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Judicial Independence and Court-Curbing: Comparative Insights
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EXECUTIVE SUMMARY

In this article, Professor Mila Versteeg provides global context that will help American judges better understand how efforts to undermine judicial independence play out. She explains that several established democracies have recent experience of institutions working to limit judicial independence when they are dissatisfied with court rulings. In the final analysis, Professor Versteeg demonstrates both that courts have challenged policies designed to compromise their independence and that, unfortunately, courts sometimes lose independence when other branches of government become determined to take it away.

Part 1 defines “judicial independence.” Professor Versteeg acknowledges that scholars and commentators sometimes mean different things by the term. Throughout the paper, Professor Versteeg argues that judicial independence is “the ability of courts to exercise their power ‘free of influence or control by other actors.’” Professor Versteeg further argues that judicial independence does not necessarily mean that courts are the final word on matters of constitutional interpretation or that public opinion plays no role in the trajectory courts take over time. Part 2 explains why societies might perceive that protecting judicial independence is valuable. They might do so because broad sections of the public respect courts and view their decisions as legitimate, such that they expect officials in other branches of government to obey even decisions they dislike. They might also do so because they believe independent courts promote the rule of law, which has economic benefits, and because competing political factions believe independent courts can protect their basic rights when they lose elections, and they believe they might lose elections some of the time.

Parts 4 and 5 describe how governments in Poland and Israel have taken steps to limit the independence of courts they perceived as thwarting their objectives. Parts 4 and 5 reveal that Poland’s government has largely succeeded in eroding judicial independence. In contrast, Israel’s courts have succeeded in pushing back against the government, although efforts to limit judicial independence remain ongoing in the country. Professor Versteeg situates Poland’s and Israel’s

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experiences in the context of recent history in American states where legislatures have also tried to reduce judicial independence.

I. Introduction

It is not uncommon for courts to face measures aimed at reducing their powers. Around the world, governments have responded to unfavorable judicial decisions with efforts to curb courts' authority, such as jurisdiction stripping, changes to appointment rules, or expansion of court size. Hungary provides a well-known example: after the Constitutional Court repeatedly constrained the government, political actors altered its composition and jurisdiction through a series of reforms.¹ In Poland, beginning in 2015, the government likewise pursued a series of measures—including changes to judicial appointments, refusal to publish court decisions, and statutory reforms—to bring the Constitutional Tribunal under political control.² In Israel, similar efforts to restructure the judiciary—including proposals to alter judicial appointments and limit judicial review—are still underway despite resistance from the courts, reflecting an ongoing struggle over the court's role and authority.³

Such dynamics are not confined to new or fragile democracies. In the United States, President Franklin D. Roosevelt's court-packing plan remains the canonical example,⁴ but similar dynamics appear regularly at the state level. In Arizona and Georgia, legislatures expanded the size of their highest courts in ways widely viewed as efforts to shift their ideological balance.⁵ Elsewhere,

¹ Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 139-140 (2012).

² Kriszta Kovács & Kim Lane Scheppele, *The fragility of an independent judiciary: Lessons from Hungary and Poland—and the European Union*, 51 COMMUNIST & POST-COMMUNIST STUD. 189, 194-198 (2018). For a discussion of the Venice Commission's attempts to curb the autocratic backslide of Poland and its back-and-forth struggle with the Polish government, see Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 3 (2017).

³ Suzie Navot & Guy Lurie, *An Attack on the Rule of Law in Israel*, 39 ISR. STUD. R. 20, 26-29 (2024).

⁴ See, e.g., Leon Julius Biela, *How to Avoid Dictatorship: The Public Debate Over Franklin D. Roosevelt's Court-packing Plan and Its International Context*, 49 J. SUP. CT. HIST. 25 (2024); Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 POL. SCI. Q. 267, 268 (1988) (describing the historic struggle between Roosevelt's administration and the Supreme Court as an "oft-told tale").

⁵ In May 2016, Arizona Governor Doug Ducey, a Republican, signed into law a bill that expanded the Arizona Supreme Court from five to seven members. Arizona's chief justice objected to the bill, as did Democrats in the state legislature, who accused Ducey and the Republicans of court packing. See Yvonne Wingett Sanchez, *"Like Blackmail": Judiciary Gets Money Only If Supreme Court Expands*, ARIZ. REPUBLIC (Apr. 28, 2016, 5:17 PM), [http://perma.cc/SXA7-XZ4R] (quoting a Democratic state representative as saying that "[t]here's absolutely no caseload reason to add Supreme Court judges, the only reason to do it is so the governor can stack the Supreme Court with his picks"); Yvonne Wingett Sanchez, *Gov. Doug Ducey Signs Legislation to Expand Arizona Supreme Court*, ARIZ. REPUBLIC (May 18, 2016, 11:35 AM), [http://perma.cc/58MR-ZQVF]. The same story played out in Georgia that year, where the Republican-controlled state legislature passed a bill that expanded the Georgia Supreme Court from seven to nine members. Georgia Republicans offered the same rationale as their Arizona counterparts—an ability to handle an enlarged caseload in a growing state—and Democrats in the state also accused the GOP of court packing. See Kristina Torres, *Expansion of Georgia's Supreme Court wins final approval*, ATLANTA J.-CONST. (Mar. 22, 2016, 10:16 PM), [http://perma.cc/X986-TXRU]. Similar efforts have been made in Florida, South Carolina, North Carolina, and Iowa. See Russell Berman, *Arizona Republicans Try to Bring Back Court-Packing*, ATLANTIC (May 10, 2016), [http://perma.cc/AG7F-KXDR].

lawmakers have pursued a broader set of measures: in North Carolina, legislators cut the state supreme court Chief Justice’s administrative budget in half, despite an overall budget surplus;⁶ and in Kansas, political actors repeatedly attempted to change judicial selection methods and discipline sitting justices following controversial rulings.⁷ Across states, these episodes reflect a recurring pattern in which adverse judicial decisions prompt efforts to bring courts into closer alignment with governing majorities.

These episodes raise questions and concerns about judicial independence. Courts are often described as independent when they are formally insulated from political control. And yet, this does not mean that courts cannot be responsive to popular majorities: courts may be more or less aligned with prevailing political views for a range of reasons without losing their independence. Nor does independence turn on whether courts have the final say on constitutional meaning; in many systems, political actors retain mechanisms to override or revise judicial decisions, and these courts are widely considered to be independent. However, when court decisions trigger efforts to curb the court’s institutional position, there is no doubt that judicial independence is at stake.

The Article also draws on the comparative literature to understand when and why courts are able to withstand such attacks. A central insight is that courts have limited ability to protect themselves once they come under sustained political pressure. When governing majorities are willing to pursue court-curbing measures, courts lack the means to resist effectively. They may declare such measures unlawful, but the force of those rulings depends on compliance by the very actors whose power is being constrained. On the other hand, some of the literature suggests that it might be within judges’ powers to prevent such attacks in the first place, by ensuring that they are valued within the broader political system.

II. What is Judicial Independence?

A. Judicial Independence

Judicial independence is the ability of courts to exercise their power “free of influence or

⁶ Billy Corriher, *The end of the N.C. legislature’s war on judicial independence?*, FACING SOUTH (June 6, 2019), <https://www.facingsouth.org/2019/06/end-nc-legislatures-war-judicial-independence>.

⁷ See, e.g., Anna Kaminski, *Plan to elect Kansas Supreme Court justices scrutinized by critics, including court’s former chief*, KAN. REFLECTOR (Mar. 18, 2025), <https://kansasreflector.com/2025/03/18/plan-to-elect-kansas-supreme-court-justices-scrutinized-by-critics-including-courts-former-chief/> (discussing repeated attempts to rework the Kansas judicial selection process over two decades); Pilar Pedraza, *Family of Carr brothers’ victims seeking change on KS Supreme Court*, KWCH 12 NEWS (Aug. 10, 2016, 10:51 PM), <https://www.kwch.com/content/news/Family-of-Carr-brothers-victims-hoping-for-change--389818632.html> (chronicling a family’s campaign to remove Kansas Supreme Court Justices after an undesired ruling); Sam Zeff, *All Kansas Supreme Court Justices Retained*, KCUR (Nov. 9, 2016, 1:24 AM), <https://www.kcur.org/politics-elections-and-government/2016-11-09/all-kansas-supreme-court-justices-retained> (highlighting a concerted conservative party campaign to remove four justices in retaliation against rulings regarding death penalty cases, abortion, and school funding).

control by other actors.”⁸ At its core, this refers to judges' ability to decide cases according to the law rather than external pressure, including pressure from the political branches or private actors. It requires that judges be protected from interference in their decision-making, whether through threats of removal, salary reductions, or other forms of coercion. Institutional arrangements such as security of tenure, protections against arbitrary dismissal, and guarantees of decisional autonomy are typically understood to serve this function.

That said, the concept is not always easy to pin down. To understand what it is, it is helpful to reflect on what it is *not*. First, judicial independence does not mean that courts are immune to political opinion. Even independent courts are responsive to public opinion to some extent. For example, in many countries, high court justices are subject to term limits, which create regular opportunities for political actors to appoint new judges and thereby align the court more closely with current political preferences.⁹ Likewise, appointment procedures vary so that appointees' views might be more or less in line with popular opinion.¹⁰ Some courts are even elected.¹¹ Regardless, among courts considered independent, there is variation in the extent to which they are responsive to public opinion. Put differently, responsiveness to popular opinion does not necessarily mean that courts are not independent: scholars have long observed that even the most independent courts are responsive to popular opinion to some extent.¹²

⁸ David S. Law, *Judicial Independence*, ENCYCLOPEDIA BRITANNICA (Mar. 11, 2026), <https://www.britannica.com/topic/judicial-independence> (defining judicial independence as “the ability of courts or judges to perform their duties free of influence or control by other actors”).

⁹ Rosalind Dixon, *Why the Supreme Court Needs (Short) Term Limits*, N.Y. TIMES, Dec. 31, 2021.

¹⁰ This idea traces to Hans Kelsen, who is widely seen as the architect of the specialized Constitutional Court. In annulling unconstitutional statutes, Kelsen believed that constitutional courts act as a “negative legislature”; one that, like the actual (positive) legislature, would require firm checks on its authority. He therefore designed the court as a separate body—a constitutional court—distinct from the ordinary judiciary. What is more, this negative legislature had to be designed so that it would not be too far out of step with the political branches: judges on the courts were to be selected through a political process and served for limited terms. See Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, in THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW 22, 47-48 (Lars Vinx, ed. & trans., 2015).

¹¹ Partisan judicial elections, which arose in the 1820s and 1830s, were originally thought to be more independent from the political branches and to provide the potential for higher judicial accountability. Nonpartisan elections, the overwhelmingly more popular form of election in the modern day, arose in the early 20th century in response to concerns of partisan elections leading to less capable and less qualified judges “ beholden to party bosses.” As of 2008, eight U.S. states selected judges by partisan election and thirteen by nonpartisan election at the supreme court level; six by partisan election and eleven by nonpartisan election at the intermediate appellate level; and nine by partisan election and eighteen by nonpartisan election at the trial level. See Charles Gardner Geyh, *Methods of Judicial Selection & Their Impact on Judicial Independence*, 137 DAEDALUS 86, 88-89 (2008). Another type of judicial election, known as a “merit plan” or “Missouri plan,” begins with a nominating commission presenting several options to an elected official (often the governor) who selects one candidate from the commission’s list. The selected candidate then faces an initial retention and regularly scheduled subsequent retention elections. For a discussion of this method of judicial elections and a comparison of partisan and nonpartisan elections in terms of judicial independence, see Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21 (2009). See also Michael J. Nelson & James L. Gibson, *Institutional Structures and Judicial Legitimacy*, 79 POL. SCI. Q. 248 (2026) (finding that the use of judicial elections does not substantially affect people’s long-term approval of their state high court or perception of the institution’s legitimacy).

¹² Compare BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009), and Michael J. Klarman, *Bush v. Gore Through the Lens of*

Second, for courts to be independent, it is not necessary for them to have the final say on the constitution. Here, it is useful to distinguish between judicial review and judicial supremacy. *Judicial review* is the power of a court to decline to enforce a law that it determines to be in conflict with the Constitution—a phenomenon that is often colloquially referred to as “invalidating” or “striking down.”¹³ Judicial review powers, however, do not equate to judicial supremacy. *Judicial supremacy* means that courts not only have the power of judicial review, but also have the final say over the constitution’s meaning.¹⁴ This means that any judicial determination of the constitutionality of a law is final; the other branches cannot challenge it. As Larry Kramer puts it, judicial supremacy is “the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone.”¹⁵

In the U.S., judicial review is viewed as inseparable from judicial supremacy, but this is not true in many other countries around the world. A lack of judicial supremacy does not equal a lack of judicial independence. For example, the Canadian Supreme Court is widely seen as an independent court; yet, parliament can “override” its decisions. Likewise, in many countries, it is common for legislatures to overturn apex court decisions by constitutional amendment, which does not mean that these courts are not independent. The same is true for state Supreme Courts, which frequently see their decisions overturned by constitutional amendment.¹⁶

Instead of asking whether courts are responsive to public opinion and/or whether they have the final say on the constitution, the more useful test is whether courts can exercise judicial review in ways that meaningfully constrain political actors when it matters most, without being subject to retaliation. This is best assessed over time within a given system rather than by comparing courts across countries. Changes that reduce a court’s ability to decide against governing majorities—especially when they follow decisions that those majorities oppose—are usually indicative that independence is at risk.¹⁷ Such actions reveal real efforts to bring the court

Constitutional History, 89 CAL. L. REV. 1721, 1750 (2001) (“On only a relative handful of occasions has the Court interpreted the Constitution in ways opposed by a clear majority of the nation.”), with Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010) (observing a relatively small effect of public opinion).

¹³ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1354 (2006) (defining judicial review as “authority to decline to apply a statute in a particular case . . . or to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage” and observing that, as a result “courts in this system have the authority to establish as a matter of law that a given statute or legislative provision will not be applied, so that as a result of stare decisis and issue preclusion a law that they have refused to apply becomes in effect a dead letter”). Only in some systems do courts have the power to actually take provisions out of statutes. See Mauro Cappelletti & John Clarke Adams, Comment, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1222 (1966).

¹⁴ See, e.g., Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1459 (2017).

¹⁵ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 125 (2004).

¹⁶ Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657, 664–666 (2016).

¹⁷ In extreme cases, when courts possess judicial review powers but lack independence entirely, judicial review can serve to help and enable autocratic leaders, a phenomenon that is well-documented in certain parts of the world. See, e.g., DANIEL BRINKS & ABBY BLASS, *THE DNA OF CONSTITUTIONAL JUSTICE IN LATIN AMERICA: POLITICS, GOVERNANCE, AND JUDICIAL DESIGN* *passim* (2018); Tom Ginsburg & Alberto Simpser, *Introduction*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES* 1, 5–6 (Tom Ginsburg & Alberto Simpser eds., 2014).

into line with political majorities and are meant to bring about a change in independence.

Retaliation against courts is usually described as *court curbing*, that is, “actual changes to the Court’s institutional power—through jurisdiction stripping, court packing, or other legislative means.”¹⁸ Such measures can be enacted through constitutional reform, legislation, or the overturning of long-standing conventions.¹⁹ Regardless of the form, their goal is to limit the courts’ powers.

Although some have speculated that court-curbing measures are rare because courts will act strategically to avoid them, there are numerous real-world cases. Perhaps the most famous example is President Franklin D. Roosevelt’s court-packing plan. When the U.S. Supreme Court repeatedly struck down legislation during the 1930s, Roosevelt responded with a plan to alter the composition of the court.²⁰ While Roosevelt’s proposal never came to pass, the approach is not foreign to American government more broadly. States such as Arizona and Georgia recently successfully packed their highest courts. Exploiting the fact that their state constitutions do not specify an exact number of judges to serve on the state supreme court, legislatures successfully increased the number of judges on their respective supreme courts.²¹

There are many more foreign examples. Consider Hungary. The Hungarian Constitutional Court, which struck down roughly one-third of all legislation it reviewed between 1990 and

¹⁸ Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 972 (2009).

¹⁹ See David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 195–215 (2013) (describing the phenomenon of “abusive constitutionalism,” whereby the tools of constitutional amendment and constitutional replacement are used for undemocratic means, including court curbing).

²⁰ This episode famously ended with Justice Owen Roberts’s “switch in time” in response to Roosevelt’s Court-packing plan. For a brief history of the Court-packing scheme and an analysis of the Court’s response, see Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 208–29 (1994). See also Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1126 (2020) (describing Roosevelt’s attempt to expand the Supreme Court as invariably “[t]he starting point for discussions over court packing”).

²¹ See Levy, *supra* note 20 (chronicling the history of attempts to alter state supreme court compositions for ideological purposes). Levy’s article outlines the methods followed by Arizona and Georgia in their successful court-packing attempts. Arizona senator Ron Gould first attempted to expand the size of the state’s supreme court from five to seven justices in 2011; the then-Chief Justice spoke out firmly against the bill before the Senate Judiciary Committee, and the bill was voted down. In 2015, the Arizona House of Representatives failed to pass a bill essentially the same as Gould’s 2011 proposal. Finally, in 2016, the same bill was proposed in a Republican-controlled legislature, which passed the bill, and then-governor Ducey signed the bill into law over the protests of the new Chief Justice. Georgia first began considering an expansion from seven to nine justices in 2006, and in the 2007–2008 legislative session proposed a constitutional amendment expanding the court to thirteen justices. When the amendment stalled, the legislature went back to pushing for a nine-justice plan that would not exceed the constitutional limit, but the bill died in committee. Like in Arizona, however, the Republican-controlled legislature in 2016 passed a bill that was quickly signed by the governor that not only expanded the Supreme Court from seven to nine justices, but also restructured appellate jurisdiction and procedures for the high court and the court of appeals. For more on the topic of state court packing (or unpacking) attempts, see William Raftery, *Up, Down, All Around: Legislative proposals to change state supreme court compositions gaining popularity*, 100 JUDICATURE 6 (2020) (recounting five successful attempts to increase or decrease the size of state supreme courts from 1980 to 2013, and several unsuccessful ones); Simon Zschrnt, *Packing State Supreme Courts: Analyzing the Dynamics of State Supreme Court Expansion*, 25 STATE POL. & POL’Y Q. 44 (2024) (assessing historical factors influencing the success of state supreme court expansions and finding that the Georgia and Arizona expansions were aberrations from the historical pattern).

1995,²² witnessed a range of court-curbing measures after the opposition party gained over two-thirds of the seats in the parliament in 2010.²³ The government curbed the court's power in three ways: (1) by amending the process for nominating constitutional judges as to allow the governing party to nominate candidates without majority agreement, including the opposition parties; (2) by excluding from its jurisdiction many fiscal matters; and (3) by significantly expanding the size of the court, thus allowing Fidesz to appoint rubber-stamp judges.²⁴ It further abolished the *actio popularis*, which had allowed all citizens to bring a case to court, regardless of whether they were personally affected by the challenged laws or regulations.²⁵ In the Hungarian case, most of these measures were passed through a series of constitutional amendments and the writing of a new constitution.²⁶

Or consider the Russian Constitutional Court, established by a law signed by President Yeltsin just a few months before the collapse of the Soviet Union in 1991.²⁷ As Lee Epstein, Jack Knight, and Olga Shvetsova show, the Russian Constitutional Court initially displayed a willingness to challenge executive authority in the early 1990s.²⁸ That period ended abruptly when the Court was shut down during the 1993 constitutional crisis, after Yeltsin grew frustrated with the Court's use of judicial review on his administration's policies, like merging the Ministries of Security and Internal Affairs and outlawing local party organizations, and accused the justices of politicization.²⁹ Despite Yeltsin's initial requests for the Court to actively settle legislative-executive disputes, the proclivity of the justices to express political opinions outside of the courtroom and their rapid involvement in serious political controversies brought about the Court's quick demise.³⁰ Although the Court was later reconstituted under the 1993 Constitution, its capacity to constrain the executive was more limited.³¹

III. Theories on Judicial Power

One of the central insights of the comparative literature is that, once political actors turn to court-curbing measures, courts have limited ability to defend themselves. To be sure, courts can and do strike down such measures as unconstitutional. The case study in Part IV elaborates how

²² Kim Lane Scheppele, *Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments*, in RETHINKING THE RULE OF LAW AFTER COMMUNISM 25, 44 (Adam Czarnota, Martin Krygier & Wojciech Sadurski eds., 2005).

²³ See Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT'L L. 285, 295-96 (2015).

²⁴ Bánkuti, Halmai & Scheppele, *supra* note 1, at 139-40.

²⁵ *Id.* at 142.

²⁶ See Landau, *supra* note 19, at 208-10 (describing how the Fidesz party in Hungary operated by employing a combination of constitutional amendment and constitutional replacement).

²⁷ See Bill Bowring, *What Went Wrong and What Could be Done? 30 Years of the Russian Constitution*, VERFASSUNGSBLOG (Feb. 11, 2024), <https://verfassungsblog.de/what-went-wrong-and-what-could-be-done/>; Jon M. Rodeback, *The Russian Constitutional Court: A Third Branch of the Russian Federal Government*, 12 SIGMA: J. POL. & INT'L STUD. 1 (1994).

²⁸ Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117 (2001).

²⁹ ALEXEI TROCHEV, JUDGING RUSSIA: THE ROLE OF THE CONSTITUTIONAL COURT IN RUSSIAN POLITICS 1990-2006 75 (2008); Rodeback, *supra* note 27, at 4-6.

³⁰ TROCHEV, *supra* note 29, at 100-03, 115-17.

³¹ *Id.* at 75.

the Polish Constitutional Court attempted to do so, but was ultimately unsuccessful at resisting the government's attack on its power.³² Likewise, Part V explores how the Israeli Supreme Court has seen limited success in striking down some of the measures to curb its power, backed by public uproar at the changes, but the battle for its power is still ongoing.³³

The issue is that rulings attempting to halt court curbing depend on whether political actors comply with them. When governing majorities are willing to ignore decisions and/or persist in reform efforts, courts lack the means to ensure that their judgments are obeyed. One fundamental feature of constitutional law (and much of public law more generally) is that it lacks an external, super-state enforcement authority capable of coercing political actors to comply with the constitution.³⁴ When it comes to ordinary law—such as codes, statutes, and other rules that apply to private actors within a state—the state is the source of law, and it has the power to enforce it against its private subjects.³⁵ For constitutional law, however, the state is not only the *source* of law, but also its *subject*, meaning that the only actor empowered to enforce law against the state is the state itself.³⁶ The same is true for judicial decisions enforcing the constitution.³⁷ As Alexander Hamilton famously observed, the judiciary lacks “influence over either the sword or the purse.”³⁸ The judiciary ultimately depends on the executive branch to enforce its rulings. The executive branch may not always be inclined to do so, especially when the executive’s own actions are at issue. It is not clear, then, that courts are able to withstand attacks on their power.

What, then, are courts to do? The comparative literature suggests that the courts have moves at their disposal to prevent such a situation from occurring in the first place. This insight rests on different strands of literature that have asked what explains whether courts are respected. Respect for the court here means the absence of court-curbing measures. But the literature has often started with the broader question of why unpopular court opinions are complied with in the first place.

Regardless, there are two main explanations in the literature for why the court is respected, in either the sense of its decisions being respected or it not encountering backlash. The first set of explanations—*legitimacy theories*—holds that governments respect courts when these courts enjoy high levels of legitimacy as an institution. The second set of explanations—*functional*

³² See *infra* Part IV.

³³ See *infra* Part V.

³⁴ See Jack Goldsmith & Daryl J. Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1795 (2009). See also Gillian K. Hadfield & Barry R. Weingast, *Constitutions as Coordinating Devices*, in INSTITUTIONS, PROPERTY RIGHTS, AND ECONOMIC GROWTH: THE LEGACY OF DOUGLASS NORTH 121, 122 (Sebastian Galiani & Itai Sened eds., 2014); Russell Hardin, *Why a Constitution?* in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 51, 53, 65–66 (Denis J. Galligan & Mila Versteeg eds., 2013); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011); Martin Shapiro, *The European Court of Justice: Of Institutions and Democracy*, 32 ISR. L. REV. 3, 8 (1998).

³⁵ See Goldsmith & Levinson, *supra* note 34, at 1795.

³⁶ See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 364 (Legal Classics 1984) (1832) (noting that “without men to enforce them,” constitutions are “merely idle words scribbled on paper or parchment”); FREDERICK SCHAUER, THE FORCE OF LAW 89–92 (2015).

³⁷ See Dieter Grimm, *Judicial Activism*, in JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 17, 26 (Robert Badinter & Stephen Breyer eds., 2004) (“It is the specific weakness of constitutional courts that the power is in the hands of those who are affected by their decisions.”).

³⁸ THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (deeming the judiciary the “least dangerous” branch).

theories—suggests that independent courts, equipped with the power of judicial review, bring important functional benefits, such as aiding coordination and providing focal points, that outweigh the costs of disrespecting the court.

A. *Legitimacy Theories*

A line of research has argued that constitutional court decisions are complied with because of the courts' legitimacy.³⁹ The idea is that courts can draw on what Professor David Easton called "diffuse support"—that is, "a reservoir of favorable attitudes or good will" toward the institution—"that helps members to accept or tolerate outputs to which they are opposed."⁴⁰ High levels of diffuse support, or legitimacy, can mitigate dissatisfaction with unpopular opinions.⁴¹ Thus, when a court is perceived as legitimate, its decisions are more likely to be complied with, regardless of the support for the decision itself. It also means that actors will not retaliate against the court in response to unfavorable rulings.

Building legitimacy does not mean that courts should do the government's bidding. But legitimacy is something that courts build over time. In a study of the high courts of eighteen EU member states, Professors James Gibson, Gregory Caldeira, and Vanessa Baird find that building legitimacy requires gaining support among successive, nonoverlapping constituencies.⁴² If courts always favored the same groups, however, they would not be perceived as legitimate.⁴³ For example, Professor Heinz Klug has argued that the South African constitutional court's initial success can be explained by the fact that it favored different constituencies, striking down old apartheid legislation and newer African National Congress (ANC) laws alike.⁴⁴ Put differently, a

³⁹ See, e.g., DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 267–68 (1965) [hereinafter EASTON, *SYSTEMS ANALYSIS*]; David Easton, *A Re-Assessment of the Concept of Political Support*, 5 BRIT. J. POL. SCI. 435, 450–53 (1975); James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459, 461 (1995); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 344–46 (1998); Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–96 (2005). Recent work by Professors Tom Ginsburg and Nuno Garoupa conceptualizes some of these same ideas as judicial reputation. See NUNO GAROUPA & TOM GINSBURG, *JUDICIAL REPUTATION: A COMPARATIVE THEORY* 14–23 (2015). There is a related strand of research, tracing back to Max Weber, that deals with the legitimacy of law more broadly, which we set aside here. There is also a strand of legitimacy theory that is more normative in character. See, e.g., Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596 (1999). There are also studies focused on procedural legitimacy. See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

⁴⁰ EASTON, *SYSTEMS ANALYSIS*, *supra* note 39, at 273.

⁴¹ This distinction is used by most political science accounts on legitimacy. See, e.g., Gibson & Caldeira, *supra* note 39, at 474–76; Gregory A. Caldeira & James L. Gibson, *The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support*, 89 AM. POL. SCI. REV. 356, 365–67 (1995); Gibson, Caldeira & Baird, *supra* note 39, at 348–52; Yonatan Lupu, *International Judicial Legitimacy: Lessons from National Courts*, 14 THEORETICAL INQUIRIES L. 437, 440–45 (2013).

⁴² Gibson, Caldeira & Baird, *supra* note 39, at 354–55.

⁴³ Shapiro, *supra* note 34, at 11 (suggesting that a court that "consistently favors some of the power holders over others" will not be seen as neutral, which might undermine its success).

⁴⁴ See Heinz Klug, *Constitutional Authority and Judicial Pragmatism: Politics and Law in the Evolution of South Africa's Constitutional Court*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 93, 109–12 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013).

court that is seen as always favoring the same side, will not be seen as legitimate. And when the losing side gains political power, they might retaliate against the court.

Legal scholars have further suggested that legitimacy can be built through legal techniques such as precedent-based reasoning, “investing rhetorical effort in maintaining neutrality,” and carefully crafting decisions so that they appear to be based on legal reasoning alone.⁴⁵ Courts can further use various techniques to avoid high-profile clashes with the political branches that have the potential to undermine their legitimacy.

Of course, tension may arise from courts’ desire to issue well-reasoned decisions, on one hand, and distributing legal victories evenly, on the other. It is unclear to what extent these two phenomena respectively impact judicial legitimacy. Regardless, the lesson of the legitimacy view is that when stakeholders view the court as the rightful arbiter of constitutional disputes, it adds to the court’s reservoir of goodwill and favorable attitudes. When there is widespread support for the institution as a whole, this increases the likelihood that the government will comply with adverse decisions, or else the government itself will lose popularity and may face electoral consequences. Likewise, where there is widespread support for the court, it is unlikely to face court-curbing measures when it issues unpopular decisions.

By its nature, legitimacy is usually acquired slowly and easily diminished. A court that frequently appears to disfavor one side can quickly lose legitimacy. When its legitimacy is depleted, a court may find that decisions that lack specific support are simply not enforced. The court might also witness various other forms of backlash, such as court packing, a change in judicial appointment procedures, or other strategies to curb the court’s independence. This would especially be true if the side that always loses gains political power. To illustrate, by consistently issuing conservative rulings, the Supreme Court risks losing legitimacy—and when progressives next gain power, they might retaliate against the Court.

B. Functional Theories

A second set of explanations focuses on the functional utility of courts. Perhaps the best-known functional theory emphasizes courts’ ability to clarify law and to provide focal points for coordination.⁴⁶ For example, a well-functioning government needs to coordinate a set of rules on how to elect the president, how many deputies to elect to parliament, how to divide power between the national government and subnational units, and where to place the capital city.⁴⁷ While the initial task of coordinating these rules falls on the constitution itself, the judiciary can further aid coordination by clarifying the rules and announcing when political actors have overstepped their powers. Thus, courts supply focal points that increase stability and predictability.⁴⁸

⁴⁵ See Fallon, *supra* note 39, at 1840–41. See also PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 234–35 (1984) (outlining different styles of constitutional argument that can improve legitimacy); Shapiro, *supra* note 34, at 9.

⁴⁶ See RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 85–140 (1999); Russell Hardin, *Why a Constitution?*, in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* 100, 102 (Bernard Grofman & Donald Wittman eds., 1989) [hereinafter Hardin 1989]; Hardin, *supra* note 34, at 59–62.

⁴⁷ See Hardin 1989, *supra* note 46, at 101 (noting that a constitution “establishes conventions” that “make it easier for us to cooperate and to coordinate”).

⁴⁸ RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW* 119–35 (2015).

It is because of the benefits derived from the supply of focal points that governments comply with judicial decisions they do not like, and that they refrain from curbing the court's power. As Professor Russell Hardin notes, supporters of presidential candidate Al Gore ultimately acquiesced in the *Bush v. Gore*⁴⁹ Supreme Court decision because, even though they (and a majority of the electorate) had chosen Gore, people feared that undermining the Court might foster the sort of political crisis that, in other times and places, has led to unrest, disorder, and even violence.⁵⁰ Thus, the long-term benefits of having rules by which to play the political game, and the existence of a final arbiter to police these rules, may outweigh the short-term costs of unfavorable decisions.⁵¹

There are other functional benefits that can flow from having an independent constitutional court. Professor Tamir Moustafa argues that Egyptian President Anwar Sadat created an independent constitutional court to attract foreign investors, and that until recently, the Egyptian government complied with the court's decisions in order to reap the long-term benefits of foreign investment.⁵² Similarly, Professor Martin Shapiro notes that the Italian Constitutional Court owes its success to the fact that it was established as a case-by-case defascification tribunal when the Italian legislature, after World War II, was unable to remove fascist elements from the Italian legal system wholesale.⁵³ It was because of this larger function of the court that the Italian government also complied with those rulings it did not like. Likewise, Professor Tom Ginsburg has suggested that respect for courts occurs because courts are established as a form of political insurance to protect the interests of political losers, and those in power are aware that they themselves might need such protection in the future.⁵⁴ What these accounts share in common is that they emphasize that the functional benefits associated with having a court might outweigh the costs of complying with occasional unfavorable rulings. Regardless of the exact mechanisms, these various accounts suggest that courts are safest from political retaliation when they supply such functional benefits.

Just like legitimacy can be depleted, functional benefits can lose their value. When courts too frequently obstruct the political process, the costs of respecting courts may outweigh the functional benefits provided by the court. For example, a court that does not protect the rights of political losers does not serve as political insurance. And if the coalition whose rights were unprotected returns to power, they may retaliate against the court.

⁴⁹ *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

⁵⁰ Hardin, *supra* note 34, at 57-58. Others have explained compliance with this same decision based on the court's legitimacy. See generally James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RSCH. Q. 187 (2005).

⁵¹ See Levinson, *supra* note 34, at 710-11.

⁵² See TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* 6 (2007). See also Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 816-23 (1989) (suggesting that credible constitutional commitments to protect private property allow governments to access capital).

⁵³ Shapiro, *supra* note 34, at 4-5.

⁵⁴ See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 21-33 (2003).

Both legitimacy and functional accounts point to the same underlying dynamic: courts are less likely to face backlash when political actors have reasons to value the institution, even in the face of unfavorable decisions. Where courts enjoy broad support, efforts to attack them carry political costs, including the risk of electoral punishment or reputational harm. Where courts provide functional benefits—such as stabilizing expectations or supplying focal points for coordination—undermining them imposes system-wide costs that political actors may wish to avoid. In both cases, these considerations raise the expected cost of retaliation and make direct attacks on the court less attractive.

These dynamics also shape how conflict with courts unfolds. Rather than pursuing overt court-curbing measures, political actors who value courts in general may resort to more limited forms of resistance, such as narrow compliance or rhetorical criticism, that allow them to contest particular decisions without undermining the institution itself. While some amount of disagreement with judicial outcomes is inevitable, it need not translate into institutional erosion.

IV. The Case of Poland

The insight that courts have few means to resist attacks on their power is illustrated by the well-known case of Poland. In October 2015, Prawo i Sprawiedliwość (“Law and Justice Party” or “PiS”), a won a decisive victory and gained control of Poland’s parliament.⁵⁵ Within weeks of taking office, PiS (aided by President Andrzej Duda, who is widely seen as the faithful agent of PiS Chairman Jarosław Kaczyński) started to undermine the checks and balances in the Polish constitutional order.⁵⁶ Within a short period, it passed laws to eliminate the independence of the Constitutional Tribunal, the nation’s chief prosecutor, and the public media. It also passed an anti-terror law giving the police expanded access to digital information and amended Polish civil service laws by increasing government discretion in appointing senior officials.⁵⁷ At the time it enacted these measures, the PiS government was genuinely popular. At the time it was elected, it captured 37 percent of the vote (which in Poland’s parliamentary system translated into a majority of seats in Parliament).⁵⁸ Since then, and notwithstanding all the events detailed below, its approval increased (with some polls suggesting as much as 47 percent backing), mostly because of the soaring economy and its adoption of generous social welfare programs.⁵⁹

When PiS came to power, controlling the Constitutional Tribunal was high on its agenda.⁶⁰ At this time, every single one of the Tribunal’s fifteen judges had been appointed by the previous

⁵⁵ James Traub, *The Party That Wants to Make Poland Great Again*, N.Y. TIMES MAG., Nov. 6, 2016, at 43.

⁵⁶ See *id.* See also Bojan Bugarič & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 J. DEMOCRACY 69, 73-74 (2016).

⁵⁷ Traub, *supra* note 55.

⁵⁸ Remy Adekoya, *Why Poland’s Law and Justice Party Remains So Popular*, FOREIGN AFF. (Nov. 3, 2017), <https://www.foreignaffairs.com/articles/central-europe/2017-11-03/why-polands-law-and-justice-party-remains-so-popular/>.

⁵⁹ *Id.*

⁶⁰ Bugarič & Ginsburg, *supra* note 56, at 74; Joanna Fomina & Jacek Kucharczyk, *The Specter Haunting Europe: Populism and Protest in Poland*, 27 J. DEMOCRACY 58, 62 (2016).

government.⁶¹ (The reason is that the Tribunal's judges serve for 9-year terms, and the outgoing government had been in power for almost a decade). Not only was the Tribunal firmly associated with the political opposition, but it was also a powerful and independent court, which had thwarted important legislative initiatives the last time the PiS government was in power (from 2005 to 2007).⁶² In this sense, it was not seen by PiS as legitimate; rather, it was seen as an institution controlled by, and in the service of, the opposition.

And this was not the only way that the Court became caught up in a partisan battle. Notably, the first move in the battle over the control of the court was not made by PiS, but by the outgoing government. Specifically, right before leaving office, the outgoing government passed a new Constitutional Tribunal Act that allowed it to replace five judges who were due to retire in 2015. This included two judges scheduled to retire after PiS was set to take office, and should therefore have been appointed by the new government.⁶³ The move was clearly of questionable constitutionality and would later be declared unconstitutional.⁶⁴ But its objective was to bolster the court as a bulwark of opposition that would rule against the PiS agenda.

For the PiS government, the unconstitutional actions by the outgoing government offered the perfect opportunity to pursue a similarly unconstitutional course of action. First, the newly elected President Duda refused to swear in *any* of the five judges nominated by the outgoing government, including the three judges whose terms had expired before PiS came to office. Next, it passed an amendment to the Constitutional Tribunal Act that enabled it to re-appoint all five judges, including the three that should have been appointed by the outgoing government.⁶⁵ After electing five new judges, President Duda swore them in immediately, in the middle of the night.⁶⁶

At this point, the Constitutional Tribunal itself entered the battle in an attempt to enforce the original constitutional rule (three seats for the outgoing government and two for PiS). It first ruled that the outgoing government had acted in an unconstitutional manner with respect to two of the five contested seats, and that the new Parliament could appoint these two judges, but not the other three.⁶⁷ In a second decision, it ruled that the amendment to the Constitutional Tribunal Act that would allow PiS to appoint five judges was unconstitutional.⁶⁸

PiS ignored the Tribunal's decisions by delaying their publication, citing doubts over the process by which the Tribunal decided them.⁶⁹ Yet the Tribunal did not give in that easily. In an

⁶¹ Michał Przybył, *Kto wybierał sędziów Trybunału Konstytucyjnego?* [Who Chose the Judges of the Constitutional Tribunal?], BLOG OBYWATELSKIEGO ROZWOJU (Dec. 9, 2015) (Pol.), <http://blogobywatelskiegorozwoju.pl/kto-wybieral-sedziow-trybunalu-konstytucyjnego/>.

⁶² Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, 11 HAGUE J. RULE L. 63, 64 (2019) (describing the Tribunal as a "leading judicial actor contributing to defense of human rights, European integration, and democratic governance").

⁶³ Ustawa z dnia 25 Czerwca 2015 r. o Trybunale Konstytucyjnym [Act of June 25, 2015 on the Constitutional Tribunal] (Dz.U. 2015, poz. 1064) (Pol.), <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20150001064>.

⁶⁴ Wyrok [Judgment] TK [Constitutional Tribunal] z [of] Dec. 9, 2015, K 35/15 (Dz.U. 2015, poz. 2147) (Pol.), <http://dziennikustaw.gov.pl/du/2015/2147/1>.

⁶⁵ Fomina & Kucharczyk, *supra* note 60, at 62.

⁶⁶ WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 64 (2019).

⁶⁷ Wyrok [Judgment] TK [Constitutional Tribunal] z [of] Dec. 3, 2015, K 34/15 (OTK ZU 11A/2015, poz. 185; Dz.U. 2015, poz. 2129) (Pol.), <http://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=16426&dokument=13053&cid=1>.

⁶⁸ Wyrok K 35/15, *supra* note 64.

⁶⁹ Tomasz P. Szyński, *Polish Constitutional Crisis – Timeline* (Aug. 21, 2016), SZYŃSKI.COM, <http://www.szynski.com/pub/polish-constitutional-crisis-timeline>.

attempt to enforce its own decisions, the Tribunal's Chairman, Andrzej Rzepliński, refused to let the three unconstitutionally appointed PiS judges commence their duties (he did, however, admit two legally appointed PiS judges to the Tribunal).⁷⁰ As a result, the fifteen-judge Tribunal was operating with twelve judges; the other three seats remained contested.

To resolve this stand-off in its favor, the PiS-controlled parliament passed another amendment to the Constitutional Tribunal Act, known as the "Repair Bill."⁷¹ The Bill stated that to issue a decision, two-thirds of the Tribunal's judges had to vote in favor, instead of a simple majority. The Bill's purpose was to give the PiS-appointed judges an effective veto over the Tribunal's decisions. The Bill further mandated that at least thirteen of the fifteen judges needed to be present to hear a case.⁷² This was an obstacle for the twelve-judge court: as long as the three PiS judges were not allowed to commence their duties, all decisions reached by the twelve sitting judges on the Tribunal would be reached in contravention of the Constitutional Tribunal Act.⁷³

The Tribunal responded by declaring the Repair Bill unconstitutional.⁷⁴ One important decision it faced was whether, in deciding this case, it should follow the procedural requirements of the Repair Bill itself (specifically, with twelve judges, it did not reach the quorum of thirteen required by the Bill unless it admitted the three unconstitutionally appointed PiS judges to the Tribunal).⁷⁵ The Tribunal decided that, since the constitutionality of the Repair Bill was the subject of the decision, it would not apply it to its decision-making process.⁷⁶ In response to this ruling, the government announced it would not respect the Tribunal's decision, since it was reached in violation of the Constitutional Tribunal Act. To give force to its rejection, it refused to publish the Tribunal's ruling in the official gazette.⁷⁷

The government also passed further legislation.⁷⁸ Specifically, a brand new Constitutional Tribunal Act required the Tribunal's Chairman to swear in the three PiS-appointed judges who

⁷⁰ Eur. Comm'n for Democracy through Law (Venice Commission), *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, 106th Sess., Doc. No. CDL-AD(2016)001, para. 6 (Mar. 11, 2016), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e).

⁷¹ Ustawa z dnia 22 grudnia 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym [Act of December 22, 2015 amending the Constitutional Tribunal Act] (Dz.U. 2015, poz. 2217) (Pol.), <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20150002217>.

⁷² Venice Commission, *supra* note 70, para. 3.

⁷³ *Id.*, para. 7.

⁷⁴ Wyrok [Judgment] TK [Constitutional Tribunal] z [of] Mar. 9, 2016, K 47/15 (Pol.), [http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/K 47 15 wyrokTK 2016 03 09 ADO.pdf](http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/K_47_15_wyrokTK_2016_03_09_ADO.pdf). This decision was never published in the Journal of Laws and was removed from the Tribunal Website. The Polish Ombudsman's website has since published the decision. See Bartłomiej Swaczyna, *Wyrok TK z 9 marca 2016 r. powinien być opublikowany* [The Judgment of the Constitutional Tribunal should be published], RZECZPOSPOLITA, Apr. 9, 2016, (Pol.), <http://www.rp.pl/Rzecz-o-prawie/304099960-Wyrok-TK-z-9-marca-2016-r-powinien-byc-opublikowany.html>.

⁷⁵ Venice Commission, *supra* note 70, para. 36.

⁷⁶ Bugarič & Ginsburg, *supra* note 56, at 74. Shortly thereafter, Poland's highest appellate court passed a resolution declaring the Tribunal's ruling valid.

⁷⁷ *Id.*

⁷⁸ Aleks Szczerbiak, *Is Poland's Constitutional Tribunal Crisis Over?*, POLISH POL. BLOG (Jan. 16, 2017), <https://polishpoliticsblog.wordpress.com/2017/01/16/is-polands-constitutional-tribunal-crisis-over/>.

had not yet been allowed to commence their duties.⁷⁹ The new Tribunal Act further introduced a veto mechanism that allowed the justices to postpone a case for up to six months.⁸⁰ The Tribunal again held these changes to be unconstitutional,⁸¹ and again, the government refused to publish its decision.⁸²

The battle ended when the Tribunal's Chairman's term expired.⁸³ The new (PiS-appointed) Chair immediately allowed the three unconstitutionally appointed PiS judges on the court. With these "quasi-judges"⁸⁴ or "anti-judges"⁸⁵ (as commentators have called them) commencing their duties, the Constitutional Tribunal fell under government control. Thus, about a year after the constitutional crisis had started, it was finally resolved in favor of the government. At this point, the outgoing Chairman issued a dire warning that Poland was "on a road to autocracy."⁸⁶ Commentators have noted that, since then, the Tribunal no longer issues independent decisions. As Wojciech Sadurski observes, the new PiS judges have consistently "voted in lockstep for the government's positions in all cases considered by the [T]ribunal."⁸⁷ Observers also note that neutralizing the Tribunal paved the way for passing laws of questionable constitutionality. As Tomasz Koncewicz noted, the Tribunal "was targeted first because it would ensure that the next phases would sail through without any scrutiny from its side" because "[w]ho cares that the new legislation flies in the face of the constitution" when "there is no procedural or institutional avenue to enforce constitutional rules."⁸⁸ And indeed, there are numerous instances whereby the government got away with laws that are plainly unconstitutional, or with "constitutional amendments via statutes," as some commentators have called them.⁸⁹ The Tribunal has allowed the government to get away with such laws, and, in some instances, has actively aided the government by upholding their constitutionality.⁹⁰

⁷⁹ Ustawa z dnia 22 Lipca 2016 r. o Trybunale Konstytucyjnym [Act of July 22, 2016 on the Constitutional Tribunal] (Dz.U. 2016, poz. 1157) (Pol.), <http://dziennikustaw.gov.pl/du/2016/1157/1>.

⁸⁰ *Id.* at art. 84.

⁸¹ Wyrok [Judgment] TK [Constitutional Tribunal] z [of] Aug. 11, 2016, K 39/16 (Pol.). This decision was again never formally published but made available by the Polish Ombudsman.

⁸² Eur. Comm'n for Democracy through Law (Venice Commission), *Opinion on the Act on the Constitutional Tribunal*, 108th Sess., Doc. No. CDL-AD(2016)026, para. 4 (2016), <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282016%29026-e>.

⁸³ Szczerbiak, *supra* note 78.

⁸⁴ SADURSKI, *supra* note 66, at 64 (calling them "quasi-judges" because they were elected to "already-occupied judicial posts").

⁸⁵ Agnieszka Grzelak, *Choosing Between Two Evils: The Polish Ombudsman's Dilemma*, VERFASSUNGSBLOG (May 6, 2018), <https://verfassungsblog.de/choosing-between-two-evils-the-polish-ombudsmans-dilemma/>.

⁸⁶ Christian Davies, *Poland Is 'On Road to Autocracy', Says Constitutional Court President*, GUARDIAN (Dec. 18, 2016, 2:24 PM), <https://www.theguardian.com/world/2016/dec/18/poland-is-on-road-to-autocracy-says-high-court-president>.

⁸⁷ SADURSKI, *supra* note 66, at 69.

⁸⁸ Tomasz Tadeusz Koncewicz, *Farewell to the Separation of Powers—On the Judicial Purge and the Capture in the Heart of Europe*, VERFASSUNGSBLOG (July 19, 2017), <https://verfassungsblog.de/farewell-to-the-separation-of-powers-on-the-judicial-purge-and-the-capture-in-the-heart-of-europe/>.

⁸⁹ Wojciech Sadurski, *Constitutional Design: Lessons from Poland's Democratic Backsliding*, 6 CONST. STUD. 59, 66 (2020).

⁹⁰ Sadurski, *supra* note 62, at 77-81. Sadurski outlines four examples of the Constitutional Tribunal not only acquiescing to the PiS agenda, but also positively enabling it. First, a judgment of June 2017 found that the existing statute on the National Council of the Judiciary (KRS) unconstitutionally discriminated against lower court judges in its appointment procedures; however, Sadurski refers to this opinion as a "post-hoc rationalization...without any

V. The Case of Israel

However, the familiar ending of a compliant court system pinned beneath the heel of an authoritarian government is not a prewritten conclusion, and courts may find limited success in resisting court-curbing measures, particularly when backed by popular support or functional importance. Like Poland, Israel currently faces its own battle against court-curbing in the name of populism. While the slow turn to authoritarianism in Israel has traditionally been less recognized in comparative literature as democratic backsliding, scholars are now highlighting the government's "proposed judicial overhaul" as the first move in the Hungarian and Polish playbook.⁹¹

Unlike most other modern democracies, Israel has had a notably weak set of checks and balances since its inception and lacks a formal constitution, and the system of checks that has developed in the dearth of the typical mechanisms centers heavily on the judiciary.⁹² Distinctive facets of the Israeli system, like concentration of power in the hands of a few members of ruling coalition parties and a lack of internal or external political restriction on the legislature, make the courts especially vulnerable to a hostile central government.⁹³ Further, Israel does not have a formal constitution; instead, the Israeli Parliament (the Knesset) has passed a series of "Basic Laws" that enjoy a superior status to regular laws,⁹⁴ with some procedural differences from

rational basis" of statutory proceedings that were already permitted under the existing constitutional scheme. Second, the PiS has weaponized the Constitutional Tribunal against the Supreme Court in a pending appeal on an issue of the President's pardoning prerogative. Third, another 2017 Constitutional Tribunal judgment on regulations regarding candidate selection for the position of Chief Justice of the Supreme Court handed down a "puzzling decision" in which a Chief Justice nomination that arose through an unconstitutional procedure somehow brought about a constitutional outcome. Sadurski hypothesizes that this decision was intended to weaken the Chief Justice' legitimacy without forcing the Tribunal to engage in such an extreme act as removing a Chief Justice, since she would soon reach the compulsory retirement age of 65. Finally, a March 2017 judgment affirmed a new statute giving "assemblies of a cyclical nature" priority over other types of assembly and eliminating the right to appeal against decisions by public authorities on prohibition of public assembly.

⁹¹ Gal Ariely, *The Democratic Backsliding Debate and the Controversy over Regime Classification in Israel*, 39 ISR. STUD. REV. 66, 69 (2024). See also Selcuk Gultasli, *Professor Ben-Porat: Israel's Rightward Shift Is More Than Political Strategy*, EUR. CTR. FOR POPULISM STUD. (June 4, 2025), <https://www.populismstudies.org/professor-ben-porat-israels-rightward-shift-is-more-than-political-strategy/> ("Orbán and what happened in Poland before the last elections were good examples for Israel... this was a copycat."); Navot & Lurie, *supra* note 3, at 30 ("The governmental proposals for a 'judicial overhaul' bear resemblance to the actions taken by the populist governments in Poland and Hungary, which sought to undermine institutional checks on their powers in what has been called a 'democratic capture.'").

⁹² Navot & Lurie, *supra* note 3, at 21-24.

⁹³ Yaniv Roznai & Amichai Cohen, *Populist Constitutionalism and the Judicial Overhaul in Israel*, 56 ISR. L. REV. 502, 509-10 (2023). See also Navot & Lurie, *supra* note 3, at 21 ("As shown by Amichai Cohen (2020) in a comparative study that examined 66 democracies, all except Israel included at least one of the following institutional checks: bicameralism (in which the legislature's powers are divided into two bodies), a presidential system (in which the legislature and the executive are independently elected and check each other), a federal system (in which the federal and state governments check each other), electoral districts, and membership in international organizations.").

⁹⁴ See CivA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 49(4) PD 221 (1995) (Isr.) (holding that Basic Laws enjoy constitutional status). This court decision, along with two Basic Laws on human rights passed in 1992, comprised what is now known as the "constitutional revolution" in Israel. See also Navot & Lurie, *supra* note 3, at 25-26.

regular laws as well.⁹⁵ The absence of a constitution also means an absence of impeachment proceedings; instead, that process has developed through regular proceedings of judicial review.⁹⁶ All of these factors position the judiciary as a critical check against democratic backslide in the Israeli system.⁹⁷

Targeting courts was not just a convenient idea from the Polish playbook of authoritarianism; the move fit cleanly with Prime Minister Benjamin Netanyahu's political circumstances and platform. Netanyahu, Israel's longest-serving prime minister (currently in his sixth term) in the country's history,⁹⁸ began leveraging populist rhetoric against the judiciary in 2015, after police investigations were opened against him near the time of the election.⁹⁹ His relationship with the judiciary worsened during his separate prosecution and trial for corruption, as he criticized the institution as the "corrupt elite" with left-leaning judges biased against him.¹⁰⁰ In 2015 and 2019, his administration suggested very similar proposals to the 2023 reforms, but those attempts petered out in the face of judicial and political opposition.¹⁰¹ During the same period, the Supreme Court faced backlash against its alleged activism from sectors of the public that believed its jurisprudence to be too liberal and human-rights focused, and from politicians who criticized the institution as "elitist."¹⁰²

From this background emerged the proposed judicial overhaul, announced in January 2023 by Justice Minister Yariv Levin.¹⁰³ Marketed by Netanyahu's administration as "governance reform" intended to right the balance between the branches of government, the plan included a number of measures curbing the jurisdiction of the judiciary, including a limitation on the courts' ability to invalidate legislation of the Knesset, a clause allowing a bare majority of Parliament to override a judicial ruling and enact a law regardless of its unconstitutionality, and an abolition of

⁹⁵ For example, most Basic Laws require a 61-member Knesset majority to modify, but some like Basic Law: The Knesset and Basic Law: Referendum require an 80-member majority to delay an election or withdraw from any territory under Israeli sovereignty (respectively). See Roznai & Cohen, *supra* note 93, at 510-511.

⁹⁶ Yoav Dotan, *Impeachment by Judicial Review: Israel's Odd System of Checks and Balances*, 19 THEORETICAL INQUIRIES L. 705, 712 (2018). In addition to judicial impeachment, institutional barriers like the binding legal norms known as the "Bill of Judicial Rights," the minimized role of elected officials in judicial selection, and the use of an independent attorney general as a check on government present yet another incentive for the Knesset and Netanyahu to cripple the judiciary through restrictive legislation. See Navot & Lurie, *supra* note 3, at 22-24.

⁹⁷ See Rivka Weill, *Did Israel Lose its Sanity? The Struggle over the Reasonableness Doctrine*, VERFASSUNGSBLOG (July 12, 2023), <https://verfassungsblog.de/did-israel-lose-its-sanity/> (characterizing the judiciary as the "only substantial counterforce to the elected branches").

⁹⁸ Raffi Berg, *Benjamin Netanyahu, Israel's controversial leader*, BBC (Nov. 21, 2024), <https://www.bbc.com/news/world-middle-east-18008697>.

⁹⁹ Tom Lurie, *From Begin to Netanyahu: The Rise of Populism in Israel*, 40 ISR. STUD. REV. 55, 67-68 (2025). The 2015 criminal investigations surrounded private expenses paid with public funds and were closed without indictment. The later corruption investigation in 2016 turned into indictments in three separate cases for bribery, fraud, and breach of trust, culminating with Netanyahu becoming the first serving prime minister to go on trial in May 2020. See Berg, *supra* note 98.

¹⁰⁰ Lurie, *supra* note 99, at 70.

¹⁰¹ Roznai & Cohen, *supra* note 93, at 513.

¹⁰² Navot & Lurie, *supra* note 3, at 26.

¹⁰³ Yaniv Roznai, *The Judicial Overhaul Post October 7: Populist Constitutionalism in Israel Under the Fog of War*, VERFASSUNGSBLOG (Sep. 21, 2025), <https://verfassungsblog.de/the-judicial-overhaul-post-october-7/>.

the courts' ability to review Basic Laws.¹⁰⁴ The plan also called for dramatic changes to the judicial selection process and alteration of the role and powers of legal advisors and the Attorney General.¹⁰⁵

The plan was met with immediate public backlash. Massive protests took place for over twenty-nine weeks, with protestors blocking major highways in countrywide demonstrations,¹⁰⁶ blocking access to a military base,¹⁰⁷ and engaging in strikes that saw hundreds of thousands of people refusing to work in protest of the plan, halting the food industry, the airline industry, and even medical services.¹⁰⁸ Law firms, army reservists, and academics in Israel publicly spoke out against the reform plan, and even acting President Hayut of the Israeli Supreme Court made a public statement characterizing the plan as an “unrestrained attack on the legal system.”¹⁰⁹ The outcry led to Prime Minister Netanyahu temporarily pausing plans to move ahead with the overhaul, postponing voting to “find a solution.”¹¹⁰

Despite public contention over the reforms, in July 2023, the Knesset moved ahead with the first step of the reform plan: amending the Basic Law: The Judiciary to abolish the doctrine of administrative reasonableness.¹¹¹ The doctrine of administrative reasonableness is a common law doctrine that places a duty on the executive branch and all administrative bodies to act in a reasonable way by balancing all relevant considerations, and serves as a “principal tool of judicial review” for Israeli courts.¹¹² This doctrine is currently the court’s primary vehicle to review the discretion of caretaker governments and the appointment and termination of top government officials.¹¹³ Under the PJO, courts would be precluded from using reasonableness to review a decision of the government, the Prime Minister, or of any other Minister, or give an order on any such matter.¹¹⁴ Historically, the reasonableness standard has been a key tool in fighting corruption in Israel by allowing courts to intervene in the appointment and removal of

¹⁰⁴ Yochai Rosner, *Five Approaches to Constituent Power: Reflections on the Israeli Reasonableness Ruling*, GERMAN L.J., June 2026, at 1, 2.

¹⁰⁵ *Id.*

¹⁰⁶ Associated Press, *Israelis block highways in nationwide protests of government’s plan to overhaul judiciary*, ASSOCIATED PRESS (July 11, 2023, 5:57 AM), <https://www.nbcnews.com/news/world/israelis-block-highways-protest-governments-judicial-overhaul-rcna93590>.

¹⁰⁷ Lawahez Jabari, Paul Goldman & Patrick Smith, *Israeli reservists block military base amid protests against planned judicial overhaul*, NBC NEWS (July 18, 2023, 9:42 AM), <https://www.nbcnews.com/news/world/israel-judicial-overhaul-netanyahu-protests-reservists-block-base-rcna94805>.

¹⁰⁸ Patrick Smith, Elizabeth Chuck & Ali Zelenko, *Netanyahu pauses judicial overhaul after protests paralyze Israel*, NBC NEWS (Mar. 27, 2023, 4:37 AM), <https://www.nbcnews.com/news/world/netanyahu-israel-judicial-reforms-engulf-gallant-protests-rcna76759>.

¹⁰⁹ Rosner, *supra* note 104, at 2-3.

¹¹⁰ Smith, Chuck & Zelenko, *supra* note 108.

¹¹¹ Rosner, *supra* note 104, at 3.

¹¹² See Dotan, *supra* note 96, at 715-17 (2018); Rivka Weill, *The Folly of the Israeli Government in Restricting Reasonableness*, VERFASSUNGSBLOG (Jul. 26, 2023), <https://verfassungsblog.de/the-folly-of-the-israeli-government-in-restricting-reasonableness/>.

¹¹³ Navot & Lurie, *supra* note 3, at 29.

¹¹⁴ Basic Law: The Judiciary, amend. 3 (Isr.) (“Notwithstanding what is stated in this Basic Law, a holder of judicial authority under law, including the Supreme Court sitting as the High Court of Justice, shall not address the reasonableness of a decision by the Government, the Prime Minister or a Government Minister, and will not issue an order in such a matter; in this section, “decision” means any decision, including in matters of appointments, or a decision to refrain from exercising authority.”). See also Rosner, *supra* note 104, at 3.

government officials, and has also been critical to supervise the Israeli police force.¹¹⁵ With the judiciary serving as the main bulwark against tyranny by the elected branches, removing a key mechanism of judicial review threatened to cripple the courts' ability to intercede in a democratic backslide.

Petitioners including the Israel Bar Association, several nonprofit groups, and individual citizens quickly challenged the amendment, and the Supreme Court heard *Movement for Quality Government v. Knesset* (2024), in September 2023, with all fifteen justices sitting for the case en banc for the first time in history.¹¹⁶ The court, in an 8-7 decision, struck down the amendment—the first time that the Israeli Supreme Court ever struck down a constitutional amendment. In the majority opinion, President Hayut held that the amendment damaged the rule of law both formally (placing elected officials above the law by allowing them to act unreasonably with no opposition) and substantively (stripping the courts of their power to keep a balance between the values, principles, and interests of democratic society).¹¹⁷ Because of the threat posed to rule-of-law and separation-of-powers principles, the amendment was an illegitimate “deviation from the Knesset’s constituent authority” and the Court declared it void.¹¹⁸

The case also raised the broader issue of whether the Supreme Court could review the content of Basic Laws to determine if the Knesset had deviated from its constituent authority. A larger twelve-justice majority agreed that, due to the uniqueness of Israel’s constitutional structure,¹¹⁹ it was imperative to establish mechanisms to enforce the limitations on the Knesset’s power, and that the Court’s position as protector of the “fundamental concepts and values of Israeli society” made it the appropriate body to exercise that review.¹²⁰

Thus far, the Court’s decision stands; despite Netanyahu’s Likud party publicly commenting that the ruling was “against the will of the people,” neither he nor the Knesset have made any attempt to overturn, ignore, or invalidate the decision.¹²¹ However, though the judiciary may have won that battle, the war is far from over. Since the landmark decision, Prime Minister Netanyahu and Minister of Justice Levin have continued their bid to diminish judicial independence.

Following President Hayut’s retirement in October 2023, Justice Minister Levin frustrated the appointment of a new Court President, resulting in a series of acting presidents for fifteen

¹¹⁵ Weill, *supra* note 97.

¹¹⁶ HCJ 5658/23 *Movement for Quality Government in Israel v. The Knesset*, Cardozo Israeli Supreme Court Project (Jan. 1, 2024) (Isr.), <https://versa.cardozo.yu.edu/opinions/movement-quality-government-israel-v-knesset> [hereinafter *Movement*]; Maayan Lubell, *Israel's Supreme Court hears arguments in showdown over judicial curbs*, REUTERS (Sept. 12, 2023, 2:56 PM), <https://www.reuters.com/world/middle-east/israel-supreme-court-set-historic-judicial-overhaul-session-2023-09-11/>.

¹¹⁷ *Movement*, *supra* note 116, ¶ 160.

¹¹⁸ *Id.* at ¶ 179.

¹¹⁹ President Hayut highlights three structural factors contributing to this “uniqueness”: the “chapter by chapter” style of Israel’s constitution, the lack of a special procedure for adopting constitutional norms, and the concentration of both legislative and constituent power in the hands of the Knesset. *Id.* at ¶ 73-81.

¹²⁰ *Id.* at ¶ 86.

¹²¹ Rob Picheta, Amir Tal & Lauren Izso, *Israel's top court strikes down key part of judicial overhaul, reigniting divisions as war rages*, CNN (Jan. 2, 2024), <https://www.cnn.com/2024/01/01/middleeast/israel-court-judicial-overhaul-intl/index.html>.

months.¹²² Levin also caused a deadlock on the appointment of three court seats by insisting on ultraconservative candidates that could not achieve a supermajority of seven votes on the Judicial Selection Committee, and weaponizing his coalition's three votes on the committee to prevent any other candidate from reaching a supermajority.¹²³ Given that those three positions were vacated by mandatory retirement by liberal members of the court, the deadlock generated a de facto conservative shift.

The Knesset also continued to push other reform bills in the overhaul platform. In 2025, coalition lawmakers passed a bill altering the composition of the Judicial Selection Committee by removing the two representatives of the Israel Bar Association, replacing them with attorneys to be directly chosen by the coalition and opposition parties.¹²⁴ The bill also gives veto power to political representatives, cabining the influence of the three judges on the Committee. Among other pieces of legislation currently being advanced are proposals to make the attorney general a political appointee and eliminate its authority to issue binding opinions on the law for the government, and assert political control over ministerial legal advisers.¹²⁵

Finally, the government has signaled that it has no plans to give up pursuit of the judicial reform. Despite acquiescing to the Supreme Court's decision in *Movement for Quality Government in Israel v. Knesset*, in January 2026, the Knesset brought a motion to the agenda declaring that the High Court of Justice cannot issue orders against amendments to Basic Laws legislated by the government—essentially undermining the decision.¹²⁶ Though the motion would have no legal force, it still serves as a “political cudgel” against the Court.¹²⁷

The Israeli Supreme Court has seen some success in resisting Netanyahu and the Knesset's encroachment on its power, no doubt assisted by the strong public outcry against the reforms, but the *Movement* decision marked one story of success in an ongoing struggle for control of the judiciary. Whether Israel's courts can resist the complete domination that the Polish Constitutional Court suffered remains to be seen.

¹²² Traditionally, the “rule of seniority” has dictated that the longest-serving judge on the day that the outgoing president steps down takes their place as the new Court president, a norm which supports judicial independence. This rule would elevate Judge Yitzhak Amit, one of the Court's more liberal members. Levin has advocated for one of the more conservative judges to take the position instead, despite his relative lack of seniority. See Amichai Cohen & Yuval Shany, *Israel's Renewed Judicial Overhaul*, LAWFARE (Mar. 3, 2025, 10:33 AM), <https://www.lawfaremedia.org/article/israel-s-renewed-judicial-overhaul>.

¹²³ *Id.*

¹²⁴ See Sam Sokol, *Knesset passes law greatly boosting political control over appointment of judges*, TIMES ISR. (Mar. 27, 2025, 12:11 PM), <https://www.timesofisrael.com/knesset-passes-law-greatly-boosting-political-control-over-judicial-appointments/>

¹²⁵ Jeremy Sharon, *Judicial overhaul redux: New laws aim to weaken legal checks on government action*, TIMES ISR. (Jan. 11, 2026, 11:14 PM), <https://www.timesofisrael.com/judicial-overhaul-redux-new-laws-aim-to-weaken-legal-checks-on-government-action/>. For an updated timeline of where each judicial overhaul bill is in the legislative process, see *Judicial Legislation Tracker*, ISR. POL'Y F., <https://israelpolicyforum.org/judicial-legislation-tracker/>

¹²⁶ *Id.*

¹²⁷ *Id.*