2022

Why Judges Can't Save Democracy

Robert L. Tsai
Boston University School of Law

WHY JUDGES CAN'T SAVE DEMOCRACY

Robert L. Tsai[†]

In *The Specter of Dictatorship*,[1] David Driesen has written a learned, lively book about the dangers of autocracy, weaving together incisive observations about democratic backsliding in other countries with a piercing critique of American teetering on the brink of executive authoritarianism at home. Driesen draws deeply and faithfully on the extant literature on comparative constitutionalism and democracy studies. He also builds on the work of scholars of the American political system who have documented the largely one-way transfer of power over foreign affairs to the executive branch. Driesen's thesis has a slight originalist cast, holding that "the Founders aimed to establish institutions and customs capable of containing a President with 'despotic' tendencies," but that such mechanisms have since become "eroded."[2] That much is not particularly novel, but Driesen's nearly singular focus on the problem of "judicial acquiescence" helps the book to stand apart from approaches that focus more explicitly on questions of design,[3] the production of norms, or perhaps even the cyclical nature of political decline and

[†] Professor of Law and Law Alumni Scholar, Boston University School of Law. This essay was developed from remarks given at the symposium on Professor Driesen's book that took place at Syracuse University's College of Law on November 12, 2021. My thanks to Andrea Scoseria Katz, Noah Rosenblum, and Jed Shugerman for engaging conversations on this paper. I also appreciate the expert proofreading of Isabella Grillo and Liz Walk.

[1] DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER (2021) [hereinafter, DRIESEN, THE SPECTER OF DICTATORSHIP].

[2] *Id*. at 1.

[3] *Id.* at 6; In its admonition that courts become more active in policing American presidents, Driesen's work resembles, and even updates, the work of HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 160 (1990) (finding "judicial decisions . . . would serve as much-needed counterweights to unchallenged executive practice").

regeneration.[4] *The Specter of Dictatorship* is timely, written in accessible prose, and takes seriously the possibility of a dictatorship in the United States.

Driesen's choice to make the centerpiece of his book about the jurisprudence addressing presidential power, however, renders the project vulnerable to the criticism that both his diagnosis and his solutions may be a tad court-centric. In this essay, I will probe why Driesen's account might lead him to miss important things that ail American democracy. Ultimately, those factors should lead us to be modest in predicting what beneficial role judges can play in constraining a president. There may be important moments when judicial decrees might be heeded and intervention would do some good, but judges alone cannot save democracy.

I. DRIESEN'S ACCOUNT

Driesen ably revisits legal disputes in which the Supreme Court refused to adjudicate claims levied against a president but also cases where the Justices helped a president to fend off alleged encroachments by Congress. Weaving older cases with more recent decisions on executive privilege and presidential removal of agency leadership, Driesen warns that courts are aiding and abetting executive branch lawyers in their efforts to undermine rule-of-law checks on

[4] *See, e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018); JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020).

presidential power.[5] In his view, judges must channel the Framers' imperative "to avoid autocracy."[6]

Driesen has qualms about the unitary executive theory, advanced by proponents of a strong presidency on matters of national security, as well as those who desire stronger presidential control over agencies.[7] His concern is that this theory can be harnessed to promote a largely unaccountable executive authority.[8]

---

[5] DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 66–71 (first quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013); then quoting Raines v. Byrd, 521 U.S. 811, 819 (1997); and then quoting INS v. Chadha, 462 U.S. 919, 930, 938 (1983); and then quoting Zivotofsky v. Clinton, 566 U.S. 189, 219 (2012); and then quoting Buckley v. Valeo, 424 U.S. 1, 262 (1976)) (first citing Goldwater v. Carter, 444 U.S. 996 (1979); then citing Seila Law LLC v. CFPB, 140 S. Ct. 140 (2020); and then citing Bowsher v. Synar, 478 U.S. 714 (1986); and then citing *Buckley*, 424 U.S. 1; and then citing Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 265 (1991); and then citing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010)) (finding "courts . . . eagerly exercise judicial review of statutes that might *limit* presidential power [] [o]n the other hand, they . . . duck review of *expansions* of presidential power").

[6] DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 12.

[7] *See, e.g.*, DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 95 ("strengthening a President through judicial creation of a wholly unitary executive . . . poses risks to democracy"). *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008) (examining the use of unitary executive from forty-three presidential administrations); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2015) (arguing that the executive power should be examined based on a thorough understanding of its use throughout history); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (2003) (examining the history of the executive power).

[8] *See, e.g.*, DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 120 ("consolidation of the chief executive's control over the executive branch [] constitutes both a defining characteristic of autocracy and a potent weapon in undermining democracy"); *id.* at 71 ("if . . . the unitary executive theory g[ives] the President sole control over law enforcement and prohibit[s] anybody else from bringing a legal challenge, then a President would be free to disregard the law completely unless impeached"). Some have criticized the historical claims of proponents of unitary executive theory. *See*, *e.g.*, PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 4 (2009) (finding that "legal theorists . . . vigorously champion[] presidentialism as an accurate reading of what our constitutional Framers historically intended. It is not."); Andrew Kent, Ethan J. Lieb & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2182 (2019) (finding that the United States Constitution's "language of faithful execution is for the most part a language of limitation, subordination, and proscription, not a language of empowerment and permission"); Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1234 (2019) (finding that in terms of public understanding at the time of the Constitution's framing "[t]he singular feature of [constitutional executive] authority was its derivative and subsequent character"); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 232, 344 (2016) ("[t]he most natural reading of [early state constitutions] belies unitary executive theory as a matter of original public meaning.").

Note, though, the prominent role that courts play throughout Driesen's account. He acknowledges uncertainty in judicial predictions about the likelihood of compliance with their decrees (which is right), but he still expresses confidence that "[p]rincipled judges defending democracy against an authoritarian attack" can make a "modest contribution to the effort to preserve democracy."[9]

When Driesen turns to the evidence of democratic backsliding in other countries such as Hungary and Turkey, his objective is to offer lessons for "presidential power jurisprudence," specifically, to warn against "judicial enabling of emergency powers" and "strengthening a President" through a vision of the unitary executive.[10] He wants us to see that America is not immune to the possibility of authoritarianism and to increase the resolve of judges to resist "a bad-faith President using the powers of his office to erode and even destroy democracy."[11]

II. WHAT'S MISSING

So what's missing from Driesen's account? From his perspective, the threat of autocracy in the United States is a fairly straightforward story of judges giving up too much of their capacity to serve as democratic guardrails. Yes, presidents are aggrandizing power, the story goes, but if only judges could stiffen their spines, they could slow a country's slide into autocracy, if not arrest it altogether.

Yet there are several reasons to doubt that judges can in fact serve such a function effectively in America for the foreseeable future. The story of democratic decline in the United

---

9 DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 147.

10 *Id*. at 95.

11 *Id.* at 174.

States may be more complicated than Driesen allows, and those underappreciated factors may blunt the capacity of judges to save the day. It's also possible that comparative accounts of autocrats seizing power in other countries do not yield useful lessons when it comes to judicial review. Additionally, robust judicial review in the name of democracy could, ironically, be counterproductive for democracy—especially during polarized times. I take these up in turn.

A. How is Democratic Decline Different from Normal Political Change?

Before putting too many eggs into judicial review as a useful mechanism for checking autocracy, we must first have a plausible account of political change over time, and the role of democratic decline in that story. Not every departure from original design is illegitimate or brings the threat of autocracy.

The rise of "living presidentialism"[12]—a set of cultural expectations favoring a strong executive, potent ideologies to justify the assertion of presidential prerogative, and bureaucracies to enable presidential administration—is a story that is far more complicated than one of judges rolling over and giving presidents what they want. Yes, there are the dramatic shifts from power seizing and power ceding that Driesen centers in his story, but other developments have also both made presidential leadership possible and altered the practical arrangements of power. Those same developments have indeed made the range of effective judicial review correspondingly smaller—though not all of these adaptations are a bad thing, lack intellectual justification or are necessarily unconstitutional.[13]

---

[12] Sai Prakash uses the term "living presidency" in pejorative terms in his book, *The Living Presidency*, in which he pits an "originalist presidency" with a living one. SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (2020). He "den[ies] that presidents, or anyone else, can change the Constitution and laws via practice." *Id*. at 11. By contrast, I use the term primarily to capture a descriptive fact and underlying set of processes to which originalists simply close their eyes.

[13] *See generally* Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022) (discussing the intellectual foundation of presidential administration); Elena Kagan, *Presidential*

Take the transfer of authority from Congress to the President over time. Congress has often fractured over efforts to hold a president accountable or wilted at the task. Legislators have many reasons to enact open-ended laws that invite presidents to act creatively in response to planned ambiguity. That delegation can certainly be abused, but it has also been deployed to enormously beneficial effect to keep the country safe as well as improve the health and safety of workers, protect the environment, and monitor economic conditions.

We instinctively think that ceding too much effective power at some point transgresses legal boundaries, but the hard task is actually drawing that line. Reaching legislative compromises is enormously costly and difficult. Not only has Congress ceded first-mover status in a whole range of matters, but the rise of the administrative state has left Congress with the role of establishing framework statutes and tweaking them, but otherwise uninvolved in many day-to-day decisions. This fact alone is not sufficient proof of democratic decline; to the contrary, it is a rational response on the part of existing institutions to the challenges of governing effectively in a modern nation-state. Presidential administration as a form of lawmaking has arisen not merely to deal with crises, but also to solve persistent and recurring problems, big and small.[14] Greater control over bureaucracies could lead to subversion of congressional priorities, but it's also the only way to formulate a coherent policy when you are managing a sprawling administrative state with civil servants who may be hostile to a president's—and by extension, voters'—preferences.

Administration, 114 HARV. L. REV. 2245 (2001) (discussing adjustment of judicial review to promote more bureaucratic control).

[14] *See, e.g.*, Blake Emerson, *Executive (Administrative State)*, *in* HELDER DE SCHUTTERCAMBRIDGE HANDBOOK OF CONSTITUTIONAL THEORY (Richard Bellamy & Jeff King eds., forthcoming 2022) (manuscript at 30–31) (finding that "the administrative state is a particularly useful and appealing avenue for . . . constitutional change because of its . . . constitutionally instrumental and generative dimensions" and providing an example in the context of human rights, when "federal administrative action temporarily displaced the constitutional value of federalism by coercing state and local compliance with an effects-based understanding of equal protection.").

What Driesen fears is that a true autocrat can exploit this imbalance of power. His emphasis on the jurisprudence rationalizing the expansion of presidential power implies that balance might be restored by discrediting certain doctrines. Yet that might be attributing too much causal force to particular legal ideas, and not enough to the geographic, economic, and political forces that have led to major adaptations in constitutional self-government.

Of course, political development of the constitution entails more than just coherent or attractive ideas; it also rests heavily upon freshly created expectations, new bureaucracies, and constituencies for powers as well as rights. Social and political conditions change each time presidential action is successfully deployed to address a crisis. After a time, a new equilibrium is established. That new baseline then becomes the basis for debates over executive power going forward. Only the simplest accounts of power and community could hold the view that each new equilibrium is a step toward autocracy. Yet we need an account of democratic backsliding that is capable of distinguishing between legitimate, useful adaptations and legal changes that represent real dangers of rule by the few.[15]

Consider Driesen's discussion of Franklin Delano Roosevelt (FDR)'s "court-packing" plan as "a technique seen in the new autocracies" and an "authoritarian tactic."[16] The general thrust of his analysis, enhanced by his comparative argument, seems to be that any effort to reorganize the judiciary or make it more accountable to the people represents a dangerous step towards autocracy. But that cannot be right. As Bugaric and Tushnet remind us, there is a

---

[15] Ginsburg and Huq helpfully distinguish between democratic "erosion" and "collapse," with the primary difference being "the speed of legal and institutional change." GINSBURG & HUQ, *supra* note 4, at 47.

[16] DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 133-34 (footnotes omitted).

difference between court reforms that "fine tun[e]" and those that "smash."[17] Motivation and context surely matter.

FDR may have been right about the need for judges to defer to policymakers when the economy is cratering. His specific proposals to reorganize the Supreme Court to ensure that judicial interpretations do not stray too far beyond majority sentiment may have merit, even if they were rejected at that historical moment.[18] Of course, if one is already deeply committed to the idea that courts as they currently exist are indispensable guardrails, rather than institutions that (at least in America) have a deeply problematic relationship with democracy, then any effort to rethink judicial review seems dangerous.

Another potent, and at times disruptive, force has been the rise of social movements on the national scene. Progressives and conservatives creating non-state but partially aligned interest organizations and networks have all played a role in creating a civic culture in which voters regularly search for transformative figures. The labor movement, immigrants' rights movement, and African American civil rights movement have joined the modern militia movement and a variety of nativist movements to form new sources of political power. These movements have often looked to the presidency as a vehicle for legal or cultural change, fostering outsized expectations of what presidents can do.

A belief in strong presidential leadership is now a feature of our political system rather than a bug (of course, the actual power that any president can wield at a particular historical

---

[17] BOJAN BUGARIC & MARK TUSHNET, POWER TO THE PEOPLE: CONSTITUTIONALISM IN THE AGE OF POPULISM 160–61 (2022).

[18] *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 133; Emerson, *supra* note 13, manuscript at 25 (citing John Dewey, *Philosophy and Democracy*, *in* 11 JOHN DEWEY, THE MIDDLE WORKS, 1899–1924 (Jo Ann Boydstrom & Harriet Furst Simon eds., 2008)) (arguing that "democracy . . . disfavors rigid, authoritative, and permanent determination of the political structure that people inhabit.").

moment is another matter).[19] Within such a political culture, it may be easier for would-be autocrats to come dressed as sheep. And it affords a president enhanced cultural power to pit one movement against another, while exploiting the combustible mixture of despair and ambition to exceed constitutional limits and break norms to deliver on policy promises.

Driesen shows that he understands nationalist movements can bring autocrats to the fore, but his analysis does not treat the movements themselves as a possible brake on what judges can be realistically expected to accomplish through judicial review. The rise of a populist leader complicates things significantly. When such a figure comes to power, many citizens will demand decisive action and believe they have authorized political creativity, if not outright breaking of existing rules and norms. Mainstream supporters will believe that strong corrective action is merely fine tuning, while ardent loyalists want radical reform of institutions, even if lines are crossed and norms are busted. Some judges may even be sufficiently in alignment with certain grassroots movements that we could call them "movement jurists," willing to use their position to facilitate parochial goals rather than interpret the laws in more distanced fashion.

A national movement can sharply limit the effectiveness of judges as a check on democratic erosion in several ways. First, movements enjoy greater power when a major political party fails to play a moderating function. But judges cannot constrain movements in the same way that parties can—especially in countries that have robust protections for free speech and association. Second, judges themselves can be drawn from movement-affiliated organizations; their ascension to the judicial role then affords them the power to shape outcomes and rationales

---

[19] *See generally* Robert L. Tsai, *The Place of the Presidency in Historical Time*, 101 B.U. L. REV. 1831, 1837 (2021) (arguing that presidential power is based on political and social movements occurring during a particular presidency); STEPHEN SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME 1–2 (2008) (finding increasing popular advocacy, starting in the twentieth century, for a "more vigorous" presidency in response to the perceived failure of congress to "express[] the popular will.").

that favor movement goals, including the possibility of empowering an autocratic figure. Third, even when judges act, intervention can make judges themselves the targets of presidential ire, as well as the focus of a movement's organizing efforts. In the event of escalating battles between judges and a president, a populist movement can generate backlash against judicial outcomes and methods. Fourth, the capacity of judges to respond to executive figures with autocratic tendencies will depend in part on the rest of civic society, i.e., the potency of opposition groups, the degree of support of judicial review, the nature and degree of an executive's support among elites, and so on. Fear of repudiation or retaliation will figure into the typical judge's decisionmaking calculus.

B. Reasons to Be Skeptical About the Efficacy of Judicial Checks on Autocracy

Driesen's view that judges have a legitimate role to play in maintaining the democratic character of the U.S. Constitution certainly has a long pedigree, and is informed in part by John Hart Ely's famous democracy-enhancing justification for judicial review.[20] While Ely felt that the prospect of judges behaving as roving updaters of the Constitution was illegitimate, he believed that judicial interpretation to perfect the political process—say, by protecting voting rights or ensuring equality—could be justified on these terms.[21]

Even so, it is one thing to hope judges will enforce congressional subpoenas or voting rights statutes, where doing so entails linking arms with another branch of government during a particular legal dispute or enforcing national norms against a subordinate jurisdiction. It is

[20] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 105 (1980) (justifying the Court's jurisprudence applying constitutional values to states on the basis that "rights like [the First Amendment] . . . must . . . be protected, strenuously so, because they are critical to the functioning of an open and effective democratic process.").

[21] *Id.* at 136 (finding that in cases of "presumptive constitutional entitlement, such as the right to vote . . . [t]he Court's job . . . is to look at the world as it exists and ask whether such a right is in fact being abridged . . . without regard to what actually occasioned it.").

another thing entirely to expect judges to stand up to presidents where the prospects of defiance are higher and the costs of being wrong can be catastrophic, such as interbranch conflicts over the commitment of troops or the assertion of emergency power. Often the political-legal values at stake are different: primarily concerned about promoting deliberation and protecting institutional prerogative rather than enforcing absolute limits (whether legal or humanitarian).

Driesen cites the experience of Turkey, where Recep Taayyip Erdogan employed a variety of tactics to centralize power and reduce existing forms of accountability.[22] Beyond the dizzying array of techniques for consolidating executive authority, each of these examples involved populist autocrats—each figure could count on a measure of popular support for his initiatives.[23] This element alters the equation for judicial review considerably.

In Turkey, Erdogan's personalization of executive power enjoyed significant backing by the people. Picked to be Prime Minister by Parliament in 2002, he then became a popularly elected president in 2014.[24] After a failed coup in 2016, Erdogan cracked down further on dissent, using a state of emergency to arrest judges, prosecutors, and two members of the Turkey's Constitutional Court.[25] As Driesen points out, he took advantage of manufactured crises, such as that posed by migrants, to help centralize bureaucratic power.[26] But Erdogan also relied upon formal constitutional amendments to cement the shifts toward a powerful executive with the capacity to remake much of the civil service and judiciary.

---

[22] *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 101.

[23] *See id.* at 101–02.

[24] *See id.* at 101.

[25] See LEVITSKY & ZIBLATT, *supra* note 4, at 96.

[26] *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 103.

In Hungary, where there is not a robust separation of powers tradition, the legislature is unicameral, and constitutional change can be made based on a single supermajority vote, the constitution arguably placed too much faith in judges to act as a backstop. After making a constitutional change to lower the threshold for future constitutional amendments from 4/5 to 2/3, the Fidesz party then proceeded to write a new constitution in secret that entrenched its own influence.[27] Taking advantage of easier rules, the Fidesz party then dismantled existing checks on their ability to govern, enlarged the Hungarian Constitutional Court, and stripped the Court's power to select its president, giving that authority to Parliament.[28]

At the time, the Court enjoyed widespread popular support and constitutional lawsuits were easy to bring. That, too, would eventually change. Yet as Kim Lane Scheppele recounts, the judiciary itself can become "trapped by the very form of a constitutional coup."[29] Even if a court acts early enough after seeing a constitutional coup coming, it might be trying to "divert an oncoming political juggernaut . . . . a dangerous action for a court to take."[30] Thus, the irony is that judges may be least likely to check presidential power when you need them most.

At first, the Hungarian Constitutional Court tried to resist the government's initiatives, by twice striking down a retroactive tax, but eventually upheld a constitutional amendment that restricted the Court's jurisdiction to review budget and tax laws.[31] Then came the most dramatic

---

[27] *See* Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)*, 23 TRANSNAT'L L. & CONTEMP. PROBS. 51, 64 (2014).

[28] *See id.* at 71 (footnotes omitted).

[29] *Id.* at 52.

[30] *Id.* at 53.

[31] *See id.* at 72–74 (footnotes omitted).

turn of events. The Court reviewed a constitutional amendment for form and substance and struck it down, prompting a furious outcry by Viktor Orban and a withering response.[32] Not only were the amendments reenacted to cure the defects, Parliament took the additional step of nullifying the Constitutional Court's precedents over a span of 22 years and banned the Court from reviewing constitutional amendments for substantive conflicts with the Constitution.[33] As Scheppele puts it: Parliament "made the Constitutional Court a prisoner of the Fidesz Constitution, unable to assert its own sense of constitutional values against those of the government."[34]

Ultimately, in neither Turkey nor Hungary did judicial pushback fundamentally reset political conditions. It did buy time for opposition forces in Hungary, but at the cost of putting judges themselves in the crosshairs.[35]

Scheppele's account suggests that during a major onslaught against a democratic order, the most valuable thing a court can do is buy time. She finds a silver lining in that the Court tried to resist Orban's initiatives for three years, even though ultimately the institution was "finally

---

[32] *See* Scheppele, *supra* note 26, at 78–84.

[33] *See id.* at 82–83 (footnotes omitted).

[34] *Id.* at 84.

[35] Andrea Scoseria Katz details the fascinating clashes between Columbia's Constitutional Court and its series of presidents, which has featured dramatic decisions striking down assertions of emergency authority. But there are some differences that might blunt one's ability to draw firm lessons about this episode for American scholars. First, such bold exercises of judicial review came on the heels of a new constitution that explicitly limited presidential powers, including emergency powers. Andrea Scoseria Katz, *Taming the Prince: Bringing Presidential Emergency Powers Under Law in Colombia*, 18 INT'L J. CONST. L., 1201, 1217 (2020) (footnotes omitted). Having rejected strong presidentialism, judges could more plausibly claim popular backing for its decisions. By contrast, no such language one way or another appears in the U.S. Constitution. *See generally* U.S. CONST. And if anything, we have gone from an early weak presidentialist system to ever-stronger variations. Second, given these changes to the country's written constitution, as Katz points out, "[w]hen it came to the state of emergency, the Court was not just permitted to review decrees, it was *required* to do so." *Id.*, at 1224 (footnote omitted).

beaten into submission."[36] This resistance, in turn, succeeded in publicizing the plight of the judicial system under siege and leveraging transnational support from the Council of Europe Institutions and the European Union (EU) to pressure the governing party over the radical changes, particularly to the Constitutional Court. But as Scheppele points out, such outside organizations work slowly and do not enjoy sufficient power to "sanction coup-making governments while the damage to constitutional institutions can still be easily reversed."[37] Presumably, an autocratic government is willing to ignore external criticism as it quells internal dissent and is willing to pay the price of international scorn. It's hard to say even today that judicial defiance has improved Hungary's prospects for returning to the fold of democratic nations.

Differences between systems also suggest there are limits to this kind of comparative analysis. In the United States, exceedingly difficult formal rules for constitutional amendments make the kind of "constitutional coup" that occurred in Hungary nearly impossible. Autocracy at the national level would be more likely to come from election subversion and illegal control or usage of the armed forces to seize power, perhaps followed by an effort to dictate the subsequent election. That is no easy task given the decentralized nature of voting systems in the United States. Given our federalist system, other forms of democratic erosion are far more likely to come at the state level, e.g., partisan and racial gerrymandering, restricting access to the ballot, suppression of local forms of governance.

---

36 Scheppele*, supra* note 26, at 87.

37 *Id*. at 115.

Driesen would surely respond that he prefers that judges act much earlier, before disaster strikes. Yet even when earlier moments to intervene may reveal themselves, other factors may temper the willingness of judges to act.

Polarization is often cited as a leading cause of political dysfunction in the United States, leading to gridlock, popular frustration with government, and perhaps an unhealthy hope for a transformative figure to come along and smash the political order. The problem of polarization is that loyalty to a particular party or narrow set of ideas comes at the expense of a commitment to the public good or citizenry as a whole. A desire to maintain ideological integrity or party discipline prevents compromise necessary for making policy that benefits the people or checking misbehavior by corrupt officials. Polarization also impacts selection of judges. As Tom Ginsburg and Aziz Huq warn, "[w]hen a judicial appointment system selects for partisan loyalty, . . . judicial resistance to democratic erosion is unlikely to emerge."[38]

But if polarization is a major factor that weakens institutions and makes it harder to muster a response when a president to seize further authority, then we should expect polarization to afflict the judiciary as well. After all, the way federal judges are selected in this country depends upon earning the attention and favor of one of the major political parties. We might not see the effects of polarization right away. But the longer a president holds office, the more opportunities he will have to remake the judiciary in his own image. This is already true even when we are not dealing with a demagogue who refuses to abide by long-standing democratic norms.

[38] GINSBURG & HUQ, *supra* note 4, at 97.

C. Reasons to Worry About Robust Judicial Involvement

All of this brings us to another set of reasons to be cautious about betting on judicial review as the primary means of reinvigorating democracy. Driesen contends that judges should not be worried about making mistakes when checking a president because "a democratic society can correct most mistakes and endure an awful lot of errors but cannot reverse substantial impairment of democracy."[39] For this claim to be true, most juridical interventions taken in the name of democracy, even if erroneous, would have to be of roughly similar consequence. Or else that judicial mistakes of differential magnitude still can be realistically overturned through a robust democratic politics. Driesen thus imagines the existence of a democracy that is slowly in decline but a judicial system that still functions more or less independently.

What if democracy is already in decline *and* the constitutional order makes it enormously difficult to correct damaging trend lines? Then the judiciary is likely to be a part of the problem. In a polarized environment rife with disinformation and widespread suspicion, aggressive forms of judicial review might not make things better, but instead make them worse. When a polity becomes deeply divided ideologically, it becomes harder to reach consensus as to a coherent vision of democracy. The vision of democracy that prevails among federal judges, or even in the Supreme Court, may not actually promote broad citizen participation or accountability. Instead, more archaic and exclusionary theories of power and community might reemerge.

Under such conditions, judges behave like more traditional political actors and see legal disputes over democracy through a partisan lens rather than by applying doctrines fairly and consistently. Outcomes are increasingly likely to turn on which party benefits from the outcome of legal disputes rather than what keeps the political order healthy or is best for the common

---

[39] DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 143.

good. The Supreme Court's recent interest in the so-called "independent state legislature theory" should send chills down the spine of anyone committed to a democratic order that respects each citizen's vote.[40] That theory would permit a state legislature to subvert the will of a majority of the state's voters after the fact and sharply limit a state judiciary's ability to protect the vote.

Acting on the fear of a "slide into authoritarianism" also requires jurists to make uncertain predictions. Say that a peak court believes it has identified a proto-dictator and acts decisively to check him before he becomes too strong. If the court is right, then it can buy time for pro-democracy forces in civil society to get their act together. But if it is incorrect, and a populist leader has no designs to wreck the constitutional order for corrupt or oppressive reasons, then judicial intervention may thwart effective solutions to serious problems, undermine legal reforms, or damage the efforts of pro-democracy or anti-corruption forces. Judges may be killing off one vision of democracy in favor of another, and their decisions in a system like ours will be difficult, if not impossible, to reverse. Ordinary people may be too demoralized, confused, or disempowered to do anything about it.

III. WHY IT MATTERS

All of this suggests that even in a civic culture that values a certain measure of judicial independence and impartiality, there are limits to how much judges can do to arrest democratic decline—at least short of significant support from civil institutions from within, allies from outside the country, or a major redesign of the political system.

[40] The Supreme Court has granted cert. in *Moore v. Harper*, to consider adoption of this theory during the 2022-23 term. Three justices—Thomas, Gorsuch, and Alito—have already expressed public support for the theory, which originally arose in Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*, 531 U.S. 98, 111 (2000) (Rehnquist, Scalia, Thomas, J.J., concurring). *See* Amy Howe, *Justices Will Hear Case That Tests Power of State Legislatures to Set Rules for Federal Elections*, SCOTUSblog, June 30, 2022; *see also* Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, 90 UNIV. CHI. L. REV. __ (2023).

Thus, unlike Driesen, I am skeptical that the judiciary in its current incarnation will be the savior of our democracy. Realizing that courts are weak and unpredictable fall-back mechanisms should eventually lead us in the direction of direct reform rather than relying on judicial review as a guardrail. Let me put aside for the moment the obvious problem that conditions of democratic decline would also impede major projects of reform, at least in the short run, as advocates struggle to cast immediate problems as evidence of flaws in democratic design. If we are realistic about the limits of judicial review as a democratic guardrail even in the best of times, then more energy should be spent on structural changes rather than matters of jurisprudence. If democracy is what we care about most of all with this talk of democratic erosion or decline, then the system must be altered to match that commitment. A Constitution that dares utter the word "democracy" and explicitly guarantees the right to vote would be a start.

Another worthy project would be to overhaul how elections are administered in the United States, not only to safeguard the franchise, but also to reduce the possibility of exclusionary philosophies and agendas corrupting the administration of elections. Federalism can limit the damage to certain states or regions that undergo democratic decline. But it also leaves itself open to experiments in small-scale illiberalism, which could then spread through borrowing by other jurisdictions. Even if we do not abandon federalism entirely, we could take any number of steps to reduce malapportionment and any number of steps to streamline and make more uniform how federal elections are conducted.

We can also consider reducing some of the speed bumps in the way of effective policymaking in Congress, which would begin to address a major source of demoralization and disaffection in this country. That conversation about how to revive democracy has been reengaged in earnest, even if I do not have the space to get into the merits of various proposals.

But seeing the issues raised by Driesen's book from this broader vantage point has an added benefit: allowing us to see that frustrating a would-be autocrat is not the only thing that matters in either constitutional design or promoting democracy. From another perspective: even if preventing autocracy is the most vital objective to pursue, one must understand the conditions that give rise to popular support for an autocrat and find solutions that begin to ameliorate those conditions.

Perhaps the biggest obstacle to Driesen's vision of judges capable of consistently defending an inclusive vision of democracy is the judicial mindset itself. How to get judges to see themselves as pro-democracy forces rather than countermajoritarian mechanisms? Changing judicial selection methods might be necessary. Moving to a system where judges are civil servants who qualify by taking exams rather than earning favor by joining a political party or other organizations would increase the prospects that judges are willing to say no to a president or a narrow agenda. At the same time, there are tradeoffs to making judges less reliant on the political branches. Such a change would also make it harder to keep the law tethered to the traditions, preferences, or expectations of the people. Where a constitution has not been modernized and so much turns on judicial interpretation of open-textured terms and the management of lower courts, structural changes to increase independence would also make it harder to bring judgments in line with popular sentiment when they become too detached from a society's current needs and beliefs.

CONCLUSION

Despite my reservations about the efficacy of judicial review in battling autocracy, I am going to end by highlighting several places of agreement with Driesen. First, we both believe in democracy and worry about judicial philosophies and legal doctrines that facilitate unchecked,

unilateral action by presidents. Although I have not spent my efforts here delving into the nuances of originalist vs. living constitutionalist debates, these remain vital conversations.

Second, we are concerned about the possibility of presidents manufacturing emergencies to not just try to fool the electorate but also to assert sweeping powers.[41] Here my added concern is that the closer interactions today between a leader who lacks civic virtue and an organized national movement can help perpetuate the falsehoods that undermine institutional capacities to check ever-broader (and perhaps even more outlandish) assertions of authority.

Third, we both agree that some degree of judicial review is usually appropriate—if for no purpose than to promote the rule of reason over the assertion of brute force. We merely disagree about how much faith to put into the federal judiciary as it is currently organized to do what needs to be done.

Fourth, even in its current shape, judicial rulings might have some rhetorical benefit in the broader fight over democracy's terms. Of course, the hard question is figuring out when judicial elaboration is, in fact, helpful to pro-democracy forces and when judicial action might be counterproductive. The way Driesen puts it is this: "rulings may help delegitimize an autocrat and strengthen political forces seeking to restore or preserve an eroding democracy."[42]

Note that this formulation of the problem, which comes at the end of Driesen's book, nods to the reality that any lasting and effective solutions to illiberalism must lie elsewhere. Not in the realm of coherent and even principled judicial determinations, but rather in the messy, energetic, hopeful activism of citizens willing to pay a price to protect their own freedoms.

---

41 DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 103, 165–66 (footnotes omitted) (explaining how autocrats in Turkey and Hungary gained power through claiming emergency powers, and finding that "[t]he United States Code currently contains 123 statutory provisions granting the President unilateral emergency powers" but "[t]he vast majority of these . . . provisions contain no criterion for what constitutes a national emergency"); Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L. J. F. 590, 592 (2020) (defining a fake crisis as "a public policy problem whose nature of scope is fabricated or exaggerated beyond reasonable parameters"); ROBERT L. TSAI, PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION 125 (2019) (arguing that there was "no reasonable basis for the drastic policy of mass internment" of Japanese Americans).

42 DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 147.