

Review of Dixon and Landau's *Abusive Constitutional Borrowing*

Mark Tushnet*

This impressive book by two leading members of their generation of scholars of comparative constitutional law offers ample opportunity for reflection upon some of the major issues in the field's scholarship today: questions about populism and constitutionalism, democratic decline, constitutional design, and more. It provides clear analytic categories and identifies important mechanisms by which constitutional provisions borrowed from one system can operate in others.¹ I have no doubt that it will influence innumerable scholars who are interested in democratic decline and related issues.

I'll state my overall perspective on the work provocatively: The arguments Dixon and Landau make sometimes are mistaken or overstated, but in extremely thought-provoking and productive ways.² The great physicist Wolfgang Pauli is

* AB Harvard University, JD, MA Yale University. William Nelson Cromwell Professor of Law emeritus, Harvard Law School. I developed many of the ideas in this Review while writing drafts of portions of a work, *Power to the People: Constitutionalism in the Age of Populism*, co-authored with Bojan Bugarcic, to be published in 2021, but I stress that Professor Bugarcic and I have not discussed these specific ideas yet, and they cannot be attributed to him (nor can I be sure that they will survive in the final version of the book).

1 See e.g. Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal Globalism and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021) at 19 (identifying sham, selective or acontextual, and anti-purposive borrowing).

2 Sometimes the problem lies in overreaching, that is, locating an illiberal or otherwise troublesome policy and attempting to jam it into the "abusive borrowing" framework. And sometimes the problem lies in stating in too unequivocal terms conclusions that might be correct but are based upon

said to have disparaged some work in quantum physics as “not even wrong” — implying that sometimes theoretical work that is “merely” wrong can make important contributions to the field. So, in my view, with this book.

Much of this Essay identifies examples offered by Dixon and Landau that don't work as well as they contend — that are “merely” wrong. Even if these examples were pared away, there'd be a great deal that was right — cases where constitutional reforms were indeed anti-constitutional. I devote little attention to what's right because for me the most interesting discussions deal with cases that seem to me wrong or ill-fitting within the analytic framework Dixon and Landau develop. My central concern is with the criteria for distinguishing the right from the merely wrong. Dixon and Landau begin with what I believe to be the right criterion, then go astray as they try to apply it. I argue that the central criterion, which focuses on anti-constitutional intent, almost certainly will have to be brought to ground with more particular attention to politics. Sometimes the relevant politics is simple: Constitutional reforms that advance bad substantive agendas are anti-constitutional and the very same or quite similar reforms that advance good substantive agendas are pro-constitutional. Sometimes, and more interestingly, the politics is more complex: Constitutional reforms that occur incrementally are sometimes good but those that are implemented rapidly can't be.

I begin by observing that Dixon and Landau get the heart of the problem right, and more right than anyone else so far. Their topic is “abusive” constitutional borrowing, which includes abusive constitutional review. The heart of the problem lies in defining “abusive” in a way that doesn't build in one's evaluations of the merits of specific constitutional developments. The difficulty arises because we know that almost every specific constitutional development can be a valuable reform in some contexts and something that weakens constitutional democracy in other contexts.³

evidence that those more sympathetic to the regimes in question could fairly find more equivocal.

3 After writing this sentence I tried to come up with examples of constitutional developments that would be unequivocally inconsistent with constitutional

Dixon and Landau solve the problem by making the intent behind the proposal or development crucial: Abuse occurs when “would-be authoritarians knowingly or *intentionally* take aim at the democratic minimum core”,⁴ which they summarize as “tilt[ing] the electoral playing field heavily in their favor”.⁵ As they put it, abuse occurs when constitutional borrowing is done in bad faith.⁶

This seems to me a major conceptual advance in the study of democratic decline and associated topics. The reason, as already noted, is that almost any constitutional change or borrowing can in appropriate circumstances be a good-

democracy. The only candidates I could come up with were a permanent suspension of elections, perhaps accompanied by the designation of a single party hierarchy as the locus for all policy-making, a system whereby all expression was subject to completely discretionary sanction by public authorities, and a system of total surveillance of individuals in public and private spaces. I’m open to the possibility that there are others, but every constitutional reform proposal that’s been on the table in recent years doesn’t approach these — or other — limits. (We now know, for example, that postponing a scheduled election might be a good idea under some now readily imaginable circumstances.)

- 4 Dixon & Landau, *supra* note 1 at 27 [emphasis in original]. See also 3 (“By abusive constitutional borrowing, we mean the appropriation of liberal democratic designs, concepts, and doctrines *in order to* advance authoritarian projects”) [emphasis added].
- 5 *Ibid* at 23. See also 192 (using the phrase “tilted the electoral playing field heavily in favour of incumbents”). Their more complete definition of the minimum core is: “regular, free and fair elections, with some minimum level of competition between political parties, and a set of background conditions that includes respect for those political rights and freedoms necessary for democratic processes as well as some conception of the rule of law and protection for independent institutions necessary to oversee and protect the other elements of a competitive electoral system” (25).
- 6 See *ibid* at 83 (“Implicit in this concept of intent is some notion of bad faith”). *Cf.* at 19 (referring to an assumption of “a kind of good faith by borrowers”). But *cf.* at 143 (noting that a human rights commission might not have had “subjectively ‘bad’ motives” in endorsing arguments that a military coup was constitutionally permissible, yet concluding that the arguments were abusive).

faith effort to improve a system's democratic credentials.⁷ To determine whether a proposal is made in good or bad faith, then, we must look to something other than the proposal itself.

I believe that there's only one serious candidate for that "something else" — the non-constitutional policies the government we're looking at has as its substantive agenda or, put another way, what the government's trying to accomplish if its constitutional revisions go through. One telling example suggests that Dixon and Landau accept this candidate. As I'll discuss later one important "case study" in Dixon and Landau involves removal of presidential term limits. Dixon and Landau discuss a Costa Rican decision holding impermissible a constitutional provision limiting an elected president to a single term over an entire lifetime. They write, "The case is not 'abusive' under our definition because ... in part ... Costa Rica ... was not experiencing *other* formal and informal changes that posed a threat to the democratic order".⁸ The remainder of this Review can be understood as presenting a series of arguments against other candidates for determining when a constitutional reform is

7 For example, even a rule authorizing or mandating gerrymandering of election districts can — again, in appropriate circumstances — improve a system's democratic credentials by providing representation for demographically or geographically isolated communities with common interests. That, for example, is the defense offered for drawing election district lines in Japan to favor rural interests. Seen in this way, gerrymandering is a cousin of reserving seats for specific communities of interest (in the Japanese example, farmers).

8 Dixon & Landau, *supra* note 1 at 1 [emphasis added]. See also 201 ("the judicial decision ... was made in a context where the country otherwise remained solidly liberal democratic"). Dixon and Landau supplement this with the observation that the court "removed the stricter constitutional limits ... but reimposed the looser but still meaningful term limit" in the original constitution. The remaining term limit was meaningful because it prevented the kinds of interaction effects that make extended presidential terms problematic, as I discuss below. For another indication that Dixon and Landau determine bad faith by examining other policies, see 147 (discussing Hungary's adoption of a provision dealing with national identity, and observing that "[t]he course of events must also be juxtaposed with the serious human rights violations that have been found in Hungary's treatment of asylum seekers").

intended to weaken the democratic core (tilt the playing field or made in bad faith, which for Dixon and Landau are short-hand formulations of the same idea).

I've already indicated why we can't use any single reform proposal to identify good or bad faith.⁹ Dixon and Landau sometimes seem to entertain the possibility of a related candidate — the entire package of constitutional reforms put on the table. Explaining why that's not a good alternative gets me to the core of my critique of Dixon and Landau. Initially methodological, that critique turns out to be political as well.

Dixon and Landau start *in medias res*: An election has occurred and the winner has put constitutional changes on the table. I believe that analysis should start at an earlier point by asking *why* the winner prevailed. The cases of interest arise when a candidate or party goes to the people with the argument, "Our nation is in serious trouble because for some period the leaders we've elected haven't done a good job. If you elect us we'll get the nation out of trouble and back on course".

The candidate or party offers a program, typically depending upon a diagnosis of why things have gone wrong. There are basically two diagnoses available. One is that the nation's leadership has been weak in many domains, and electing a strong leader will allow the nation to move forward by defeating the forces to which that weak leadership has succumbed. When the people elect a candidate who offers this diagnosis, they are electing someone who explicitly presents himself (or, a possibility not yet realized, herself) as a would be authoritarian who tells the nation that authoritarianism is the way to get it back on course. Jair Bolsonaro in Brazil and Rodrigo Duterte in the Philippines might be examples. We can assume that any constitutional reforms they propose are intended to promote their authoritarian agenda (which, I emphasize, was the platform they offered to the people).

9 Cf. *ibid* at 175 ("Rather than focusing on tactics themselves, ... there is no substitute for observing the contexts in which arguments are deployed and their effects on the democratic minimum core").

The cases Dixon and Landau examine in most detail involve candidates and parties that offer a different diagnosis. The second diagnosis is that prior governments have adopted substantive policies that have worked badly for the nation, and the remedy is a set of alternative policies — an obviously non-exhaustive list might include wealth redistribution, a national industrial policy that reclaims jobs for our people, or immigration restrictions to make more jobs available to the nation's citizens. I'll call this an "ambitious reform agenda", and emphasize that the agenda can be either radically conservative or radically progressive.

How should we think about constitutional reforms proposed by victorious parties with ambitious reform agendas (ARAs)? Begin with two observations: Enacting and implementing an ARA takes time and political effort even for a party that's won a large majority in a single election; and a single election rarely determines the composition of every institution that has input into policy adoption and implementation.

The first observation means that there's a decent chance that the victorious party won't be able to make enough progress on its ARA before the next round of elections occurs.¹⁰ If it doesn't, it might lose support from voters who conclude that the party is just the same old same old — people who promise much and deliver little. So, a party with an ARA might in good faith try to accelerate the processes of policy-making and implementation.

The second observation means that some existing institutions — notably, constitutional courts — might remain controlled (from the victorious party's point of view, captured) by the losing and discredited parties.¹¹ Opposition

10 Political scientist Stephen Skowronek describes this as a tension between calendar time and political time.

11 This describes a well-known account of the role of constitutional courts, given its most pointed expression for present purposes in Ran Hirschl's description of how elites anticipating electoral defeat expand the power of constitutional review as a mechanism for "hegemonic self-preservation". See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2007).

control of these veto points can prevent the victorious party from enacting the ARA that was the basis for its victory.¹² The victorious party might make two additional and related observations. Some of the policy failures that led to its election — that is, some of the failures by the parties it defeated — might have resulted from the existence of veto points that prevented previous governments from implementing substantive policies that would have kept the nation from getting into the pickle from which voters now want rescue. Further, prior policy failures, if attributed to the existence of veto points, show that the status quo number of veto points isn't necessarily optimal. So, a party with an ARA might in good faith try to re-staff or bypass these institutions.

One final preliminary before I take up Dixon and Landau's treatment of specific constitutional reforms. We're primarily interested in situations where the victorious party is in a position realistically to seek constitutional revision, typically because it's won by a large enough electoral margin to make politically feasible the pursuit of constitutional reform. I sketch the three main modes of formal constitutional change.

The victorious party can negotiate with those over whom they prevailed. This is especially attractive where the losers retain significant power, whether political or economic. So, for example, the African National Congress negotiated constitutional changes with representatives of the apartheid regime, who had significant economic power. Many of the transitions in central and eastern Europe from 1989 to 1991, including that in Hungary, were negotiated with the remnants of communist parties that still had significant political support among the nations' voters.

This mode of constitutional reform is available, though, only if the losers are willing to accept their loss and negotiate in good faith. And that's not always the case. It seems reasonably clear, for example, that the elites who were displaced by Hugo Chávez in Venezuela and Evo Morales in Bolivia never accepted the

12 More recent theorizing characterizes some of these institutions as speed bumps rather than veto points. As speed bumps they slow down the pace of enactment and implementation, and for that reason trigger the concern already discussed about the tension between calendar time and political time.

legitimacy of those who defeated them. When Chávez proposed a referendum on convening a constituent assembly and got approval from the non-Chavista Supreme Court, opposition parties boycotted the referendum and then renewed their boycott for elections to the constituent assembly. A few years later they attempted a coup d'état, which failed miserably. The evidence from Bolivia is harder to come by, but Morales was forced out of office by a process that might reasonably be described as a coup, and I have a strong impression that the elites that Morales and his political movement displaced simply couldn't accept the fact that a boorish representative of the nation's indigenous people was going to exercise power over them.¹³ In these cases good-faith negotiations for constitutional reform weren't realistically available.

The second mode is using existing provisions for constitutional amendment if the party's victory is large enough. That's what happened in Hungary. Hungary's amendment procedures turned out to be badly designed, but it's hard to charge the Fidesz party with bad faith simply because it used entirely lawful procedures for amending the constitution — and remember, we're looking for evidence of changing the constitution for the very purpose of eroding democratic constitutionalism. In itself following the rules for amending the constitution can't give us much evidence of that purpose.

The final mode of constitutional reform is through a constituent assembly convened for the purpose of revising or replacing the existing constitution. This might be a particularly attractive mode for a recently victorious party with an ARA because it can expect to win roughly the same proportion of seats in the

13 Morales was forced out of office in this way: Early returns from a presidential election appeared to show that Morales had won just over 40 percent of the votes and just over 10 percent more than his nearest rival, which under Bolivia's election rules would have been just sufficient to avoid a run-off. Some election observers, including international voting monitors, believed that the early returns were suspicious. As the returns were being finalized, opposition leaders supported by military officers approached Morales and told him that he had to relinquish his claim to office. He did so. One later analysis of the early returns supported Morales's claim to victory; a follow-up study contested that analysis. I discuss Morales's fate below.

constituent assembly that it won in the preceding election. As Dixon and Landau explain, the theory of constituent power holds that constitutions are founded upon fundamental choices made by the nation's people speaking through some institutional form — here, the constituent assembly — that can fairly be said to stand as a representative of the people taken as a whole. Constituent assemblies, in short, must be representative. Dixon and Landau argue that Venezuela's constituent assembly in 1999 wasn't adequately representative. But note their description of why it wasn't: “the rules selected by Chávez (along with other key factors, such as an opposition boycott of the election) resulted in a wipeout. Chávez's forces won over 90 percent of the seats with just over 60 percent of the votes, with a handful of independent candidates winning most of the remainder”.¹⁴ Relegating the opposition boycott to a parenthetical comment seems to me a mistake: Venezuela's constituent assembly was unrepresentative because the opposition, not Chávez, made it unrepresentative. And, as Dixon and Landau observe, once the constituent assembly set to work, “[t]he process was fairly participatory, with the Assembly receiving input from a range of civil society groups”.¹⁵

How should we think about constitutional reforms aimed at easing the path to enactment and implementation of an ARA when we have a constitutional reform process that isn't intrinsically suspicious — for example, a process that expressly conforms to existing constitutional amendment procedures or a constituent assembly that is either broadly representative or unrepresentative through no scheming by the victorious party? Remember that our goal is to identify situations where the reforms are intended to “take aim at the democratic core” or “tilt the electoral playing field”. Yet, we are dealing with reforms that proponents of an ARA assert are intended “merely” to make it easier for them

14 Dixon & Landau, *supra* note 1 at 123.

15 *Ibid* at 124. Dixon and Landau say that Ecuador's constitutional revision process “followed the same broad approach” (125), but don't provide details on the actual representativeness of the constituent assembly, which is, it seems to me, the key question.

to enact and implement that agenda. How can we tell that the proposed reforms are the former and not the latter?

I think that the key is the cast of mind we bring to the analysis. Specifically, suppose we thought that the ARA either is a good one (we're basically sympathetic to the victors who are trying to change the constitution) or is within the range of reasonable policy choices available in a constitutional democracy. We would then ask about reform proposals, If adopted will they ease the path to adopting and implementing the ARA in the short run but weaken the democratic core in the long run? And, as I will argue next, in many instances the answer to that question will probably be, Hard to know.

Dixon and Landau offer what I call a "global" and a "discrete" analysis of reform proposals. Both analyses try to identify politically neutral criteria for answering the key question. Such criteria make no reference to the substantive content of the ARA promoted by the victorious party. Both the global and the discrete analyses can make some progress toward answers in some cases, but in the end, I argue, neutral criteria won't be sufficient to carry the day. That is, in the end we will decide that a victorious party aims at the democratic core when its ARA, not its constitutional reforms, is politically out of bounds.

The global analysis takes irregularity as an indication of an intent to weaken the democratic core rather than to ease the path to adopting and implementing the ARA. Irregularity can be procedural or substantive.¹⁶

Because we're dealing with actions that fully comply with the procedures set out in law, procedural irregularity is a matter of departing from procedural *norms*. Dixon and Landau's best example is an action taken by the Supreme Court of Nicaragua to extend Daniel Ortega's presidential term. The Court acted in the middle of the night, with only Ortega's supporters on the court notified that something was about to happen.¹⁷ Dixon and Landau suggest that

16 *Ibid* at 185 (referring to "context, legal reasoning, and procedural irregularities").

17 *Ibid* at 86. One might worry that by the time the court acted Ortega wasn't a would be authoritarian but was a full-fledged one.

the use of private bills as the vehicles for major reforms in Hungary was procedurally irregular. Dixon and Landau's explanation for why this matters is somewhat opaque: Apparently the rules for processing government bills expose the bills to greater scrutiny than the rules dealing with private bills (though that's counterintuitive to me). More important, I need to know more about Hungarian parliamentary norms dealing with private and government bills to know whether using private bills is a signal of improper intent.

A related difficulty attends the use of substantive irregularity, by which I mean implausible legal defenses of unconstitutional reforms: The government adopts such a reform, the opposition challenges it as unconstitutional, the government — and the courts it has captured — defend the action as constitutionally permissible, and the defense is implausible. To know whether an action is substantively irregular in this sense — and so whether it signals an intent to weaken the democratic core — requires knowledge about the relevant law.¹⁸

Here there's a serious methodological problem with some of Dixon and Landau's presentations, indicated by their occasional use of qualifiers like "arguably" to modify claims that the action was unconstitutional.¹⁹ Except with respect to Colombian and perhaps Venezuelan law, neither Dixon nor Landau can represent themselves to be authorities about the law they are discussing — nor, I emphasize, do they purport to do so. They rely as they must upon what experts in the relevant domestic constitutional law have said. Unfortunately, the experts who have discussed that law tend to be opponents of the regime. Dixon and Landau cite Wojciech Sadurski on Poland, Gregor Halmai and Kim Lane

18 Cf. *ibid* at 85 (referring to decisions that "respect[] relatively orthodox processes of legal reasoning"); at 86 (describing courts that "fail[] to live up to [their] own ordinary standards of legal reasoning").

19 See *e.g. ibid* at 95 (referring to an Ecuadorian process of constitutional amendment "that arguably clashed with a tiered amendment rule"). Cf. at 97 (referring to a decision resting upon a "dubious ground"), and at 100 (referring to "legally dubious decisions").

Scheppele on Hungary. With two overlapping exceptions that I could find,²⁰ they don't cite or discuss the arguments put forward by the lawyers defending the government or made by the courts upholding the actions. That means that readers have to take on faith representations about domestic constitutional law made by partisans in serious political conflicts. Of course those representations might be accurate, but I'm uncomfortable in making so much hinge on them.

Here are a few examples to illustrate my concern. Allan-Randolph Brewer-Carias wrote one of the few extended legal accounts of Venezuela's constitutional history under Chávez.²¹ Dixon and Landau necessarily rely on it, but it's worth noting that Brewer-Carias isn't a dispassionate analyst of the developments. The leader of the failed 2002 coup against Chávez sought Brewer-Carias's advice on the lawfulness of a decree the leader issued purporting to dissolve the Chávez government. Venezuelan authorities prosecuted Brewer-Carias for attempting to overthrow the government by force. Brewer-Carias contended that he never actually offered any advice (Venezuelan authorities represented that Brewer-Carias's involvement was far more extensive than he asserted), but the fact that he was brought to military headquarters suggests that the coup leader thought

20 The exceptions both involve arguments made by government supporters defending as consistent with popular constitutionalism proposals to allow legislatures to override adverse constitutional court decisions, *ibid* at 156. Dixon and Landau properly observe that these arguments do track those made in the literature on popular constitutionalism but fail to take into account conditions like general respect in the legislature for constitutional values that proponents of popular constitutionalism impose.

21 Allan-Randolph Brewer-Carias, *Dismantling Democracy in Venezuela: The Chavez Authoritarian Experiment* (Cambridge: Cambridge University Press: 2010), cited at Dixon & Landau, *supra* note 1 at 34, n 59.

that Brewer-Carías take the legal claim seriously.²² This in turn suggests that his account of Venezuelan constitutional law shouldn't be accepted uncritically.²³

Another example involves one aspect of the means by which the PiS government in Poland came to control the constitutional court. The factual background is complex.²⁴ The constitutional court had 15 members. The terms of three members expired on November 6, 2015, those of two others in December. Elections were scheduled for October 25, 2015, with the victor to take office on November 12. On October 8, the government then in power appointed five judges to the constitutional court – three for the vacancies to occur on November 6, two for the vacancies to occur in December. PiS and its coalition partners defeated the sitting government and contended that all five appointments were void. To an outsider the appointments to the December seats seem quite questionable as an effort to extend the former government's power into the period after it was thrown out of office. What of the three November appointments, which “took effect” in the period between the former government's defeat and PiS's accession to power? Dixon and Landau rely on Sadurski to support the claim that refusing to seat the November appointees was substantively irregular.²⁵

22 For the facts, see *Brewer Carías v Venezuela* (2014), Inter-Am Ct HR (Ser C) No 115, Preliminary Objections (dismissing for failure to exhaust domestic remedies Brewer Carías's claim that prosecuting him for seeking to overthrow the government by violence violated his rights under the Inter-American Convention on Human Rights), at paras 38, 62 (setting out the competing factual claims).

23 A similar reliance on partisan accounts, here of facts, occurs in connection with claims by Burundian judges that they had been forced to leave the country (Dixon & Landau, *supra* note 1 at 88).

24 Dixon and Landau's account is barebones (and relies on Sadurski's interpretation of the relevant court decisions), *ibid* at 90.

25 *Ibid* at 34 (referring to the “capture of key judicial institutions ... to validate these laws, many of which are pretty clearly violations of the existing constitutional text”, and citing to Sadurski).

That might be right, but it's not difficult to come up with an argument supporting the PiS position on those appointees: The "clearly" improper December appointments taint the entire package of appointments made in October. I have no idea whether that argument has support in Polish constitutional law, but I do know, because Dixon and Landau and Sadurski tell us, that the constitutional court held that the December appointments were indeed invalid — and presumably offered some sort of argument to support that holding. I'd like to know what the argument was, so that I can figure out whether throwing the three judges off the court was substantively irregular.²⁶

A final example is much more consequential because it involves the predicate for much in the book: efforts by governments with ARAs to gain control of constitutional courts that might stand in the way of implementing their agendas, by changing the court's membership or jurisdiction.²⁷ Dixon and Landau observe that all such efforts compromise the value of judicial independence, as they do. Does that mean that they are always substantively irregular? Do they always rest on legally implausible grounds? Here I think the answer is unequivocally No. Sometimes, though of course not always, there are plausible legal arguments for changing a court's composition or jurisdiction.

The reason is that judicial independence isn't the only value in the premises. We want judges to be accountable as well. Accountability has two components — accountability to law and accountability to politics.

26 Again relying upon Sadurski, Dixon and Landau refer to a Polish law on demonstrations that "effectively prioritiz[ed] pro-government rallies over other assemblies", and assert that it poses "an *obvious* clash with freedoms of expression and association" (*ibid* at 95) [emphasis added]. The law was one that employed a facially neutral standard for the purpose of accomplishing a disparate effect upon demonstrations. The free-expression analysis of such statutes is complicated, and they probably are generally inconsistent with free expression principles (when I used the statute in an examination, almost all of my students concluded that it was unconstitutional under the U.S. First Amendment), but the argument supporting that conclusion isn't an obvious one.

27 The question is dealt with at *ibid* at 87–93.

We want judges to be accountable to law, which means (to short circuit a complex argument) we want them to make decisions that are visibly connected to all the available legal materials. As good lawyers know, though, the legal materials can support results that point in quite different directions. Specifically, the legal materials can support the conclusion that some parts of an ARA are constitutionally impermissible *and* the conclusion that those same parts are constitutionally permissible. When a government changes the court's composition or jurisdiction to make it more likely that the court will reach the latter conclusion, is it weakening the democratic core value of judicial independence? Or is it promoting judicial accountability to law rather than politics?

The “rather than” implicit in the preceding sentences is misleading, though. We also want constitutional court judges to be accountable politically in a broad sense, which is why almost everywhere political actors have a significant role in naming judges to the constitutional court. When a significant political transition occurs, a court that was adequately politically accountable to the prior regime might get out of sync with — become insufficiently politically accountable to — the new regime. Changing the composition of the court might then be a good faith attempt to bring the court into closer balance with the elected government.²⁸ It might not be, of course, but once again we can't look only to the government's effort to change the court's composition or jurisdiction to come up with the answer.

I conclude that we can't come up with politically neutral criteria that support a global analysis of constitutional reform proposals by distinguishing between good-faith reforms, which are in the global analysis supported by plausible legal

28 Dixon and Landau mention a White Paper produced by the PiS government in Poland defending its “judicial reforms”, which “stated that even more than 25 years after the transition to democracy, too many judges on Polish courts had been involved in the Communist regime” (*ibid* at 149). If true, that fact has some bearing upon the question of achieving a desirable degree of accountability to both law and politics by reforming the courts.

arguments, and bad-faith efforts to weaken the democratic core, which in the global analysis are supported by only implausible ones.

That leaves us with discrete analyses, those that seek to determine good- and bad-faith with respect to individual constitutional reforms. Here too I think an important distinction needs to be drawn between what I'll call substantive policies, some of which might be components of an ARA (which will provide my primary examples of this category), and policies that affect the electoral playing field reasonably directly (some aspects of free expression law and presidential term limits, which will be my primary example).

Dixon and Landau offer many examples of substantive policies that might well be intended to tilt the electoral playing field in favor of the incumbent party. The problem here is that in some sense they don't offer enough examples. And if they did, we'd see that substantive policies quite often have this intent but can't readily be described as intended to weaken the democratic core. My conclusion is that we have to be quite careful in equating policies that tilt the playing field with policies that are intended to weaken the democratic core — and I'm tempted to think that the right solution is simply to exclude from the field of concern substantive policies intended to tilt the playing field.

All this is rather abstract, so I move on to examples, first of substantive policies that Dixon and Landau classify as abusive because they are intended to weaken the democratic core and then of substantive policies that are intended to tilt the electoral playing field.

Dixon and Landau point to some expansions of rights as abusive because they are deceptive, meaning, I think, that governing parties that expand these rights do so to attract votes without actually intending to implement the rights. For example, Ecuador's constitution contains an expansive list of rights associated with the environment and with indigenous communities. To use the term I've introduced, protecting the environment and indigenous communities was part of an ARA.

By including these rights in the constitution, Correa and his party drew votes from environmentalists and indigenous communities (and from their supporters outside Ecuador). Dixon and Landau point out that after the

constitution went into effect Correa's government sacrificed environmental protection and protection of the rights of indigenous communities to economic development, with a notable case in which the government promoted environmentally damaging resource exploitation in an area important to sustaining the viability of an indigenous community — sacrificing both the environment and the indigenous community on the altar of economic development.²⁹ They conclude that the Correa government wasn't really committed to the expansive list of rights.

There's an alternative account of these events, though. Correa's constitution had a now standard list of first-generation rights and second-generation rights as well as the newer environmental and indigenous rights. Implementing second-generation rights — that is, making material resources more widely available to the poor — is easier when the nation has more resources at hand. In particular, exploiting natural resources is a way of generating the revenue to be used to implement second-generation rights.³⁰ A government sincerely

29 *Ibid* at 77–78. They also point to the adoption of legislation, apparently general, that increased the government's ability to shut down NGOs, which was then used against "a prominent environmental NGO", and cite "two political scientists [who] cite a 2010 memo allegedly circulated among judges by the National Judicial Secretary, in which Correa explicitly warned that any judge finding public works projects (including mining) unconstitutional would be *personally* liable to the state for 'damage and harm' caused by the lost opportunity to pursue the project" (78). These matters do bolster the argument that the initial inclusion of environmental rights was a sham, but only a bit: If, as their presentation suggests, the NGO statute was general, it doesn't tell us much about the initial inclusion of environmental rights that it was used against an environmental NGO (if it was used against other NGOs as well, which Dixon and Landau don't say). And the phrase "allegedly circulated" is a red flag to me; who alleged it, and why weren't the political scientists able to say simply "circulated"?

30 *Cf. ibid* at 78 (noting that the Correa government defended a mining law criticized as anti-environmental "as necessary to promote a program of pro-poor development"). Dixon and Landau acknowledge these points, but conclude that "the weight of the evidence in the Ecuadorian case supports a 'sham-like' intent, with Correa using constitutional rights that he had no intention of implementing, as a currency to advance an anti-democratic agenda" (80).

committed to protecting second- and third-generation rights faces significant trade-off issues. Sometimes it might decide to protect the environment, forgoing the revenue that natural resource exploitation would generate, but it then has fewer resources to devote to education and medical care for those in need. Sometimes it might trade things off in the opposite way, increasing funding for schools and medical care from revenues generated by activities that damage the environment. In a world of tradeoffs, it's a mistake to say that any specific tradeoff demonstrates that the promise of the rights that gets the short end of the deal was illusory, deceptive, or abusive in Dixon and Landau's sense.

A second example of rights-expansion is Rwanda's guarantee of equal representation of women in its decision-making structures.³¹ Dixon and Landau point out that this guarantee was fastidiously honored in a purely descriptive sense but didn't result in the adoption of policies that advanced the interests of women on the ground.³² For them, then, the promise of gender equality was abusive: It attracted the votes of women (and, again important in the story, approval from the international community) for a governing party that wanted those votes and that approval simply to perpetuate its rule.³³

Again, though, there's an alternative account. Dixon and Landau argue that providing equal descriptive representation isn't providing "real" gender equality

Readers can decide for themselves whether they agree; for myself, I think that the evidence is more equivocal.

31 *Ibid* at 71–74.

32 *Ibid* at 72–73.

33 The attention Dixon and Landau pay to the many "audiences" for constitutional reform is another important and valuable feature of their work. The audiences include domestic voters, "close, sophisticated observers" (*ibid* at 17), and international NGOs, including human rights NGOs. See *e.g. ibid* at 47 (discussing sham borrowing to "deceive international and domestic audiences"). The role of audiences is especially important in connection with regimes' efforts to take advantage of the presumptive legitimacy of judicial review. See *e.g. ibid* at 112–113. My only reservation is that Dixon and Landau might underestimate the ability of ordinary voters to discern what "close, sophisticated observers" (like them) do.

— or, put another way, a theory defending as a form of equality “mere” equality in descriptive representation is not as good as a theory defending substantive equality. That might well be right, but it’s also true that on standard accounts mere descriptively equal representation does something good for gender equality. To take a U.S. example: Nikki Haley and Kamala Harris have quite different views about what policies are best for women whose forebears came from South Asia, but their prominence in national politics advances the interests of such women anyway: Descriptively equal representation matters to some extent. So, for all we know from the material Dixon and Landau present, Kenya’s leaders had a good-faith view that providing descriptively equal representation was simultaneously a genuine advance for gender equality (though perhaps not as substantial an advance as would have occurred by a commitment to other theories of gender equality), a public-relations benefit, and — because of the mechanisms used to select the female members of parliament — a way of increasing the governing party’s already substantial grip on power. Of course, Rwanda’s leader Paul Kagame was an authoritarian straight-out, which we know from matters other than the gender-equality provision, but only the electoral effect, and not the claim that descriptive representation didn’t lead to substantive advances in equality, supports the argument that the gender quotas were a sham.

The problem here, I think, arises from the following circumstances. We agree that some value — environmental protection, material equality, gender equality — should be promoted. A political party will gain votes by putting forth policies that it says promote that value. In addition, we have available to us reasonable but different normative specifications of those values (descriptive representation versus substantive equality). And, finally, we as people with our own normative views think that one specification is (clearly) better than others. This combination leads us to conclude that those who chose a different specification must not really be committed to the underlying value: Their commitments are shams, deceptions, abuses, adopted simply to get votes (to tilt the playing field). It’s clear to me that that conclusion simply doesn’t follow. Our critique really is that we disagree with the choice among reasonable alternative specifications that the government we’re criticizing has made.

There's a further problem with a "tilt the electoral playing field" story about substantive policies: It licenses critics to describe as abusive a far too large set of substantive policies.³⁴ A crude version: *Every* substantive policy a government adopts is intended to tilt the electoral playing field by leading voters to conclude that re-electing the government that did this good thing for them will continue to do good things for them.

Consider direct monetary or in-kind payments to families. The Brazilian *bolsa familia*, a system of payments to poor families, was pioneered in the mid-1990s by the Workers Party (PT) governor of Brasilia, then expanded and made national in scope by president Fernando Henrique Cardoso, who led a centrist coalition. Luiz Inácio Lula da Silva of the Workers Party succeeded Cardoso, and dramatically expanded the size and scope of the program. He did so because in his view it was good policy *and* good politics, and the program did indeed enhance PT's electoral chances. The PiS in Poland has similarly bolstered its electoral position by providing significant payments to Polish families. It can't be, though, that these policies, adopted by parties that some see as led by would be authoritarians, are abusive even though they do indeed tilt the electoral playing field.

I conclude that we have no obvious criteria to identify as intended to weaken the democratic core substantive policies that tilt the electoral playing field, independent of a political evaluation of the policies. So, for example, we might argue that the *bolsa familia* or Polish subsidies have grown so large as to be unsustainable in the long run, which means that they are substantively bad policies and in their current form must be understood as intended only to perpetuate the sitting government's power.³⁵ Or, we might say that mere

34 I put this as an additional problem, but I think that it actually is just an extension to another area of the arguments already made.

35 That argument of course is fundamentally an empirical one, and supporters of the programs would surely contest its factual predicate, of unsustainability (for example, by arguing that children who benefit from the subsidy programs will grow up to be more productive citizens whose work will continue to generate the revenues needed to support the programs).

descriptively equal representation is a bad theory of equality. Or, finally, we might think that some components of an ARA are such bad ideas that the only explanation we can give for their inclusion is an intent to weaken the democratic core. It's clear to me, though, that at this point we're having a simple political argument about the merits of the ARA.

I turn now to policies dealing more or less directly with the democratic core, focusing on presidential term limits. My argument is that here too there's a problem of inferring improper intent from policies that do adversely affect the prospect that the opposition will be able to displace the sitting government, because sometimes there are decent arguments that the policies are appropriate, sometimes possibly necessary, to ensure the success of an ARA.³⁶

There are lots of reasons to worry about elimination of presidential term limits, but the case for doing so for the purpose of implementing an ARA is stronger than the literature acknowledges. And, further, we actually have some evidence supporting the proposition that sometimes the purpose of eliminating

36 I confine to this note the observation that not all laws that adversely and unjustifiably affect free expression weaken the democratic core. Dixon and Landau devote some attention to “memory” laws modeled on Holocaust denial laws (Dixon & Landau, *supra* note 1 at 59–66). There's no doubt that some such laws define as violations of national honor claims that are prominent in national politics and that therefore do weaken the democratic core. The Polish memory law, which makes it offense to imply that Poles collaborated with the Nazi regime during World War II, doesn't seem to me one of them, despite Dixon and Landau's inclusion of it in their analysis (64–65). The reason is that they don't show that any anti-PiS party makes allegations of Polish collaboration an important part of its platform (nor, it seems to me, would doing so be a sensible political tactic). The Polish memory law might well violate general principles of free expression, but that in itself doesn't mean that it's abusive in Dixon and Landau's sense (otherwise every violation of free expression principles would be abusive, which they clearly don't contend). Their express conclusion is that the Polish memory law is “illiberal” (true) and its “antidemocratic impact ... is largely latent” (66) (which is, I think, true of all illiberal legislation). Including the case in a study of abusive borrowings that threaten the democratic core seems to me an overreach.

presidential terms limits is in fact not to weaken the democratic core but rather to implement an ARA.

There appears to be something approaching an international consensus that nations with presidential systems should limit elected presidents to two terms of somewhere between four and seven years. The reason is that presidents who serve longer than that are too likely to gain control of all or nearly all of the other institutions that provide collateral protection for the democratic system, such as the constitutional court, the election management body, and the ombuds office.³⁷ It's also clear that there's some tension between this consensus and the principle, stated by Alexander Hamilton in connection with elections to the legislature, that "the people should choose whom they please to govern them".³⁸ The international consensus expresses a judgment about the right balance between these considerations.

Now consider something else that might be placed in the balance. The people elect a president because he or she has an ARA. Enacting and implementing the ARA will always take time precisely because it is ambitious. And, as discussed earlier, the time it takes might be extended by vigorous opposition mounted by the losing side. Meanwhile the clock is ticking. The

37 Citing Kim Lane Scheppele, Dixon and Landau observe that in Hungary and Poland "a number of institutions were curbed and/or captured simultaneously" – the constitutional court, ombuds offices, media regulators, and electoral commissions (Dixon & Landau, *supra* note 1 at 166). Neither nation is presidential, which suggests to me that we need some arguments that explain why presidents are properly placed under term limits but prime ministers aren't. Perhaps for some reason prime ministers are unable to gain control of these collateral institutions no matter how long they serve, though the Hungarian and Polish cases would remain a puzzle.

38 Quoted in *United States Term Limits v Thornton*, 514 US 779 (1995) at para 793. Dixon and Landau refer to this as "the (dubious) claim of a human right to reelection" (Dixon & Landau, *supra* note 1 at 116), and more strongly, "the argument that term limits violate international human rights law is baseless" (140). That's right as presented (in terms of a "right"), but overstated when we consider the people's interest as a consideration relevant to assessing the question of term limits' consistency with the democratic core.

president might believe in good faith that the scope of the ARA and the degree of continuing opposition it faces will make it impossible to enact and implement important components of the ARA before his or her term comes to its constitutionally mandated conclusion. So, the president seeks the people's approval of a constitutional amendment removing the term limit from the constitution.

Should these matters affect the balance that determines how long a president can serve? Consider that the consensus gives presidents *two* terms, and that neither Dixon and Landau nor other scholars of whose work I am aware criticize the Colombian Supreme Court for allowing a referendum changing a one-term limit to a two-term one. And the reason is clear: The consensus accepts the view that one term might not be long enough to allow a president to enact and implement the policies in the platform on which he or she ran. A president's ability to enact and implement policy agenda does indeed go into the balance.

But, proponents of term limits might say, why *you* in particular? That is, the president is the head of a party and has allies within the party one of whom might take the office and carry out the remaining parts of the ARA. So, for example, in Bolivia when Evo Morales was prevented from continuing in office, a few months later his former finance minister Luis Arce was elected president on a platform of policy continuity.

The president might respond — again without intending to weaken the democratic core — that the potential successors on the horizon lack the political skills needed to sustain the coalition supporting the ARA. As against Arce, we might cite Lenin Moreno, Correa's vice-president and successor as president who split the governing party and abandoned Correa's program.³⁹

The cases of Ecuador and Bolivia are interesting in another way: Both Correa and Morales succeeded in their efforts to eliminate presidential term limits but neither benefited from their victories. To secure adoption of the amendment

39 Dixon and Landau observe that Nicolas Maduro, Chávez's designated successor, was both less charismatic and less skilled as a politician than Chávez (*ibid* at 99).

eliminating term limits Correa had to accept a provision whose effect was to bar him from running for a third successive term,⁴⁰ though he reserved the right to run after an intervening presidential term.⁴¹ This suggests, though of course it doesn't establish, that Correa had principled reasons for his support for unlimited presidential terms; alternatively he might have believed that he could leave office for one term then return (a misjudgment, as it turned out). Morales did run for a third term but as described earlier was prevented from taking office. He went into a brief exile, then returned to Bolivia after Arce's election, and stated that (at least for the moment) he was returning to his role as a labor organizer rather than re-entering high-level national politics.

Taking everything into account, I believe that the international consensus favoring a two-term limit strikes the right balance. At the same time, though, I can't conclude that the argument I've laid out for removing term limits when a president has an ARA is insubstantial, and so can't conclude that those who advocate for removing presidential terms limits by that act alone show that they are would be authoritarians. They might be, as the case of Daniel Ortega shows, but we can come to that conclusion only by looking at *other* things they are doing.

With all the preceding in hand, I come to my final point: A great deal that is presented as criticism of abusive constitutionalism or, in Dixon and Landau's version, abusive constitutional borrowing, is criticism either of specific ARAs or, more interestingly, of the very idea that pursuing an ARA is a good idea.

I use Dixon and Landau's discussion of the potential intellectual imperialism of arguments about abusive constitutional borrowing as the entry point for my argument. They frame the concern about intellectual imperialism with reference to hypocrisy: Those said to abusively borrow things (structure or doctrines) from other systems respond either with the tu quoque of "whataboutism" or by

40 Correa's popularity had already eroded substantially, because of deteriorating economic conditions, and the referendum campaign occasioned "large-scale street protests" against the government (*ibid* at 136).

41 In the event even that possibility was foreclosed when Moreno sponsored an amendment reimposing presidential term limits.

saying, “You’re just jealous that we’ve tweaked your thing to make it better both for us and, we think, for you if only you’d acknowledge that fact that subalterns actually have good ideas”.⁴²

Dixon and Landau acknowledge that there’s something to each of these responses, but argue that in the end they can’t carry the day against arguments that really do identify some abuses — and I agree with both their acknowledgement and their conclusion that the charge of hypocrisy doesn’t undermine their core argument. In my view the charge of imperialism rests on different grounds, though.

I’ve argued in some detail that Dixon and Landau’s approach, which identifies abusive practices with those intended to weaken the democratic core or tilt the electoral playing field, is correct. I’ve also argued that the only way we can reliably determine that an actor has that abusive intent is by looking not at the constitutional reforms the actor sponsors but at what I’ve called the substantive policies the actor seeks to implement. Again, a crude version: A president who takes over the courts by a procedurally regular constitutional amendment *and* throws political opponents in jail is a would be authoritarian; a president who takes over the courts and doesn’t throw opponents in jail isn’t necessarily a would be authoritarian. In the course of this Essay I’ve offered what I hope are less crude versions of that argument.

If I’m right, the claim about intellectual imperialism comes down to this. The critic of abusive constitutionalism disagrees with some or many of the policies in the regime’s ARA, and that disagreement is the foundation for the critic’s inference of bad intent. Or, much more interesting, the critic might have process-based concerns. ARAs should be implemented through a dialogue with the opposition, apparently without regard to whether the opposition itself is willing to engage in a good-faith dialogue. Or, ARAs are in principle abusive because ambitious reforms should be implemented incrementally rather than quickly. This is not sheer status quo-ism because the critic is open to reforms,

42 Dixon & Landau, *supra* note 1 at 190–191.

even ambitious ones.⁴³ It is a political position nonetheless: that dialogue and incrementalism are the proper forms of political action. As should be clear, many of those who vote for candidates proposing ARAs disagree and, just to be crystal clear, I'm not going to say them nay.

43 There is a hint of status quo-ism in Dixon and Landau's reference to "those elements of liberalism that deal with the limitation of government power and the protection of individual liberty, dignity, and equality" (*ibid* at 28), a standard formulation that fails to take into account the possibility — associated with many ARAs — that exercising government power can sometimes be an effective method of protecting individual liberty, dignity, and equality.