, as much as possible, to act as though everything is "business-as-usual."

At its core, this Article argues that courts have an important role in protecting democracy against constitutional reforms eroding the constitutional order and that courts should stand firm against pressure so they can do their best to protect democracy, even if they cannot save democracy on their own.

INTRODUCTION

Constitutional democracies around the world are in a crisis.[1] European countries that were considered, until recently, stable democracies are facing "democratic backsliding,"[2] and scholarly work has begun to explore whether the democracy in the U.S. is in danger.[3] The 2019 Freedom House Report, for example, indicates that 2018

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[1] *See generally, e.g.*, CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); DAVID RUNCIMAN, HOW DEMOCRACY ENDS (2018); YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT (2018); WILLIAM A. GALSTON, ANTI-PLURALISM: THE POPULIST THREAT TO LIBERAL DEMOCRACY (2018).

[2] *See generally, e.g.*, PAUL BLOKKER, NEW DEMOCRACIES IN CRISIS?: A COMPARATIVE CONSTITUTIONAL STUDY OF THE CZECH REPUBLIC, HUNGARY, POLAND, ROMANIA AND SLOVAKIA (2014); THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE (András Jakab & Dimitry Kochenov eds., 2017); ANDRÁS L. PAP, DEMOCRATIC DECLINE IN HUNGARY: LAW AND SOCIETY IN AN ILLIBERAL DEMOCRACY (2018); WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019).

[3] *See generally, e.g.*, Robert Mickey, Steven Levitsky & Lucan Ahmad Way, *Is America Still Safe for Democracy?: Why the United States is in Danger of Backsliding*, 96 FOREIGN AFFS. 20 (2017).

marked a serious crisis of democracy and recorded the thirteenth consecutive year of decline in global freedom as sixty-eight countries suffered from decline in civil and political rights.[4] Democracy around the world is being eroded.[5]

Tom Ginsburg and Aziz Huq define democratic erosion "as a process of incremental, but ultimately still substantial, decay in the three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the rule of law."[6] They explain that "erosion does not *typically* result in full-blown authoritarianism. Instead, its outcome is some form of competitive authoritarianism, in which elections of a sort occur, where liberal rights to speech and association are not wholly stifled, and where there is some semblance of the rule of law."[7] As they demonstrate, such processes are taking place in various countries, such as Hungary, Poland, and Venezuela.[8] This is the global context for this Article, though there is also a local context as a case study. In recent years, Israel has witnessed a process of counter-constitutional revolution in response to the liberal constitutional revolution in the 1990s.[9] It is "in the midst of an intentional legislative and political process which aims to weaken and circumvent democratic checks and balances and liberal-democratic principles."[10] There are, among other developments described lengthily elsewhere, manifold attempts to reform the judiciary, such as: (1) proposals to limit the court's authority to review administrative actions based on the "reasonableness" doctrine; (2) proposals to limit standing before the court; (3) serious discussions on inserting an "override clause" to Basic Law: Human Dignity and Liberty, which would allow a majority of Knesset Members to enact legislation notwithstanding its unconstitutionality; (4) proposals to change the way judges are appointed; and more.[11] Although many of the examples are from Israel, the argument that is drawn is applicable to many—if not all—of the cases of democratic crises we are witnessing.

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[4] *Freedom in the World 2019*, FREEDOM HOUSE (2019), https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf [https://perma.cc/5SEN-MD6L].

[5] Various terms have recently been used to express this crisis: democratic "decay," "decline," "erosion," "retrogression," "rot," or "backsliding." *See generally* Tom Gerald Daly, *Democratic Decay: Conceptualising an Emerging Research Field*, 11 HAGUE J. ON RULE L. 9 (2019).

[6] TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 43 (2018) (emphasis omitted).

[7] *Id.* at 44.

[8] *Id.* at 45–47.

[9] *See generally, e.g.*, Nadiv Mordechay & Yaniv Roznai, *A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel*, 77 MD. L. REV. 244 (2017).

[10] Gila Stopler, *Constitutional Capture in Israel*, INT'L J. CONST. L. BLOG (Aug. 21, 2017), http://www.iconnectblog.com/2017/08/constitutional-capture-israel [https://perma.cc/QBN4-7CRN].

[11] These processes are fully described in Mordechay & Roznai, *supra* note 9, at 253–54; Yaniv Roznai, *Israel: A Crisis of Liberal Democracy?*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 1, at 355, 363–64.

Indeed, against the backdrop of this global and local context, this Article explores the more general question: can courts protect democracy through judicial review? It will focus especially on a particular type of judicial exercise—judicial review of formal constitutional amendments by using the "unconstitutional constitutional amendments doctrine," a rising phenomenon in recent years.[12]

Throughout the discussion, this Article seeks to highlight and analyze three central tensions concerning the relationship between courts and the protection of democracy. In light of conflicting visions of democracy that reflect the basic tension in the crisis of democracy—whether democracy is purely formal, as reflecting the majority's will, or whether there are substantive values which trump majoritarian decision-making[13]—Part I asks what type of democracy are we to protect? Part II demonstrates how judicial review of constitutional amendments may assist in protecting democracy. By so doing, it also exposes the false dichotomy of some of the objections to judicial review, which argue that judicial review would be helpless in protecting democracy against a corrupted society that no longer wishes to be a democratic one. Additionally, it examines the anticipatory effect of judicial review on constitutional amendments and its ability to protect democracy during the early stage of the legislative process. Finally, since a central feature of democratic erosion is court-capturing, -packing, or -threatening,[14] Part III asks what courts should do when they are under political pressure. Resembling scenarios of dealing with bullies, it proposes an anti-bully theory of judicial review according to which the judiciary should neither go down the bunker nor retaliate the confrontation but try, as much as possible, to act "business-as-usual."

I. WHAT TYPE OF DEMOCRACY ARE WE TO PROTECT?

In a 2014 public speech, the Hungarian Prime Minister, Victor Orbán, declared: "[T]he new state that we are constructing in Hungary is an illiberal state, a non-liberal state. It does not reject the fundamental principles of liberalism such as freedom . . . but instead includes a different, special, national approach."[15] Thus, the transformation from a liberal democracy to an illiberal state seems to have been an explicit goal of the regime.[16] This transformation, which has taken place in recent years, weakened checks

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[12] On the increasing trend of judicially reviewing constitutional norms, *see generally* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017); KEMAL GÖZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY (2008).

[13] *See* AHARON BARAK, THE JUDGE IN A DEMOCRACY 23–26 (2009).

[14] Tom Ginsburg, *The Jurisprudence of Anti-Erosion*, 66 DRAKE L. REV. 823, 829 (2018).

[15] Viktor Orbán, Prime Minister, Speech at the 25th Bálványos Summer Free University and Student Camp (July 26, 2014), http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp [https://perma.cc/B6FG-9DRG] (cached version).

[16] On this transformation, see generally Gábor Halmai, *An Illiberal Constitutional System*

and balances and rights protection and ultimately failed "to comply with minimum standards of constitutionalism."[17] This challenge to a "liberal notion of democracy" is not unique to Hungary. It appears that, in various countries, liberal or substantive notions of democracy are under attack in the name of a purely procedural or majoritarian version of democracy, according to which the political majority represents the sovereign and is thus omnipotent.[18]

A somewhat similar approach is being expressed in Israel, where, according to some political and public views, democracy is fulfilled through elections and decision-making processes reflecting the majority's will and nothing more.[19] Perhaps the best example is reflected in the approach of Israel's former Minister of Justice, Ayelet Shaked, who led various reforms to restrict courts' authority and acted to appoint "conservative" judges during her term.[20] In response to claims that such reforms are a threat to democracy, she claimed: "they declared [Israel's democracy's] death so many times, that it seems that not only cats have nine lives, but also our democracy."[21] In her opinion, "Israeli democracy is as healthy as a bull," and the processes that are taking place fortify the notion that Israel's democratic basis reflects the majority's will.[22] Prior to the general elections that took place in early 2019, Minister Shaked released a campaign video in which she posed in a mock advertisement for a perfume labeled "Fascism."[23] The video is a reaction to those who have criticized—including accusations of fascism—her attempts to restructure the Israeli judiciary.[24] In the black and white video, Shaked wanders around in slow motion, her hair blowing as soft piano music plays in the background while she whispers her key policies: "judicial

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in the Middle of Europe, 2014 EUR. Y.B. HUM. RTS. 497; Kriszta Kovács & Gábor Attila Tóth, *Hungary's Constitutional Transformation*, 7 EUR. CONST. L. REV. 183 (2011); Sonja Priebus, *Hungary*, *in* CONSTITUTIONAL POLITICS IN CENTRAL AND EASTERN EUROPE 101 (Anna Fruhstorfer & Michael Hein eds., 2016); Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *From Separation of Powers to a Government Without Checks: Hungary's Old and New Constitutions*, *in* CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY'S 2011 FUNDAMENTAL LAW 237 (Gábor Attila Tóth ed., 2012).

[17] Renáta Uitz, *Can You Tell When an Illiberal Democracy Is in the Making?: An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 INT'L J. CONST. L. 279, 281 (2015).

[18] On the concept of illiberal democracy, see generally Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFFS. 22 (1997).

[19] *See, e.g.*, Roznai, *supra* note 11, at 359–60, 362–63, 366.

[20] Oliver Holmes, *Far-Right Israeli Campaign Ad Jokes of "Fascism" Perfume*, GUARDIAN (Mar. 19, 2019, 6:30 AM), https://www.theguardian.com/world/2019/mar/19/far-right-israeli-campaign-ad-jokes-of-fascism-perfume-ayelet-shaked [https://perma.cc/KS2P-U9AT].

[21] Roznai, *supra* note 11, at 370 (discussing comments from former Minister Shaked, which are located in Itamar Levin, *Naor Against Shaked: It Is Forbidden to Examine the Positions of a Judge*, NEWS1 (Dec. 1, 2016), https://www.news1.co.il/Archive/001-D-385614-00.html [https://perma.cc/L6X3-44HY] (in Hebrew)).

[22] *Id.*

[23] Holmes, *supra* note 20.

[24] *Id.*

revolution," "scaling back judicial activism," "judicial appointments," "governance," "separation of powers," and "restraining the High Court of Justice."[25] Spritzing, holding a perfume labeled "Fascism," she then turns to the camera, suggesting, "the bottle has been mislabeled: 'To me, it smells like democracy.'"[26] While this is meant to be a "humoristic" video, it cogently reflects the notion that granting more power to the political branches while limiting the judiciary is a fulfilment of democracy.

Such a notion focuses on the formal or procedural aspects of democracy. It considers democracy as purely procedural, i.e., simply as a system of self-governance in which citizens can make majority, collective decisions. But surely democracy, as a system of government, does not end with majoritarian rule-making. Democracy cannot be reduced to two wolves and a lamb voting on what to have for lunch. It must mean more than that. Democracy is more than just majoritarianism. It includes—and must include—the protection of certain basic rights and basic principles.[27] Democracy includes substantive preconditions for its realization.[28] As Frank Michelman writes:

> Maybe everyone agrees that democracy connotes a procedure of joint decision by many persons somehow acting together. But no less essentially, it connotes a socially constituted relationship among parties to the procedure. You will not, I hope, regard a political procedure as democratic . . . unless participants enter the procedure in the appropriate relations of equality, independence, freedom, and security, vis-à-vis one another and vis-à-vis the political collective and its powers.[29]

Even if one focuses on the narrowest character of formal democracy, elections, this must include substantive values.[30] There is no formal democracy without substantive values.[31] True, majority is the basis for democracy. But for majority decision-making to exist (and for the simplicity of the discussion assume the need to have genuine and fair elections), other values must exist, at least to a certain degree: freedom of speech, freedom of association, equality, rule of law, and separation of

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[25] Jonathan Caras, *Ayelet Shaked—Fascism—English Subtitles*, YOUTUBE (Mar. 19, 2019), https://www.youtube.com/watch?v=P0peSwxSEqY [https://youtu.be/P0peSwxSEqY].

[26] Holmes, *supra* note 20; Caras, *supra* note 25.

[27] *See, e.g.*, BARAK, *supra* note 13, at 24 ("The most important of these values are separation of powers, the rule of law, judicial independence, human rights, and basic principles that reflect yet other values (such as morality and justice), social objectives (such as public peace and security), and appropriate ways of behavior (reasonableness, good faith).").

[28] *See, e.g.*, *id.* at 23–24; RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 35 (1990).

[29] Frank I. Michelman, *Brennan and Democracy*, 86 CALIF. L. REV. 399, 419 (1998).

[30] BARAK, *supra* note 13, at 24–26.

[31] *Id.* at 24.

powers.[32] The former principles are essential for a genuine democracy, and the latter are crucial for making sure there are no actions to undermine or defraud the system of competitive elections.[33]

A majoritarian decision of five to eliminate the minority of four in a "fair" and "equal" vote, in order to ensure that, in future elections, the majority's chances of winning the elections would be guaranteed, is not a democratic decision.[34] The disagreement, whenever it exists, is which and to what extent substantive values are necessarily included in democracy.[35] Thus, there is no such thing as a purely "formal democracy." A genuine democracy requires substance.[36] Likewise, there is no such thing as an "illiberal democracy"; democracy must be liberal.[37] Of course, there is a spectrum of liberalism to which democracy adheres. A democracy can be more or less liberal. But below a certain threshold, there is no such thing as an illiberal democracy—it is simply not a democracy.[38] As Del Dickson puts bluntly:

> Illiberal democracy is not so much a liberal democracy gone bad as an illusory democracy; an authoritarian regime with symbolic trappings of democracy, but without the substance. It has pseudo-liberal architecture and institutions, but lacks the underlying commitment to core liberal ideas such as limited and accountable government and the rule of law. It lacks the rules, procedures, practices, and habits that make democracy come to life.[39]

In that respect, Jan-Werner Müller is correct to claim that "[t]he fact that Europe's new authoritarians have come to power through free and fair elections" does not mean that their attempts to transform the political system are democratically legitimate.[40] "Instead

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[32] *Id.* at 145–46.

[33] *Id.*

[34] *See* BARAK, *supra* note 13, at 25.

[35] *Id.* at 23–26.

[36] *Id.* at 24 ("[The rule of democratic values] is a substantive aspect of democracy. . . . Without it, a regime is not democratic.").

[37] For a counter-classification of varieties of democracy, see ALBERT WEALE, DEMOCRACY 19–39 (1999).

[38] The question of what constitutes that minimal core of democracy is, of course, a contentious one. For an attempt at answering it, see Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional Minimum Core*, *in* ASSESSING CONSTITUTIONAL PERFORMANCE 268, 269 (Tom Ginsburg & Aziz Huq eds., 2016) ("We define the minimum core of a democratic constitutional order as the set of institutions, procedures, and individual rights that are necessary to maintain a system of multiparty competitive democracy.").

[39] DEL DICKSON, THE PEOPLE'S GOVERNMENT: AN INTRODUCTION TO DEMOCRACY 25 (2014).

[40] Jan-Werner Müller, *The Problem with "Illiberal Democracy,"* SOC. EUR. (Jan. 27, 2016), https://www.socialeurope.eu/the-problem-with-illiberal-democracy [https://perma.cc/D9XA-8PTT].

of describing them as 'illiberal,'" he claims, "we should be calling them what they really are: 'undemocratic.'"[41]

After understanding what kind of democracy is to be protected, the question remains, can courts fulfill this function?

II. WHO WILL SAVE THE REDHEADS?

A. The False Dichotomy of Democratic Failure

Assuming one understands the minimum substantive core of democracy that ought to be protected, one basic question regarding judicial review and the protection of democracy concerns the actual *ability* of courts to function as guardians of the democratic order. In other words, the question is: can courts deliver?

Before delving into this question, an explanation must be in place for what is meant by protecting democracy. After establishing, in the previous section, that democracy includes the formal, fair, and equal-majoritarian process of decision-making, in addition to substantive principles such as freedom of expression, freedom of association, equality, separation of powers, and rule of law,[42] it is easier to divide the role of protection of democracy into its four main priorities:

First, is the protection of the democratic process itself, i.e., making sure that the narrow competitive electoral and majoritarian processes in a democracy are maintained as genuine, fair, and equal.[43] Here, the courts have a crucial role to play. This is because elected politicians—unlike judges—lack the necessary incentives to maintain democratic competition.[44] For example, a recent case from the Republic of Malawi, which concerned an election dispute, successfully brought a repeat election in which an opposing politician defeated an incumbent and thus resulted in governmental turnover.[45] This and other examples from Africa brought commentators to argue "that judicializing presidential election disputes may under certain circumstances constitute

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[41] *Id.*

[42] *See supra* Part I; *see also* BARAK, *supra* note 13, at 23–26.

[43] Compare this notion with Ely's theory of judicial review, according to which judicial review should focus on the political process and should ensure equal representation. This theory maintains that courts should intervene when the political process fails, either when powerholders obstruct it to preserve the status quo or when the government denies minorities the same protection it grants to the majority. *See* John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 453 (1978). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[44] Aziz Z. Huq & Tom Ginsburg, *Democracy Without Democrats*, 6 CONST. STUD. 165, 167 (2020).

[45] Mutharika v. Chilima [2020] MWSC 1, 69 (Malawi), https://malawilii.org/mw/judgment/supreme-court-appeal/2020/1 [https://perma.cc/E5GG-T9YN]; Hamza Mohamed, *After Historic Election, What Next for Malawi?*, AL JAZEERA (June 28, 2020), https://www.aljazeera.com/news/2020/6/28/after-historic-election-what-next-for-malawi [https://perma.cc/VW6V-TFYH].

a safeguard protecting the integrity of elections that incumbents rig in their favor."[46] Such cases are important for protecting the possibility of rotation, which is essential for guaranteeing democracy and the rule of law.[47]

Second, is the protection of individual rights and, in particular, minority rights against the tyranny of the majority.[48]

Third, is the protection of the separation of powers and making sure that one branch does not overstep its mandate and trespass into another's authority.[49] An example of the role of the court as the guardian of separation of powers can be found when courts invalidate a decision of the executive that undermines the authority of the legislature. A recent illustration would be the *Cherry/Miller (No. 2)* case by the UK Supreme Court.[50] In this case, the Supreme Court was called to determine whether the advice of the Prime Minister to the Queen regarding the prorogation of Parliament was unlawful.[51] The Supreme Court held that government's advice to the Queen to prorogue Parliament:

> [W]ill be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature

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[46] Olabisi D. Akinkugbe & James T. Gathii, *Judicial Nullification of Presidential Elections in Africa:* Peter Mutharika v. Lazarus Chakera and Saulos Chilima *in Context*, AFRONOMICSLAW (July 3, 2020), https://www.afronomicslaw.org/2020/07/03/judicial-nullification-of-presidential-elections-in-africa-peter-mutharika-v-lazarus-chakera-and-saulos-chilima-in-context/ [https://perma.cc/7FA4-ASE6].

[47] Andras Jakab, *What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law*, 6 CONST. STUD. 5, 23 (2020).

[48] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 85 (1977). *See generally* Minh Tuan Dang, *Constitutional Protection of Fundamental Rights: Comparative Analysis of the American and European Model of Constitutional Review*, *in* THE ROLE OF COURTS IN CONTEMPORARY LEGAL ORDERS 189 (Martin Belov ed., 2019). The question of whether judicial review is essential for protecting rights is a complex one. Rights can surely be secured by legislatures as well. *See generally, e.g.*, GRÉGOIRE WEBBER ET AL., LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION (2018). Nevertheless, courts clearly play a significant role in rights protection. For an analysis, see generally Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977); Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002). For a recent argument that courts' ability to enforce constitutional rights is more limited than is commonly believed, see generally Adam S. Chilton & Mila Versteeg, *Courts' Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293 (2018).

[49] *See* Yaniv Roznai, *Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset*, 51 VERFASSUNG UND RECHT IN ÜBERSEE 415, 422–23 (2018).

[50] R v. Prime Minister [2019] UKSC 41 (appeal taken from Eng.), https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf?fbclid=IwAR3cTBCSGvPP7ByGQ7L_5FZBpmWKY1FSaQmPWB9TE17ZtOsvJLG5y3QReIQ [https://perma.cc/NB6M-YC4V].

[51] *Id.* at [1].

> and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[52]

In such a case, the court protected the principle of separation of powers.[53]

Fourth, is the protection of the very foundational principles of the constitution, for example by enforcing constitutional unamendability through judicial review of constitutional amendments.[54] To be clear, upholding democracy is a key and legitimate part of the judicial role.[55] Importantly, courts—especially in a dysfunctional democratic institutional environment—often work to improve the performance of political institutions and to make democratic institutions work better.[56] What this Article describes is a rather minimalist judicial role of *protecting* democracy, not improving or building it.[57]

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[52] *Id.* at [50]. On the ability of this test to bolster the judicial protection of democracy, see Tarun Khaitan, *The Supreme Court Ruling: Why the Effects Test Could Help Save Democracy (Somewhat)*, LONDON SCH. ECON. (Sept. 24, 2019), https://blogs.lse.ac.uk/brexit/2019/09/24/the-supreme-court-ruling-why-the-effects-test-could-help-save-democracy-somewhat/ [https://perma.cc/C2QH-S2WT]. Khaitan explains:

> The Miller2/Cherry test, expressed more broadly and less deferentially below, is a brand new and sophisticated ammunition in the rapidly ageing arsenal of democracy defenders:
>
> "Governmental action that has the effect of frustrating, preventing, or substantially undermining the ability of constitutional actors to discharge their constitutional powers, duties, or functions shall be unlawful, unless the government can show that such action was a proportionate means of achieving a legitimate objective."
>
> This test will not be a panacea. And courts alone cannot save democracy either, even if they remain competent, constitutionally literate, and independent. But as far as the judiciary's constitutional watchdog role goes, this is as good as a judicial intervention is likely to get.

[53] *R*, [2019] UKSC at [34] ("Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers."). For some recent examples from Israel, where the Supreme Court acted as guardian of the Knesset against the rising power of the executive, see Roznai, *supra* note 49, at 422–23.

[54] *See* ROZNAI, *supra* note 12, at 183–225.

[55] Luis Roberto Barroso, *Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies*, 67 AM. J. COMPAR. L. 109, 142 (2019).

[56] For evidence of such a role of courts, mainly in the "Global South," see generally David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C. L. REV. 1501 (2014).

[57] David Prendergast, *The Judicial Role in Protecting Democracy from Populism*, 20 GERMAN L.J. 245, 246 (2019) ("In addressing the populist challenge, courts can, in principle, try to be a few steps ahead in anticipating and, where they can, slowing democratic degradation."); *id.* at 247 ("[I]t is consistent with democratic theory for judges to be constitutionally empowered to intervene to prevent democratic degradation; this function may help guard against the dangers of populism, and it should be performed in a restrained manner, which is styled as protecting—not perfecting—democracy.").

In that respect, this Article accepts Sethi's approach according to which the court's "most vital" role is "democratic protectionism"; "'protecting a democracy from eroding' . . . is what constitutional courts should devote the bulk of their institutional capital towards."[58]

The claim that courts can actually function as protectors of democracy has been under criticism by various politicians and public thinkers, who argue that the court should not be empowered to review constitutional laws or who claim that restricting and limiting the authority of courts to conduct judicial review is not such an adverse process because, in any event, courts cannot protect democracy against destruction. So, the argument goes, because the power of the courts is limited anyways, there is no problem in limiting a court's authority further.

Again, Israel is an example. In early 2019, Chief Justice of the Israeli Supreme Court Esther Hayut stated in a speech in Nuremberg, Germany that:

> One of the universal lessons we should learn from the historical events . . . is that judicial independence, on the institutional and personal level, is one of the most important guarantees that the individual has an address to turn to to protect their rights . . . . The safeguarding of that principle and judges' independence is therefore one of the cornerstones of every democratic regime . . . .[59]

In response, Yair Netanyahu, the son of Prime Minister Benjamin Netanyahu, tweeted: "Fact check: in Germany before the rise of the Nazis, the court had the authority to invalidate laws!"[60]

Historically speaking, the courts did not stop the Nazis' rise to power and perhaps were even helpful to such a rise.[61] Of course, judicial review under the Weimar

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[58] Amal Sethi, *Towards a Pluralistic Conception of Judicial Role*, 90 UMKC L. REV. (forthcoming 2021) (manuscript at 4), https://ssrn.com/abstract=3545792 [https://perma.cc/7U8H-S6HQ].

[59] Michael Bachner, *Supreme Court President Invokes Nazi Era in Implicit Swipe at Netanyahu*, TIMES ISR. (May 14, 2019, 11:11 PM), https://www.timesofisrael.com/israeli-supreme-court-president-invokes-nazi-era-in-implicit-swipe-at-netanyahu/ [https://perma.cc/2CMZ-ECKU].

[60] Yair Netanyahu (@YairNetanyahu), TWITTER (May 14, 2019, 5:32 AM), https://twitter.com/YairNetanyahu/status/1128261905456476162?s=20 [https://perma.cc/ZDW2-LPRL] (in Hebrew); *see also* Toi Staff, *Netanyahu's Son Lashes Chief Justice for Purportedly Comparing His Dad to Hitler*, TIMES ISR. (May 15, 2019, 7:41 AM), https://www.timesofisrael.com/netanyahus-son-lashes-chief-justice-for-comparing-father-to-hitler/ [https://perma.cc/T8J9-XSNT]. The article discusses the argument by "the Movement for Governance and Democracy, a right-wing activist group critical of the Israeli Supreme Court's powers," which announced "[t]he court in Germany before the rise of the Nazis to power had the power to cancel laws, and did so. But it was unable to prevent and may have even abetted the Nazi rise." *Id.*

[61] Michael Mandel, *A Brief History of the New Constitutionalism, or "How We Changed Everything So That Everything Would Remain the Same*," 32 ISR. L. REV. 250, 259 (1998)

Constitution was very narrow.[62] While the constitution recognized judicial review of state law and executive ordinances and decrees, it was silent regarding acts of the national legislature.[63] The objection to judicial review arose mainly from the simple reason that the Weimar Constitution had no superiority and was considered a law like all other statutes, which can be changed according to the procedure stipulated in Article 76.[64] "As a rule," Heinrich Nagel wrote, "a court could not review the question whether a law of the Empire or of a single state was in conformity with any of the fundamental rights of the Constitution."[65] The Constitution's silence did not preclude courts from gradually reviewing and even invalidating national legislation, although this has occurred in very few cases.[66] But that was the case when a law conflicted with the constitution without being enacted by the required constitution-amending majority.[67] Judicial review of constitutional norms was not recognized.[68] Could judicial review of constitutional norms (or laws enacted through the constitution-amending majority) have hindered the Nazis' rise to power? Surely, this is a difficult question that involves hypothetical scenarios and alternative histories—ones which I do not intend to invent. The more interesting question is what if the Weimer Constitution had included an explicit "unamendable provision" (as the one included now in the Basic Law protecting the fundamental values of Germany as a constitutional democracy) backed with the power of judicial review? Gregory Fox and Georg Nolte remark that the framers of the German Basic Law believed that if an unamendable provision "had been present in the Weimar Constitution, Hitler would have been forced to violate the constitution openly before assuming virtually dictatorial power. . . . [G]iven the traditional orderly and legalistic sentiment of the German people, this might have made a difference."[69] Maybe or maybe not.

("If anything, the problem with the Weimar Republic was an excess of judicial review, hindering the democratic forces and helping the Nazis.").

[62] *See* Carl Joachim Friedrich, *The Issue of Judicial Review in Germany*, 43 POL. SCI. Q. 188, 199 (1928).

[63] *See id.* at 193 (discussing the silence of the constitution as to both the question of whether the Weimar Constitution was a fundamental law superior to ordinary legislation and the question of judicial review, which led to disagreements between leading German commentators on whether judicial review should be introduced).

[64] *See id.* at 192.

[65] Heinrich Nagel, *Judicial Review in Germany*, 3 AM. J. COMPAR. L. 233, 238 (1954).

[66] *See* J.J. Lenoir, *Judicial Review in Germany Under the Weimar Constitution*, 14 TUL. L. REV. 361, 369–70 (1940); Bernd J. Hartmann, *The Arrival of Judicial Review in Germany Under the Weimar Constitution of 1919*, 18 BYU J. PUB. L. 107, 125 (2003); Michael Stolleis, *Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic*, 16 RATIO JURIS 266, 270, 277 (2003).

[67] *See* Lenoir, *supra* note 66, at 362.

[68] *See* Nagel, *supra* note 65, at 237.

[69] Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 19 (1995).

In any event, the argument that judicial review did not prevent the rise of the Nazis and is therefore useless,[70] is *reductio ad absurdum*. The analogy is a ridiculous one. It takes the extreme case Y and claims that since measure X did not assist in the case of Y, it cannot assist in any other case. It is scientifically unfounded to take a single extreme case and argue that it manifests the general rule that would always apply. As I elaborate later, this is the result of a false dichotomy.[71]

But the question remains, can courts intervene and effectively block a law or a constitutional amendment that manifests a clear attack on democracy? Can courts protect against a law that would intentionally target a minority like redheads?[72]

In Israel, a recurring argument against authorizing the court to review Basic Laws (i.e., laws of a constitutional status), is that in any case, when a basic law that would truly harm democracy will arrive, its invalidation by the court would simply be ignored and will not assist in protecting democracy. So, former Justice Minister Shaked claimed in a public speech:

> I do not accept the presumption as if the court has absolute priority over Parliament in the area of human rights protection. As if Parliament hangs the redheads on electricity poles and the court goes one pole by the other and taking them down. If Parliament would enact a law that says 'all redheads must be hanged'—the court will not be able to assist because society has become so corrupted.[73]

And in another speech before the Plenary of the Knesset, Justice Minister Shaked stated: "If the Knesset were to pass a law rescinding the voting rights of women or

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[70] *See, e.g.*, Staff, *supra* note 60.

[71] *See infra* note 79 and accompanying text.

[72] The example of redheads being targeted is often given as an example for an extreme and unreasonable action. *See* Short v. Poole Corp. [1925] 1 Ch 66, at 91 (Lord Warrington) (Eng.) ("It may be also possible to prove that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative. It is difficult to suggest any act which would not be held ultra vires under this head, though performed bona fide. To look for one example germane to the present case, I suppose that if the defendants were to dismiss a teacher because she had red hair, or from some equally frivolous and foolish reason, the Court would declare the attempted dismissal to be void.").

Later, in the famous case *Associated Provincial Picture Houses LTD v. Wednesbury Corp.*, Lord Green repeated this incident of a teacher fired from school because of her red hair as an example of an unreasonable administrative decision, saying, "[t]hat is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another." Associated Provincial Picture Houses LTD v. Wednesbury Corp. [1948] 1 KB 223, at 229 (Lord Green) (Eng.).

[73] Kohlet Policy Forum, *Minister of Justice at Ecclesiastical Forum Conference: Disqualification of Constitutional Amendments Dangerous*, YOUTUBE (Oct. 9, 2018), https://www.youtube.com/watch?v=moXqrpg4skQ [https://youtu.be/moXqrpg4skQ] (in Hebrew).

red-haired people . . . this would signal the collapse of our democracy. In such a case, I don't think that even the court could save us from ourselves."[74] This argument was not voiced by Shaked alone.[75] Another former Minister of Justice, Professor Daniel Friedmann, one of the more critical voices against judicial activism, has argued that granting great power to the court is even dangerous.[76] And Gadi Taub, a public intellectual, continued this line of thought:

> [I]f, God forbid, the majority's values will cease to be democratic—like the horror scenarios that are thrown to the air in the current discussions, describing how the majority would decide to take away the right to vote of Arabs or redheads—then no court would be able to stop Democracy's destruction.[77]

These statements allude to the famous wording of Learned Hand:

> [T]his much I think I do know—that society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need save*; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.[78]

With all due respect, this argument presents a fallacy. It falls to the false dichotomy of democratic failure: either we have a perfectly functioning democracy or a complete failure, Weimar style.[79] But that is never the case; the court's influence on democracy is not measured in the final hypothetical law that transforms a country from a democratic one to an autocracy but incrementally and gradually in a series of judgments

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[74] *See* Levin, *supra* note 21.

[75] Daniel Friedmann, *The Knesset is Dangerous, but the Supreme Court is More Dangerous*, YNET (Oct. 8, 2018), https://www.ynet.co.il/articles/0,7340,L-5365724,00.html [https://perma.cc/TFK2-WWVL] (in Hebrew).

[76] *Id.* ("In contrast with the zero chance that the Knesset [Israeli Parliament] would cancel democracy, if we allow the court to review constitutional norms we would find ourselves open to much greater risks. Whoever thinks that the court would only deal with a Basic Law (no one imagines to enact) to cancel democracy, would realize that the court is dealing with all basic laws and re-writing them.").

[77] Gadi Taub, *The Majority Will Decide Its Basic Values*, HAARETZ (Oct. 11, 2018), https://www.haaretz.co.il/opinions/.premium-1.6550428 [https://perma.cc/N5N6-LGJQ] (in Hebrew).

[78] LEARNED HAND, *The Constitution of an Independent Judiciary to Civilization*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESS OF LEARNED HAND 155, 164 (Irving Dillard ed., 1942).

[79] PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 161 (11th ed. 2011) ("The fallacy of false dichotomy is committed when a disjunctive ('either. . . or . . .') premise presents two unlikely alternatives as if they were the only ones available, and the arguer then eliminates the undesirable alternative, leaving the desirable one as the conclusion.") (emphasis omitted).

in the life of a nation.[80] As Eugene Rostow noted, "It may of course be true that no court can save a society bent on ruin. . . . But the work of the Court can have, and when wisely exercised does have, the effect not of inhibiting but of releasing and encouraging the dominantly democratic forces of American life."[81] The dichotomy between a perfectly functioning democracy and a complete failure is a false one. In fact, between these two extremes there is a vast spectrum in which courts can function as a useful stop sign or a speed bump against constitutional and legal reforms aiming to undermine or erode the democratic order.[82]

B. Judicial Review as a Useful Speed Bump or Stop Sign

Often, when courts declare constitutional amendments that would significantly harm the democratic constitutional order as unconstitutional, such judicial decisions may slow down—even if not completely stop—authoritarian initiatives until different political actors gain power.[83] Elsewhere, I have elaborated on the different uses of constitutional amendment judicial review in protecting democracy in countries such as Taiwan, Colombia, and Uganda.[84] In Taiwan, on March 24, 2000, the Council of Grand Justices announced Interpretation No. 499 in which it declared the Fifth Amendment to the Constitution as unconstitutional.[85] The amendment, ratified (by anonymous balloting) on September 4, 1999, turned the Third National Assembly into an unelected body by providing that the Fourth National Assembly be appointed from the various political parties according to the ratio of votes each party received in the corresponding Legislative Yuan election.[86] It also extended the National Assembly term by two additional years.[87] The Council of Grand Justices invalidated the amendment on the grounds that it violated certain basic constitutional principles that are the foundation of the constitution's very existence.[88] In retrospect, David KC Huang and Nigel NT Li wrote:

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[80] Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 193, 210, 213 (1952).

[81] *Id.* at 207, 210.

[82] Yaniv Roznai, *The Uses and Abuses of Constitutional Unamendability*, *in* THE ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 150, 157, 159–61 (Xenophon Contiades & Alkmene Fotiadou eds., 2020).

[83] *See* Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 636 (2015).

[84] Roznai, *supra* note 82, at 157–60.

[85] Judicial Interpretation No. 499 [2000] (promulgated by the Constitutional Court, March 24, 2000), *translated in* CONST. CT. INTERP., https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=499#secSeven [https://perma.cc/TAE7-8497] (last visited Dec. 8, 2020).

[86] *Id.*

[87] *Id.*

[88] *Id.*; *see generally* David S. Law & Hsiang-Yang Hsieh, *Judicial Review of Constitutional Amendments: Taiwan*, *in* CONSTITUTIONALISM IN CONTEXT 31, 35, 40 (David S. Law ed., forthcoming 2020) (manuscript at 31, 35, 40), http://dx.doi.org/10.2139/ssrn.3359520 [https://perma.cc/JH7X-GEKB].

> When looking back on *Judicial Yuan Interpretation No. 499* [2000] in its twentieth anniversary year, it is no exaggeration to say that the hard work of at least three generations brought an end to the Chinese political tradition of lifelong tenure. The Interpretation set a milestone marking Taiwan's progress towards democratisation and constitutionalisation, because no politician in this country dare to extend his or her term of office from that point onward.[89]

With this decision, the democratic constitutional order in Taiwan was preserved.[90]

Another example arrives from a recent judicial decision in Uganda. On July 26, 2018, the Constitutional Court of Uganda delivered a landmark 814-page-long judgment embracing and incorporating the Indian "basic structure doctrine" and holding that parliament has limited amendment powers.[91] The court ruled by a 4–1 majority to uphold provisions of a constitutional amendment that removed the presidential age limit, according to which anyone over the age of seventy-five is banned from running for the presidency.[92] Nevertheless, all judges decided that the amendment's provision extending the term of office for Members of Parliament from five to seven years is unconstitutional and void.[93] In this case, the result portrays a more complex picture. On the one hand, the court assisted in blocking the misuse of the amendment power by the Members of Parliament who wished to extend their term of office.[94] Judicial review, in this case, was a useful tool against abusive constitutionalism. However, from the perspective of erosion through incumbent takeover, extending the legislative term did not pose a greater threat to democracy than allowing the removal of the presidential age limit, which paved the way for seventy-four-year-old President Yoweri Museveni to run for reelection in

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[89] David KC Huang & Nigel NT Li, *Unconstitutional Constitutional Amendment in Taiwan: A Retrospective Analysis of Judicial Yuan Interpretation No. 499 (2000)*, 15 U. PA. ASIAN L. REV. 427 (2020).

[90] *See* Wu Sheng-Wen, *Popular Sovereignty and Limitations on Constitutional Amendments—Dissertate from Constitutional Interpretation No. 499 of the Grand Justices, Judicial Yuan* (June 7, 2005) (Masters Thesis, Graduate Institution of Political Science, National Sun Yat-Sen University), https://etd.lis.nsysu.edu.tw/ETD-db/ETD-search/view_etd?URN=etd-0607105-185141 [https://perma.cc/QN5H-HNS9].

[91] Mabirizi v. Att'y Gen., Constitutional Appeals No. 02, 03 and 04 of 2018 at 1, 11, 19–21, 101 (Uganda) (ULII).

[92] *Id.* at 10, 109–10.

[93] Justice Kakuru's dissent was that the entire amendment is unconstitutional and void. Farooq Kasule, *Ruling on Age Limit Appeal for this Thursday*, NEW VISION (April 15, 2019, 4:27 PM), https://www.newvision.co.ug/news/1498534/ruling-age-limit-appeal-Thursday [https://perma.cc/3FTZ-KSKZ].

[94] *Id.*

2021, his thirty-sixth year in office.[95] In April 2019, Uganda's Supreme Court upheld by a majority of 4–3 the constitutional amendment to remove the age limit.[96] And, in September 2020, the East African Court of Justice unanimously ruled that the removal of the presidential age limit did not violate the East African Community Treaty.[97]

A third example comes from Colombia. After the Colombian Constitutional Court allowed Uribe to amend the constitution to seek a second consecutive term, in 2010 the Constitutional Court invalidated a referendum that would have allowed President Alvaro Uribe to seek a third consecutive term in office.[98] A third consecutive presidential term, the Constitutional Court held, would concentrate executive power, cause severe damage to institutional checks on the president, and force the political opposition to compete on a greatly tilted playing field.[99] Accordingly, such a reform would be an unconstitutional constitutional replacement. Since this judgment, President Uribe has left power peacefully, and it appears that the Constitutional Court played a central role in protecting against an erosion of democracy in Colombia.[100]

These cases demonstrate that with the power to review—and even invalidate—constitutional amendments, courts do have the potential ability to protect democracy.[101] However, is this always the case?

In a recent study, Michael Hein examined judicial review of constitutional amendments in forty-nine European countries with entrenched constitutions from

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[95] Bukola Adebayo & Samson Ntale, *Uganda Court Upholds Law That Could Allow Yoweri Museveni Be President for Life*, CNN (July 27, 2018, 2:56 PM), https://www.cnn.com/2018/07/27/africa/uganda-presidential-age-limit/index.html [https://perma.cc/C3KG-9WG2].

[96] *Mabirizi*, Constitutional Appeals 02, 03, and 04, at 1–2, 10–11; *see Uganda's Top Court Upholds Ruling to Remove Presidential Age Caps*, E. AFR. (April 18, 2019), https://www.theeastafrican.co.ke/tea/news/east-africa/uganda-s-top-court-upholds-ruling-to-remove-presidential-age-caps-1416174 [https://perma.cc/FM8J-98ZK].

[97] *See* Mabirizi v. Att'y Gen., Reference No. 6 of 2019 at 96, 136 (E. Afr. Ct. J. 2019), https://www.eacj.org/wp-content/uploads/2020/09/Reference-No.-6-of-20191.pdf [https://perma.cc/JHX8-26JV]; Crispin Adriaanse, *Court Gives Museveni Green Light to Run in Uganda's 2021 Elections*, IOL (Oct. 1, 2020), https://www.iol.co.za/news/africa/court-gives-museveni-green-light-to-run-in-ugandas-2021-elections-8b66e2fd-c9fe-5e48-99d4-09d2108c41c4 [https://perma.cc/M6R5-CPE7].

[98] *See generally* Corte Constitucional [C.C.] [Constitutional Court], februero 26, 2010, Sentencis C-141/10 (Colom.), http://www.corteconstitucional.gov.co/relatoria/2010/c-141-10.htm [https://perma.cc/L57Y-VDCQ]; MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 352 (2017).

[99] ESPINOSA & LANDAU, *supra* note 98, at 354–55.

[100] Dixon & Landau, *supra* note 38, at 275–76. Importantly, Huq wrote, "The decision, however, was only possible because the court had initially avoided a confrontation with Uribe, and instead had delayed intervention until it would have maximum effect and might generate more public support." Aziz Z. Huq, *Democratic Erosion and the Courts: Comparative Perspectives*, 93 N.Y.U. L. REV. ONLINE 21, 23 (2018).

[101] *See supra* notes 90, 96, 98 and accompanying text.

1945 to 2016.[102] He found 154 decisions on the constitutionality of constitutional amendments and, according to his analysis:

> In 44 decisions (28.6%), amendments were completely (N=26/16.9%) or partially (N=18/11.7%) declared unconstitutional, whereas 110 decisions (71.4%) accepted the respective amendment entirely. The vast majority of all decisions (137 of 154 cases, 89.0%) were taken in countries whose constitutions contained a general entrenchment clause at the time of the decision. Among the 44 invalidations, 38 were made based on a general entrenchment clause, whereas five decisions were made on procedural grounds, and one decision was based on the supremacy of international law. Not a single amendment was invalidated based on implicit amendment limitations.[103]

There has been a recent development in Europe concerning the latter type of limitation:

> [O]n 30 January 2019, . . . the Constitutional Court of Slovakia delivered a judgment in which it declared, for the first time in its history, a constitutional amendment as "unconstitutional" and void. The unconstitutional amendment concerned security clearance by the national security authority of judges and judicial candidates. In a judgment that exceeded 100 pages, the Constitutional Court held that "the Constitution contains an implicit substantive core, which consists of the principles of democracy and rule of law, including the principle of separation of powers and the related independence of judiciary." Moreover, "not even constitutional laws may violate this implicit substantive core of the Constitution." . . . [T]he Constitutional Court has the power to examine constitutional laws for possible violations of the implicit substantive core of the Constitution and if it finds a violation, it has the power to declare unconformity of the respective constitutional law with the implicit core of the Constitution.[104]

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[102] Michael Hein, *The Least Dangerous Branch? Constitutional Review of Constitutional Amendments in Europe*, *in* COURTS, POLITICS AND CONSTITUTIONAL LAW: JUDICIALIZATION OF POLITICS AND POLITICIZATION OF THE JUDICIARY 187, 194 (Martin Belov ed., 2020) [hereinafter Hein, *The Least Dangerous Branch?*]; *see also* Michael Hein, *Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe*, 18 INT'L J. CONST. L. 78, 78–110 (2020).

[103] Hein, *The Least Dangerous Branch?*, *supra* note 102, at 194–95.

[104] Lech Garlicki & Yaniv Roznai, *Introduction: Constitutional Unamendability in Europe*, 21 EUR. J.L. REFORM 217, 217–18 (2019).

Thereby, the Slovak Constitutional Court, for the first time in Europe's history, invalidated a constitutional amendment using the doctrine of implied limitations.[105]

Returning to Hein's study, in thirteen decisions, courts struck down constitutional amendments for procedural irregularities or substantive violations of an unamendable provision.[106] In these cases, he notes, "The courts thus effectively contributed to the protection of the democratic order."[107] However, the courts' ability to protect the democratic order is not perfect. As he indicates, in six decisions, courts restrained themselves from invalidating the reviewed amendments, although they breached (or had the potential to breach) the amendment procedure, international law, or an unamendable provision.[108] Out of these six cases, four amendments have become part of the constitution (two amendments were eventually not enacted).[109] "In these cases," he writes, "the courts refrained from circumventing damages to the democratic constitutional order."[110]

What about the other remaining decisions of invalidations? Here, Hein and I are in dispute. Hein writes that "almost twice as many decisions (N=34) were . . . activist interventions, where the courts illegitimately interfered with the constitutional amendment process."[111] It is not entirely clear in all these decisions, just because the courts acted in an "activist" manner, that they did not assist in protecting the democratic order. For Hein, when reviewing amendments vis-à-vis unamendable provisions, courts act legitimately only when they acknowledge "competing constitutional interpretations as equally legitimate and leaving it to the democratically legitimated amending power to choose between them."[112] Hein gives an example:

> If . . . a constitutional eternity clause protects the independence of the judiciary, the court would be allowed (and obliged) to invalidate any amendment that would infringe on that principle (e.g., the introduction of a right of the minister of justice to intervene in court proceedings). In contrast, amendments that only reform the way an independent judiciary is organized, for example, a change from the judicial self-management model to the management-by-the-executive model, would have to be accepted.[113]

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[105] Ústavný súd [Constitutional Court] Jan. 30, 2019, Pl. ÚS 21/2014-96 (Slovk.), https://www.ustavnysud.sk/documents/10182/0/PL_+US+21_2014.pdf/233a617c-4dfd-4151-8a6b-16d180b27111 [https://perma.cc/SQ8P-GZZP].

[106] Hein, *The Least Dangerous Branch?*, *supra* note 102, at 199.

[107] *Id.*

[108] *Id.* at 199–201.

[109] *Id.* at 201.

[110] *Id.*

[111] *Id.* at 199.

[112] *Id.* at 193.

[113] *Id.*

I am not convinced that in the context of democratic erosion and populist constitutionalism, when courts may be threatened, pressured, or packed, a decision concerning judicial appointment cannot help in guarding democracy.

As Ginsburg and Huq claim, "constitutional provisions on judicial appointments, removal, and salaries are rarely immunized from constitutional amendment. Hence, it is typically fairly easy for a would-be autocrat to first gain control of the judicial apparatus before turning to amending other features of the constitution."[114] Indeed, limiting judicial independence is one of the main indicators of "constitutional regression."[115] One such mechanism to capture the court is court-packing, as well as increasing the size of the court, decreasing the number of sitting judges, and replacing sitting judges with "loyal" ones.[116] Accordingly, in order to protect the democratic order in its entirety, there may be a "strong justification for applying the [unconstitutional constitutional amendments] doctrine especially in cases concerning judicial independence and separation of powers."[117] The recent case of the Slovak Constitutional Court may be such an example. The court acted in an "activist" manner as it acted without a formal unamendable provision or eternity clause. Instead, it relied on the constitution's substantive core—an implicit eternity—which serves as a limitation on the constitutional amendment power, in a manner that "every constitutional amendment can, therefore, be unconstitutional if it . . . does not respect substantive elements of the core."[118] The Court noted that if candidates for judicial office and incumbent judges could be subject to National Security Authority surveillance, the latter might be in a position to exert undue pressure on the judiciary.[119] The Constitutional Court thus regarded the amendment as violating separation of powers and judicial independence. The independence of the judiciary, Ľalík notes, was indeed endangered: "judicial independence is one of the structural values (besides

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[114] GINSBURG & HUQ, *supra* note 6, at 174.

[115] Zoltán Szente, *Subverting Judicial Independence in the New Authoritarian Regimes: Comparing Polish and Hungarian Judicial Reforms*, *in* THE ROLE OF COURTS IN CONTEMPORARY LEGAL ORDERS, *supra* note 48, at 341, 341–42. *See generally* Angela Di Gregorio, *Constitutional Courts in the Context of Constitutional Regression—Some Comparative Remarks*, *in* COURTS, POLITICS AND CONSTITUTIONAL LAW, *supra* note 102, at 209.

[116] David Kosar & Katarina Sipulova, *How to Fight Court-Packing?*, 6 CONST. STUD. 133, 133–64 (2020).

[117] *See* Yaniv Roznai & Tamar Hostovsky Brandes, *Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine*, 14 L. & ETHICS HUM. RTS. 19, 47 (2020).

[118] Tomáš Ľalík, Case Note, *The Slovak Constitutional Court on Unconstitutional Constitutional Amendment (PL. ÚS 21/2014)*, 16 EUR. CONST. L. REV. (forthcoming) (manuscript at 5), https://www.cambridge.org/core/journals/european-constitutional-law-review/article/slovak-constitutional-court-on-unconstitutional-constitutional-amendment-pl-us-212014/98FEFF484AA569FDDD21202E77BF6E08 [https://perma.cc/YN97-SRC8].

[119] *Id.* at 6 (noting that there was also "a real risk of misuse of the information collected, the possibility of boundless security checks, a lack of rules governing the storage of said information, and even the possibility that judges would be blackmailed").

the rule of law, democracy, and human rights) that stands in stark opposition to the previous authoritarian regime. Therefore, the reviewed regulation had a substantial, negative impact on judicial independence."[120] The judgment, he correctly notes, should be regarded as an attempt by the court to mend the flexibility of the Slovak Constitution, which makes it vulnerable to abuse of the amending power:

> [T]he Constitutional Court recognised that flexibility was a problem when it noted that the existence of a substantive core meant that the Constitution was no longer helpless against the forces of a qualified majority of MPs and the possible misuse of the power to amend the Constitution. A victory in parliamentary elections was not tantamount to a *coup d'état*.[121]

In that respect, he adds, "The power to declare an amendment unconstitutional may guard the democratic legitimacy of the whole system."[122] If this is the case with implicit unamendability, it is all the more so with explicit unamendability, protecting judicial independence. Hein himself writes that "29 out of the 34 activist interventions among the studied court decisions were based on constitutional entrenchment clauses."[123] The mere fact that, in these cases, the courts took "a specific but controversial vision of the constitution" does not mean that they have not assisted in protecting the democratic order.[124]

In the literature, skeptical and critical voices were pronounced about the ability of courts to build and protect democracy.[125] Courts are not a perfect safety mechanism for the democratic order. Often, they may even harm democracy.[126] But still, as I have demonstrated, courts can play an important role in guarding democracy.[127]

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[120] *Id.* at 15.

[121] *Id.* at 9.

[122] *Id.* at 10.

[123] Hein, *The Least Dangerous Branch?*, *supra* note 102, at 201–02.

[124] For this reason, our conclusions are different. For Hein, "[t]hese results disprove the optimistic assumption that courts predominantly protect the democratic constitutional order by reviewing constitutional amendments." *Id.* at 201. In the author's opinion, in at least thirteen cases, and probably in many out of the other thirty-four cases, courts assisted in protecting basic constitutional principles from encroachments.

[125] On the limits of courts as democracy-builders in states emerging from authoritarian rule, see generally TOM GERALD DALY, THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS (2017).

[126] This is especially true once they are already captured by the government. *See* David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 UC DAVIS L. REV. 1313, 1373 (2020).

[127] This argument supplements other studies concerning the positive role of courts. *See, e.g.*, Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445, 445 (2004) (finding "strong support for the proposition that both judicial independence and constitutional review are associated with greater freedom"); Douglas M. Gibler & Kirk A. Randazzo,

Sethi is correct in claiming that "[i]n such situations where democracy is subverted by constitutional amendments and legal means, constitutional courts are in a unique position to identify these legal threats and can often provide a much-needed apparatus to countries and prevent their democratic erosion."[128]

According to Sethi, there are institutional advantages of constitutional courts exercising what he terms "democratic protectionism," among them: (1) courts can identify threats on democracy and tackle them on their own and without other institutions; (2) they are comprised of highly trained and experienced individuals capable of dealing with constitutional issues and are thus situated better than other institutions to decide whether a law erodes the constitutional democratic order; (3) they allow the people take a role in protecting democracy by accepting petitions; and (4) by hearing petitions and publishing judgments, they elevate contested issues to the public sphere, encouraging a broader national dialogue.[129] By exercising judicial review, courts can thus assist in protecting democracy.

In what follows, the author wishes to claim that regardless of the actual act of judicial review of amendments, i.e., irrespective of the number of invalidations of amendments that have breached unamendable principles, the mere possibility that a court might invalidate amendments assists in protecting the democratic order ex ante during the legislative process itself.

C. Judicial Review and the Sword of Damocles

Courts can, as noted earlier, play a role as guardians of democracy by adjudicating and invalidating constitutional amendments.[130] They may also protect democracy by declaring the "suspected" nature of constitutional amendments and asking the legislature to reconsider the amendment, thereby "passing the ball" to the political arena.[131] A serious pronunciation by the Court that a given constitutional amendment infringes fundamental constitutional principles may not be taken lightly by the legislative authority, which softens the infringement.[132]

Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding, 55 AM. J. POL. SCI. 696, 696 (2011) (finding "that established independent judiciaries prevent regime changes toward authoritarianism across all types of states").

[128] Sethi, *supra* note 58, at 25.

[129] *Id.* at 25–26.

[130] *See* Dixon & Landau, *supra* note 83, at 606.

[131] *See, e.g.*, Ahmed v. Federation of Pakistan, (2010) PLD (SC) 1165, ¶ 13 (Pak.) ("[W]e would like to refer to the Parliament for re-consideration, the issue . . . introduced by Article 175A of the Constitution, *inter alia*, in the light of the concerns/reservations expressed and observations/suggestions made hereinabove.").

[132] Consider the following example from Pakistan: The Eighteenth Amendment to the Constitution of Pakistan sought, inter alia, to change the appointments process for judges of the High Courts and the Supreme Court by envisaging an almost equal role in that process for the executive and the legislature. This amendment was challenged immediately before

However, even before an amendment is enacted, the mere possibility of judicial review of amendments has an "anticipatory effect" that assists in protecting democracy.[133] Imagine a constitutional system with a recognized scheme of judicial review of constitutional amendments, either based on an explicit unamendable provision or on an implicit unamendable material core, Slovak style, or à la Indian "basic structure" model. A proposal to amend the constitution is then discussed in Parliament. Some members of Parliament raise the fear that some of the proposal's provisions violate the constitution's unamendable principles or its material core. Such an alleged violation, that creates the possibility that a court may invalidate the amendment, either in full or in part, may bring substantive modifications to the proposed amendment during the legislative process. As Mark Tushnet correctly notes, the mere existence of unamendability doctrines "may serve as a political check on the amendment process, as a 'sword of Damocles' that, because it occasionally drops, cautions political actors against devoting too many resources to attempting to alter the existing specification of some component of the [constitution's] basic structure."[134]

Indeed, even without actual judicial review of amendments and—as I will demonstrate with regards to Israel—even without a clear acknowledgment of such an authority, the mere possibility or threat of invalidation of a constitutional amendment carries a preventative effect in making sure that proposed constitutional changes align with the constitution's core principles during the legislation process.[135] Just as in ordinary legislation, legislators engage in what Alec Stone Sweet calls "*autolimitation*," or the modification of proposals in the anticipation of judicial review in regard to constitutional reform.[136] The legislators anticipate judicial invalidation and often respond to it by modifying the bill to make it "constitutionally sound,"[137] and the

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the Supreme Court on the ground that it violated the basic structure and salient features of the constitution. The Court passed a "short order," referred the matter back to the Parliament, and offered advice on how to modify the Eighteenth Amendment to make it conform to the constitution. *Id.* Accordingly, Parliament enacted the Nineteenth Amendment and softened the earlier change in the appointments process by retaining a more predominant role for the judiciary in that process. This amendment withstood challenge. Bhatti v. Federation of Pakistan, (2011) PLD (SC) 407, ¶¶ 2, 10 (Pak.). *See* Saroop Ijaz, *Judicial Appointments in Pakistan: Coming Full Circle*, 1 LUMS L.J. 86, 87–89 (2014).

[133] *See* Georg Vanberg, *Abstract Judicial Review, Legislative Bargaining, and Policy Compromise*, 10 J. THEORETICAL POL. 299, 314 (1998).

[134] Mark Tushnet, *Amendment Theory and Constituent Power*, *in* COMPARATIVE CONSTITUTIONAL THEORY 317, 332 (Gary Jacobsohn & Miguel Schor eds., 2018).

[135] *See* Vanberg, *supra* note 133, at 314.

[136] According to Stone Sweet, "'autolimitation'—refers to the exercise of self-restraint on the part of the government and its parliamentary majority in anticipation of an annulment by the constitutional court." Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 INT'L J. CONST. L. 69, 87 (2007); *see also* ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 122 (1992).

[137] Vanberg, *supra* note 133, at 303.

same applies to constitutional amendments. This "anticipatory effect of judicial review" is a natural result of legislative-judicial interactions.[138]

An example could be the enactment process of Basic Law: Israel as The Nation State of the Jewish People, enacted on July 19, 2018.[139] This basic law represents a new chapter in the Israeli Constitution, the making-process of which is still ongoing.[140] It states that Israel is the Nation State of the Jewish People but is regarded as highly controversial as it does not mention the democratic character of the state or the principle of equality, and thus is regarded as problematic for its alienation of the non-Jewish minority in the state.[141] The basic law represents a central attempt by the political branches to target the state's national identity, seeking to shift the balance between the state's "Jewish and Democratic" commitments in favor of the former.[142] As Menachem Mautner notes, the enactment of Basic Law: The Nation State occurred at the height of the animosity of Israeli Religious-Zionists and Israeli nationalists to the constitutional project of the Court in an attempt to offset the liberal constitutional project embarked on in the 1990s.[143]

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[138] For a game-theory model of this interaction, see Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 AM. J. POL. SCI. 346, 346 (2001).

[139] Suzie Navot & Yaniv Roznai, *From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel*, 21 EUR. J.L. REFORM 403, 420 (2019).

[140] Adam Shinar, *Accidental Constitutionalism: The Political Foundations and Implications of Constitution-Making in Israel*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 207, 208 (Denis J. Galligan & Mila Versteeg eds., 2013).

[141] *See* Suzie Navot, *A New Chapter in Israel's "Constitution": Israel as the Nation State of the Jewish People*, VERFASSUNGSBLOG (July 27, 2018), https://verfassungsblog.de/a-new-chapter-in-israels-constitution-israel-as-the-nation-state-of-the-jewish-people/ [https://perma.cc/DCJ7-HGGZ]. For various perspectives on the basic law, see generally DEFINING ISRAEL: THE JEWISH STATE, DEMOCRACY, AND THE LAW (Simon Rabinovitch ed., 2018); Ilan Peleg, *Introduction to Israel Dialectics—The 2018 Basic Law: Israel as the Nation-State of the Jewish People*, 25 ISR. STUD. 132 (2020); Eugene Kontorovich, *A Comparative Constitutional Perspective on Israel's Nation-State Law*, 25 ISR. STUD. 137 (2020); Rami Zeedan, *Reconsidering the Druze Narrative in the Wake of the Basic Law: Israel as the Nation-State of the Jewish People*, 25 ISR. STUD. 153 (2020); Alexander Yakobson, *Jewish Nation-State, Not This Law*, 25 ISR. STUD. 167 (2020); Dov Waxman & Ilan Peleg, *The Nation-State Law and the Weakening of Israeli Democracy*, 25 ISR. STUD. 185 (2020); Gad Barzilai, *A Land of Conflict: Law as a Means of Hegemony*, 25 ISR. STUD. 201 (2020); Orit Kamir, *Basic Law: Israel as Nation-State—National Honor Defies Human Dignity and Universal Human Rights*, 25 ISR. STUD. 213 (2020); Ilan Troen & Natan Aridan, *Introduction to Adalah Petition to Israel's High Court of Justice*, 25 ISR. STUD. 228 (2020); Adalah, *Adalah Petition to Israel's High Court of Justice Proposed Basic Law: Israel—The Nation State*, 25 ISR. STUD. 229 (2020); Abraham Bell, *The Counter-Revolutionary Nation-State Law*, 25 ISR. STUD. 240 (2020); Doreen Lustig, *"We The Majority . . .": The Israeli Nationality Basic Law*, 25 ISR. STUD. 256 (2020).

[142] *See* Navot & Roznai, *supra* note 139, at 420.

[143] *See generally* Menachem Mautner, *Protection of Liberal Rights Amidst A "War of Cultures" (Kulturkampf) Between Secular and Religious Groups*, 48 ISR. Y.B. HUM. RTS. 125 (2018).

While several petitions were submitted against this new basic law, the question of whether the Court has the authority to review a law carrying a constitutional status remains open and in the center of heated public debates.[144] Whereas the High Court of Justice ordered that an extended panel of eleven judges hear the arguments on the constitutionality of Basic Law: the Nation State,[145] former Minister of Justice, Ayelet Shaked, repeatedly argued that the Supreme Court lacks the authority to review basic laws, and that if it would invalidate Basic Law: The Nation State there would "be an earthquake, a war between the authorities."[146] In contrast, together with Suzie Navot, this author has claimed that:

> In Israel, where the legislature is composed of a single chamber, when basic laws are easily amended, coupled with the dominance of the government in the legislative process, there is a greater fear of an abuse of constituent power. Judicial review of basic laws, especially in the absence of any supra-national court, seems necessary. Otherwise, the Knesset that possesses two hats—the ordinary legislature and the constituent authority—would practically be omnipotent and would be able to render immune any law from judicial review simply by labelling it as a 'basic law.'[147]

Regardless of the actual question of whether the Court *should* possess the authority to review basic laws, the mere possibility, even if only still theoretical, that it would review the basic law was essential in the legislative process for modifying several provisions of the then proposed basic law that were considered extremely violative of the state's democratic character.[148]

To take one example, section 7 of Basic Law: The Nation State, originally included in the bill, proposed the following: "[T]he State may allow a community, including followers of a single religion or members of a single nationality, to

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[144] Notwithstanding some judicial statements in obiter dictum, the Israeli Supreme Court has never formally adopted the idea of substantive limits on the Knesset's constituent authority. For a review, see Navot & Roznai, *supra* note 139, at 412–14.

[145] Yonah Jeremy Bob, *High Court Broadens Panel Hearing of Nation-State Law*, JERUSALEM POST (Jan. 1, 2019, 8:40 PM), https://www.jpost.com/Israel-News/High-Court-broadens-panel-hearing-of-Nation-State-Law-in-petition-to-11-justices-576053.

[146] Revital Hovel & Noa Shpigel, *Israel's Justice Minister Warns of 'An Earthquake' if Top Court Kills Nation-state Law*, HAARETZ (Aug. 5, 2018, 10:21 PM), https://www.haaretz.com/israel-news/.premium-justice-minister-warns-of-earthquake-if-court-kills-nation-state-law-1.6343122 [https://perma.cc/J9BY-PXDU]; Ayelet Shaked, Opinion, *The Basic Law of All of Us*, ISR. HAYOM (Aug. 2, 2018, 1:23 PM), https://www.israelhayom.co.il/opinion/576425 [https://perma.cc/ZVW9-6L2M] (in Hebrew).

[147] Navot & Roznai, *supra* note 139, at 421–22.

[148] For an example involving Section 7 of Basic Law: The Nation State, see generally Ronit Levin-Schnur & Adam Shinar, *Section 7 of Basic Law: The Nation—Can the Disputes Be Settled?*, DEMOCRATIC CULTURE (forthcoming 2020) (on file with author) (in Hebrew).

establish a separate communal settlement."[149] Early in the legislative debates, the legal advisory to the Knesset warned that such a provision, which deals with fundamental rights and principles, raises difficulties.[150] Especially, the legal advisors of the government and the Knesset expressed objections to exclusion based on nationality.[151] The main discussion concerned the relationship between this section and the principle of equality.[152] Those objecting to the provisions, to whom the Attorney General joined, claimed that the provision violated the principle of equality, established discrimination in housing at a constitutional level, and contributed to segregation more generally.[153] Thus, the parliamentary committee responsible for drafting the bill was confronted with an objection by the Attorney General that section 7 contradicts the principle of equality, may offend Israel at the international law level, and may by invalidated by the court.[154] It was expressly argued in the committee that the provision might trigger the "unconstitutional constitutional amendment" doctrine.[155] In light of the various objections, alternative options were examined and eventually the provision was modified to the following statement: "The [S]tate considers the development of Jewish settlement a national value, [a]nd will act to encourage and promote its establishment . . . ."[156] This vague declaration

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[149] Raoul Wootliff, *In Rare Rebuke, Rivlin Urges MKs to Amend 'Discriminatory' Jewish State Bill*, TIMES ISR. (July 10, 2018, 10:03 AM), https://www.timesofisrael.com/in-rare-rebuke-rivlin-urges-mks-to-amend-discriminatory-jewish-state-bill [https://perma.cc/R5X9-R5PT] (quoting language from an earlier version of the bill).

[150] *Id.*

[151] *See* Levin-Schnur & Shinar, *supra* note 148.

[152] *Id.*

[153] *Id.*

[154] During the discussion, Prof. Yedidia Stern of the Israeli Democracy Institute said:

> I want to repeat what Eyal Yinon just said and I am not convinced everyone listened. Friends, this law, section 7(b), if enacted will certainly be invalidated by the court. . . . So, no one can say 'I didn't know. . . . [W]e are knowingly heading towards a constitutional crisis we have never had alike. Knowingly. Section 7(b) will be invalidated, because it is clearly racial discriminatory. No judge can approve it.
> [Then, Eyal Yinon, the Legal Advisor to the Knesset clarified:]
> I did not establish, and certainly have no ability to estimate and declare that this provision . . . would certainly be invalidated by the Supreme Court. I did not say this. I said that one cannot preclude from possibility that at least sec. 7(b), that contradicts basic principles recognized by the Supreme Court, would be invalidated. But there is a problem how would it be nullified, if it will. This can only be done by adopting a doctrine never adopted by the court [up] until now—the unconstitutional constitutional amendment doctrine.

Protocol No. 15 to the Joint Committee of the Knesset Committee and Constitution, Law and Justice Committee, Discussing Bill Basic Law: Israel—the Nation State of the Jewish People, DK, 20th Knesset, Session No. 4 (2018) 31, 47–48 (Isr.) (in Hebrew).

[155] *See* Levin-Schnur & Shinar, *supra* note 148.

[156] *Id.*

is less discriminatory than the previously explicit statement and is open to various interpretations.[157]

Another example concerns a constitutional amendment that allows the removal from the legislature of lawmakers whose actions constitute incitement to racism or support for an armed struggle against the State of Israel.[158] Originally, the bill included another justification for removal of a Member of Parliament: if he or she negates the existence of the State of Israel as a Jewish and democratic state.[159] During the discussion, one of the alternatives was to include, as a justification for removal, only one justification concerning the existence of the state as Jewish and democratic.[160] To this proposal, the legal advisor of the Knesset, Eyal Yinon, responded:

> If the committee decides to include only this justification for removal, I fear that a claim would come up that this is a highly problematic amendment constitutional-wise, which may even be regarded as an unconstitutional constitutional amendment, that the Supreme Court has recognized the possibility of its existence yet has never applied it.
>
> I thus urge the Members of Knesset not to adopt this idea . . . ,[161]

a suggestion the Members of Knesset adopted.[162] Eventually, inter alia, due to the system of checks and balances it contains and because it cannot be said that it

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[157] *See id.*

[158] According to the amendment:

> 70 Knesset members—10 of whom must be from the opposition—may file a complaint with the Knesset speaker against any lawmaker who supports armed struggle against Israel or incites to racial hatred, kicking off the impeachment process. The Knesset House Committee would then debate the complaint before clearing it with a three-quarter majority in the committee. The motion to dismiss the lawmaker would then be sent to the plenum, where, if 90 of the 120 Knesset members vote in favor, the MK would be ousted. The deposed lawmaker could then appeal the decision with the Supreme Court.

Marissa Newman & Toi Staff, *Knesset Approves Controversial Law to Remove Lawmakers from Office*, TIMES ISR. (July 16, 2016, 1:31 AM), https://www.timesofisrael.com/knesset-approves-bill-to-remove-lawmakers-from-office/ [https://perma.cc/N6H6-UZR9].

[159] *Protocol N. 129 of the Constitution, Law and Justice Committee*, DK, 20th Knesset, Session No. 2 (2016) (in Hebrew) [hereinafter *Protocol N. 129*].

[160] *Id.*

[161] *Id.*

[162] Ruth Levush, *Israel: Constitutionality of Removal from Parliament for Incitement to Racism or Support for Armed Struggle Against the State*, LIBR. CONG. (June 7, 2018), https://www.loc.gov/law/foreign-news/article/israel-constitutionality-of-removal-from-parliament-for-incitement-to-racism-or-support-for-armed-struggle-against-the-state/ [https://perma.cc/7P4Z-4ALY] (discussing the Supreme Court later rejecting challenges to the law's constitutionality).

contradicts the core of the state's democratic identity, a constitutional challenge against this constitutional amendment was rejected.[163] Chief Justice Esther Hayut, who was joined by eight other judges, wrote that even if we had examined the amendment according to any of the doctrines accepted in the world regarding limits on constitutional amendments, it appears that this amendment would pass the various standards.[164] Accordingly, it is better to leave the complex question regarding the applicability of the doctrine in Israeli law undecided for now.[165] The legal advice of Eyal Yinon assisted in removing a highly problematic provision, which "saved" the amendment from judicial invalidation.[166]

Italy may provide another example. On October 7, 2009, the Italian Constitutional Court declared as unconstitutional Law No. 124 of 2008 ("Lodo Alfano," named after Minister of Justice, Angelino Alfano), which had established a form of immunity from criminal prosecution for the highest state's officials (President of the Republic, Prime Minister, ministers).[167] According to the Constitutional Court, the law was unconstitutional because it created blanket immunity (in contrast with exceptional immunity for official conduct) and because it granted greater protection to the Prime Minister than it did to other ministers.[168] The Court also stated that while Parliament could not enact ordinary legislation governing immunity but had to recourse to a constitutional amendment.[169] Brendan Quigley remarks that, by this decision, "the Court made an important endorsement of democracy. Regardless of the depth and scope of Berlusconi's power, wealth and influence cannot constitutionally place an individual above the law."[170]

As a reaction to this judgment, immediately afterward the government presented a constitutional bill intended as an integration of the constitutional status of the "highest office prerogatives."[171] The presentation to the Senate of the bill triggered a heated discussion that involved both public opinion and public law scholars.[172] Among the several objections to the "constitutionality" of this constitutional amendment,

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[163] *Id.*

[164] *See id.*

[165] *See id.*

[166] *See Protocol N. 129*, *supra* note 159 (describing Yinon's advice).

[167] Brendan Quigley, *Immunity, Italian Style: Silvio Berlusconi Versus the Italian Legal System*, 34 HASTINGS INT'L & COMPAR. L. REV. 435, 452, 455 (2011).

[168] *Id.* at 454.

[169] Corte cost. [Constitutional Court], 7 ottobre 2009, Judgment No. 262 of 2009 at 2 (It.), https://www.cortecostituzionale.it/actionPronuncia.do?anno=2009&numero=262&operazione=ricerca [https://perma.cc/QHB8-VKMT]; *see* Quigley, *supra* note 167, at 454–55.

[170] Quigley, *supra* note 167, at 460.

[171] Draft of Constitutional Law No. 2180, Senato della Repubblica (May 12, 2010), http://www.senato.it/service/PDF/PDFServer/BGT/00479405.pdf [https://perma.cc/7A3G-BZU7].

[172] For public law scholars' communications in Session No. 203 of June 23, 2010, see *Documenti acquisiti in Commissione,* Senato della Repubblica, http://www.senato.it/leg/16/BGT/Schede/Ddliter/documenti/35399_documenti.htm [https://perma.cc/3DVY-SFRU] (last visited Dec. 8, 2020) (in Italian).

one recurrently referred to the constitutional court doctrine about a set of supreme constitutional principles which cannot be altered, subverted, or amended even by adopting constitutional amendments or laws because they are inherent to fundamental constitutional values.[173] The idea, in brief, that certain values such as presidential and minister prerogatives, rights, and liberties vis-à-vis criminal justice are somewhat part of this nucleus and that only a very careful and detailed discipline of the possible exceptions to the normal course of criminal law would avoid a future annulment by the constitutional court.[174] This may not necessarily be the only reason, but as a matter of fact, the "constitutionalised Lodo Alfano" never passed the committee stage, most probably due to this barrage of criticism and was eventually abandoned.[175]

These examples demonstrate the ability of judicial review of amendments to protect democracy even without judicial review. The mere anticipatory effect that judicial review has is thus important in the protection of democracy.[176] Without the "threat" that the sword of Damocles would drop on the amendment, warning raised by various actors (including legal advisors) during the legislative process concerning the questionable constitutionality of a proposed bill would be significantly weakened.[177]

III. WHO CAN STOP THE D9? TOWARDS AN ANTI-BULLY THEORY OF JUDICIAL REVIEW

As noted earlier, in a democratic erosion setting, courts are under political pressure.[178] David Landau has demonstrated how populist projects of constitutional change

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[173] The Italian Constitution includes one explicit, unamendable provision protecting the republican form of government. Art. 139 Costituzione [Cost.] (It.). In one famous judicial decision, however, the Constitutional Court did not exclude the possibility of also implicit limitation:

> The Italian Constitution contains some supreme principles that cannot be subverted or modified in their essential content, either by laws amending the Constitution, or by other constitutional laws. These include both principles that are expressly considered absolute limits on the power to amend the Constitution, such as the republican form of State (Art. 139) as well as those principles that, even though not expressly mentioned among those principles not subject to the procedure of constitutional amendment, belong to the essence of the supreme values upon which the Italian Constitution is founded.

Corte cost. [Constitutional Court], 29 dicembre 1988, Giur. it. I 5565, 5569 (It.); *see generally* Pietro Faraguna, *Unamendability and Constitutional Identity in the Italian Constitutional Experience*, 21 EUR. J.L. REF. 329 (2019).

[174] The most contentious part of the bill regarded immunity for criminal offenses unrelated to the office and even committed before the appointment. *See* Wendy Zeldin, *Italy: Constitutional Court Strikes Down Parts of Immunity Law*, LIBR. CONG. (Feb. 11, 2011), https://www.loc.gov/law/foreign-news/article/italy-constitutional-court-strikes-down-parts-of-immunity-law/ [https://perma.cc/PWP6-TDHQ].

[175] Quigley, *supra* note 167, at 450.

[176] *See* Vanberg, *supra* note 133, at 348.

[177] *See* Tushnet, *supra* note 134, at 332.

[178] *See* Roznai & Brandes, *supra* note 117, at 20, 31.

modify the rules for appointment and jurisdiction of bodies, like constitutional courts, in an attempt to weaken their independence, pack them, and even capture them.[179] Often, courts are threatened in ways that makes it difficult for them to "do their job" without being worried about possible overrides and political backlashes.[180] Schnutz Rudolf Dürr describes the severe pressures courts endure from state powers:

> In a democracy respecting the rule of law, judgments of constitutional courts can be criticized but they have to be executed. Unfortunately, this is not the case for every constitutional court. Not only do judgments remain non-implemented, the court's budget is cut, the procedures of the court are changed to make them dysfunctional, no new judges are appointed to "starve" the court of new judges or the court is packed with judges close to the government majority. Some courts are even threatened with outright abolition and this really happened to a few of them. . . . [A]ll these methods are being used in practice—and increasingly so.[181]

Consider the following example. In 2015, reacting to a judicial decision not to his liking, a Member of Knesset from the Jewish Home Party of the coalition, Motti Yogev, was interviewed on television and said, "A D9 [bulldozer] shovel should be used against the High Court. . . . We, as a legislative system, will make sure to rein in the [judicial rule] in this country, and the tail that wags the dog."[182] Such a reaction is not unique to politicians in Israel, of course. In the UK, after the abovementioned *Cherry/Miller (No. 2)* case, Tory MP Desmond Swayne was interviewed on television and, after claiming that the Supreme Court "well overstepped the mark" in its prorogation judgment, continued to claim that they "should have a commitment to abolish the Supreme Court."[183] Should judges take into consideration possible political "backlash" when they adjudicate?

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[179] David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521, 532 (2018); David Landau, *Abusive Constitutionalism*, 47 UC DAVIS L. REV. 189, 189 (2013). For an example regarding Poland, see SADURSKI, *supra* note 2, at 58–131; Fryderyk Zoll & Leah Wortham, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, 42 FORDHAM INT'L L.J. 875, 877–79 (2019).

[180] *See* Roznai & Brandes, *supra* note 117, at 31, 38–39.

[181] Schnutz Rudolf Dürr, *Constitutional Courts: An Endangered Species?*, *in* LES COURS CONSTITUTIONNELLES, GARANTIE DE LA QUALITÉ DÉMOCRATIQUE DES SOCIÉTÉS? 111, 112 (Dominique Rousseau ed., 2019).

[182] Shimon Cohen, *MK Call to "Raze the High Court" Spark Knesset Ire*, ARUTZ SHEVA (July 29, 2015, 3:41 PM), http://www.israelnationalnews.com/News/News.aspx/198784 [https://perma.cc/U9JN-R8AE].

[183] *'This Parliament is a Dead Parliament': Attorney General Says MPs Have No 'Moral Right' to Be in the Commons*, ITV (Sept. 25, 2019, 7:02 PM), https://www.itv.com/news/2019-09-25/mps-return-to-westminster-after-bombshell-legal-ruling/ [https://perma.cc/W75U-RDF6].

Cass Sunstein asked a somewhat similar albeit broader question: "If People Would Be Outraged by Their Rulings, Should Judges Care?"[184] Sunstein then writes that from a consequential point of view, one may argue that when public outrage may lead to particularly bad consequences (attacks on the courts may be such consequences), it may be prudent rather than cowardly for judges to care.[185] Epistemologically, he adds, under certain conditions, outrage may embody a collective wisdom superior to the judgment of individual persons, including judges.[186] Consequentialism, Andrew Coan replies to Sunstein, is empty without a normative theory to explain which consequences count as good and bad.[187] Coan argues, "Like consequentialism without a normative account, the epistemic argument is empty without a theory of interpretation."[188] "If the proper interpretation of the Constitution depends, in whole or in part, on the public's views (not as information but as such), public outrage becomes primary, not secondary evidence of constitutional meaning."[189] This author wishes to leave this more general question aside and focus on a narrower question concerning the situation where a court in a democracy experiencing democratic erosion faces political pressure or threat.[190] There is no doubt that, just as legislatures care about judicial invalidation (what this author has called "the sword of Damocles"), judges worry about possible political "retaliation" to their rulings.[191] The literature on judicial behavior usually emphasizes three models: legal, attitudinal, and strategic. Briefly put, the legal model states that justices only consider the law when deciding cases, and non-legal factors do not play a role in judicial decision-making. According to the attitudinal model, judges' decisions are motivated by their own policy and personal preferences. And according to the strategic model, within their decision-making process, judges anticipate the reactions of other actors within the broader institutional context in which they operate.[192] Clearly judges, as the

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[184] For an analysis of judicial anticipation of public outrage and its effects on judicial independence, see generally Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

[185] *Id.* at 170.

[186] *Id.* at 159–61.

[187] Andrew B. Coan, *Well, Should They?: A Response to* If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 213, 234 (2007).

[188] *Id.*

[189] *Id.*

[190] For a recent excellent collection of essays on democratic breakdown and constitutionalism under pressure, see CONSTITUTIONALISM UNDER STRESS (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2020).

[191] LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY 35 (2002).

[192] *See generally, e.g.*, JEFFREY A. SEGAL & HAROL J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2005); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, *in* SUPREME COURT

literature on judicial behavior suggests, consider the attitudes of other actors in a strategic manner.[193] But should—and if so, to what extent—courts consider the political ramifications of its decisions (the "political backlash") during judicial review of laws or of amendments that touch upon sensitive issues but are crucial for the democratic order? Is it better for them to "go down to the shelter" in order to survive or perhaps to confront the political branches in order to try and save democracy but risk a retaliation or even its demise? Or, as Roni Mann puts the question accurately: "Should a court that responds by toning down its decisions and adopting a strategy of restraint be praised for its shrewd pragmatism, or should we instead demand that it bravely stay the course, regardless of retaliatory consequences, even if these might amount to the demise of the constitutional system?"[194]

In order to try and analyze these questions, this author uses the analogy of anti-bullying tactics to evaluate the different models of judicial reactions to political pressure.[195] One of the best ways to deal with bullying is avoiding it. Courts often have tools of docking petitions,[196] but assuming a court cannot avoid the case and must make a decision, it seems that there are three main possible models.

The first model is confrontation. Researchers from social psychology demonstrate how this may be the harshest scenario for someone dealing with a bully; it

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DECISION-MAKING—NEW INSTITUTIONALIST APPROACHES 1, 1–12 (Cornell W. Clayton & Howard Gillman eds, 1999). For an overview, see generally Arthur Dyevre, *Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour*, 2 EUR. POL. SCI. REV. 297 (2010).

[193] *See* Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RSCH. Q. 625, 626 (2000).

[194] Roni Mann, *Non-ideal Theory of Constitutional Adjudication*, 7 GLOB. CONSTITUTIONALISM 14, 19 (2018). Mann argues that "judges should reach a decision about what is constitutionally—ideally—right, and then calculate how to make it indeed the 'law of the land' with the highest impact." *Id.* at 41.

[195] Three disclaimers are in place regarding this analogy and for using social psychology literature for our matter. First, there are many aspects, such as personal welfare, physical and mental health, self-perception, and mental resilience, as well as individuals' differences (such as age, gender, culture, etc.) and the daily emotional stress that are critical in examinations for anti-bully strategies. These cannot be reflected in any analogy regarding the pressure imposed upon political and judicial institutions. Second, there are many elements in the relationship between the judiciary and other branches and the public that are not manifested in the relationship between a bully and its victim. One such element is trust. The victim can allow himself to "break the tools" against the bully, and the prospective consequences will not have broad implications like in the case of a judiciary. Furthermore, theoretically, the bullying victim can simply escape—leave school or the workplace. This option does not exist for the court. Third, in interpersonal situations, context and circumstances are dynamic and vary from one to another. It is thus very difficult to find a uniform recommendation for how to deal with bullying.

[196] One may think of doctrines such as ripeness, political question, and deference. For avoidance tactics, see generally, for example, Alexander M. Bickel, *Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016).

usually makes things worst.[197] As bullying researcher Marano says, "[F]ighting back is the *worst defense*," as the bully is usually stronger and bigger.[198] It may just escalate conflict, which the judiciary is most likely to lose.[199] As Rosalind Dixon and Samuel Issacharoff write, "[T]here is no obvious reason to suppose . . . [courts] would prevail in confronting formidable political power. Lessons abound of courts that misplayed their hands, sought to thwart a too-powerful executive and were quickly relegated to irrelevance."[200] How, in Russia, Yeltsin suspended the Constitutional Court after a highly charged political dispute is just one example.[201]

The second model is "going down the bunker." The problem with this approach is that surrendering to the bully usually does not stop the harassment.[202] The bullying continues and is often aggravated. It is true that in real life, time span matters. The bully might leave school or the workplace, and life can return to normalcy. Also, in political life, time matters. In their research, Dixon and Issacharoff demonstrate how deferral in judicial decision-making can be a useful strategy in the long term: "Living to fight another day proves to be an attractive option in judging as in all matters of statecraft."[203] Or, as Erin Delaney puts it:

> Delaying a decision on substance might allow the time and space necessary for productive dialogue with (and within) the political branches to resolve the question outside of the courts. Delay may even allow for the evolution of popular consensus on the issue. The unelected judges on the court may thus be able to sidestep the difficult question, thereby safeguarding institutional legitimacy and security.[204]

This strategy may be useful in normal times. However, the problem with such an approach in the context of populism and democratic erosion is that if political measures

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[197] *See generally* Dieter Zapf & Claudia Gross, *Conflict Escalation and Coping with Workplace Bullying: A Replication and Extension*, 10 EUR. J. WORK & ORGANIZATIONAL PSYCH. 497 (2001).

[198] KATHLEEN WINKLER, BULLYING: HOW TO DEAL WITH TAUNTING, TEASING, AND TORMENTING 77 (2005).

[199] *See id.*

[200] Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683, 689.

[201] Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC'Y. REV. 117, 151–52 (2001).

[202] *See, e.g.*, Yonah Jeremy Bob, *When Under Pressure, Judges Should Not Back Off from Doing Their Job*, JERUSALEM POST (May 30, 2019, 4:04 AM), https://www.jpost.com/Israel-News/When-under-pressure-judges-should-not-back-off-from-doing-their-job-591041 [https://perma.cc/52UR-TCEA] (interviewing Mattias Kumm).

[203] Dixon & Issacharoff, *supra* note 200, at 731.

[204] Delaney, *supra* note 196, at 4.

to capture democratic institutions are not prevented at the right time, it may simply be too late to try and stop them at a later stage.[205] Democracy has already been eroded or has even collapsed. As Mattias Kumm recently stated in an interview: "'[C]ourts were not successful' when they tried to 'become strategic actors and tried to retrench, back down . . . and go into a [metaphorical] bunker . . . to weather the storm.'"[206] This retrenchment strategy, which some courts have tried, is based on the hope that "the storm will pass, and then they will be there to resume their proper function at a later time—this is a widespread tendency."[207] Kumm's problem with courts adopting such a passive approach towards power-grabs by other branches is that in some systems, courts cannot expect to see through the leaders behind the antidemocratic changes; these rulers may be in power for life.[208] Thus, Kumm "urg[es] courts to resist 'the illusions they can save the institution by hunkering down.'"[209] This, he suggests, often simply allowed for antidemocratic political players to "run ragged on the system," harm, and modify it irreversibly.[210]

In the short term, "going down the bunker" in difficult times may avoid backlash, but it produces bad outcomes which would taint the judiciary's reputation for decades to come.[211] One can just think of the legacy of *Korematsu v. United States* in which the Supreme Court of the United States upheld the constitutionality of a military order in World War II that initiated the internment of citizens of Japanese ancestry.[212] This decision is often regarded as a useful lesson for "the inability of courts during wartime to provide any check on political excesses, particularly those jointly endorsed by the executive and legislature."[213] It is also regarded as a dark moment in the history of the judiciary and as a "tainted precedent."[214] As Craig Green writes, "Every American lawyer knows *Korematsu v. United States* as a discredited precedent."[215] Thus, for example, the Congressional report "Personal Justice Denied" declared that "each part of the decision, questions of both factual review and legal principles, has been discredited or abandoned."[216]

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[205] Dixon & Issacharoff, *supra* note 200, at 729–30.

[206] *See* Bob, *supra* note 202 (quoting Mattias Kumm).

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] 323 U.S. 214, 223–24 (1944).

[213] Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 311 (2004).

[214] Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2077 (2007).

[215] Craig Green, *Ending the* Korematsu *Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983, 985 (2011).

[216] *See* GEORGE MILLER, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON

The third model is business-as-usual. When the bully comes, stand firm. As one expert of anti-bullying says, "Bullies lose their power if you don't cower. . . . They admire you for speaking with self-assurance and confidence. So, when they bombard, don't counterpunch. Rather, win them over with your strong, firm, courteous demeanor."[217] This is different than the first and second models as it does not ask to change behavior to a more aggressive or passive one: "Courts are likely to do best if they simply do their job in a business-as-usual manner. They should not be intimidated by the political context," as Kumm says.[218] He further explains:

> When under pressure from increasingly aggressive executive and legislative branches, the judicial branch's best option is to stick to its guns and simply do its job as it usually would. . . .
>
> . . . .
>
> [F]or maintaining democracy, it is important that judges press onward with exercising their authority, even if keeping their heads down to weather the storm might seem like a more attractive option.[219]

A similar approach was recently voiced by Former President of the Israeli Supreme Court, Professor Aharon Barak, who, in a response to a question on how the court should act when attacked, said: "The court is attacked, bombarded, however, it must not say let's go into the bunker and wait it out in hope of better days. I have no idea when and if those better days will come . . . . You must stand up tall, and . . . keep on issuing the same rulings."[220] The benefit of continuing to issue ordinary judicial rulings, even those that dominant political actors will not like, is that such rulings may "help motivate forces which can fight."[221] Kumm realizes that "this means

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WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 239 (1997). On the legacy of the case and its influence as a precedent, see generally Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 UCLA ASIAN PAC. AM. L.J. 72 (1996).

[217] F. Diane Barth, *6 Smarter Ways to Deal with a Bully*, PSYCH. TODAY (Feb. 7, 2017) (quoting Amy Cooper Hakim), https://www.psychologytoday.com/us/blog/the-couch/201702/6-smarter-ways-deal-bully [https://perma.cc/W9GU-4UJJ].

[218] Bob, *supra* note 202. Of course, this "normal behavior" may itself change between courts. Some courts are activist in their "normal state of affairs," others are more passive. For passive courts, the requirement to take an assertive role might mean some change of behavior to a more activist role.

[219] *Id.*

[220] Reimagining Democracy, *Prof. Aharon Barak, Former President of the Supreme Court*, YOUTUBE (Oct. 28, 2020), https://www.youtube.com/watch?v=awQOQx-AVEg&ab_channel=IsraelDemocracyIns, [https://perma.cc/C3S2-6DPG]; *see also Aharon Barak: "Court Under Shelling,"* AL KHALEEJ TODAY (Oct. 28, 2020), https://alkhaleejtoday.co/international/5217780/Aharon-Barak-Court-under-shelling.htmlThe [https://perma.cc/3UXS-J8XZ].

[221] *Id.*

[there is] a real danger that the court will be neutralized," but "if the court doesn't try to perform its neutral function, the likelihood of playing a constructive role and supporting political normalization is lower."[222] And if courts are acting "business-as-usual" it becomes much more difficult to justify their "neutralization": "[I]t cannot be wrong for judges to do what they were put there to do."[223]

There is another important argument for not going into the bunker but rather to exercise judicial authority. While the political branches may retaliate or refuse to comply with the judicial decision or override it, the court's ruling destroys the legitimacy of the measure being taken.[224] The business-as-usual action by the court at the very least denies the "appearance of constitutionality" from the constitutional and legal measures.[225] In a nutshell, the best strategy for courts under such circumstances seems to be non-strategic. There is thus certain convergence between acting strategically and a normative model of judicial behavior according to which judges are neutral and act strictly according to law. Strategic considerations require that courts act as though matters are "business-as-usual," correlating with the normative approach, which requires judges to consider only legal considerations and deems strategic considerations as unworthy. Thus, when it comes to protecting the judiciary the normative approach merges with the strategic approach.

Of course, not all bullies are the same, and their reactions may be different. A court can traditionally make certain judicial maneuvers it cannot make when facing an authoritarian government.[226] As Verdugo correctly notes, autocrats have more significant and effective strategies to "deal with the judiciary" than accountable and elected politicians and are subject to less political checks than those existing in competitive democracies. For the autocrats, political backlash against the judiciary is simply less costly.[227] The "business-as-usual" model may only be effective in a certain level of functioning democracy; it may be less useful or even harmful in a non-democratic environment. After all, the political power of courts and their ability to protect the democratic order is not static; it varies with the conditions of democracy within which they operate.[228]

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[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *See* Lech Garlicki, *Constitutional Court and Politics: The Polish Crisis*, *in* JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS 141, 160 (Christine Lanfried ed., 2019).

[226] *See* PO JEN YAP, COURTS AND DEMOCRACIES IN ASIA 2 (2017).

[227] Sergio Verdugo, *How Can Judges Challenge Dictators and Get Away with It?*, 59 COLUM. J. TRANSNAT'L L. (forthcoming) (manuscript at 9–10) (on file with author). Although he further argues that "it is possible, under certain conditions, to confront authoritarian or semi-authoritarian regimes in high-stakes cases when the costs of disobeying or ignoring the unfavorable judicial decision are too high to tolerate." *Id.* at 55.

[228] As Po Jen Yap showed, courts are more effective in dynamic democracies than in

Most importantly, the ability to successfully face a bully also depends on whether there are other kids in the playground and what their likely reaction will be. Just as when facing a bully, the role of third parties is important, and one cannot examine courts as standing alone.[229] Tom Ginsburg has demonstrated how courts around the world apply various mechanisms to constrain democratic backsliding.[230] Nonetheless, as he remarks:

> [C]ourts are not great heroes here. Their role in saving democracy is a limited one. The view of the role of courts in this account is essentially an informational one. Courts operate by providing high-quality information to publics and elites. But the action taken to protect democracy from erosion is taken by other actors, not courts themselves. What judges can do is speak truth to power, allowing *other* actors to step up.[231]

Judicial independence, whether the court enjoys longstanding legitimacy, how strong and supported civil society or the opposition are, and the stage and state of democracy in the country may all be relevant factors for the success or failure of the model.[232] "A strong and rapid reaction from the people, from civil society, followed by others," Dürr notes, "can sometimes avoid problems from developing further."[233]

What is normatively argued is that courts should take a reasonably "assertive" role in maintaining democratic integrity.[234] András Jakab argues that "constitutional courts should demonstrate activism when protecting democratic and rule-of-law mechanisms."[235] This author is not sure courts should be especially activist. They

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dominant-party systems, where they can only pursue "dialogic" paths to restrain authoritarian tendencies. YAP, *supra* note 226, at 2, 4.

[229] *Id.* at 1–2.

[230] Ginsburg, *supra* note 14, at 840.

[231] *Id.*

[232] Andrew Arato, *Populism, Constitutional Courts, and Civil Society*, *in* JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS, *supra* note 225, at 318 (arguing that "the way to oppose populist authoritarianism and its attack on courts requires a strategy that is both legal and political, based on the mutual support of associations and initiatives of civil society and courts"); *see also* Jeffrey K. Staton, Christopher Reenock, Jordan Holsinger & Staffan Lindberg, *Can Courts Be Bulwarks of Democracy* (Jan. 22, 2019), https://ostromworkshop.indiana.edu/pdf/seriespapers/2019spr-colloq/staton-paper.pdf [https://perma.cc/L6Z7-UVWG] ("Democratic states should be made less vulnerable to breakdown in the presence of strong civil societies, which empower courts and incentivize them to be willing to render independent decisions.").

[233] Dürr, *supra* note 181, at 136.

[234] SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 9 (2015) (arguing that the presence of strong constitutional courts is one of the most significant antidotes to authoritarianism).

[235] Jakab, *supra* note 47, at 22; András Jakab, *What Can Constitutional Law Do Against*

should act as they would normally act without such political pressure. True, courts cannot save democracy on their own. But when they exercise their full authority to protect democracy, at the very least they do the best they can to save it.[236] As Samuel Issacharoff states, "The era of rising populist anger and the dysfunction of modern democracies is hopefully transitory. For as long as these moments last, however, there is greater pressure for judicial engagement with the institutional foundations of democratic governance."[237]

In exercising this role, courts' authority to review amendments is important for two main reasons. First, because a central mechanism in the process of democratic erosion is formal constitutional amendments, the doctrine of "unconstitutional constitutional amendments," which sets various limits on formal constitutional change, may function as a useful tool to block or hinder such attempts at harming democracy.[238]

Second, and more importantly as for the more general role of courts, when courts possess the power to review even constitutional amendments, the worry against possible political "retaliation" is relaxed because the court can take a more "sincere" approach to constitutional adjudication.[239] It provides the court the freedom to primarily decide cases according to its own policy preferences rather than search for second-best solutions that consider possible overrides and backlashes.[240] It releases the court from strategic calculations and allows it to focus more on the normative force of principled constitutional reasoning.[241]

CONCLUSION

As I have argued in this Article, courts have an important role, through judicial review and its anticipatory effect, in protecting democracy.[242] Democracy, in the substantive sense, is a system of government that includes not only majoritarian processes of decision-making but also a core of fundamental rights, rule of law, and separation of powers. Nevertheless, around the world, democracy is under stress, a

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the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law 14–15 (Max Planck Inst. Compar. Pub. L. & Int'l L. Research Paper No. 2019-15) [hereinafter Jakab, *What Can Constitutional Law Do*], https://ssrn.com/abstract=3454649 [https://perma.cc/K75R-N6ZC].

[236] *Id.* at 22–23 (discussing courts and other systems to safeguard democracy).

[237] Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1, 56 (2019).

[238] Roznai & Brandes, *supra* note 117, at 19–20.

[239] *See generally* Nicola Tommasini, Pedro Riccetto & Yaniv Roznai, *When Backlashes and Overrides Do Not Scare: The Power to Review Constitutional Amendments and the Case of Brazil's Supreme Court*, 7 INT'L J. HUM. RTS. & CONST. STUD. (forthcoming 2020) (on file with author).

[240] *Id.* at 2.

[241] *Id.*

[242] *See supra* Section II.B.

phenomenon that raises difficult questions for the role of courts as they face political pressure. When under pressure, courts should neither retaliate nor go under the bunker to weather the storm.[243] They should act "business-as-usual" and continue with their role without being overly strategic.[244] The bunker approach, just like facing a bully, is doomed to fail. When the judiciary has the authority to review constitutional amendments, and not just ordinary legislation, the court has less to worry about with regard to possible overrides and backlashes.[245]

With that said, courts are limited organs, and judicial decisions have less power and influence than we—constitutional scholars—often like to believe.[246] In 1892, James Thayer wrote that "[u]nder no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere."[247] This statement invites a cautionary note in conclusion. The court has neither "the sword nor the purse," to use Hamilton's famous words.[248] All it has is its legitimacy.[249] Eventually, it comes down to the people themselves, the society, its culture, and its education.[250] As András Jakab recently claimed, constitutional norms cannot be considered detached from their particular social and political context.[251] Only within such context can one understand how constitutional norms can support democracy and the rule of law. And when democratic erosion occurs, the normativity of constitutional law is failing; a failure that expands the gap between the constitution and constitutional reality.[252] Liora Lazarus rightly notes:

> The fight to stem the tide of authoritarianism depends on establishing a defence of the rule of law which has real purchase on the public imagination. This narrative must be capable of persuading the broader public of the essential value of constitutionalism. If we fail to establish this counter-narrative, liberal democracy as a whole is threatened.[253]

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[243] *See* Bob, *supra* note 202.

[244] *Id.*

[245] *See* Tommasini, Riccetto & Roznai, *supra* note 239, at 2.

[246] Just consider the limited influence *Brown v. Board of Education* had. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? *(*1991).

[247] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17, 156 (1893).

[248] THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 1961).

[249] Dilyan Nachev, *Judicial Activism and the Democratic Legitimacy of Courts*, *in* THE ROLE OF COURTS IN CONTEMPORARY LEGAL ORDERS, *supra* note 48, at 133, 138 ("[J]udges are an essential part of any justice system, and one of the important prerequisites for the proper functioning of this system is the trust we place in them.").

[250] Jakab, *What Can Constitutional Law Do*, *supra* note 235, at 15.

[251] *Id.* at 9.

[252] *Id.* at 10.

[253] Liora Lazarus, *Brexit in the Supreme Court: When Populists Attack the Rule of Law,*

The judiciary has an important supporting role in that respect. The legal debate brings with it a public debate, and it is a hindering machinery that allows the people, the politicians, and the civil society to reconsider constitutional and legal changes and, if needed, to object to them.[254] And through its judgments, the court can also explain and educate about the possible problems a specific legislation or an amendment poses to democracy.[255] By so doing, it removes the façade of constitutionality from certain actions or reforms that may harm democracy.[256] True, the power of the court—like any legal instrument—is limited. This does not mean that it should be emptied of power. Courts have an important role in hindering certain processes, but they alone cannot save democracy. In the end, "[C]onstitutions cannot save democracy: only (small *d*) democrats can."[257] The same is true with courts and the protection of democracy. Courts, however, may assist small *d* democrats to save democracy.

Everyone Loses, CONVERSATION (Sept. 26, 2019, 11:53 AM), https://theconversation.com/brexit-in-the-supreme-court-when-populists-attack-the-rule-of-law-everyone-loses-124302?fbclid=IwAR2GsL_g3HozjmRNv7elL-efq9Tft8K7dL_RE4-merzceWcXA7vjb8ob28s [https://perma.cc/BWL3-AQGL].

[254] Jakab, *What Can Constitutional Law Do*, *supra* note 235, at 15.

[255] Christine Landfried, *Introduction* to JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS, *supra* note 225, at 1, 1–2.

[256] *Id.* at 3.

[257] GINSBURG & HUQ, *supra* note 6, at 240.