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TEXT

1 1.

Among the most contentious and discussed issues in American comparative constitutional law today is the role that legal institutions play in the process of democratic backsliding. It is not news to observe that there has been a crisis in the modal forms of liberal constitutionalism that emerged as a default design choice for political systems across Europe and North America in the wake of World War II, It then diffused more widely across the globe as a whole.[1] Central to this form of constitutionalism was a written constitution with an enumeration of individual rights; rights-based judicial review; a heightened threshold for constitutional amendment; a commitment to periodic democratic elections; and a commitment to the rule of law.[2] While details varied, liberal constitutionalism, so defined, sought broadly to protect democracy and limit state power-however patchwork its achievements were in practice.

2 The twin surprises of 2016 Brexit referendum and U.S. presidential election punctured triumphalist narratives about liberal democracy. In both countries, right-of-center populist positions hostile to international migration, international and supra-national organizations, and the liberal tolerance of different ethnicities and faiths prevailed. Their triumphs were part of a wider, right-leaning "populist explosion." Although they have typically obtained power by democratic, electoral means, populists on both the left and right departed from liberal democratic norms in several ways. They repudiated liberal norms of tolerance and openness; restricted press freedom; attacked institutional checks that promote the rule of law; and catalyzed constitutional and statutory transformations that promise to entrench populist coalitions beyond fresh democratic defeat. In the past decade, an increasing number of seemingly stable, reasonably

wealthy democracies have also regressed from previously robust democratic regimes toward autocracy. These states are literally all over the map: They range from Eastern Europe (Hungary and Poland) to the Mediterranean (Turkey) to Latin America (Bolivia and Venezuela). Once-anticipated democratic gains in Russia and China have failed to materialize. At the same, a hoped-for "fourth wave" of democracy in the Arab Spring's wake has dissipated into bitter civil war or charismatic authoritarianism, while Russia and China have both asserted nondemocratic norms with increasing vigor and even bellicosity. Russia's invasion of Ukraine in early 2022 marked the end of any illusion of gradual pacification of the world order.

3 These developments triggered a wave of comparative constitutional scholarship.[3] This is part of a more general renewed theoretical and historical interest in democracy in transhistorical, comparative, and theoretical perspectives.[4] The legal scholarship has drawn on that larger body of work, without collapsing into it. In previous work published in an American legal journal and in a book in 2018, we offered a comparative constitutional perspective on the comparative constitutional law of democratic backsliding.[5] Drawing on the experience of other polities that had experienced various forms of democratic backsliding, we aimed to cast light on the specific legal mechanisms and institutional changes employed to unravel democratic practice. This comparative analysis led us to conclude that the U.S. Constitution might be good at checking coups or the anti-democratic deployment of emergency powers, but it is not well suited to stall the slow decay of democracy. This eighteenth-century Constitution singularly lacked provisions necessary to slow down a would-be autocrat bent on the slow dismantling of democracy.

4 In our scholarship, we have focused specifically on constitutional mechanisms, including: amendment rules; entrenched protection for rights of free speech and association; term limits and other protections of election integrity; and the constitutional viability of an autonomous bureaucracy and 'fourth branch' institutions designed to check the abuse of executive power. Correspondingly, we suggested that comparative experience illuminates the mechanisms of backsliding. On our view, comparative experience suggests that leaders who want to engineer a retrogression typically use some combination of the five following mechanisms:

- Constitutional amendment, in particular to remove limits to executive terms;
- The elimination of institutional checks in the legislative or judicial branches, or that take the form of otherwise independent accountability institutions;
- The centralization and politicization of executive power, including purging or intimidating the meritocratic state bureaucracy;
- The degradation of a shared public sphere through intimidating the media and civil society; and
- The elimination of political competition, either through direct attacks on competitors, or through rigging the electoral machinery to permanently entrench one side.

5 Understanding the risk of retrogression, we concluded, requires separate attention to each one of these legal mechanisms, and careful consideration of whether a particular national constitution either impedes or accelerates them. In respect to the United States. With the exception of the first of these modalities (constitutional amendment), we were skeptical that the U.S. Constitution did much to constrain backsliding away from democracy. In some ways, indeed, we suggested that it might even facilitate such a shift. Even assuming official compliance with the law, therefore, we argued, the road of constitutional retrogression is a relatively uncluttered one, especially if there is what Kim Lane Scheppele a "phalanx of lawyers" to facilitate the path. If a U.S president is agnostic about constitutional rules, and backed by a partisan coalition bent on entrenchment, they would have many tools at their disposal.

6 2.

Obviously, ours was not the only such effort to mine comparative experience to understand the conditions of democratic survival. Since we wrote, there has been important work along several margins. In this section, we canvas central lines of research that have been explored in the American legal scholarship in the past few years —much of it related to the core issued that we identified in our 2018 book and article. We do not attempt here to be comprehensive; rather, our aim is to identify the most important lines of comparative work by American legal scholars or in American journals (with some defensible and brief detours) that have emerged in the last few years related to the problem of democratic backsliding.

7 Consider first the question of constitutional amendments. Several studies have explored the transnational domain across which constitutional amendment occurs, and point to ways in which backsliding politicians have strategically borrowed from their peers in respect to the use of amendatory strategies for undermining democracy.[6] The result of this work is an increasing skepticism that "thin, formal" conceptions of terms such as "judicial independence" and the "rule of law," can do much effectual work in maintaining democracy.[7] This scholarship complements recent comparative work on Asian jurisdictions, where the role of courts in enabling "self-dealing" entrenchment through amendment has been highlighted.[8] Not surprisingly, this tendency toward 'abusive' amendment has also led to an upsurge in interest in Roznai's important earlier work on "unconstitutional constitutional amendments."[9]

8 Related to the question of constitutional amendments is the role of constitutional courts: Judicial review, after all, can be a substitute for formal amendment where the latter is too difficult to achieve. A split of opinion occurs in respect to the role of national courts in the dynamics of democratic backsliding. On the one hand, there is a strand of important work that has added to our understanding of the ways in which judicial review, rather than being deployed in defense of democracy, can be used to undermine it.[10] Of note here is the emergence of the concept of "abusive judicial review" in the important work of Dixon and Landau.[11] The increasingly regressive U.S. Supreme Court has, in particular, come under harsh criticism from commentators because its narrowing or invalidation of anti-entrenchment election measures and its refusal to prohibit partisan gerrymandering.[12] These decisions aid the Republican party, whose presidents appointed a supermajority of the Justices. (While not strictly comparative, this work is often in explicit conversation with other work of transnational scope, such as our own).[13] On the other hand, other scholars have identified ways in which apex courts might be conscripted into democracy's successful defense.[14] Hence, some have explored ways of insulating the judiciary from partisan entrenchment,[15] and argued for a jurisprudence that might be more robust against backsliding.[16]

9 If courts have been one of the most important front-lines of the assault upon democracy—often because of preemptive strikes by

would-be autocrats—another major arena has been presidential term limits. Writing before the wave of democratic backsliding had become apparent, one of us identified term limits as a potential weak spot in democracy's defense.[17] More recent studies have demonstrated that about half of those leaders globally who are subject to term limits attempt to overstay, often with the aid of constitutional amendments.[18] Yet other work has explored a range of possible reform strategies to make term limits "stick" better.[19] In that vein, one of us has recently highlighted the role of international law and institutions in either accelerating or putting a brake on term-limit evasion.[20] Political scientists have importantly supplemented this legal scholarship by exploring the ways in which post-term economic opportunities generate or stanch evasion efforts.[21]

10 Finally, Tushnet and Khaiten have both written recent insightful pieces (a book and an article, respectively) on "fourth branch" or "guarantor" institutions.[22] While both draw on comparative methods, they diverge on the extent to which they see practical promise in such bodies. The U.S scholarship here, although rich, focuses on comparative examples, in part because the American context is shockingly bare of experience.[23] One of the problems created by the American constitution is the limitations it purportedly places on independent bureaucratic agents. In this regard, it appears to be a global outlier.[24]

11 In conclusion, it is worth noting, not all comparative work has been transnational in character. Taking advantage of subnational variation, scholars have also looked to the constitutional law of the several American states for inspiration about new modes of democratic defense.[25] Other scholars point not only to how federalism can create a "repository of diversity" but instead a springboard for democratic backsliding efforts.[26] The role of such "subconstitutional" actors is an important field of further potential study[27]—not least because of the risk that state-level actors in the American context become critical catalysts of democratic unraveling in the 2024 presidential election context.

12 3.

The regime shift in the United States in 2020 has not abated scholarly interest in the question of how constitutional law figures in the

dynamics of backsliding: If anything, alarm about the prospects for America democracy, and liberal democracy worldwide, remains quite high.[28] Moreover, the events of 2020-21, and in particular the violence that occurred on January 6, 2021 at the U.S. Capital, and the related efforts by former president Donald Trump and his allies to subvert the results of the 2020 election. To date, there is not yet a robust U.S. literature on this (although that's probably just a question of time). Certain specific questions remain underexplored concerning how specific individuals (or groups) who mobilize against democratic norms should be treated in the future. In particular, should they be permitted to continue to be involved in politics, and if so in what capacity?

13 In the remainder of this paper, we focus on a series of specific design questions that remain relatively unexplored. Drawing on recently published and forthcoming work, we develop a perspective on two specific mechanisms for addressing these concerns: impeachment and disqualification.[29] One of us has argued that the basic choice facing constitutional designers is between 'legal' mechanisms, which involve apolitical expert bodies such as prosecutors' offices, 'political' mechanisms, which run through elected bodies such as legislatures, or some mix of the two.[30] This dichotomy runs through the design of impeachment and disqualification alike. Neither the corner solutions nor any mix of both legal and political mechanisms, however, is obviously optimal.

14 Consider first the question of impeachment, which follows wrongdoing by an elected leader. Impeachment usually includes removing a president from office, other than through the regular operation of elections, term limits, or the normal apparatus of political selection. As such, it goes to the core of democratic governance. The problem of head-of-state removal is acute in both presidential and semi-presidential systems. But the challenge of presidential removal does not raise the same concerns as removal in parliamentary systems that employ a vote-of-no-confidence measure to remove heads of government.[31] The difficulty of head-of-state removal, moreover, is not limited to the design of an impeachment-like mechanism. Recent experiences in Honduras, Niger, and Burundi vividly show that a polity must struggle with the attendant problem of how to enforce such a constraint against a recalcitrant leader. Constitutional

designers have proved increasingly unwilling to adopt a presidential form of government. Instead, an increasingly common response to the problem of head-of-state criminality is to refuse to invest the head of state with substantial power. The rise of semi-presidentialism, in which there is a directly elected fixed-term president, along with a prime minister and a cabinet responsible to the legislature, is not inconsistent with this point since many of those presidents are fairly weak. [32] Nevertheless, recent events in Italy are a reminder that even a limited presidential role in a parliamentary system can be consequential enough to spur talk of impeachment talk.

15 Impeachment globally remains rare. Between 1990 and 2018, there were at least 210 impeachment proposals in 61 countries, against 128 different heads of state," but only ten successful removals. The evidentiary basis for analyzing disqualification by impeachment is correspondingly thin. Hence, study must focus on constitutional text rather than practice. Through a review of comparative and international evidence, we found that there is striking diversity in the substance of impeachment law. Criminal offenses and treason, rather than a more inchoate category of 'offenses against the state' seem to be core criteria for impeachment globally. Impeachment does not always focus on the criminal behavior or bad acts of an individual president. Rather, it also serves as a response to a particular kind of political crisis in a presidential system, commonly in which public support for the leader has collapsed. In some recent impeachments, such as in South Korea, crisis combined with evidence of criminality to oust a president from office. But in other cases, such as in Brazil and Paraguay, there was scant evidence of high-level criminality. Removal was rather used to push out weak presidents who had lost the ability to govern. Consistent with this practice, many constitutions around the world include a textual standard for removal that explicitly goes beyond criminality to include governance failures or poor performance in office, while others enable such an approach through ambiguity. In general, impeachment globally is, in practice, a device to mitigate the risk of paralyzing political gridlock, rather than simply a way to deal with individual malfeasance.

16 Turning to process, we found that the pathways of removal typically involve multiple phases and different institutions. These pathways

were also characterized by different voting thresholds (sometimes within the same document) and time limits. Procedural details also sometimes varied along with the basis of the removal charge. All this means that there is a good deal of complexity and variation. But there are some generalizations that can be drawn. Even if not called impeachment, head of state removal typically begins with action in the legislature, either in the lower house, the upper house, or both houses acting jointly. The most common vote threshold is a two-thirds rule. Whether or not the legislature proposes removal, it often has a role in approving the process. Again, the modal threshold is a two-thirds vote. Further, courts in many countries have a role in approving the removal of the president. But the judicial role in impeachment varies quite widely. In some cases, courts may be limited to ensuring that impeachment procedures are being carried out using the proper procedures by political actors. In others, such as in South Korea, courts may become involved at the final, trial-like stage of impeachment, after the legislature has made an initial decision as to whether impeachment is justified. A few constitutions also have multiple tracks for impeachment, some dominated by the courts and some by legislators. For example, the Colombian Constitution provides that if the president is impeached for "crimes committed in the exercise of his/her functions" or "unworth[iness] to serve because of a misdemeanor" the House impeaches and the final trial for removal is before the Senate. But where a president is impeached for a common crime, the final trial instead occurs before the Criminal Chamber of the Supreme Court.

17 Examining measures of democratic quality in impeachment's wake, we found no evidence (at least in the small sample of extant cases) that impeachment of a president reduces the quality of democracy in countries where it is carried out. The same holds true when removal through impeachment is attempted, but not completed. The fear that a more political impeachment process would necessarily be destabilizing has no empirical support in the recent comparative experience. Rather than being a way of undermining or circumventing democracy, we suggest that in fact impeachment may play an important role in its stabilization.

18 Although we must tread carefully in drawing normative conclusions given the limited pool of available data and endogeneity concerns,

our analysis nevertheless has implications for the design and practice of impeachment, particularly in the United States. We argue that a model of impeachment focused only on the individual culpability of chief executives—what we call a "bad actor" model—is likely incomplete and undesirable as a functional matter. Instead, impeachment processes should be attentive to the broader political context, which we call a "political reset" model. Impeachment can be useful to ameliorate one of the major weaknesses of presidentialism—rigidity—by removing poorly performing presidents when their support has collapsed. [33]

19 Now consider the possibility of individual disqualification. Consider here the January 6 insurrectionists: Having worked against democracy, should they be allowed to continue to participate in democratic life? Or should they be disqualified from future office holding? The disqualification of individuals for their antidemocratic actions presents a specific iteration of another pervasive problem of democratic design: the tension between democratic self-realization and democratic self-destruction. On the one hand, democratic institutions have a reasonable claim to set the terms of political participation. The forms of elections, the rules for candidate and voter qualification, and ballot access rules are all commonly matters for democratic decision. Yet at the same time, there is a risk that the power to set rules for the democratic game will be used to fence out disfavored groups, to entrench incumbents beyond electoral challenge, and to create the image of democratic competition without its substance. Democratic mechanisms—including rules for disqualification--must be designed to advance the goal of self-government without facilitating malign entrenchment. Unbounded, the power to exclude specific individuals imperils democracy as a going concern. But its absence also means lost opportunities to deepen democracy and even to defend its basic existence.

20 Almost all democratic constitutions, including our own, contain instruments of *democratic disqualification*. These are mechanisms for identifying and excluding specific individuals or groups, whether through discrete adjudication or general legislative rule, from public office, either temporarily or permanently. Disqualification mechanisms differ from the *ex ante* categorical exclusions of certain classes of persons—such as noncitizens, minors or, even more dubiously,

women or racial and ethnic minorities—from public office. They are also distinct from criminal prosecution or conviction: Indeed, disqualification can and often is implemented through mechanisms that go well beyond the criminal justice process, while criminal sanction need not lead to political disqualification.

21 There are two design choices embedded in any disqualification mechanism. First, disqualification rules can operate either on the *group level*, or on the *individual level*. That is, they can either disqualify actors en masse, because of membership in a certain party or affiliation with a discredited regime. Or they can work at the retail level, focusing on the conduct and characteristics of the individual actor at issue. Second, disqualification rules can be *backward-looking*, focusing on the prior acts of an individual or group, or *future-focused*, seeking to identify organizations or actors that pose ongoing and serious threats to constitutional stability.

22 These two choices create a framework of possibilities. International experience with disqualification shows that constitutional designers have experimented with all four possible permutations of these design choices.

23 First, backward-looking group rules have been adopted in many transitional democracies, which have deployed rules screening, barring, or even removing candidates from public office based on their association with a prior regime. "Lustration" as it is known, is closely associated with the transition from Communism after the Iron Curtain fell. In the Czech Republic, for example, some fifteen thousand individuals were removed or barred from public office. In the eastern portion of reunified Germany, lustration under reunification treaty provisions resulted in some 54,926 people being removed or barred from office. It has also been used in post-invasion Iraq, where the Baath Party was disbanded and its members excluded from office. In practice, lustration is often applied in a narrower way than its formal scope might suggest. Practical and political concerns limit its operation. Where lustration has been widened, as in Iraq, it has interacted with ongoing political fissures in socially and politically damaging ways. At the same time, lustration regimes tend to linger beyond the transition. Transitional mechanisms can help ensure that senior officials are not too "tainted" by association with the old

regime. But they work best when they are temporary and use a sunsetting mechanism to minimize disruptions into ordinary politics.

24 Second, some systems use forward-looking group disqualification. German jurist and refugee Karl Loewenstein coined the term "militant democracy" shortly before World War II to describe "the use of legal restrictions on political expression and participation to curb extremist actors in democratic regimes."[34] Today, militant democracy's most important institutional form is the ban on anti-democratic parties, deployed at various times in Germany, Finland, Czechoslovakia, Korea, France, Spain, and the United Kingdom. Although not formally a bar against specific persons' participation in politics, a party ban is often *de facto* a disqualification of known individuals. Some 29 percent of constitutional courts have the ability to adjudicate the legality or constitutionality of political parties. Party bans have been imposed recently across regions and contexts, from Spain and Turkey to Israel and South Korea. For example, in 2014, a Korean court disqualified the United Progressive Party, a small left-wing party, citing alleged links with North Korea, at the behest of former president Park Geun-Hye, after affiliates were arrested for an alleged plot with North Korea. The modern U.S. approach, where the First Amendment has been held to prohibit party bans, is exceptional from a global perspective.

25 Perhaps the most important historical example is Germany's. Under Article 21 of the 1945 Basic Law promulgated in West Germany after World War II, "[p]arties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional." Further, all parties' "internal organization must conform to democratic principles"; their use of funds must also be transparent." In 1951, the federal government asked the Constitutional Court to ban both the Socialist Reich Party and the Communist party. In the Socialist Reich Party case of 1952, the Court acted quickly and with relative ease, finding that the party's platform leaned heavily on former Nazi ideas and imagery, that the party recruited unrepentant former Nazis to fill its ranks, and that it was organized in a top-down, undemocratic manner. The Court had more difficulty in the Communist Party case, which came down four years later. It ultimately upheld the ban in a long, detailed opinion.

26 Third, there are also individualized disqualification mechanisms that target bad behavior in the past. Almost all (90 percent) of national constitutions with a presidency speak to impeachment. We have discussed this pathway above.

27 Fourth, term limits are a forward-looking individual-level mechanism of disqualification. Term limits prevent officials from entrenching themselves in office by categorically barring terms of more than a certain number of years. The vast majority of presidential or semi-presidential systems include a term limit for their presidents. The small percentage (16) that do not tend to be non-democracies, often because the term limit was removed at the behest of an autocratic chief executive. The most common design, found in a majority of presidential systems, is the U.S. approach: an absolute bar on any presidential reelection after two consecutive terms have been served. A sizable number of systems include an alternative form of disqualification, where presidents must leave office after serving either one or two terms, but only temporarily: They can return after sitting out a set period of time (usually one term). Chile offers an interesting recent example. From 2006-2022, four presidencies were held by two presidents from different sides of the political spectrum (Michelle Bachelet and Sebastian Pinera), each alternating service for one term. As with other forms of disqualification, then, term limits sometimes require only a temporary exit—in only a small number of systems (8 percent) is all possibility of reelection foreclosed.

28 What can we learn from this international experience? First, disqualification is a common feature of democratic political systems, even if we do not always recognize the relationship among these various modalities. Second, it is often temporary---banned parties can reform, lustration periods end, and politicians can sit out a term before re-entering the arena. We think this is wise, as it gives the democratic process time to adjust, without permanently excluding individuals and parties that have significant and enduring support.

29 Conclusion

What else is there to consider? There is obviously much to say here, and we do not claim to offer a comprehensive account of gaps in the scholarship. But here is one suggestion: There are several ways in which an internationalized theater of political action increases the

strain on democratic institutions. Consider the operation of transnational networks in which ideological justifications and legal strategies for backsliding circulate. There is to date no careful and comprehensive account of how these networks have succeeded in shifting national-level dynamics.[35] That is, more work is needed on the manner in which the right of association—supposedly a keystone of democratic practice—can, in its transnational form, enable democratic collapse.

NOTES

1 S. P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1993).

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3 Some earlier pieces contained prescient discussions. S. Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015).

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11 D. Landau and R. Dixon, 'Abusive Judicial Review: Courts against Democracy' (2019) 53 *UC Davis Law Review* 1313

12 J. Chen and N. O. Stephanopoulos, 'The Race-Blind Future of Voting Rights' (2020) 130 *Yale Law Journal* 862; N. O. Stephanopoulos, 'The Anti-Carolene Court' (2020) 2019 *The Supreme Court Review* 111; M. J. Klarman, 'The Degradation of American Democracy - and the Court The Supreme Court 2019 Term: Foreword' (2020) 134 *Harvard Law Review* 1; see also A. Z. Huq, 'The Anti-Democratic Difficulty' (forthcoming 2023) 102 *Northwestern University Law Review*.

13 Stephanopoulos has also written an important piece in comparative election law. N.O. Stephanopoulos, 'Our Electoral Exceptionalism' (2013) 80 *University of Chicago Law Review* 769

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23 R. Dixon and M. Tushnet, 'Constitutional Democracy and Electoral Commissions: A Reflection from Asia' [2021] *Asian Journal of Comparative Law* 1.

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ABSTRACTS

English

There has been a crisis in the modal forms of liberal constitutionalism that emerged as a default design choices for political systems across Europe and North America in the wake of World War II. Central to the crisis have been

institutionalized assaults on democratic institutions, often conducted with legal tools. This article reviews the extensive literature in American comparative constitutional law on the role that legal institutions play in the process of democratic backsliding. Drawing on a range of comparative experience, it draws attention to questions of constitutional amendment rules; entrenched protection for rights of free speech and association; term limits and other protections of election integrity; and the constitutional viability of an autonomous bureaucracy and 'fourth branch' institutions designed to check the abuse of executive power.

Français

Les modèles relevant du constitutionnalisme libéral, apparus en Europe et en Amérique du Nord au lendemain de la seconde guerre mondiale traversent une crise. Ce phénomène s'explique en particulier par des attaques contre les institutions démocratiques, le plus souvent menées grâce à des instruments juridiques. Le présent article analyse l'abondante littérature nord-américaine en droit constitutionnel comparé sur le rôle que jouent les institutions juridiques dans le processus de recul démocratique. Il vise plus particulièrement, en s'appuyant sur une série d'expériences comparées, à mettre l'accent sur les questions relatives aux règles d'amendements constitutionnels, à la protection des libertés d'expression et d'association, à la limitation des mandats et aux diverses protections de l'intégrité des élections, ainsi qu'à la constitutionnalité d'une bureaucratie autonome et d'institutions relevant d'un "quatrième pouvoir", à même de contrôler les abus de pouvoir de l'exécutif.

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Mots-clés

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