Abusive Constitutional Borrowing: A Reply to Commentators

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I. What is Abusive Borrowing?
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We are extremely grateful to Tom Ginsburg, Ran Hirschl, Sandy Levinson and Mark Tushnet ("commentators") for their generous engagement with our new book, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*. Any author of a monograph would be delighted to have readers willing to engage with their work in such detail, and with such acuity and generosity. But we feel especially fortunate to have such brilliant and distinguished commentators as interlocutors.

We also owe thanks to each commentator for earlier feedback on and encouragement of the project. As Hirschl alludes to in his comment, he played a critical role in prompting us to develop our ideas in book form.[1] And Tushnet and Ginsburg both commented on multiple drafts, and along with Levinson,

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1 Ran Hirschl, "Abusive Constitutional Borrowing as a Form Politics by Other Means" (2021) 7:1 Canadian Journal of Comparative & Contemporary Law 6.

joined us in many panel discussions on the themes we traverse in the book. Indeed, all the commentators have been important teachers and mentors to us as comparative constitutional scholars over the last decade.

We are grateful to each of the commentators for their willingness to support and respond to our work in this way, and to the *Canadian Journal of Comparative and Contemporary Law* for curating this wonderful discussion.

Parts I, II, and III of this response briefly summarize and respond to reviewers' comments on the major claims of our book. Part IV deals with the thrust of several reviewers' comments about our criteria for identifying abuse and the ways in which we classify cases, while Part V treats methodological concerns. Part VI concludes by highlighting some of the reviewers' important suggestions for future research.

I. What is Abusive Borrowing?

The starting point for the book is the broadly shared understanding that we are living in a moment of democratic "decline", "erosion", "backsliding", "rot" or "decay" — or seeing the rise of new forms of "stealth authoritarianism", "autocratic legalism" or what Landau previously labelled "abusive constitutionalism".[2]

These trends are not universal, or one-way. There are signs in some countries of new forms of democratic renewal and resistance. Indeed, the election of President Joe Biden, and successful transition of power from Donald Trump to Biden, have given many in the US a new sense of optimism about the possibilities of democratic renewal, or what might be called a form of "restorative" as opposed to abusive constitutionalism.[3]

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2 See *ibid* at 6 (and cites therein).

3 Levinson, of course, sees the causes of democratic erosion in the US more in structural terms. As he pithily notes in his comment, "the widely-recognized dysfunctionality of the American constitutional order is scarcely likely to abate simply because Joseph R. Biden was able to prevail against a notably incompetent and nearly sociopathic Trump": Sanford Levinson, "Assessing

Other countries have seen relative stability in their constitutional democratic arrangements. Countries such as Australia are a case in point.[4] But a large number of countries have seen a notable erosion in liberal democratic norms. In Europe, the best-known examples are the changes that have occurred in Hungary and Poland over the last decade.[5] There are signs of similar if not yet as significant forms of erosion occurring in the Czech Republic, Romania, Belarus, and Slovakia.[6] In the Asia-Pacific, constitutional democracy has been stressed, and often under attack, in Cambodia, Thailand, and Fiji. In Africa, elected presidents have stayed on past the initial constitutionally appointed time to leave office in Chad, Gabon, Guinea, Namibia, Togo, Uganda, Cameroon, Djibouti, Rwanda and Burundi.[7] And in Latin America, there have been threats to democracy in Venezuela, Honduras, Nicaragua, Brazil and we also argue in Bolivia and Ecuador.

'Abusive Constitutionalism' in a Complex Political Universe" (2021) 7:1 Canadian Journal of Comparative & Contemporary Law 15, 16.

4 See *e.g.* Rosalind Dixon & Anika Gauja, "Australia's Non-Populist Democracy? The Role of Structure and Policy" in Mark A Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018) 395.

5 See *e.g.* Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021) at 13ff, 53ff [Dixon & Landau, *Abusive Constitutional Borrowing*].

6 See *e.g.*, *ibid*; Petra Guasti, "Populism in Power and Democracy: Democratic Decay and Resilience in the Czech Republic (2013-2020)" (2020) 8:4 Politics & Governance 473; Aris Trantidis, "Building an Authoritarian Regime: Strategies for Autocratisation and Resistance in Belarus and Slovakia" (2021) British Journal of Politics and International Relations [Forthcoming]; Nicole Wells, "Political Corruption: The Threat of Democratic Erosion in Romania" (22 April 2018), online: *Democratic Erosion* <www.democratic-erosion.com/2018/04/22/political-corruption-the-threat-of-democratic-erosion-in-romania-by-nicole-wells-american-university/>.

7 See Rosalind Dixon & David Landau, "Constitutional End Games: Making Presidential Term Limits Stick" (2020) 71:2 Hastings Law Journal 359 [Dixon & Landau, "Constitutional End Games"].

Of course, this phenomenon has received considerable attention and generated a massive literature in both law and political science.[8] The aim of the book is to focus on one aspect, which we argue has received insufficient attention: the role of legal globalization — and specifically the borrowing of liberal democratic constitutional norms (as well as related fields like international human rights) — in advancing many recent authoritarian projects.

Our basic claim is straightforward. Rather than experiencing them as a constraint, many would-be authoritarians are turning to liberal democratic norms as a source of inspiration and/or justification for anti-democratic or abusive forms of constitutional change. Levinson puts the point this way:

> [t]hings are not always as they are alleged to be, and the lessons taught by "comparative constitutionalism" can, in the wrong hands, become a source of great evil instead of enlightenment based on "best practices." Techniques make sense, ultimately, only against a background of shared value commitments as to what they are in fact being used to achieve. But, as we know from countless "mad scientist" movies, even the most benevolent techniques can be seized and misused by those who don't share those commitments.[9]

As his useful summary suggests, our definition of abusive borrowing has two key components: first, we identify constitutional changes that, either taken alone or in combination with other parallel or subsequent changes, have a material adverse effect on the "minimum core" of constitutional democracy; and second, we focus on the ways in which liberal democratic concepts or norms are used as either the inspiration or justification for these changes.

All forms of comparative "borrowing" involve a process of comparative adaptation, whereby foreign or international norms are adapted to fit a new and

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8 For recent general accounts, see *e.g.* Tom Ginsburg & Aziz Z Huq, *How to Save Your Constitutional Democracy* (Chicago: University of Chicago Press, 2018) [Ginsburg & Huq, *How to Save*]; Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018).

9 Levinson, *supra* note 3 at 18.

distinctive context.[10] But abusive forms of borrowing go beyond this necessary adaptation and involve forms of borrowing that are radically *superficial, selective, acontextual or anti-purposive* in nature *and* that adversely impact the democratic minimum core. In this sense, as Hirschl notes, we understand abusive borrowing as the "simultaneous reliance on, yet effective hollowing out of, core concepts of constitutionalism to advance an anti-democratic and often illiberal political platform".[11]

We further identify both weak and strong notions of "abuse". The weakest notion of abusive borrowing will simply involve borrowing or comparative justification that has a material adverse *impact* on the stability of the democratic minimum core. But a stronger notion of abuse involves would-be authoritarians knowingly or intentionally engaging in forms of borrowing that are antidemocratic in effect. It is, in this sense, a form of borrowing or comparative justification engaged in in bad faith.[12] And as Tushnet notes, this is the primary notion of "abuse" that we adopt throughout the book.

As Hirschl rightly notes, our focus is on the impact of abusive borrowing on the minimum core of democracy. And our definition of democracy is relatively thin or minimalist in nature.[13] It is not purely procedural, but rather includes the idea of regular, free and fair multi-party elections, political rights and

10 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 40ff. See Rosalind Dixon & Amelia Loughland, "Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia" (2021) International Journal of Constitutional Law [Forthcoming]; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

11 Hirschl, *supra* note 1 at 7.

12 See Rosalind Dixon & David Landau, "1989-2019: From Democratic to Abusive Constitutional Borrowing" (2019) 17:2 International Journal of Constitutional Law 489 [Dixon & Landau, "1989-2019"]. See discussion in Mark Tushnet, "Review of Dixon & Landau's *Abusive Constitutional Borrowing*" (2021) 7:1 Canadian Journal of Comparative & Contemporary Law 23, 25ff [Tushnet, "Review"]. Compare also David E Pozen, "Constitutional Bad Faith" (2016) 129:4 Harvard Law Review 885.

13 See Levinson, *supra* note 3 at 15.

freedoms for all citizens, and a set of institutional checks and balances necessary to ensure the protection of the first two elements of democracy.

The advantage of this definition is that it draws on extant practices within constitutional democracies worldwide and the degree of overlap or overlapping consensus among them.[14] As well, it draws on areas of overlap or agreement among constitutional and political theorists about the requirements of democracy, so that our definition is capable of attracting agreement from a wide range of scholars and practitioners, in ways that provide a relatively objective and non-contestable definition of democratic "abuse".

We do not focus primarily on the erosion of liberalism itself, and the rule of law and individual rights to freedom, dignity and equality beyond the political sphere, though we suggest that attacks on democracy and liberalism frequently go together, and would-be autocrats frequently borrow from both liberal and democratic ideas in order to erode the democratic minimum core.

Abusive borrowing has targeted a wide range of hallowed norms and institutions in the liberal democratic canon, as well as international human rights law. Recent waves of legal globalization have greatly expanded the scope and breadth of this liberal democratic constitutional canon. Indeed, as Ginsburg notes, it now arguably extends to "judicial review, constitutional rights, the constituent power, human rights law, hate speech laws and gender quotas".[15]

In the book, we draw on a large number of examples of interest to both constitutional scholars and international lawyers. We look at several different invocations of rights, including the use of hate speech norms and memory laws in Rwanda, Russia, and Poland, the "expansion" of the right to vote in Fiji and Hungary, gender quotas as a tool to consolidate regime power in Rwanda, and

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14 Compare Rosalind Dixon & David Landau, "Competitive Democracy and the Constitutional Minimum Core" in Tom Ginsburg & Aziz Z Huq, eds, *Assessing Constitutional Performance* (New York, Cambridge University Press, 2016) 268; Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5.

15 Tom Ginsburg, "Review of Dixon and Landau's *Abusive Constitutional Borrowing*" (2021) 7:1 Canadian Journal of Comparative & Contemporary Law 1, 2.

"sham" environmental rights in Ecuador. We also consider the use of courts and judicial review as an authoritarian tool, using as our main examples the deployment of the Venezuelan Supreme Court to shut down the opposition-controlled legislature after 2015, and the use of courts to ban parties with anti-democratic effect in Cambodia and (more ambiguously) in Thailand. We consider the abuse of the discourse of constituent power, including two successive anti-democratic constituent assemblies in Venezuela (1999 and 2017), as well as the wielding of the "unconstitutional constitutional amendment" doctrine and its relatives to excise term limits in Latin America, using the (bogus) argument that there is a fundamental human right to unlimited re-election. Finally, we look at the ways in which theories of "dialogic" constitutionalism or weak-form judicial review, such as "legislative constitutionalism" (in conjunction with the EU principles of "constitutional identity" and "constitutional pluralism"[16]) and the Canadian model of legislative override, have been used to advance authoritarian goals in Poland, Hungary, and Israel.

Hirschl rightly questions whether the phenomenon we identify is in fact a new one, or rather an old problem that seems simply to have become more severe with time. The question, as he poses it is, "whether this phenomenon is qualitatively different from what we know has taken place [elsewhere and before]" or whether it is "a question of degree".[17]

Hirschl correctly points out that the phenomenon is not completely new, but instead has a number of precursors.[18] However, its breadth and scope today does seem substantially broader than in the past. This is in part because the available material for borrowing has expanded so greatly and become so much

16 R Daniel Kelemen & Laurent Pech, "The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland" (2019) 21 Cambridge Yearbook of European Legal Studies 59.

17 Hirschl, *supra* note 1 at 10.

18 See David Landau, "Abusive Constitutionalism" (2013) 47:1 UC Davis Law Review 189.

more globally accessible via online resources, translations and legal and political interactions across borders. Moreover, while a number of older efforts to use law to legitimize autocracy traded off a relatively thin conception of the rule of law, the more recent efforts seem to be more draw off of a thicker set of liberal democratic norms. Ironically, this is in part a product of the rhetorical success of liberal democratic constitutionalism and the corresponding thickening of the "canon". Furthermore, the pay-off to abusive borrowing has increased, along with the rise in the costs or penalties for open or outright forms of constitutional coup or authoritarian take-over.[19]

II. When and Why It Occurs

Indeed, one of the explanations for abusive borrowing is that the price of open attacks on democracy have gone up over time — as other democracies and regional organizations have moved to imposed sanctions or other forms of penalty on openly authoritarian governments, and citizens in many new democracies have become accustomed to their rights as voters and democratic rights holders.[20]

As Hirschl notes, this does not mean that abusive borrowing of liberal democratic norms is the only tactic deployed by would-be authoritarian actors.[21] Instead, they simultaneously engage in abusive engagement with liberal democracy and, at the same time, utilize explicitly illiberal forms of discourse, which attack the desirability of liberal democratic ideas and norms. Leaders such as Orban and Kaczynski are perhaps the best examples: they have sought to draw comparisons between their own practices and those of countries such as Germany and the US, long considered established constitutional democracies, while simultaneously embracing the idea of "illiberal democracy" and Russia, China, Turkey and Singapore as models.[22] The persistence of both forms of

19 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5.

20 See *ibid*.

21 Hirschl, *supra* note 1.

22 *Ibid*; Dixon & Landau, "1989-2019", *supra* note 12.

discourse by the same anti-democratic actors, often simultaneously, is an interesting phenomenon — it may suggest an attempt to reach different kinds of audiences, as well as constituting a form of "gaslighting", disorienting and upending the normative foundations of the public.[23]

But abusive constitutional borrowing does seem to be an increasingly prevalent phenomenon, and one that is offering would-be authoritarians increasing benefits. As we emphasize in the book, we are living in what many might call the age of comparative constitutionalism, or an era of legal globalization. This is an era in which the transfer, migration or borrowing of legal and constitutional ideas is pervasive, and there are increasingly dense networks of interaction between lawyers, judges, and scholars across the world. For the most part, these networks and forms of engagement have been positive for liberal democracy. They have led to the spread of ideas that can inform and enhance constitutional democratic performance. But that story also overlooks a real and growing dark side to these networks of ideas and personal connections: the capacity for would-be authoritarians to draw on these networks for their own ends.[24]

One question, raised by Hirschl, is how and why tactics of this kind succeed. Abusive borrowing can have both domestic and international audiences.[25] International audiences, are often quite important: In an age of globalization, governments have a strong interest in maintaining the appearance of liberal democratic legitimacy. And too often, the international community seems willing to accept that things *are* as they seem, or to focus on the form over substance of claims by would-be authoritarians that they are advancing or conforming to liberal democratic norms.

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23 See Dixon & Landau, "1989-2019", *supra* note 12.

24 *Cf* David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004).

25 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at ch 3. See also discussion in Tushnet, "Review", *supra* note 12 at 40 n 33.

Examples we give in the book include the attempts by Hungarian and Polish leaders to justify their actions to the EU, and by President Kagame to retain the support of the international community. As Sadurski and others have noted, the EU has been quite slow to criticize Hungarian and Polish government officials for their attacks on liberal democracy, and especially to impose sanctions for breaches of shared European commitments to these norms. And the international community has actively embraced Kagame, including by appointing him Chair of the Secretary-General's advisory group on the Millennium Development Goals,[26] despite his authoritarian tendencies.[27]

The same could also be said of some domestic audiences. Domestic audiences have readier access than international ones to information about social facts and conditions "on the ground". They may also be more motivated to acquire this information, given its direct impact on their own current and future life. But they too may be too quick to focus on form over substance, or to accept the hope or promise of liberal democratic change – compared to the likelihood of superficial or even anti-purposive borrowing.

III. Can Abusive Borrowing be Stopped?

In Chapter 8 of the book, we explore a number of potential tools of constitutional design that may help reduce the risk of abusive borrowing, or tools and techniques of constitutional "abuse-proofing". We also suggest, however, that design responses of this kind have limited promise as a response to what is fundamentally a discursive or rhetorical legitimation strategy.

One key to stopping abuse will be for relevant audiences to become more *sceptical* of this kind of discursive or rhetorical strategy.[28] And part of our hope in writing the book is that by noticing and calling out abusive borrowing as a

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26 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 183–184. See also "Paul Kagame", online: *World Bank Live* <live.worldbank.org/experts/paul-kagame>.

27 Tushnet, "Review", *supra* note 12 at 41–42 acknowledges this.

28 As Levinson, *supra* note 3 at 18 notes, part of what we are calling for is a new "hermeneutics of suspicion".

phenomenon, we may in fact be starting on the path of stopping it. To recognize borrowing as abusive is effectively to deprive it of its legitimating power.

Achieving this will often require a form of global legal "realism" that is often lacking in comparative constitutional scholarly commentary and engagement, and a willingness to face up to charges of hypocrisy or imperialism. Few constitutional democracies fully live up to their own ideals, and thus when those ideals are implemented elsewhere in superficial or selective ways, there is a natural tendency to suggest that the two contexts are similar. Would-be authoritarians may also be especially keen to exploit this form of similarity as part of their broader abusive tactics, including engaging in a form of abusive borrowing of the discourse of post-colonialism or anti-imperialism. We suggest in the book, however, that it is possible to respond to encourage this more realist approach, and one that takes concerns about imperialism seriously, without succumbing to a form of political paralysis.[29]

IV. Defining and Identifying Abuse

The main critique of several of the commentators is that we adopt a definition of abusive borrowing that sweeps too broadly in its treatment of legitimate attempts at political change — or what Tushnet calls an "ambitious reform agenda".[30] Both Levinson and Tushnet in particular raise this concern. Levinson, for example, worries that "*any* recourse to notions of 'constituent power' or 'popular sovereignty' will be open to charges of abuse".[31] The problem, as he sees it, is "that there may be no neutral definitions of opportunism or even demagoguery". And Tushnet worries that — by including a range of measures that tilt the electoral playing field, without directly undermining the democratic minimum core — our definition of abuse "licenses critics to describe as abusive a far too large set of substantive policies".[32]

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29 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at ch 8.

30 Tushnet, "Review", *supra* note 12 at 28.

31 Levinson, *supra* note 3 at 21 [emphasis in original].

32 Tushnet, "Review", *supra* note 12 at 42.

Let us take the two points in order, as they are related but slightly different. Levinson's argument may be that there is no way to make meaningful distinctions between abusive and democratic invocations of constituent power. At the outset, we emphasize that an action is not abusive just because it may be illegal or extra-legal. That is, invocations of the constituent power are *not* abusive under our definition because they mark a "revolutionary" break with the prior legal order. Indeed, we emphasize in the book the regional example of Colombia, which in 1991 used constituent power theory to replace its existing constitution, and did so in a way that had clearly pro-democratic effects. The model of constituent power as exercised in Colombia — a body representing popular will that works around existing institutions and has power to wield other powers (such as shutting down existing institutions or influencing legislation) in addition to constitution-making — is one with attractiveness in some contexts, but one that is also fairly easy to abuse for authoritarian ends. Elsewhere in the Andes, this is exactly what happened.

There are ultimately two ways to distinguish abusive from legitimate invocations of constituent power. One is process: Procedural considerations can often, as we note in the book, be key indicators of abusive intent.[33] One should ask, for example, whether the claim to wield constituent power is grounded in widespread political participation or mobilization, or instead whether this claim is an empty or fraudulent one.[34] The second, perhaps more important test is about outcome: whether the relevant invocation of constituent power is made to support a truly democratic constitution, or instead one that fails to protect the democratic minimum core.

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33 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 86.

34 See Kim Lane Scheppele, "Unconstitutional Constituent Power" in Rogers M Smith & Richard R Beeman, eds, *Modern Constitutions* (Philadelphia: University of Pennsylvania Press, 2020) 154; Chaihark Hahm & Sung Ho Kim, "To make "We the People": Constitutional founding in postwar Japan and South Korea" (2010) 8:4 International Journal of Constitutional Law 800; David Landau & Rosalind Dixon, "Constraining Constitutional Change" (2015) 50:4 Wake Forest Law Review 859.

One can usefully apply these tests to the Venezuelan constituent assemblies of 1999 and 2017, examined in detail in the book. The first, as we note, shows some indicia of abusiveness, although it is a case with some ambivalence. Hugo Chavez's invocation of constituent power to scrap the existing Venezuelan constitution was grounded in an authentic, widely-held desire for institutional change, as well as a sense that the existing order was exhausted. But he also wrote electoral rules that allowed his supporters to dominate the Assembly almost completely.[35] The Assembly then wielded its powers in a problematic way —— what in Colombia had been collateral and supportive powers to reorganize other institutions and play a legislative role became perhaps the central function of the Assembly. The 1999 Assembly shut down or reorganized other institutions of state, and also monopolized lawmaking functions for an extended period of time.[36] The result is that Chavez emerged from the constitution-making process dominating all other state institutions, rather than facing opposition-controlled institutions as he did when he won the 1998 election. And indeed, the outcome of the 1999 constitution-making process was anti-democratic: it paved the way for the construction of a competitive authoritarian regime.

The 2017 process, by Chavez's successor Nicolas Maduro, was thoroughly abusive, indeed it made a farce of the concept of constituent power.[37] Unlike in 1999, there was little genuine popular support for constitution-making in 2017, and the regime's popular support was extremely low. Unlike Chavez, Maduro called the Assembly without even holding a popular referendum testing support

35 Aided, as we note in the book and as Tushnet points out in his review, by the problematic decision of opposition parties to boycott the Assembly elections. See David Landau, "Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce" in Mark A Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018) 161 [Landau, "Constitution-Making and Authoritarianism"].

36 See Joshua Braver, "Hannah Arendt in Venezuela: The Supreme Court Battles Hugo Chávez Over the Creation of the 1999 Constitution" (2016) 14:3 International Journal of Constitutional Law 555.

37 See Landau, "Constitution-Making and Authoritarianism", *supra* note 35.

for one, arguing (controversially) that he was allowed to do this under the 1999 Constitution. Vote totals in the elections for the Assembly were apparently goosed by fraud, because the true numbers were embarrassingly low.[38] The electoral rules were bizarre, including egregious malapportionment and substantial representation for a number of corporatist communities like "farmers and fishermen and fisherwomen" that were dominated by regime loyalists.[39] The Assembly never even bothered to enact a new constitution or new constitutional reforms before it wrapped up in December 2020.[40] It used all of its time (over three years of life) passing new legislation, reorganizing the electoral calendar, and removing or punishing any pockets of opposition. Basically, it wielded a fraudulent conception of "the people" to further entrench what has become an authoritarian state.

These examples are reminders of points we emphasize in the book: there will inevitably be clearer and more borderline cases of abusiveness, and in some cases, it will only be clear whether a change is abusive after the fact, by evaluating contextual or procedural indicia of abusiveness in the context of their impact on the democratic minimum core. It also suggests, as we discuss in our concluding

38 See Miguel Ángel Martínez Meucci, "Symposium on "Venezuela's 2017 (Authoritarian) National Constituent Assembly" – Maduro's National Constituent Assembly: Constituent Power to Build an Undemocratic Regime" (29 August 2017), online (blog): *Blog of the International Journal of Constitutional Law* <www.iconnectblog.com/2017/08/symposium-on-venezuelas-2017-authoritarian-national-constituent-assemblymiguel-angel-martinez-meucci/>.

39 Juan Alberto Berríos Ortigoza, "Symposium on 'Venezuela's 2017 (Authoritarian) National Constituent Assembly' – (Mis)representing the People: Notes about the Electoral Bases of the 2017 National Constituent Assembly in Venezuela" (31 August 2017), online (blog): *Blog of the International Journal of Constitutional Law* <www.iconnectblog.com/2017/08/symposium-on-venezuelas-2017-authoritarian-national-constituent-assemblyjuan-alberto-berrios-ortigoza/>.

40 See "Venezuela to shut all-powerful National Constituent Assembly", *Al Jazeera* (19 December 2020), online: <www.aljazeera.com/news/2020/12/19/venezuela-to-shut-all-powerful-legislative-assembly>.

chapter, that some constructions of normative ideas might be more susceptible to abuse than others, and therefore the ways in which scholars, judges, and others construct and discuss concepts matters. In the case of constituent power, for instance, it may make sense to emphasize the constitution-making function of Assemblies, while downplaying or even prohibiting them from exercising ordinary legislative or coercive powers over other state institutions.[41] Experience in Venezuela and elsewhere has shown that the latter power is highly susceptible to abuse.

There is another way of understanding Levinson's concern: that opponents of democratic reform may seek to impede its progress by calling out the *legitimate* exercise of constituent power as abusive in nature. As Oren Tamir has noted, this is in effect the abuse of the discourse of abusive constitutionalism itself — or the abusive borrowing of the idea of abusive constitutional change.[42] At base, it also the abuse of the idea of reasonable disagreement: it is the invocation of the idea that an exercise of constituent power is contestable, when it is not in fact so, in ways that trade off the legitimacy associated with ideas about reasonable democratic disagreement.

This also seems to underpin at least part of Tushnet's concern that the idea of abusive borrowing may itself license critics to undermine the perceived legitimacy of attempts to adopt an ambitious reform agenda, or new model of "transformative" constitutionalism.[43] Tushnet's objection, however, is broader than this concern about the abuse of the discourse of abusive borrowing. He argues that there is no objective way to distinguish between abusive forms of change and forms of constitutional "hardball" that advance an ambitious and

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41 See Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge: Cambridge University Press, 2017); Joel Colón-Ríos, *Constituent Power and the Law* (Oxford: Oxford University Press, 2020).

42 Compare Oren Tamir, "Abusive 'Abusive Constitutionalism'" (2021) Working Paper.

43 See *ibid*. On transformative constitutionalism, see Karl E Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14:1 South African Journal on Human Rights 146.

legitimate reform agenda. Would-be reformers, Tushnet argues, may often have good reason for resorting to what elsewhere he calls "hardball" tactics[44] — for example, attempts to circumvent constitutional constraints by complying with their form, while largely denying them any substantive operation. The political opposition, for example, may be uncooperative or itself engage in bad faith attempts to obstruct an ambitious reform agenda.[45] Or existing constitutional limitations may reflect the interests of a prior regime in ways that impose unreasonable obstacles to the achievement of that agenda.[46] It is therefore almost impossible to determine what is abusive constitutional change, and what is legitimate democratic hardball, without focusing on the broad set of policies and changes that a political actor is seeking to achieve. And that, Tushnet argues, requires making an inevitably ideological judgment about the bounds of legitimate and desirable political change.[47]

We suggest in the book, and elsewhere, that there are in fact a greater number of "objective" guideposts for making judgments of this kind. Attention to substantive political changes and policies is surely part of how we ascertain abusive motives, or the impact of certain changes on the democratic minimum core. But this is not the only way.

When it comes to ascertaining the motives of relevant actors, we can look at what they say and what they do — both before and after enacting relevant changes. Sometimes, what people say *before* adopting relevant changes may not be controlling: they may have good reason for changing their position in response to changing circumstances, or new arguments. And sometimes their subsequent record on implementation may not be controlling. As Tushnet notes, circumstances may change in ways that make it more difficult to live up

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44 See Mark Tushnet, "Constitutional Hardball" (2003) 37:2 John Marshall Law Review 523.

45 See Tushnet, "Review", *supra* note 12 at 28–30.

46 See *ibid* at 28–29.

47 See *ibid* at 29–30.

to earlier ideals, and thus that point to good faith but unsuccessful efforts at social or political change.

In many cases, however, what leaders say and do will be an important indication of their motives: if they have no prior history of supporting the norms they rely on, this will raise a question about their good faith commitment to these norms. And if they immediately abandon prior promises, without any apparent reason linked to an exogenous shock or change in circumstances, we may again question the good faith of their earlier commitments. This is even more true if they are quite vicious in turning against anyone who continues to pursue these prior shared goals.

This is one reason we are reasonably confident in our view that the adoption of environmental rights in Ecuador had abusive motives: Correa never expressed support for environmental rights before 2008[48] and made no effort to implement them after 2008, despite healthy increases in oil and gas prices, and a strong state budgetary position. He also launched multiple public attacks against environmental protesters and supported their imprisonment.[49] Most strikingly, there is compelling evidence that Correa directly threatened the personal economic security of any judge willing to uphold the Constitution's environmental guarantees.[50]

To ascertain intent, we can also look for indications of procedural irregularity. For instance, if political leaders depart from existing norms of public debate, deliberation and engagement with the political opposition, this may be an indication that they know that the changes they are pursuing are democratically illegitimate and would not withstand this form of scrutiny. Similarly, if they ignore 'secondary' legal norms about how certain primary legal

48 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 76.

49 See *ibid*.

50 Tushnet, "Review", *supra* note 12 puts weight on the fact that it is only "arguable" that these threats were communicated to judges. The evidence, however, seems fairly strong, and hard to imagine it could be stronger without endangering individual judges who would need to go on the record for these allegations to be reported in a more definitive form.

changes are to occur, this may suggest they know that those changes are *prima facie* legally irregular.

In Nicaragua, for example, we point to the exclusion of opposition-appointed judges from the Supreme Court panel that heard a case about the constitutionality of presidential term limits as *prima facie* evidence of abusive motives on the part of the regime, and Court President. And in Hungary, we suggest that reliance on a private members bill, rather than ordinary government bill, in a way that reduced the role of the opposition was sometimes indicative of an abusive intent on the part of relevant legislators.

Not every form of procedural irregularity will indicate abusive aims: sometimes, for example, there may be such extreme political polarization or dysfunction that the opposition is itself unwilling to engage, and thus no choice but to circumvent norms of consultation or bipartisanship in order to achieve legitimate political change, and especially ambitious political reform. Justifications of this kind, however, would need to exist before procedural irregularity was ruled out as a prima facie indicator of abusive intent.

Third, we can look at the broader context for a particular constitutional change. Constitutional changes are often adopted as a package, and it is often possible to assess the aims of certain individual changes by looking at how they interact with that broader package.[51] This was a point first made by Kim Lane Scheppele.[52] Constitutional democracy is often eroded by a package of changes, which considered alone may look far more benign; and hence one way we can understand the aims of a particular change is to look at the relationship between it and other proposed changes, whether pursued in parallel, beforehand, or afterwards.[53]

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51 Tushnet, *ibid* at 27, acknowledges this.

52 See Kim Lane Scheppele, "The Rule of Law and the Frankenstate: Why Governance Checklists do not Work" (2013) 26:4 Governance 559.

53 See also Tarunabh Khaitan, "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India" (2020) 14:1 Law & Ethics of Human Rights 49.

Finally, there are at least some objective guideposts for determining when a particular change is likely to have an adverse impact on the democratic minimum core. Perhaps most important, we suggest in the book that a process of constitutional comparison — or in effect resort to the resources offered by legal globalization itself — may offer some solutions.[54] Some norms, we argue, are sufficiently common to constitutional democracies worldwide that they should be regarded as part of the democratic minimum core; whereas other norms are ones that are specified in vastly different ways across different countries. Attention to this form of overlapping consensus, or lack of it, about the "essential" character of a democratic constitutional norm can also guide decision-makers as they attempt to determine what is or is not abusive in character. In the book, and earlier work, we call this a process of "transnational anchoring".[55]

Take for example presidential term limits: there is considerable variation among systems as to whether one or two terms should be permitted, and whether bars on re-election are permanent or consecutive. But virtually no well-functioning presidential or semi-presidential system permits indefinite presidential election.[56] Attempts to alter a constitution to allow a president to be re-elected once, or even twice, would therefore be unlikely to count as abusive on our definition, but attempts to interpret or amend term limits to allow for further, and certainly indefinite, presidential re-election would often meet the definition of abusive constitutional change.[57]

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54 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at ch 8.

55 See Rosalind Dixon & David Landau, "Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment" (2015) 13:3 International Journal of Constitutional Law 606.

56 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5; Dixon & Landau, "Constitutional End Games", *supra* note 7.

57 Tushnet, "Review", *supra* note 12 at 44 suggests some sympathy for this analysis, noting that a two-term presidential limit seems to be more or less the globally accepted norm, but he expresses a concern that there might be greater room for reasonable disagreement on this question. We agree, but suggest that the scope for such disagreement does not extend to indefinite re-election, or

Most often, of course, identifying abuse will require consideration of a mix of these factors. Take gender rights in Rwanda. The book notes that the expansion of gender rights occurred simultaneously with the expansion of executive power and single party dominance (by the RPF).[58] We also note the degree to which Kagame had little prior history of support for gender rights, and the relevant quotas led to little real substantive, as opposed descriptive, change. The more important point, however, is the impact of or way in which the relevant quotas were implemented: reserved gender seats were appointed seats, and appointment power was given solely to the President and the RPF. This suggests that Kagame and the RPF had abusive motives for pursuing their adoption, and certainly shows that they had an abusive effect by further entrenching authoritarianism in Rwanda.

Further, consider attempts to exert pressure on constitutional judges to be more democratically accountable. As Tushnet rightly notes, there is a tension between commitments to judicial independence and accountability within a constitutional democracy; and many attempts to rebalance a court's trajectory toward greater accountability — or what Dixon has called "responsiveness" — will be democratically legitimate.[59] Many changes to judicial procedure or to the internal functioning of the judiciary will have no significant impact on the democratic minimum core. This was likely the case, for instance, with Franklin Delano Roosevelt's court-packing plan in the United States, which constituted a significant attack on the US Supreme Court but did so because of disagreements on legislative policy rather than because of an agenda to

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longer than (say) 10-12 years without persuasive justification. Compare Dixon & Landau, "Constitutional End Games", *supra* note 7.

58 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 71ff. Compare also Rosalind Dixon, "Constitutional Rights as Bribes" (2018) 50:3 Connecticut Law Review 767.

59 Compare Rosalind Dixon, "Democracy and Dysfunction: Towards Responsive Judicial Review" (2021) [unpublished].

undermine electoral democracy itself, or to take aim at vulnerable minority groups.[60]

Take in contrast the ways in which "political constitutionalism" concepts have been used to legitimate attacks on courts in Poland and Hungary, as we discuss in the book. The Polish and Hungarian regimes have argued at times that they are just pursuing a *different* conception of constitutionalism, where the main checks on power are legislative rather than judicial.[61] But as we note in the book, the claim ignores the political context, where majoritarian parties seem to ram through even the most sweeping legislative or constitutional changes without the kind of deliberation or internal institutional checks that are characteristic of the theory and practice of legislative constitutionalism.

The claim might be reframed to say that the Hungarian and Polish regimes are privileging a majoritarian (and potentially illiberal) vision of democracy over liberal democracy. This is not — to be clear — "political constitutionalism"; it is raw majoritarianism. But even this claim is deeply problematic, because the many changes carried out by the ruling parties (not just to the Courts, but also to other institutions) have not only undermined checks on majority power and protections for minority rights, which are hallmarks of liberalism, but have also helped to tilt the playing field heavily in favor of incumbents. The purpose in Hungary of consolidating power over the media, of selectively adding a large number of new expatriate voters outside Hungary that are known to support Fidesz, and of using new electoral rules to gerrymander districts is, of course,

60 Transnational anchoring may sometimes be useful to distinguish changes that are harmless or even pro-democratic. Where changes have analogues in other systems, such as the Indian attempt to end the "collegium" system, there may be less reason for concern. At the same time, returning to Scheppele's point, the anti-democratic impact of judicial reforms can be constituted by their interactions, rather than by any one change considered in isolation. This is, in large part, the story of judicial changes in both Poland and Hungary, which are cobbled together from designs that have some analogue elsewhere in Europe, but are thrown together in a more distinctively problematic way.

61 See Gábor Halmai, "Is There Such a Thing as 'Populist Constitutionalism'? The Case of Hungary" (2018) Fudan Journal of the Humanities & Social Sciences 323.

precisely to make it far more difficult for the opposition to win subsequent elections.

Thus, despite Tushnet's resistance to some of our examples, we remain confident that we have identified genuine instances of abuse. Of course, we do not suggest that "abusive" forms of borrowing are always easy to identify, or that there is always a bright line between abusive and legitimate uses of liberal democratic norms. As we have already noted, the idea of abuse is one of degree, and this is a point we emphasize repeatedly.

Where our analysis suggests that a case is borderline, we highlight that point rather than shying away from it. One class of cases sometimes touched upon in the book is where there is a clear impact on "liberalism", but less of an impact on the minimum core of democracy. This may be the case with the migration (or distortion) of memory laws into Poland and Russia, where they are repurposed from being about the dignity of minority groups and remembrance of the Holocaust, and instead reconstructed as tools of nationalism.[62] The laws restrict freedom of speech even on matters that may be true (for example, they prohibit claims of state or national collaboration with the Nazi regime even where they may have occurred), and are aimed in part at chilling certain kinds of academic inquiry. But their practical applications — particularly in Poland — have been limited. They thus have not to date become major tools to repress the political opposition, unlike the much more dramatic use of hate speech laws to imprison Kagame's political opponents in Rwanda.[63] Still, the Rwandan example suggests that these kinds of laws at least have the potential to become significant anti-democratic tools.

A second class of borderline cases is one where there is some question whether the appropriation actually carries out an intentional attack on the democratic minimum core. While we think most of our examples unambiguously fit the definition, we do include a few more ambivalent cases. Consider the use of "militant democracy" doctrines in Cambodia and Thailand,

62 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 59ff.

63 *Ibid*.

as discussed in our chapter on abusive judicial review. In Cambodia, the ruling party, which had long governed an authoritarian regime, simply turned to the high court to ban a rival that had unexpectedly won a large number of seats in the prior election. The party was banned on dubious grounds — including its alleged links to foreign actors and the supposed threat it posed to "multiparty liberal democracy" — and the result was that the ruling party, with no rivals left, won every single seat in the next election.[64] The classification of the case as "abusive" is straightforward.

In contrast, in Thailand the Constitutional Court at times banned the parties and allies of Thaksin Shinawatra, helping to create a political vacuum that led to two military coups, the last of which was durable. While the effect of these series of decisions are clearly an undermining of the democratic minimum core, it is far harder to judge intent in this case because Thaksin himself posed a plausible populist threat to the democratic order. Some judges may have thought, especially initially, that the threat posed by Thaksin justified the Court's hostile response to his electoral victories and political agenda. Over time, though, we think the actions of the judiciary became more plausibly abusive in nature, as the nature of the threat posed by the military to Thai democracy also became clearer.

Let us conclude this section by discussing two important issues raised by Tushnet's reply. The first is his suggestion that "tilt the electoral playing field" theories of democracy are themselves analytically problematic.[65] This is an intriguing point because it takes aim not just at parts of our analysis, but also at much of the modern strain of political science that sees a heavily tilted electoral playing field as the core of a definition of a competitive authoritarian regime.[66] One way to frame the objection is to note that tilting the playing field is

64 See Supreme Court of Cambodia, Plenary of Trial Chamber, 16 November 2017, *Ministry of Interior v National Rescue Party* (2017), Verdict No 340 (Cambodia).

65 Tushnet, "Review", *supra* note 12 at 42.

66 See Steven Levitsky & Lucan A Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War* (Cambridge: Cambridge University Press, 2010).

ubiquitous in democratic politics — to this point the response is straightforward, and reiterates our point about the importance of degree, context, and interaction.[67] Not every effort to tilt the electoral playing field will change the character or the regime, but alarm bells should ring when it has been tilted quite substantially in favour of an incumbent regime.

The potentially richer framing is to argue that many actions that tilt the playing field are legitimate politics, and therefore there must be unstated background factors distinguishing between legitimate and illegitimate tilting. Tushnet gives the example of regimes that create popular new subsidy programs to build up political support, and then win elections in part on that basis.[68] The example is far from hypothetical, given its centrality to regimes in places like Hungary, Poland, Venezuela, and Ecuador, although it is not one on which we rely to make our arguments in this book.

A full answer to this point — which we think is ripe for future research in both political science and law — is beyond the scope of this brief response, and doubtful to hinge on any one factor. A big part of it may lie in distinguishing the (admittedly sometimes hard to discern) line between persuading voters to vote for your party and rigging the rules such that you tend to win irrespective of shifts in sentiment. Another, related line may be between ordinary political programs — which can be the object of contestation between competing parties — and structural changes to entrench power more durably. Political programs can be the object of contestation by opposition parties, but then a key question is whether the opposition can contest these programs, for example in the media, in a reasonably fair way. A third set of factors may evaluate the way in which programs are constructed and executed. Subsidy programs are normal instruments of politics, but when policies seem clearly targeted to build patterns of support while punishing political enemies, this may raise red flags.[69] Similarly,

67 See Jonathan S Gould and David E Pozen, "Structural Biases in Structural Constitutional Law" (forthcoming) New York University Law Review.

68 See Tushnet, "Review", *supra* note 12 at 42–43.

69 See Kirk A Hawkins, *Venezuela's Chavismo and Populism in Comparative Perspective* (Cambridge: Cambridge University Press, 2010).

some subsidy programs may be expensive but still sustainable with the right tax base, while others may be patently unsustainable efforts to build short-term political support at the expense of long-term economic stability and prosperity.[70]

Finally, Tushnet at times suggests (alongside a venerable strain of political theory and political economy) that the value of democracy itself may be open to contestation, and that a sacrifice in the democratic minimum core may in fact be needed in some contexts to advance an ambitious reform agenda or to advance a longer-term vision of democracy itself. Our own view, however, is that there is little empirical basis to support a belief of this kind. It is hard to point to any society that has "temporarily" suspended its commitment to the democratic minimum core in ways that have positively contributed to long-term democratic and social-and economic progress. We are also not persuaded that it is justifiable to sacrifice commitments to democracy in the pursuit of economic development, or other ambitious reform goals. There is certainly an argument that competitive authoritarian or authoritarian regimes, such as Singapore, have achieved an enviable economic record, but we are not persuaded that this record justifies departure from democratic constitutional commitments, or that citizens would be better off if more countries took such a route.

As we note in the book's conclusion, we are quite open about the potential for broad and transparent experimentation. We emphasize this point because we think authentic experimentation is necessary to reinfuse democratic constitutionalism with greater popular support and legitimacy, rather than having it emerge as a kind of victor by default or only in form. Our red line is preservation of the democratic minimum core.

V. Research Methods

Another concern raised by Tushnet concerns methodology. Few comparative constitutional scholars, Tushnet suggests, have the skills and knowledge of

70 Tushnet alludes to this criterion of sustainability in his comment: see Tushnet, "Review", *supra* note 12 at 42; Rudiger Dornbusch and Sebastian Edwards, "Macroeconomic Populism" (1990) 32: 2 Journal of Development Economics 247.

individual countries directly to engage in a study of abusive constitutional developments. He includes himself in this category of "generalist" comparative constitutional scholars; and suggests that it applies to most scholars whose work is truly comparative. And the implication of this is that as a field we tend to rely heavily on the accounts of certain country "specialists".

Tushnet worries that this has the potential to create a systemic structural bias in the conclusions we draw as a field: as comparative scholars, we often tend to focus on the works of scholars writing in English, and whose work we have come to know and respect through shared membership in the transnational scholarly community.[71] But English-language abilities and cosmopolitan academic citizenship are also highly correlated with a set of intellectual and ideological attitudes that are broadly liberal democratic, and not shared by scholars who are more nationalistic and conservative, or radical left, in orientation.[72] This, in effect, means that the field tends to marginalize the views of the nationalistic right and socialist left. And because of this, Tushnet says, it may tend too readily to label practices as "abusive" that either the nationalistic right or socialist left would view as a legitimate part of an ambitious reform agenda.[73]

One response to this argument is to note, as Tushnet points out, that we do have deep "area" expertise with some of the cases explored in the volume, which ameliorated the need to rely on secondary sources or translations and allowed us to tap into local scholarly networks. This is the case, for instance, in Latin American jurisdictions like Colombia, Venezuela, and Ecuador, where one of us (Landau) has extensive experience. In Venezuela, for instance, Tushnet suggests that our work was heavily dependent on a scholar who was in opposition to the

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71 Tushnet, "Review", *supra* note 12; Mark V Tushnet, "Writing While Quarantined: A Personal Interpretation of Contemporary Comparative Constitutional Law" (2020) Harvard Public Law Working Paper No 20-19.

72 Tushnet, "Review", *supra* note 12.

73 Levinson likewise points out that "the most pervasive challenge in the field of 'legal studies' in the degree to which one can genuinely separate positivist 'legal analysis' from 'politics' and one's own normative political commitments": Levinson, *supra* note 3 at 19.

regime, Allan R. Brewer-Carias.[74] While Brewer-Carias is an important Venezuelan public law academic, our account of Venezuelan legal developments rests on a far broader foundation, including court decisions, legislation, the records of the constituent assemblies, and discussions and readings of a wide range of scholars with expertise on Venezuelan law.[75]

A more general response is that was one that was previously suggested to Tushnet by Dixon: comparative scholars who are also skilled constitutional scholars, trained in and deeply schooled in the constitutional arguments and "moves" made in a single (often home) jurisdiction, can anticipate that there are a range of legal and political moves or arguments that can be made in any given case.[76] They can further understand that some views are more likely to be surfaced than others in different institutional contexts — *e.g.* the academy, the courts or the press. And they will be mindful of the need to achieve some degree of ideological balance, and cross-cutting engagement, in the sources they rely on with this knowledge in mind. This, Dixon suggested, is one way in which comparative scholars can lessen the risks that Tushnet alludes to. Indeed, it is a standard tool of solid comparative work, particularly as a way to lessen the tension between methodological country "specialists" and "generalists" within the field.[77]

This is also a methodological approach that we were conscious of adopting in the book. In the Thai context, for example, we explicitly suggest that there is room for reasonable disagreement as to if and when the Thai Constitutional Court's actions became abusive in nature; and we cite both defenders of the court (Bishop) and its critics of the Court (Merieau, Dressel, and

74 Tushnet, "Review", *supra* note 12 at 34–35.

75 For more comprehensive accounts of Venezuelan legal developments than could be included in the book, see David Landau, "Constitution-Making Gone Wrong" (2013) 64:5 Alabama Law Review 923; Landau, "Constitution-Making and Authoritarianism", *supra* note 35.

76 Tushnet, "Review", *supra* note 12 at 32.

77 See Levinson, *supra* note 3 at 19.

Tonsakulrungruang).[78] We were also careful to talk to scholars and practitioners who identified as both "red" and "yellow" in orientation — the two major cleavages in Thai politics.

In Fiji, we read and spoke with scholars and lawyers identified with the opposition, but also a leading lawyer with close ties to the Bainimarama regime, who sought actively to defend the legality of its actions.[79]

In Poland, we likewise engaged with the work of Wojciech Sadurski and Adam Czarnota.[80] Sadurski and Czarnota are colleagues living and working

78 See Sarah Bishop, "Balancing the Judicial Coup Myth: The Constitutional Court and the 2014 Coup" (2017) [unpublished, archived with author]; Eugénie Mérieau, "Thailand's Deep State, Royal Power and the Constitutional Court (1997-2015)" (2016) 46:3 Journal of Contemporary Asia 445; Björn Dressel, "Thailand's Elusive Quest for a Workable Constitution, 1997-2007" (2009) 31:2 Contemporary Southeast Asia 296; Björn Dressel, "Judicialization of politics or politicization of the judiciary? Considerations from recent events in Thailand" (2010) 23:5 The Pacific Review 671; Björn Dressel & Khemthong Tonsakulrungruang, "Coloured Judgments? The Work of the Thai Constitutional Court, 1998-2016" (2018) 49:1 Journal of Contemporary Asia 1; Khemthong Tonsakulrungruang, "Thailand: An Abuse of Judicial Review" in Po Jen Yap, ed, *Judicial Review of Elections in Asia* (New York: Routledge, 2016) 173; Khemthong Tonsakulrungruang, "The Constitutional Court of Thailand: From Activism to Arbitrariness" in Albert HY Chen & Andrew Harding, eds, *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge: Cambridge University Press, 2018) 184; Khemthong Tonsakulrungruang, "Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict" (2017) 26:2 Washington International Law Journal 247.

79 Interview with Shaista Shameem, on her background and role, see *e.g.*, "Lawyer who wrote Fiji coup report gets Massey role" (25 February 2014), online: *Stuff* <www.stuff.co.nz/world/9758466/Lawyer-who-wrote-Fiji-coup-report-gets-Massey-role>.

80 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 93, 97–98, 161. See also Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019); Ginsburg & Huq, *How to Save*, *supra* note 8; Adam Czarnota, "The Constitutional Tribunal" (3 June 2017), online (blog) *Verfassungsblog* <verfassungsblog.de/the-constitutional-tribunal/>; Adam Czarnota, "Constitutional Correction as a Third Democratic Revolutionary

(mostly) in Sydney, and in some sense, classic cosmopolitans. But they have taken very different views of the reasonableness of the PiS regime's actions and provide a useful counterpoint in understanding the (il)legitimacy of their actions.

In some cases, there will only be one side to the story — but if we have followed the right research method, that is a sure sign of abusive constitutional change, not its absence. In Rwanda and Burundi, for example, there is so little protection for freedom of speech, or academic freedom, that it is almost impossible to imagine someone writing something critical of the regime — without living outside the country or fleeing it. Indeed, research on questions like gender quotas in Rwanda can only legally be conducted with the express, prior personal consent of the President.[81] It is therefore inevitable that we are required to rely on the work of "cosmopolitan" authors in assessing the abusive nature of relevant changes; though as Tushnet himself notes, the broader context itself provides pretty compelling objective support for the conclusions these authors draw, and which we draw in reliance on their work.

The best understanding of Tushnet's critique, therefore, is not that it is impossible to engage in reliable comparative constitutional inquiry — either generally or in the specific context of a study of abusive borrowing. It is that in engaging in this kind of secondary-source-based analysis, we should as a community be more sensitive to the possibility that particular viewpoints will tend to be privileged in the national constitutional scholarship we rely on as informing our work; and seek to ensure that we hear all, not just one, sides of a legal and political debate.

Moment in Central Eastern Europe" (2019) 11:2/3 Hague Journal on the Rule of Law 397.

81 See Lindiwe D Makhunga, "Elite Patriarchal Bargaining in Post-Genocide Rwanda and Post-Apartheid South Africa: Women Political Elites and Post-Transition African Parliaments" (PhD Thesis, University of the Witwatersrand, 2015).

VI. Questions for Further Research

The final contribution made by the commentators is to identify a range of questions not answered by the book, and that call for future work by us and ideally other scholars in the field. Hirschl suggests that there may well be important variation between different types of would-be autocrats. Some, he suggests:

> appear to be ideology-light autocrats who cling to power; others are opportunistic politicians purporting to represent the political, economic and cultural hinterlands in their respective polities; and yet others are ideologues, ranging from right-wing communitarians, or sectarian religionists to all out Schmittian reactionaries who see extreme nationalism as a just weapon against liberal democracy and its supposedly hollow cosmopolitanism.[82]

Tushnet likewise suggests there are important differences between would-be authoritarians that openly announce their strongman ambitions, and those that focus on their agenda for political reform and treat structural changes as simply a means to facilitate those reforms, not the focus of their political appeal or efforts.[83]

This is a fruitful hypothesis for further investigation. Understanding the different motives, backgrounds, and political strategies of would-be authoritarians could potentially help us do better identifying the potential risks they pose, or even in identifying whether their actions have abusive aims or tendencies. While there is a venerable literature on varieties of authoritarianism,[84] some of that work could use updating, and it seems

82 Hirschl, *supra* note 1 at 9.

83 See Tushnet, "Review", *supra* note 12 at 28.

84 See Juan J Linz, *Totalitarian and Authoritarian Regimes* (Boulder: Lynne Rienner, 2000).

important to better link variations in regime type with strategies of constitutional change and reliance on liberal democratic norms.[85]

Ginsburg draws attention to aspects of our work that reveal the degree to which successful constitutional design depends on often unstated empirical assumptions. What he suggests is required to develop more effective answers to the challenge of "constitutional abuse proofing",[86] therefore, is a clearer statement of the empirical assumptions behind various theories and the "the empirical basis for assessing the probability that such a thing will actually play out".[87] Of course, answering these questions will be difficult. It will also necessarily require a truly interdisciplinary approach to comparative constitutional studies, or one that draws on the tools and insights of a range of other disciplines — including psychology, politics and sociology.[88] Ginsburg is surely correct that we have a long way to go in identifying effective strategies of constitutional and conceptual design to prevent abuse, and in linking those strategies to other, background factors such as political and legal culture, as well as politics itself. Designing and disseminating liberal democratic norms that are more robust against the challenges posed by autocratic misappropriation is no easy task.

In writing this book, we aim mainly to frame the problem of abusive constitutional borrowing, in the process hoping to show the comparative constitutional law community — scholars, judges, and policymakers — that so many ideas they had constructed and imagined as building blocks of liberal

85 Tom Ginsburg & Alberto Simpser, eds, *Constitutions in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2013); Mark Tushnet, "Authoritarian Constitutionalism" (2015) 100:2 Cornell Law Review 391.

86 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 193ff. See also Hirschl, *supra* note 1 at 12–13.

87 Ginsburg, *supra* note 15 at 4.

88 See Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014). See also Erin Delaney, "More Than Words: Constitutionalism Between Law and Politics" (Keynote Speech delivered at The Global Summit: The International Forum on the Future of Constitutionalism, 13 January 2021).

democracy could readily be redeployed for autocratic ends. We hope, in other words, that this work serves as a wake-up call for the fields of comparative constitutional law and international human rights, or at least a reminder of their (perhaps inevitable) dark sides. We are heartened that our interlocutors in this exchange, and hopefully many others, will join us in trying to meet this challenge.