Oxford Constitutional Law

III Factors, 32 Will Democracy Die in Darkness?: Calling Autocracy by Its Name

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From: Constitutional Democracy in Crisis?
Edited By: Mark A. Graber, Sanford Levinson, Mark Tushnet

Content type: Book content
Product: Oxford Constitutions of the World [OCW]
Published in print: 24 October 2018
ISBN: 9780190888985

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Calling Autocracy by Its Name

The *Washington Post*'s New Slogan

Last year, the *Washington Post* adopted a new slogan: "Democracy Dies in Darkness." But what does this phrase precisely mean? It clearly speaks to the role of the media in a democracy. The press sheds light on exercises of public power, especially those decisions that governments would prefer to remain hidden in the shadows. The power of the public to hold governments accountable, through elections, in legislatures, and in the court of public opinion, requires transparency and information. But the phrase goes further, by linking darkness to the *death* of democracy. The spotlight of the press is not merely integral to the proper functioning and health of democracy; rather, it is essential to its very survival. How?

"Democracy Dies in Darkness" gestures toward a deeper theory of the relationship among political action, constitutions, and democratic stability. There is a widely held view in the United States that its institutions are resilient enough to protect constitutional democracy from a would-be autocrat. This mindset is not just an American one; across the world the fate of democracy is increasingly entrusted to constitutional design. But Steve Levitsky and Daniel Ziblatt argue in *How Democracies Die*, that even the most thoughtfully drafted constitutions cannot check the slide into autocracy if they are not underpinned by a set of (p. 572) unwritten norms. They term these norms mutual toleration (the acceptance of the legitimacy of the political opposition)—and forbearance (the refusal to exercise power to its full legal limits to disable or destroy the opposition).[1] As Sam Issacharoff attests to in his contribution to this volume, these norms are under historically unprecedented strain in the United States. For example, he notes that the idea that presidents would use their executive power to prosecute political opponents was once unthinkable. Yet now, chants of "lock her

up” take center stage at rallies of the Republican Party, urged on by President Trump himself.[2]

As I have argued elsewhere, the common mission of constitutional democracies across the world is to create a framework for bounded partisan pluralist contestation that is nested within the underlying political economy, within which the major social groups engage in political conflict and compete for power according to the rules and under the institutions of a constitutional order, because it is in their mutual advantage to do so.[3] On Levitsky and Ziblatt’s account, what the norms of mutual toleration and forbearance do is to ensure that the institutions and rules of constitutional democracy are exercised in a manner that serves this intended purpose, to allow for collective decision-making under conditions of, and to preserve, political pluralism. Without those norms, those very same institutions and rules could be perversely “weaponized”—in contemporary jargon—to undermine the constitutional democracy and political pluralism they are designed to defend. Unwritten norms are fundamentally matters of a shared constitutional culture, not constitutional design. In the Commonwealth constitutional tradition, we would term them constitutional conventions. Mistakenly identified with the United Kingdom’s so-called “unwritten constitution,” unwritten norms are essential to the proper functioning of even the most detailed written constitutional texts.

The dependence of rules and institutions on unwritten norms raises perhaps the greatest challenge for scholars and practitioners of constitutional design. Contemporary authoritarians have come to understand that they can subvert democracy as readily by undermining conventions and norms as they can by changing laws and constitutions. Yet, this raises important questions about the extent to which constitutional design and implementation can thwart the rise of authoritarianism. In the midst of the great crisis facing contemporary democracy, in America and globally, is there nothing that the law can do? In this chapter, I suggest that the distinction between unwritten and written norms is not always as sharp as some suggest. Norms that are unwritten in some constitutional orders are written in others. Moreover, if a basic mission of *any* self-described constitutional democracy is to create an enduring framework for bounded, partisan, pluralist contestation, that unwritten norm can be interpreted as a central purpose underlying the written constitutional text, and therefore as a hard legal constraint on exercises of public power pursuant to that (p. 573) text, enforceable by the courts. Courts can therefore fuel political support for the same unwritten norms that make the courts effective at all—making the causal arrow run in both directions. To do so, courts must fearlessly call autocracy by its name.

Eric Holder’s Tweet

Eric Holder—the former attorney general under President Obama—tweeted to his followers in December 2017:

> ABSOLUTE RED LINE: the firing of Bob Mueller or crippling the special counsel’s office. If removed or meaningfully tampered with, there must be mass, popular, peaceful support of both. The American people must be seen and heard - they will ultimately be determinative.[4]

Holder’s call to action is built around two concepts. Red lines are clear, uncontroversial boundaries; if officials traverse them, they are extremely likely to have abused their authority. Holder relies on the idea of a boundary that is basic or fundamental to American democracy—that is, a constitutional boundary. As well, Holder supposes that the American people ought to assess if a particular decision crosses a constitutional red line, and that if such a transgression occurs, they must publicly respond (“be seen and heard”) because how

they react will ultimately determine how the issue is resolved ("be determinative")—that is, whether the crossing of the red line stands or is reversed.

Holder's tweet presupposes a theory of constitutional self-enforcement, built around the concept of a focal point. As Barry Weingast has argued, constitutions coordinate the expectations of officials and citizens regarding the appropriate boundaries of public authority.[5] They do so by creating focal points—constitutional rules—that provide reasons for official behavior, benchmarks for assessing official conduct, and grounds to criticize actions that violate these rules. Constitutions are self-enforcing, in the sense that elites and masses can police the boundaries of official conduct without the need for a court to first rule that the constitution has been violated. Indeed, it is striking that Holder, once the nation's chief law enforcement official, does not mention a legal challenge to attempts to obliterate Mueller's authority, even in a supporting role.

The classic example of a focal point is a presidential term limit. Across the world, as in the United States, the norm in presidential and semi-presidential systems is to limit an individual to a total of two terms as president. A classic move in the autocrat's handbook is a blatant attempt to stay in office beyond a term limit—for example, by declaring a state (p. 574) of emergency, dissolving the legislature, and/or suspending elections. It is clear when this is happening, and more often than not, attempts to do so will lead political opponents to mobilize against such attempts, and bring citizens into the streets. Courts may get involved in checking attempts to change term limits (as has occurred in many countries), but they are not the only, or even the principal, line of defense.

Disregarding term limits is one example of a more general category termed the self-coup or *autogolpe*, which is an attempt by directly elected executives to extend their power once elected, invoking a democratic mandate from the people. A second category is the coup d'état, the unconstitutional seizure of power without any electoral legitimacy—for example, by the military. A third is blatant electoral fraud by incumbents to maintain the façade of democratic legitimacy. A fourth category is the closing of electoral space, through the outright prohibition of political parties, and crackdowns on freedom of assembly, association, and the press. During the Cold War, the relative clarity of these four phenomena made it relatively uncontroversial to identify, assess, and criticize them—even if they could not be reversed.

La Suite Polonaise

But the character of threats to democracy has undergone a profound shift since the end of the Cold War. To understand how, consider the last few years of legal developments in Poland under the rule of the Law and Justice Party (better known by its Polish initials, PiS).[6] The PiS is nationalist, populist, and right-wing. It won a legislative majority in the 2015 elections to Poland's parliament, the Sejm. Since then, the Polish government has undertaken a systematic effort to undermine the framework of constitutional democracy, in order to remove impediments to its rule, and to entrench itself in power through future electoral cycles. The PiS's initial focus has been on the Constitutional Tribunal (Poland's Constitutional Court), although it has more recently targeted the ordinary courts and the electoral machinery. I collectively term these measures "La Suite Polonaise" to capture that they are a series of distinct initiatives that nonetheless are components of a coherent strategy with thematic unity.

The details are complex, but they matter. Appointments to the Constitutional Tribunal are governed by the Constitutional Tribunal Act, which requires the nomination and election of candidates by the Sejm, followed by a swearing-in by the president of Poland. Just before the 2015 elections, the outgoing Sejm (not under PiS control) nominated and elected new judges to fill vacancies (as well as some constitutionally suspect nominations for future vacancies). Immediately after the election, President Duda refused to swear in three of these justices, effectively blocking those appointments; in parallel, the (p. 575) Sejm

amended the Constitutional Tribunal Act in November 2015, setting the stage for appointment of five judges aligned with the PiS. In early December 2015, four judges were nominated and elected by the Sejm, and three of them were sworn in by President Duda to take the place of the judges whose appointment he had blocked. Moreover, President Duda did so *before* the Tribunal handed down its decision in a constitutional challenge to the appointment of the judges by the old Sejm, in which it held that it was not necessary for the president of Poland to swear-in the judges for them to take office; rather, nomination and election by the Sejm sufficed. The effect of this ruling, along with President Duda's actions, meant there were two sets of judges who could lay claim to the vacancies on the Constitutional Tribunal.

The Sejm's next move was to adopt legislation, in mid-December 2015, requiring the Tribunal to sit *en banc* in all cases (as opposed to its past practice of also sitting in panels of three or five judges), and to require a two-thirds majority for it to declare laws unconstitutional—which in combination gave the newly appointed PiS justices a blocking veto that would prevent the Tribunal from striking down PiS legislation. In addition, the Tribunal was given the power *en banc* to reopen any decisions decided by a chamber, which was designed to allow the Tribunal to eventually overrule its own judgment validating the nomination and election of the judges by the Sejm. For several months, there was a stalemate on the Tribunal, with the president of the Constitutional Tribunal refusing to allow PiS-supported judges to participate in cases because they had been appointed, in his view, when there was no vacancy on the Tribunal. In November 2016, the Sejm adopted yet another law, which obliged the president of the Tribunal to assign cases to all judges sworn in, thereby forcing the PiS judges onto the Tribunal.

The conflict then shifted to the Tribunal's General Assembly, which consists of all its judges. The principal role played by the General Assembly is in the process of appointing the president of the Constitutional Tribunal, by sending a short list of current Constitutional Tribunal members to the president of Poland. The Sejm's November 2016 law created a new position, interim president of the Constitutional Tribunal, who would lead the court once its president had stepped down, and assigned it on the basis of a seniority rule gerrymandered to give it to a PiS-backed judge. One role for the interim president was to chair the General Assembly, which bypassed giving this responsibility to the Tribunal's vice president, as had been the normal procedure. Shortly before the retirement of the president of the Constitutional Tribunal, the General Assembly sent a short list to the president of Poland, which he rejected, on the basis that the General Assembly lacked a quorum because it included judges whom the president had not sworn in, and because of a boycott by the PiS judges. Immediately after the interim president took office, she reconvened the General Assembly, which now had a quorum because of the participation of the PiS-appointed judges, and which nominated her as the single candidate for president of the Tribunal, a position to which the president of Poland appointed her. She also included the PiS-appointed judges on the bench and assigned them to cases.

(p. 576) Let's stand back from this story and unpack the different dimensions of the PiS capture of the Constitutional Tribunal: its *democratic legitimacy*, *legal basis*, *pace*, *scope*, and *substantive character*.

The PiS commanded a parliamentary majority, secured in an election free of force or fraud. Likewise, President Duda was properly elected and commanded a democratic mandate. Both the Sejm and President Duda possessed democratic legitimacy when they acted; moreover, both were elected on the PiS platform in separate elections in 2015, suggesting broad public support for the PiS.

The Polish Constitution creates the Constitutional Tribunal, and sets out its basic institutional framework. But rather than deploying a constitutional amendment to capture the Tribunal in one fell swoop—for example, one that would have purged the Tribunal's judges and replaced them with an entire bench of PiS supporters—the PiS has instead captured the Constitutional Tribunal through a series of ordinary statutes, and exercises of statutory discretion and inherent powers by the president of Poland. Constitutional amendments require supermajority support, and in some cases, a referendum. The use of a special legislative procedure that departs from the normal rule of a simple majority, and a referendum that would include a campaign, are much more visible than legislation or presidential decisions. Moreover, we can think of visibility along two dimensions: domestically to the Polish public, and internationally to the international community, and, in the Polish context, the European Union. The greater visibility of constitutional amendments is deliberate, because as a general matter, constitutional amendments concern matters of greater consequence than ordinary law or exercises of presidentialial discretion; the visibility of constitutional amendments can catalyze domestic debate and trigger EU institutions to examine whether those amendments have any bearing on EU law. Because decisions of the president of Poland have less visibility than ordinary law, this creates the incentive for the Sejm to shift decisions to the president via grants of statutory discretion. In addition, the interim president of the Constitutional Tribunal and the judges appointed by the PiS played an important role within the Tribunal's General Assembly, in a manner that perhaps is the least visible of all.

Unlike a single, comprehensive constitutional amendment, the capture of the Constitutional Tribunal took place over a period of slightly over a year, at an uneven pace, with periods of intense activity followed by months of apparent inactivity. The PiS also acted incrementally, through a number of discrete decisions spread out over time. Moreover, those decisions involved different institutions and actors: the president of Poland, the Sejm, the interim president of the Tribunal, and the PiS-appointed judges within the General Assembly. The pace and scope and institutionally-fragmented nature of the PiS measures made the thread hard to follow, probably deliberately.

Finally, many of the changes were of a highly technical or procedural nature, which obscured their substantive impact. The new rules governing the constitution of panels, voting, the assignment of judges to cases, and the creation of the interim president of the Tribunal did not, in and of themselves, suggest the ulterior motive that underpinned (p. 577) them. Indeed, they seemed like housekeeping matters to increase institutional efficiency or promote legal certainty that fell within the scope of legitimate constitutional design and reasonable disagreement far from the shoals of constitutional capture. And the objections to these changes were also highly technical: for example, the apparent circumvention of the vice president of the Tribunal by creating a new position of interim president.

The End of History?

The capture of the Constitutional Tribunal by the PiS is part of a broader global story.[7] As Nancy Bermeo has observed, the prevalence of coup d'états and *autogolpes* declined steeply with the end of the Cold War.[8] What has partially replaced them is democratic backsliding, whereby a democratically elected government or president uses legal means to manipulate rules and institutions to remain in power in future electoral cycles, inter alia with respect to electoral system design, election administration, political party regulation, presidential term limits, civil and political liberties, independent institutions such as constitutional courts and agencies, and media regulation. The classic case lurking in the background of all contemporary discussions is the fall of Weimar Germany, which was captured from within. Democratic backsliding is sometimes termed "authoritarian

backsliding" when the democratic regime under threat replaced a prior authoritarian regime to which it may revert, as in Poland.

The causes for this shift are major changes in the international environment. The widespread presupposition is now that democracy is "the only game in town." States must now presumptively present themselves to the world as constitutional democracies, because of strong international disincentives for governments to be transparently undemocratic. Thus, the PiS—and governing parties in Hungary, Turkey, and elsewhere—adopt the forms and rituals of constitutional democracy, such as written constitutions with bills of rights and the separation of powers; a commitment to the rule of law, constitutional courts, and an ordinary judiciary; and regular and periodic elections free of the widespread use of force or fraud.

(p. 578) But the rules and institutions of constitutional democracy also provide the means whereby constitutional democracy undermines itself, and the political language to respond to critics. Fukuyama's "End of History" thesis was right, in the sense that democracy is now the near-universal basis of political legitimation, even if used rhetorically to give cover to undemocratic regimes.[9]

Instead of the collapse of democracy, we have its "degradation" (Larry Diamond)[10] or "retrogression" (Tom Ginsburg and Aziz Huq).[11] There is no binary, either-or distinction between democracies and autocracies with a bright line between them. Rather, we have a spectrum of regimes along a continuum with democracy and absolute dictatorship at its poles. This reality has generated a cottage industry of new terminology, such as "illiberal democracies" (Fareed Zakaria),[12] "competitive authoritarian regimes" (Steve Levitsky and Lucan Way),[13] "defective democracy" and "electoral authoritarianism" (Matthijs Bogaards)[14]—rooted in a shared project of describing shades of gray.

Bermeo has argued that the "vexing ambiguity" of democratic backsliding has important implications for political science.[15] In her view, democratic backsliding requires that we recognize that "democracy is 'a collage' of institutions" that is "put together piece by piece, and can be taken apart the same way."[16] This poses a great challenge for scholars of democratization, who have "focused on clear cases of democratic collapse," which contain "the bright spark that ignites an effective call to action" as opposed to "slow slides toward authoritarianism."[17] Political scientists must come to grips with this reality "or risk their own slide into irrelevance."[18] Less of a focus "on economic and institutional correlates" and more attention to "choices and choosers" is vital, because the latter "may be more amenable to direct influence and rapid intervention."[19]

There is a parallel challenge for constitutional law. In December 2017, colleagues and I convened a small workshop of constitutional experts in Berlin, to examine the prospects and pathways for recovering from authoritarian constitutionalism in Hungary and Poland. One of the participants was Marcin Matczak, a leading Polish constitutional academic and lawyer who has argued a number of constitutional challenges to PiS initiatives. (p. 579) Matczak's view is that the PiS made very weak legal arguments in these cases. The opponents of the regime made stronger arguments, but the PiS-aligned Constitutional Tribunal rejected them. What was truly worrisome and troubling for Matczak was the failure of the opposition to persuade the public in the court of public opinion. Good legal arguments, rooted in the idea that the PiS had violated the "spirit" of the constitution by abusing its rules and institutions to undermine its very purpose, were insufficiently strong to overcome the public support for the regime.

What would Holder make of the failure of constitutional democrats in Poland to persuade their fellow citizens? For Holder, the crossing of red lines mobilizes regime opponents to resist anti-constitutional conduct, and hopefully translates into electoral victory. But Poland may be teaching us, in real time, that the we need to rethink the very idea of the red line. A red line implies a constitutional threshold that is clear and uncontroversial, that sounds in

the language of principle, that is highly visible—perhaps because it is constitutionally entrenched—and that is traversed quickly and comprehensively. But the campaign of the PiS to subvert Polish democracy from within is none of those things.

Indeed, while firing Mueller might cross a red line, how about crippling him, as Holder put it? Persuading the public that something less-than-dismissal, which may fatally undermine Mueller, would nonetheless cross a red line, could be a tall order. This is true even in the United States, where the constitution serves the common reference point for political life, and constitutional argument is part of the grammar of politics, perhaps more than anywhere else in the world. While the great American contribution to constitutional thought is the anti-positivist idea that even the most basic, seemingly uncontroverted constitutional claims are interpretative, in Ronald Dworkin's famous formulation,[20] that noble idea has been taken up by conservatives and liberals alike to turn the legal system into a terrain of elemental, total ideological struggle where there are no longer few, if any, right or wrong answers at all. As a distinguished American colleague once explained to me before I moved to the United States, to my fascination and horror, "it's politics all the way down."

Presidential Impeachment through the Comparative Looking Glass

Can we reinterpret and resurrect Holder's red lines? I want to suggest how, through the question of presidential impeachment. Although not yet a live issue in the United States, this has been a central question in South Africa for the past couple of years. The unusual interventions of the South African Constitutional Court offer the outlines of a potential approach to renovating the relationship among courts, constitutions, and political mobilization.

(p. 580) The South African impeachment saga arises out of President Jacob Zuma's self-enrichment at public expense, through expensive renovations at his country home. These were initially defended as necessary for security upgrades, but South Africa's Public Protector—a law enforcement official created by South Africa's constitution with broad powers to investigate and remedy official wrongdoing—concluded that the upgrades included non-security measures such as building a swimming pool, and that the president had breached his constitutional obligations to comply with an ethics code and to not use his position to enrich himself. She ordered the president to repay some of the renovation expenses and to report to the National Assembly within fourteen days, and sent the report to the National Assembly.

The African National Congress (ANC) government used the transmission of the report to the National Assembly, where it commands an absolute majority, as a diversion strategy. The government created an ad hoc legislative committee that commissioned an alternative report from the minister of police, a member of Zuma's cabinet. That report exonerated the president; the National Assembly then passed a resolution endorsing that report and absolving Zuma of all liability.

Opposition political parties turned to the Constitutional Court, which held in *Economic Freedom Fighters 1* that the National Assembly had acted unconstitutionally by usurping the authority of the Public Protector, a fairly traditional separation-of-powers argument.[21] But the Court went further. The South African Constitution codifies the duties of the National Assembly to scrutinize, oversee, and hold the executive accountable, matters that are left to unwritten constitutional convention elsewhere. The Court held that the National Assembly had breached these duties by setting aside the Public Protector's report without even considering it. Indeed, the Court strongly hinted that the combination of the unconstitutional refusal to examine the Public Protector's report, and commissioning and

substituting a manifestly unconstitutional alternative, amounted to acting for an unconstitutional motive: to shield for partisan ends the president from legal accountability.

The Court also affirmed the Public Protector's finding that the president had acted unconstitutionally, which emboldened the opposition parties to attempt to impeach Zuma on the basis that he had committed a "serious violation" of the Constitution. That vote unsurprisingly failed, given strong ANC party discipline. But the opposition parties went back to the Constitutional Court, which held in *Economic Freedom Fighters 2* that the failure of the National Assembly to put in place special procedures to regulate the impeachment process was unconstitutional.[22] The Court ruled that there has to be a special committee of the National Assembly to conduct "preliminary inquiry" into the meaning of the grounds for impeachment listed in the constitution, and whether the impugned (p. 581) conduct fell into that category. The Court also held that such a procedure would be unconstitutional if party representation on the committee mirrors representation in the National Assembly, because "members of the majority party . . . may prevent an impeachment process from proceeding . . . to shield a President who is their party leader."[23] What party composition *would* be constitutional the Court did not say. A plausible reading of the judgment is that a committee controlled by the majority party would be unconstitutional, with the implication being that the committee must be opposition controlled.

The Court's latest judgment continues an effort to square the circle between the partisan nature of the National Assembly and its constitutional duties to check the executive. But what practical goal would be served by an impeachment process that would ultimately fail in the Assembly, where the president is supported by the majority party? An answer comes not from the Court's opinion, but from news reports of the hearing before the Court, where the opposition parties stated that a special committee on impeachment would force Zuma to answer questions that he had thus not answered, presumably under oath.[24] Coupled with the requirement that the committee not be under ANC control, the hearings and resulting report—framed in terms of whether Zuma had violated the Constitution—would catalyze public debate and set the terms of the political agenda. Indeed, the Court looked ahead toward the eventual National Assembly debate on impeachment, by admonishing the Speaker (an ANC member) on the need to act impartially, and lecturing ANC National Assembly members that voting against impeachment for partisan reasons would be acting for an unconstitutional motive (italics mine):

> members may not frustrate the realization of ensuring a government by the people if its attainment would harm their political party. If they were to do so, they would be using the institutional power of the Assembly *for a purpose other than the one for which the power was conferred*. This would be inconsistent with the Constitution.

In short, the Court demanded that on the question of impeachment, legislators—including those from the ANC—put the country before party.

Zuma resigned as president of South Africa on February 15, 2018—about eight weeks after the judgment in *Economic Freedom Fighters 2*. He did so under the threat of a vote of no-confidence, an alternative to impeachment that also had been tried unsuccessfully against Zuma that had generated its own constitutional litigation over whether a secret ballot was required.[25] The ANC decided that it would join the opposition parties to vote against him. A number of factors led the ANC to this decision, including the election of a new president of the ANC in December 2017, Cyril Ramaphosa, who was opposed by ANC elites allied with Zuma. Ramaphosa's election set the path for a transition, both (p. 582) through its rejection of Zuma and providing a successor at hand. Another factor, though, was the prospect of Zuma testifying under oath before a committee of the National Assembly as a consequence

of *Economic Freedom Fighters 2*, which would have been damaging to the electoral prospects of the ANC.

Back to America

To be sure, the terrain of South African constitutional jurisprudence differs markedly from that of American constitutional doctrine. An American court confronted with a parallel constitutional challenge would have viewed the questions of internal legislative procedure as raising non-justiciable political questions, and being vulnerable to near-fatal objections on the basis of ripeness and standing. Nonetheless, there are lessons for American public law to be gleaned from peering through the comparative looking glass.

There is something neo-Bickelian in the Constitutional Court of South Africa's decision. The core argument of *The Least Dangerous Branch* is that the federal courts should use techniques of decisional avoidance to remand difficult constitutional issues to the political branches, especially state legislatures and Congress.[26] Bickel's hope was that the political branches would openly and squarely debate difficult constitutional questions prior to the courts doing so. And Bickel hoped that these hard constitutional issues would, for the most part, be settled in politics, with public opinion serving as the ultimate guarantor of the constitution.

The Constitutional Court of South Africa likewise remanded a difficult constitutional issue to politics, by imposing on the National Assembly the duty to create a new procedure that would ensure that the impeachment of President Zuma would be debated once again, in a multiparty committee not controlled by the ANC, where Zuma would be forced to answer questions under oath. Moreover, it established constitutional parameters for that debate, including the specification of what would count as unconstitutional motives for members of the Assembly, by reference to the constitutional text. Ultimately, whether to impeach Zuma was a decision for the National Assembly, not subject to judicial second-guessing. It fell to the South African public to ensure that public power was used—to paraphrase the Constitutional Court—for the purpose for which that power was conferred.

Abstracting away from the South African case, we can recast the idea of red line as a combination of (1) judicial agenda-setting by forcing institutional deliberation on an issue, and (2) judicial delineation of unconstitutional motives that circumscribe the discursive boundaries of that deliberation, in a context where (3) the judiciary has not been captured, (4) the political opposition and perhaps elements of the governing party would take this opportunity to challenge the original decision on the issue as being rooted in (p. 583) unconstitutional motives, and (5) that kind of argument would resonate in the broader political culture among the public.

This conception of a red line can be adapted to the challenge of stemming the slide into autocracy. To be sure, the South African impeachment cases are about executive impunity for self-enrichment at the state's expense—that is, institutionalized corruption. But it is not hard to imagine a different case. A basic mission of any constitutional democracy is to allow for bounded, partisan, pluralist contestation. We might even call this mission an element of every constitution's "basic structure," to adopt a term from Indian constitutional law. And a basic principle of public law is that all grants of public power are inherently limited and can only be exercised for the purposes that the power has been granted. To be sure, these purposes may be extremely broad. However, they are not unlimited. Pulling these threads together yields the following legal principle: that executives and legislatures act for an unconstitutional motive if they exercise public power to erode or eliminate bounded, partisan, pluralist contestation. This purpose is core to the very idea of a constitutional democracy. It is simultaneously an unwritten norm that is part of constitutional culture, *and*

a legal principle implicit in the design of any constitution that describes itself as one of a constitutional democracy.

As Jack Balkin and Sandy Levinson might put it, any government decision pursued in the name of "partisan entrenchment" is manifestly unconstitutional.[27] When governments act in this way, the courts must call autocracy by its name—to make it more likely that the people will do so as well. If the people make themselves "be seen and heard," as Holder puts it, his hope is that this "will ultimately be determinative." To be sure, adjudicating questions of legislative motive is to be approached cautiously by the courts. Motive is sometimes difficult to ascertain, and the charge is a serious one, because it is an accusation of bad faith. But following Larry Sager, those considerations should lead us to underenforce that norm, but to nonetheless accept that it is legally valid to its full conceptual limits.[28]

Firing or crippling Mueller would clearly fall into this category. At the center of his investigation is whether Russia interfered in the American political process, potentially "in collusion" with the Trump campaign. The goal of Russian interference would have been to shape the results of the 2016 presidential election to favor candidate Trump through a variety of means—WikiLeaks, Russian bots operating on social media, and perhaps other techniques that have yet to come into public view. There has been a great deal of discussion about the circumstances under which the fact of Russian assistance might constitute a crime under federal law, if it was "solicited." But on the argument I have offered here, whether such conduct actually constitutes a crime is merely evidence—albeit compelling (p. 584) evidence—of an unconstitutional motive, because the goal of the conduct would be to interfere with the election to favor one political party over another. Firing or crippling Mueller to prevent him from uncovering these unconstitutional motives would be an extension of the original, illegitimate conduct, aimed at undermining bounded, partisan, pluralist contestation.

In earlier scholarship on democratic backsliding, Sam Issacharoff and I trusted the courts to play the initial role in forestalling backsliding.[29] But neither of us had fully reckoned with backsliding supported by populist mobilization. That is precisely the scenario that confronts us now. In this situation, the question is whether the courts can withstand the populist surge and retain their credibility. It is indeed worrying that in Poland, one of the very first targets of the PiS was the Constitutional Tribunal, which has now been captured. As well, as Matczak has attested to, the broader constitutional culture in Poland is so degraded that even if the Tribunal had called autocracy by its name, it might have been too late. Although Zuma has effectively controlled appointments to the Constitutional Court of South Africa for many years, that court has demonstrated a great deal of independence from him; yet the sharp divisions in *Economic Freedom Fighters 2*, where there were vigorous dissents, suggests that the limits of the Court's involvement may have been reached. But its intervention, in combination with the contingent facts of a recent ANC leadership succession, a mobilized political opposition, and an institutional focus for the reconsideration of Zuma's conduct, was likely a contributing factor to his resignation.

It may then be fortuitous that President Trump has not yet had the opportunity to make many federal judicial appointments, and that there is Senate opposition—some of it bipartisan—to many of his judicial nominees. The contingent fact that he is on a collision course with Mueller so early into his first term after a two-term Democratic president might be what allows the federal courts to call autocracy by its name.

Footnotes:

* An earlier version of this paper was presented at the GlobCon Colloquium at the WZB Berlin Social Science Center. I wish to thank Sumit Bisarya, Sam Issacharaoff, Mattias Kumm, Dilek Kurbam, Michael Meyer, Kai Möller, Ulrich Preuss, Mark Tushnet and Fred Felix Zaumseil for helpful questions and comments.

1 Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018).

2 Samuel Issacharoff, "Populism versus Democratic Governance," in *Constitutional Democracy in Crisis?*, ed. Mark A. Graber, Sanford Levinson, and Mark Tushnet (New York: Oxford University Press, 2018).

3 Sujit Choudhry, "Resisting Democratic Backsliding: An Essay on Weimar, Self-Enforcing Constitutions, and the Frankfurt School," *Global Constitutionalism* 7 (2018): 54–74.

4 Eric Holder. Twitter Post. Dec. 17, 2017, 11:49 AM. https://twitter.com/EricHolder/status/942481938165747712.

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