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Fragile Futures and Resiliency

Litigating Climate Change
Judging Under Stress

Co-Editors
Judith Resnik
Clare Ryan
2019





Gruber Program for Global Justice and Women's Rights

The Gruber Program for Global Justice and Women's Rights has supported the Yale Global Constitutionalism Seminar since The Gruber Foundation was established at Yale University in 2011. The Seminar originated at Yale Law School in 1996 and is now an integral part of the Gruber Program.

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Yale Law School, 2019

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Daniel Esty, Douglas Kysar, Manuel José Cepeda Espinosa,
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Judging Under Stress

Kim Lane Scheppelle, Judith Resnik, Marta Cartabia,
and Carlos Rosenkrantz

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Preface

This year's volume, *Fragile Futures and Resiliency*, takes up the critical challenges of changing climates, both environmental and political. We ask our perennial question—what role for the courts?—in the context of requests for help to mitigate the harms of climate change and in the face of attacks on the authority and legitimacy of the judiciary.

Chapter I, *Litigating Climate Change*, focuses on a subset of questions related to the broader topic of the environment. These materials, compiled by Daniel Esty, Douglas Kysar, Manuel José Cepeda Espinosa, Laurent Fabius, and Laurent Neyret, are predicated on the growing body of evidence about the deterioration of the climate. Scientists report that the concentration of carbon dioxide is at a level not experienced in the last three million years, and they have identified significant rises in methane and other greenhouse gases caused by fossil fuel combustion and deforestation.

As the excerpts of cases and commentary exemplify, lawsuits asking judges for remedies are underway in many jurisdictions. The legal categories are familiar—the liability of governments and of private actors, with sources of law grounded in the common law, in constitutional text, and in transnational agreements. In many of the disputes, the arguments center on the authority of plaintiffs to bring claims, on the nexus between alleged injuries and defendants' actions, the appropriate scope of deference to other branches of government, and the remedies courts can order. Yet the context, scale, and urgency of the problems are new.

Chapter II, *Judging Under Stress*, reflects on the many jurisdictions in which judges are finding that their own legitimacy is called into question. These materials map efforts to reconfigure courts, force the retirement of some judges, select others, and change judges' decision-making authority. Kim Lane Scheppele, Judith Resnik, Marta Cartabia, and Carlos Rosenkrantz have shaped a set of readings that cut across jurisdictions to understand the shifting contours of the idea of “judicial independence.”

In earlier eras, the core concerns were about the risk of encroachment by monarchs and legislatures aiming to influence judges. In the nineteenth century, Jeremy Bentham invoked what he termed the principle of “publicity,” as he insisted that judges had to work before the “Tribunal of Public Opinion,” which he believed would curb the self-interested misbehavior of “Judges & Company.” Today, we live in an age of a multi-faceted and fractured “public.” Debates about judicial independence must now account for pressures exerted by diverse forms of media and by repeat-player litigants, as well as by the other branches of government.

In this chapter we ask: What are the metrics of courts' legitimacy? What are the sources of backlash? Are they jurisdiction-specific? Can courts contribute to their own legitimacy and, more generally, to the stability of democratic constitutional orders? When do the actions of judges undermine the institution of the judiciary and the constitutional orders in which courts sit?

Examples in these readings find judges puzzling about the impact of legislative and executive actions on their salaries, their terms of office, the addition or retirement of judges, and the fidelity to precedent, as courts articulate when reconfigurations of courts and of law are benign or pernicious. In addition to the readings, the Seminar participants will also hear from Linda Greenhouse, who will comment on the challenges facing the U.S. Supreme Court.

This volume has fewer chapters than in previous years because the 2019 Global Constitutionalism Seminar is held in conjunction with the Gruber Distinguished Lecture on Women's Rights, which is honoring the coming centennial of securing women's right to vote through the Nineteenth Amendment to the Constitution of the United States. Through a mix of panels, lectures, and traditional private group conversations, a segment of the Seminar will explore the relationship of enfranchisement to authority and equal citizenship. Participants include Ruth Rubio-Marín, who will deliver the Gruber Lecture; commentators Rosalie Abella, Susanne Baer, Manuel José Cepeda Espinosa, and Brenda Hale, addressing transnational equality questions; and Fatima Goss Graves, Jill Lepore, and Tomiko Brown-Nagin, focusing on the United States. These segments, moderated by Judith Resnik and Reva Siegel, will enable an in-depth examination of the many facets of political, economic, and social empowerment and disempowerment.

Further, we will continue to devote segments of the 2019 Global Constitutionalism Seminar to topical issues for which readings are not plausibly prepared in advance. Trust, norms, and institutions—both national and international—remain in flux, as conflicts within and across polities are producing changing practices and commitments. One discussion, led by Brenda Hale, Susanne Baer, and Piet Eeckhout, will consider Europe/Brexit, and another will continue exploring judging under stress.

* * *

This volume is, as always, a collaborative venture. The participants suggest materials and the discussion leaders spend hours reviewing compilations, which are then heavily edited. Paragraphs have been combined for easier reading and most footnotes and citations have been omitted. The footnotes that are retained keep their original numbering. For accessibility across jurisdictions, we add excerpts of referenced legal texts in footnotes marked by asterisks that, along with square brackets, indicate editorial insertions. This book will also be published as the eighth volume in a series of Yale Global Constitutionalism Seminar e-books, a practice that began with our 2012 volume.

Thanks are due to the Lillian Goldman Law Library, under the direction of Teresa Miguel-Stearns, for help identifying sources that would otherwise have been unavailable. Jason Eiseman, Yale Law School's Associate Law Librarian for Technology and Digital Initiatives, continues to provide guidance on how to turn the Seminar's volumes into e-books. We have done this with help from Assistant Dean Sara Lulo and under the tutelage of our colleague Jack Balkin in connection with the Information Society Project that he chairs, and with the support of the Oscar M. Ruebhausen Fund at Yale Law School.

Clare Ryan joins us for a third year as a Senior Research Fellow and as the co-editor of this volume. She graduated from Yale Law School in 2013, returned to Yale to complete a Ph.D. in Law, and is now a law professor at Louisiana State University Law Center in Baton Rouge, Louisiana. We are both indebted to remarkable students at Yale Law School, led by José Argueta Funes, who has provided thoughtful, thorough, and insightful guidance, as has Allison Rabkin Golden, who has now become a Senior Editor. We are joined by new Student Editors who have shown their research aptitude and their commitment to careful analyses, and we introduce and thank Neil Alacha, Sofea Dil, Jonathan Liebman, and Lawrence Liu. In addition, David Louk remains the Executive and Managing Editor Emeritus, and he has been incredibly generous in providing thoughtful reviews.

Key to all of our work is Renee DeMatteo, Yale Law School's talented Senior Conference and Events Services Manager. Participants admire her advice and her kindness. Renee ensures that this book comes into being in time for circulation for those traveling to New Haven in September. Once again, Bonnie Posick demonstrated her expertise as a proofreader and editor. We are also supported and guided by Mindy Jane Roseman, Yale Law School's Director of International Law Programs and Director of the Gruber Program for Global Justice and Women's Rights.

No account of this Global Seminar would be complete without acknowledging the institutional support that frames it. The commitment of the Deans of the Yale Law School has been unfailing. From Anthony Kronman, who was the dean when Paul Gewirtz founded the Seminar, to Harold Hongju Koh, Robert Post, and now Heather Gerken, they have enabled the Seminar to flourish. In its founding years, the resources for Yale Law School's Global Constitutionalism Seminar were provided by Betty and David A. Jones, Sr. '60, and by Mary Gwen Wheeler and David A. Jones, Jr. '88, who helped to build bridges across oceans and legal systems. Since 2011, this Seminar has been part of the Gruber Program for Global Justice and Women's Rights at Yale Law School.

As we continue the process of intergenerational transitions, this Seminar remains indebted to its founding and early participants: Yale Law School professors Bruce Ackerman, Akhil Amar, Robert Burt, Drew Days, Owen Fiss, Paul Gewirtz, Paul Kahn, Harold Hongju Koh, Anthony Kronman, John Langbein, and Jed Rubenfeld, and constitutional court justices including Aharon Barak (Israel), Stephen Breyer (United States), Pedro Cruz Villalón (Spain), Lech Garlicki (Poland), Dieter Grimm (Germany), Frank Iacobucci (Canada), and László Sólyom (Hungary).

* * *

We are all lucky to be able to come together, to welcome new participants, and to have the luxury of time to spend with one another. For that, we are the beneficiaries of Peter and Patricia Gruber, who have had the vision, in the face of the world's problems, to insist on hoping for fairness and justice. Their commitment to this and many other activities at Yale University and elsewhere sustain the Seminar and our relationships across borders. Once again this year, we are called to insist on the vitality of transnational exchanges and the importance of commitments

to independent and wise judging, even as we watch targeted efforts to undermine those very values and the justice that they help to produce.

Judith Resnik
Chair and Co-Editor,
Global Constitutionalism Seminar
and Arthur Liman Professor of Law

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LITIGATING CLIMATE CHANGE

DISCUSSION LEADERS

DANIEL ESTY, DOUGLAS KYSAR,
MANUEL JOSÉ CEPEDA ESPINOSA, LAURENT FABIOUS, AND
LAURENT NEYRET

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Like the environment itself, the legal issues raised here are vast. This chapter is conceived as the first of two. The focus here is on efforts to respond to climate change through litigation under domestic and international sources of law. In the 2020 volume, we will consider courts' involvement in the development of other kinds of environmental rights around the globe.

The atmospheric concentration of carbon dioxide is now at levels not seen in the last three million years. Along with similarly dramatic rises in methane and other greenhouse gases (GHGs), these increases are attributable to human activities such as fossil-fuel combustion and deforestation and are changing the earth's climate. Manifestations include global warming, sea-level rise, intense and frequent hurricanes, changed rainfall patterns, more floods and droughts, disrupted agriculture, and new vectors of disease. This chapter explores attempts to respond through litigation predicated on domestic and international sources of law.

Climate-change jurisprudence raises the familiar issue of the judicial role in the context of daunting challenges to the world. One set of issues revolves around governments' and private parties' responsibilities not to contribute to and to stem the tide of change. Many defendants respond by arguing that the individuals, groups, or entities seeking to hold them accountable have no authority to proceed, or that courts ought to defer to other branches of government and reject lawsuits. When such objections are overcome, issues of liability and remedies come to the fore, again framed through questions about the authority of judges to call on others for answers or to specify standards. These questions arise in cases where litigants allege governments have not

complied either with domestic or with international commitments to tackle climate change.

TO SUE AND BE SUED

Who may bring an action challenging a failure to mitigate the causes of climate change or to adapt to its consequences? What kinds of harms to discrete individuals (including future generations), plants, animals, or places need to be shown? What are the sources of liability? What parties can proceed, and from whom may relief be obtained?

Challenging Governmental Responses to Climate Change

Massachusetts v. Environmental Protection Agency

Supreme Court of the United States

549 U.S. 497 (2007)

Justice Stevens delivered the opinion of the Court[, joined by Justices Kennedy, Souter, Ginsburg, and Breyer].

. . . [A] group of States, local governments, and private organizations alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. Specifically, petitioners asked us to answer two questions concerning the meaning of § 202(a)(1) of the [Clean Air] Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute. . . .

Article III of the Constitution* limits federal-court jurisdiction to “Cases” and “Controversies.” Those two words confine “the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.” . . .

The parties’ dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court. Congress has moreover authorized this type of challenge to EPA action. That authorization is of critical importance to the standing inquiry: “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none

* Article III of the United States Constitution provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party

existed before.” . . . “In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.” . . . We will not, therefore, “entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.” . . .

EPA maintains that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle. We do not agree. At bottom, “the gist of the question of standing” is whether petitioners have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.” . . .

To ensure the proper adversarial presentation, . . . a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury. . . . When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. . . .

States are not normal litigants for the purposes of invoking federal jurisdiction. . . .

“This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the title of its citizens, in all the earth and air within its domain.” . . .

That Massachusetts does in fact own a great deal of the “territory alleged to be affected” only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.

When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted [by federal law]. . . .

These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the “emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” [Section 202(a)(1) of the Clean Air Act.] Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. Given that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis. . . .

[I]t is clear that petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both "actual" and "imminent." There is, moreover, a substantial likelihood that the judicial relief requested will prompt EPA to take steps to reduce that risk. . . .

Considering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China. Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence . . . to global warming. . . .

Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere. . . .

In sum—at least according to petitioners' uncontested affidavits—the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA's denial of their rulemaking petition. . . .

Chief Justice Roberts, with whom Justice Scalia, Justice Thomas, and Justice Alito join, dissenting.

Global warming may be a "crisis," even "the most pressing environmental problem of our time." Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. . . .

Apparently dissatisfied with the pace of progress on this issue in the elected branches, petitioners have come to the courts claiming broad-ranging injury, and attempting to tie that injury to the Government's alleged failure to comply with a rather narrow statutory provision. I would reject these challenges as nonjusticiable. Such a conclusion involves no judgment on whether global warming exists, what causes it, or the extent of the problem. Nor does it render petitioners without recourse. This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here "is the function of Congress and the Chief Executive," not the federal courts. . . .

Justice Scalia, with whom The Chief Justice, Justice Thomas, and Justice Alito join, dissenting.

The Court's alarm over global warming may or may not be justified, but it ought not distort the outcome of this litigation. This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.

* * *

The debate illustrated by the *EPA* case is repeated with varying outcomes in other jurisdictions, which like the majority and dissents in *EPA*, disagree. Several courts have held that individual private plaintiffs are able to sue their governments for failures to engage in a particular mitigation effort. For instance, in *Verein KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy, and Communications*, A-2992/2017 (2018), a group of women over the age of seventy-five sued the Swiss government for not adopting a more aggressive target for reduced GHG emissions. The group pointed to studies concluding that elderly women were particularly affected by increasingly frequent heat waves. The First Section of the Federal Administrative Court of Switzerland disagreed:

[T]he group of women older than 75 years of age is not particularly affected by the impacts of climate change. Although different groups are affected in different ways, ranging from economic interests to adverse health effects affecting the general public, it cannot be said from the perspective of the administration of justice . . . that the proximity of the appellants to the matter in dispute . . . was particular, compared with the general public.

In the excerpt below, the Court of Justice of the European Union reached a similar conclusion in a lawsuit challenging emissions targets adopted by the European Union.

Carvalho v. European Parliament and Council of the European Union

Court of Justice of the European Union (Second Chamber)

Case No. T-330/18 (2019)

The General Court (Second Chamber), composed of M. Prek, President, F. Schalin (Rapporteur) and M.J. Costeira, Judges, Registrar: E. Coulon, makes the following Order[:]

. . . 1. The applicants, . . . all of whom operate in the agricultural or tourism sectors, are 36 individuals in families from various countries in the European Union . . . and the rest of the world (Kenya, Fiji), and an association governed by Swedish law, which represents young indigenous Sami. . . .

18. . . . [T]he applicants claim that the Court should:

- declare that the legislative package regarding greenhouse gas emissions is unlawful in so far as it permits the emission between 2021 and 2030 of a quantity of greenhouse gases corresponding to 80% of 1990 levels in 2021, decreasing to 60% of 1990 levels in 2030; . . .

- order the Council and the Parliament to adopt measures under the legislature package regarding greenhouse gas emissions requiring a reduction in greenhouse gas emissions by 2030 by at least 50% to 60% compared to their 1990 levels, or by such higher level of reduction as the Court shall deem appropriate

21. . . . [T]he Parliament and the Council have requested a ruling on inadmissibility, the Court, considering that it has sufficient information from the documents in the case file, hereby decides to give a ruling regarding that request without taking further steps in the proceedings. . . .

23. . . . [T]he applicants submit that the Union's level of ambition is not sufficiently high with regard to reducing greenhouse gas emissions and infringes binding higher-ranking rules of law. . . .

24. . . . [The] damage [applicants claim] is both current and future and consists in their living conditions being adversely affected, in particular in so far as climate change, to which greenhouse gas emissions directly contribute, curtails their activities and their livelihoods and results in physical damage. As is apparent from the reports of the world bank and UNICEF . . . , heatwaves are already causing damage to human health, in particular to children, and to persons whose professions are dependent on moderate temperatures, such as in the agriculture and tourism sectors. . . .

46. . . . [T]he applicants are claiming an infringement of their fundamental rights. They infer from this that they are individually concerned, given that, although all persons may in principle each enjoy the same right . . . , the effects of climate change and, by extension, the infringement of fundamental rights is unique to and different for each individual.

47. [This] argument cannot succeed. . . .

49. The applicants have not established that the contested provisions of the legislative package infringed their fundamental rights and distinguished them individually from all other natural or legal persons concerned by those provisions

50. . . . [T]he fact that the effects of climate change may be different for one person than they are for another does not mean that . . . there exists standing to bring an action against a measure of general application. . . .

* * *

Other courts have recognized that private plaintiffs can sue the government when the failure to tackle climate change threatens fundamental rights.

Leghari v. Federation of Pakistan

Lahore High Court, Lahore Judicial Department, Pakistan

Case No. 25501/2015

[Syed Mansoor Ali Shah, Judge:]

The petitioner has approached this Court as a citizen [of Pakistan] for the enforcement of his fundamental rights. He submits that [the] overwhelming majority of scientists, experts, and professional scientific organizations . . . agree that evidences are sufficient that climate change is real. . . . Further, most of the experts agree that the major cause is human activities, which include a complex interaction with the natural environment coupled with social and economic changes that are increasing the heat trapping CO₂ and other greenhouse gases (GHG) in the atmosphere, which are increasing global temperature and in turn causing climate change. . . .

3. For Pakistan, climate change is no longer a distant threat The country experienced devastating floods during the last three years. These changes come with far reaching consequences and real economic costs.

4. The petitioner submits that in order to address the threat of climate change[,] the National Climate Change Policy, 2012 (“NCCP”) and the Framework for Implementation of Climate Change Policy (2014-2030) [“Framework”] ha[ve] been announced by the Ministry of Climate Change, Government of Pakistan, however, no implementation on the ground has taken place. He submits that inaction on the part of Ministry of Climate Change and other Ministries and Departments in not implementing the Framework, offends his fundamental rights[,] in particular Articles 9* and 14** of the Constitution besides the constitutional principles of social and economic justice. He submits that international environmental principles like the doctrine of public trust, sustainable development, precautionary principle and intergenerational equity form part of the fundamental rights. . . .

* Article 9 of the Constitution of Pakistan provides:

No person shall be deprived of life or liberty save in accordance with law.

** Article 14 of the Constitution of Pakistan provides:

The dignity of man . . . shall be inviolable.

8. . . . Pakistan's contribution to global greenhouse gas emissions is very small, [but] its role as a responsible member of the global community in combating climate change has been highlighted by giving due importance to mitigation efforts in sectors such as energy, forestry, transport, industries, urban planning, agriculture and livestock.

9. The Framework . . . has been developed not as an end in itself, but rather a catalyst for mainstreaming climate change concerns into decision making that will create enabling conditions for integrated climate compatible development processes. It is, therefore, not a stand-alone document, but rather an integral and synergistic complement to future planning in the country. The Framework is a "living document." This is because we are still uncertain about the timing and exact magnitude of many of the likely impacts of climate change. . . . The goal of NCCP is to ensure that climate change is mainstreamed in economically and socially vulnerable sectors of the economy and to steer Pakistan towards climate resilient development. . . .

11. I have heard the representatives of the Ministries and the respective Provincial Departments. It is quite clear to me that no material exercise has been done on the ground to implement the Framework. In order to expedite the matter and to effectively implement the fundamental rights of the people of Punjab, [the] Climate Change Commission ("CCC") is constituted

[Judge Syed Mansoor Ali Shah authorized a twenty-one member Commission, including representatives from the Ministry of Climate Change, Ministry of Water and Power, Ministry of Foreign Affairs, and Government of Punjab's Irrigation and Agricultural Departments, to monitor effective implementation of the NCCP and Framework.]

* * *

The Climate Change Commission submitted a report to the Green Bench of the Lahore High Court, which addresses cases concerning environmental issues, in January 2018, and described substantial compliance with the Framework. The Commission also recommended that responsibility for implementing the remaining aspects of the Framework return to the government. The Lahore High Court agreed, dissolving the Commission. The Court created a Standing Committee on Climate Change to ensure continued implementation of the Framework.

The Public Trust: The Law's DNA Gerald Torres and Nathan Bellinger (2014)*

. . . When government fails to take action on a pressing issue like climate change, the question becomes, how can citizens hold government accountable for its actions, and inactions, when faced with an impending crisis? If we were being invaded by

* Excerpted from Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281 (2014).

another country, confronted with a meteor spiraling towards Earth, or forced to deal with some other imminent threat to our very existence, we would expect our government to respond and to take the necessary measures to protect us. Climate change is no different—it truly *requires* governmental action. . . . When government fails to defend these rights, the public trust doctrine is a legal tool citizens can use to compel government action to protect both present and future generations from the irreversible and catastrophic impacts of climate change.

Governmental inaction, and inadequate action, on climate change directly contravenes one of the most fundamental purposes of our government—facilitating the re-creation of ourselves, our institutions, and our civilizations. Admittedly, inquiring about the purpose of government will generate all manner of responses; however, one central purpose of government is to protect the essential natural resources that enable our society to function, evolve, and reproduce for future generations. This purpose is clearly articulated in the public trust doctrine, which imposes duties on government and instills certain inalienable rights in the people. The public trust doctrine constitutes the sovereign legal obligation that facilitates the reproduction and survival of our society; it is akin to legal DNA. . . .

The public trust doctrine is a “principle of vital importance” that refers to the general fiduciary obligation of government toward its citizens, and to the related, fundamental understanding that no legislature can abdicate or irrevocably alienate its core sovereign powers. The public trust doctrine is frequently described as being of Roman origin, stemming from the Roman understanding that certain types of property, known as *res communes*, have a distinct character requiring unique treatment. At common law, these unique types of property are known as *jus publicum*, which recognizes that certain natural resources are public property owned by government for the people. The public trust doctrine is meant to protect those resources that have an inherently public character and are not owned in the same way as traditional property. Early cases recognized marine resources, tidal waters and the submerged land beneath them, and navigable waters as resources protected by the public trust doctrine. However, the scope of protected public resources has evolved to include resources such as non-navigable tributaries, wetlands, groundwater, dry sand beaches, wildlife, and the air. . . .

Natural resources, like the atmosphere, are complicated and delicate. Without proper care, these resources can deteriorate to a point where restoration is no longer possible. If the substance of the public trust is irreversibly destroyed or deteriorated, then government’s essential attribute as a trustee over that substance has been eviscerated. A future legislature with different prerogatives, and an eye towards trust management, may find that there are no laws that it can enact to accomplish those ends under the apparent factual circumstances. In violation of the reserved powers doctrine, that future legislature would be bound by de facto abdication of a previous legislature to forfeit its fundamental obligation as a public trustee.

Were government to attempt such an abdication through an affirmative contract or alienation of property, courts could enjoin government from doing so. In other words, courts can require legislatures to not act where it would have otherwise acted; yet, when the same result occurs through inaction, courts have been reluctant to place an affirmative duty on the legislature. . . .

The public trust doctrine is critical for *preserving* democracy, despite some criticism that the public trust doctrine is undemocratic. While courts are frequently called on to protect the rights of minorities, in public trust cases they are actually being called on to protect the rights of the majority. Due to a failure in the political process, a minority now exercises undue influence over the executive and legislative branches to the detriment of the majority. This situation is patently undemocratic. As Professor Joseph Sax explained in his seminal 1970 article on the public trust doctrine, “self-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore more broadly based public interests.” He went on to say that the function of the courts is “to promote equality of political power for a disorganized and diffuse majority” and that “the fundamental function of courts in the public trust area is one of *democratization*.” In situations like the one we currently face, where minority special interest groups (e.g., the fossil fuel industry) have a disproportionate influence on decisions related to the use and management of natural resources and the protection of the environment, the courts have an important role to play in protecting the majority and restoring balance to our democracy. . . .

The failure of the executive and legislative branches to take any meaningful action to reduce greenhouse gas emissions and address climate change makes it even more important for the judiciary to fill this void. The executive and legislative branches absolutely *must* act to address climate change in order to fulfill their fiduciary duty to the trust beneficiaries. However, until the political branches act, our tripartite system of constitutional government gives citizens one last opportunity to vindicate their core rights—the judiciary. As the nation’s leading public trust scholars explained in an *amicus curiae* brief, “[c]ourts are being called upon . . . to ensure that the political branches fulfill their obligation to avoid destruction or irreparable harm to an asset that must sustain future generations.” . . .

Juliana v. United States

U.S. District Court for the District of Oregon

217 F. Supp. 3d 1224 (D. Or. 2016)

*Argued on appeal before the U.S. Court of Appeals for the Ninth Circuit
on June 3, 2019, No. 18-36082*

Aiken, Judge:

Plaintiffs . . . are a group of young people between the ages of eight and nineteen (“youth plaintiffs”); Earth Guardians, an association of young environmental activists; and Dr. James Hansen, acting as guardian for future generations. . . . Plaintiffs allege defendants have known for more than fifty years that the carbon dioxide (“CO₂”) produced by burning fossil fuels was destabilizing the climate system in a way that would “significantly endanger plaintiffs, with the damage persisting for millennia.” . . . Despite that knowledge, plaintiffs assert defendants, “[b]y their exercise of sovereign authority over our country’s atmosphere and fossil fuel resources, . . . permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels, . . . deliberately allow[ing] atmospheric CO₂ concentrations to escalate to levels unprecedented in human history.” . . . [P]laintiffs aver defendants bear “a higher degree of responsibility than any other individual, entity, or country” for exposing plaintiffs to the dangers of climate change. . . . Plaintiffs argue defendants’ actions violate their substantive due process rights to life, liberty, and property, and that defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations.

Plaintiffs assert there is a very short window in which defendants could act to phase out fossil fuel exploitation and avert environmental catastrophe. They seek (1) a declaration their constitutional and public trust rights have been violated and (2) an order enjoining defendants from violating those rights and directing defendants to develop a plan to reduce CO₂ emissions. . . .

The questions before the Court are whether defendants are responsible for some of the harm caused by climate change, whether plaintiffs may challenge defendants’ climate change policy in court, and whether this Court can direct defendants to change their policy without running afoul of the separation of powers doctrine. . . .

At the pleading stage, plaintiffs have adequately alleged a causal link between defendant’s conduct and the asserted injuries. . . . Youth plaintiffs have adequately alleged they have standing to sue. . . .

The Due Process Clause of the Fifth Amendment to the United States Constitution bars the federal government from depriving a person of “life, liberty, or property” without “due process of law.” . . . Plaintiffs allege defendants have violated their due process rights by “directly caus[ing] atmospheric CO₂ to rise to levels that dangerously interfere with a stable climate system required alike by our nation and Plaintiffs[,] . . . knowingly endanger[ing] Plaintiffs’ health and welfare by approving and promoting fossil fuel development, including exploration, extraction, production, transportation, importation, exportation, and combustion,” . . . and, “[a]fter knowingly creating this dangerous situation for Plaintiffs, . . . continu[ing] to knowingly enhance that danger by allowing fossil fuel production, consumption, and combustion at dangerous levels”

Substantive due process “forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” . . . Fundamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are either (1) “deeply rooted in this Nation’s history and tradition” or (2) “fundamental to our scheme of ordered liberty” In determining whether a right is fundamental, courts must exercise “reasoned judgment,” keeping in mind that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries.” . . . The genius of the Constitution is that its text allows “future generations [to] protect . . . the right of all persons to enjoy liberty as we learn its meaning.” . . .

I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. . . . [A] stable climate system is quite literally the foundation “of society, without which there would be neither civilization nor progress.” . . . Plaintiffs do not object to the government’s role in producing *any* pollution or in causing *any* climate change; rather, they assert the government has caused pollution and climate change on a catastrophic level, and that if the government’s actions continue unchecked, they will permanently and irreversibly damage plaintiffs’ property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children’s) ability to live long, healthy lives. . . . [P]laintiffs allege a stable climate system is a necessary condition to exercising other rights to life, liberty, and property.

In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims. On the one hand, the phrase “capable of sustaining human life” should not be read to require a plaintiff to allege that governmental action will result in the extinction of humans as a species. On the other hand, acknowledgment of this fundamental right does not transform any minor or even moderate act that contributes to the warming of the planet into a constitutional violation. . . . [T]his Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government’s knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right. . . .

With limited exceptions, the Due Process Clause does not impose on the government an affirmative obligation to act The “danger creation” exception [to this rule] permits a substantive due process claim when government conduct “places a person in peril in deliberate indifference to their safety[.]” Plaintiffs purport to challenge the government’s failure to limit third-party CO₂ emissions pursuant to the danger creation . . . exception. . . . [P]laintiffs allege defendants played a unique and central

role in the creation of our current climate crisis; that they contributed to the crisis with full knowledge of the significant and unreasonable risks posed by climate change; and that the Due Process Clause therefore imposes a special duty on defendants to use their statutory and regulatory authority to reduce greenhouse gas emissions. Accepting the allegations of the complaint as true, plaintiffs have adequately alleged a danger creation claim. . . .

[T]he term “public trust” refers to the fundamental understanding that no government can legitimately abdicate its core sovereign powers. . . . Permitting the government to permanently give one of these powers to another entity runs afoul of the public trust doctrine because it diminishes the power of future legislatures to promote the general welfare. . . . Plaintiffs’ public trust claims arise from the particular application of the public trust doctrine to essential natural resources. . . .

The natural resources trust . . . impose[s] upon the trustee a fiduciary duty to “protect the trust property against damage or destruction.” . . . The trustee owes this duty equally to both current and future beneficiaries of the trust. . . . The public trust doctrine is generally thought to impose three types of restrictions on governmental authority:

[F]irst, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses. . . .

[P]laintiffs assert defendants have violated their duties as trustees by nominally retaining control over trust assets while actually allowing their depletion and destruction, effectively violating the first and third restrictions by excluding the public from use and enjoyment of public resources. . . . Time and again, the Supreme Court has held that the public trust doctrine applies to “lands beneath tidal waters.” . . . Because a number of plaintiffs’ injuries relate to the effects of ocean acidification and rising ocean temperatures, they have adequately alleged harm to public trust assets. . . .

The public trust doctrine defines inherent aspects of sovereignty. The Social Contract theory, which heavily influenced Thomas Jefferson and other Founding Fathers, provides that people possess certain inalienable rights and that governments were established by consent of the governed for the purpose of securing those rights.¹³

¹³ The Founding Fathers were also influenced by intergenerational considerations. . . . Thomas Jefferson . . . thought that each generation had the obligation to pass the natural estate undiminished to future generations. . . . In a 1789 letter to James Madison, Jefferson wrote that “no man can, by natural right, oblige lands he occupied . . . to the payments of debts contracted by him. For if he could, he might, during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to than the living, which would be the reverse of our principle. What is true of every member of the society individually is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of the individuals.” . . . Although I find it unnecessary . . . to address the standing of future generations or the merits of plaintiffs’ argument that youth and posterity are suspect classifications, I am mindful of the intergenerational dimensions of the public trust doctrine in issuing this opinion.

Accordingly, the Declaration of Independence and the Constitution did not *create* the rights to life, liberty, or the pursuit of happiness—the documents are, instead, vehicles for protecting and promoting those already-existing rights. . . . Governments, in turn, possess certain powers that permit them to safeguard the rights of the people; these powers are inherent in the authority to govern and cannot be sold or bargained away. One example is the police power. . . . Another is the status as trustee pursuant to the public trust doctrine. . . .

Although the public trust predates the Constitution, plaintiffs’ right of action to enforce the government’s obligations as trustee arises from the Constitution. . . . [P]laintiffs’ public trust claims are properly categorized as substantive due process claims. . . .

A deep resistance to change runs through defendants’ and intervenors’ arguments for dismissal: they contend a decision recognizing plaintiffs’ standing to sue, deeming the controversy justiciable, and recognizing a federal public trust and a fundamental right to climate system capable of sustaining human life would be unprecedented, as though that alone requires its dismissal. This lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motions to dismiss. . . . Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it. . . .

“No Ordinary Lawsuit”: Climate Change, Due Process, and the Public Trust Doctrine

Michael C. Blumm and Mary Christina Wood (2017)*

. . . The *Juliana* case is part of a wave of atmospheric trust litigation launched by the non-profit organization, Our Children’s Trust. Recognizing that looming tipping points necessitate a rapid and decisive response to the planet’s atmospheric crisis—and that the crisis only worsened over several decades while the political branches indulged in climate-change denial—the Atmospheric Trust Litigation (“ATL”) campaign has turned to the judiciary for eleventh-hour relief to force worldwide emissions reductions.

ATL is a full-scale, coordinated movement, with multiple suits pending and others teed up in different forums, all connected by a common template of science and law. . . . The litigation campaign began in May 2011, when young people filed legal processes in every state in the United States, launched a federal suit, and began plans for lawsuits in other countries as well. . . .

The ATL campaign draws upon the public trust principle in large part because it is a universal principle of ecological obligation, as the doctrine has developed both in the United States and abroad. The idea is that, in the wake of a failure of international

* Excerpted from Michael C. Blumm & Mary Christina Wood, *No Ordinary Lawsuit*, 67 AM. U. L. REV. 1 (2017).

treaty negotiations, domestic courts across the world are positioned to enforce climate obligations from a shared framework of fiduciary responsibility toward the common atmosphere. ATL suits seek to accomplish, through decentralized domestic litigation in other countries, what has thus far eluded the centralized, international diplomatic treaty-making process. The ATL campaign characterizes all nations as co-trustees of the atmosphere, each holding a duty towards both their own citizens and their co-trustees of protecting the shared atmospheric trust. If the ATL approach succeeds, domestic actions would force science-based CO₂ reduction and create tangible backing to the principles declared in the United Nations Framework Convention on Climate Change (UNFCCC), agreed to in 1992 by 192 nations of the world. . . .

* * *

Another example of public trust climate-change litigation comes from Uganda. In *Mbabazi and Others v. The Attorney General and National Environmental Management Authority*, filed in 2012, a group of minor plaintiffs contend that Article 237 of the Constitution of Uganda* makes the government of Uganda a public trustee for the nation's atmosphere. Plaintiffs argue that this provision—along with Article 39 of the Constitution, which protects “a right to a clean and healthy environment”—requires that the government preserve resources for the sake of present and future generations. After a preliminary hearing, the High Court at Kampala ordered the parties to undertake a 90-day mediation process, but has taken no further action as of the spring of 2019.

In *Pandey v. India*, filed in 2017 and pending before the National Green Tribunal of India, Plaintiffs argue that “the State and its machinery is a trustee of vital natural resources [and is] . . . bound by a fiduciary duty under the Public Trust Doctrine to mitigate climate change so as to protect such resources for the benefit of current and future generations.” Plaintiffs rely on prior decisions by the Supreme Court of India articulating the government's obligations under the public trust doctrine. In *Fomento Resorts & Hotels Ltd. v. Minguel Martins*, (2009) 3 SCC 571, that Court explained:

The heart of the Public Trust Doctrine is that it imposes limits and obligations upon government agencies and their administrators on behalf of all the people and especially future generations. . . .

The Public Trust Doctrine is a tool for exerting long-established public

* Article 237 of the Constitution of Uganda provides:

- (1) Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.
- (2) Notwithstanding clause (1) of this article . . .
 - (b) the Government or a local government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens

rights over short term public rights and private gain. Today, every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use the same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or a lessee and a water right holder has an obligation to use such resources in a manner as not to impair or diminish the people's rights and the people's long term interests in that property or resource, including down slope lands, waters and resources. . . .

Aji P. v. State of Washington
Superior Court of Washington, King County
2018 WL 3978310 (Wash. Super.)

Michael Scott, Judge.

. . . Plaintiffs are twelve young Washingtonians, under the age of 18. . . . Plaintiffs suggest the State of Washington should strive to achieve a 96% reduction of CO₂ by 2050, and assert that “[i]n order to retain a reasonable chance to preserve a stable climate system, the state needs to transition almost completely off of natural gas and gasoline and diesel fuel within the next 15 years, and then generate 90% of its electricity from carbon-free sources by 2030.” Plaintiffs complain that “the State’s current target to reduce emissions 50% by 2050 . . . is *grossly inadequate*, maintains dangerous dependency on fossil fuels, and will put young people in the difficult position of being forced to choose between heated homes and stable coastlines; between expensive climate adaptation or energy rationing.”

The relief Plaintiffs seek is sweeping in scope. Among other requests, Plaintiffs ask the Court to: . . .

Order Defendants to develop and submit to the Court by a date certain an enforceable state climate recovery plan, which includes a carbon budget, to implement and achieve science-based numeric reductions of GHG emissions in Washington consistent with reductions necessary to stabilize the climate system and protect the vital Public Trust Resources on which Plaintiffs now and in the future will depend

The relief sought by Plaintiffs would require the Court to usurp the roles of the legislative and executive branches of our state government. Plaintiffs ask the court to order and oversee the development of a far-ranging climate action plan that would involve a complex regulatory scheme. Any climate action plan and regulatory regime would require the assessment of numerous costs and benefits, balancing many interests, and resolving complex social, economic, and environmental issues. This policy-making is the prerogative and the role of the other two branches of government, not of the judiciary. . . .

Plaintiffs’ claims are nonjusticiable—they present political questions that must be resolved by the political branches of government. If the court addressed the issue posed by the Plaintiffs and ordered the relief they seek, it would violate the separation of powers. . . . This court “is not equipped to legislate what constitutes a ‘successful’ regulatory scheme by balancing public policy concerns, nor can [it] determine which risks are acceptable and which are not. These are not questions of law; [this Court] lacks the tools.” . . .

To avoid the problem of nonjusticiability, Plaintiffs attempt to frame a constitutional claim. They assert a constitutional right to “a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty.” There is no such right to be found within our State Constitution. Plaintiffs ask the court to follow *Juliana v. United States* (D. Or. 2016), in finding a previously unrecognized right to a “stable climate system.” This Court declines to do so. As one federal court has recently observed, *Juliana* is an outlier. Except for *Juliana*, “whenever federal courts have faced assertions of fundamental rights to a ‘healthful environment’ or to freedom from harmful contaminants, they have invariably rejected those claims.”

Plaintiffs, like the court in *Juliana*, rely heavily on [the U.S. Supreme Court’s decision in] *Obergefell v. Hodges* (2015), for the proposition that courts can recognize new unenumerated rights. Their reliance is misplaced. *Obergefell* involved a fundamental *individual* right—the right of a person to marry another person, a right deeply rooted in constitutional jurisprudence protecting personal freedom, and in history and tradition. The purported right asserted by Plaintiffs is not analogous. There is no individual, personal right to a “stable climate system,” just as there is no personal, individual right to world peace, or economic prosperity, or any of a number of other desirable objectives. . . .

A stable and healthy climate, like world peace and economic prosperity, is a shared aspiration—the goal of a people, rather than the right of a person. These types of aims are the objectives of a polity, to be pursued through the political branches of government. They are not individual rights that can be enforced by a court of law.

Plaintiffs also invoke the Equal Protection Clause of Article 1, Section 12, of the Washington State Constitution.* Their equal protection claim is without merit.

Plaintiffs allege that they, “as young people under the age of 18, are a separate suspect and/or quasi-suspect, class in need of extraordinary protection from the political process pursuant to the principles of equal protection. . . . Plaintiffs are an insular

* Article I, Section 12 of the Washington State Constitution provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

minority with no voting rights and little political power or influence over Defendants and their actions.” . . .

Plaintiffs are not an “insular minority.” And age is not immutable. Each plaintiff, like every human, will grow older. Plaintiffs cannot prove any set of facts to establish that they have been discriminated against regarding climate change based on their age. Plaintiffs live in the same climate as everyone else. We are *all, regardless of age*, experiencing the harmful effects of climate change.

Plaintiffs are also not without power or influence. Although they cannot yet vote, they have influence over those who do, including their parents and guardians, and many others who are concerned about young people and the future they will face. No case has recognized people under the age of 18 as a protected class simply because they cannot yet vote. And Plaintiffs have many other rights, such as rights of free speech and assembly, through which they can advocate for political change. The court encourages Plaintiffs to continue to exercise those rights. . . .

Plaintiffs’ claims are dismissed with prejudice. . . . The young people who are the plaintiffs in this case can (and must) continue to help solve the problems related to climate change. They can be advocates, urging the legislature and the executive to enact and implement policies that will promote decarbonization and decrease greenhouse gas emissions, such as a carbon tax, the development of alternative energy sources (including nuclear energy), and international cooperation in climate regulations. These are solutions that must be effected through the political branches of government, and not the judicial branch.

Future Generations and Non-Human Entities as Plaintiffs

Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice

Burns H. Weston and Tracy Bach (2009)*

. . . [Intergenerational] justice exists . . . “when the accumulated capital, which the next generation inherits, is at least as high as what the present generation inherited.” This capital comes in several forms [including] *natural capital*, which is the stock of environmental assets important for supporting human life, such as biodiversity and the atmosphere

* Excerpted from Burns H. Weston & Tracy Bach, *Recalibrating The Law of Humans with The Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice* (Vermont Law School Research Paper No. #10-06, Aug. 3, 2009).

Edith Brown Weiss advances three basic principles of intergenerational ecological equity in her . . . book, *In Fairness to Future Generations* [(1989)]. Together they provide a foundation for determining when law adequately protects future generations from climate change harms. Brown Weiss starts with the premise that each generation receives a natural legacy in trust from its predecessors, which it then holds in trust for future generations. This trust relationship imposes duties on the current generation and grants rights to beneficiaries in future generations. To determine one generation's ecological legacy to the next, we should assess how what is passed on conserves 1) *options*, 2) *quality*, and 3) *access* for the next generation. . . .

Brown Weiss leads to the following two propositions:

Each generation has the right to expect the preceding generation to (1) conserve its options, (2) conserve quality, and (3) conserve access; and

Each generation has an obligation to the next generation to (1) conserve its options, (2) conserve quality, and (3) conserve access. . . .

New Zealand enshrines the rights of future generations in nineteen legislative acts that address such environmental concerns as conservation land and hazardous materials. The far-reaching Resource Management Amendment Act (RMA) of 1996, which seeks "to promote the sustainable management of natural and physical resources," . . . highlights the need to . . . "[s]ustain the potential of natural and physical resources (excluding minerals) to *meet the reasonably foreseeable needs of future generations*; [s]afeguard the life-supporting capacity of air, water, soil, and ecosystems; and [a]void, remedy, or mitigate any adverse effects of activities on the environment."

Under the RMA, Councils manage the natural and physical resources of the region. Like most other countries, New Zealand requires environmental impact assessment before conducting an activity which may have harmful effects on the environment. One of the matters considered is whether the proposed activity would have "[a]ny effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural, or other special value for present or future generations." Thus, on paper, the rights of future generations must be considered. . . .

The environment court established under the RMA has interpreted the Act to require affirmative consideration of intergenerational justice. Most notably, in a case pertaining to global climate change, *Genesis Power Limited v. Franklin District Council* [(2005)], the [New Zealand Environmental Court] . . . stated, "Climate change is a silent but insidious threat that scientists tell us threatens to improperly deprive future generations of their ability to meet their needs." The court concluded that climate change must be addressed, and that in this case, one way to do so was through renewable energy.

Australia has also used its environmental review powers to account for intergenerational justice in the climate change context. . . . Through a series of cases, courts have decided that environmental impact assessments, required under the

[Environment Protection and Biodiversity Conservation Act of 1999] . . . and relevant state environmental planning statutes, must consider climate change and its intergenerational effects. The courts have also ruled that [the Act] . . . affirms “the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.” . . . [T]he courts have used [this principle] . . . to assert the government’s responsibility to assess even the indirect impacts of environmentally harmful activities. . . .

In 1993, the Supreme Court of the Philippines, in the case of *Oposa v. Factorian*, brought international attention to the intergenerational justice language of the country’s environmental policy. Filipino law officially declares that “it is the continuing policy of the State . . . to fulfill the social, economic and other requirements of present and future generations of Filipino[s].” . . . [T]he Supreme Court sought to ensure conservation of options for future generations by claiming the right to “the full benefit, use and enjoyment of the natural resource treasure that is the country’s virgin tropical rainforest.” . . . [T]he Supreme Court took a strong position on the ability of future generations to enforce their rights in the courts: “We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.” . . .

Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court

Manuel José Cepeda Espinosa (2004)*

. . . [In Colombia, c]onstitutional judicial review in specific, individual cases, or concrete review, was significantly expanded in 1991 with the creation of the *acción de tutela* (writ of protection of fundamental rights).

The *acción de tutela* enables any person whose fundamental rights are being threatened or violated to request that a judge with territorial jurisdiction protect that person’s fundamental rights. This measure serves to protect the integrity of the Constitution. Citizens may file informal claims without an attorney, before any judge in the country. That judge is legally bound to give priority attention to the request over any other business. Judges have a strict deadline of ten days to reach a decision and, where appropriate, to issue a mandatory and immediate order. In accordance with the requirements of the specific situation, the *tutela* procedure allows judges to order the adoption of any measure necessary to protect threatened fundamental rights, even before rendering a final judgment. In addition, every single *tutela* judgment can be reviewed by the Constitutional Court, which will select those that it considers necessary to correct

* Excerpted from Manuel José Cepeda Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529 (2004).

or pertinent for the development of its own case law, and issue a corresponding judgment. Except for decisions in which the Court seeks to unify its doctrine on a given matter . . . or decisions that are adopted by the Full Chamber . . . , *tutela* judgments are issued by Review Chambers The Review chambers are composed of three magistrates; there are nine Chambers, each one presided over by one of the nine magistrates.

Although the *tutela* is formally defined in the Constitution as a means to protect fundamental rights . . . , the Constitutional Court has issued numerous and uniform decisions expanding the catalogue of rights. These decisions have direct and immediate application beyond Chapter I, Title Two of the Constitution, which contains the formal catalogue of fundamental rights, including economic, social and cultural rights, and collective rights. The nature of the right depends on the circumstances of each case, the gravity of the allegations, and the vulnerability of the plaintiff. Still, the constitutional doctrine concerning the enforceability of such rights is still in the making. Moreover, the protective spirit that is usually present in Colombian constitutional caselaw has expanded in several ways. First, incorporated entities are now allowed to make use of this action. This development recognizes the existence of fundamental rights on their behalf because of their definition as legal entities. Second, the writ now includes all state authorities and officials as potential respondents in such a claim, making them potential violators of fundamental human rights. Third, the jurisprudence allows the presentation of *tutela* claims against private persons in positions of power, provided that certain conditions are met. This substantial expansion of the *tutela* procedure's admissibility has had the effect of granting a higher degree of protection to all types of constitutionally-protected fundamental rights. However, it has also excessively increased the court's workload

Judgment T-622 of 2016

Constitutional Court of Colombia (Sixth Review Chamber)

November 10, 2016*

The Sixth Chamber of Revision of the Constitutional Court, composed of Magistrates Aquiles Arrieta Gómez . . . , Alberto Rojas Ríos, and Jorge Iván Palacio Palacio, presiding, . . . offers the following: . . .

Chocó is located in one of the most biodiverse regions in the planet [It is] one of the territories richest in natural, ethnic, and cultural diversity [It] possesses a great valley running south to north, through which run the Atrato, San Juan, and Baudó Rivers. The Atrato River Basin . . . represents a little more than 60% of the area of the Department

The Atrato River[']s] . . . banks are home to multiple Afro-Colombian and indigenous communities, among them those bringing forth this action, whose ancestors

* Translation by José Argueta Funes (Yale Law School, J.D. Class of 2019).

have inhabited the region These communities have for centuries engaged in artisanal mining, agriculture, hunting, and fishing in this region as means to supply their food needs. . . . These communities have made the banks of the Atrato River not only their territory, but a space for the reproduction of life and the recreation of culture

Additionally, social exclusion in Chocó has deep historical roots, for after independence no inclusive political or administrative institutions developed in the region. Instead, the region came under exclusively extractive institutions, which have favored corruption since colonial times. . . . In the present day, 48.7% of the population of Chocó lives in extreme poverty. . . .

2.1. . . . [C]omplainant ethnic communities bring this action of tutela to stop the intensive and large scale use of several extractive mining methods and . . . illegal forest exploitation

2.4. . . . The environmental crisis produced by the activities complained of has dramatically affected the loss of life among indigenous and Afro-descendant youth. [For example,] . . . in 2014 the indigenous town of Embera-Katío, located in the basin of . . . [one of the Atrato's tributaries] . . . , reported the death of 34 children [due to ingestion of contaminated water]. . . . In Afro-Colombian communities, . . . illegal mining and forestry activities have led to a proliferation of illnesses like diarrhea, dengue, and malaria Furthermore, the region does not possess an adequate health system to assist these communities. . . .

The . . . Administrative Tribunal of Cundinamarca denied the tutela. It reasoned that the request for a tutela was improper because the case presented the question of protection of collective, not fundamental rights. Therefore, it added that complainants should seek recourse through a popular judicial action* and not through a tutela seeking to defend their interests. . . . The . . . Council of State . . . affirmed this decision. . . .

3.2. . . . This body has insisted that . . . tutelas promoted by ethnic minorities and, generally, groups and subjects in vulnerable situations must be examined with weighted criteria. This flexibility is justified by the need to demolish the obstacles and limitations that have impeded these populations' access to the judicial mechanisms legislators designed for the protection of their rights in the same capacity as other sectors of the population. . . .

5.3. The Constitution of 1991, attuned to the principal international concerns regarding the protection of the environment and biodiversity, has recognized that the

* Article 88 of the Constitution of Colombia, as translated by ConstituteProject.org, provides:

The law will regulate popular actions for the protection of collective rights and interests related to the homeland, space, public safety and health, administrative morality, the environment, free economic competition, and other areas of similar nature defined in it.

It will also regulate the actions stemming from the harm caused to a large number of individuals, without barring appropriate individual action.

fundamental right to a healthy environment has the characteristics of a *superior interest* [The Constitution includes] . . . close to 30 provisions . . . consecrating a series of principles, mandates and duties seeking . . . : (i) to protect the environment in an integral fashion and (ii) to guarantee a model of sustainable development, upon which this body has developed the concept of “Ecological Constitution.” . . .

5.10. . . . [N]ature and the environment are a transversal element of the Colombian constitutional order. Their importance falls, of course, on the attention to human beings that live in it and in the need to have a healthy environment in order to carry on a dignified life . . . [but their importance also reflects] the other living organisms with whom we share this planet, who are understood as entities worthy of protection in their own right. We . . . recognize ourselves as integral parts of the global ecosystem—the biosphere—before we think about the environment through the normative categories of domination, simple exploitation, or utility. . . .

5.18. Public policies on the conservation of biodiversity must . . . center around the preservation of life and its diverse manifestations, but principally around the preservation of the conditions under which this biodiversity can continue unfolding its evolutionary potential in a stable and indefinite manner, as the Court has noted through its jurisprudence. Similarly, the States’ duties to protect and conserve the ways of life of indigenous, black, and farming communities imply guaranteeing the conditions for these ways of being, perceiving, and comprehending the world to survive.

5.50. . . . [A]lthough the right to water is not included in the Constitution as a fundamental right, the Constitutional Court does consider it as such insofar as it is part of the essential nucleus of the right to life in dignified conditions—not only insofar as water is destined for human consumption, but also because water is an essential part of the environment and is necessary for the lives of the multiple organisms and species that inhabit the planet and, of course, for the human communities that develop around it [T]his is particularly relevant for ethnic groups insofar as the preservation and provision of water is essential for the survival of indigenous and tribal cultures

6.3. . . . [F]or ethnic communities, their territories—particularly those in which they have been located for several generations—and the natural resources included in them do not have a valuation or representation in market or economic terms [O]n the contrary, these territories are intimately connected to their existence and survival as culturally differentiated groups from a religious, political, social, and economic point of view. . . .

7.41. . . . [M]ining is an activity with the potential to affect the environment and the sustainability of natural resources, and therefore the State must take strict regulatory and control measures . . . as required by the Constitution of 1991 . . . to protect the superior interest of the environment and its enjoyment by human communities. This mandate is even more relevant regarding so-called illegal mining which has flourished without significant state control

9.1. . . . [Complainants] consider that defendant state agencies . . . are responsible for the infringement of their fundamental rights to life, human dignity, health, water, food security, healthy environment, culture, and territory because they have failed to take effective action to stop the development of illegal mining activities that have produced a grave humanitarian and environmental crisis in the region in which the facts of this case take place.

[The Court highlighted several instances in which Complainants, other ethnic communities, private entities, and other representative bodies had called the attention of the authorities to the grave consequences of mining in the region.]

9.18. . . . [T]he great majority of answers different public entities submitted to the Court over the course of this process [reveal] . . . the notable lack of information, coordination and articulation of functions, jurisdictions, and competencies among these agencies Another aspect [of these answers] . . . that produces great concern for the Chamber is the important number of institutional responses that insisted that illegal mining in the Atrato River Basin is neither within their competency nor their responsibility. . . .

9.19. . . . Defendant state authorities, through their failure to take effective actions to stop the development of illegal mining activities, are responsible for the infringement of the complainant ethnic communities' fundamental rights to life, health, water, food safety, healthy environment, culture, and territory

10.1. . . . [G]iven [this case's] complexity and the enormous challenges that stand in the way of compliance, the . . . [Chamber] will issue simple orders as well as complex orders directed at guaranteeing the fundamental rights of the ethnic communities in the Atrato River Basin, whether or not these communities resorted to the tutela for the protection of their rights

These orders are aimed . . . at the adoption of effective and concrete decisions to progressively and permanently overcome the inadequacy of resources, including institutional flaws, based on the constitutional principle of harmonious collaboration among public powers, to secure the effective protection of the fundamental rights and the full implementation of the Constitution in the Department of Chocó

10.2. . . . The Atrato River, its basin and tributaries, will be recognized as an entity subject to rights to protection, conservation, maintenance, and restoration under the care of the State and the ethnic communities The Government shall exercise . . . the legal representation of the rights of the river . . . jointly with the ethnic communities who live in the Atrato River Basin in Chocó; . . . the Atrato River . . . shall be represented by a member of the plaintiff communities and a delegate of the Colombian government, together acting as guardians of the River. . . .

Judgment STC-4360 of 2018

Supreme Court of Justice of Colombia (Civil Cassation Chamber)

April 5, 2018*

[The Civil Cassation Chamber of the Supreme Court of Justice of Colombia, composed of Aroldo Wilson Quioz Monsalvo, President of the Chamber, Margarita Cabello Blanco, Álvaro Fernando García Restrepo, Luis Alonso Rico Puerta, Ariel Salazar Ramírez, Octavio Augusto Tejeiro Duque, and Luis Armando Tolosa Villabona.]

. . . Complainants pray for the protection of “supralegal” rights, among them the rights to “enjoy a healthy environment,” life, and health, which have been allegedly violated by the defendants[, including the Presidency of the Republic, the Ministry of the Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development]. . . . [C]omplainants are . . .

a group of 25 boys, girls, teenagers, and young adults . . . between 7 and 25 years old, who live in cities that are listed among the cities facing greatest risk from climate change. . . . [Complainants] have an average life expectancy of 78 years . . . and they hope to live their adulthood in the years 2041-2070 and their seniority starting in the year 2071 In these time periods, according to the climate change scenarios presented by the [Colombian Institute of Hydrology, Meteorology, and Environmental Studies, or IDEAM] . . . , the average temperature in Colombia is expected to increase between 1,6 C and 2,14 C

[Complainants] explain that under the Paris Accord and the Law 1753 of 2015, the government undertook national and international commitments to achieve “the reduction of deforestation and the emission of greenhouse gases,” including the obligation to reduce “the net rate of deforestation in the Colombian Amazon by the year 2020.” . . . [Complainants note that] “deforestation increased by 44% [between 2015 and 2016],” [including] 70.074 hectares [of forest cover] in the Amazon. . . . [Complainants also] argue that “deforestation in the Amazon affects not only the Amazon region but also ecosystems across” the country

[Complainants argue that continued deforestation] results from the defendants’ failure to adopt pertinent measures . . . , with nefarious consequences for complainants’ places of residence, altering complainants’ living conditions and depriving them of the possibility of “enjoying a healthy environment.” . . . [Complainants] present this request for protection as a temporary measure . . .

To avoid the occurrence of an irreparable harm: the increase of greenhouse gas emissions, [the] principal cause of climate change, as a consequence of the increase . . . in the rate of deforestation and the

* Translation by José Argueta Funes (Yale Law School, J.D. Class of 2019).

destruction of the Colombian Amazon . . . resulting from the influx of peoples after the end of the armed conflict into territories that were previously in a state of conservation, paradoxically because of occupation by the guerilla forces of the [Revolutionary Armed Forces of Colombia, or FARC)

[Complainants] request . . . :

An order to the Presidency of the Republic and defendant ministers to present “in six months, an action plan to reduce deforestation in the Colombian Amazon to zero by the year 2020.” . . .

[An order] to the head of the executive, “along with complainants, members of the future generation which will face the effects of climate change” to elaborate[:]

an intergenerational accord on the measures to be adopted to reduce deforestation and the emission of greenhouse gases, as well as the adaptation and mitigation strategies each of the vulnerable cities and municipalities in the country will adopt regarding climate change

[The court below] dismissed the petition after concluding:

[T]he exceptional constitutional mechanism [of the tutela] is not the appropriate means to obtain the orders sought, for the proper mechanism to achieve the desired end is the popular action . . . [which is] capable not only of protecting the collective right to a healthy environment, but also of guaranteeing the fundamental rights complainants seek to protect

2. . . . [T]he fundamental rights to life, liberty, and human dignity are substantially connected to and determined by the environment and the ecosystem. Without a healthy environment, rightsholders and sentient beings in general cannot survive, much less protect these rights, neither for our children nor for coming generations. Neither will we be able to guarantee the existence of the family, society, or the State itself. . . . Therefore, the tutela is the proper means to resolve the problem presented, because this case presents the jurisprudential requirements for invoking a tutela, given the connection between the environment and [fundamental] . . . rights. . . .

4. Humanity is principally responsible for [increasing environmental precarity] . . . because its planetary hegemony led it to adopt an anthropocentric and selfish model, whose characteristics are noxious to environmental stability . . . [including]: i) unbounded demographic growth, ii) the adoption of a vertiginous development system guided by consumerism and current political economy, and iii) unbounded exploitation of natural resources.

5. Nevertheless, an awareness of our obligation to change our behaviors has slowly been developing. . . .

5.2. . . . [T]he scope of protection provided by fundamental rights is the individual, but also the “other.” The “fellow” is otherness; its essence, the other persons living in the planet, includes also other animal and vegetable species. . . . [It] also includes subjects not yet born, who deserve to enjoy the same environmental conditions in which we have lived. . . .

5.3. The environmental rights of future generations are founded upon (i) the ethical duty of species solidarity and (ii) the intrinsic value of nature. . . . [N]atural goods are shared among all inhabitants of Planet Earth, as well as by descendants or coming generations who have yet to materially possess these goods, but who are nevertheless tributaries, recipients, and holders of them [W]ithout an equitable and prudent consumption criterion, the human species will see itself compromised in the future because of the scarcity of necessary resources for life. In this way, solidarity and environmentalism “are related to the point of becoming the same.” . . .

6. . . . [A] global public ecological order has emerged in light of these principles which assists in orienting national laws and which help resolve citizen suits over the destruction of the environment with the aim of protecting the . . . rights of persons and of present and future generations. . . .

7. In Colombia, the 1991 Constitution updated our ordering of the environmental question, upon which a national public ecological order has been built The Constitutional Court has played an important role . . . in designing a jurisprudential line including concepts and developments on the environmental question arising in the international and academic scenes. . . . In Judgment T-411 of 1992, the environmental question was described:

. . . The ecological problem and everything it implies is a universal clamor, a problem of survival [T]he protection of the environment is not ‘a platonic love to mother nature,’ . . . [but] an issue so vital that it deserves a firm and unanimous decision from the world population. After all, the natural patrimony of a country, much like its historical and artistic patrimony, belongs to the persons living in the country, as well as to the coming generations, for we have the obligation and the challenge to deliver to the coming generations the legacy we have received in optimal conditions

8. The environment constitutes a right of constitutional rank, contemplated in chapter III of the Constitution, which regulates “collective and environmental rights,” in articles 79 and 80: . . .

Art. 79. All persons have the right to enjoy a healthy environment. The law will guarantee the participation of the community in the decisions

that may affect it. . . . It is the duty of the State to protect the diversity and integrity of the environment, conserve the areas of special ecological importance and promote education for the achievement of these ends. . . .

Art. 80. The State will plan the management and use of natural resources, to guarantee its sustainable development, its conservation, restoration or replacement. . . . In addition, it must prevent and control the factors of environmental deterioration, impose the legal sanctions and demand the repair of the damages caused. . . . Likewise, it will cooperate with other nations in the protection of the ecosystems located in the border areas. . . .

10. Conservation of the Amazon is a national and global obligation, involving the main environmental axis of the planet, which is why it has been cataloged as the “lung of the world” [I]n the . . . Paris Agreement of 2015, . . . Colombia . . . acquired the responsibility of reducing the “deforestation of the Colombian Amazon” . . . and for this purpose adopted the “Sustainable Colombia initiative” and the “Amazon Vision” Fund

11. This Body concludes that . . . between the years 2015 and 2016, deforestation in the Amazon region increased by 44%, going from 56,952 to 70,074 affected hectares. . . . [D]eforestation of the Amazon leads, in the short, medium, and long term, to imminent and grave harm to the children, teenagers, and adults bringing this action, and generally to all the inhabitants of the national territory, for it . . . releases . . . [CO₂] . . . into the atmosphere, producing the greenhouse effect, which transforms and fragments ecosystems

11.2. The principle of intergenerational equity is obviously violated in these circumstances. The projected temperature increase for 2041 is 1,6°C, and for 2071 up to 2,14°C. Future generations . . . will be directly affected unless the present generations reduce the rate of deforestation to zero.

12. . . . This Chamber . . . [takes notice of] the thesis expounded by the Constitutional Court in Judgment T-622 of 2016, related to the recognition of nature as a . . . subject of rights, a position in accordance with the importance of the environment and its conservation

13. It is clear, despite the existence of numerous international commitments . . . and jurisprudence on the matter, that the Colombian State has not efficiently addressed the problem of deforestation in the Amazon.

13.1. . . . The three autonomous regional corporations with jurisdiction over the Amazonian territory have not carried out efforts to reduce the concentrated area of deforestation [T]hese environmental authorities are not fulfilling their functions of evaluating, controlling, and monitoring natural resources and imposing and executing

sanctions in cases where there is a violation of the norms of environmental protection within their competencies

14. . . . [T]o protect that vital ecosystem . . . , as the Constitutional Court declared regarding the Atrato River, we recognize the Colombian Amazon as an entity “subject of rights,” entitled to protection, conservation, maintenance, and restoration under the charge of the State and the territorial entities that compose the region.

Therefore, we will award the requested remedy, ordering the Presidency of the Republic, the Ministry of the Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development to develop, . . . with the participation of complainants, affected communities, and the interested general public, within four . . . months . . . a short, medium, and long term plan to counter the deforestation rate of the Amazon which tackles the effects of climate change. . . .

Additionally, we will order the Presidency of the Republic, the Ministry of the Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development to formulate an “intergenerational pact for the life of the Colombian Amazon” . . . within five . . . months . . . with the active participation of complainants, affected communities, scientific organizations or environmental research groups, and the general interested public[.] . . . [The plan] must adopt measures geared at eliminating deforestation and greenhouse gas emissions, and shall include national, regional, and local execution strategies of [a] preventive, obligatory, corrective, and pedagogical nature directed at climate change adaptation. . . .

Rights of Nature: Rivers That Can Stand in Court

Lidia Cano Pecharroman (2018)*

. . . [T]he country that pioneered the inclusion of the rights of nature as a constitutional right was Ecuador. . . . The [2008] constitution has a chapter exclusively dedicated to the rights of nature. The text states that nature has the right to be respected, and that its existence and the maintenance and regeneration of its life cycles, structure, and evolving processes must be allowed for. Furthermore, it gives any person the right to ask public authorities to respect its rights. Moreover, the constitution states that the state will apply “precautionary” and “restrictive” measures to any activity that may lead to the extinction of a species, the destruction of the ecosystems, or the permanent alteration of natural cycles. . . . However, as constitutional principles remain broad, it is unclear how these rights would be exercised, and whether or when nature would hold locus standi to defend these rights. . . .

Worldwide legal systems are gradually introducing the possibility of granting rights to nature to stand in court for protection. . . . To date, rivers have been recognized

* Excerpted from Lidia Cano Pecharroman, *Rights of Nature: Rivers That Can Stand in Court*, 7 RESOURCES 13 (2018).

as holding rights by a court ruling in Ecuador, India, New Zealand, and Colombia. These cases are the first judicial attempts to apply legislation that recognizes the rights of nature or to set precedence in recognizing such rights.

The first ruling was delivered in Vilcabamba, Ecuador. A public contractor started building a road next to the Vilcabamba River using dynamite and heavy machinery and depositing rocks and other construction materials in the river banks. The accumulation of these materials caused floods along the river and polluted the waters. After some affected citizens brought this case to the courts, the river's right to stand in court was admitted and those citizens representing the river continued in the process. The judge determined that the rights of nature had been violated—more specifically nature's right “to exist, to be maintained and to the regeneration of its vital cycles, structures and functions.” . . . The ruling recognized the plaintiff's right to sue [under] . . . the constitution, which establishes every citizen or nation's right to demand [from] the authorities the compliance with the rights of nature. The ruling recognizes the rights of nature as a constitutional right to be observed and emphasizes that every citizen can defend such rights in court when violated. . . . [T]he provincial governments alleged that respecting the rights of nature would mean the violation of the local's human right to development. . . . [T]he court responded that both rights are recognized by the constitution and should be pondered in the light of the constitutional principles. For this specific case, the court concluded that these rights are not colliding since the road can still be constructed while respecting nature's rights.

In New Zealand, members of the indigenous Maori tribes have disputed with the Crown the status of the Whanganui River for the last 140 years In 2014, a settlement was finally reached that would grant the river its own legal identity, with the rights, duties, and liabilities of a legal person. . . . This settlement was turned into the Te Awa Tupua Act in 2017 by which the Whanganui becomes a legal person that will be able to be represented in court proceedings and would have two guardians, one from the Crown and one from the Whanganui iwi It specifies that, for the purposes of the Resources Management 1991 Act, the trustees “are entitled to lodge submissions on a matter . . . affecting the Whanganui River” and are “recognized as having an interest . . . greater than any interest in common with the public generally.” . . .

[T]he Uttarakhand High Court in India recognized that both the Ganges and its main tributary, the Yamuna, as well as “all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers” would be “legal and living entities having the status of a legal person with all corresponding rights, duties and liabilities.” The case was brought to court when officials complained that the governments of Uttarakhand and Uttar Pradesh states were not cooperating with the federal government to set up a panel to protect river Ganges. The ruling . . . appointed [government officials as] legal custodians that would be . . . in charge of protecting the rivers The court bases its decision on the need to protect the recognition and the faith of society given that both of these rivers “support and assist both the life and natural resources . . . of the community.” . . . This same court ruled in April of the same year

that Himalayan glaciers Gangotri and Yamunotri are legal persons. However, the Indian Supreme Court later overturned both rulings after the state of Uttarakhand argued that the ruling could lead to complicated legal situations given that the consequences of providing rights to these rivers were not clearly defined. . . .

Critics of the doctrine of the rights of nature have expressed concern over the attribution of legal personhood to nature as a source of legal uncertainty. This uncertainty is even more accentuated when it comes to defining when nature holds locus standi and on what basis. The debate remains whether the traditional theories that define both legal personhood and locus standi need to become more flexible to adapt to new paradigms and the way society perceives animals and nature. . . .

Private Liability for Climate Change

Native Village of Kivalina v. ExxonMobil Corporation

U.S. Court of Appeals for the Ninth Circuit

696 F.3d 849 (9th Cir. 2012)

[Before: Sidney R. Thomas and Richard R. Clifton, Circuit Judges, and Philip M. Pro, District Judge. Opinion by Judge Thomas.]

. . . The City of Kivalina sits on the tip of a six-mile barrier reef on the northwest coast of Alaska, approximately seventy miles north of the Arctic Circle. The city . . . has long been home to members of the Village of Kivalina, a self-governing, federally recognized tribe of Inupiat Native Alaskans. . . .

Kivalina's survival has been threatened by erosion resulting from wave action and sea storms for several decades. The villagers of Kivalina depend on the sea ice that forms on their coastline in the fall, winter, and spring each year to shield them from powerful coastal storms. But in recent years, the sea ice has formed later in the year, attached later than usual, broken up earlier than expected, and has been thinner and less extensive in nature. As a result, Kivalina has been heavily impacted by storm waves and surges that are destroying the land where it sits. Massive erosion and the possibility of future storms threaten buildings and critical infrastructure in the city with imminent devastation. If the village is not relocated, it may soon cease to exist.

Kivalina attributes the impending destruction of its land to the effects of global warming, which it alleges results in part from emissions of large quantities of greenhouse gases by [multiple oil, energy, and utility companies, collectively] the Energy Producers. . . .

Kivalina filed this action against the Energy Producers, both individually and collectively, in District Court for the Northern District of California, alleging that . . . the Energy Producers' emissions of carbon dioxide and other greenhouse gases, by contributing to global warming, constitute a substantial and unreasonable interference with public rights, including the rights to use and enjoy public and private property in Kivalina. Kivalina's complaint also charged the Energy Producers with acting in concert to create, contribute to, and maintain global warming and with conspiring to mislead the public about the science of global warming.

The Energy Producers moved to dismiss the action for lack of subject-matter jurisdiction They argued that Kivalina's allegations raise inherently nonjusticiable political questions because to adjudicate its claims, the court would have to determine the point at which greenhouse gas emissions become excessive without guidance from the political branches. They also asserted that Kivalina lacked Article III standing to raise its claims because Kivalina alleged no facts showing that its injuries are "fairly traceable" to the actions of the Energy Producers.

The district court held that the political question doctrine precluded judicial consideration of Kivalina's federal public nuisance claim. The court found that there was insufficient guidance as to the principles or standards that should be employed to resolve the claims at issue. The court also determined that resolution of Kivalina's nuisance claim would require determining what would have been an acceptable limit on the level of greenhouse gases emitted by the Energy Producers and who should bear the cost of global warming. Both of these issues, the court concluded, were matters more appropriately left for determination by the executive or legislative branch in the first instance.

The district court also held that Kivalina lacked standing under Article III to bring a public nuisance suit. The court found that Kivalina could not demonstrate either a "substantial likelihood" that defendants' conduct caused plaintiff's injury nor that the "seed" of its injury could be traced to any of the Energy Producers. The court also concluded that, given the remoteness of its injury claim, Kivalina could not establish that it was within sufficient geographic proximity to the Energy Producers' alleged "excessive" discharge of greenhouse gases to infer causation. The court declined to exercise supplemental jurisdiction over the state law claims. . . .

In contending that greenhouse gases released by the Energy Producers cross state lines and thereby contribute to the global warming that threatens the continued existence of its village, Kivalina seeks to invoke the federal common law of public nuisance. We begin, as the Supreme Court recently did in *American Electric Power Co., Inc. v. Connecticut* ("AEP") (2011), by addressing . . . whether such a theory is viable under federal common law in the first instance and, if so, whether any legislative action has displaced it. . . .

[F]ederal common law can apply to transboundary pollution suits. Most often, as in this case, those suits are founded on a theory of public nuisance, . . . defined as an “unreasonable interference with a right common to the general public.” A successful public nuisance claim generally requires proof that a defendant’s activity unreasonably interfered with the use or enjoyment of a public right and thereby caused the public-at-large substantial and widespread harm.

However, the right to assert a federal common law public nuisance claim has limits. Claims can be brought under federal common law for public nuisance only when the courts are “compelled to consider federal questions which cannot be answered from federal statutes alone.” On the other hand, when federal statutes directly answer the federal question, federal common law does not provide a remedy because legislative action has displaced the common law. . . .

The Supreme Court has . . . determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law.

In *AEP*, eight states, the city of New York, and three private land trusts brought a public nuisance action against “the five largest emitters of carbon dioxide in the United States.” The *AEP* plaintiffs alleged that “defendants’ carbon-dioxide emissions created a ‘substantial and unreasonable interference with public rights,’ in violation of the federal common law of interstate nuisance,” and sought injunctive relief through a court-ordered imposition of emissions caps. Concluding that the Clean Air Act already “provides a means to seek limits on emissions of carbon dioxide from domestic power plants,” the Supreme Court in *AEP* held “that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement” of such emissions. . . .

Kivalina does not seek abatement of emissions; rather, Kivalina seeks damages for harm caused by past emissions. However, the Supreme Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement. . . .

The civil conspiracy claim falls with the substantive claim. . . .

Our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea. But the solution to Kivalina’s dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law. . . .

Pro, District Judge, concurring: . . .

I . . . write separately to express my view that Kivalina lacks standing. . . .

Kivalina has not met the burden of alleging facts showing Kivalina plausibly can trace their injuries to Appellees. By Kivalina's own factual allegations, global warming has been occurring for hundreds of years and is the result of a vast multitude of emitters worldwide whose emissions mix quickly, stay in the atmosphere for centuries, and, as a result, are undifferentiated in the global atmosphere. Further, Kivalina's allegations of their injury and traceability to Appellees' activities is not bounded in time. Kivalina does not identify when their injury occurred nor tie it to Appellees' activities within this vast time frame. Kivalina nevertheless seeks to hold these particular Appellees, out of all the greenhouse gas emitters who ever have emitted greenhouse gases over hundreds of years, liable for their injuries. . . .

If at First You Don't Succeed: Suing Corporations for Climate Change

Geetanjali Ganguly, Joana Setzer, and Veerle Heyvaert (2018)*

. . . In the first wave of private climate litigation, corporate defendants successfully filed motions to dismiss plaintiffs' claims on procedural grounds. In the United States, corporate defendants managed to prevent several climate change lawsuits from proceeding to the merits stage by challenging the court's jurisdiction through the invocation of the standing and political question doctrines as a first line of defence. . . .

The difficulty of proving causation—the link between an actor's behaviour and subsequent harm to another—has also been an obstacle to successful private climate litigation. Causation requires that a plaintiff demonstrate a causal connection between an injury and the defendant's action to satisfy the proposition that remedies for injury should come from those responsible. . . . The difficulties for plaintiffs to persuasively pinpoint the cause of climate change related harm is . . . beautifully illustrated in *Kivalina*

A rapidly evolving scientific, discursive and constitutional context has cleared the path for a second wave of strategic private litigation cases, which have a better chance of overcoming the judicial hurdles of standing, proof of harm and causation that scuppered earlier attempts. . . .

[A]dvances in climate science have enabled researchers to identify discrete groups of potential defendants whose contributions to the climate crisis are identifiable, measurable and significant. Richard Heede's 2013 study was the first to map and quantify the cumulative emissions of the 90 largest carbon producers from 1854 to 2010. The study calculates a percentage figure for the individual contribution of each 'Carbon Major Entity' of two-thirds of all global anthropogenic carbon emissions. Although the study and its methodology are not without controversy, the results of Heede's research have since been peer reviewed and published in the academic journal *Climatic Change*.

* Excerpted from Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841 (2018).

A critical finding of this study is that the 90 Carbon Majors released more than half of their total contribution of carbon emissions after 1988, which indicates that the roots of the problem are more recent and easier to trace than previously assumed. . . .

While Heede's work helped identify individual defendants or groups of defendants, it did not resolve the question of whether very large emitters are responsible for specific climate change-related events. However, climate change attribution research is also developing rapidly. In recent years, attribution research with respect to single (extreme) events has made significant progress. For example, researchers from the Union of Concerned Scientists and Oxford University collaborated with Heede to combine both fields of attribution. By tracing company emissions over time, Ekwurzel and others attribute fractions of the accumulation of CO₂ in the atmosphere, increases in atmospheric temperature and elevation of the sea level to individual companies. Just as significantly, their article indicates how deaths from a single extreme weather event could be attributed to climate change and, ultimately, to Carbon Major companies. These ongoing developments in the science of extreme weather event attribution have the potential to significantly impact the legal landscape for climate-related suits. . . .

Through a combination of advances in climate science, quantification and attribution science, claimants may now argue with some credibility that, 'but for' the emissions of company X, they would not have suffered a particular, measurable harm. The proliferation of such argumentation could result in climate change no longer being represented before the court as a diffuse and general problem caused by myriad unknown and unidentifiable sources, but instead as the consequence of a specific set of choices and actions, undertaken by a discrete group of well-informed actors, which causes particular and measurable damage. . . . Recent litigation already shows signs of subtle shifts in the narrative[, including] . . . the resurgence of interest in exploiting the precedential value of tobacco and asbestos litigation

[A]ttempts to build on the legacy of tobacco and asbestos litigation and use it as a relevant precedent for climate litigation are the Californian lawsuits filed in July 2017 by San Mateo County, Marin County and the City of Imperial Beach. In a manner analogous to the tobacco and asbestos litigation of the 1990s, the plaintiffs in the California climate lawsuits accuse oil companies of knowing that their emitting activities are causing catastrophic climate change. The emergence of governments as claimants in private climate litigation moreover helps to overcome some of the legal obstacles that thwarted the claimants in *Kivalina* Rather than relying on federal common law, . . . these cases are grounded instead in state common law, which is unaffected by the prior rulings. . . .

In private climate litigation, too, courts and tribunals have recently sent some unexpectedly encouraging signs to claimants. . . . Perhaps a factor is that, as extreme weather events become ever more frequent and warning signs that our planet is teetering on the brink of catastrophic change multiply, something simply has got to give. In the Global South, too, an upward trend in climate litigation against corporations on behalf

of individuals can be discerned. . . . [T]hree factors . . . may help to explain these recent shifts: (i) the proliferation of environmental courts; (ii) the constitutionalisation of environmental protection; and (iii) the rise of transnational judicial networks.

An increase in the litigation and adjudication of climate change matters worldwide might partly be attributed to increased judicial capacity to deal with such matters, as indicated by the recent surge of specialist environmental courts and tribunals, particularly in the Global South. . . . India has a National Green Tribunal (NGT) that, since its inauguration in 2010, has already issued a number of decisions that affirm environmental protection as a fundamental right. NGT decision-making procedures are heavily animated and enhanced by the involvement of scientific and technical experts who are key evidentiary actors and data providers. This signals the potential for climate science to play a greater role in future legal proceedings on climate change in India.

The adoption of constitutions by many countries around the world over the past decades has been accompanied by an ‘environmental rights revolution,’ with environmental problems increasingly being addressed through the prism of human rights and constitutionalism. Of the 196 countries with constitutions, 148 have enshrined some form of environmental constitutionalism. . . .

In Brazil, federal legislation further provides for the ‘polluter pays’ principle and strict liability for environmental offences, which means that it is unnecessary to prove that the defendant caused harm through negligence or intent. The Brazilian Superior Court of Justice has relied on these legal provisions to ban the use of fires in sugarcane harvesting, among other reasons, because of the GHG emissions generated by this activity. . . .

The international legal community also plays an increasingly active role in educating international and domestic courts and tribunals about climate justice, and the importance of their role in achieving it. For example, the Oslo Principles on Global Climate Change Obligations, drafted in 2015 by legal experts and judges, identify a number of existing legal bases on which both governments and enterprises (including large fossil fuel and cement corporations) are obligated to reduce GHG emissions. Obligations imposed on enterprises include self-assessment of vulnerability and risk; public disclosure duties towards clients, investors and entities likely to be directly or indirectly affected by their activities; and conducting environmental impact assessments prior to the construction of new facilities. . . .

The Huaraz Case
Will Frank (2017)*

. . . Can big emitters of GHGs . . . be held liable for nuisance caused by climate change to private property? In an oral hearing . . . the Oberlandesgericht (Civil Court of Appeals) of Hamm (Germany) answered the question of possible legal responsibility of a big GHG-emitter for climate damage/nuisance in the affirmative.

Saul Luciano Lluyia, the plaintiff, is a Peruvian citizen. His house is located in the town of Huaraz in a valley underneath Lake Palcacocha, a glacial lagoon. He asserts that CO₂ emissions of power plants operated by the defendant have contributed to climate warming and thereby to accelerated glacial melting and the rising water level of the glacial lagoon, by which the safety of his house is endangered. He claims that at any time big chunks of ice from the Palcaraju Glacier above the lagoon may break off and trigger a huge Glacial Outburst Flood that may destroy his house.

RWE, the defendant, is a German electric power company, the biggest in Europe. . . . RWE is responsible for 0.47% of global CO₂ emissions. . . .

The plaintiff applies for a declaratory judgement determining,

“that the respondent is liable, proportionate to its level of impairment of 0,47 % to cover the expenses for appropriate safety precautions . . . undertaken by the plaintiff . . . to protect . . . property from a . . . flood from Lake Palcacocha”

The court of first instance, the Landgericht Essen (Regional Civil Court), denied this claim in 2016. Although acknowledging, that “in all likelihood, in the case of a flood wave, the house of the plaintiff would be flooded” and that “scientifically” climate change might be responsible, it rejected the claim on legal grounds notably with respect to legal causality. In essence the lower court argued that because of the complexity of climate change, specific impacts of climate change could not be attributed to individual emitters, and since everyone emits greenhouse gases, no single emitter could be held liable. . . .

In its oral hearing . . . the Court of Appeals of Hamm . . . issued an order that evidence shall be taken through expert opinion with respect to the following questions—whether:

. . . Because of the significant increase of the expansion and the volume of the Palcacocha Lagoon there is a serious imminent interference of the

* Excerpted from Will Frank, *The Huaraz Case (Lluyia v. Rwe) - German Court Opens Recourse to Climate Law Suit Against Big CO₂ Emitter*, COLUM. CLIMATE L. BLOG (Dec. 7, 2017), <http://blogs.law.columbia.edu/climatechange/2017/12/07/the-huaraz-case-lluyia-v-rwe-german-court-opens-recourse-to-climate-law-suit-against-big-co2-emitter>.

plaintiff's property underneath the lagoon being flooded or exposed to a mudslide.

. . . CO₂-emissions release[d] by . . . the defendant rise into the atmosphere causing as to law[s] of physics . . . higher atmospheric concentrations of GHGs.

. . . The higher concentration of GHG molecules causes a decrease in the escape of heat from the earth, which in turn causes a rise of global temperature.

. . . Because of the consequential rise of mean temperatures also locally, there is accelerated melting of the Palcaraju Glacier . . . and the volume of the water increases so much that it cannot be held back by the natural moraine.

. . . The proportion of the partial causation . . . is measurable and calculable. It adds up to 0.47% today. A different proportion of partial causality, if observed, shall be determined and stated by the expert. . . .

The Court of Appeals of Hamm accepted justiciability [and concluded] . . . that the case can be decided on the basis of existing laws [in the German Civil Code (BGB)].

In this context the court cited from the Motives of the BGB the following excerpt:

“We are living at the bottom of an ocean of air. This situation necessarily leads to an extension of the effects of human activities to remote places. Everybody who is causing the existence of imponderables must know that they are taking their own way. This transmission beyond borders is to be attributed as a consequence of such activities and direct and indirect emissions are in this respect not to be distinguished from each other.”

The court deemed that this consideration applies also to GHG-emissions and their effects. . . .

According to [the German Procedure Code], local jurisdiction in environmental cases lies with the courts at the place of origin of damage (not the place where the damage accrues). This rule applies analogically to international jurisdiction when a case has a connection to different States (Peru and Germany). Hence German courts have jurisdiction in the Huaraz Case

Paving the Way for a Preventive Climate Change Tort Liability Regime

Mathilde Hautereau-Boutonnet and Laura Canali (2019)*

. . . What about the prevention of climate damage? What role can [the law play] on tort liability in this regard? Going forward, could companies be held liable for future climate damage? Could the courts order them to adopt preventive measures? . . .

The preventive role of tort liability remains fragile and largely depends on the powers of the court to assess future harm and order adequate preventive measures. Far less used than the compensatory function of tort liability, it suffers, in France at least, from a lack of formalisation and structuration that impedes its effectiveness. In the context of transnational harm, the effectiveness of prevention through the law on tort liability will thus depend for a large part on connecting the dispute at stake to the legal order that offers the best chances of implementing it. . . .

[B]y implementing . . . the objectives of mitigation and adaptation to climate change established by the Paris Agreement at the international level, the courts would contribute to its “*garantie normative*.”³² . . .

In France, although there is no separate preventive liability action, there is no doubt that this particular function will eventually emerge, given the variety of proceedings that can be linked to the civil liability regime and the measures ordered by courts in response to civil liability claims. . . .

Under French law, while some authors plead in favour of the recognition of a “general duty of prevention,” this duty already transpires in environmental matters. While the French Conseil constitutionnel stated in a preliminary ruling (*QPC*) on 8 April 2011 that “everyone is bound by a duty of care with regard to the environmental harm that may occur as a result of one’s activity,” a duty of care for corporations was entrenched in the law n° 2017-399 of 27 March 2017. In substance, it requires certain French parent companies and principals to draw up and implement a vigilance plan to prevent . . . harm to the health and safety of employees, the violation of human and environmental rights caused by their activities and those of their trading partners. . . .

[L]egislators have provided that “when a company requested to meet its obligations . . . does not comply therewith within three months from the date of the notice, the relevant court may, at the request of any person demonstrating a legal interest to bring proceedings, order such company, if necessary subject to a fine, to comply with

* Excerpted from Mathilde Hautereau-Boutonnet & Laura Canali, *Paving the Way for a Preventive Climate Change Tort Liability Regime* (2019) (unpublished manuscript) (on file with editors).

³² The concept of “*garantie normative*” was developed by C. Thibierge to describe the force assigned to a legal norm by the legal system, i.e. the potential and/or actual reaction of the legal system in order to safeguard the validity and enforcement thereof.

these obligations.” Here we see the link between the duty of care (*devoir de vigilance*) and the legal action designed to ensure compliance if such duty is violated. Therefore, a lever does exist in climate matters: the possibility of ensuring that companies impacted by this mechanism implement a plan that includes measures sufficient in order to prevent climate damage. . . .

What about the law abroad? Here too, legal writers highlight how the duty of due diligence . . . is a malleable duty. . . . [I]n order to rule on the violation of a due diligence obligation, courts must determine whether a defendant company was subject to a duty of care [T]he finding by a judge of a duty of care is linked to the assessment of three elements . . . : the foreseeability of the damage caused to the claimant, the proximity of the claimant and the defendant and the fair and reasonable nature of the prescription of a duty of care given the facts of the case or the more general political context. A number of cases . . . show that the foreseeability and reasonable nature criteria are evolving . . . [to make] commitments in favour of human rights, security and the environment. The [2015 Superior Court of Ontario] case of *Choc c./Hubbday minerals Inc* . . . is a good illustration thereof. The liability of the Canadian transnational mining company was sought by claimants located in Guatemala. These representatives of an indigenous Mayan people argued that the subsidiary of the parent company located in Guatemala was responsible for the violation of their fundamental rights (endangering their security) and that the Canadian company was under an obligation to prevent the harm suffered. In order to determine, among other things, the existence of a duty of care, . . . the judge took into account the environmental and social policy of the company, in particular the voluntary commitments made in this respect. . . .

[T]he duty of care, with its many different forms across the various legal orders, could be bolstered by the development of disclosure obligations imposed on corporations with regard to climate. Then, through proceedings seeking the reinstatement of such care in the event of a violation, the recognition of a preventive climate change tort liability could occur. . . .

Thus, in the United States, legal scholars are contemplating the potential of the regime on the liability for defective products to prevent harm linked to climate change. This legal basis is already at the heart of the proceedings initiated by a number of Californian municipalities against large oil corporations . . . [which claim] a defect in the product’s design [and] . . . argue, in the name of an “alternative design,” for the necessity to design a product less dangerous for the future. . . .

[F]undamental rights could play a part. . . . French law acknowledges in the first article of the French Charter for the environment that “everyone has the right to live in a balanced environment which shows due respect for health.” If this right is violated, victims may rely on this provision to demand its reinstatement in summary proceedings, but also on the merits, on the basis of the existence of a manifestly illegal nuisance. . . .

ENFORCING INTERNATIONAL COMMITMENTS

In 2015, the District Court of the Hague ruled that the Dutch Government had not set a sufficiently aggressive emissions goal in order to respond to climate change. Litigants have mounted similar challenges in other countries since the adoption of the Paris Agreement, which aimed to hold the average increase in global temperature below 2°C above pre-industrial levels. Parties to the Agreement committed to set nationally determined contributions (NDCs) to curb emissions. Parties also agreed to announce new NDCs every five years. Litigants have argued that governmental responsibilities to tackle climate change arise from these international agreements and have turned to courts to challenge perceived failure by the political branches to do so.

Urgenda Foundation v. The State of the Netherlands

District Court of The Hague
Case No. C/09/456689 (2015)*

[Judges H.F.M. Hofhuis, J.W. Bockwinkel and I. Brand.]

4.1. This case is . . . about . . . whether the State has a legal obligation towards Urgenda to place further limits on greenhouse gas emissions—particularly CO₂ emissions . . . Urgenda argues that the State does not pursue an adequate climate policy and therefore acts contrary to its duty of care towards Urgenda and the parties it represents as well as . . . Dutch society. Urgenda also argues that because of the Dutch contribution to the climate policy, the State wrongly exposes the international community to the risk of dangerous climate change, resulting in serious and irreversible damage to human health and the environment. . . .

4.36. Article 21 of the Dutch Constitution** imposes a duty of care on the State relating to the liveability of the country and the protection and improvement of the living environment. . . . The manner in which this task should be carried out is covered by the government’s own discretionary powers. . . .

4.39. . . . Urgenda also brought up the international-law “no harm” principle, which means that no state has the right to use its territory, or have it used, to cause significant damage to other states. The State has not contested the applicability of this principle. . . .

4.42. . . . [T]he State is bound to UN Climate Change Convention [(1992)], the Kyoto Protocol [(1997)] . . . and the “no harm” principle. However, this international-law binding force only involves obligations towards other states. When

* Unofficial translation provided by the Court.

** Article 21 of the Constitution of the Kingdom of the Netherlands provides:

It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.

the State fails one of its obligations towards one or more other states, it does not imply that the State is acting unlawfully towards Urgenda. . . .

4.44. The comments above regarding international-law obligations also apply, in broad outlines, to European law The Netherlands is obliged to adjust its national legislation to the objectives stipulated in the directives, while it is also bound to decrees (in part) directed at the country. . . .

4.53. The question whether the State is in breach of its duty of care for taking insufficient measures to prevent dangerous climate change, is a legal issue which has never before been answered in Dutch proceedings

4.55. . . . [U]nder Article 21 of the Constitution, the State has a wide discretion of power to organise the national climate policy in the manner it deems fit. However, . . . due to the nature of the hazard (a global cause) and the task to be realised accordingly (shared risk management of a global hazard that could result in an impaired living climate in the Netherlands), the objectives and principles, such as those laid down in the UN Climate Change Convention and the [Treaty on the Functioning of the European Union (TFEU)], should also be considered in determining the scope for policymaking and duty of care. . . .

4.65. . . . [I]t is an established fact that the current global emissions and reduction targets of the signatories to the UN Climate Change Convention are insufficient to realise the 2° target and therefore the chances of dangerous climate change should be considered as very high [I]t is also an established fact that without farreaching reduction measures, the global greenhouse gas emissions will have reached a level in several years, around 2030, that realising the 2° target will have become impossible, these mitigation measures should be taken expeditiously. . . . The court also takes account of the fact that the State has known since 1992, and certainly since 2007, about global warming and the associated risks. These factors lead the court to the opinion that, given the high risk of hazardous climate change, the State has a serious duty of care to take measures to prevent it.

4.66. . . . [I]t is an established fact that the State has the power to control the collective Dutch emission level (and that it indeed controls it). . . . Moreover, citizens and businesses are dependent on the availability of non-fossil energy sources to make the transition to a sustainable society. . . . The State therefore plays a crucial role in the transition to a sustainable society and therefore has to take on a high level of care for establishing an adequate and effective statutory and instrumental framework to reduce the greenhouse gas emissions in the Netherlands. . . .

4.70. . . . [T]he State confirmed that it would be possible for the Netherlands to meet the EU's 30% target for 2020 [T]he court concludes that there is no serious obstacle from a cost consideration point of view to adhere to a stricter reduction target. . . .

4.79. . . . [C]limate change is a global problem and therefore requires global accountability. . . . It compels all countries, including the Netherlands, to implement the reduction measures to the fullest extent as possible. The fact that the amount of the Dutch emissions is small compared to other countries does not affect the obligation to take precautionary measures in view of the State's obligation to exercise care. . . . Moreover, it is beyond dispute that the Dutch per capita emissions are one of the highest in the world. . . .

4.86. . . . Although it has been established that the State in the past committed to a 30% reduction target and it has not been established that this higher reduction target is not feasible, the court sees insufficient grounds to compel the State to adopt a higher level than the minimum level of 25%. According to the scientific standard, a reduction target of this magnitude is the absolute minimum and sufficiently effective

4.93. . . . [T]he court concludes that the State—apart from the defence to be discussed below—has acted negligently and therefore unlawfully towards Urgenda by starting from a reduction target for 2020 of less than 25% compared to the year 1990. . . .

4.95. . . . Dutch law does not have a full separation of state powers . . . between the executive and judiciary. . . . This does not mean that the one power in a general sense has primacy over the other power. . . . Separate from any political agenda, the court has to limit itself to *its own* domain, which is the application of law. . . .

4.97. . . . [A] judge, although not elected and therefore has no democratic legitimacy, has democratic legitimacy in another—but vital—respect. His authority and ensuing “power” are based on democratically established legislation, whether national or international, which has assigned him the task of settling legal disputes. This task also extends to cases in which citizens, individually or collectively, have turned against government authorities. The task of providing legal protection from government authorities, such as the State, pre-eminently belong to the domain of a judge. This task is also enshrined in legislation.

4.98. . . . [T]he claim does not fall outside the scope of the court's domain. The claim essentially concerns legal protection and therefore requires a “judicial review.” . . . The possibility—and in this case even certainty—that the issue is also and mainly the subject of political decision-making is no reason for curbing the judge in his task and authority to settle disputes. Whether or not there is a “political support base” for the outcome is not relevant in the court's decision-making process. . . .

4.100. . . . The State has put forward that allowing the claim regarding the reduction order would damage the Netherlands' negotiation position at, for instance, the conference in Paris in late 2015. In the opinion of the court, this does not have independent significance in the sense that—if the court rules that the law obliges the State towards Urgenda to realise a certain target—the government is not free to disregard that obligation in the context of international negotiations. . . .

4.101. . . . [T]he claim discussed here is not intended to order or prohibit the State from taking *certain* legislative measures or adopting a *certain* policy. If the claim is allowed, the State will retain full freedom, which is pre-eminently vested in it, to determine how to comply with the order concerned. . . .

* * *

On October 9, 2018, the Hague Court of Appeals affirmed the Hague District Court's decision, both on the scientific urgency of the need to respond to climate change, and the Dutch government's imputed duty to respond under Articles 2 and 8 of the European Convention on Human Rights. The Court of Appeals highlighted "the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life" if the Netherlands did not take sufficient action to combat climate change.

Paris Agreement

United Nations Framework Convention on Climate Change (2015)*

. . . Article 2

1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change . . . including by:

(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change

Article 4

1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

* Excerpted from Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016).

3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances. . . .

9. Each Party shall communicate a nationally determined contribution every five years

11. A Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition

13. Parties shall account for their nationally determined contributions. In accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting

Article 9

1. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention. . . .

Article 13 . . .

7. Each Party shall regularly provide the following information:

(a) A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases . . . ; and

(b) Information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4. . . .

* * *

In the excerpt below, the Wellington Registry of the High Court of New Zealand considered a challenge to New Zealand's NDC. The decision came shortly after a general election ushered in a new governing coalition led by the Labour Party. The government announced its intent to revise the 2050 emissions goal through a Zero

Carbon Bill in 2019. As of spring 2019, the government had not altered the 2020 or 2030 targets at issue in this case.

Thomson v. Minister for Climate Change Issues
High Court of New Zealand, Wellington Registry
[2017] NZHC 733

[Judgment of Mallon, J:]

. . . [35] The Paris Agreement reaffirms the goal of keeping average global warming below 2°C above pre-industrial levels, and pursuing efforts to limit warming to 1.5°C. It requires each country to put forward their own Nationally Determined Contribution (NDC) and to pursue “domestic mitigation measures, with the aim of achieving the objectives of such contributions.” . . .

[63] . . . [The Minister for Climate Change Issues] recommended to Cabinet a target of 10 per cent below 1990 levels by 2030 which equates to 29 percent below 2005 levels by 2030. . . .

[65] Cabinet . . . decided on the slightly higher target of 30 per cent from 2005 levels (equating to 11 per cent from 1990 levels). In accordance with Cabinet’s decision [the Minister for Climate Change Issues] announced this as New Zealand’s INDC [(Intended Nationally Determined Contribution)]

[68] Alongside ratifying the Paris Agreement, New Zealand needed to finalise and communicate its NDC. . . . As . . . New Zealand’s INDC was tabled on an explicitly provisional basis, Cabinet had to consider whether it was comfortable confirming the INDC as its NDC. The Hon Paula Bennett, the then Minister for Climate Change Issues, set out in a paper to the . . . [Cabinet Economic Growth and Infrastructure (CEGI)] Committee why she was comfortable in doing so. [The Cabinet subsequently finalized the INDC as its NDC.] . . .

[99] . . . [The second] cause of action concerns [New Zealand’s] 2030 target communicated under the Paris Agreement. The plaintiff contends the defendant failed to take into account [several] relevant considerations in making the NDC decision

[145] . . . [First, t]he Convention requires countries to give “full consideration” to “[t]he specific needs and special circumstances of developing [countries]” especially the needs of “small island countries and countries with low-lying coastal areas.” . . . [T]he plaintiff submits the Minister was required to take into account the circumstances of Tokelau [(a dependent territory of New Zealand that sits at three and five meters above sea level)], and developing countries more generally, when developing the NDC. She submits this should have led the Minister to pursue efforts to limit the temperature increase to 1.5°C, consistent with the purpose of the Paris Agreement, when deciding on New Zealand’s NDC. . . .

[157] . . . The international framework provides the opportunity for New Zealand to take account of the special needs and circumstances of Tokelau in its climate change decisions as appropriate. The evidence indicates New Zealand intends to do that. . . .

[160] The Minister set New Zealand's NDC, considering it to represent New Zealand's fair contribution in light of its national circumstances, recognising it would need to determine ways to "bend the curve" on our greenhouse emissions and to show progression over time. The nature of the decision involved a balancing of competing factors. The Government of the day was concerned about imposing burdensome costs on the economy especially when there was no "easy" solution to lowering our emissions from a switch to renewable energy and a large proportion of our emissions arose in the agriculture sector. A period of time was needed for the solutions to lower our emissions that the Government wished to pursue. A differently constituted Government may have balanced the competing factors differently and made different choices about how to lower our emissions. But that does not mean the NDC was outside the proper bounds of the Minister's power, even though the combined INDCs were an insufficient response to the dangerous climate change risks.

[161] The plaintiff's third cause of action pleads that the NDC decision was irrational or unreasonable because:

. . . there is no rational basis for the belief that the NDC will strengthen the global response to the threat of climate change; and/or

. . . the global scientific consensus shows the NDC falls short of the extent and speed of reductions needed to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. . . .

[169] More generally the plaintiff's submission is that delaying additional mitigation to 2030 will substantially increase the challenges associated with limiting warming to below 2°C. . . . This may . . . be so, but New Zealand's NDC does not remain set in stone until 2030. Reviews are envisaged. It is for the new Minister to consider any appropriate review.

[176] . . . New Zealand's 2030 target is somewhat less ambitious than its 2050 target and somewhat less ambitious than the EU's target. That may increase the costs to New Zealand of reducing our emissions over time. That, however, does not mean it is inconsistent with the global temperature goal under the Paris Agreement such that the NDC does not meet our international obligations and is outside the proper bounds of the Minister's power. Importantly, nor does it mean that a new Minister will take the same view about the appropriate level of ambition for New Zealand. . . . It is open under the international framework to review the 2030 target. It is also open under our domestic law to set a new 2030 target or other targets as is considered appropriate in light of the relevant economic, environmental, social and international considerations involved.

[179] . . . I am not persuaded the Minister made any reviewable error for which the Court may intervene. The international framework has been followed. It has not been demonstrated the NDC decision was outside the Minister's power under this framework. That is not to say another Minister would have assessed the appropriate 2030 target in the same way and reached the same decision. Nor does it prevent New Zealand from doing more between now and 2030 than contemplated in its NDC decision. . . .

* * *

Litigants seeking to reduce emissions have not only challenged NDCs, they have also challenged activities such as oil extraction and coal mining, which they argue exacerbate climate change. In these cases, litigants have argued that government authorizations to do so contravene the international commitment to reduce greenhouse gas emissions under the Paris Agreement.

**EarthLife Africa Johannesburg v. Minister of Environmental Affairs
and Others**

High Court of South Africa (Gauteng Division, Pretoria)

Case No. 65662/16 (2017)

[Murphy, J:]

1. This application raises concerns about the environmental impacts of the decision to build a . . . coal-fired power station near Lephalale in the Limpopo Province. The power station is to be built by . . . Thabametsi . . . and is intended to be in operation until at least 2061.

2. . . . [T]he National Environmental Management Act ("NEMA") provides that any activities which are listed or specified by the Minister of Environmental Affairs must obtain an environmental authorisation before they may commence. The construction of a coal-fired power station is [a] . . . listed activity The applicant, Earthlife Africa ("Earthlife"), appealed against the grant of authorisation to . . . the Minister of Environmental Affairs ("the Minister"), who . . . upheld the decision. Earthlife now seeks to review both the decision to grant the environmental authorisation and the appeal decision of the Minister. . . .

5. . . . NEMA requires that . . . once an application for environmental authorisation has been made, an environmental impact assessment process must be undertaken . . . to provide competent authorities with all relevant information on the environmental impacts of the proposed activity. . . . NEMA obliges competent authorities to take account of all relevant factors in deciding on an application for environmental authorisation, including any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused. Earthlife asserts that the climate change impacts of a proposed coal-fired power station

are relevant factors and contends that at the time the Chief Director took his decision, the climate change impact of the power station had not been completely investigated or considered in any detail. . . .

19. . . . South Africa is facing an energy crisis and . . . the government is given scope within the domestic and international environmental law regime to make adjustments to address that crisis. Some measure of coal-generated energy is necessary to meet South Africa's current and medium-term energy needs. . . .

20. The Minister . . . averred that the Chief Director had adequately considered the climate change effects, but had not conducted a comprehensive assessment In the context of the prevailing regulatory regime and socio-economic context, she submitted, her decision cannot be impugned as irrational, unreasonable, or unlawful. . . .

25. South Africa is [a] significant contributor to global GHG emissions as a result of the significance of mining and minerals processing in the economy and our coal-intensive energy system. . . . Coal-fired power stations are the single largest national source of GHG emissions in South Africa. South Africa is therefore particularly vulnerable to the effects of climate change due to our socio-economic and environmental context. . . .

26. Be that as it may, coal-fired power stations are an essential feature of government medium-term electricity generation plans. . . .

35. South Africa's international obligations similarly anticipate and permit the development of new coal-fired power stations in the immediate term. . . . South Africa is not . . . bound to any emissions targets under [the UN Framework Convention or the Kyoto Protocol.] . . . The Paris Agreement requires State parties to commit to Nationally Determined Contributions ("NDC"), which describe the targets that they seek to achieve and the climate mitigation measures that they will pursue. South Africa's NDC expressly anticipates the establishment of further coal-fired power stations and an increased carbon emission rate until 2020 and records that climate change action takes place in a context where poverty alleviation is prioritised, and South Africa's energy challenges and reliance on coal are acknowledged. . . .

78. . . . A plain reading of section 24O(1) of NEMA* confirms that climate change impacts are indeed relevant factors that must be considered. The injunction to consider any pollution, environmental impacts or environmental degradation logically expects consideration of climate change. All the parties accepted in argument that the

* Section 24O of the National Environmental Management Act of South Africa provides:

(1) If the Minister . . . considers an application for an environmental authorisation, the Minister . . . must . . .

(b) take into account all relevant factors, which may include—

(i) any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused

emission of GHGs from a coal-fired power station is pollution that brings about a change in the environment with adverse effects and will have such an effect in the future. All the relevant legislation and policy instruments enjoin the authorities to consider how to prevent, mitigate or remedy the environmental impacts of a project and this naturally . . . entails an assessment of the project's climate change impact and measures to avoid, reduce or remedy them. . . .

80. . . . Section 2 of NEMA sets out binding directive principles that must inform all decisions taken under the Act, including decisions on environmental authorisations. . . . Competent authorities must take into account the directive principles when considering applications for environmental authorisation. The directive principles promote sustainable development and the mitigation principle that environmental harms must be avoided, minimised and remedied. The environmental impact assessment process is a key means of promoting sustainable development The directive principles caution decision-makers to adopt a risk-averse and careful approach especially in the face of incomplete information.

81. . . . [C]ourts . . . interpreting legislation are duty bound by section 39(2) of the Constitution* to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question. The approach mandated by section 39(2) is activated when the provision being interpreted implicates or affects rights in the Bill of Rights, including the fundamental justiciable environmental right in section 24 of the Constitution.** . . .

82. Section 24 recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. . . . Climate change poses a substantial risk to sustainable development in South Africa. . . . Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures [to] protect the environment “for the benefit of present and future generations” and hence adequate consideration of

* Section 39(2) of the Constitution of South Africa provides:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

** Section 24 of the Constitution of South Africa provides:

Everyone has the right—

- (a) to an environment that is not harmful to their health or wellbeing; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

climate change. Short-term needs must be evaluated and weighed against long-term consequences.

83. NEMA must also be interpreted consistently with international law. Section 233 of the Constitution* provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. . . .

96. . . . Policy instruments developed by the Department of Energy cannot alter the requirements of environmental legislation for relevant climate change factors to be considered. . . . [T]he government has not satisfied the required standard

119. . . . [T]he decision to grant the authorisation without proper prior consideration of the climate change impacts is prejudicial in that permission has been granted to build a coal-fired power station which will emit substantial GHGs in an ecologically vulnerable area for 40 years without properly researching the climate change impacts for the area and the country as a whole before granting the authorisation. . . . [T]hat may justify the environmental authorisation being reviewed and set aside However, such a remedy . . . might be disproportionate. . . .

121. . . . [T]he more proportional remedy is not to set aside the authorisation, but rather to set aside the Minister's ruling . . . and to remit the matter of climate change impacts to her for reconsideration on the basis of the new evidence in the climate change report. The appeal process must be reconstituted, not the initial authorisation process. Although undoubtedly a less intrusive remedy, . . . NEMA operates to suspend the environmental authorisation pending the finalisation of the appeal. . . .

125. Earthlife has had success and I see no reason why it should not be awarded its costs. . . .

* * *

The Minister of Environmental Affairs reconsidered Thabametsi's authorization, evaluating potential climate-change impacts of authorization and on January 30, 2018, the Minister authorized Thabametsi's coal-fired power station.

* Section 233 of the Constitution of South Africa provides:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

**Greenpeace Nordic Association and Nature and Youth v. Ministry of
Petroleum and Energy**

Oslo District Court

16-166674TVI-OTIR/06 (2018)*

[Judgment of District Court Judge Hugo Abelseth:]

On 10 June 2016, the Norwegian Government reached a decision by Royal Decree on awarding [petroleum] production licences in the 23rd licensing This case involves the validity of this decision. . . .

Norwegian petroleum activities must occur in line with what is laid down in the Management Plan for the maritime area where the activities will take place. The purpose of the Management Plan is to provide a framework for creation of wealth through sustainable use of resources and ecosystem services, while maintaining the ecosystems' structure, mode of operation, productivity and natural diversity. . . .

The 23rd licensing round was started in August 2013. The then Government invited the companies on the Norwegian continental shelf to nominate areas they wished to include in the 23rd licensing round. . . . The [finalized recommendations of the] 23rd licensing round [were] announced in January 2015. . . . [T]he Government decided which companies would receive offers of ownership interests and operatorships including terms and conditions and work programmes [“the Decision”]. . . .

It is primarily argued that the Decision is wholly or partially invalid because it is contrary to Article 112 of the Constitution**. . . .

The Decision must also be assessed in a broader context. These are the first licences granted after there is reliable knowledge that the world's proven fossil fuel resources exceed what can be burned in order to reach the goals in the Paris Agreement. . . . The objective is to maintain petroleum production at the current level despite the fact that emissions must be reduced at a dramatic tempo. . . .

* Unofficial translation.

** Article 112 of the Constitution of Norway provides:

Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. . . .

[C]itizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the state shall take measures for the implementation of these principles.

Article 112 of the Constitution cannot be invoked for every encroachment that has a negative impact for the environment [I]t must exceed a certain threshold. . . . The right under Article 112 must be seen in context with the third paragraph. . . . [A] decision such as the one here is not prohibited if the duty to take measures under the third paragraph of Article 112 is fulfilled. . . .

In order for a measure to fulfil the duty under the third paragraph of Article 112, it must be appropriate and necessary. . . . The relationship between the first and third paragraphs of Article 112 thus indicates that the measures under the third paragraph must bring the encroachment “down to” the permitted threshold. This can be expressed as the measure must be sufficient. . . .

Under international law, each country is responsible for greenhouse gas emissions on its territory. The Court thus understands this to mean that the international obligations of Norway and other countries under both the Kyoto Protocol and the Paris Agreement relate to national emissions targets. Neither Norway nor countries in the same situation have any duty to take measures to compensate for the effect from oil and gas exported to other countries. However, obligations under international law do not limit protection rules in domestic law, for example, under Article 112 of the Constitution. Nevertheless, it appears unclear what consequences it would have for international cooperation if Norway should be responsible for emissions from exported oil and gas in addition to the emitting country. . . . [Therefore, e]missions of CO₂ abroad from oil and gas exported from Norway are irrelevant when assessing whether the Decision entails a violation of Article 112. . . .

As the Court sees it, . . . [i]n part it is talk of possible impacts from the Decision that are too remote in relation to the risk that is relevant to assess, and in part the issues involve overall assessments that are better assessed through political processes that the courts are not suited to reviewing.

Accordingly, it is the Court's opinion that the Decision as such or parts of it are not contrary to Article 112 of the Constitution. This is because the duty to take measures has been fulfilled. . . .

* * *

Greenpeace Nordic Association and Nature and Youth filed an appeal of the Oslo District Court's decision before the Supreme Court of Norway, which was pending as of the spring of 2019.

Gloucester Resources Limited v. Minister for Planning
Land and Environment Court, New South Wales, Australia
[2019] NSWLEC 7

[Preston, CJ:]

. . . 3. Beneath the surface of the [Gloucester] valley lies the mineral resource of coal. Geological forces have pushed productive seams of coal near to the surface in the valley beneath Rocky Hill.

4. A mining company, Gloucester Resources Limited (GRL), wishes to mine this coal. It has proposed an open cut coal mine to produce 21 million tonnes of coal over a period of 16 years. . . .

7. . . . GRL . . . unsuccessfully applied to the Minister for Planning for development consent for the Rocky Hill Coal Project. The Minister . . . refused consent to the mine. GRL appealed to this Court. The Court on the appeal exercises the function of the Minister as the consent authority to determine the development application for the Rocky Hill Coal Project. . . .

422. Gloucester Groundswell, [a nonprofit organization advocating for Gloucester residents,] contended that the Rocky Hill Coal Project should be refused because the greenhouse gas (GHG) emissions from the Project would adversely impact upon measures to limit dangerous anthropogenic climate change. . . . Gloucester Groundswell developed this argument as follows. . . .

440. Australia is a party to both the Climate Change Convention and the Paris Agreement. . . . Australia's NDC is to reduce GHG emissions by 26-28% below 2005 levels by 2030. The . . . [New South Wales (NSW)] Government has endorsed the Paris Agreement and has set a more ambitious objective to achieve net zero emissions by 2050.

452. . . . GRL contended at the outset that Gloucester Groundswell's argument of "no new coal mines, anywhere" is not required by any international agreement (the Climate Change Convention or the Paris Agreement) or Commonwealth or State law. . . . There are no governing structures under the Paris Agreement that predetermine how these reductions should occur. In particular, there are no sectoral or commodity-based emission targets or budgets. Similarly, Commonwealth and State laws do not specify how Australia's NDC emission reductions need to be achieved and, in particular, do not specify that no new coal mines can be approved. GRL submitted that the Court, in determining this appeal, "to adopt a policy of no new coal mines would be to impermissibly legislate a strict rule of general application without jurisdiction to do so."

453. . . . GRL contended that . . . Australia needs to account for . . . emissions associated with a coal mine in Australia, but not for . . . emissions associated with the combustion of coal product in other countries. . . .

487. Although GRL submitted that . . . emissions [arising from sources neither owned nor controlled by GRL] should not be considered in determining GRL's application for consent for the Rocky Hill Coal Project, I find they are relevant to be considered. . . .

495. As the Full Federal Court of Australia held in *Minister for Environment and Heritage v Queensland Conservation Council* (2004), the impact of an action includes not only the direct but also the indirect influences or effects of the action

496. The Court later indicated that "all adverse impacts' includes each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether the consequences are within the control of the proponent or not."

497. The Court held that the adverse impacts of the action, the Nathan Dam on the Dawson River, were not confined to the adverse impacts of the construction and operation of the dam, but included the adverse impacts of the use of water downstream from the dam, including its use for growing and ginning cotton. . . .

516. Many courts have recognised . . . that climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved by abatement of the GHG emissions from these myriad of individual sources. . . .

521. In *Urgenda Foundation v The State of the Netherlands* (2015), the Hague District Court rejected the Dutch government's argument that the Dutch contribution to worldwide emissions is only small

523. The Hague Court of Appeal in *The State of the Netherlands v Urgenda Foundation* [(2018)], dismissed on appeal the State's defence that "the Dutch greenhouse gas emissions . . . are minimal, that the State cannot solve the problem on its own, that the worldwide community has to cooperate . . . and this concerns complex decisions for which much depends on negotiations," saying:

"These arguments are not such that they warrant the absence of more ambitious, real actions. . . . [This] is a global problem and . . . the State cannot solve this problem on its own. However, this does not release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change." . . .

526. . . . It is true that the Paris Agreement, Australia's NDC of reducing GHG emissions in Australia by 26 to 28% below 2005 levels by 2030 or NSW's Climate Change Policy Framework do not prescribe the mechanisms by which these reductions in GHG emissions to achieve zero net emissions by 2050 are to occur. . . . [T]here is no proscription on approval of new sources of GHG emissions, such as new coal mines.

527. Nevertheless, the exploitation and burning of a new fossil fuel reserve, which will increase GHG emissions, cannot assist in achieving the rapid and deep reductions in GHG emissions that are necessary in order to achieve "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" or the long term temperature goal of limiting the increase in global average temperature to between 1.5°C and 2°C above pre-industrial levels. . . .

699 . . . [A]n open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. [It] . . . will cause significant planning, amenity, visual and social impacts [and] . . . the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when . . . a rapid and deep decrease in GHG emissions [is needed]. . . . The Project should be refused. . . .

**Rights Based Climate Litigation in the Indian Courts: Potential,
Prospects & Potential Problems**
Lavanya Rajamani (2013)*

. . . Rights-based claims relating to mitigation . . . may prove difficult to sustain. The principal hurdle in sanctioning state action relating to mitigation as insufficient or requiring states to take further action will be in identifying benchmarks. How much action is appropriate for a country like India, given its . . . limited contribution to the problem, and its limited ability . . . to resolve the problem? If the international regime had reached an equitable and effective burden sharing agreement, and the Indian government were falling short of its just share of the burden, a claim may lie. However, in the absence of such an agreement, the Court would need to substitute its judgment for that of the international community, as well as for that of the executive, which it may be reluctant to do. The reluctance may stem from concerns about intervening in an intensely political and polarized north-south climate debate as well as . . . stepping on the executive's toes. . . .

Indian Courts have over the years come to acquire and assume policy evolution functions. Political, social and economic questions, not usually put to judges in other countries, are decided as a matter of course before the Indian Supreme Court. If a rights-based climate claim were to be brought before them, their inclination, borne out by their pattern of intervention in public interest environmental litigation, would be to demand

* Excerpted from Lavanya Rajamani, *Rights Based Climate Litigation in the Indian Courts: Potential, Prospects & Potential Problems* (Ctr. for Policy Research, Climate Initiative, Working Paper No. 2013/1, May 1, 2013).

explanations from relevant Ministry officials, create an ad-hoc committee or appoint a commissioner to examine the issue, and to use the device of ‘continuing mandamus’ orders to first direct the government to take particular actions, and then continuously monitor their implementation. The Courts would, as they have in numerous environmental rights-based public interest cases, assume policy prescription and governance functions. These are roles, however, that the Courts are ill-equipped to play.

Courts lack institutional competence . . . to assess the credibility of relevant climate science, judge the relative merits of different policy measures on adaptation/mitigation, or determine the appropriate balance between mitigation and adaptation measures as well as between climate change and development concerns. . . . Effective climate policy can only be built on a re-assessment of current developmental models, resource use patterns, and lifestyle choices. And it will have implications for India’s energy security, economic growth, and geo-political aspirations. Courts have neither the mandate nor the ability to generate effective policy on such an all-encompassing issue. What they can and will likely do is engage in the ‘jurisprudence of exasperation’—where the function of law is to express frustration with the state of affairs—and proceed to prescribe an ad hoc, reactive and temporary solution drive either by the judges inarticulate major premises or by their views of the parties and lawyers before them. This will have the unfortunate effect of converting particular strains of opinion into policy, while at the same time endless judicial oversight will paralyze the Executive and distort existing processes and policy evolution channels on climate change. . . .

The Civil Court as Risk Regulator: The Issue of Its Legitimacy

Marc A. Loth (2018)*

. . . In the case of *Urgenda e.a. v. the State of the Netherlands* the . . . [Hague District] Court used international and European obligations to construct wrongfulness under national tort law on the one hand, and displayed all available scientific knowledge to substantiate that wrongfulness on the other. . . . [T]he Court attributed responsibility for a sustainable development of the atmosphere to the Dutch Government, and did this on the demand of a rather haphazard organization of worried citizens. . . . [T]he *Urgenda* ruling raises questions with regard to the role of the civil court as risk regulator, especially with regard to the legitimacy of this role. . . .

The argument most often used against the *Urgenda* ruling is that it violates the principle of the separation of powers. . . . The Court reviews such a highly sensitive topic for governmental policy as the emission of GHGs, and even gives an injunction to the government to adapt its democratically established policy. In doing this, the Court makes

* Excerpted from Marc A. Loth, *The Civil Court as Risk Regulator: The Issue of Its Legitimacy*, 9 EUR. J. RISK REG. 66 (2018), <https://doi.org/10.1017/err.2017.77>.

decisions that are essentially political by nature and therefore ought to be taken by the legislator or the government, but in any case not by the judiciary. . . .

. . . [T]he Court explicitly addresses [this] argument, but refutes it. The Court reminds us that under Dutch constitutional law there is no strict separation of powers, but a balance of powers. With regard to lawmaking the role of the judiciary is a subordinate one. . . . When it comes to the grand design of society and the formulation of policy, the Court has to show restraint. With regard to legal protection, however, the judiciary is in the lead. The government is the defendant and its conduct is subject to judicial review. Since this system of legal protection is guaranteed by law, it is democratically legitimized. Urgenda's claims do not stretch outside the judicial domain since they do not ask for an order to legislate

. . . [C]ritics have overlooked an important change in the legal landscape, namely the development from a single to a multilayered legal system. . . .

[T]he Court is not only engaging with the national government and parliament, but also with European courts, international courts, and other European and international institutions. . . . This extension of the principle of the separation of powers to the transnational stage has two, intertwined implications, for the dialogue between the institutions involved. The first is that the transnational institutions . . . share a common responsibility to establish and maintain a system of checks and balances between them. This common responsibility underlines the need for cooperation. The second implication, however, is that if this balance is disturbed for whatever reason, this may justify for each institution to operate strategically, in order to restore the balance. . . .

[T]his implies that national courts may be justified to engage in a countervailing coalition against new political powers at the transnational stage. The *Urgenda* ruling provides a perfect illustration. The reason for the Court to correct the government's policy on the emission of GHGs might very well have been that *supranational* decision-making was failing across the board (apart from its judgment that the *national* reduction policy was substandard). If so, the decision of the Court does not violate the principle of the separation of powers, on the contrary, it is legitimised by this principle, now understood in its new extended application at the transnational stage. If all other institutions fail to develop a common policy that really addresses excessive global warming, the court is justified in its attempt to initiate a judicial countervailing move that does just that. . . .

[T]he key [to legitimising the Court's decision] is to be found on the more general level of the view one holds on the role of civil courts in the political system. For clarity we may distinguish two opposing paradigms here, which have been phrased the "problem-solving conception" and the "public life conception" of adjudication respectively. In the problem-solving conception the civil court is there to litigate between opposing parties In the public life conception, however, civil adjudication is claimed to have added value for society. In litigating conflicts civil courts develop

new norms, enforce established ones, review public policies, and thus maintain the rule of law. . . . In fact civil adjudication is part of the way a political community governs itself, and thus of the political decision-making process

The legitimation of the *Urgenda* ruling is to be found in this public life conception of civil adjudication. . . . [T]he eagerness with which the Court in *Urgenda* has interpreted the open norms of national tort law in the light of transnational law . . . may . . . extend outside the strictly legal domain, since judicial activism is not only motivated by the ideal of legal protection, but also by that of responsiveness. At the time, national and transnational political institutions failed to reach agreement on the reduction of GHGs, which in itself legitimises the courts to step in. From this perspective, it may be perfectly justified for the court to intervene if politics fails. One may even conceive *Urgenda* as an attempt to start a countervailing judicial force to tip the balance. In an activist interpretation of the constitutional principles this is not a violation of the principle of the separation of powers, but on the contrary, a validation of this principle, since it restores the balance. . . .

The Closing Argument Douglas A. Kysar (2019)*

. . . Later this spring, the Ninth Circuit will hear arguments from both sides [in the *Juliana v. United States* litigation] regarding whether the government has legal obligations to cease taking actions that contribute to our collective demise. It will do so without benefit of testimony from some of the most knowledgeable individuals in the world regarding climate change and the U.S. government's role in causing it. In the government's view, such testimony is unnecessary because the plaintiffs' claims raise political questions that simply cannot be addressed by the judicial branch.

The courts—particularly the Supreme Court if an appeal from the Ninth Circuit is granted—will be tempted to agree, ever fearful of their legitimacy. On the other hand, if the government's view is accepted, it may become the argument to end all argument. . . .

We are talking, after all, about a government's responsibility to maintain the basic conditions necessary for social order to exist at all. In the American legal tradition we are fond of saying that the Constitution is not a suicide pact. Usually, this phrase is invoked to justify suspending a constitutional limitation on government action when necessary to preserve the state and its people against a massive threat. The *Juliana* litigation offers an opportunity to do the inverse—to recognize a constitutional right to stop one's own government from creating and supporting a massive threat to our very survival. If our Constitution does not include this right—which, to be fair, was not explicitly enumerated when the document was drafted, a time

* Douglas A. Kysar, *The Closing Argument*, L.A. REV. BOOKS BLOG (Jan. 16, 2019), <https://blog.lareviewofbooks.org/provocations/closing-argument>.

when the world contained less than one billion people and the Industrial Revolution had hardly begun—then we may have to reconsider whether it is a suicide pact after all.

For its part, the Supreme Court appears reluctant to confront the grand questions of law posed by the children’s suit. Chief Justice Roberts is a master tactician and he is well aware that the Court—particularly at this turbulent moment in its history—would not benefit from headlines that read, “US Supreme Court shuts down historic kids’ climate lawsuit.” But Roberts likely also recognizes the grave challenge posed by the merits of the children’s suit. If he and his fellow conservatives on the Court are forced to confront the core argument of the case, they will have to decide whether the government is constitutionally permitted to follow a course of conduct that knowingly destroys the stability of the climate, the very context in which human civilization arose. In other words, the conservative majority will have to decide whether the Constitution *is* a suicide pact, at least when it comes to climate change.

The surest way for Roberts to save the courts is not to duck this question, tempting though it will be. It is instead to declare that reason, evidence, and principle—which uniformly point to the need for government accountability in the era of climate change—still underwrite the legitimacy of the judicial branch.

The question is not how to preserve the courts, but for how long.

JUDGING UNDER STRESS

DISCUSSION LEADERS

KIM LANE SCHEPPELE, JUDITH RESNIK,
MARTA CARTABIA, AND CARLOS ROSENKRANTZ

II. JUDGING UNDER STRESS

DISCUSSION LEADERS:

KIM LANE SCHEPPELE, JUDITH RESNIK, MARTA CARTABIA, AND
CARLOS ROSENKRANTZ

Challenging Courts’ Legitimacy in the Twenty-First Century: “Judicial Hellholes” and “Enemies of the People”

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CHALLENGING COURTS' LEGITIMACY IN THE TWENTY-FIRST CENTURY: "JUDICIAL HELLHOLES" AND "ENEMIES OF THE PEOPLE"

Conventional narratives posit judicial independence under attack from the political branches. Given a world of internet connectivity and political mobilization in which conflicts over judicial authority play out, that pattern needs to be reconfigured. The quotes with which this chapter opens—"judicial hellholes" and "enemies of the people"—come from the United States and the United Kingdom, where media have targeted individual judges and courts in efforts to delegitimize them.

In contrast to eighteenth and nineteenth centuries concerns about the need to buffer judges from encroachments by the executive and legislature, judicial foes—or friends—in the twenty-first century come not only from other branches of government but also from the media and from repeat player litigants who can seek to select judges and shape court precedents and procedures.

In this chapter, after providing brief excerpts of attacks on judges and courts, we turn to texts reflecting the long history of the judiciary as a discrete and peculiar aspect of government. The sampling of provisions reiterates that judicial independence is fundamental to constitutionalism and the rule of law. What those precepts mean in practice is, however, complex. Hence, we explore the political economy and theories that produces commitments to judicial independence and arguments that particular practices undercut it. We then consider how judges exercise power in fractured and politicized times. In polarized environments, some judges are restrained, tethering their work to precedents, and others emboldened.

The length of this chapter underscores that attacks on judiciaries and claims of judicial overreach crisscross the globe. Further, in the first decades of this Seminar, the future of constitutional courts seemed secure. Today a sense of urgency has emerged. Courts and the democratic orders in which they sit are precariously situated.

Our questions are whether structures for protecting judicial independence, shaped during the past centuries, suffice in light of twenty-first century challenges to judicial authority and to constitutional democracy more generally. Moreover, can courts help in this time of stress, through their practices, to lessen attacks on judiciaries and on the legitimacy of norms and practices of government? Alternatively, how and when should judges speak up to question the decisions of courts as failing to conform to the standards of judging? When do judges contribute to perceptions that, using the political moment, they are implementing agendas of new governments? Answers to some of these questions come by way of the essays and decisions of constitutional court judges, excerpted in the second half of this chapter, as they speak to their colleagues and the body politic and call for recommitments to the integrity of judiciaries, the structures of fair governance, and the rights of individuals.

* * *

The tenor of some of the attacks on judging can only be captured by repeating the words deployed. One example comes from a newspaper headline of November 4, 2016, when *The Daily Mail* in the United Kingdom, put these words into bold and large print:

“Enemies of the People: fury over ‘out of touch’ judges who have declared ‘war on democracy’ by defying 17.4m Brexit voters and who could trigger constitutional crisis.”

The article that followed featured large photographs of the three judges who, on November 3, 2016, had issued a first decision in *Miller v. Secretary of State for Exiting the European Union*. Under the picture of Lord Chief Justice Thomas was the caption “committed Europhile.” The three judges had ruled that the U.K. government was required to gain the consent of Parliament to trigger Article 50 and exit the European Union. In January 2017, the Supreme Court of the United Kingdom agreed.

In the United States, attacks on specific judges and courts take a variety of forms. Excerpted below are paragraphs from the eighty-four page 2018-2019 report of the American Tort Reform Foundation, which describes itself as a non-profit organization whose mission is “to educate the general public about how the American civil justice system operates; the role of tort law in the civil justice system; and the impact of tort law on the private, public and business sectors of society.” Since 2002, this entity has published reports on what it styles as “judicial hellholes” identifying names of courts and at times providing photographs of specific judges deemed unfavorable to business interests.

The 2018-2019 Judicial Hellholes report shines its brightest spotlight on . . . jurisdictions, courts or legislatures that have earned reputations as Judicial Hellholes. Some are known for welcoming litigation tourism or as hotbeds for asbestos litigation, and in all of them state leadership seems eager to expand civil liability. . . .

#1 CALIFORNIA A perennial Judicial Hellhole, California has once again regained its position atop the Judicial Hellholes list due to the propensity of California judges and legislators to extend liability at almost every given opportunity. California courts have adopted novel theories of liability and unique California laws and expansive court decisions have fostered abusive “no-injury” litigation. As a result, the state has become a magnet for class actions targeting food and beverage marketing and disability access lawsuits. In addition, a new data privacy law is plaintiffs’ lawyer gold and is expected to lead to extensive lawsuit abuse.

#2 FLORIDA The Florida Supreme Court issued a series of liability-expanding opinions that invalidated civil justice reforms, damaging the state's civil justice system. The high court once again showed contempt for the lawmaking authority of the state legislature and its decisions will have a lasting impact on the state's legal climate. The Florida legislature also failed to address blatant lawsuit abuse and fraud, and plaintiffs' lawyers continued with their usual antics.

#3 NEW YORK CITY While the New York City Asbestos Litigation has been featured in the report since 2013, the 2018-2019 report broadens the "Judicial Hellhole" distinction to include other types of litigation in New York City. Courts in New York City are filled with frivolous consumer class actions and judges permit plaintiff-friendly procedures and high awards in asbestos cases. The state high court also further stacked the deck against defendants in personal injury litigation. Hedge funds are increasingly investing in New York litigation and driving some of the most expensive cases in the state. Additionally, the legislature failed to address excessive construction liability and asbestos litigation abuse, and it expanded medical liability. . . .

Beyond the Judicial Hellholes, this report calls attention to seven additional jurisdictions that bear watching due to their histories of abusive litigation or troubling developments. Watch List jurisdictions fall on the cusp—they may drop into the Hellholes abyss or rise to the promise of Equal Justice Under Law.

COLORADO SUPREME COURT Liability-expanding decisions and rulemaking by the court coupled with prospects of a pro-plaintiff legislative agenda in 2019 has created an unfair and unbalanced environment for defendants in the Centennial State.

GEORGIA SUPREME COURT Georgia's Supreme Court in recent years has issued decisions that significantly expanded civil liability, and that troubling trend continued in 2018. . . .

This year's report again enthusiastically emphasizes the good news from some of the Judicial Hellholes states and other jurisdictions across the country. Points of Light are examples of fair and balanced judicial decisions adhering to the rule of law, positive legislative reforms and other encouraging developments. . . . Among the other positive decisions, the U.S. Supreme Court enforced a class action waiver in arbitration agreements, and the Fifth Circuit overturned a \$502 million verdict against Johnson & Johnson after finding "unequivocally deceptive" conduct by the plaintiffs' lawyer. . . .

INDEPENDENCE / DEPENDENCE

Provisions designed to protect judicial autonomy have appeared in constitutional texts for centuries. Our sampling begins with the 1701 Act of Settlement, which was primarily concerned with regulating succession and is notable today for enshrining England's first formal guarantee of judicial independence. Senior judges had served at the pleasure of the monarch; the Act of Settlement gave removal authority to a joint decision by both houses of Parliament. The 1780 Constitution of the Commonwealth of Massachusetts expanded the insulation. These models were taken up by national, supranational, international and non-governmental bodies, which have elaborated on structures of protection beyond salaries, length of tenure, and means of dismissal. We conclude this section with accounts of the political, economic, and cultural motivations for commitments to judicial independence and the mechanisms that bolster or undermine judicial autonomy and power.

Textualizing Authority

Act of Settlement of 1701

An Act for the Further Limitation of the Crown and Better Securing the
Rights and Liberties of the Subject
12 & 13 William III, c. 2 (England)

. . . Judges['] Commissions [shall] be made *Quam diu se bene Gesserint* [during good behavior] and their Salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawfull to remove them.

. . . [T]he Laws of England are the Birthright of the People thereof and all the Kings and Queens who shall ascend the Throne of this Realm ought to administer the Government of the same according to the said Laws and all their Officers and Ministers ought to serve them respectively according to the same . . .

Constitution of the Commonwealth of Massachusetts

March 2, 1780

. . . [Part I]

Art. V. . . . [T]he several magistrates and officers of government vested with authority, whether legislative, executive, or judicial, . . . are at all times accountable to [the people]. . .

Art. XXIX. It is essential to the preservation of the rights of every individual . . . that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is . . . not only the best policy, but for

the security of the rights of the people, . . . that the judges of the supreme judicial court should hold their offices as long as they behave themselves well, and that they should have honorable salaries ascertained and established by standing laws.

Art. XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers . . . ; the executive shall never exercise the legislative and judicial powers . . . ; [and] the judicial shall never exercise the legislative and executive powers . . . to the end [that] it may be a government of laws, and not of men. . . .

[Part II, Chapter VI]

Art. II. No . . . judge of the supreme judicial court shall hold any other office or place, under the authority of this commonwealth, . . . nor shall they hold any other place or office, or receive any pension or salary from any other State, or government, or power, whatever. . . .

Basic Principles on the Independence of the Judiciary
Seventh United Nations Congress on the Prevention of Crime and the
Treatment of Offenders
(Endorsed by the General Assembly 1985)

. . . 5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals. . . .

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions. . . .

8. . . . [M]embers of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. . . .

10. . . . Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. . . .

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. . . .

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. . . .

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Bangalore Principles of Judicial Conduct

United Nations Judicial Group on Strengthening Judicial Integrity
(adopted 2002)

. . . 1.3. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom. . . .

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. . . .

4.9. A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge

5.1. A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes

Mount Scopus International Standards of Judicial Independence

International Association of Judicial Independence and World Peace
(approved 2008, consolidated 2018)

. . . 1.4. Every society and all international bodies, tribunals and courts shall endeavour to build and maintain a culture of judicial independence

2.4. Judicial appointments and promotions by the Executive are not [necessarily] inconsistent with judicial independence

2.5. No executive decree shall reverse specific court decisions, or change the composition of the court in order to affect its decision-making. . . .

2.7. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.

2.8. The power of removal of a judge shall preferably be vested in a judicial tribunal.

2.9. The Executive shall not have control over judicial functions. . . .

2.20. Judicial salaries and pensions shall be adequate at all times, fixed by law, and should be periodically reviewed independently of Executive control

2.21. The position of the judges, their independence, their security of tenure, and their adequate remuneration shall be entrenched constitutionally or secured by law.

2.22. Judicial salaries, pensions, and benefits cannot be decreased during judges' service except as a coherent part of an overall public economic measure. . . .

2.26. The Executive shall not have the power to close down, or suspend, or delay, the operation of the court system at any level.

3.1. The Legislature shall not pass legislation which reverses specific court decisions.

3.2. Legislation introducing changes in the terms and conditions of judicial service shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service and are generally applied.

3.3. In case of legislation reorganising or abolishing courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same or materially comparable status. . . .

4.3. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.

4.3.1. Retirement age shall not be reduced for existing judges. . . .

4.7. The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition. . . .

5.5. . . . The grounds for removal shall be limited to reasons of medical incapacity or behaviour that renders the judge unfit to discharge their duties. . . .

6.2. . . . [A] judge should not interview directly with the general media . . . [except i]n exceptional circumstances

6.3. The media should show responsibility and restraint in publications on pending cases . . . [that] may influence the outcome of the case. . . .

7.2. Judges shall not hold positions in political parties. . . .

8.1. A judge shall enjoy immunity from legal actions in the exercise of his official functions. . . .

**Serbia—Opinion on the Draft Amendments to the
Constitutional Provisions on the Judiciary
Venice Commission (2018)**

[On the basis of comments by Substitute member Mr. Hirschfeldt (Sweden), Substitute member Ms. McMorrow (Ireland), Member Mr. Steen Sørensen (Denmark), Honorary President Ms. Suchocka, and Member Mr. Varga (Hungary).]

1. . . . [The] Minister of Justice of Serbia . . . made a request for an opinion by the Venice Commission on the draft Amendments to the constitutional provisions on the judiciary [as part of the National Action Plan of the accession negotiations by Serbia with the European Commission]

14. . . . Article 4 of the current Constitution of Serbia . . . states that the “*Government system shall be based on the division of power into legislative, executive and judiciary. . . . Relation[s] between three branches of power shall be based on balance and mutual control.*” . . . [T]he wording “*mutual control*” raises concern. The word control could give rise to misgivings in interpretations regarding the role of the other powers, especially the executive power towards courts and lead to “political” control over the judiciary. . . . [I]t would be better to delete the wording “*mutual control*” from the text of any future constitution and to replace it with the wording “*shall be based on checks and balances*”. . . .

24. An aspect that has been omitted altogether . . . is its budget. Although international texts do not provide for the budgetary autonomy of the judiciary, there is a strong case in favour of taking the views of the judiciary into account when preparing the budget. . . . [T]he judiciary exercising control and being accountable for their own budget could impact positively on better use of court time and resources, thereby delivering a better judicial public service to the Serbian people. . . .

42. Having a national judicial academy is welcome and not unusual by any means, for instance, France has the *École Nationale de la Magistrature* [T]he Academy’s role as a sole gatekeeper to the judiciary seems well founded with the aspiration and commitment to strengthen the calibre and professionalism of judicial

and prosecutorial training, but it would be advisable to protect the Academy from possible undue influence by providing it with a firm status within the Constitution. . . .

45. . . . *“The terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds.”*

46. The appointment and the dismissal of judges should be regulated in the Constitution [T]his Amendment provides for four reasons for a judge’s dismissal: 1) being sentenced to at least six months’ imprisonment; 2) committing a crime that makes the person unworthy of judgeship; 3) performing judicial functions incompetently, and 4) having committed a serious disciplinary offence. . . .

49. The fourth reason needs to provide detail on what these serious disciplinary offences are. . . . Care should be taken that only failures performed intentionally or with gross negligence should give rise to this most severe sanction. . . . *“Disciplinary proceedings should generally be initiated in case of professional misconduct that is gross and inexcusable, bringing the judiciary in disrepute.”* . . .

61. The main problem with respect to . . . [the Amendment of the judicial disciplinary council] is that the non-judicial members of the [disciplinary council] . . . are all elected in the same manner by the National Assembly: in the first round, they can be elected by a 3/5th majority. This majority . . . provides for . . . only a weak protection against the election of all non-judicial members by the majority of the day. . . . In order to be a mechanism suitable to ensure pluralism within the . . . [council], the choice of the five-member commission should not be limited to candidates proposed by a parliamentary committee.

62. . . . [T]his provision creates the possibility that half of the members of the [council] . . . will be a coherent and like-minded group in line with the wishes of the current government. This is very problematic One [solution] would be to provide for a proportional electoral system that ensures the minority in the Assembly will also be able to elect members. Another option would be to give to outside bodies, not under government control, such as the Bar or the law faculties the possibility to appoint members. A third option would be to increase the number of judicial members to be elected by their peers. A fourth option would be to increase the majority requirement and to enable the five-member commission to choose from among the candidates who originally applied with the National Assembly for the membership

Incentivizing Judicial Independence

The Puzzling (In)Dependence of Courts: A Comparative Approach

J. Mark Ramseyer (1994)*

. . . Basic comparative research shows that independent judiciaries (defined here as courts where politicians do not manipulate the careers of sitting judges) are *not* common to freedom-loving nations everywhere. . . . Why do rational politicians in some democracies offer independent courts, while politicians in other democracies do not? . . .

[T]he answer lies in an analogy to the simple theory of repeated games. When in a Prisoner's Dilemma, rational players who expect to play the game only once will defect. Players who expect to play it indefinitely may sometimes defect and sometimes cooperate. So too with whether rational politicians will keep courts independent. Fundamentally, whether they keep them independent (whether they adopt the cooperative strategy) depends on two things: (a) whether they expect elections to continue indefinitely, and (b) if elections will continue, whether they expect to continue to win them indefinitely. Only where they rate (i) the likelihood of continued electoral government high and (ii) the likelihood of their continued victory low might they provide independent courts. . . .

In the modern United States, politicians in both parties expect the electoral system to continue, but no one gives either party high odds of controlling the government indefinitely—so politicians offer independent courts. In modern Japan, politicians in all parties expect competitive elections to continue indefinitely, but until recently those in the ruling Liberal Democratic Party (LDP) rationally expected to win the elections—so they offered less independent courts. . . .

Although Japanese judges have not been as independent as their American federal peers, the reason does not primarily lie in any of the obvious institutional constraints. . . . Instead, LDP politicians controlled judges more subtly, primarily through job assignments. In the Japanese judiciary, would-be judges apply for a job at the end of their legal training. If chosen, they receive a ten-year appointment. At the cabinet's discretion, they then receive renewals every decade. During this time, they rotate through positions every two or three years. By controlling these two- and three-year postings, the LDP leaders could control their judges: industrious and orthodox judges they could reward with prestigious postings; the indolent and heterodox they could sentence to years in obscure posts. . . .

Although modern Japanese elections are highly competitive affairs, for forty years the LDP consistently won them. Partly by shifting its policies with the shifting

* Excerpted from J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994).

median voter, and partly by using its control over government to give constituents generous private goods, it dominated the political marketplace. By contrast, American parties win erratically at best. As a result, LDP leaders could reasonably expect that they would continue to control the government. No American leader of either party can do so.

If rational politicians face significant odds of being in the minority party, however, they will try to reduce the variance to their political returns. In part, they can do this by insulating the judicial system from political control. Suppose the party in power has relatively little control over judges. It will earn a smaller advantage to electoral victory, but will incur a smaller cost to electoral loss. American political leaders have chosen this option.

Liberal Democratic Party leaders had less reason to insulate their judges. Because they could realistically expect to stay in power indefinitely, they faced smaller expected future costs to a *nonindependent* judiciary. Consequently, they could rationally elect to monitor judges instead, and thereby obtain greater control over policy. Although they increased their costs to electoral losses, they were less likely to care *ex ante*—since they were less likely to lose.

At stake is an intertemporal calculus. American political leaders agree to increase their control over the judiciary *into the future*, by decreasing their control over the judiciary *in the present*. They do freely politicize appointments, for they routinely name party loyalists. By insulating these judges (once appointed) from political control, though, they increase the impact that they will have (through these appointments) after they have lost office. . . .

Understanding the Constitutional Revolution

Jack Balkin and Sanford Levinson (2001)*

. . . The most important factor in understanding how constitutional revolutions occur, and indeed, how judicial review works, particularly in the twentieth century, is a phenomenon we call partisan entrenchment. To understand judicial review one must begin by understanding the role of political parties in the American constitutional system. Political parties are among the most important institutions for translating and interpreting popular will and negotiating among various interest groups and factions. Political parties are both influenced by and provide a filter for the views of social movements. Both populism and the Civil Rights Movement influenced the Democratic Party, for example, which, in turn, accepted some but not all of their ideas. . . .

When a party wins the White House, it can stock the federal judiciary with members of its own party, assuming a relatively acquiescent Senate. They will serve

* Excerpted from Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

for long periods of time because judges enjoy life tenure. On average, Supreme Court Justices serve about eighteen years. In this sense, judges and Justices resemble Senators who are appointed for 18-year terms by their parties and never have to face election. They are temporally extended representatives of particular parties, and hence, of popular understandings about public policy and the Constitution. The temporal extension of partisan representation is what we mean by partisan entrenchment. It is a familiar feature of American constitutional history. Chief Justice John Marshall kept Federalist principles alive long after the Federalist Party itself had disbanded. William O. Douglas and William Brennan, two avatars of contemporary liberalism, promoted the constitutional values of the Democratic party for decades, just as William Rehnquist has for thirty years now proved to be a patient but persistent defender of the constitutional values of the right wing of the Republican Party.

Partisan entrenchment is an especially important engine of constitutional change. When enough members of a particular party are appointed to the federal judiciary, they start to change the understandings of the Constitution that appear in positive law. If more people are appointed in a relatively short period of time, the changes will occur more quickly. Constitutional revolutions are the cumulative result of successful partisan entrenchment when the entrenching party has a relatively coherent political ideology or can pick up sufficient ideological allies from the appointees of other parties. Thus, the Warren Court is the culmination of years of Democratic appointments to the Supreme Court, assisted by a few key liberal Republicans. . . .

But Presidents cannot appoint just anyone to the federal judiciary or to the Supreme Court. The Senate, which may be controlled by a different political party, must advise and consent. This means that judges—and particularly Supreme Court Justices—tend to reflect the vector sum of political forces at the time of their confirmation. That is why Dwight D. Eisenhower appointed a Catholic Democrat, William Brennan, rather than a conservative Republican in 1956. And it is also why although Harry Blackmun and Antonin Scalia were both Republicans who were appointed by Republican presidents, they turned out so differently. Blackmun was appointed in 1969, when liberalism was still quite strong. Although the Democrats had lost the White House in 1968, they still retained control of Congress. Two Southern nominees were rejected by the Democratic Senate before President Nixon nominated the far more centrist Harry Blackmun, a close friend of Chief Justice Burger from Minnesota. . . .

Judicial Independence and Corruption

Susan Rose-Ackerman (2007)*

. . . [Judicial i]ndependence implies that judges' careers do not depend on pleasing those with political and economic power. Such separation of powers is necessary both to prevent politicians from interfering with judicial decision-making and to stop incumbent politicians from targeting their political opponents by using the power of civil and criminal courts as a way of sidelining potential challengers. The judiciary needs to be able to distinguish strong, legitimate cases from those that are weak or politically motivated. Otherwise, the public and users of the court system will lose confidence in the credibility and reliability of the court system to punish and pass judgement on crimes and civil disputes, and judicial sanctions will have little deterrent effect. Individuals may conclude that the likelihood of arrest and conviction is random or, even worse, tied to one's political predilections. In such cases, the legal process does not deter corruption and it may undermine the competitiveness of democratic politics.

Independence is necessary but not sufficient. An independent judiciary might itself be irresponsible or corrupt. If judges operate with inadequate outside checks, they may become slothful, arbitrary or venal. Thus, the state must insulate judicial institutions from improper influence at the same time as it maintains checks for competence and honesty. Judges must be impartial as well as independent. On the one hand, an independent judiciary can be a check both on the state and on irresponsible or fraudulent private actors—whether these are the close associates of political rulers or profit-seeking businesses acting outside the law. On the other hand, independent courts may themselves engage in active rent seeking. States need to find a way to balance the goals of independence and competence. In practice, a number of solutions have been tried; none seems obviously superior, but this overview suggests some common themes and some promising avenues for the reform of malfunctioning judiciaries.

Independence is often opposed by political actors. Resistance may arise from a president or a legislature wishing to avoid checks on their power and from influential vested interests. Given such resistance, governments may limit the impact of the courts by keeping overall budgets low so that salaries and working conditions are poor. They may make judicial appointments on the basis of clientelist ties, not legal qualifications. . . .

In states that follow the civil law model, serious problems arise if the supposedly apolitical, civil service nature of judicial selection and promotion is undermined by the use of political selection criteria. A patronage-based appointment

* Excerpted from Susan Rose-Ackerman, *Judicial Independence and Corruption*, in TRANSPARENCY INTERNATIONAL: GLOBAL CORRUPTION REPORT 115 (2007).

process will be particularly harmful here because the checks that exist in most common law systems are largely absent. . . .

Top judges may also be able to manipulate the assignment of cases to those willing to rule in favour of powerful clients. The lack of dissents and the low level of lay participation will make corruption relatively easy to hide.

To the extent that trial procedures are under the control of judges rather than lawyers, this will give litigants incentives to corrupt lower-level trial judges who can manipulate procedures in their favour. . . .

If the judiciary suffers from a lack of resources and staff, this can produce delays that litigants may pay to avoid. In the extreme, judges and their staff can create delays in order to generate payoffs. . . .

The common law model presents a different set of corrupt incentives. The political nature of the appointment process may lead candidates to pay politicians for the privilege of being appointed, or they may be beholden to wealthy contributors if they must win contested elections. Even if appointed, judges may be biased toward the political party or coalition that appointed them. If judges are independently wealthy from a prior career as a private lawyer, they may be subject to conflicts of interest. These may surface, not as outright bribery, but as an incentive to favour litigants associated with organisations in which the judge has a financial interest. Dereliction of duty may arise in forms that do not fit conveniently under the legal definition of corruption, but that nevertheless distort the operation of the judicial system. . . .

Making Our Democracy Work: A Judge's View

Stephen Breyer (2010)*

. . . How do we explain to the ordinary American why and how he or she should try to maintain a strong judiciary? . . . [A]s Justice David Souter has pointed out, a

populace that has no inkling that the judicial branch has the job of policing the limitations of power within the constitutional scheme, and no understanding that judges are charged with making good on constitutional guarantees even to the most unpopular people in society, . . . will hardly find much intuitive sense when someone trumpets judicial independence or decries calls to impeach judges who stand up for individual rights against the popular will.

A public that does not understand the judiciary, its role in protecting the Constitution, and the related need for judicial independence may act in ways that

* Excerpted from STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010).

weaken the institution. Where judicial elections take place, . . . as they do in many states, the electorate can vote against candidates who reach unpopular decisions, they can authorize litigants to contribute millions of dollars to judicial candidates, they can enhance the electoral importance of individual cases by limiting the length of judicial terms of office, and they can support ballot initiatives such as South Dakota’s “jail for judges” who “wrongly” decide cases. Where judges are not elected . . . voters can still communicate to legislators that when they help select judges, politics, not law, is what matters. . . .

Judicial independence . . . is essentially a state of mind. . . . Support for the judicial institution rests upon teaching in an organized way to generations of students about our history and our government. . . .

Staffing Judiciaries

Despite the centrality of “independence” to the conception of courts, judiciaries are in practice deeply *dependent* institutions, reliant on legislative enactments for much of their jurisdiction and financing, and often on executive actions for staffing. Around the world, other branches of government have endowed courts with authority and resources, as have private sector actors and the media. Interdependence, rather than independence, is the leitmotif.

We could thus explore the many ways in which judiciaries have flourished by virtue of support from their sibling branches and the public. Various metrics of success—the high demand for services, the dominance of courthouse buildings in public landscapes, staff, grants of jurisdiction, and media attention—can be proffered as evidence of thick commitments to the deployment of judges in service of the enforcement of state norms in polities across the globe.

Yet, a simultaneous narrative—and our focus in this chapter—recounts the institution of the judiciary as under siege. This sense of the vulnerability of adjudication is longstanding, as the very documents instantiating judicial independence illustrate. In 2019, new challenges have emerged that raise questions about the means to protect judicial autonomy. For example, are constitutional courts more vulnerable than general jurisdiction apex courts, or are national cultures or political party alignments key variables to long-term institutional viability? Are there ways to structure judicial selection that make it less subject to political capture, or are political mandates central to judicial legitimacy?

This section takes up these issues in the context of changes to judicial appointments, length of tenure, and judicial structure, often explained in terms of rising demand for services, limited funds, and efficient methods of administration.

When political, social, or financial changes occur, can the executive or legislature alter the judiciary's size, function, budget, or role in response? Can and should judges review changes in judicial appointments, retirements, length of tenure, and salaries? If so, what are the criteria to identify a legitimate restructuring of the judiciary in light of changed circumstances or impermissible incursions on judicial autonomy? We then turn to the perennial problem of remedies. What obligations on other branches of government should judges impose when concluding that new provisions compromise their legitimacy and authority?

**Judicial Selection and Democratic Theory:
Demand, Supply, and Life Tenure**
Judith Resnik (2005)*

How ought a democracy select its judges? How long should they serve? Critics in Canada, England, and Wales invoke the democratic values of accountability and transparency to call for a diminution in prime ministerial control over judicial appointments. In the United States, Article III of the Constitution's text directs that the President nominate—with the advice and consent of the Senate—life-tenured federal judges. Bitter conflicts about particular nominees have produced many proposals for changes of that system. And in those states that rely on various forms of judicial election, concerns focus on funding and campaigning. In short, both globally and locally, democracies debate the legitimacy and wisdom of various methods used to endow individuals with the state's power of adjudication.

This diversity of techniques for judicial selection illuminates the complex relationship of adjudication to democracies. Democracy tells one a good deal about rights to justice, equality before and in the law, and constraints on the power of the state, its courts included. But absent a claim that all government officials in a democracy must be elected, it is difficult to derive from democracy any particular process for picking judges. In contrast, democratic principles do rule out a few procedures for judicial selection—such as by inheritance or through techniques that systematically exclude persons by race, sex, ethnicity, and class.

In addition to examining the interaction between democratic theory and judicial selection, this article details the degree to which the life-tenured (or “Article III”) judiciary in the United States has become anomalous, both when compared to high court judgeships in other countries and to . . . magistrate and bankruptcy judges [in the U.S.]. Article III judges have no mandatory age for retirement nor a fixed, non-renewable term of office. Rather, they serve relatively long terms—often of more than twenty years. In addition, they control the timing of their resignations, enabling them to bestow political benefits on a particular party. Further, Article III judges now have the authority to appoint hundreds of non-life-tenured federal judges. . . .

* Excerpted from Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579 (2005).

[C]onflict over life-tenured judgeships is neither surprising nor necessarily inappropriate. Given the nature and form of power held by Article III judges, the political import of federal courts in the United States, the constitutional allocation of power to both the President and the Senate, and disagreements about what good governance entails, judicial selection is a ready opportunity for political signaling. . . .

[D]ebates about individuals seeking confirmation have been repeatedly used as a means of articulating legal norms. From the legality of the Jay Treaty in the eighteenth century to the role of railroads and unions in the nineteenth century to the rights of women in the twentieth century and gay marriage in the twenty-first, conflict over nominations has helped to identify certain issues as powerfully divisive and others as so settled as to be seen as nonpolitical. . . .

[T]o see utility in debate about who shall serve as life-tenured judges does not mean that the current structure is optimal. With the growth in the number of life-tenured judgeships at the lower ranks and with the innovations in information technology, powerful participants in and out of the government have gained the ability to fill many seats with individuals identified with certain approaches to American law. Life-tenured appointments were always an opportunity for patronage, but when the slots were few and the length of tenure shorter, they could be used less successfully as a means of setting long term political agendas. . . .

[C]onsideration should be given to revising the federal process. . . . Requiring a supermajority rule to confirm is one technique to signify that the power of judicial appointment is shared and that senators ought to take an active role in making life-tenured appointments. Further, Congress could create incentives, such as pension benefits or penalties, to encourage individual judges to step aside after a specified number of years-thereby generating more openings and reducing the long term impact of individual appointments. And, just as the Supreme Court has found constitutional the devolution of judicial power to non-life-tenured judgeships, it could also reread Article III to permit fixed times for retirement. . . .

Proposals such as these derive from democratic values of constrained power and dialogic development of the law. Thus, while the fact of a democracy does not drive specific selection methods for judges, it does inform rules about the terms of service and the mode of action of judges. Democracy teaches that no one person (judges included) ought to hold too much power for too long. . . .

Another way to try to lower the political heat in the United States would be to increase the number of life-tenured judgeships. The very small number of positions makes an appointment a real “political plum” that vests significant power in relatively few individuals. The appellate courts are now both the end point for most cases and the pool from which Supreme Court nominees are drawn. Were hundreds more selected for life-tenured slots, the power of life tenure would be shared by more people and each individual appointment would become less significant.

Of course, the more judgeships with life tenure, the less unique the job. The job might lose some of its cachet and therefore attract a somewhat different pool. But the tradeoff could enable a shift in the understanding of a judge's job away from the glamour of policymaking and towards the more mundane, record-driven activity of applying law to fact. When done properly, adjudication is a labor-intensive job, requiring a kind of work that is time-consuming and sometimes tedious. We want candidates for judgeships to be committed to doing that form of work—much of it without high visibility yet having profound effects on specific litigants. . . .

[Another] lesson is that as principles of democracies themselves evolve, methods for selection of judges that were once perceived to be legitimate may need to be revisited. Increased demands for deliberative representation within democracies have prompted insistence—in many countries—that not all judges be white or male or of a certain class. When the content and import of equality changes, processes once seen as unproblematic become questionable. . . .

[D]emocratic premises are relevant not only to the question of selection but also to the length of service enjoyed by judges and the range of choice that judges have over their own workload. I have argued that judges in the United States who have life tenure and who hold the power to make so much law for so long have too much power. Built into adjudication is the capacity for revision through the case law method. As the composition of judiciaries change[s], the wisdom of a particular rule of law can be tested, in that new members of high courts may not adhere to its premises. But that very capacity to generate change depends on limiting the length of service of powerful judges. . . .

Starrs v. Procurator Fiscal
Scottish High Court of Justiciary
[1999] ScotHC 242

[The bills called before the High Court of Justiciary, comprising the Lord Justice-Clerk (Cullen), Lord Prosser and Lord Reed for a hearing. Opinion of Cullen, Lord Justice-Clerk]: . . .

1. . . . [A]t issue is whether the Lord Advocate has acted in a way which was incompatible with the rights of the accused under Article 6(1)* of the [European Convention on Human Rights] to [a] fair trial by “an independent and impartial tribunal”. . . .

* Article 6(1) of the Convention provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law

9. Section 11 of the 1971 [Sheriff Courts (Scotland) Bill] . . . makes provision . . . for the appointment of a temporary sheriff principal where there is a vacancy or the sheriff principal is unable to perform . . . all or some part of his duties. . . .

12. . . . Although the power of appointment was vested in the Secretary of State, . . . [t]he decision that there was a requirement for temporary sheriffs was taken by the Lord Advocate

20. . . . [I]n practice, the system was not one of “temporary” appointments (other than in the sense that the appointments were formally for a period of one year, and lacked security of tenure), but was one of part-time appointments which were intended to be long-term.

21. . . . [I]t was also possible for a temporary sheriff to be “sidelined” without any formal recall or non-renewal of his appointment . . . [or] could simply not be “used,” as a matter of administrative practice. . . .

22. . . . [T]emporary sheriffs were paid *per diem* and did not qualify for a pension, unlike permanent sheriffs [S]ome temporary sheriffs . . . were dependent on their earnings [from] that source. . . . [S]ome temporary sheriffs were seeking preferment to permanent appointments as sheriffs. . . . If a person were to apply for a permanent appointment without having previously served as a temporary sheriff, then he might be encouraged to seek a temporary appointment first, effectively as a form of probationary service. . . .

27. . . . [T]he term of office of a temporary sheriff was limited to one year. . . .

29. . . . [T]emporary sheriffs were appointed, or ruled out from further appointment, at the instance of the Lord Advocate. . . . At the same time the Lord Advocate was master . . . in all criminal prosecutions in Scotland. . . .

30. . . . [T]he temporary sheriff occupied a role which was subordinate to one of the parties. . . . Their security of tenure was inferior to that of permanent sheriffs. . . . Furthermore, temporary sheriffs did not have financial security They were paid for their work as a matter of “grace and favour” rather than by way of a salary. They did not qualify for non-contributory pensions. The Sheriffs’ Pensions (Scotland) Act 1961 did not apply to them. They did not receive either sick or holiday pay. A temporary sheriff was paid at half rate for writing days. The arrangement for his sitting was liable to be cancelled at short notice, in which case he was not paid the full daily rate. . . .

32. . . . [T]emporary sheriffs were permitted to continue in the practice of the law. . . .

39. . . . [The law] confers a power of recall which . . . is without any qualification as to the circumstance in which it may be exercised, the test which is to be applied or the means by which the justification for its exercise may be investigated. It is doubtful how far its exercise is susceptible of judicial review. The terms . . . stand in stark contrast to . . . the case of a permanent sheriff

40. . . . [T]he fact that a temporary sheriff is appointed for only one year at a time . . . has made it unnecessary for the executive to take the formal step of recalling the appointment. . . .

46. [T]he limits imposed . . . encourage the perception that temporary sheriffs who were interested in their advancement might be influenced in their decision-making to avoid unpopularity with the Lord Advocate. . . .

47. . . . There is no question whatever as to the integrity and fair mindedness with which the Lord Advocate has acted. . . . [A]ppointment by the executive is consistent with independence only if it is supported by adequate guarantees that the appointed judge enjoys security of tenure. It is clear that temporary sheriffs are appointed in the expectation that they will hold office indefinitely, but the control which is exercised by means of the one year limit and the discretion exercised by the Lord Advocate detract from independence. . . .

49. . . . [A] temporary sheriff, . . . [is] not an “independent and impartial tribunal” within the meaning of Article 6(1) of the Convention. . . .

[The opinion of Lord Prosser is omitted. Opinion of Lord Reed:]

. . . 8. . . . [T]emporary sheriffs form a pool of persons who have been actually appointed to shrieval office [M]embership of the pool of temporary sheriffs has increasingly come to be coveted as a step on the road towards a permanent appointment, and on the Lord Advocate’s side it has equally come to be seen to some extent as, in effect, a probationary period during which potential candidates for a permanent appointment can be assessed. . . .

22. A short term of office is not . . . necessarily objectionable Indeed, the Convention itself provides for the appointment of *ad hoc* judges to sit on the European Court of Human Rights, appointed for the purpose of a particular case. Temporary appointments are however apt to create particular problems . . . where the duration of the appointment is not fixed so as to expire upon the completion of a particular task or upon the cessation of a particular state of affairs (such as some emergency or exigency), but is a fixed period of time of relatively short duration. . . .

23. . . . [R]enewal is both possible and expected, but is at the discretion of the Executive. In effect, temporary sheriffs have their judicial careers broken up into

segments of one year, so as to provide the Executive with the possibility of re-considering their appointment on an annual basis. . . .

24. Given that temporary sheriffs are very often persons who are hoping for graduation to a permanent appointment, and at the least for the renewal of their temporary appointment, the system of short renewable appointments creates a situation in which the temporary sheriff is liable to have hopes and fears in respect of his treatment by the Executive when his appointment comes up for renewal: in short, a relationship of dependency. This is in my opinion a factor pointing strongly away from “independence” within the meaning of Article 6. . . .

61. . . . I am not suggesting that any temporary sheriff has ever allowed his judicial conduct to be influenced by any consideration of how he might best advance his prospects of obtaining the renewal of his appointment, or his promotion to a permanent appointment. Nor am I suggesting that any official or Minister has ever sought to interfere with the judicial conduct of a temporary sheriff or would ever be likely to do so. There is however no objective guarantee that something of that kind could never happen; and that is why these appeals must succeed. . . .

Provisions Governing the Appointment of Temporary Administrative Court Judges Are Compatible with the Constitution

Federal Constitutional Court of Germany, Second Senate

Press Release No. 38/2018 of 18 May 2018

Summarizing Order of 22 March 2018, BvR 780/16*

. . . The Act for Expediting Asylum Proceedings . . . of 20 October 2015 amended the Code of Administrative Court Procedure . . . , introducing the possibility of appointing, as temporary judges, civil servants with life tenure and the qualification to hold judicial office. The [Code] . . . requires that temporary judges be appointed for at least two years. For the duration of their specified term of service, the civil servant status of temporary judges is suspended; upon expiry of their judicial term, they automatically resume the status of civil servant. Temporary judges may only serve at the administrative courts of first instance. Under the . . . statutory framework, the appointment of temporary judges is permissible only in the event of a “solely temporary increased demand for personnel.” The primary aim of these measures is to ensure that the sharp increase in the number of asylum proceedings pending before the courts may be swiftly resolved. Nonetheless, temporary judges may be assigned cases other than asylum proceedings. . . .

The complainant had requested preliminary legal protection from the administrative courts, against the rejection of his asylum application . . . [and] the decision of the administrative authorities ordering his deportation to Italy

* The following excerpt is taken from the Federal Constitutional Court’s English language summary of its decision in *Order of 22 March 2018* (BvR 780/16).

1. Requiring that all career judges be appointed for life does not rule out the appointment of temporary judges if such temporary appointments are limited to situations of exceptional demand. The normative model of the Basic Law . . . [is] that judges be appointed definitively to regularly established positions [T]he guarantee of judicial independence does not require that judges generally be appointed for life. . . . It is imperative, however, that the appointment of temporary judges remain the exception, and that judicial positions be filled primarily by way of lifetime appointment. Thus, the statutory condition of “temporary demand for personnel” must be interpreted in a strict manner; it can only be fulfilled where a situation of exceptional pressure is at hand that cannot be resolved by means of the regular instruments of personnel planning and management.

2. Temporary judges are accorded the status of judge. They are assigned regularly established positions. Their principal occupation must be their judicial work. Their term of service cannot be terminated prematurely. . . . For the duration of their term of service, temporary judges are guaranteed personal independence . . . [and] enjoy strict protection against dismissal, removal from office or transfer.

3. Ultimately, the appointment of civil servants with life tenure as temporary judges, whereby the civil servant status is merely suspended and then automatically resumed upon expiry of the term as temporary judge, is compatible with the Basic Law. . . .

b) . . . [That temporary judges] will return to their former posts in public administration does not jeopardise [their independence] . . . at least if the term as temporary judge is subject to a specified minimum duration[,] . . . [g]iven the established political culture in Germany that upholds respect for judicial independence. . . .

c) . . . It is, however, imperative that a certain “distance requirement” be observed: temporary judges are barred from sitting on cases that involve . . . the administrative authority at which the judge in question previously served as civil servant, or its respective supervisory authority. . . .

7. What would not be justifiable under constitutional law, however, is to allow for the same civil servant to be appointed as a temporary judge more than once. If temporary judges could be re-appointed upon expiry of their term of service, the executive could gain a controlling influence by way of deciding whether to extend their judicial term; this could undermine the prohibition of dismissal, removal from office or transfer applicable to judges as part of the guarantee of judicial independence. Therefore, . . . the re-appointment of temporary judges upon expiry of their specified term of service is not permissible.

Separate Opinion of Justice Hermanns:

[The 2015 Law is] incompatible with the principle of judicial independence . . .

1. . . . Temporary judges are exposed to the risk that the executive branch might exert influence over the exercise of their judicial functions given that their personal independence is only temporarily protected . . . and that upon expiry of their judicial term the progress of their career hinges, to a larger extent, on government decisions. This risk could be avoided by way of assigning judges appointed for life or judges in subsidiary office to the relevant positions instead. Even though temporary judges enjoy security in terms of status rights and financial remuneration given that they automatically resume the status of civil servant, their specific assignment following the end of their judicial term is uncertain; in addition, their career track as civil servants is subject to a much stricter hierarchy than the career track of judges. This creates incentives that . . . allow the executive to exert influence, at least in an indirect and informal manner, over the exercise of judicial functions by temporary judges. The shorter the specified term of service of temporary judges, the more conceivable such incentive effects become.

The guarantee of judicial independence under . . . [the Basic Law] provides the normative bedrock for the evolution of a political culture that upholds respect for the independence of the judiciary . . . a weakening of the normative framework that safeguards judicial independence may undermine this very culture.

2. Temporary judges, moreover, lack the neutrality and distance vis-à-vis the parties to the proceedings that is required under . . . [the Basic Law], given that they automatically resume civil servant status upon ceasing to hold judicial office and are thus exposed . . . to external influencing on the part of the executive, the very branch whose acts they are called upon to review as administrative judges. The fact that the executive branch temporarily “lends” judges to the judiciary may give rise . . . to the apprehension . . . that the judge had “partisan ties” to the opposing party and thus lacked neutrality. . . .

3. . . . Effective legal protection is only possible where judges are independent.

* * *

In the 1930s, the United States experienced an economic crisis known as the “Great Depression.” In response, legislators in the states and the federal government enacted economic and labor regulations. The U.S. Supreme Court struck down various of these provisions. In 1937, President Franklin Delano Roosevelt responded with a plan popularly termed “court-packing” that sought to add new judgeships at all levels of the federal judiciary. Excepted below are his reasons and the draft provisions. The proposal was not pursued, and some commentators credit the decision by a member of

the Supreme Court to change his views (the “switch in time that saved nine”) as ending the pressure to do so.

The President Presents a Plan for the Reorganization of the Judicial Branch of the Government

Speech by President Franklin D. Roosevelt to the Congress (1937)

. . . The Judiciary has often found itself handicapped by insufficient personnel with which to meet a growing and more complex business. . . .

In almost every decade since 1789, changes have been made by the Congress whereby the numbers of judges and the duties of judges in federal courts have been altered in one way or another. The Supreme Court was established with six members in 1789; it was reduced to five in 1801; it was increased to seven in 1807; it was increased to nine in 1837; it was increased to ten in 1863; it was reduced to seven in 1866; it was increased to nine in 1869. . . .

[T]oday a new need for legislative action arises because the personnel of the Federal Judiciary is insufficient to meet the business before them. A growing body of our citizens complain of the complexities, the delays, and the expense of litigation in United States Courts. . . . Delay in any court results in injustice.

It makes lawsuits a luxury available only to the few who can afford them or who have property interests to protect which are sufficiently large to repay the cost. Poorer litigants are compelled to abandon valuable rights or to accept inadequate or unjust settlements because of sheer inability to finance or to await the end of a long litigation. Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do. . . .

[C]an it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 percent of the cases presented to it by private litigants? . . .

The modern tasks of judges call for the use of full energies. Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business. A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.

We have recognized this truth in the civil service of the nation and of many states by compelling retirement on pay at the age of seventy. We have recognized it in

the Army and Navy by retiring officers at the age of sixty-four. A number of states have recognized it by providing in their constitutions for compulsory retirement of aged judges.

Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments: it was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world. . . .

I, therefore, earnestly recommend that the necessity of an increase in the number of judges be supplied by legislation providing for the appointment of additional judges in all federal courts, without exception, where there are incumbent judges of retirement age who do not choose to retire or to resign. . . .

These proposals do not raise any issue of constitutional law. They do not suggest any form of compulsory retirement for incumbent judges. Indeed, those who have reached the retirement age, but desire to continue their judicial work, would be able to do so under less physical and mental strain and would be able to play a useful part in relieving the growing congestion in the business of our courts. . . .

One further matter requires immediate attention. We have witnessed the spectacle of conflicting decisions in both trial and appellate courts on the constitutionality of every form of important legislation. Such a welter of uncomposed differences of judicial opinion has brought the law, the courts, and, indeed, the entire administration of justice dangerously near to disrepute.

A federal statute is held legal by one judge in one district; it is simultaneously held illegal by another judge in another district. . . . Thus rights fully accorded to one group of citizens may be denied to others. As a practical matter this means that for periods running as long as one year or two years or three years—until final determination can be made by the Supreme Court—the law loses its most indispensable element—equality. . . .

Now, as an immediate step, I recommend that the Congress provide that no decision, injunction, judgment or decree on any constitutional question be promulgated by any federal court without previous and ample notice to the Attorney General and an opportunity for the United States to present evidence and be heard. This is to prevent court action on the constitutionality of Acts of the Congress in suits between private individuals, where the Government is not a party to the suit, without giving opportunity to the Government of the United States to defend the law of the land. . . .

The Draft of the Proposed Bill follows:

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That:

(a) When any judge of a court of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy years and has held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and within six months thereafter has neither resigned nor retired, the President, for each such judge who has not so resigned or retired, shall nominate, and by and with the advice and consent of the Senate, shall appoint one additional judge to the court to which the former is commissioned. Provided, That no additional judge shall be appointed hereunder if the judge who is of retirement age dies, resigns or retires prior to the nomination of such additional judge.

(b) The number of judges of any court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. No more than fifty judges shall be appointed thereunder, nor shall any judge be so appointed if such appointment would result in (1) more than fifteen members of the Supreme Court of the United States, (2) more than two additional members so appointed to a circuit court of appeals, the Court of Claims, the United States Court of Customs and Patent Appeals, or the Customs Court, or (3) more than twice the number of judges now authorized to be appointed for any district or, in the case of judges appointed for more than one district, for any such group of districts. . . .

* * *

Changing U.S. Supreme Court Appointments: Law Professors' Proposed Judiciary Act of 2009

. . . Congress has given scant attention to the role and structure of the Third Branch since the days of the ill-advised "Court-packing" proposal of 1937. . . .

[A]ppointments to the Court are made so infrequently as to diminish the likelihood that the Court's many important policy decisions will reflect the moral and political values of the contemporary citizens they govern.

The first reform . . . provides for regular biennial appointments of new Justices selected by the then sitting President and Senate in order to assure timely rotation within the membership of the Court. To assure a Court of nine Justices, this will require a modification of the duties of Justices who have remained on the Court for more than eighteen years. . . . [W]e see no serious constitutional problem in legislating

regularized appointments with diminished but continuing roles for those Justices holding office for very long terms.

Almost everywhere high court judges are subject to term or age limits that prevent the risk of superannuation. Our proposal is not a term limit but a system of rotation to assure some regularity of change in the composition of the Court. If necessary to meet the constitutional objection, the allocation and assignment of duties when there are more than nine active Justices could be left for the Justices themselves to resolve by a rule of court. . . .

Our specific proposal is:

. . . The Supreme Court shall generally sit as a Court of nine Justices but if necessary six Justices shall constitute a quorum. The Court may by rule authorize a single Justice to make provisional rulings when necessary. . . .

One Justice, and only one, shall be appointed during the first session of Congress after each federal election, unless during that Congress one or more appointments are required Each appointment shall become effective on August 1 of the year following the election. If an appointment under this section results in the availability of more than nine Justices, the nine who are junior in time of service shall sit to decide each appeal certified for its decision on the merits. . . .

If a retirement, death or removal of a Justice results in there being fewer than nine Justices, including Senior Justices, a new Justice or Chief Justice shall be appointed and considered as the Justice required to be appointed during that Congress, if that appointment has not already been made. If more than one such vacancy arises, any additional appointment will be considered as the Justice required to be appointed during the next Congress for which no appointment has yet been made. . . .

Cooper v. Berger

North Carolina General Court of Justice
Superior Court Division 18-CVS-9806 (2018)

[Superior Court Judges Bridges and Lock, as a majority of a three-judge panel issue the following order]: . . .

2. Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, . . . do not contend, nor do we otherwise conclude, that Plaintiff Governor Roy A. Cooper . . . lacks standing to

bring a separation of powers challenge in this case. Indeed, “if a sitting Governor lacks standing to maintain a separation-of-powers claim predicated on the theory that legislation impermissibly interferes with the authority constitutionally committed to the person holding that office, we have difficulty ascertaining who would ever have standing to assert such a claim.” . . .

13. On June 28, 2018, the General Assembly [of North Carolina] enacted . . . Session Law 2018-118, [which] . . . contains the text of proposed amendments to the North Carolina Constitution. . . . [The] Session Law also contains the language to be included on the 2018 general election ballot submitting the proposed amendments to the qualified voters of our State. . . .

25. Section 6 of S.L. 2018-118 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-5 of S.L. 2018-118 to the qualified voters of our State. The “question to be used in the voting systems and ballots” is required by S.L. 2018-118 to read as follows:

[] FOR [] AGAINST

Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections. . . .

36. [T]he North Carolina Constitution make[s] plain . . . [first, that] the power to govern in this State, including the power to write, revise, or abolish the Constitution is vested in the **people** of this State, founded upon the **will of the people**; second, the General Assembly may initiate a proposal for one or more amendments to the Constitution, by adopting an act submitting the proposal to the voters. The General Assembly has exclusive authority to determine the time and manner in which the proposal is submitted to the voters, but ultimately the issue must be submitted to the voters for ratification or rejection, whereupon the will of the people, expressed through their votes, will determine whether or not the proposal becomes law. . . .

43. . . . [The North Carolina Supreme Court has] said: “In elections of this character great particularity should be required in the notice in order that the voters may be *fully informed of the question they are called upon to decide*. . . . [E]ven where there is no direction as to the form in which the question is submitted to the voters, it is essential that it be stated in such manner to enable them *intelligently to express their opinion upon it*.” . . .

57. Governor Cooper . . . complain[s] that this ballot language is misleading in saying that the amendment implements a “nonpartisan merit-based system” that instead of relying on “political influence” relies on “professional qualifications.” A majority of this panel agrees and finds that the language in this Ballot Question

misleads and does not sufficiently inform the voters. . . . [T]he ballot language in 2018-118 does not sufficiently inform the voters and is not stated in such manner to enable them intelligently to express their opinion upon it. In particular:

. . . The ballot language indicates that the nonpartisan merit-based system will rely on “professional qualifications” rather than “political influence.” The Amendment requires only that the commission screen and valuate each nominee without regard to the nominee’s partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified, as prescribed by law. Aside from partisan affiliation, there is no limitation or control on political influence; the nominees are categorized only as qualified or not qualified rather than being rated or ranked in any order of qualification and the General Assembly is not required to consider any criteria other than choosing nominees found “qualified” by the Commission. . . .

The Amendment makes substantial change to appointment powers of the Governor in filling judicial vacancies, but no mention is made of the Governor in the ballot language. . . .

59. We find that irreparable harm will result . . . if the Ballot Language included in . . . S.L. 2018-118 is used in placing these respective proposed constitutional amendments on a ballot, in that we conclude beyond a reasonable doubt that such language does not meet the requirements under the North Carolina Constitution for submission of the issues to the will of the people by providing sufficient notice so that the voters may be fully informed of the question they are called upon to decide and in a manner to enable them intelligently to express their opinion upon it. . . .

* * *

Indira Gandhi served as Prime Minister of India from 1966 to 1977. During this period Gandhi was accused of rewarding certain judges with powerful positions—including appointing a Chief Justice to the Supreme Court that, contrary to tradition, bypassed more senior candidates. The government also transferred state high court judges who ruled contrary to the government’s wishes from their home high courts to the high courts of other states. Tensions came to a head during the 21-month state of emergency between 1975 and 1977, during which civil liberties were suspended, political opposition suppressed, and the Prime Minister empowered to rule by decree.

Popular anger at “the Emergency” led to Prime Minister Gandhi’s temporary ouster in 1977, but she was again elected in 1980. In 1981, a lawsuit was filed during the period of uncertainty that accompanied Gandhi’s return to power, amid concern that she might resume an autocratic mode of governance. *S.P. Gupta v. Union of India* (1981) challenged the federal government’s practice of transferring judges

between the Indian high courts (apex courts at the state level) without obtaining consent from the judges and the government's asserted authority to override the Chief Justice of India's recommendations on judicial appointments to the high courts and Supreme Court. The Court found that the transfer policy was a valid exercise of government power—even if the judges did not agree to be transferred. Similarly, the Court held that the power to appoint judges ultimately lay in the hands of the executive, while the Chief Justice was to play a non-binding, advisory role in the process.

S.P. Gupta was the first in a trio of cases known as the “Three Judges Cases.” In the second case, *Supreme Court Advocates v. Union of India* (1993), the Indian Supreme Court revised its ruling in *Gupta* and instituted a “collegium” system, whereby primary authority in making appointments to the high courts and Supreme Court rests with a panel of five judges led by the Chief Justice. Although the Court ruled in favor of the government in *Gupta*, the judgment is recognized as laying the foundation for more assertive statements of independence in the subsequent years.

Forcing Retirement

Schiffrin v. National Executive Power

Supreme Court of Argentina

CSJ 159/2012 (48-S)/CS1 (2017)*

In Argentina, prior to the 1994 constitutional amendment, judges were appointed for life in accordance with the National Constitution. Law 24,309 governed the scope of the 1994 amendment process. The law did not open Section 96 of the Constitution for amendment, which read: “The Justices of the Supreme Court and the judges of lower courts shall hold their offices during good behavior, and shall receive for their services payment to be ascertained by law which shall not be diminished in any way while holding office.”

However, in 1994 the Constitutional Convention added a new paragraph to Section 99** of the National Constitution, which regulated the judicial appointment process. The new paragraph stated: “Once they have attained the age of seventy-five

* English summary provided by Justice Carlos Rosenkrantz.

** Section 99, sub-section 4 of the National Constitution of Argentina provides:

The President of the Nation has the following powers:

He appoints the justices of the Supreme Court with the consent of the Senate by two-thirds of its present members, in a public meeting called to this effect. He appoints judges of the lower federal courts according to a binding proposal of a list of three candidates . . . with the consent of the Senate in a public meeting . . .

years, a new appointment, with the same consent shall be necessary to continue in office. Judges of that age or older shall be appointed for five years and may be indefinitely re-appointed by this same procedure.” In 1999, the Supreme Court of Argentina held in a case called “Fayt” that the amended Section 99 was “null and void” because it fell outside the scope of the Convention’s authority to amend the Constitution.

On March 28th, 2017, the Supreme Court of Argentina (Justices Lorenzetti, Maqueda and Rosatti writing for the majority) overturned “Fayt” by holding that the Constitutional Convention had the legal power to reduce the length of tenure of federal judges, including Supreme Court justices. Finding the amended Section 99 valid, the majority held that “Fayt” should be replaced with a broader interpretation of the powers of the Constitutional Convention. The majority read Law 24,309 as authorizing the Constitutional Convention to update the powers of the Congress and the Executive Branch, including the appointment process of federal judges. Consequently, Justices Lorenzetti, Maqueda and Rosatti concluded that the constitutional amendment at issue had respected, on one hand, the limits established by the Congress, and on the other hand, the principle of judicial independence. According to the majority, the Court should defer to the Constitutional Convention given its high degree of legitimacy and representativeness.

Justice Rosenkrantz dissented on the grounds that the Constitutional Convention had acted in excess of its competence in violation of the Constitution. Justice Rosenkrantz argued that Law 24,309 did not permit the Constitutional Convention to reduce the length of tenure of federal judges. In his view, Congress had only authorized the Convention to amend the appointment process of judges, but not to alter the length of judicial terms of office, which were established in a provision that had not been opened to amendment. Justice Rosenkrantz explained that the rules governing the constitutional amendment process were of crucial importance since they determined the endurance, if any, of the constitutional system of rights and duties, as well as the form of government adopted in the National Constitution. According to Justice Rosenkrantz, allowing the Constitutional Convention to regulate issues that were not previously foreseen in the provision whose amendment was authorized would be extremely dangerous as it would free the Convention from all the controls, limits, and reassurances established by the Constitution and the Congress. As a result, it would be impossible to prevent elected members of the Constitutional Convention from introducing topics in accordance with their personal preferences that were not previously agreed to be subject to amendment. Justice Rosenkrantz stated that a limited interpretation of the powers of the Constitutional Convention was the only one that ensures the effective sovereignty of the people of the nation. He also contended that in cases where the validity of a constitutional reform is at stake, judges needed to be particularly consistent over time. He added that for more than twenty years all constituted authorities, regardless of their political views, had abided by the “Fayt” ruling.

Abrahamson v. Neitzel

U.S. District Court for the Western District of Wisconsin
120 F. Supp. 3d 905 (W.D. Wis. 2015)

James D. Peterson, District Judge.

The Wisconsin Supreme Court, once a sterling example among state supreme courts, has hit a long rough patch, and it has become notorious for the fractiousness of its members. With that history as a backdrop, the state legislature in 2013 started the process of amending the state constitution to change the method of selecting the chief justice, from seniority to election by a majority of the sitting justices. Ratification of that amendment was completed on April 7, 2015, when it was approved in a state-wide referendum. The day after the referendum, then-Chief Justice Shirley Abrahamson, with five citizens who had voted for her re-election in 2009, filed this lawsuit.

Plaintiffs do not challenge the amendment itself. They concede, as they must, that Wisconsin has the power to change the manner of selecting its chief justice. Nor do they challenge that the amendment was duly ratified according to the process established in the Wisconsin Constitution. Rather, plaintiffs seek only an interpretation of the amendment, under which the amendment would not be implemented until the next vacancy in the position of chief justice, which is to say when Abrahamson leaves the position. Plaintiffs contend that their interpretation is justified not only because it is a sound interpretation of the amendment under Wisconsin law, but because a contrary interpretation would run afoul of the United States Constitution, which protects plaintiffs' rights to due process and equal protection.

The interpretation of an amendment to the Wisconsin Constitution is a matter for the state courts of Wisconsin. This federal court does not have to guess what that interpretation would be, because on April 29, 2015, the day that the referendum was certified, four justices voted to elect Justice Roggensack as the new chief. But the federal constitutional issues remain for this court to resolve.

Plaintiffs press a theory grounded in well-established principles, but novel in their application to the situation at hand. . . . [P]laintiffs contend that if Wisconsin wanted to change the manner of selecting its chief justice immediately, so that it would deprive Abrahamson of the position before her term as chief was over, Wisconsin needed to do so with an amendment of utter clarity. Otherwise, the voters did not truly understand what they were voting for, and Abrahamson did not have sufficient notice that her position as chief was on the line. The court is not persuaded by plaintiffs' case Constitutional provisions are drawn with broad strokes. There is no requirement that a state, in restructuring its government or the powers and duties of its officials by means of a constitutional amendment, do so with super-clarity to protect the interests of the officials or voters whose interests might be impaired. Unless its actions are plainly unconstitutional, Wisconsin has the authority and

autonomy to restructure its government without interference from the federal government.

The court concludes that Wisconsin's new method of selecting its chief justice was effective on April 29, 2015, when the referendum was certified, and that the Wisconsin Supreme Court was authorized to implement that method and to elect a new chief justice on that day. Defendants are entitled to summary judgment; plaintiffs' case is dismissed. . . .

* * *

In 2018, the Court of Justice of the European Union (CJEU) issued an order of interim measures against Poland. The CJEU rarely issues interim measures, but the Polish case was distinct for two reasons. First, only a few years earlier in Hungary, judicial retirement and removal had been accomplished while a case challenging the Hungarian retirement age law was pending before the CJEU. Second, along with the European Commission, to whose application the CJEU's response was directed, the judges who would be affected by the lowered retirement age also sent a reference to the European Court asking if they would be obliged to comply with the Polish law in question.

European Commission v. Republic of Poland
Court of Justice of the European Union
Case No. C-619/18 (2018)

The President of the Court, after hearing the Judge-Rapporteur, A. Prechal, and the Advocate General, E. Tanchev, makes the following Order:

1. . . . [T]he European Commission requests that the Court declare that, on the one hand, by lowering the retirement age of the judges appointed to the Sąd Najwyższy (Supreme Court, Poland) . . . and, on the other, by granting the President of the Republic of Poland the discretion to extend the period of judicial activity of judges of that court, the Republic of Poland has failed to fulfil its obligations under the combined provisions of the second subparagraph Article 19(1)* TEU and Article 47** of the Charter of Fundamental Rights of the European Union. . . .

* Article 19(1) of the Treaty on European Union provides:

The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of Treaties, the law is observed.

** Article 47 of the Charter of Fundamental Rights of the European Union provides:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

3. . . . Article 37 of the Law on the Supreme Court [provides that] the retirement age of judges at the Sąd Najwyższy . . . has been lowered to 65 years. The reduction in the retirement age applies to all judges at that court, including those appointed before the entry into force of that law.

4. Extension of the period of judicial activity of the judges of the Sąd Najwyższy . . . beyond the age of 65 years is subject to the presentation by those judges of a declaration stating their wish to continue to carry out their duties and a certificate stating that their state of health allows them to do so, together with authorisation from the President of the Republic of Poland. Article 37 of the Law on the Supreme Court governs that extension.

5. . . . Article 111(1) of the Law on the Supreme Court [provides that] judges of the Sąd Najwyższy . . . who have reached 65 years of age at the date of entry into force of that law, or by 3 July 2018 at the latest, retire on 4 July 2018, unless they have presented . . . the declaration and certificate . . . and provided that the President of the Republic of Poland has authorised the extension Article 5 of the . . . Law amending the Law on the organisation of the common law courts, the Law on the Supreme Court and certain other laws . . . contains independent provisions governing the procedure for extending the period of judicial activity of the judges of the Sąd Najwyższy . . . who have reached retirement age on or before 3 July 2018. . . .

8. . . . [W]hen taking his decision on the extension of the period of judicial activity of the judges of the Sąd Najwyższy . . . , the President of the Republic of Poland is not bound by any criteria and his decision is not open to review by the courts.

9. . . . [T]he Law on the Supreme Court leaves the President of the Republic of Poland free to decide, until 3 April 2019, to increase the number of judges of the Sąd Najwyższy

11. By order of 19 October 2018, the Vice-President of [this] Court . . . ordered that Member State . . . :

- to suspend application of . . . the Law on the Supreme Court, of Article 5 of the [law on the organization of the common law courts] . . . and of all other measures adopted in application of those provisions;
- to adopt all necessary measures to ensure that the judges of the Sąd Najwyższy . . . affected by those provisions may carry out their duties

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

in the same post while benefiting from the same staff regulations, the same rights and employment conditions as those under which they were employed until . . . the date of entry into force of the Law on the Supreme Court;

– to refrain from any measure appointing judges to the Sąd Najwyższy . . . in the place of those affected by the provisions . . . and any measure to appoint the new First President of that court or to indicate the person responsible for leading that court in the place of its First President . . .

– to communicate to the Commission . . . details of all the measures which it has adopted in order to comply fully with this order. . . .

15. . . . [T]he Commission submits that the complaints which it raises . . . are such as to give rise to legal uncertainty and to hinder the proper functioning of the EU legal order, so that it is necessary quickly to rule on the dispute in order to limit that period of uncertainty so far as possible.

16. On the one hand, . . . the national supreme courts play a central role in the system for the application of EU law. Any doubts as to the compliance with the guarantees of independence as regards those courts are such as to prevent them fully from playing that role. On the other, such doubts are also likely to undermine the mutual trust between the Member States and their respective courts, necessary for the principle of mutual recognition, which plays an essential role in connection with many legal acts of the European Union concerning the area of freedom, security and justice, to function. . . .

21. . . . [T]he requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.

22. In addition, the uncertainties thus surrounding the disputed national provisions are also liable to have an effect on the working of the system of judicial cooperation embodied by the preliminary ruling mechanism provided for in Article 267 TFEU, the keystone of the EU judicial system, for which the independence of the national courts, and particularly those ruling at last instance, is essential (see, to that effect, . . . judgment of 27 February 2018, Associação Sindical dos Juizes Portugueses).

* * *

In April of 2019, Advocate General Tanchev issued his opinion on the merits:

. . . 71. Recently, the European Court of Human Rights reiterated the circumstances in which removal of a judge from office violates the independence and impartiality of a judge under Article 6(1) of the ECHR. The objective element of impartiality protected by that article requires objective assessment of whether the tribunal itself, and among other aspects its composition, offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. Appearances are of a certain importance, so that “justice must not only be done, it must also be seen to be done.” What is at stake is the confidence which courts in a democratic society must inspire in the public. . . .

72. The irremovability of judges, along with security of tenure, are also recognised as fundamental guarantees of judicial independence in guidelines issued by European and international bodies relating to judicial independence. In particular, judges should have a guaranteed tenure until a mandatory retirement age or the expiry of their term of office, and can be subject to suspension or removal from office in individual cases only for reasons of incapacity or behaviour rendering them unfit for office. Early retirement should be possible only at the request of the judge concerned or on medical grounds, and any changes to the obligatory retirement age must not have retroactive effect.

73. In the present case, the Commission has sufficiently demonstrated that the contested measures violate the principle of irremovability of judges, whose observance is necessary to meet the requirements of effective judicial protection under the second subparagraph of Article 19(1) TEU. . . .

99. . . . I propose that the Court should: declare that by lowering the retirement age of the judges of the Supreme Court and applying it to judges appointed to that court before 3 April 2018, and by granting the President of the Republic the discretion to extend the period of judicial activity of Supreme Court judges, the Republic of Poland failed to fulfil its obligations under the . . . TEU

Constitutional Court and Politics: The Polish Crisis

Lech Garlicki (2019)* [Part I]

The Constitutional Court of Poland is more than 30 years old. It was created in 1982–1986, still under the Communist system, even if that system had then already reached a final stage of decline. . . .

[T]he evolution of constitutional adjudication in Poland has often been regarded as a quite successful story. . . . [T]he Court’s success was but a manifestation

* Excerpted from Lech Garlicki, *Constitutional Court and Politics: The Polish Crisis*, in JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS 141 (Christine Landfried ed. 2019).

of the general success of Polish transformation, of the transformation of economic and social fabric of the society. The development of constitutional adjudication in Poland may be organized into three basic periods: 1982-1989: from the enactment of the constitutional amendment that provided for the creation of the Constitutional Court till the elections of 1989 that marked the end of the Communist regime; 1989-1997: from the beginning of the democratic transformation till the enactment of the new Constitution of Poland that entered into life on October 17, 1997; and 1997-2015: when the Court has been operating under the new constitution.

It seems that the end of 2015 marks the beginning of a new dramatic period in which, for the first time in the Court's history, it was confronted with the crisis of a systemic nature. . . . [From 1997-2005], the Court was able to reconfirm its position and to develop into an obvious component of the new constitutional system. Its case law was, to a considerable extent, concentrated on fundamental rights, but it addressed also several institutional matters, particularly as concerned the judicial independence and the local government autonomy. The Court managed to act as an integrated body and to avoid "head-on collisions" with the political branches of government.

The situation became less comfortable after the 2005 parliamentary elections when the new majority of the Law and Justice Party (LaJ) launched a new project that drastically differed from the hitherto established patterns. The political conflict soon expanded into the area of constitutional interpretation and, as neither the Constitutional Courts nor other supreme courts were ready to yield, it culminated in attacks on the judicial branch. It was only in the fall of 2007 when new elections restored the previous, more moderate, parliamentary majority.

This was a good opportunity to put in motion the "insurance function" of constitutional adjudication. The Court emerged from the crisis with a strengthened authority. On the one hand, due to its courage and persistence, the leading lines of the case law remained intact. On the other hand, the Court demonstrated its ability to act as a check against projects and practices uniformly supported by the political branches of government. Although this success was not without price, it confirmed the legitimacy of the Court. . . .

In 2015, presidential and parliamentary elections resulted in an entirely new political situation. The LaJ achieved an overwhelming victory allowing it to control the Parliament, cabinet, and presidency. It soon transpired that the new majority openly supported a systemic change in the system of government. As the LaJ Party did not reach constitutional majority, its actions had to be limited to legislative changes and new political practices. Inevitably, it had to produce a head-on confrontation with the Constitutional Court.

Theoretically, the Court should remain safe, at least for the immediate future. Its status and jurisdiction were regulated by the constitution, so could not be modified but by a constitutional amendment. Furthermore, the constitution provided that the

constitutional judges are appointed for nine years and cannot be removed by any political branch of government. The nine-years-term, combined with the parliamentary appointment of judges, was meant to serve as a check on concentration of political power: in principle, judges appointed by the outgoing Parliament should continue during at least one subsequent legislature. . . .

The first stage of the crisis was related to unsuccessful attempts to “pack” the Court with new judges. By a sheer coincidence, the term of office of five (out of 15) judges of the Constitutional Court was scheduled to elapse at the end of 2015: on November 5 (three judges) and in early December (two judges).

In June 2015, . . . the parliamentary majority could not resist the temptation to take care of all five vacancies in the Court. Accordingly, the new CCAct [Constitutional Court Act] modified the existing deadlines and five new judges were appointed on October 8. While three of them could assume their seats before the end of the Parliament’s term, the mandate of two others would begin only in December well after the start of the new Parliament.

This gave rise to a sequence of political and legislative moves, of—at best—a dubious compatibility with the constitution. The president of the Republic refused to administer the oath of office in respect to all five judges. The Parliament, in an unprecedented move, declared that all five October appointments had been invalid and appointed five new judges immediately sworn in by the president of the Republic.

These decisions were challenged by the opposition. The Constitutional Court, in the judgment of December 3, 2015, . . . examined the constitutionality of the provisions of the 2015 CCAct and held that appointments to the Court should be made by the Parliament that sits when the term of office of the departing judge has elapsed. It meant that, while three October appointments should be considered valid and effective, the other two had been defective. In another decision, the Court refused to review the validity of individual appointments, arguing that its jurisdiction is limited to review of legal regulations and does not extend to individual measures.

The president of the Republic declined to comply with the judgment K 34/15 and maintained (together with the ruling majority) that all new appointments had been validly made by the Parliament. Nevertheless, the president of the Court decided that only two “new” judges who had filled the vacancies arising only in December can assume their office and refused to accept appointments of the remaining three “new” judges.

The net result of this confrontation was that the Court was composed only of 12 judges of uncontested mandate, whereas the three seats were claimed by two packs of three judges—“old” and “new” ones. As the three “new” judges were not allowed to sit by the president of the Court, the political branches of government began to contest the legitimacy of the actual composition of the Court and—very soon—this

was extended to attacks on the legitimacy of the Court (and—on [the] validity of its judgments).

The “court-packing plan” was, therefore, unsuccessful on both sides: The outgoing majority was unable to secure effectivity of their appointments and the new majority was able to get only two judges of uncontested status. At the same time, it became clear that there was a strong majority of judges who were not ready to yield to constitutional interpretations defended by the LaJ Party. This opened the second stage of confrontation. Now, the ruling majority decided to attack the Court’s procedural capacity to operate.

On December 15, 2015, a group of Law and Justice MPs initiated a bill amending several provisions of the CCAct The December Amendment provided, in particular, that (1) almost all cases decided in the procedure of so-called abstract review shall be heard and decided by the plenary composition of the Court (under the Act of June 25, 2015 as well as under the two previous CCActs, such cases could also be decided by panels of five judges); (2) the plenary composition of the Court may sit only if at least 13 (out of 15) judges are present—all previous CCActs set this limit at nine; (3) the plenary composition shall adopt all judgments and decisions by the majority of the two-third of judges participating (the previous acts require the absolute majority of participating judges); and (4) the plenary composition shall hear cases according to the sequence of their arrival and is not allowed to give priority to any case. . . .

The government’s position did not have any backing in the constitution but was, nevertheless, maintained in the subsequent months. This magnified the crisis well beyond its original confines. The uncertainty concerning the personal composition of the Court was now extended to its ability to decide cases and to the legal authority of its judgments. . . .

The spring scenario was, therefore, repeated almost without variations as all subsequent judgments of Court were regarded as irregular and remained unpublished. In the political dimension, the Court and its judges were a target of constant attacks, intimidation, and harassment.

These moves did not remain totally unsuccessful. The Court was getting tired of the ongoing confrontation, the term of office of some judges (including its president) was approaching the end, and the general political situation in Poland showed more and more features of a “stabilized backsliding” from the rule of law. In brief, it began to transpire that very soon the Court may lose its will and ability to resist the political pressure. . . .

The confrontation between the Court and political branches of government created a particular situation of “dualism.” Two parallel interpretations emerged with regard to the composition of the Court, its ability to operate, and the authority of its

judgments. On the one hand, the Court (with support of the remaining segments of the judicial branch) claimed constitutional empowerment to continue its operations and rejected parliamentary interventions into its procedure and personal composition. On the other hand, the political branches of government supported an opposite interpretation, maintaining that, so long as all new judges and all procedural deformations have not been accepted by the Court, its judgments could not be treated as binding. . . .

[T]he Court's obstinacy allowed it to save its constitutional and political legitimacy (its position being also supported by both the European Union Commission and the Venice Commission). In other words, the Court managed to demonstrate that it was able to act in an extremely unfriendly environment and to resist attempts of political absorption. But, at the same time, the number of cases decreased in a visible manner and judgments of political importance became practically limited to regulations concerning the Court. It meant that the new majority appeared quite successful in neutralizing the Court's potential to review other reforms effectuated since the 2015 elections. In other words, the "insurance function" was exercised only to a limited extent.

A combination of four factors became characteristic for the 2017 Court: return to procedural arrangements preceding the crisis, significant changes in the personal composition of the Court, a new composition and style of the Court's leadership, and a new style of the judicial decisions. . . .

[Two] acts of November 30, 2016, removed most of the "disabling" procedural provisions adopted previously by the new Parliament. In other words, they restored a satisfactory framework for the constitutional adjudication. What remains to be seen, however, is how this framework would be used by the "new" Court, particularly in protecting its independence and political impartiality. . . .

As regards the presidency of the Court, the style of leadership changed considerably. It seems to be less oriented toward continuation, the validity of some judgments adopted in 2016 is no longer recognized, there are problems with harmonious cooperation with other judicial institutions, and radical—institutional and personal—changes took place in the Court's Registry. . . . [T]he number of cases decided on the merits diminished: In 2017, the Court adopted 32 judgments. At the same time, there was a certain increase of the number of cases that were found inadmissible due to the procedural reasons. . . .

Furthermore, it seems that the Court is more deferential to new legislative measures, although only a handful of such cases have been decided until now. At the same time, the Court decided several cases addressing some pending political controversies, particularly in regard to the position of the judicial branch and attempts of its reform. As [is] easy to guess, in none of them did the Court's judgments collide with interpretations defended by the political branches of government. . . .

The key to a reasonable solution remains in the hands of the political world. At the same time, however, the present institutional and procedural arrangements allow the Court to act independently and in bona fide manner. It means that the definition of its ultimate role within the system of “checks and balances” lies also within the responsibility of the Court, its presidents, and its judges. . . .

**The Fragility of an Independent Judiciary:
Lessons from Hungary and Poland—and the European Union**
Kriszta Kovács and Kim Lane Scheppele (2018)*

[In Hungary,] the Fidesz-Christian Democratic coalition won a landslide victory in the general elections in 2010, which opened the way for a profound shift in the direction of the state The lightly entrenched 1989 democratic constitution . . . could be amended by a single two-thirds vote of the Parliament, and the new government . . . had 68 per cent of the seats. . . . One year into its term, . . . [Fidesz] adopted a wholly new constitution without the support of any other party. This new “Fundamental Law,” as it was called, signaled that the constitutional transformation had begun. . . .

Previously, the judiciary and the Constitutional Court were the institutions that served as main checks on the power of governmental majorities. . . . But immediately after its election in 2010, the Fidesz government attacked the independence and the competencies of the Constitutional Court. First, an early constitutional amendment of July 5, 2010 changed the selection procedure for the justices of the Constitutional Court and the election rules for the Court’s President. Since then, the President of the Court has been elected by a two-third vote of the Parliament while Constitutional Court judges have been nominated by a parliamentary committee that the governing party dominates, followed by a two-thirds vote of the Parliament. Thus, only governing party votes are needed to select new judges. Later, through another constitutional amendment, the parliamentary majority . . . changed the number of judges on the Constitutional Court from 11 to 15 By spring 2013, the Constitutional Court was effectively neutralized as a check on government because the governing coalition had named a majority of the judges who in turn refused to nullify almost any law that the government supported. . . .

The Fourth Amendment, which marked the final capture of the Constitutional Court by the governing coalition, also nullified the entire case law of the Constitutional Court from . . . before the enactment of the new constitution The Fourth Amendment also inserted directly into the constitution nearly all of the legal provisions that the once-independent Constitutional Court had found unconstitutional after the Fidesz government took office. . . . [T]he Fourth Amendment also prevented

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the Court from reviewing all constitutional amendments for their compliance with the basic principles of the Fundamental Law. . . .

The Fundamental Law [also] abolished the primary vehicle for constitutional challenges before that time: the *actio popularis* petition, through which anyone could turn to the Constitutional Court to request review of the constitutionality of laws. . . .

The ordinary judiciary has been attacked as well. . . . Act CLXII/2011 on the Status and Remuneration of Judges . . . lowered the age-limit for compulsory retirement from 70 to 62–65 years according to a graduated system depending on the date of birth of judges. The vast majority of senior judges—between 10 and 15% of all judges in the country, and disproportionately including judges in the leadership of the courts—were forced to leave the bench almost immediately. . . .

At the same time . . . a unique system of judicial administration . . . was introduced through . . . the creation of a new National Judicial Office. The president of the new National Judicial Office has . . . complete discretionary power to promote and demote judges as well as to transfer and reassign them, and she has a role in initiating and organizing judicial discipline. . . .

After the ruling coalition regained its two-thirds majority in the 2018 general election, it almost immediately pushed through the Parliament yet another amendment The Seventh Amendment to the Fundamental Law passed in July 2018 now permits the creation of a wholly separate public administration court system, including an Administrative Supreme Court that is separate from other public courts but with the same legal status as the Kúria. . . .

As these attacks on the independence of the judiciary continued over eight long years, some of the European Union institutions took note, made repeated criticisms, but ultimately did not succeed in altering the course of events substantially. . . .

Discipline and Removal

Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador

Inter-American Court of Human Rights

Inter. Amer. Ct. H.R. (ser. C) No. 268 (2013)

[In 1998 Ecuador promulgated a new constitution, which included the creation of a Constitutional Tribunal composed of nine members (and nine alternates) appointed by the National Congress for a renewable term of four years. In 2003, the Congress selected new members of the Tribunal through a method called “single-list” voting, in which proposed candidates were voted on together rather than individually.

In 2004, members of the opposition political party planned to impeach the President of Ecuador for embezzlement. The President was able to form a coalition, including joining with the party of a former Ecuadorian president who was at the time a fugitive in Panama. This new coalition formed a majority in Congress and, along with ending the impeachment process, issued plans to reorganize the judiciary.

The National Congress then passed a resolution stating that the 2003 seating of the Constitutional Tribunal members had been illegal and terminated their terms of office. All eighteen members of the Tribunal were removed from office. At the same time, legislators moved to impeach the removed Tribunal members on the grounds that they had decided certain high-profile cases incorrectly. Their motions did not pass. Four days later, the Congress re-opened the impeachment process without notifying the Tribunal members and issued six letters of censure against the removed judges. The next day, newly appointed members of the Tribunal issued a declaration that the regular courts were not permitted to hear cases regarding the removal of the previous Tribunal members. The government also removed all members of the Supreme Electoral Tribunal and the Supreme Court of Justice. Soon thereafter, the new justices of the Supreme Court of Justice held that all charges against the previous and sitting presidents of Ecuador were void.

This chain of events led to a political crisis and mass demonstrations in Quito. After a period of institutional instability, in which Ecuador was without a Supreme Court for over seven months, a new constitution entered into force in 2008. The new constitution created a Constitutional Court, whose members were not subject to impeachment. In 2013, nearly a decade after the Constitutional Tribunal members were removed, the Inter-American Court of Human Rights issued the following judgment finding that Ecuador had acted in violation of the American Convention on Human Rights.

The Court, composed of the following judges: President Diego García-Sayán, Vice President Manuel E. Ventura Robles, and Judges Alberto Pérez Pérez, Eduardo Vio Grossi, Roberto F. Caldas, Humberto Antonio Serra Porto, and Eduardo Ferrer MacGregor Poisot, issued the following judgment:] . . .

171. Article 8(1)* of the Convention guarantees that the decision in which the rights of the individual are determined must be adopted by the competent authorities determined by domestic law. In this case, the termination of the judges entailed a determination of their rights in the sense that the consequence of this termination was their immediate removal from office, so that the judicial guarantees established in Article 8(1) of the American Convention are applicable. . . .

* Article 8 of the American Convention on Human Rights provides:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. . . .

172. The Court . . . [must] determine whether this removal from office falls within any of the permitted circumstances [under Ecuadorian law]; in other words, completion of the term of office or for serious disciplinary offenses. . . . [T]he main reason stated in the resolution was that “the permanent members of the Constitutional Tribunal and their alternates were appointed illegally”

174. Even though the “single-list” voting mechanism was not to be found explicitly in Ecuador’s domestic laws, no evidence was provided to the Court on any type of legislative, administrative or judicial action that was filed to contest or to regulate the scope and admissibility of the “single-list” voting mechanism, following the appoint of the members of the Constitutional Tribunal on March 19, 2003, until the time of the political crisis towards the end of 2004. If Congress considered that the appointment had been made irregularly, it should not have waited more than a year and a half to rectify this irregularity. . . .

176. [T]he only way in which it was possible to terminate the Constitutional Tribunal was by an impeachment proceeding

179. . . . [A]llowing the possibility of reversing an appointment of the highest court on constitutional matters to subsist for more than 18 months . . . affects the guarantee of stability in office and can permit the emergence of external pressures, aspects directly related to judicial independence. In circumstances such as those of the instant case, this would mean legitimating the permanence of the members of a high court in legal uncertainty regarding the legality of their appointment, and could result in a constant threat of the possibility of being removed from their functions at any time, an aspect that, in certain political contexts, increases the risk of undue external pressure on the exercise of the judicial function.

180. . . . [T]he National Congress was not competent to take the decision to terminate the judges, and this was not an appropriate decision in light of the principles of judicial independence

188. . . . According to the case law of this Court and of the European Court of Human Rights, as well as according to the United Nations Basic Principles on the Independence of the Judiciary, the following guarantees are required for judicial independence: an appropriate appointment procedure, tenure, and a guarantee against external pressure. . . .

198. . . . [T]he State must guarantee the autonomous exercise of the judicial function in both its institutional aspect, that is in relation to the Judiciary as a system, and also in relation to its individual aspect, that is, as regards the person of the specific judge. . . .

204. . . . [T]he purpose of an impeachment proceeding by the National Congress could not be the dismissal of a member of the Constitutional Tribunal based

on a review of the constitutionality or legality of the judgments adopted by that body. This is due to the separation of powers and the exclusive competence of the Constitutional Tribunal to review the formal and/or substantial constitutionality of the laws enacted by the National Congress. . . .

207. . . . [T]he collective termination of judges, particularly of high courts, constitutes an attack not only on judicial independence but also on the democratic order. . . .

211. . . . [A]t the time the termination of the judges occurred, Ecuador was experiencing a situation of political instability that had involved the removal of several Presidents and the amendment of the Constitution on several occasion[s] in order to deal with the political crisis. . . .

212. . . . [W]ithin a period of 14 days, not only the Constitutional Tribunal was removed, but also the Electoral Tribunal and the Supreme Court of Justice, which constitutes an abrupt and totally unacceptable course of action. All these acts signify an impairment of judicial independence. . . .

222. Consequently, the Court declares the violation of Article 8 . . . owing to the arbitrary termination and the impeachment proceedings that occurred

254. The Court orders the State to publish . . . (a) the official summary of the Judgment prepared by the Court, once, in the official gazette of Ecuador; (b) . . . in a national newspaper with widespread circulation, and (c) this Judgment in its entirety, available for one year, on an official website of the Judiciary. . . .

256. The [victims] asked that the State “reinstate the judges . . . in the same or a similar position to the one they held, with the same remuneration, social benefits, and rank comparable to the one they would hold today if they had not been removed arbitrarily,” and that “[i]f the State is able to prove that it is not possible to reinstate them for well-founded reasons, it must pay compensation to each of the victims . . . not . . . less than US\$60,000.” . . .

262. . . . [T]he 2008 amendment of Ecuador’s Constitution, as well as the subsequent restructuring of the Constitutional Court, . . . entailed important changes in matters such as the number, composition, and election of the members of the Constitutional Court. . . . [T]he members of the Constitutional Tribunal could only be appointed to another high court of the Judiciary, which makes their reinstatement difficult or even impossible. Consequently, . . . owing to the new constitutional circumstances, the difficulties to appoint the judges in the same position or one of a similar rank, as well as the new norms to protect the tenure of officials of the judicial career, the reinstatement of the judges would not be possible. . . .

264. . . . [I]n cases in which it is not possible to reinstate judges removed from their position arbitrarily, compensation should be ordered owing to the impossibility of reinstating them in their functions as judge. Therefore, the Court establishes the sum of US\$60,000.00, as a measure of compensation for each victim. . . .

288. . . . [T]he Court establishes the following amounts as pecuniary damages for the remuneration and social benefits that the judges ceased to receive over the period December 1, 2004, to March 23, 2007 [providing between US\$230,000 and US\$275,000 for each judge]

305. . . . [T]he termination of their functions, the dismissal by means of impeachment proceedings, and the way in which this occurred, caused non-pecuniary damage to the judges, which was manifested by symptoms such as the depression that some of them suffered or the feelings of shame and uncertainty. The judges also suffered non-pecuniary damage because they could not work as judges of the Judiciary, and receive a remuneration for their work that would allow the victims and their families to enjoy a similar way of life to the one they had before the termination and the impeachment proceedings. . . . Accordingly, the Court establishes, in equity, the sum of US\$5,000.00 for each victim

Partially Dissenting Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot

67. . . . I consider that the Judgment should have placed greater emphasis on the anti-democratic attack that the public authorities made on the Constitutional Tribunal in this case. Thus, even though the [Court] declared the violation of Article 8(1) of the American Convention, owing to the violation of the right to be heard and to the guarantee of competence to the detriment of the eight victims as a result of their arbitrary termination and the impeachment proceedings[,] it should also have analyzed the violation of Article 8 in greater depth, from the perspective of the safeguard that the inter-American system professes for the democratic rule of law and, in particular, the independence of the judges who ensure its functioning, and who make it resistant to the assault of the political authorities. . . .

Nixon v. United States
Supreme Court of the United States
506 U.S. 224 (1993)

Chief Justice Rehnquist delivered the opinion of the Court[, in which Justices Stevens, O'Connor, Scalia, Kennedy, and Thomas joined]. . . .

Petitioner Walter L. Nixon, Jr., asks this Court to decide whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, . . . [which] provides that the “Senate shall have the sole Power to try all Impeachments.” . . .

Nixon, a former Chief Judge of the United States District Court for the Southern District of Mississippi, was convicted by a jury of two counts of making false statements before a federal grand jury and sentenced to prison. . . . Because Nixon refused to resign from his office as a United States District Judge, he continued to collect his judicial salary while serving out his prison sentence. . . .

After the House presented the articles [of impeachment] to the Senate, the Senate voted to invoke its own Impeachment Rule XI The Senate voted by more than the constitutionally required two-thirds majority to convict Nixon The presiding officer then entered judgment removing Nixon from his office as United States District Judge.

Nixon thereafter commenced the present suit, arguing that Senate Rule XI violates the constitutional grant of authority to the Senate to “try” all impeachments because it prohibits the whole Senate from taking part in the evidentiary hearings. . . .

A controversy is nonjusticiable—*i.e.*, involves a political question—where there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. . . .”

In this case, we must examine Art. I, § 3, cl. 6 [of the United States Constitution, the Impeachment Clause], to determine the scope of authority conferred upon the Senate by the Framers regarding impeachment. It provides:

“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.”

The language and structure of this Clause are revealing. The first sentence is a grant of authority to the Senate, and the word “sole” indicates that this authority is reposed in the Senate and nowhere else. The next two sentences specify requirements to which the Senate proceedings shall conform: The Senate shall be on oath or affirmation, a two-thirds vote is required to convict, and when the President is tried the Chief Justice shall preside.

Petitioner argues that the word “try” in the first sentence imposes by implication an additional requirement on the Senate in that the proceedings must be in the nature of a judicial trial. From there petitioner goes on to argue that this limitation precludes the Senate from delegating to a select committee the task of hearing the testimony of witnesses, as was done pursuant to Senate Rule XI. . . .

The conclusion that the use of the word “try” in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions is fortified by the existence of the three very specific requirements that the Constitution does impose on the Senate when trying impeachments: The Members must be under oath, a two-thirds vote is required to convict, and the Chief Justice presides when the President is tried. These limitations are quite precise, and their nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word “try” in the first sentence. . . .

[T]he word “sole” is of considerable significance. . . . The commonsense meaning of the word “sole” is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. . . . If the courts may review the actions of the Senate in order to determine whether that body “tried” an impeached official, it is difficult to see how the Senate would be “functioning . . . independently and without assistance or interference.” . . .

The Framers labored over the question of where the impeachment power should lie. Significantly, in at least two considered scenarios the power was placed with the Federal Judiciary. . . . Despite these proposals, the Convention ultimately decided that the Senate would have “the sole Power to try all Impeachments.” . . . [I]ts Members are representatives of the people. . . .

There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses—the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. . . . The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments:

“Would it be proper that the persons, who had disposed of his fame and his most valuable rights as a citizen in one trial, should in another trial, for the same offence, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights, which might be brought to vary the complexion of another decision?” The Federalist No. 65

Certainly judicial review of the Senate’s “trial” would introduce the same risk of bias as would participation in the trial itself.

Second, judicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature. . . .

Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the Framers. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate. . . .

In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. . . . [O]pening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. . . .

Justice Stevens, concurring.

For me, the debate about the strength of the inferences to be drawn from the use of the words "sole" and "try" is far less significant than the central fact that the Framers decided to assign the impeachment power to the Legislative Branch. . . .

Justice White, with whom Justice Blackmun joins, concurring in the judgment.

. . . It should be said at the outset that, as a practical matter, it will likely make little difference whether the Court's or my view controls this case. This is so because the Senate has very wide discretion in specifying impeachment trial procedures and because it is extremely unlikely that the Senate would abuse its discretion and insist on a procedure that could not be deemed a trial by reasonable judges. Even taking a wholly practical approach, I would prefer not to announce an unreviewable discretion in the Senate to ignore completely the constitutional direction to "try" impeachment cases. When asked at oral argument whether that direction would be satisfied if, after a House vote to impeach, the Senate, without any procedure whatsoever, unanimously found the accused guilty of being "a bad guy," counsel for the United States answered that the Government's theory "leads me to answer that question yes." Especially in light of this advice from the Solicitor General, I would not issue an invitation to the Senate to find an excuse, in the name of other pressing business, to be dismissive of its critical role in the impeachment process.

Practicalities aside, however, since the meaning of a constitutional provision is at issue, my disagreement with the Court should be stated. . . .

The majority's conclusion that "try" is incapable of meaningful judicial construction is not without irony. One might think that if any class of concepts would fall within the definitional abilities of the judiciary, it would be that class having to do with procedural justice. Examination of the remaining question—whether proceedings in accordance with Senate Rule XI are compatible with the Impeachment Trial Clause—confirms this intuition. . . .

[T]he discord between the majority's position and the basic principles of checks and balances underlying the Constitution's separation of powers is clear. . . . [T]he majority suggests that the Framers' conferred upon Congress a potential tool of legislative dominance yet at the same time rendered Congress' exercise of that power one of the very few areas of legislative authority immune from any judicial review. . . . In a truly balanced system, impeachments tried by the Senate would serve as a means of controlling the largely unaccountable Judiciary, even as judicial review would ensure that the Senate adhered to a minimal set of procedural standards in conducting impeachment trials. . . .

Justice Souter, concurring in the judgment. . . .

One can . . . envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply "a bad guy," judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence. . . .

Baka v. Hungary
European Court of Human Rights (Grand Chamber)
No. 20261/12 (2016)

[The European Court of Human Rights, sitting as a Grand Chamber composed of: President López Guerra, Judges Lazarova Trajkovska, Bianku, Yudkivska, De Gaetano, Nußberger, Laffranque, Pinto de Albuquerque, Sicilianos, Møse, Keller, Lemmens, ad hoc Judge Jäderblom, Judges Pejchal, Wojtyczek, Vehabović, and Dedov, and Deputy Grand Chamber Registrar Callewaert:]

15. In April 2010 the alliance of Fidesz–Magyar Polgári Szövetség (Fidesz–Hungarian Civic Union, hereinafter "Fidesz") and the Christian Democratic People's Party ("the KDNP") obtained a two-thirds parliamentary majority and undertook a programme of comprehensive constitutional and legislative reforms. In his professional capacity as President of the Supreme Court and the National Council of Justice, the applicant expressed his views on different aspects of the legislative reforms affecting the judiciary, notably the Nullification Bill, the retirement age of

judges, the amendments to the Code of Criminal Procedure, and the new Organisation and Administration of the Courts Bill. . . .

33. As a consequence of the entry into force of [a number of] . . . constitutional and legislative amendments, the applicant's mandate as President of the Supreme Court terminated on 1 January 2012, three and a half years before its expected date of expiry. . . .

123. The applicant complained that his mandate as President of the Supreme Court had been terminated as a result of the views he had expressed publicly in his capacity as President of the Supreme Court and the National Council of Justice, concerning legislative reforms affecting the judiciary. He alleged that there had been a breach of Article 10 of the Convention, which, in so far as relevant, provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . .

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” . . .

149. . . . [O]nce there is *prima facie* evidence in favour of the applicant's version of the events and the existence of a causal link, the burden of proof should shift to the Government. This is particularly important in the case at hand, since the reasons behind the termination of the applicant's mandate lie within the knowledge of the Government and were never established or reviewed by an independent court or body. . . . [T]he explanations given at the relevant time in the bills introducing the amendments on the termination of the applicant's mandate were not very detailed. The bills referred in general terms to the new Fundamental Law of Hungary, the succession of the Supreme Court and the modifications to the court system resulting from that Law, without explaining the changes that prompted the premature termination of the applicant's mandate as President. . . . Furthermore, neither the applicant's ability to exercise his functions as president of the supreme judicial body nor his professional conduct were called into question by the domestic authorities. . . .

151. Consequently, . . . the Government have failed to show convincingly that the impugned measure was prompted by the suppression of the applicant's post and

functions in the context of the reform of the supreme judicial authority. Accordingly, [the Court] agrees with the applicant that the premature termination of his mandate was prompted by the views and criticisms that he had publicly expressed in his professional capacity. . . .

156. The Court accepts that changing the rules for electing the president of a country's highest judicial body with a view to reinforcing the independence of the person holding that position can be linked to the legitimate aim of "maintaining the authority and impartiality of the judiciary" within the meaning of Article 10 § 2. . . . [H]owever, . . . a State Party cannot legitimately invoke the independence of the judiciary in order to justify a measure such as the premature termination of the mandate of a court president for reasons that had not been established by law and which did not relate to any grounds of professional incompetence or misconduct. The Court considers that this measure could not serve the aim of increasing the independence of the judiciary, since it was simultaneously . . . a consequence of the previous exercise of the right to freedom of expression by the applicant, who was the highest office-holder in the judiciary. . . . In these circumstances, rather than serving the aim of maintaining the independence of the judiciary, the premature termination of the applicant's mandate as President of the Supreme Court appeared to be incompatible with that aim. . . .

162. . . . [C]ivil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention

171. . . . [T]he applicant expressed his views and criticisms on constitutional and legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system, the independence and irremovability of judges and the lowering of the retirement age for judges, . . . which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State. . . .

173. Furthermore, the premature termination of the applicant's mandate undoubtedly had a "chilling effect" in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary. . . .

176. Accordingly, there has been a violation of Article 10 of the Convention. . . .

Concurring opinion of Judge Sicilianos . . .

5. . . . [The text] of the Convention has led the Court to analyse the issue of judicial independence from the perspective of *the rights of persons involved in court proceedings* and not from that of *judges' subjective right* to have their own independence guaranteed and respected by the State. . . .

13. The above considerations give rise to the question of whether . . . the Convention can be interpreted in such a way as to recognise . . . a subjective right for judges to have their individual independence safeguarded and respected by the State . . . without necessarily having to prove that an interference with their independence had simultaneously amounted to an unjustified interference in the exercise of their right to freedom of expression or another right enshrined in the Convention. In other words, such an interpretation would strengthen the protection granted to judicial independence under the Convention. . . .

15. The Court has . . . reiterated . . . the importance of the principle of the rule of law In my opinion, however, the rule of law is hardly imaginable without an obligation on the State to offer safeguards for the protection of judicial independence and, hence, without the corresponding right of judges themselves to independence. . . .

Dissenting opinion of Judge Wojtyczek . . .

4. . . . In cases where an applicant holds public office it is necessary to distinguish between the private person (the holder of the office) and the State organ in question (the office held). A person holding a public office may act either in an official capacity or in a private capacity. . . . An individual is a holder of rights and duties in his or her relationship with the State. A State organ cannot be a holder of rights. Its status is analysed in terms of its tasks and powers, as well as its interactions with other State organs. Acts performed in an official capacity cannot fall within the ambit of guaranteed rights.

5. For the purpose of adjudicating human rights, it is also necessary to distinguish subjective (individual) rights from objective guarantees of the rule of law. The Convention protects individual rights. Individual rights are legal positions of individual persons, established by legal rules in order to protect the individual interests of the persons concerned, in particular their dignity, life, health, freedom, personal self-fulfilment and property. This connection between individual rights and the individual interests of the right-holder is an essential element of the notion of an individual right. Objective guarantees of the rule of law may have a more or less direct impact on the status of the individual, but are primarily enacted to serve the public interest. . . .

Judicial independence and irremovability are not laid down to protect the individual interests of judges or to facilitate their personal self-fulfilment, but rather to

protect the public interest in fair judicial proceedings and the proper functioning of the justice system. . . . The guarantees of judicial independence are not special human rights granted to individual persons holding judicial office, and they do not increase the degree of protection that individuals holding judicial office enjoy as human-rights holders. Equally, they do not broaden the scope of the human rights enjoyed by those individuals. On the contrary, judicial integrity and independence may justify deeper interference with judges' rights than in the case of ordinary citizens. . . .

7. . . . The sphere of judges' speech cannot be regarded as a domain of personal choice, but instead as a field subject to precise legal obligations, which have been imposed in the public interest and which restrict the choices available to a judge. In other words, judges' official speech is not a matter of individual freedom, but remains very strictly circumscribed and subordinated to the promotion of specific public interests. Public office in the judiciary is not a rostrum for the exercise of free speech. . . .

18. . . . [T]he instant case is a public-law dispute between two organs of the Hungarian State: the Supreme Court and Parliament, acting in its capacity as the constituent power. It concerns fundamental questions of the rule of law in general and judicial independence in particular, but it remains outside the scope of the jurisdiction of the European Court of Human Rights. Other tools exist for protecting judicial independence within the framework of the Council of Europe, as well as within the European Union.

The majority decided to consider that certain legal positions of State organs are covered by the provisions of the Convention, extending their applicability to State organs. Moreover, legal rules pertaining to judicial independence are interpreted in a manner which seems to transform them into special human rights granted to judges. In this way the Court has extended its jurisdiction to certain public-law disputes between State organs, by trying to characterise them as human-rights disputes. This is a major change in the European paradigm of human-rights protection and a challenge to the European legal tradition. I am concerned that this approach, consisting in tacitly recognising human rights to State organs, may—in a longer-term perspective—undermine the efficiency of human-rights protection in Europe.

[Judges Pinto de Albuquerque and Dedov also filed a separate concurring opinion, and Judge Pejchal also filed a dissenting opinion.]

Controlling Finances

How are judges' salaries set? When are raises required? When can judges salaries be cut? Lawsuits raising these questions have come before courts in several jurisdictions during the last decades.

* * *

Due to economic recession in the 1980s, Canadian governments made significant budget cuts. In Alberta, Prince Edward Island, and Manitoba, provincial laws and regulations reduced the salaries of provincial judges. Salary reductions were either included in general measures affecting public sector employees or targeted specifically at judges. Judges' associations and others filed a series of lawsuits challenging the salary reductions, which were appealed to the Canadian Supreme Court. The Court consolidated the appeals to answer whether judicial salary reductions violated guarantees of judicial independence. The judgment is excerpted below.

Reference re Remuneration of Provincial Court Judges

Supreme Court of Canada

[1997] S.C.R. 3

The judgment of Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. was delivered by The Chief Justice[:]

1. The four appeals handed down today . . . raise a range of issues relating to the independence of provincial courts, but are united by a single issue: whether and how the guarantee of judicial independence in s. 11(d)* of the *Canadian Charter of Rights and Freedoms* restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges. . . .

9. Although these cases implicate the constitutional protection afforded to the financial security of provincial court judges, the purpose of the constitutional guarantee of financial security . . . is not to benefit the members of the courts Financial security must be understood as merely an aspect of judicial independence, which . . . is valued because it serves important societal goals

119. . . . Security of tenure, financial security, and administrative independence come together to constitute judicial independence. By contrast, the dimensions of judicial independence indicate which entity—the individual judge or the court or

* Section 11(d) of the Canadian Charter of Rights and Freedoms provides:

Any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

tribunal to which he or she belongs—is protected by a particular core characteristic. . . .

121. . . . [F]inancial security has both an individual and an institutional or collective dimension. . . .

131. . . . [W]hat is the institutional or collective dimension of financial security? To my mind, financial security for the courts as an institution has three components, which all flow from the constitutional imperative that . . . the relationship between the judiciary and the other branches of government be depoliticized. . . . [T]his imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse. . . .

133. First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process What judicial independence requires is an independent body . . . to set or recommend the levels of judicial remuneration. . . . Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, . . . if the executive or the legislature chooses to depart from them, it has to justify its decision—if need be, in a court of law. . . .

134. Second, under no circumstances is it permissible for the judiciary . . . to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. . . . [S]alary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence. . . . The prohibition on negotiations . . . does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

135. Third, and finally, any reductions to judicial remuneration, including de facto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries. . . .

141. . . . [T]he depoliticization of these relationships is so fundamental to the separation of powers, and hence to the Canadian Constitution, that the provisions of the Constitution, such as s. 11(d) of the Charter, must be interpreted in such a manner as to protect this principle. . . .

142. . . . [T]he fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. . . .

145. With respect to the judiciary, the determination of the level of remuneration from the public purse is political in another sense, because it raises the spectre of political interference through economic manipulation. An unscrupulous government could utilize its authority to set judges' salaries as a vehicle to influence the course and outcome of adjudication. . . .

147. . . . [T]he imperative of protecting the courts from political interference through economic manipulation requires that an independent body—a judicial compensation commission—be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration . . . by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature [I]n order to guard against the possibility that government inaction could be used as a means of economic manipulation . . . , the commission must convene if a fixed period of time (e.g., three to five years) has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors. . . .

169. The commissions charged with the responsibility of dealing with the issue of judicial remuneration must meet three general criteria. They must be independent, objective, and effective. . . .

184. . . . Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are *prima facie* rational. . . . By contrast, a measure directed at judges alone may require a somewhat fuller explanation, precisely because it is directed at judges alone.

185. By laying down a set of guidelines to assist provincial legislatures in designing judicial compensation commissions, I do not intend to lay down a particular institutional framework in constitutional stone. What s. 11(d) requires is an institutional sieve between the judiciary and the other branches of government. Commissions are merely a means to that end. In the future, governments may create new institutional arrangements which can serve the same end, but in a different way. As long as those institutions meet the three cardinal requirements of independence, effectiveness, and objectivity, s. 11(d) will be complied with. . . .

187. . . . [Salary] negotiations [between provincial judiciaries and governments] are deeply problematic because the Crown is almost always a party to criminal prosecutions in provincial courts. Negotiations by the judges who try those cases put them in a conflict of interest, because they would be negotiating with a litigant. The appearance of independence would be lost, because salary negotiations bring with them a whole set of expectations about the behaviour of the parties to those negotiations which are inimical to judicial independence. . . .

193. . . . [T]he Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants. Perhaps more importantly, in the context of s. 11(d), there is the perception that this could happen. . . .

[The Court held that the provincial processes for negotiating judicial salaries were unconstitutional.]

[Justice La Forest, dissenting in part:]

296. The primary issue raised in these appeals is a narrow one: has the reduction of the salaries of provincial court judges, in the circumstances of each of these cases, so affected the independence of these judges that persons “charged with an offence” before them are deprived of their right to “an independent and impartial tribunal” within the meaning of s. 11(d) of the *Canadian Charter of Rights and Freedoms*? . . . Although I agree with substantial portions of [the Chief Justice’s] reasons, I cannot concur with his conclusion that s. 11(d) forbids governments from changing judges’ salaries without first having recourse to the “judicial compensation commissions” he describes. Furthermore, I do not believe that s. 11(d) prohibits salary discussions between governments and judges. . . .

336. The fact that the potential for [economic] manipulation exists . . . does not justify the imposition of judicial compensation commissions as a constitutional imperative. . . .

337. . . . [A]ll changes to the remuneration of provincial court judges threaten their independence. . . . It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of substantially all persons paid from public funds imperils the independence of the judiciary. To hold otherwise is to assume that judges could be influenced or manipulated by such a reduction. A reasonable person, I submit, would believe judges are made of sturdier stuff than this. . . .

350. . . . Provincial judges associations are not unions, and the government and the judges are not involved in a statutorily compelled collective bargaining relationship. While judges are free to make recommendations regarding their salaries, and governments would be wise to seriously consider them, as a group they have no economic “bargaining power” vis-à-vis the government. The atmosphere of negotiation the Chief Justice describes, which fosters expectations of “give and take” and encourages “subtle accommodations,” does not therefore apply to salary discussions between government and the judiciary. . . .

351. Of course, some persons may view direct consultations between the government and the judiciary over salaries to be unseemly or inappropriate. . . . A general prohibition against such consultations, however, is not required by s. 11(d) of the Charter. In most circumstances, a reasonable, informed person would not view them as imperiling judicial independence. . . .

Beer v. United States

United States Federal Circuit Court of Appeals
696 F.3d 1174 (Fed. Cir. 2012)

Opinion for the Court filed by Chief Judge Rader, in which Circuit Judges Newman, Mayer, Lourie, Linn, Prost, Moore, O’Malley, Reyna and Wallach join. . . .

The Constitution erects our government on three foundational corner stones—one of which is an independent judiciary. The foundation of that judicial independence is, in turn, a constitutional protection for judicial compensation. The framers of the Constitution protected judicial compensation from political processes because “a power over a man’s subsistence amounts to a power over his will.” Thus, the Constitution provides that “Compensation” for federal judges “shall not be diminished during their Continuance in Office.”

This case presents this court with two issues involving judicial independence and constitutional compensation protections—one old and one new. First, the old question: does the Compensation Clause of Article III of the Constitution prohibit Congress from withholding the cost of living adjustments [COLA] for Article III judges provided for in the Ethics Reform Act of 1989 (“1989 Act”)? To answer this question, this court revisits the Supreme Court’s decision in *United States v. Will* (1980). Over a decade ago . . . this court found that *Will* applied to the 1989 Act and concluded that Congress could withdraw the promised 1989 cost of living adjustments. This court . . . now overrules [its earlier decision] and instead determines that the 1989 Act triggered the Compensation Clause’s basic expectations and protections. . . .

[T]he Legislative branch withheld from the Judicial branch those promised salary adjustments in fiscal years 1995, 1996, 1997, and 1999. During these years,

General Schedule federal employees received the adjustments, . . . but Congress blocked the adjustments for federal judges.

In response to these missed adjustments, several federal judges filed a class action alleging these acts diminished their compensation in violation of Article III. After certifying a class of all federal judges serving at the time . . . the district court held that Congress violated the Compensation Clause by blocking the salary adjustments. . . .

[J]udicial review of laws affecting judicial compensation is not done lightly as these cases implicate a conflict of interest. After all, judges should disqualify themselves when their impartiality might reasonably be questioned or when they have a potential financial stake in the outcome of a decision. In *Will*, the Supreme Court applied the time-honored “Rule of Necessity” because if every potentially conflicted judge were disqualified, then plaintiffs would be left without a tribunal to address their claims. . . .

[T]he statutes reviewed in *Will* required judicial divination to predict a COLA and prevented the creation of firm expectations that judges would in fact receive any inflation-compensating adjustment. In that context, as the Supreme Court noted, no adjustment vested until formally enacted and received. However, the statutes reviewed . . . in this case provide COLAs according to a mechanical, automatic process that creates expectation and reliance when read in light of the Compensation Clause. Indeed a prospective judicial nominee in 1989 might well have decided to forego a lucrative legal career, based, in part, on the promise that the new adjustment scheme would preserve the real value of judicial compensation. . . .

The dual purpose of the Compensation Clause protects not only judicial compensation that has already taken effect but also reasonable expectations of maintenance of that compensation level. The 1989 Act promised, in precise and definite terms, salary maintenance in exchange for prohibitions on a judge’s ability to earn outside income. The 1989 Act set a clear formula for calculation and implementation of those maintaining adjustments. Thus, all sitting federal judges are entitled to expect that their real salary will not diminish due to inflation or the action or inaction of the other branches of Government. The judicial officer should enjoy the freedom to render decisions—sometimes unpopular decisions—without fear that his or her livelihood will be subject to political forces or reprisal from other branches of government.

Prospective judges should likewise enjoy the same expectation of independence and protection. A lawyer making a decision to leave private practice to accept a nomination to the federal bench should be entitled to rely on the promise in the Constitution and the 1989 Act that the real value of judicial pay will not be diminished. . . .

[T]he Compensation Clause does not require periodic increases in judicial salaries to offset inflation or any other economic forces. . . . However, when Congress promised protection against diminishment in real pay in a definite manner and prohibited judges from earning outside income and honoraria to supplement their compensation, that Act triggered the expectation-related protections of the Compensation Clause for all sitting judges. A later Congress could not renege on that commitment without diminishing judicial compensation. . . .

This court has an “obligation of zealous preservation of the fundamentals of the nation. The question is not how much strain the system can tolerate; our obligation is to deter potential inroads at their inception, for history shows the vulnerability of democratic institutions.” The judiciary, weakest of the three branches of government, must protect its independence and not place its will within the reach of political whim. . . .

Dyk, Circuit Judge, with whom Bryson, Circuit Judge, joins, dissenting.

. . . While the majority’s approach has much to recommend it as a matter of justice to the nation’s underpaid Article III judges, it has nothing to recommend it in terms of the rules governing adjudication. . . . Under *Will*’s bright-line vesting rule, Congress was free to “abandon” a statutory formula and revoke a planned cost-of-living adjustment The majority attempts to redefine the constitutional test as turning not on “vesting,” but on “reasonable expectations,” a concept that appears nowhere in the *Will* opinion. . . .

O’Malley, Circuit Judge, with whom Mayer and Linn, Circuit Judges, join, concurring.

. . . If we accept *Will*’s holding that Congress can abolish judicial salary adjustments at any time before they take effect, it logically follows that Congress would also be free to abolish judicial retirement pay at any time. The practical consequences of *Will* would place judicial retirement benefits at risk, despite the fact that the Supreme Court itself previously has characterized such benefits as “compensation” under Article III. . . .

If *Will* truly established an “actual possession” vesting rule for Compensation Clause purposes, that holding seems indefensible under the Constitution. The Framers formulated the Compensation Clause for the express purpose of maintaining judicial independence, in part by providing judges with reasonable expectations about their pay and the inability of Congress to reduce it. . . .

The Compensation Clause should be “construed, not as a private grant, but as a limitation imposed in the public interest.” It is the public that benefits from a strong, independent judiciary that is free to issue decisions without fear of repercussion. . . .

Associação Sindical dos Juízes Portugueses v. Tribunal de Contas
Court of Justice of the European Union (Grand Chamber)
Case No. C-64/16 (2018)

[In the face of the 2010-14 financial crisis, Portugal enacted laws temporarily reducing the salaries of a number of public sector employees, including judges on the Tribunal de Contas (Court of Auditors). The Associação Sindical dos Juízes Portuguese, a trade union representing the affected judges, challenged the law. The Supremo Tribunal Administrativo (Supreme Administrative Court) referred the question to the Court of Justice of the European Union (CJEU).

By the time the question was addressed in 2018, the European Union was also concerned about judicial independence in other Member States, including Hungary and Poland. The Court upheld the Portuguese salary-reduction measures, while affirming its authority to review measures affecting judicial independence in the courts of Member States.

The Grand Chamber, composed of President Lenaerts, Vice-President Tizzano, Presidents of Chambers Bay Larsen, von Danwitz, da Cruz Vilaça, Rosas, Levits (Rapporteur), and Fernlund, and Judges Toader, Safjan, Šváby, Berger, Prechal, Jarašiūnas, and Regan, gives the following Judgement:] . . .

13. . . . [T]he [Trade Union of Portuguese Judges] argues that the salary-reduction measures infringe ‘the principle of judicial independence’ enshrined not only in the Portuguese Constitution but also in EU law, in the second subparagraph of Article 19(1)* TEU and Article 47** of the Charter. . . .

32. Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2*** TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. . . .

* Article 19(1), subparagraph 2 of the Treaty on European Union provides:

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

** Article 47 of the Charter of Fundamental Rights of the European Union provides:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. . . .

*** Article 2 of the Treaty on European Union provides:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights

34. . . . Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. . . . Member States [must] . . . establish a system of legal remedies and procedures ensuring effective judicial review in those fields

36. . . . [E]ffective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.

37. It follows that every Member State must ensure that the bodies which . . . come within its judicial system in the fields covered by . . . [EU] law, meet the requirements of effective judicial protection. . . .

42. The guarantee of independence, which is inherent in the task of adjudication, is required not only at EU level . . . but also at the level of the Member States as regards national courts. . . .

45. . . . [T]he receipt by [judges] . . . of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence. . . .

49. [The salary-reduction measures at issue here] cannot . . . be perceived as being specifically adopted in respect of the members of the Tribunal de Contas (Court of Auditors). They are . . . in the nature of general measures seeking a contribution from all members of the national public administration to the austerity effort dictated by the mandatory requirements for reducing the Portuguese State's excessive budget deficit. . . .

52. . . . Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas. . . .

JUDGING IN POLITICIZED TIMES

To think about judging under stress as only about external efforts to alter the conditions of judging is to miss the pressures from within, as judges either acquiesce, resist, or capitalize on their powers. Functioning in polarized and politicized environments, some judges are restrained, insistent on protecting precedents, and others appear to take license from new political alignments. The questions that laced the first segment reemerge: how are we to sort the benign from the pernicious? How and when should judges exercise authority or object to their colleagues' judgments as undermining courts' legitimacy? And how are we to assess which situations put the enterprise of constitutional adjudication in question?

Separation of Powers and Judicial Independence: Current Challenges
Speech by Justice Marta Cartabia to the European Court of Human Rights
(2018)*

The fundamental principles of the separation of powers and judicial independence are considered central tenets of all liberal democracies, everywhere and in every time. And rightly so. . . .

Unexpectedly powerful leaders supported by strong majorities have dismantled all restraints; the separation of powers has eroded and the rule of law, as well as judicial independence, are at risk in many countries and even in some western liberal democracies. Many international actors are sounding the alarm and sending warnings in the form of recommendations, resolutions and other documents: from the institutions of the European Union to the Council of Europe and the Venice Commission. . . .

Most of the new issues of social life are framed in terms of individual rights: a number of new rights have stemmed from the right to private life, the right to self-determination, and the right to non-discrimination, and they touch upon new, sensitive, and unsettled issues of our day. Rights can be claimed directly before the courts. Whereas political bodies can be paralyzed by divisions and lack of consensus and might be unwilling to deliberate on controversial issues, courts are bound to decide even on the most sensitive ones. New rights claims concerning bioethical issues, the transformation of family law, multicultural concerns, law and religion, and immigration are part and parcel of the everyday work of courts. In many cases, courts have to decide new rights issues without the support of a clear piece of legislation. These cases push the judiciary to the forefront of the public debate and keep it always under the spotlight. . . .

[T]he judicialization of political issues . . . means that political issues are more and more often brought before the bench. . . . For a long time, electoral laws have been considered the “domain of politics.” However, for many years, political bodies had been unable to reach any agreement on new legislation, and the public debate was growing more and more critical of the legislation in force because of its misrepresentative effects. As a result, the electoral legislation was challenged before the Constitutional Court. . . .

[C]ourts are to be included among the main actors of legal globalization. Whereas parliaments, governments and in general democratic institutions do not fit into large systems, courts seem to be suitable for the grand scale. This fact is

* Justice Marta Cartabia, Vice President of the Italian Constitutional Court, delivered the speech, “Separation of Powers and Judicial Independence: Current Challenges,” as part of a seminar on The Authority of the Judiciary, to the European Court of Human Rights, in Strasbourg, France, on January 26, 2018.

remarkable and almost ironic: it proves that a dramatic change is taking place in the judiciary. After all, the judicial function has traditionally been considered intrinsically “national” or “domestic.” Now courts are more affected by the globalizing process than other branches of government. . . .

There is no doubt that we live at a time in which the judiciary is thriving. Constitutional courts are not the only ones to have gained importance in Europe and elsewhere. Supranational and international courts’ authority has increased. At the national level, the judicial function by and large exceeds the traditional syllogistic implementation of written legal rules. Judge made law is now a reality even in countries that can be ascribed to the continental tradition based on written parliamentary legislation. Human rights adjudicators have multiplied. . . .

These are the conditions in which we have to consider the present, serious attacks on the judiciary. In some cases, the attacks are *open* and *large-scale*; in other cases, they are *veiled, disguised and discrete*. They are different in nature and require different kind of remedies. . . .

As for the first class of attacks, those that are open and large-scale, we all have a number of countries in mind. Let me simply mention the endemic situation in Poland, which induced the Commission of the European Union to open the procedure under Article 7 of the Treaty of the European Union. . . . The Commission believes that the country’s judiciary is now under the political control of the ruling majority and, in consequence, it has proposed to the Council to adopt a decision under Article 7(1) of the Treaty on European Union to protect the rule of law in Europe.

In other countries there may be subtler underway attempts to control the role of the judiciary. Let’s start from this simple fact. The judiciary carries out its functions under the law. The status, salary, tenure and career of judges, as well as the organization and procedure of judicial bodies, are regulated by law. The law is a fundamental guarantor of the independence of the judiciary; the law is a shield against arbitrary interference with judicial activity on the part of single personalities. But the law can also adversely affect judicial activity. . . .

Stability of tenure is an essential element for judicial independence. Unexpected and hasty changes in retirement age rules, arbitrary termination of terms in office of judges, or forced dismissal of judges and prosecutors are just some examples of intrusion by political bodies in the judiciary. Attention should be paid to those positions that are covered for a short fixed term (5-6 years) and are renewable at the discretion of the executive branch.

Another weak point may be judges’ remuneration and funding of the judiciary. The enduring economic crises suffered by many Member States has required the imposition of severe cuts and the freezing of budgets and salaries for all the branches of the administration, included the judicial one. Whereas temporary sacrifices are

inevitable, chronic underfunding can impair the working condition of the judiciary: lack of appropriate remuneration, security risks, cuts in staff, and cuts in peripheral judicial bodies can increase the workload of courts and undermine their ability to decide cases with the necessary quality and care and within a reasonable time. Moreover, cuts in legal aid may be an obstacle to access to justice. . . .

As for *judicial activity as such*, a range of interference by political bodies can occur. . . . [R]etroactive legislation can be approved by political bodies in order to interfere with a specific case or a class of pending proceedings; partisan pardon laws or milder legislation on criminal matters can stop trials in place and can be used in order to stop judges from issuing sentences or ordering convictions; the rules of procedure are in the hands of political bodies, because they are regulated by legislation. Moreover, any reform of procedural rule is to be applied immediately—*tempus regit actum*—and can therefore easily encroach upon trials in place; special attention is required for standing: *locus standi* is crucial for a judge's possibility to act. The *judicial function is a power on demand*. No court can initiate a case; a court is required only to respond to a case that is brought to its attention. Nor can it broaden the scope of its decision: the borders of its power are delimited by the plaintiff. Restricting the rules on standing or reducing the access to justice can neutralize the courts.

. . . [M]any of the guarantees of judicial independence “depend” on legislation. But what if legislation itself takes an illiberal turn? Many European legal orders have a Constitutional Court and it falls to the Constitutional Court to make sure that constitutional principles—including the separation of power and the independence of the judiciary—are complied with by all actors. To this end, the constitutional courts have many competences that may be triggered according to the rules of each legal system: judicial review of legislation, direct complaint, conflicts between powers. . . .

In most cases, in the face of specific or individual challenges to judicial independence, constitutional courts can defend, strengthen and support other courts. Courts are networked and can do a great deal to support one another. However, when the disruptive effect on judicial independence comes from the system, and not from a single piece of legislation—when the culture is permeated by “constitutional bad faith,” as Lech Garlicki puts it . . . —then it would seem that courts are disarmed.

Rule of—and not by any—Law
Susanne Baer (2018)*

. . . When it comes to law, to constitutionalism and to constitutional courts or supreme courts with constitutional mandates in particular, there is the grand history of enlightenment and the modern rule of law. However, there is also a long tradition of

* Excerpted from Susanne Baer, *The Rule of—and not by any—Law. On Constitutionalism*, 71 CURRENT LEGAL PROBS. 335 (2018).

skepticism and critique. Yet because today, the rule of law is not criticized but under attack, it is crucial to distinguish the two

[S]ome of the most productive strands in dealing with law are the critical traditions that challenge ‘legalism’ and the ‘juridical.’ Some discuss law as a normative force that covers, perpetuates or ontologizes inequalities. Others focus on problematic versions of ‘rights’ that amount to rather egocentric claims of idealized economic actors, or to ‘trumps’ to fight one another. . . . [T]he key message is: Law matters because these people matter, and even elected political majorities shall not ever be allowed to forget about such individuals that are not mainstream and do not define politics, and independent institutions must take care of this if all else fails. In times of a growing sense of economic disparities, and with the increase in relative poverty in otherwise affluent societies, coupled with the sense that no one cares which then informs new brands of populism, such critique is desperately needed. . . .

As such, there is also a need for informed criticism of what I call ‘varieties of constitutionalism,’ including varieties of courts and their practice of judicial review, to implement the rule of law in protecting fundamental rights. . . .

[W]e do not have too much law in the 21st century. In the 20th century, we agreed that human dignity is inviolable, yet in the 21st century, we see torture not only in dictatorial regimes, as exceptions to the rule. Instead, we see torture used and defended by official actors in, what is still a paradigmatic shift, the US government.

And it is not only a US problem. Today’s problem is thus not only that we see human rights violations. They always threaten the rule of law, in that they show a lack of protection, a failed promise, a deficiency. Yet an exception to the rule is very different from a dismissal of the rule itself. Even when violated, there is still a consensus that actors must follow the law, that human rights are generally respected, that there is judicial review, by independent courts, that is followed up on. Different from that, it is a crisis of law itself when the rule is dismissed as such.

The same applies to the recent uses of the exceptional state of emergency. Turkey has perpetually justified the removal of thousands of people from office on dubious to no grounds after the attempted coup, by eliminating recourse to judicial review in a state of emergency. France has reacted to terrorism also by removing legal protection, eventually stopped by the *Conseil Constitutionnel*, which in turn has become more of a fundamental rights defending institution than before, and then is confronted with even harsher critiques. . . .

Recent attacks on the rule of law are dressed up as legal arguments, and appear to be playing by the rules while in fact destroying them. In many countries, attacks on the rule of law are staged by means of, or even in the name of, law. . . .

[In the EU] . . . populist leaders and parties staged a ‘legal reform,’ ‘simply’ changing ‘some technical rules.’ In Hungary first, and then in Poland, they changed the procedures of access to and the competence of courts, of selection, monitoring, discipline and retirement age of judges, in a quick succession of tiny steps. Yet what is meant to seem a rather technical and small matter does in fact destroy constitutionalism. It is no coincidence that the attack starts with the constitutional court, by changing its mandate, reach and procedure, eventually re-staffing the bench, and then destroying the independence of the entire justice system, again by changing procedure, selection, disciplinary control and career options, step by step, seeming rather formal and small. When this is done, one may return to a new normal. Poland thus gestured to satisfy critics in the EU to undertake yet another ‘reform,’ returning power to institutions that were dismantled early on. But since they have been re-staffed entirely, to now serve the government, this is merely decorative—all but window-dressing. . . .

[P]opulism . . . specifically targets institutions—the topic indeed ranks second, right after immigration/refugees. It is thus not enough to criticize the racism and the antisemitism and the islamophobia and the heteronormativity of populist politics. We also need to understand the attack on institutions. It is often peppered with an attack on the people who serve in them, like ‘those politicians,’ or on people that otherwise protect the rule of law, like ‘those judges.’ Yet the attacks on the rule of law and constitutionalism are also specifically complicated in that they tie into the skepticism regarding judicial review that is so widespread.

Dropping derogatory remarks about courts and judges, as well as about government and administration, right-wing populists do appeal to many critics’ discomfort. The sometimes subtle, yet often harsh and personalized critique of ‘elites,’ dismissing ‘those’ ‘up there,’ be it a bench or government position, and ‘bureaucracies,’ particularly ‘Brussels’ seek to have the critics of such systems share the feeling that ‘enough is enough,’ that it is . . . ‘time to leave’ (or ‘exit’), or to ‘take over.’ . . .

The utter disregard and disrespect for the rule of law in general, and of courts in particular, is not only driven by, and does employ, populist sentiment and enlists established skepticism. Moreover, and adding to the use of legal means to undo the law, there are striking attempts to capture essential terms, not only calling right-wing politics a ‘spring’ or ‘movement,’ but also in claiming ‘democracy’ and . . . ‘the rule of law,’ or ‘*Rechtsstaat*,’ itself. . . .

[C]onstitutionalism is a demanding recipe for nation states and transnational structures alike Without functioning institutions, and namely: independent judicial review, constitutionalism does not deserve the label, but is fake, window-dressing, mere rhetoric. Therefore, courts are key. . . . Beyond their legal role, courts may also represent as well as communicate the basics that count in a society. But the core function of courts with a constitutional mandate is to protect fundamental rights

even against legitimate majority government, based on the rule of law, and thus democracy. As such, constitutionalism backed up by courts ensures that governments are formed and can be removed by a procedure agreed on beforehand, and that all have a say in this, by way of equality in voting both regarding access and results, to be held accountable beyond election days, and allow for those who lost to eventually win again. . . .

One needs truly independent courts to safeguard fair play at the centre of all political struggles for power, to safeguard democracy. This requires adequate design of selection, discipline, and resources, as well as the power to handle internal matters. Only then does judicial review ensure that the rule of law is not the rule of *any* law. Courts with the power of judicial review ensure that all rules are both shaped and limited by, and may even be required to enhance, democracy, because of our commitment not just to law, but to a more substantive claim of what may be called justice. . . .

[T]he populists got it. They understand the inextricable connection of democratic politics, fundamental rights and independent courts. Because wherever populism and autocrats started running the show, it is the courts they get at quickly. Besides attacks on critical media and academics, autocrats start their political takeover by destroying constitutional courts, in particular. They know that independent constitutional courts are the last resort when it comes to majorities abusing their powers, to eventually redesign the state, in abandoning democracy. They know that there is no constitutionalism without them, thus no democracy, no rule of law, no human rights when people really need them, for real. Therefore, there is an urgent need to properly understand, and eventually defend, such courts today. Also, the attacks on courts that protect fundamental rights spare dominant economic and social elites and cultural hegemony that enjoy and perpetuate privilege. Thus, a defence of courts is also a defence of the weak and vulnerable in a given society. . . .

Generally, courts with a constitutional mandate do have to maneuver in the political landscape anyway, and thus tend to register political pressure quickly, as they are institutions walking the fine line between law and politics. In their judicial competence, courts also have a choice. On the one hand, it is tempting to withdraw. Then, courts expand a jurisprudence of ‘political questions’ and subsidiarity and margins of appreciation and separation of powers with latitude for legislators, all doctrines to free legislative, executive and judicial power by regular courts from constitutional limitations. . . .

[C]ourts and judges are not very well equipped to defend themselves, since their standing is entirely based on recognition by all other powers, political actors have the power to define the rules of the game. Since such rules are often deemed but technical and small matters that evade public attention, and since constitutional courts tend to disturb political power and are thus no natural allies to influential players, the

power of a constitutional court may in fact be quickly undone. But when the going gets tough, courts need strong actors on their side. . . .

[C]onstitutionalism only works with courts, but it also only survives when it is really people who take constitutionalism in their hands. Law is practice, not neat doctrine only. And constitutionalism is neither a formal exercise nor a political power game, but always both, and more. As such, constitutionalism needs you. So join the chorus: rise for the rule of law, stand up for human rights, and call for constitutionalism. . . .

Building Judicial Authority: A Comparison Between the Italian Constitutional Court and the German Federal Constitutional Court

Armin von Bogdandy and Davide Paris (2019)*

“That is not how we expected it to turn out”—so the first Federal Chancellor of Western Germany, Konrad Adenauer, is reported to have said when observing the very first years of the German Constitutional Court’s operation. These words succinctly express a peculiar feature of the German Constitutional Court: a direct confrontation with the political power was the foundational moment of the Court’s authority—a confrontation in which the Court achieved a shining victory that let it emerge as a counterbalance to the ruling majority. . . .

Things went differently in Italy. . . . [I]n the so-called first war of the courts, the Constitutional Court failed to achieve another victory over the Supreme Court. At stake was the Constitutional Court’s attempt to make its own interpretation of the law to be accepted by the Supreme Court. In the end, this attempt was unsuccessful and the Constitutional Court was forced to back down, justifying this result with the new doctrine of the “living law.” Essentially, this means that the Constitutional Court must review laws as interpreted by the Supreme Court and cannot replace that interpretation with its own.

On that occasion, the Italian Constitutional Court experienced its own weakness in the clearest manifestation: unlike other constitutional courts, the Italian Constitutional Court has to share and bargain its authority with the ordinary courts, on which both its activity and its effectiveness are conditional. Indeed, the Court’s most important power—the concrete review of legislation—depends on the willingness of the ordinary courts to refer questions of constitutionality to it. . . .

However, what appears to be the Italian Constitutional Court’s main weakness if compared to its German counterpart, is perhaps the Court’s most remarkable feature

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in a comparative perspective. Its institutional weakness led the Italian Constitutional Court to establish a well-functioning cooperation with the ordinary courts. . . .

“Power is perfected in weakness” captures this essential feature of the Italian Constitutional Court. The logic of power in weakness, however, goes beyond the relationship with the ordinary courts. In the following sections, we try to provide a reading of the Italian Constitutional Court according to the *fil-rouge* of weakness that turns into strength

The Court’s rather minimalist style of reasoning and its overall low-profile standing in public opinion seems, at first sight, to be a weakness, but in reality may not be, for they at least present some advantages, too The weakness of the political context in which the Court operates, and notably the unresponsiveness of the legislature, could have been an obstacle to the Court’s power. But in the end, it pushed the Court to become more activist and to exceed the role of a “negative legislator” Finally, the dynamic of “strength in weakness” can be applied to the interaction with the European courts as well: despite several limitations, the Court was able to gain a significant role in the European legal space

The lack of constitutional complaint to the Italian Constitutional Court amounts to its most apparent weakness: it renders the Court’s authority conditional on the cooperation of the ordinary courts. This forced cooperation may be difficult to grasp for a German constitutional law scholar. In Germany, the concept of “judicial dialogue” refers to the interaction of the Constitutional Court with the European Courts, and not, as in Italy, to the relationship with the ordinary courts as well. . . .

[T]he German Constitutional Court does not, in principle, *cooperate* with the ordinary courts but rather *corrects* them. This is a conscious decision. . . . The constitutional complaint . . . is foremost a complaint against a judgment . . . , in which the Constitutional Court reviews whether ordinary courts, by their application of the law, violated the fundamental rights enshrined in the Constitution. . . .

Whereas the Italian Constitutional Court speaks essentially to the referring courts, the main addressee of the German Constitutional Court’s judgments is the individual. The former protects the individual’s rights *alongside the ordinary courts*; the latter protects them *from* (among others) *the courts*. . . .

[T]he lack of constitutional complaints also awards the institutional organization of the Italian Constitutional Court one of its most characteristic features: its collegiality. Always deciding as a whole—“the Constitutional Court”—and having all judges equally and fully involved in every single case help to strengthen the legitimacy of the Court, the consistency of its jurisprudence, and the deliberative and inclusive nature of its adjudication. But this is only possible because the Court deals with some hundreds of references annually. The same level of collegiality would be

impossible for the German Constitutional Court, which deals with roughly 6,000 constitutional complaints per year. . . .

The authority of a court does not only depend on the substance of its decisions but also on the way in which they are reached and on how they speak to their audience. “Impressive” opinions at the end of an inclusive and publicly-followed proceeding certainly contribute to consolidate a court’s authority and prestige, both domestically and abroad. After all, a constitutional court’s jurisprudence can be seen as the best introduction to a nation’s legal culture, because one can expect that a legal order’s most sophisticated doctrine is produced by its highest court. From this perspective, dissenting and concurring opinions can serve as an important tool to foster the court’s authority. . . . The same applies with regard to the direct engagement with legal scholarship: by quoting scholarly opinions in its decisions, a constitutional court shows that it is cognizant of academic debate and that it might even engage with the critical voices of its legal culture, which, ultimately, can strengthen the legitimacy of the institution itself. Maybe it is not a coincidence that justices of the two most authoritative courts on both sides of the Atlantic—the U.S. Supreme Court and the German Constitutional Court—do write separate opinions and do engage explicitly with legal scholarship.

From this perspective, the Italian Constitutional Court does not shine at first sight. Neither dissenting opinions nor direct quotations of legal scholarship are at its disposal, or at least the Court has not yet resorted to any of them. Furthermore, proceedings before the Italian Constitutional Court are rather closed as far as third-party interventions and *amici curiae* are concerned. . . .

After all, it should not come as a surprise that the very names of the Constitutional Court’s justices, including the Court’s president, are essentially unknown to the public. From this perspective, there could be no greater contrast to the United States, where the health conditions of a single justice can be top news in the media and gather the interest of common citizens. The public visibility of the Constitutional Court is also far higher in Germany than in Italy. . . .

However, one should not ignore the other side of the coin by underestimating the advantages of a less visible power. . . . The lack of dissenting opinions surely curtails a justice’s freedom of expression and makes it difficult for that justice to become a public character. But it protects all justices, and, more importantly, the Court as a whole, from accusations of political biases, thereby supporting their independence. . . . In his famous dissent in *Obergefell*, Justice Scalia questioned the legitimacy of the Supreme Court’s decision with these impressive words: “Today’s decree says that . . . the Ruler of 320 million Americans coast-to-coast, is a *majority of the nine lawyers on the Supreme Court*.” This objection, however, loses part of its grip in a legal system like the Italian one, where “constitutional justice is a function carried out by a body, not by fifteen persons.” . . .

* * *

In 2005, the President of Uganda since 1986, Yoweri Museveni, enacted a constitutional amendment to eliminate presidential term limits. In the presidential election the following year, Dr. Kizza Besigye, a physician, politician, and former military officer in the Uganda People's Defence Force, emerged as the principal political challenger to incumbent President Museveni. Dr. Besigye was the Forum for Democratic Change opposition party presidential candidate and had been living in exile in South Africa since 2001, after experiencing police harassment following a failed previous presidential bid.

Just prior to the 2006 presidential election, and only weeks after returning to Uganda from South Africa, Dr. Besigye was indicted for treason for having ties with rebel groups and for rape, charges widely considered unfounded. The High Court granted Dr. Besigye bail. However, the government dispatched a militia to the courthouse in order to prevent his release. In the election, President Museveni won re-election with fifty-nine percent of the vote, while Br. Besigye garnered thirty-seven percent. The following excerpt is from the final appeal by Dr. Besigye and others implicated in his alleged treason, which was heard by the Constitutional Court of Uganda after the election had passed.

Dr. Kizza Besigye & Others v. Attorney General
Constitutional Court of Uganda
Constitutional Petition No.7 of 2007 [2010]

[The Honorable Justices Mpagi Bahigeine, Engwau, Twinomujuni, Byamugisha, and Nshimye delivered the judgment:] . . .

1.1 The petitioners were arrested . . . and charged with treason. . . .

1.7 On the 12th January 2007 the Constitutional Court . . . ordered that the Bailed Petitioners be released on bail as ordered by the High Court forthwith. . . .

1.12 On the 2nd March 2007 [ten of the petitioners were charged with murder in Magistrate Courts].

. . . [T]he following four issues were agreed and argued: . . .

1. Whether the security personnel's conduct towards the petitioners in and around the premises of the High Court of Uganda on the 1st March 2007 contravened Article 23(1), Article 23(6), Article 24, Article 28(1), Article 28(3), Article 44(a), Article 44(c), Article 126, Article 28(1) – (3) of the Constitution.*

* Article 23. Protection of personal liberty.

(1) No person shall be deprived of personal liberty except in any of the following cases—

2. Whether the commencement of the [murder charges violated the Constitution]

(a) in execution of the sentence or order of a court, whether established for Uganda or another country or of an international court or tribunal in respect of a criminal offence of which that person has been convicted, or of an order of a court punishing the person for contempt of court;

(6) Where a person is arrested in respect of a criminal offence—

(a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable;

Article 24. Respect for human dignity and protection from inhuman treatment.

No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.

Article 28. Right to a fair hearing.

(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. . . .

(3) Every person who is charged with a criminal offence shall—

(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;

(9) A person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

Article 44. Prohibition of derogation from particular human rights and freedoms.

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment; . . .

(c) the right to fair hearing

Article 126. Exercise of judicial power.

(1) Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.

(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles—

(a) justice shall be done to all irrespective of their social or economic status;

(b) justice shall not be delayed;

(c) adequate compensation shall be awarded to victims of wrongs;

(d) reconciliation between parties shall be promoted; and

(e) substantive justice shall be administered without undue regard to technicalities.

Article 128. Independence of the judiciary.

(1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.

(2) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions. . . .

3. Whether the sequential commencement and simultaneous prosecution by the State of the Treason Trial, . . . [and the murder trials,] contravened Article 24, Article 28(1), Article 28(3), Article 44(a) and [A]rticle 44(c) of the Constitution.

4. Whether the cumulative effect of the conduct of the State towards the Judiciary and the Petitioners in matters connected with the Treason Trial contravened Article 28(1), Article 28(3) and Article 44(c).

. . . [T]he petition relies on the evidence of three main witnesses

The gist of their evidence is that: . . .

(1) They were arrested and charged at different times and in different courts, of Treason, unlawful possession of firearms, Terrorism, rape and murder.

(2) Though after a protracted struggle, they managed to obtain bail from the High Court, the State always violently intervened to re-arrest them and re-charge and re-detain them.

(3) Despite several orders of the High Court and the Constitutional Court that they should be released on bail, most of them were still unlawfully on remand at the time this petition was filed.

(4) That their lengthy unlawful detention and treatment by the agents of the State has caused them physical and psychological torture of the degree that is prohibited by the Constitution of Uganda.

(5) That the cumulative effect of the conduct of the State towards the petitioners and the Judiciary has left the petitioners with a very strong apprehension that they may never receive a fair trial in all the cases now still pending against them. . . .

A similar issue . . . was considered by this court in Constitutional Petition No.18 of 2005 *Uganda Law Society vs Attorney General*. In that case the security forces of Uganda Government, on 16th November 2005[,] besieged the High Court of Uganda in order to re-arrest prisoners, including some in this petition, and beat them up after which they were re-arrested and driven back to detention centres in Kampala. This court held that such conduct contravened articles 23(1) and (6), 28(1), 128(1)(2) and (3) of the Constitution.

. . . [T]his court is bound by the earlier precedents to make some findings where similar acts have been committed in and around the premises of the High Court.

. . . We hold that the conduct of the respondent in the instant violated the above provisions of the Constitution. . . .

In our view, the petitioners had gone to court to seek justice but instead they were subjected, in court premises, inside the Temple of Justice, to humiliating, cruel and degrading treatment that is prohibited by articles 24 and 44(a) of our Constitution. We hold that the conduct of the respondent on 1st [M]arch 2007 violated the two above articles of the constitution. . . .

In the exercise of this judicial power, the Courts are Independent and are not subject to the Control or direction of any person or authority. The Executive has no role in that process except such a role that [it] may be assigned by the judiciary. The Constitution (article 28(2)) prohibits all forms of interference with Courts or judicial officers from any person or authority. Judicial power is derived ONLY from the people and is exercised by ONLY THE COURTS established under the Constitution. The acts of the State on 1st [M]arch 2007 at the premises of the High Court of Uganda in Kampala grossly interfered with the exercise of judicial power in contravention of article 126 and 128 of the Constitution. We therefore answer the first issue in the affirmative.

. . . [The fourth issue] is whether the petitioners will ever be able to receive a fair trial on the charges which are still pending in the Magistrates Courts and the High Courts of this country? Can any trial resulting from tainted proceedings as has been described in this petition be fair within the meaning of article 28 and 44(c) of the Constitution?

The petitioners believe that the events of 1st March 2007 which included the shedding of blood in the premises of the High Court, brutal assaults on prisoners who had been released on bail, violent arrest and manhandling prisoners as they were thrown on lorries as if they were sacks of potatoes, unlawful confinement of the Deputy Chief Justice, the Principal Judge and other frightened Judges and Registrars who were confined and besieged for over six hours in the High Court buildings and the unrepentant attitude of the Executive Arm of this Republic, all point in one direction that they will never receive a fair trial from the legal system of this country for the offences now pending against them.

. . . We have painfully arrived at a similar conclusion that no trial arising from proceedings bearing a history like the one described in this petition can ever be said to be fair within the meaning of articles 28 and 44 of the Constitution of Uganda of 1995. . . .

We do hereby grant all the declarations sought in the petition.

. . . The first order sought is for a stay of all criminal proceedings in all the courts . . . and a direction to each of the said courts to discharge the petitioners. We have found that what the security and other State agencies did at the premises of and Headquarters of the third organ of State (Judiciary) was an outrageous affront to the Constitution, constitutionalism and the Rule of Law in Uganda. . . .

[I]n the process of producing and presetting suspects in our courts, the police and the prosecution do violate numerous constitutional rights of accused persons, yet even where such violations are brought to the notice of the courts, the prosecutions go [ahead] as if nothing has gone [amiss]. We think it is high time the judiciary reclaimed its mantle and apply the law to protect fundamental rights and freedoms [of] our people as the Constitution requires. . . .

The last order sought in this petition is . . . permanently prohibiting the State from using the process of any court, military or civilian so as to initiate and prosecute the petitioners in connection of the alleged plot to overthrow the Government of Uganda by force of arms between December 2001 and December 2004. . . .

By a unanimous decision of this court, the petition succeeds. . . .

* * *

In September 2014, the pro-democracy Umbrella Movement (also called Occupy Central) emerged in Hong Kong as a response to proposed electoral reforms for the 2017 Chief Executive election. The reforms would have granted universal suffrage to Hong Kong citizens as a replacement for the existing 1200-person Election Committee, but voters would only be allowed to choose among two to three pre-screened candidates who must “love the country [China] and love Hong Kong.” These reforms were ultimately rejected by Hong Kong’s Legislative Council (LegCo) in 2015 after 33 pro-Beijing members staged a walkout, but did not stop the vote. However, they set the backdrop for the 2016 legislative and 2017 Chief Executive elections.

In September 2016, Yau Wai Ching and Sixtus (Baggio) Leung were elected to the Hong Kong LegCo. Both are members of the Youngspiration Party, which emerged after the Umbrella Movement and favors Hong Kong’s right to self-determination and protection from Chinese government interference. When they were sworn in as new legislators, Yau and Leung altered the words of the legislative oath to avoid pledging allegiance to China. Consequently, they were prohibited from taking their seats in the legislature.

The Chief Executive (head of the Hong Kong government) and Secretary of Justice brought suit against Yau and Leung to prevent them from retaking their legislative oaths and assuming their seats. While the case was pending in the court of first instance, Beijing’s National People’s Congress Standing Committee (NPCSC) issued an interpretation of the Basic Law’s provision on oathtaking. The interpretation stated that elected officials who declined to take the oath or refused to do so sincerely, solemnly, and accurately would be disqualified from office. After the NPCSC issued its interpretation of the law, Yau and Leung appealed to the Hong Kong Court of Final Appeal, whose judgment is excerpted below.

Yau Wai Ching v. Chief Executive of Hong Kong
Hong Kong Court of Final Appeal
Miscellaneous Proceedings Nos. 7, 8, 9 & 10 of 2017 (Civil)

The Appeal Committee[, Chief Justice Ma, and Permanent Judges Ribeiro and Fok, delivered the judgment]:

1. These applications for leave to appeal to the Court of Final Appeal arise out of proceedings concerning the taking of the oath of a Legislative Councillor by the two applicants, Sixtus Leung Chung Hang and Yau Wai Ching, following the general election in September 2016 and the consequences of their purporting to do so. . . . [I]t was determined by the President of the Legislative Council (Legco) that their actions did not constitute a valid taking of the requisite oath and he decided that they should be given a further opportunity to do so. Before they were able to do so, however, these proceedings were commenced by the then Chief Executive and the Secretary for Justice, the material question being whether in the circumstances Leung and Yau were entitled to re-take their oaths. The Court of First Instance concluded that they were not and made declarations as to the invalidity of their oaths and of their disqualification from assuming office as members of Legco and acting as such. That decision was affirmed on appeal and has led to the applications now before us.

2. These proceedings have received widespread publicity and the circumstances leading to them have provoked strong expressions of opinion and comment amongst many members of the community. Be that as it may (and the Court’s role is not to enter into matters of political debate), the sole legal issue . . . has been whether the criteria for the grant of leave to appeal have been satisfied. . . .

3. . . . [W]e had no doubt that the threshold for leave to appeal is not met and that, accordingly, the applications must be dismissed. . . . [A]lthough the questions touch upon issues of law of general and public importance, there is no reasonably arguable basis for disturbing the judgments under appeal. . . .

4. Article 104 of the Basic Law of the Hong Kong Special Administrative Region (“BL104”) provides:

When assuming office, . . . members of the . . . Legislative Council . . . must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.

5. The Oaths and Declarations Ordinance (Cap.11) (“the Ordinance”) stipulates [a script for taking “the Legco oath” of office]. . . .

7. . . . [S]ection 21 of the Ordinance provides for the consequence of non-compliance in the following terms:

Any person who declines or neglects to take an oath duly requested which he is required to take by this Part, shall . . .

(b) if he has not entered . . . office, be disqualified from entering on it. . . .

8. . . . Instead of taking the Legco oath in the form stipulated . . . [Yau and Leung] made a number of material alterations to it and accompanied their words by various actions [including the use of the term “Hong Kong nation,” mispronouncing the word “China,” and displaying a blue banner bearing the words “HONG KONG IS NOT CHINA.”] . . .

11. On 7 November 2016, after the hearing of the proceedings in the Court of First Instance but before judgment was given, the Standing Committee of the National People’s Congress (“NPCSC”) of the People’s Republic of China (“PRC”) exercised its power under Article 158(1) of the Basic Law* to interpret BL104 The Interpretation states as follows: . . .

(2) An oath taker must take the oath sincerely and solemnly, and must accurately, completely and solemnly read out the oath prescribed by law

(3) An oath taker is disqualified forthwith from assuming the public office specified in the Article if he or she declines to take the oath. An oath taker who intentionally reads out words which do not accord with the wording of the oath prescribed by law, or takes the oath in a manner which is not sincere or not solemn, shall be treated as declining to take the oath. . . .

15. . . . [W]hen they purported to take the Legco oath . . . , Leung and Yau each:

. . . manifestly refused (and thus declined) to solemnly, sincerely and truly bind themselves to uphold the BL or bear true allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China. Alternatively, at the least, they must have wilfully omitted (and hence neglected) to do so. . . .

* Article 158(1) of the Basic Law provides:

The power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress.

16. . . . [T]he questions of law sought to be raised by each of the applicants' respective notices of application engage: (1) the issue of the applicability of the non-intervention principle, (2) the proper construction of section 21 of the Ordinance, and (3) the ambit and effect of the Interpretation. . . .

17. . . . [C]ourts will not intervene to rule on the regularity or irregularity of the internal processes of the legislature but will leave it to determine exclusively for itself matters of this kind: this is the non-intervention principle. . . .

21. In the present context, the principle of non-intervention cannot apply in respect of the court's duty to rule on the question of compliance with the constitutional requirements of BL104. . . . [I]t is the duty of the courts of the Hong Kong Special Administrative Region . . . to enforce and interpret that law. BL104 gives rise to a constitutional duty on members of Legco to take an oath to swear to uphold the Basic Law and to swear allegiance to the Hong Kong Special Administrative Region. This is clear from the terms of BL104 itself but is reinforced by paragraph 2 of the Interpretation. Although the precise terms of the oath to be taken are not expressly set out in BL104, the provision imposes a duty to swear "in accordance with law." That law is the Ordinance, . . . which stipulate[s] the form of the Legco oath . . . and also provides, by section 21, that certain consequences will attach to a person who declines or neglects to take that oath when duly requested to do so. . . .

28. . . . [W]here a member has been incontrovertibly found by a court to have declined or neglected to take the Legco oath, . . . there is no discretion or judgment to be exercised by the President of Legco. . . .

35. . . . Under the constitutional framework of the Hong Kong Special Administrative Region, the Basic Law is a national law of the PRC, having been enacted by the National People's Congress pursuant to Article 31 of the Constitution of the PRC. The NPCSC's power to interpret the Basic Law derives from Article 67(4) of the Constitution of the PRC and is provided for expressly in the Basic Law itself in BL158(1) An interpretation of the Basic Law issued by the NPCSC is binding on the courts of the Hong Kong Special Administrative Region. It declares what the law is and has always been since the coming into effect of the Basic Law on 1 July 1997.

36. . . . [The] disqualification of Leung and Yau is the automatic consequence of their declining or neglecting to take the Legco oath, and that . . . is binding on the courts of the Hong Kong Special Administrative Region as regards the true construction of BL104 at the material time when Leung and Yau purported to take their oaths. . . .

38. . . . [R]egardless of the general and public importance of some of the questions sought to be raised, Leung and Yau's appeals . . . are not reasonably arguable and . . . there is no reasonable prospect of the Court differing from the conclusions of the courts below. . . .

The Muiña* and Batalla Cases in Argentina*** (2018)**

In 2017 and 2018, the Supreme Court of Argentina issued two landmark rulings on the applicability of procedural benefits to individuals convicted of crimes against humanity during the 1976–1983 military dictatorship. Law 24,390 provided that time served in excess of two years of preventive detention before conviction should be counted twice towards the final sentence (popularly known as the 2x1 benefit).**** The law, in force from 1994 until 2001, was repealed by Congress.

The first Supreme Court ruling was issued on May 3, 2017. The majority, comprised of Justices Highton, Rosenkrantz and Rosatti, declared the applicability of law 24,390 to crimes against humanity. Justices Highton and Rosenkrantz relied upon section 2 of the Criminal Code, which established that a criminal law more favorable to the defendants applied to all crimes, whatever their bases. Based on the principle that a restrictive interpretation is preferred whenever rights are permanently restricted, these two justices concluded that any doubts as to the applicability of section 2 of the Criminal Code to crimes against humanity had to be resolved in favor of the convicted. In their view, the best answer that a law-abiding society can provide in the face of crimes against humanity and the only effective way to not resemble what that polity battled and condemned is strict compliance with the rule of law. In this case, that principle compelled the application of the 2x1 benefit to the convicted. Justice Rosatti concurred on separate grounds.

Justices Lorenzetti and Maqueda dissented. They argued that serving the full sentence was part of the normative concept of crimes against humanity and that an interpretation of the new law ought not be used to frustrate this purpose. In their view, the prosecution of crimes against humanity was a state policy, affirmed by the different branches of the government, that constituted a part of the social contract of the Argentine people.

The “Muiña” decision prompted outrage and resulted in one of Argentina’s largest-ever human rights demonstrations. Thereafter, the National Congress in a special session and by the vote of all members of the Congress but one, enacted law 27,362, which provided that law 24,390 was not applicable to crimes against humanity.

* CSJ 1574/2014/RHI, Bignone, Reynaldo Benito Antonio and other over extraordinary appeal.

** FLP 91003389/2012/T01/93/1/RH11, Appeal lodged by Batalla, Rufino en la causa Hidalgo Garzón, Carlos del Señor and others.

*** English summary provided by Justice Carlos Rosenkrantz.

**** Law 24, 390 provided:

Section 1: The time spent in preventative detention cannot be longer than two years. . . .

Section 7: Once the two year period provided for in section 1 has elapsed, one day of preventative detention will count as two days in prison. . . .

On December 4, 2018, the Supreme Court decided again on the applicability of the 2x1 benefit to crimes against humanity in light of the enactment of law 27,362. The majority decision—now formed by Justices Highton, Rosatti, Maqueda and Lorenzetti—held that the 2x1 benefit did not apply to those convicted for crimes against humanity.

In the view of Justices Highton and Rosatti, law 27,362 was “interpretative” since it did not retroactively modify the criminal legislation but clarified how the law applicable to the case should be interpreted. Further, the new law had not prolonged the penalty of the convicted, but established the manner in which the time spent in prison before conviction should be counted. According to Justices Highton and Rosatti, both laws could be applied jointly. Furthermore, Justices Highton and Rosatti concluded that the application of law 27,362 was neither arbitrary nor discriminatory to the extent that it targeted all of those who had been convicted for crimes against humanity. Justices Maqueda and Lorenzetti affirmed that the issue submitted before the Court was substantially analogous to the one analyzed in their respective dissenting opinions in “Muiña,” therefore forming a majority on the basis of their prior view.

Justice Rosenkrantz dissented and argued that the holding in “Muiña” ought to apply despite the enactment of law 27,362; in his view, that law was unconstitutional because it violated the principle of non-retroactivity enshrined in section 18 of the National Constitution.* According to Justice Rosenkrantz, even if law 27,362 was genuinely interpretative, in the criminal field, the laws that worsen the situation of the convicted violate a core value of liberal humanism: the principle of non-retroactivity. Justice Rosenkrantz highlighted that even if the social reaction that prompted the enactment of the law expressed the legacy of “never again” (*Nunca más*) and the social purpose of prosecuting crimes against humanity, not all efforts to put these values into practice were consistent with the Constitution. Thus, he affirmed that it was the duty of courts to resist the temptation, understandable but unjustified, to punish individuals convicted of crimes against humanity in a manner that is inconsistent with the Constitution. Finally, Justice Rosenkrantz stated that the Constitution compelled judges to apply the principle of non-retroactivity equally to everybody.

* Section 18 of the National Constitution of Argentina provides:

No inhabitant of the Nation may be punished without previous trial based on a law enacted before the act that gives rise to the process, nor tried by special committees

Abusive Judicial Review: Courts Against Democracy

David Landau and Rosalind Dixon (2019)*

. . . [C]ourts are often seen as one of the main defenses against the threat posed by the new authoritarians. Judges are increasingly being called upon to intervene to protect democracy—or to engage in a form of democratic hedging. Not every effort at democratic hedging by courts will succeed. But constitutional courts can, and do, play an important role in protecting democracy from the threat of democratic backsliding. . . . Based on comparative evidence, this article shows that the fear espoused by critics of the [U.S.] Supreme Court—that it might stand by passively as democracy is dismantled—is a reasonable one. But the prospect of courts standing idly by in the face of an anti-democratic threat is not actually the worst-case scenario.

In fact, across a range of countries would-be authoritarians have fashioned courts into weapons for, rather than against, abusive constitutional change. In some cases, courts have upheld and thus legitimated regime actions that helped actors consolidate power, undermine the opposition, and tilt the electoral playing field heavily in their favor. In other cases, they have gone further and actively attacked democracy by, for example, banning opposition parties, eliminating presidential term limits, and repressing opposition-held institutions. We label courts' intentional attacks on the core of electoral democracy abusive judicial review, and we argue that it is an important but undertheorized aspect of projects of democratic erosion.

Regimes turn to courts to carry out their dirty work because, in doing so, they benefit from the associations that judicial review has with democratic constitutional traditions and the rule of law. Having a court, rather than a political actor, undertake an anti-democratic measure may sometimes make the true purpose of the measure harder to detect, and at any rate it may dampen both domestic and international opposition. The nature of the practice of abusive judicial review, which masquerades as a legitimate exercise of an institution that is now almost-universally promoted, makes the practice challenging to prevent and respond to. Not all instances of abusive review will succeed, and not all courts will (willingly) engage in the practice, but we suggest, the practice is likely to be a significant part of the authoritarian toolkit going forward. . . .

Labelling some subset of constitutional amendments and replacements “abusive” begs the obvious question of how to distinguish “abusive” forms of constitutional change from other forms. We . . . [define] “abusive” constitutional change as change that makes the constitutional order meaningfully less democratic

*Excerpted from David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. (forthcoming 2020). Excerpted from a draft. The final work, copyright 2020 by David Landau and Rosalind Dixon, will be published in the *UC Davis Law Review*, vol. 53, copyright 2020, by The Regents of the University of California. All rights reserved. Printed with permission.

than it was initially. In other words, it moves it on a spectrum towards authoritarianism, even if the resulting regime will often be “hybrid” or “competitive authoritarian” rather than completely authoritarian. . . .

Our definition of abusive judicial review requires that judges *intentionally* take aim at the democratic minimum core. . . . [J]udges usually do this after being either coerced or captured by anti-democratic actors, and thus become part of a regime strategy to undermine liberal democracy. Implicit in this concept of intent is some notion of bad faith, at least when abusive judicial review operates within constitutional orders with a liberal democratic starting point. In issuing decisions with a heavily anti-democratic valence, judges distort constitutional meaning and often draw on concepts and doctrines designed to protect liberal democracy in an abusive way that subverts their underlying meaning and turns them into tools to attack liberal democracy. . . .

As an example of the complexities that sometimes attend efforts to discern judicial intent in this area, consider a line of cases by the Thai Constitutional Court that took aim at the populist leader Thaksin Shinawatra and his allies. The Thai Constitutional Court and Tribunal between 2005 and 2015 handed down decisions invalidating the 2006 parliamentary elections, removing three prime ministers, disqualifying the largest political party in Thailand, preventing most of its leadership from seeking political office, and preventing it from enacting a range of key policies, including a series of constitutional amendments. These decisions were interspersed with military coups in 2006 and 2014 against the elected democratic order, with the most recent coup resulting in a durable military regime. Without much question, then, the long-term effect of this line of jurisprudence has been anti-democratic in nature: the Court’s decisions helped to create the climate that justified military rule.

Determining anti-democratic intent is trickier. Thaksin’s populism posed its own kind of threat to the democratic order While those bringing cases against Thaksin may have had abusive motives from the start, some have suggested that the decisions banning Thaksin’s supporters may have been based on a good-faith (although ultimately erroneous) idea about which side posed the bigger threat to democratic constitutionalism. The Court, on this account, may have contributed to the suspension of the Constitution and military rule, but this was an unintended consequence of a good-faith but clumsy effort to check Thaksin and the threat that his brand of electoral populism posed to constitutionalism and the rule of law. Others have labelled the Court’s decisions a form of anti-democratic “judicial coup.” It is of course also possible that the nature of judicial intent changed over time and became closer to abusive judicial review as the military’s end goals became clearer. . . .

Since abusive judicial review is usually associated with captured (or at least cowed) judiciaries, one should look for evidence that the independence of courts and judges have been undermined. . . . [E]vidence of both formal and informal moves to take over courts is often available: flimsy impeachment attempts or other irregular removals, changes to the rules for selecting and regulating judges, and similar

measures. . . . In some cases, would-be authoritarians may simply threaten to use these tools as a means of capturing or controlling a court—and do so behind closed doors.

Other important indicators are significant procedural irregularities in the way an individual case is handled. . . . While procedural irregularity may not [be] the same [as] bad faith, it may be an important indicator of it. Thus, judges being mysteriously replaced, normal procedures deviated from, or decisions made under odd circumstances may all be potential red flags.

Take the 2009 Nicaraguan case . . . where the Supreme Court excised presidential term limits from the Nicaraguan constitution. The decision was issued under extraordinary procedural conditions. The president of the Court formally notified the other judges of the vote on the case only after normal business hours had ended, and thus judges and court personnel had gone home for the day. Informally, only those judges affiliated with the president's party were notified; naturally, the opposition judges on the Court did not show up and were replaced by pro-regime substitutes. Such extraordinary procedural irregularities are useful evidence of bad faith. . . .

[D]eparture by a court from its *own* established practices and precedents may be one important sign that a court is in fact engaging in knowing forms of abusive judicial review: if a court fails to live up to its own ordinary standards of legal reasoning, this may be one relatively clear sign that it is engaged [in] abusive forms of review.

Where courts knowingly engage in anti-democratic forms of review, there may likewise be evidence of abusive forms of reasoning or “borrowing” by judges in the application of existing precedents. . . . Instead of simply ignoring existing doctrines, they will tend to cite them in an a-contextual way—thus reusing doctrines found elsewhere in contexts where the absence of certain supporting legal, social, or political conditions would make that use problematic. Or they may make use of doctrine in a way that is patently selective, for example by wielding doctrines against political opponents but trying to protect allies. . . .

When regimes pursue a strategy of abusive judicial review, they are also attempting to play off the presumptive legitimacy accorded to judicial review in liberal democratic constitutionalism in order to blunt both domestic and internal opposition to authoritarian actions. Domestic constitutional cultures, as well as international norms, may make it difficult for executive or legislative officials to flagrantly disregard or violate constitutional norms. For example, and to take several examples . . . from recent comparative experience, political officials who disregard clear textual term limits on their mandates, who ban opposition parties, and who shut down or limit opposition-controlled institutions such as legislatures, may face a hostile domestic reception and swift sanctions from international or regional institutions. Courts can cut through some of the constraints apparently posed by constitutional texts, in a way that

may cause less of an outcry from international institutions, if they are the ones who carry out these actions. . . .

[I]nternational actors may sometimes be less willing to attack judicial decisions, or quick to perceive that a regime actually is exceeding its constitutional bounds. This may help to stave off sanctions or other consequences that would otherwise ensue from anti-democratic action. In short, judicial review may be a way to make democratic erosion both less visible and more legitimate, with potential benefits to the regime. . . .

[R]egimes have a range of formal *legal* tools to influence the composition and powers of the judiciary. Most of these changes fall into one of two buckets: attempts to “pack” a court by influencing its composition, and attempts to “curb” a Court by threatening its institutional powers or resources.

The most orthodox way to influence the composition of a court, or to “pack” it, will be to appoint a new set of judges to one or more vacant seats. But where this is not possible, would-be authoritarians may attempt to alter the size of a court, or the number of judges sitting on a . . . specific judicial panel. For example, they might choose not to appoint a full quorum of judges to a court, or conversely, to increase the size of a court, with a view to appointing a new set of ideologically sympathetic judges. . . .

Another mechanism for influencing the composition of a court involves attempts to remove existing allegations of misconduct against certain judges, including allegations of corruption, and following established procedures for removal such as impeachment based on misconduct or corruption. Where regimes have sufficient support in the legislature, such removals may be fairly easy. In Bolivia, for example, the regime of Evo Morales has been aggressive in seeking to impeach hostile judges on flimsy grounds. In 2014, for example, impeachment proceedings were initiated against three Constitutional Court justices after they ruled against the government, and all three were eventually removed from the Court.

A related way to remove hostile judges is to change the retirement age, effectively forcing older judges to leave the Court and thus creating new vacancies that can be packed by regime loyalists. . . .

A “softer” version of a similar technique is to manipulate the process of judicial promotion, either to higher courts or to the chief justiceship of a court. In India, for example, after the Supreme Court issued its famous *Kesavananda* decision holding that a constitutional amendment of Indira Gandhi purporting to insulate certain issues from judicial review was an unconstitutional constitutional amendment, she responded the very next day by flouting a long-accepted norm that promotion to the chief justiceship of the Court would be based solely on seniority. She passed over

three senior justices in the *Kesavananda* majority and promoted a more junior justice who had dissented

Instead of, or in addition to, seeking to pack a court, regimes may also target the court as an institution. For example, they may cut a court's budget or remove its access to necessary resources[,] strip a court's jurisdiction to hear some or all cases involving core constitutional disputes, decline to publish its judgments, or refuse to follow its judgments where the executive government is a party to the case. By cutting a court's budget, or access to basic resources, would-be authoritarians can undermine courts in several ways. They can make it more difficult for judges to produce judgements in a timely way. They can also reduce the perceived power and prestige of the court in ways that affect the support for the court in the broader constitutional culture. And they can reduce the attractiveness of judicial office, or the caliber, of judge likely to take office in the future. . . .

[R]efusing to publish a court decision or give it any authoritative effect reduces the practical effect of court decisions as a potential check on abusive constitutional change, and diminishes the perceived power and prestige of courts as important social actors in ways that undermine . . . their effectiveness as institutions. . . .

[A] weak form of abusive judicial review occurs paradigmatically when courts are asked to review new legislation or executive action that plausibly clashes with the constitutional text and undermines the democratic minimum core. By dismissing a constitutional challenge to this legislation or executive action, courts are often interpreted by the broader public to be affirming the legitimacy of those laws. . . . This kind of "legitimation effect" may be especially valuable to would-be authoritarian actors seeking to engage in "stealth" forms of authoritarianism, or to achieve anti-democratic change while retaining the appearance of a commitment to constitutional democracy. . . .

More interesting than mere legitimation of anti-democratic political decisions are cases where courts themselves are the ones actively undertaking anti-democratic changes. Courts in some cases may choose to engage in robust forms of review, which involve little or no deference to the constitutional judgements of legislators or executive actors. Judicial review of this kind is also often understood as a form of "strong" or "active" judicial review. Courts may likewise rely on certain remedies, such as the immediate invalidation of an existing statute or executive decision, or a mandatory order directed at a specific government official requiring specific and immediate action, which tend to give judicial review a strong character. . . .

[Some designs for the judiciary] will likely . . . function better during periods of anti-democratic threat than others. And a good design may act as a speed bump, slowing efforts to consolidate power by at least lengthening the amount of time needed for would-be authoritarians to take over a court. At least three techniques seem

important to doing this. The first is fragmentation of the appointment process, so that no single actor or movement can easily control it. . . .

A second useful technique will thus be to give some appointment powers to other independent institutions, such as ordinary courts, merit commissions, ombudspersons, and similar actors. These institutions too can eventually be captured by an authoritarian regime, but the capture process is likely to take longer, in turn slowing the process of packing a high court. . . .

The third technique is the staggering of terms on a court. Few systems outside of the U.S. provide for life tenure for justices on an apex constitutional court; the majority view instead is to provide terms that are longer than those for political actors, often around eight to ten years, and which are ordinarily made non-renewable. Most important, from this perspective, is that all or most of the slots on the court should not open up at once; instead, ideally, a few vacancies would occur every few years. Again, given enough time incumbents will likely be able to capture a court regardless, but staggering should at least slow the process, and in the meantime, political power may change hands. . . .

[For] those interested in protecting liberal democracy, the broad point is that “backlash” against a court that weakens it, although a problematic outcome, may in fact be less bad than an attack that preserves or strengthens judicial power *and* captures the court. . . .

In some contexts, it may be that designers should worry less about protecting against court-curbing than court-packing, and thus for example might feel comfortable leaving provisions dealing with judicial power or budget less entrenched than those dealing with appointment and similar issues. Such an approach might allow for democratic input against overreaching or out of touch judges, while protecting against the potent threat posed by abusive judicial review.

More counter-intuitively, in some especially precarious contexts designers may choose to construct weaker courts than they might otherwise, as a way to lessen the potential risks posed by abusive judicial review. . . . [C]reating a very strong court may risk handing opponents a loaded weapon that, if captured, can be turned into a devastating tool to attack the democratic order. . . .

Abusive judicial review often seems to trade on a reluctance on the part of [international] observers to question the propriety or legitimacy of court decisions. The rule of law has been a central commitment of the international community in the post-Cold War era. Building respect for court decisions has also been an integral part of many international rule of law programs, and this has led to a reluctance on the part of many international actors to criticize or attack the decisions of courts.

In many cases, of course, this international reverence for courts has been very helpful, for example by allowing courts to push back against international actors and insist on compliance with core democratic or constitutional commitments. . . . But this asymmetry between the approach of outsiders to political and legal actions is also a contributor to abusive judicial review. If courts have the capacity to do things which the political branches cannot do as easily, then the institution of judicial review will have added value for would-be authoritarians. Courts will thus become more frequent targets for anti-democratic co-optation. . . .

Bucklew v. Precythe
Supreme Court of the United States
139 S. Ct. 1112 (2019)

Justice Gorsuch delivered the opinion of the Court[, joined by Chief Justice Roberts, and Justices Thomas, Alito, and Kavanaugh].

Russell Bucklew concedes that the State of Missouri lawfully convicted him of murder and a variety of other crimes. He acknowledges that the U.S. Constitution permits a sentence of execution for his crimes. He accepts, too, that the State’s lethal injection protocol is constitutional in most applications. But because of his unusual medical condition, he contends the protocol is unconstitutional as applied to him. Mr. Bucklew raised this claim for the first time less than two weeks before his scheduled execution. He received a stay of execution and five years to pursue the argument, but in the end neither the district court nor the Eighth Circuit found it supported by the law or evidence. Now, Mr. Bucklew asks us to overturn those judgments. We can discern no lawful basis for doing so. . . .

After a decade of litigation, Mr. Bucklew was seemingly out of legal options. A jury had convicted him of murder and other crimes and recommended a death sentence, which the court had imposed. . . . As it turned out, though, Mr. Bucklew’s case soon became caught up in a wave of litigation over lethal injection procedures. . . .

Addressing [a] similar . . . protocol, [a plurality of this Court] concluded that a State’s refusal to alter its lethal injection protocol could violate the Eighth Amendment* only if an inmate first identified a “feasible, readily implemented” alternative procedure that would “significantly reduce a substantial risk of severe pain.”. . .

While all this played out, pressure from anti-death-penalty advocates induced the company that manufactured sodium thiopental to stop supplying it for use in

* The Eighth Amendment of the Constitution of the United States provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

executions. As a result, the State was unable to proceed with executions until it could change its lethal injection protocol again. This it did in 2012, prescribing the use of a single drug, the sedative propofol. Soon after that, Mr. Bucklew and other inmates sued to invalidate this new protocol as well, alleging that it would produce excruciating pain and violate the Eighth Amendment on its face. . . .

[T]he State scheduled Mr. Bucklew’s execution for May 21[, 2014]. But 12 days before the execution Mr. Bucklew filed yet another lawsuit, the one now before us. In this case, he presented an as-applied Eighth Amendment challenge to the State’s new protocol. Whether or not it would cause excruciating pain for *all* prisoners, as his previous lawsuit alleged, Mr. Bucklew now contended that the State’s protocol would cause *him* severe pain because of his particular medical condition. Mr. Bucklew suffers from a disease called cavernous hemangioma, which causes vascular tumors—clumps of blood vessels—to grow in his head, neck, and throat. His complaint alleged that this condition could prevent the pentobarbital from circulating properly in his body; that the use of a chemical dye to flush the intravenous line could cause his blood pressure to spike and his tumors to rupture; and that pentobarbital could interact adversely with his other medications. . . .

Despite the [court of appeals’] express instructions, . . . Mr. Bucklew . . . refused to identify an alternative procedure that would significantly reduce his alleged risk of pain. Instead, he insisted that inmates should have to carry this burden only in facial, not as-applied, challenges. Finally, after the district court gave him “one last opportunity,” Mr. Bucklew . . . claimed that execution by “lethal gas” was a feasible and available alternative method that would significantly reduce his risk of pain. . . .

The [court of appeals] held that Mr. Bucklew had produced no evidence that the risk of pain he alleged “would be substantially reduced by use of nitrogen hypoxia instead of lethal injection as the method of execution.” . . .

On the same day Mr. Bucklew was scheduled to be executed, this Court granted him a second stay of execution. We then agreed to hear his case to clarify the legal standards that govern an as-applied Eighth Amendment challenge to a State’s method of carrying out a death sentence. . . .

[W]e first examine the original and historical understanding of the Eighth Amendment and our precedent The Constitution allows capital punishment. In fact, death was “the standard penalty for all serious crimes” at the time of the founding. . . . Of course, that doesn’t mean the American people must continue to use the death penalty. The same Constitution that permits States to authorize capital punishment also allows them to outlaw it. But it does mean that the judiciary bears no license to end a debate reserved for the people and their representatives.

While the Eighth Amendment doesn’t forbid capital punishment, it does speak to how States may carry out that punishment, prohibiting methods that are “cruel and

unusual.” What does this term mean? At the time of the framing, English law still formally tolerated certain punishments even though they had largely fallen into disuse—punishments in which “terror, pain, or disgrace [were] superadded” to the penalty of death [citing Blackstone]. . . .

At the time of the Amendment’s adoption, the predominant method of execution in this country was hanging. While hanging was considered more humane than some of the punishments of the Old World, it was no guarantee of a quick and painless death. . . . The force of the drop could break the neck and sever the spinal cord, making death almost instantaneous. But that was hardly assured given the techniques that prevailed at the time. More often it seems the prisoner would die from loss of blood flow to the brain, which could produce unconsciousness usually within seconds, or suffocation, which could take several minutes. But while hanging could and often did result in significant pain, its use “was virtually never questioned.” Presumably that was because, in contrast to punishments like burning and disemboweling, hanging wasn’t “*intended* to be painful” and the risk of pain involved was considered “unfortunate but inevitable.”

What does all this tell us about how the Eighth Amendment applies to methods of execution? For one thing, it tells us that the Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, isn’t guaranteed to many people, including most victims of capital crimes. . . .

This Court has yet to hold that a State’s method of execution qualifies as cruel and unusual, and perhaps understandably so. Far from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite. . . . Through much of the 19th century, States experimented with technological innovations aimed at making hanging less painful. . . . And beginning in the 1970s, the search for less painful modes of execution led many States to switch to lethal injection. . . .

Still, accepting the possibility that a State might try to carry out an execution in an impermissibly cruel and unusual manner, how can a court determine when a State has crossed the line? . . . [W]here (as here) the question in dispute is whether the State’s chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason. . . . There are . . . many legitimate reasons why a State might choose, consistent with the Eighth Amendment, not to adopt a prisoner’s preferred method of execution. . . .

[Bucklew] suggests that he should not have to prove an alternative method of execution in his as-applied challenge because “certain categories” of punishment are “manifestly cruel . . . without reference to any alternative methods.” He points to “burning at the stake, crucifixion, [and] breaking on the wheel” as examples of

“categorically” cruel methods. And, he says, we should use this case to add to the list of “categorically” cruel methods any method that, as applied to a particular inmate, will pose a “substantial and particular risk of grave suffering” due to the inmate’s “unique medical condition.” . . .

Distinguishing between constitutionally permissible and impermissible degrees of pain . . . is a *necessarily* comparative exercise. To decide whether the State has cruelly “superadded” pain to the punishment of death isn’t something that can be accomplished by examining the State’s proposed method in a vacuum, but only by “compar[ing]” that method with a viable alternative. . . .

Mr. Bucklew’s argument . . . is inconsistent with the original and historical understanding of the Eighth Amendment As we’ve seen, when it comes to determining whether a punishment is unconstitutionally cruel because of the pain involved, the law has always asked whether the punishment “superadds” pain well beyond what’s needed to effectuate a death sentence. And answering that question has always involved a comparison with available alternatives, not some abstract exercise in “categorical” classification. At common law, . . . hanging carried with it an acknowledged and substantial risk of pain but was not considered cruel because that risk was thought—by comparison to other known methods—to involve no more pain than was reasonably necessary to impose a lawful death sentence. . . .

“Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.” . . . Those interests have been frustrated in this case. Mr. Bucklew committed his crimes more than two decades ago. . . . [H]e has managed to secure delay through lawsuit after lawsuit. . . .

The people of Missouri, the surviving victims of Mr. Bucklew’s crimes, and others like them deserve better. . . . The answer is not . . . to reward those who interpose delay with a decree ending capital punishment by judicial fiat. Under our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve. . . . Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm, and “the last-minute nature of an application” that “could have been brought” earlier, or “an applicant’s attempt at manipulation,” “may be grounds for denial of a stay.” So, for example, we have vacated a stay entered by a lower court as an abuse of discretion where the inmate waited to bring an available claim until just 10 days before his scheduled execution for a murder he had committed 24 years earlier. If litigation is allowed to proceed, federal courts “can and should” protect settled state judgments from “undue interference” by invoking their “equitable powers” to dismiss or curtail suits that are pursued in a “dilatatory” fashion or based on “speculative” theories. . . .

Justice Thomas, concurring.

I adhere to my view that “a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain.” . . . I would end the inquiry there. . . .

Justice Kavanaugh, concurring.

. . . [A]n inmate who contends that a particular method of execution is very likely to cause him severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain. At oral argument in this Court, the State suggested that the firing squad would be such an available alternative, if adequately pleaded. . . . I do not here prejudge the question whether the firing squad, or any other alternative method of execution, would be a feasible and readily implemented alternative for every State. Rather, I simply emphasize the Court’s statement that “we see little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative.”

Justice Breyer, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan join in all but Part III, dissenting.

. . . [T]here is no need for any [comparative method of execution] reference point in a case like this. Bucklew accepts the constitutionality of Missouri’s chosen execution method as to prisoners who do not share his medical condition. We are informed that this method has been used in 20 executions, apparently without subjecting prisoners to undue pain. To the extent that any comparator is needed, those executions provide a readymade, built-in comparator against which a court can measure the degree of excessive pain Bucklew will suffer. . . .

It is . . . difficult to see how the “alternative-method” requirement could be “compelled by our understanding of the Constitution,” even though the Constitution itself never hints at such a requirement, even though we did not apply such a requirement in more than a century of method-of-execution cases, and even though we unanimously rejected such a requirement in [a recent decision]. . . .

The majority acknowledges that the Eighth Amendment prohibits States from executing prisoners by “horrid modes of torture” such as burning at the stake. But the majority’s decision permits a State to execute a prisoner who suffers from a medical condition that would render his execution no less painful. Bucklew has provided evidence of a serious risk that his execution will be excruciating and grotesque. The majority holds that the State may execute him anyway. . . .

I cannot reconcile the majority’s decision with a constitutional Amendment that forbids all “cruel and unusual punishments.” . . . [W]e have repeatedly held that the Eighth Amendment is not a static prohibition that proscribes the same things that it

proscribed in the 18th century. Rather, it forbids punishments that would be considered cruel and unusual today. The Amendment prohibits “unnecessary suffering” in the infliction of punishment, which this Court has understood to prohibit punishments that are “grossly disproportionate to the severity of the crime” as well as punishments that do not serve any “penological purpose.” The Constitution prohibits gruesome punishments even though they may have been common at the time of the founding. . . .

[T]he majority invokes the long delays that now typically occur between the time an offender is sentenced to death and his execution. . . . I agree with the majority that these delays are excessive. . . .

The majority responds to these delays by curtailing the constitutional guarantees afforded to prisoners like Bucklew who have been sentenced to death. By adopting elaborate new rules regarding the need to show an alternative method of execution, the majority places unwarranted obstacles in the path of prisoners who assert that an execution would subject them to cruel and unusual punishment. These obstacles in turn give rise to an unacceptable risk that Bucklew, or others in yet more difficult circumstances, may be executed in violation of the Eighth Amendment. Given the rarity with which cases like this one will arise, an unfortunate irony of today’s decision is that the majority’s new rules are not even likely to improve the problems of delay at which they are directed. . . .

Today’s majority appears to believe that . . . “because it is settled that capital punishment is constitutional, it *necessarily follows* that there must be a constitutional means of carrying it out.” These conclusions do not follow. It may be that there is no way to execute a prisoner quickly while affording him the protections that our Constitution guarantees to those who have been singled out for our law’s most severe sanction. And it may be that, as our Nation comes to place ever greater importance upon ensuring that we accurately identify, through procedurally fair methods, those who may lawfully be put to death, there simply is no constitutional way to implement the death penalty. . . .

Justice Sotomayor, dissenting.

. . . [T]here is no sound basis in the Constitution for requiring condemned inmates to identify an available means for their own executions. . . .

Given the majority’s ominous words about late-arising death penalty litigation, one might assume there is some legal question before us concerning delay. Make no mistake: There is not. . . .

The majority seems to imply that this litigation has been no more than manipulation of the judicial process for the purpose of delaying Bucklew’s execution. When Bucklew commenced this case, however, there was nothing “settled” about

whether the interaction of Missouri's lethal-injection protocol and his rare medical condition would be tolerable under the Eighth Amendment. . . .

The principles of federalism and finality that the majority invokes are already amply served by other constraints on our review of state judgments—most notably the Anti-Terrorism and Effective Death Penalty Act of 1996, but also statutes of limitations and other standard filters for dilatory claims. We should not impose further constraints on judicial discretion in this area based on little more than our own policy impulses. Finality and federalism need no extra thumb on the scale from this Court, least of all with a human life at stake.

The only sound approach is for courts to continue to afford each request for equitable relief a careful hearing on its own merits. That responsibility is never graver than when the litigation concerns an impending execution. Meritorious claims can and do come to light even at the eleventh hour, and the cost of cursory review in such cases would be unacceptably high. . . .

There are higher values than ensuring that executions run on time. If a death sentence or the manner in which it is carried out violates the Constitution, that stain can never come out. Our jurisprudence must remain one of vigilance and care, not one of dismissiveness.

* * *

In May of 2019, the United States Supreme Court issued its ruling in *Franchise Tax Board of California v. Hyatt*. The question was whether state governments were immune from private lawsuits in the courts of another state. In 1979, the Supreme Court ruled in a 6-3 decision in *Nevada v. Hall* that states were not immune from suit in other states' courts. The Court in *Hyatt*, in a 5-4 opinion, overruled *Nevada v. Hall*. Writing for the majority, Justice Thomas wrote, "*Nevada v. Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution. *Stare decisis* does not compel continued adherence to this erroneous precedent."

In response, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented. The dissent concluded with the following statement:

. . . I understand that judges, including Justices of this Court, may decide cases wrongly. I also understand that later-appointed judges may come to believe that earlier-appointed judges made just such an error. And I understand that, because opportunities to correct old errors are rare, judges may be tempted to seize every opportunity to overrule cases they believe to have been wrongly decided. But the law can retain the necessary stability only if this Court resists that temptation, overruling prior precedent only when the circumstances demand it. . . .

It is one thing to overrule a case when it “def[ies] practical workability,” when “related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine,” or when “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” It is far more dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question. The majority has surrendered to the temptation to overrule even though it is a well-reasoned decision that has caused no serious practical problems in the four decades since we decided it. Today’s decision can only cause one to wonder which cases the Court will overrule next. I respectfully dissent.

Israel—A Crisis of Liberal Democracy?

Yaniv Roznai (2018)*

. . . The Declaration of Independence of May[14,] 1948, explicitly stated that the Israeli regime would be based on a constitution. However, after deep political disagreements over the need to adopt a constitution at that stage, on June 13, 1950, the Knesset (the Israeli Parliament) adopted the ‘Harari Decision’ according to which instead of completing the constitutional project at once, the Knesset, which holds both legislative and constituent powers, would enact Basic Laws in stages, and those would eventually comprise the Israeli constitution. Until the early 1990s, the Knesset enacted several Basic Laws that regulated governmental structure and institutions. Moreover, the High Court of Justice (“HCJ”) served as a legal defender of unwritten common law rights and freedoms even without an entrenched bill of rights. Yet the prevailing approach was that of legislative supremacy.

In 1992, The Knesset enacted two significant Basic Laws on human rights: Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Occupation. These two Basic Laws provide substantive limits on the legislative powers of the Knesset by stipulating conditions for infringing protected constitutional rights. Three years later, in the pioneer judgment of *United Mizrahi Bank v. Migdal Cooperative Village*, the Supreme Court held that the Basic Laws hold a normative constitutional status superior to ordinary laws and that the court has the power to conduct judicial review and invalidate unconstitutional legislation. The constitutional revolution then reached a peak.

In addition to the constitutional revolution, the court has extended its authority through the years by taking a broad notion of justiciability by declaring that “the world is filled with law; anything and everything is justiciable,” thereby refusing to place political questions beyond the scope of judicial review. It also removed the traditional

* Excerpted from Yaniv Roznai, *Israel—A Crisis of Liberal Democracy?*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 355 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

requirement of legal standing (*locus standi*) for petitioners before the HCJ, and allowed petitions brought by ‘public petitioners’ as long as they concern significant rule of law or constitutional questions. It developed the ‘reasonableness’ ground for reviewing and invalidating governmental decisions, and finally, in a series of judicial decisions that followed the *United Mizrahi Bank* case, the HCJ broadly interpreted ‘human dignity’ so as to include certain aspects of the right to equality and freedom of expression, according them a constitutional status even though these rights were intentionally excluded from the Basic Laws on human rights.

The Supreme Court has therefore emerged as a dominant branch of government with a central constitutive role in collective decision-making. Amnon Rubinstein, the ‘father’ of Israeli Basic Laws on human rights and a renowned professor of constitutional law, wrote that “in fact, in many senses, under [Aharon] Barak’s leadership, the Court has turned itself into an alternative government.” Describ[ing] the Supreme Court under the leadership of President Barak, Richard Posner wrote that: “What Barak created out of whole cloth was a degree of judicial power undreamed of even by our most aggressive [U.S.] Supreme Court justices.” Accordingly, the Israeli judiciary has been regarded by many observe[r]s, in Israel and abroad, as one of the world’s activist courts, perhaps even “the most activist in the world.” . . .

[R]ecent years witness the rise of right-wing parties that support national, traditional and religious agendas together with aspirations of a “greater Israel.” . . . [P]olitical right discourse in Israel is characterized . . . by nativist ideas . . . [including] ‘territorial nativism’ which promotes Israeli control on the West Bank, the Golan Heights and East Jerusalem, as well as ‘ethnic nativism’ which is manifested through the aspiration for ethnic/religious homogeneity. . . . [T]he central role of authoritarianism . . . is “reflected in attempts to emphasize the superiority of national values and practices over individual ones” Finally, “in recent years, far right discourse promotes populist worldviews arguing that the will of the people is being ignored or manipulated as a result of the control of certain left-wing elite groups in the media, in parts of civil society, in the higher education system, and in the judiciary.”

There are multiple reasons for the success of right wing political parties and the push to counter the constitutional revolution with its liberal and universal values. *First*, there is an identification in the public between “critical voices” and “disloyalty” to the state or its “delimitation.” Accordingly, critical voices from the media, political opposition, or civil society are easily displayed as being disloyal. *Second*, there is an anti-elite sentiment in parts of the general public, which is being directed against the judiciary, the media, and academia. *Third*, the extreme right-wing is succeeding in creating a correlation of the left-wing with values such as liberalism and human rights. According to the 2017 Democracy Index, 72% of Jewish right-wing voters agree with the statement that “the leftist judiciary, media, and academia interfere with the elected right wing’s ability to rule.” *Fourth*, the endless[ness] of terrorism and security

challenges coupled with the hopeless Israeli-Palestine conflict lead to public support of right-wing political parties. . . .

[T]here are multiple legislative attempts to limit the court's competence to conduct judicial review, to limit *locus standi*, to change the voting method in the judicial selection committee, or the seniority principle for selecting the President of the Supreme Court. Such attempts join critical voices of coalition politicians against the Court, including the Minister of Justice, Ayelet Shaked who warned against judicial activism and pushing to nominate conservative judges.

A clear example for such an attempt is the recently proposed Basic Law: Legislation. On the one hand, this bill recognizes the constitutional revolution by explicitly authorizing the court to conduct judicial review. On the other hand, it seeks to greatly restrict the court's authority, compared to its existing authority; only the HCJ could strike down legislation (currently every court has judicial review power *inter partes*) and striking down [the] Knesset's legislation would require a minimum of a nine-judge panel and a two-thirds majority. Moreover, the proposal includes an 'override clause' that would allow a majority of 61 Knesset members (out of 120) to overcome HCJ decisions and to re-enact laws that were deemed as unconstitutional. Such laws would be valid for five years with an option of extension. Finally, the proposal includes a non-justiciability clause, according to which the court would lack the authority to invalidate legislation due to flaws in the legislative process or to conduct substantive review of basic laws. When presenting the proposed Basic Law, Minister Shaked criticized judicial activism that has "harmed Israeli democracy" saying that "from the current judicial chaos there will be order and a balance will be achieved between the three branches of government." Education Minister Naftali Bennett added that "Today we tell the court . . . The government ought to govern and the judges ought to judge." This rational[e] might be appealing to right-wing voters, among which, a small majority (53%) believes that the authority to overrule legislation should be taken away from the Supreme Court. However, as the 2017 Democracy Index reveals, the majority of the general public (58%) actually oppose the 'override clause.'

In a comparative perspective, some arguments can be made in favour [of] this proposal. Proposing to transform from a diffused system of judicial review to a centralized model in which only the HCJ can strike down legislation would turn Israel like most of the European countries. This is not the problematic aspect of the proposal, and it is supported by prominent jurists, Barak included. The main problems are with allowing a majority of 61 MKs to enact . . . unconstitutional legislation and with providing the Knesset, exercising its 'constituent power hat,' limitless power regarding substance. What is the problem, one may claim? Arguably, the mechanism of override exists in Canada's constitutional law, and in some perfectly democratic states, such as the [U.K.] or the Netherland[s], the guiding principle is legislative supremacy. Moreover, such a mechanism already exists in Basic[]Law: Freedom of Occupation. . . .

First, in [other] . . . countries there is an effective mechanism of constitutional review within the legislative process. In the Netherland[s], bills are presented to the Advisory Division of the Council of State that determines the constitutionality of the bill. . . . *Second*, [t]here is a distinction between allowing to override freedom of occupation and over[riding] the right to life or dignity. *Third*, in contrast with members of the Council of Europe, Israel is not a party to the European Convention on Human Rights, so there is no supra-national court above the Supreme Court, and there are no Strasb[o]urg judges to guard fundamental right[s] of individuals. *Fourth*, it is clear that such examples of countries without judicial review, New Zealand included, are the exception rather than the rule. *Fifth*, the Israeli legislature is composed of a single chamber, without a second chamber which can function as restraining, and the legislative process is dominantly controlled by the executive. . . . *Finally*, Israel is a young democracy without a long and established democratic culture or tradition, and some sections of the Israeli public have no actual commitment to liberal democracy. This political culture makes the proposed override mechanism less appropriate than other countries, such as Canada. Especially, the proposed majority of 61 MKs is inadequate as it would practically allow any coalition in the Knesset to enact unconstitutional legislation. A super-majority of at least 80 MK[s], I believe, would be more appropriate. Accordingly, the proposed Basic Law carries perilous implications of unlimited legislative powers granted to the Knesset, risking cuffing the hands of the HCJ from defending against the tyranny of the majority. Indeed, the Attorney General, Avichai Mandelblit, warned that the proposed bill would “cause significant harm to Israeli democracy.” Barak stated that if the bill is enacted in its current form, it would “take back Israeli law 25 years.”

Speaking at the 2018 annual conference of the Israeli Association of Public Law, Minister Shaken said that by challenging the Knesset’s legislation, the judiciary was “fleeing the people” and their choices, and that this derived from a “disconnect between some of the old elite from the realities of life.” . . . Shaked argued that in the eyes of the court “the ‘demos’ has become a demon.” The Minister of Justice is portraying the court as an elite group that treats people as the enemy, which makes the court, in its turn, the people’s enemy. This anti-elitism and the claim to be the sole representatives of the people is clear populism. . . .

[L]oyalty is a central theme in contemporary Israeli politics. Not only are certain human rights organization or philanthropic funds frequently accused of being disloyal, but the Minister of Culture, Miri Regev, also promotes a dependency between public funding and ‘cultural loyalty’ to the Israeli State, its symbols or values, intended to effectively silence critical positions. The prevailing rhetoric of loyalty is part of the populist wave that undermines the pluralism that characterized the Israeli society.

The de-legitimation of those opposing government’s policies on the one hand and the promotion of a single state[] vision on the other hand is also evident in the government’s complicated relationship with the media: aiming to control statutory

media authorities and excoriating media channels and reporters critical of the prime minister or the government. . . .

[A]ren't some of the laws or policies of the government legitimate? Isn't the shout[-]out of the end of democracy exaggerated? After all, Israel is not on the path to becoming a de-facto one party democracy. Indeed, perhaps some of the laws and policies discussed here are justifiable. Yet *the incremental aggregation of events is leading to a wide-ranging risk to the Israeli liberal-constitutional order, to an erosion of its democratic institutions, and to a gradual democratic backslide*. As Sadurski writes, the "comprehensive assault upon liberal-democratic constitutionalism produces a cumulative effect, and the sum is greater than the totality of its parts." . . .

Nowadays, democratic breakdowns occur not by an immediate break—a sudden suspension or destruction of the constitution following a coup d'état, but by elected governments using, abusing, and subverting the democratic institutions themselves. Since there is no single moment of constitutional breakdown which can mark the "crossing the red line" towards dictatorship or to an authoritarian regime, democratic backsliding is dangerously misleading. The erosion of democracy is virtually unnoticeable: "democracy's assassins use the very institutions of democracy—gradually, subtly, and even legally—to kill it," and those who criticize the government's abusive actions are dismissed as exaggerating or crying wolf. Therefore, we must neither exaggerate in our warnings, nor give the warning signs short shrift.

When Aharon Barak was recently asked whether he thinks that Israeli democracy is in danger, he replied "danger is a too-extreme expression. However, there is a trend, which if aggravated can lead to danger. We are on a slippery slope, and who knows where it will stop. It might not stop, and then there will be total deterioration. If the current trend continues or worsens, it could lead to 'tyranny of the majority' . . . I am not saying we are there, but if we continue to do so, we will get there." . . .

Judicial Independence in a Polarized World

Speech of Justice Rosalie Silberman Abella, The President of Israel's
Symposium in Honour of the 70th Anniversary of the Supreme Court of
Israel (2018)*

It was the *Charter of Rights and Freedoms* in 1982 that brought the Supreme Court of Canada—and judicial independence—to the public's attention, and introduced it to a uniquely Canadian justice vision, a vision that took the status quo as the beginning of the conversation, not the answer. . . .

* Justice Rosalie Silberman Abella of the Supreme Court of Canada delivered her speech, "Judicial Independence in a Polarized World," on the occasion of The President of Israel's Symposium in Honour of the 70th Anniversary of the Supreme Court of Israel on October 23, 2018, in Jerusalem.

Where for others pluralism and diversity are fragmenting magnets, for Canada they are unifying. Where for others assimilation is the social goal, for us it represents the inequitable obliteration of the identities that define us. Where for others treating everyone the same is the dominant governing principle, for us it takes its place alongside the principle that treating everyone the same can result in ignoring the differences that need to be respected if we are to be a truly inclusive society. . . .

What have I learned about judicial independence from Canada's experience? I learned that democracy is strengthened in direct proportion to the strength of rights protection and an independent judiciary, and that *injustice* is strengthened in direct proportion to their absence. A Supreme Court must be independent because it is the final adjudicator of which contested values in a society should triumph. In a polarized society, it is especially crucial to have an institution whose only mandate is to protect the rule of law.

It is the media's job to gather and disseminate the information we need to participate in the public conversations that lead to deciding whom to elect—or defeat; it is the legislature's job to take the public's pulse and decide which of its opinions to implement as public policy; and it is the Court's job to decide how best to protect democracy's core values, *regardless* of public opinion. Only Courts are not entitled to abandon their commitment to those core values—human rights, freedom of expression, freedom of the press, and protection of [women] and minorities, among others. Those are the values a Supreme Court has in its tool kit, and those are the values it must protect as it grapples with some of society's most complex issues, such as the relationship between state power, rights and public safety; the relationship between minority rights and majoritarian expectations; or the relationship between religious demands and secular beliefs. These are the kinds of challenges that attract intense public scrutiny, and they are the kinds of issues that cannot be decided—or be seen to be decided—without a fiercely independent judiciary. They are also the kinds of decisions that define a nation's values and, in defining its values, define not only its identity, but also its soul.

Many countries around the world are having existential crises over their national identities. They have made Faustian bargains, selling their democratic souls in exchange for populist approval. Their humanity has been the victim. So have their minorities. So have human rights. This, to me, is unconscionable. . . .

[H]ere we are in 2018 . . . watching that wonderful democratic consensus fragment all over the world, shattered by polarizing insensitivity; an unhealthy tolerance for intolerance; a cavalier indifference to equality; a deliberate amnesia about the instruments and values of democracy that are no less crucial than elections; and a shocking disrespect for the borders between power and its independent adjudicators, like the courts, who are made to choose between independence, ideological compliance, and survival.

Israel is having its own existential crisis and, with respect, the humanity of its soul is at risk unless the country understands that it cannot survive as the vibrant and complicated democracy that bloomed out of the desert 70 years ago without fiercely protecting the independence of its 70[-]year[-]old Supreme Court.

What is putting this at risk? The deliberate attempts to undermine public confidence in the Court's integrity; the unforgivable sacrificing of the Court's international reputation on the altar of partisanship; the hyperbolic rhetoric of hate that greets unpopular decisions; the menacing volley of simplistic pejorative labels, like 'unpatriotic,' that too often replace mature debate; the demeaning of human rights by trivializing it as a weakness of the 'left,' whatever that means, instead of recognizing that human rights is essential to the health of the *whole* political spectrum. All this is corrosive not only of the Israeli judiciary's independence, but of Israel's democracy. . . .

The Israeli Supreme Court is the most precious jewel in the democratic crown Israel put on in 1948. Tampering with its independence and legitimacy is tampering with its integrity, and tampering with its integrity is tampering with Israel's soul. That would break the hearts not only of judges all over the world who have looked to the Israeli Supreme Court for guidance and inspiration for the last 70 years, but the hearts of everyone all over the world who cherishes democracy.

Constitutional Court and Politics: The Polish Crisis Lech Garlicki (2019)* [Part II]

. . . The term *illiberal democracy* was elaborated to describe such combination of electoral (democratic) legitimation and (to put it in mild terms) problematic (antidemocratic) content of the transition process. But, it should be kept in mind, that similar trends were present also in pre-World War II Europe and that the tragic experience of this period found its constitutional conclusion in the concept of "militant democracy" and in the determination of limits for democratically legitimated change. Both supranational organisms, the European Union and the Council of Europe, are based on such [a] premise.

As regards constitutional courts, criticism based on the "democracy argument" may be treated as another, not particularly refined, attempt to revive the debate on "counter-majoritarian difficulty." But, at least in post-Soviet Europe, many arguments and proposals are not intellectually sophisticated. Rather, they fall not far from the traditional Communist idea that there can only be a single center of political power and decision. This may invite some analogies with both conceptual pillars of the Communist system: the dominant position of the party (or, rather, of its leadership)

* Excerpted from Lech Garlicki, *Constitutional Court and Politics: The Polish Crisis*, in JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS 141 (Christine Landfried ed. 2019).

and the principle of “the unity of state power” (understood as rejection of separation of powers). Such an approach does not leave too much room for independence of a constitutional court.

This is often accompanied by a nihilistic approach to the constitution (particularly, where constitutional amendments remain beyond the reach of the ruling majority) articulated in blunt statements like: “It is the will of the people, not the law that counts.” It leads to different forms of “constitutional nihilism:” abuse of “neutral” constitutional provisions, elaboration of twisted constitutional interpretations, inflation of temporary/provisional regulations of exceptional nature, and—as the ultimate weapon—open disregard to certain constitutional rules and principles. All these techniques are based on a common premise, namely on challenging the role of the constitution as the “supreme law of the land.” In effect, the aggregation of ordinary laws and political practices creates a *de facto* change of the existing constitution.

The present success of “illiberal democracies” can be attributed to both successful economic development and sociotechnical measures integrating voters around populist slogans and concepts. In the legislative area, it finds its expression in the concept of “constitution of fear.” The process of changes “is defined by suspicion, exclusion, drive for retribution and settling the scores.”

In the institutional dimension, this process is driven by the distrust toward a pluralistic concept of state and society, that is by the simple belief that if “we” are right then the “others” must be wrong. The analogy with the Communist vision of society as an aggregate of “working people” and of “enemies of the people” is here difficult to resist.

A logical consequence of such an approach is the elimination of mechanisms based on the separation of powers and on the concept of checks and balances. Although illiberal democracies originate from electoral success, once the new majority acquires control over the legislative, cabinet, and presidency, there are no impediments to manipulative modifications of electoral laws for the future. There are also no obstacles against the political absorption of different bodies and authorities, which were meant to function as institutional checks, and therefore should remain separated from current political majorities. New legislation on civil service, public media, prosecutorial authorities as well as the army and state security institutions allowed a deep personal and structural modification of those institutions. In Poland, this process has already been completed almost in full.

Two basic techniques have been used to achieve total control of the state machinery. Both evoke historical connotations of rather unfortunate nature. The technique of “absorption” . . . relies on the sequence of provisional (one-time) measures starting with modifications on the legal status (in particular, the term of office) of a particular body or authority, always followed by personal changes and, sometimes, also by appropriate cuts in its powers and independence. In the end, such

body or authority may reappear in almost identical “legal shell” but also under a full political control of the ruling structures.

The technique of “neutralization” or “disablement” . . . is used where “absorption” is not possible due to the existing constitutional constraints. It is focused on measures attacking operational capacities of the body in question. Its personal composition may be challenged, in full or in part, its procedures may be complicated beyond any reasonable need, access to it may be curtailed, and the validity of decisions may be questioned or simply ignored. In effect, such body or authority may retain its previous personal composition and political independence, but its ability to act becomes seriously affected, *de jure* as well as *de facto*. This was exactly the experience of the Polish Constitutional Court in 2016.

The constitutionality of particular measures may vary and, often, only few of them are blatantly incompatible with the constitution. What counts, however, is their cumulative effect on the affected body measured by its capability to exercise its functions in an independent and unbiased manner. Any destruction of such capability is, by itself, unconstitutional. The crisis of such magnitude could not leave the judicial branch untouched. From the ideological point of view, the strive for a total control over the state machinery cannot be completed so long as courts remain separate and independent. From the pragmatic point of view, independent courts may be cumbersome as they are vested with significant powers regarding legal (constitutional) dimension of the ongoing controversies.

The latter reason becomes particularly compelling because the Polish variation of “illiberal democracy” invests a great deal of time and trouble into appearance of constitutionality and legality. Although, constitutional nihilism may determine the substance of many actions and measures of the ruling majority, there is still much political attractiveness in squeezing them into constitutionally required limits. It is particularly important due to the constraints resulting from Poland’s membership to the Council of Europe and the European Union. The courts (and, in particular, the Constitutional Court) represent both a danger and an asset in this respect.

A danger because it is quite obvious that many steps of the ruling majority are hardly compatible with the existing constitution. This puts the Constitutional Court into a key position as only the Constitutional Court has a power to decide on the unconstitutionality of a disputed measure or regulation. Such decision ends the legal dimension of the controversy. Although the political branches may, as shown in the recent practice, refuse to comply, it destroys legitimacy of the contested measure and cast[s] serious doubts on its validity, internally as well as internationally. In other words, the continuation of an independent exercise of “insurance function” by the Constitutional Court may easily deprive the governmental action of any “appearance of constitutionality.”

An asset because once the courts . . . become absorbed into the “new order,” their decisions may legitimize new regulations and measures, particularly, by confirming their constitutionality. Furthermore, there are many other ways in which courts may be instrumentalized, that is, made to intervene in political controversies in the right time and in the right manner. So, absorption or (at least) neutralization of different segments of the judicial branch can hardly be skipped from the political agenda of any “illiberal democracy.”

However, such absorption/neutralization appears not easy in practice, at least so long as the ruling majority has not decided to abandon the “appearance of constitutionality.” The experience of the Polish crisis showed that the Constitutional Court has been able to protect its independent position for about a year. Although, this stage seems now to be closed, it gave more time to the remaining segments of the judicial branch.

The controversy around the Polish Constitutional Court is but an element of the general crisis of the existing constitutional and political system. The nature of the crisis reflects a systemic backsliding from the (dominating in Europe) understanding of such general concepts as democracy, constitutionalism, rule of law, and separation of powers. At the same time, the Polish situation is particularly interesting as (unlike in Hungary) the ruling party does not have a constitutional majority in Parliament and, due to diverse reasons, does not want to abandon its “appearance of constitutionality” approach.

That was why the position and powers of the Constitutional Court made it one of the principal targets of the reform attempts of the new majority. But the Court (together with other segments of the judicial branch) was the only institution that had some resources to resist pressure. The 15-[month]-long controversy around the neutralization of the Court delivered an animated example of the rise and demise of the “insurance function” of constitutional jurisdictions. It also confirmed that, in the final effect, courts and judges may not survive a frontal collision with the political branches of government.

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President Laurent Fabius is a former student of the École Normale Supérieure of the Rue d'Ulm, holder of an Agrégation higher degree in French Language and Literature, and former student of the École Nationale d'Administration. Member of the “Conseil d'État,” Laurent Fabius occupied several governmental positions in France: Minister for the Budget (1981-1983), Minister of Industry and Research (1983-1984), Prime Minister (1984-1986), Minister for the Economy, Finance and Industry (2000-2002), and Minister of Foreign Affairs and International Development (2012-2016). He was also a Member of Parliament from 1978 to 2012, and served twice as President of the French National Assembly, from 1988 to 1992, and again from 1997 to 2000. In 2015, as President of the COP 21, he played a crucial role in the negotiations that led to the Paris Climate Agreement, the first universal agreement to fight against climate change. In February 2016, he was appointed President of the Constitutional Council of the French Republic.

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Professor Laurent Neyret is a professor of law at the University of Versailles Paris-Saclay and at Sciences Po Law School. His work lies at the crossroads of national and international law as well as private and public law. With these legal tools, he aims at studying the ways in which the law evolves and transforms to better respond to health and environmental issues. Parallel to his active work in academia, he participated in the elaboration of one of the most important evolutions of French environmental law in recent years: the recognition of ecological prejudice in the Civil Code in 2016. He is also the author of a report submitted in 2015 to the Ministry of Justice proposing to alter the punishment of crimes against the environment under both national and international law. In 2017, he was part of the international group of experts commissioned by Laurent Fabius to draft the proposal of a Global Pact for the Environment. His recent work focuses on climate liability and the legal status of nature. In 2018, he became chief of staff for President Laurent Fabius at the Constitutional Council of the French Republic.

Professor Judith Resnik is the Arthur Liman Professor of Law at Yale Law School, where she teaches about federalism, procedure, courts, equality, and citizenship. Her teaching and scholarship focus on the impact of democratic, egalitarian principles on government services, from courts and prisons to post offices; on the relationships of states to citizens and non-citizens; on the forms and norms of federalism; and on equality and gender. Professor Resnik's books include *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (2011, with Dennis E. Curtis); *Migrations and Mobilities: Citizenship, Borders and Gender* (2009, with Seyla Benhabib); and the 2014 Daedalus volume, *The Invention of Courts* (co-edited with Linda Greenhouse). Recent articles include "Accommodations, Discounts, and Displacement: The Variability of Rights as a Norm of Federalism(s)," 17 *Jus Politicum* 209 (2017), and "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights," 124 *Yale Law Journal* 2804 (2015). Professor Resnik chairs Yale Law School's Global Constitutionalism Seminar and edits its online book series. Professor Resnik is also the founding director of Yale's Arthur Liman Center for Public Interest Law, which convenes colloquia on access to criminal and civil justice systems and awards year-long fellowships to law school graduates and summer fellowships at several U.S. colleges. The 2019 Liman monograph, *Ability to Pay*, and the 2018 Liman monograph, *Who Pays? Fines, Fees, and the Cost of Courts*, are available as e-books; earlier monographs include a series of reports (*Time-in-Cell*) on solitary confinement, co-authored with the Association of State Correctional Administrators. Professor Resnik has recently been awarded an Andrew Carnegie Fellowship for two years to support her work to write a book, "Impermissible Punishments," about when and how constitutional law came to limit the forms of punishment prison administrators can impose. She is a member of the American Philosophical Society, a Fellow of the American Academy of Arts and Sciences, and a Managerial Trustee of the International Association of Women Judges. In 2018, she received an Honorary Doctorate in Laws from the University College London Faculty of Laws.

The Honorable Carlos Rosenkrantz was nominated to the Supreme Court of Argentina in December 2015 and confirmed in June 2016. In September 2018 he was promoted to Chief Justice. Prior to this, he was a law professor at the University of Buenos Aires and, since 2008, was a Rector of the University of San Andrés. He obtained his J.D. from the University of Buenos Aires, where he graduated first in his class. He received both his LL.M. and J.S.D. from Yale University. In 1984, Chief Justice Rosenkrantz joined the working group of Carlos Santiago Nino in his project on deliberative democracy to draft standards for structural reform at the end of the military dictatorship. In 1994, Chief Justice Rosenkrantz served as an advisor for President Alfonsín at the National Constitutional Convention. He founded Bouzat, Rosenkrantz & Asociados, a law firm that represented several large companies. He was an arbitrator and counsel in many different international cases. Chief Justice Rosenkrantz is an expert in constitutional litigation and complex cases. Chief Justice Rosenkrantz was a Global Law Professor at New York University Law School and has been a visiting professor at several other universities. He has, since 2013, been a member of the Fulbright Commission, Argentina, and he was an associate founder and board member of the Association for Civil Rights.

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About the Student Editors

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David Louk is a 2015 graduate of Yale Law School and a post-doctoral research scholar and lecturer in law at Columbia Law School, where he teaches courses on legal and statutory drafting and interpretation. He is the co-author of the forthcoming casebook, *Legal Methods: Case Analysis, Statutory Interpretation, and Statutory Drafting* (with Jane C. Ginsburg, 5th ed. 2020), and his current research, which stems from his Ph.D. dissertation, *Law's Audiences*, examines the concept of audience in legal interpretation, as well as the role of non-judicial interpreters of statutes and constitutions. A portion of his dissertation, *The Audiences of Statutes*, will be published in the *Cornell Law Review* later this year. His academic writing has previously been published in the *Yale Law Journal*, the *University of Chicago Law Review Dialogue*, and the *University of Colorado Law Review*, and his research on preventing government shutdowns has been cited and discussed in *The Economist*, *The Wall Street Journal*, and *The Washington Post*. He has been selected to serve as a law clerk for Justice Ruth Bader Ginsburg on the U.S. Supreme Court for the October 2020 term, and he previously served as a law clerk for Chief Judge Robert A. Katzmann on the U.S. Court of Appeals for the Second Circuit, and for Judge James E. Boasberg on the U.S. District Court for the District of Columbia. He received his B.A. in Political Science from Stanford University, his M.Phil in International Relations from the University of Oxford, and his Ph.D. in Jurisprudence & Social Policy from UC Berkeley.

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