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'Good' Court Packing?: The Paradoxes of Constitutional Repair in Contexts of Democratic Decay

Tom Gerald DALY

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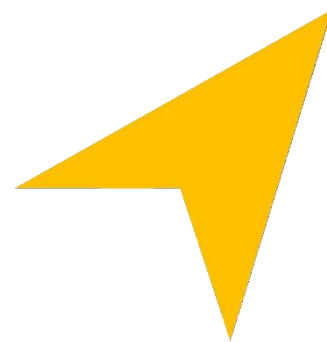
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No. 1/2022

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‘Good’ Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay

Tom Gerald Daly*

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The article is available open access at this link: <https://go.unimelb.edu.au/fna8>.

US debates on reforming the Supreme Court, including controversial arguments to break the norm against court-packing to repair the democratic system, have generally focused on historical precedents and the domestic system, with scant comparative analysis. However, the US debate raises fundamental questions for comparative constitutional lawyers regarding the paradoxes of democratic restoration in contexts of democratic decay, framed here as a distinct category of constitutional transition. This study argues that sharpening our analytical tools for understanding such reforms requires a novel comparative and theoretical approach valorising the experiences of Global South states and drawing on, and connecting, insights across four overlapping research fields: democratic decay, democratisation, constitution-building, and transitional justice. The paper accordingly pursues comparative analysis of the legitimacy of court-packing through case-studies of Turkey and Argentina to offer a five-dimensional analytical framework: (i) *democratic context*; (ii) *articulated reform purpose*; (iii) *reform options*; (iv) *reform process*; and (v) *repetition risk*. In doing so, the paper seeks not to present a rigid check-list for evaluating the legitimacy of contested reforms, but rather, to foreground important dimensions of reforms aimed at reversing democratic decay as an emergent global challenge for public law meriting closer attention.

Keywords: Democratic restoration – court-packing – USA – Argentina – Turkey

Introduction

The death of Justice Ruth Bader Ginsburg on 18 September 2020, followed by the rapid and one-sided confirmation of ultra-conservative Justice Amy Coney Barrett on 26 October by a 52-48 Senate vote (all Democrats opposed) and the November 2020 election of President Biden, lent a jolt of urgency to an intensifying debate about the need to reform the US Supreme Court. Mark Tushnet had already noted in April 2019 that structural reforms like court-packing are firmly back on the political agenda “in ways they haven’t been for several

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decades”.¹ In late 2020, scholars such as Jan-Werner Müller and Aaron Belkin² contended that, in order to save US democracy, the only option would be “to fight fire with fire”³ by breaking the norm against packing – in other words, breaching democratic norms for democratic purposes. This raises a question that is rarely posed outside of transitions from authoritarian to democratic rule: can we speak of ‘good’ court packing? In contemplating the democratic legitimacy of such measures, we evidently need to be capable of more than simply trusting the democratic *bona fides* of their proponents or treating the propriety of such measures as self-evident. After all, “trust me” is the by-word of every canny autocrat (or would-be autocrat) who presents democracy-undermining measures as positive democratic reform. Even if we truly believe in the good faith of any proponent, reforms must be defensible to a broader audience beyond their supporters and on the basis of more objective criteria.

This paper rests on four fundamental methodological premises that are of broad relevance for comparative constitutional law. First, it is argued that, to date, the framing and terms of the US court-packing debate, crystallized in analyses from the Biden administration’s bipartisan Commission on Supreme Court reform,⁴ have obscured the ‘transitional’ dimensions of the overarching reform context as one of (highly contested) democratic restoration in response to democratic decay. Analysts have generally focused on ‘time travel’, analysing domestic historical precedents in analysing whether court-packing can be justifiable. This can cast the debate as merely the latest phase in a long-running battle between those who wish to preserve or restore the longstanding system of judicial supremacy, supported by legal constitutionalists, and supporters of some form of political constitutionalism, or at least rebalancing of power to the elected branches of government. Yet, many proponents of packing have emphasised the high stakes, with court reform relating not simply democratic improvement but as necessary to stem democratic decay – “the degradation of American democracy” and sufficiently dire circumstances of democratic crisis.⁵ Democratic restoration, in this sense, means system change, not merely the recreation of a *status quo ante*. Although this evidently does not mirror more recognisable contexts of democratic decay, such as Hungary or India, or older transitions from authoritarianism to democracy in states such as Spain, Poland or Brazil, resonances with these contexts come into sharper focus when one considers the strongly contested nature, quality, and trajectory of contemporary US democracy. At the time of writing, the USA has recently experienced a presidential term noted for intensifying curbs on core democratic rights (especially voting rights), acutely controversial judicial appointments, a sharply contested presidential election (including vitriolic contestation of the legitimacy of the electoral system), violent disorder in the seat of

¹ M Tushnet, ‘Court-Packing On the Table in the United States?’ *Verfassungsblog* (3 April 2019).

² A Belkin, ‘Court Expansion and the Restoration of Democracy: The Case for Constitutional Hardball’ (2019) 1 *Pepperdine Law Review* 19.

³ J-W Müller, ‘Democrats Must Finally Play Hardball’ *Project Syndicate* (25 September 2020).

⁴ Presidential Commission on SCOTUS, discussed in Part I, below. See ‘Discussion Materials’ issued in October 2021 at <https://www.whitehouse.gov/pscotus/public-meetings/october-15-2021-pcscotus-meeting/>.

⁵ See discussion document ‘Membership and Size of the Court’ p.17, issued for the Commission’s meeting on 15 October 2021: <https://www.whitehouse.gov/pscotus/public-meetings/october-15-2021-pcscotus-meeting/>.

government, generally declining scores in leading democracy assessments,⁶ and the election of a new government with a central policy platform to repair the democratic system.⁷

Second, that this is no ordinary debate on reform of the constitutional order, or constitutional mega-politics, means that, even for those willing to engage in ‘space travel’ – looking abroad for guidance – it is hard to find instructive comparative examples in recent history from among the world’s long-established liberal democracies, such as the United Kingdom, Australia, Germany, France, or Japan. Other states that have experienced court-packing in the context of both democratisation and democratic decay have been paid little attention, presumably on the basis that they are viewed as too different to warrant closer analysis. For instance, working documents from the Presidential Commission on Supreme Court reform make passing reference, in just one paragraph, to court-packing as a “worrying sign of democratic backsliding” in Argentina, Venezuela, Turkey, Hungary, and Poland.⁸ Identifying useful comparators requires a significant shift in our view of what are appropriate states for comparison. Comparativists have long tended, implicitly or expressly, to either separate the Global North from the Global South (evidently contested categories in themselves); or if engaging in comparison, have tended to view the former as the main source of insights.⁹ However, democratic flux across both the Global North and South, and especially the degradation of democratic rule in the former, heighten the instructive value of Global South experiences. This is not to argue that the USA belongs in the same category of political system as states such as Turkey or Argentina, but to propose that these contexts – featuring acute democratic crisis and contestation, and perceptions of institutional failure – can provide insights relevant to the US debate and challenges, despite the obvious differences in their political and constitutional development.

Third, to achieve meaningful comparison between the USA and these unlikely comparators, and to identify how the US debate is relevant internationally, requires us to sharpen our analytical tools and intellectual frameworks for distinguishing democratic restoration in the context of democratic decay as a category of constitutional transition distinct from two other categories – ‘ordinary’ constitutional reform and full-blown democratic transition from authoritarianism – which raises a suite of distinctive challenges and additional layers of complexity and contestation. This analysis requires us to draw on, and connect, insights across four somewhat overlapping but still unhelpfully siloed research fields: democratic decay, constitution-building, democratisation, and transitional justice.¹⁰

Fourth, even for those resistant to the second proposition, a closer analysis of the theoretical, constitutional and practical challenges posed by the US court-packing debate from

⁶ See e.g. Freedom House, *Freedom in the World 2021: Democracy under Siege* (March 2021) 6, 9; and Economist Intelligence Unit, *Democracy Index 2020: In sickness and in health?* (February 2021) 42-46.

⁷ A central plank of the Biden campaign was ‘Restoring and Strengthening Our Democracy’: *2020 Democratic Party Platform* 55-60.

⁸ See discussion document ‘Membership and Size of the Court’ (n 5) p.19.

⁹ See e.g. Z Oklopcic, ‘Comparing as (Re-)Imagining Southern Perspective and the World of Constitutions’ in P Dann, M Riegner & M Bönemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press, 2020).

¹⁰ See e.g. TG Daly, ‘Democratic Decay: Conceptualising an Emerging Research Field’ (2019) 11(1) *Hague Journal on the Rule of Law* 9; L.E. Miller & L Aucoin (eds), *Framing the State in Times of Transition: Case Studies in Constitution Making* (US Institute of Peace Press, 2010); J Haynes (ed), *Routledge Handbook of Democratization* (Routledge, 2012); and C Bell, C Campbell & F Ní Aoláin, ‘Transitional Justice: (Re)Conceptualising the Field’ (2007) 3(2) *International Journal of Law in Context* 81.

a comparative perspective appears timely and worthwhile, given that democratic restoration, including but not confined to the reform of apex courts, may soon become an emerging global challenge, if elections in states such as Hungary, Poland, Turkey and elsewhere oust anti-democratic incumbents. It may also be relevant to other ongoing or potential democratic transitions, such as the Ukraine, where corruption in the courts may require personnel change to produce a more legitimate and functional apex court.¹¹ Questions of norm-breaking for the purposes of democratic restoration include the Hungarian opposition leadership's talk of 'regime change' through restoring checks and balances by a referendum bypassing the amendment process in the Constitution imposed by the Fidesz government in 2011, described as a "dangerous game" of "breaking legal continuity" by the constitutional scholar Andras Jakab;¹² and questions about direct democratic restoration in Poland – where the original democratic 1997 Constitution remains in place – through simply unwinding key measures, laws, and institutional transformations enacted by the sitting Law and Justice Party (PiS) government. Engaging with this complexity also presents something of a retort to simplistic arguments in other contexts of democratic decay, such as Brazil, for simple replacement of the existing constitution to improve democratic performance, as proposed by Ackerman.¹³

This paper therefore seeks to add to the US debate and explore the wider questions it poses through 'space travel'. The paper looks to two case-studies where packing ostensibly aimed at strengthening the democratic system suggests the possibility of 'good' packing, but where the context and implementation of the reforms ultimately negated any positive impact: Turkey, where the Constitutional Court was overhauled in 2012¹⁴; and Argentina, where well-intentioned packing of the Supreme Court in the 1980s was poorly implemented and set a dangerous precedent. In its argument, this paper builds on the rapidly expanding literature on court-packing, particularly Kosař and Šipulová's 2020 work conceptualising packing through a taxonomy of the principal techniques employed by governments to alter the composition of an existing court and, thereby, achieve a "politically friendly composition" on the court, summarised in the next section.¹⁵ Importantly, while the democratic arguments for court-packing in states such as Hungary or Poland since 2010 have been weak, Turkey and Argentina present more complex scenarios of top courts that simply could not continue in their existing form and where reform was justifiable in liberal-democratic terms. The analysis lingers longest on the Argentine context as offering key insights, especially that, once introduced in good faith for democracy-strengthening purposes, court-packing can set a dangerous precedent to be abused by later presidents, and that taking little care regarding implementation can trigger a packing spiral with a highly negative impact on the court and distortive effects on development of its jurisprudence.

By providing a thicker account of two court-packing case-studies, and drawing on a range of relevant research fields, this paper sets out a framework for considering the democratic legitimacy of proposed reforms, comprising five dimensions: (i) *democratic*

¹¹ See e.g. D Francis, 'Ukraine's reforms remain hostage to corrupt courts' Atlantic Council (15 September 2015).

¹² See e.g. M Dunai & B Hall, 'Hungary opposition leader vows 'regime change' if Orban defeated' Financial Times (10 November 2021).

¹³ See T da Rosa Bustamante, E Peluso Neder Meyer, M Andrade Cattoni de Oliveira, J Reis Gonçalves Pereira, J Zaiden Benvindo & C Paixão, 'Why Replacing the Brazilian Constitution Is Not a Good Idea: A Response to Professor Bruce Ackerman' *Int'l J. Const. L. Blog* (28 July 2020).

¹⁴ Turkey has three top courts: the Constitutional Court (*Anayasa Mahkemesi*); the Court of Cassation (*Yargıtay*); and the Council of State (*Daniştay*).

¹⁵ D Kosař & K Šipulová, 'How to Fight Court-Packing' (2020) 6 *Constitutional Studies* 133, 139.

context – assessing court-packing against the wider political context and democratic trajectory of the state; (iii) *articulated purpose* – the need for a full articulation of the reform’s aims and to what degree it is exceptional; (ii) *reform options* – especially whether a different or less controversial reform can achieve the desired result; (iv) *reform process* – the salience of an open, pluralistic, and participatory process for reform; and (v) *repetition risk* – how to ensure that good faith reforms do not trigger retaliation (for instance, in the US case, the risk that single-instance ‘good’ packing is not followed by a recurring cycle of retaliatory and remedial packing). There is no claim that this framework is comprehensive or airtight: it is merely intended to set out a clearer basis for analysis and to foreground important dimensions of the challenges democratic restoration reforms pose for constitutional law, which have wider application and merit closer attention.

This argument is pursued in five parts. Part I briefly sets out the contours of the court-packing debate in the USA and places it in global context. Part II discusses the ambiguous nature of court-packing in Turkey in the 2010s, which points to the potential for ‘good’ court-packing but emphasises the importance of the reform context and process. Part III sets out the background to packing of the Supreme Court in Argentina by highlighting key aspects of the state’s political and constitutional development, while Part IV analyses court-packing measures in Argentina since the restoration of electoral democracy in 1983; first as a justifiable remedy to reform an authoritarian-era organ in the absence of other reform options, and later as a return to a negative pathology. Finally, Part V applies the insights from the two case-studies and the five-dimensional analytical framework to contemplate the dilemmas and complexities of democratic restoration in the contested US context, and its lessons for the world.

I The US Debate in Global and Historical Context

It is impossible to capture the full breadth of the US court-packing debate here, and the global and historical contexts in which it is taking place. This section merely aims to present the essentials of this debate, its key tensions, and how arguments for packing in the US context are differentiated from recent court-packing measures in states such Hungary and Turkey.

In the US, the court packing debate famously harks back to the 1930s, with President Franklin D. Roosevelt’s roundly defeated plans to pack the Supreme Court, then viewed as the main institutional obstacle to major structural socio-economic reforms. In recent decades, the idea of packing had receded to the status of historical, but not contemporary, importance.¹⁶ However, packing – and the wider debate surrounding reform of the Supreme Court¹⁷ – has returned to the fore as the Court’s role as a central vehicle for progressive reform has been increasingly called into question at the liberal-left side of the political spectrum, and as the composition and legitimacy of the Court has also been affected by politically controversial manoeuvres aimed at ensuring Republican party control of judicial appointments (in a context of Republican presidents having appointed 14 of 18 justices since 1969¹⁸). Packing of the Court can be viewed as an attempt to achieve a more representative

¹⁶ See Tushnet (n 1).

¹⁷ See e.g. D Orentlicher, ‘Supreme Court Reform: Desirable—and Constitutionally Required—Postscript (Comment)’ (2018) 92 *Southern California Law Review* 29.

¹⁸ See T McCarthy, ‘What does Ruth Bader Ginsburg’s death mean for the supreme court?’ *The Guardian* (19 September 2020).

court reflective of the main political cleavages across the nation, and even as a remedial measure – a ‘righting of wrongs’ given Senate Republicans’ refusal to consider Merrick Garland’s nomination in 2016. Some, of course, see it as a dead end: Frederick Schwartz (who favors a constitutional amendment to enshrine 18-year non-renewable term-limits) decries it as a “short-term partisan legislative step” that “cures nothing”.¹⁹ Others have observed that packing would simply elicit a tit-for-tat response, such as the opposition demoting ‘packed’ judges to the lower courts upon regaining power.²⁰

On 9 April 2021 the Biden administration announced the terms of reference of a 36-member bipartisan commission comprising leading scholars from constitutional law, history and political science (some also previously active in civil society organisations such as the American Civil Liberties Union; ACLU). The body is tasked with producing a report within 180 days of its first meeting and with holding public meetings to hear the views of experts, groups and interested individuals holding varied views on the issues of reform:

The Commission’s purpose is to provide an analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals. The topics it will examine include the genesis of the reform debate; the Court’s role in the Constitutional system; the length of service and turnover of justices on the Court; the membership and size of the Court; and the Court’s case selection, rules, and practices.²¹

Of course, if this were another country where constitutional amendment was easier, and in the context of a broader political transformation spurred by democratic transition or peace-building, reform possibilities for an apex court this contested might include establishing a new institution; either a new iteration of the Supreme Court (as in Kenya), a new constitutional chamber in the Supreme Court (as in Estonia or Nepal), or an entirely new constitutional court (as seen in Germany in the 1950s, or Hungary and South Africa in the 1990s).²² In rarer circumstances still, one might allocate a number of foreign judges to sit on the Court (e.g. Kosovo²³) or assess judges’ suitability to continue sitting individually (as in Kenya after adoption of the 2010 Constitution²⁴). Extraordinary measures for extraordinary times. Evidently, such options are off the table due to the rigidity of the US Constitution, the totemic socio-political and cultural stature of the Supreme Court, and the different democratic context. Yet, despite clear dissimilarities, the current US context, focused on institutional reform after acute democratic crisis, raises problems that resonate with these contexts.

Four key proposals in the US reform debate show how, shaped by legal and political constraints, proposals range in scope and nature: packing, term-limits, selection, and

¹⁹ FAO Schwarz, ‘Saving the Supreme Court’ *Democracy: A Journal of Ideas* (Fall 2019, No. 54).

²⁰ See C Sprigman, ‘With RBG’s Passing, Start Thinking About How to Rein in the Supreme Court’ *Just Security* (21 September 2020).

²¹ White House statement, ‘President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States’ (9 April 2021).

²² See TG Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (Cambridge University Press, 2017) 88-89.

²³ See A Dzedzic, ‘Foreign Judges: Pacific Practice and Global Insights’ (2019) 24(2) *Commonwealth Judicial Journal* 26.

²⁴ See Daly, *The Judiciary and Constitutional Transitions* (International IDEA, 2016) 13-14.

jurisdiction-stripping.²⁵ Proponents present packing as legally easier to achieve than 18-year non-renewable term-limits because it would require no more than statutory change, although in both cases the requirement for constitutional amendment is contested. Packing is also presented as offering more immediate political benefits compared to term-limits, whose impact would unfold over a period of decades. Some packing proposals seek to achieve the best of both worlds; court ‘balancing’ proposals include the appointment of two federal judges designated by statute to sit on the Supreme Court for 18 years, with a political commitment to appoint one liberal (to balance the appointment of Neil Gorsuch) and Merrick Garland, whose appointment was kiboshed at the end of President Obama’s presidency in 2016.²⁶ Other options seek to depoliticise the Court by focusing on selection: lottery selection would involve appointing all existing 179 federal judges as associate justices of the Supreme Court and forming 9-member Court panels by random selection from among the nine current justices and the expanded pool of judges, ordinarily reshuffling panels every two weeks.²⁷ Proposals for jurisdiction stripping (which form part of broader disempowerment proposals such as supermajority rules for finding laws unconstitutional) argue that Article III, section 2, clause 2 of the Constitution explicitly empowers Congress to remove the Supreme Court’s appellate jurisdiction over specific issues or cases,²⁸ and that removing jurisdiction concerning contentious issues such as abortion could help to depoliticise the Court.²⁹

Beyond the technical details of reform options, and their political feasibility, this debate is animated by deeper normative positions regarding the democratic and constitutional legitimacy of engaging in norm-breaking; namely, the norm against packing an independent court to achieve defined political ends. Müller, writing in September 2020, argued that Senate Republicans’ rush to replace Justice Ginsburg with a “conservative hardliner” is not only at odds with their refusal to consider Garland’s appointment in 2016, but occurs in a wider context in which the Republican Party is now willing to do anything to retain power, while the Democratic party remains constrained by its commitment to the rules and even hope for bipartisanship. As he frames it, Republicans have gained an advantage through a willingness to engage in ‘constitutional hardball’ – technically permissible practices under the Constitution that violate existing constitutional understandings³⁰ – and the only option left to Democrats is to “fight fire with fire” through, principally, expanding the Supreme Court. He emphasises that packing would form part of broader democratic reforms such as stronger protections for voting rights, abolishing the filibuster to render the Senate more representative, and granting statehood to Puerto Rico and Washington, DC.³¹

In this way – whether we accept the argument or not – proponents of court-packing proposals in the USA seek to differentiate these measures from the negative experiences of court-packing in other countries; many authors also eschew the term ‘packing’, preferring

²⁵ Sitaraman and Epps map the debate in ‘How to Save the Supreme Court’ (2019) 129(1) *Yale Law Journal* 148, 169-180. See also Presidential Commission on SCOTUS discussion materials (n 4): ‘Membership and Size of the Court’ (n 8); ‘Term Limits’; and ‘The Court’s Role in the Constitutional System’.

²⁶ I Somin, “‘Court Balancing’ is Just Court-Packing by Another Name” *The Volokh Conspiracy* (7 July 2018).

²⁷ D Epps & G Sitaraman, ‘How to Save the Supreme Court’ (2019) 129(1) *Yale Law Journal* 148.

²⁸ C Sprigman, ‘Congress’s Article III Power and the Process of Constitutional Change’ (2020) 95(6) *New York University Law Review* (forthcoming).

²⁹ Epps & Sitaraman (n 27) 178, citing Samuel Moyn.

³⁰ M Tushnet, ‘Constitutional Hardball’ (2004) 37 *J Marshall L Rev* 523.

³¹ Müller (n 3). As of April 2021, bills to enhance voting rights and recognise Puerto Rican statehood are before Congress.

‘court expansion’ or ‘re-balancing’.³² Recent court-packing in states such as Turkey, Hungary and Poland has been portrayed as a clearly identifiable first step in an “authoritarian playbook” pursued by democratically elected but anti-democratic executives to degrade the democratic system by bringing independent institutions to heel. In other words, court-packing is itself approached as a strong indicator that the democratic system is undergoing negative transformation. As Sadurski explains in the Hungarian context:

[T]he capture of the Constitutional Court proceeded through changing the rules for nomination of judges, then by restricting the court’s jurisdiction, and finally by court-packing, which included an increase in the number of judges, thus producing a safe Fidesz [ruling party] majority on the court.³³

In Poland, Sadurski has described the packing of the Constitutional Tribunal by the ruling Law and Justice (PiS) party as a key part of the state’s “constitutional breakdown”, which was preceded by a sustained government disinformation campaign casting judges as an unresponsive elite tied to the Communist era.³⁴ This was not a straightforward process of expanding the court to ensure greater loyalty to the ruling party, but a complex suite of measures, including replacement of constitutionally-appointed judges by judges not appointed according to the constitutional procedures, forcing certain judges to take accrued holiday leave, and lowering the retirement age for judges; the latter deemed by the Court of Justice of the European Union (CJEU), in a judgment of June 2019, to be incompatible with the principle of ‘irremovability of judges’ as a core feature of judicial independence.³⁵

As regards reform context, these changes all occurred in an environment where the capacity of every institution to constrain the executive was weakened in a short period of time, through a bewildering flurry of mutually reinforcing measures, including the creation of two new chambers in the Supreme Court with power over politically sensitive matters (including election results), replacement of virtually all court presidents, refusal to publish adverse judgments of the Constitutional Tribunal deeming the law reforming the Tribunal to be unconstitutional, constraining the opposition in parliament, enhancing control of State broadcasters, changing the leadership across the civil service, and establishing ‘mirror bodies’ by statute to displace constitutional bodies such as the National Council of Radio and TV Broadcasting.³⁶ Moreover, in terms of the reform process, the procedure for achieving these anti-pluralist transformations was itself exclusionary. In Poland, the required legislation was rammed through parliament in an “atmosphere of secrecy”³⁷ by circumventing meaningful discussion and scrutiny; opposition MPs’ speeches being limited to 30 seconds, for example.³⁸ (Similarly, in Hungary the 2011 Basic Law has been called the “iPad Constitution” because the drafting process was so opaque that at one point the only detail known was that it had been

³² See Belkin (n 2).

³³ W Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press, 2019) 26.

³⁴ *Ibid.*, 98.

³⁵ See P Bárd & A Sledzinska-Simon, ‘On the principle of irremovability of judges beyond age discrimination: Commission v. Poland’ (2020) 57(5) *Common Market Law Review* 1555.

³⁶ See a summary in TG Daly, ‘Between Fear and Hope: Poland’s Democratic Lessons for Europe (and Beyond)’ (2019) 15(4) *European Constitutional Law Review* 752, 755-757.

³⁷ M Pilich, ‘Disobedience of Judges as a Problem of Legal Philosophy and Comparative Constitutionalism: The Polish Case’ *Res Publica* (forthcoming; published online 11 January 2021) 7.

³⁸ Sadurski (n 33) 134.

partly drafted on an iPad.³⁹) As for reform effects, the result was initially a “paralysed” court,⁴⁰ and later, a court that operates as a ‘government enabler’ rather than any form of constraint.⁴¹

Two decades previous, and long before Vladimir Putin took power in 2000, perhaps one of the surest signs that the Russian democratic experiment was souring was the packing of the Constitutional Court in 1993 alongside the adoption of Yeltsin’s new Constitution. As Epstein, Knight and Shepsova have observed, the new iteration of the Court was “now composed of two sets of Justices-members of the old Court (many of whom opposed Yeltsin in the previous period) and those who were added after the adoption of the new Constitution as part of Yeltsin’s reform”, which although not entirely captured by the executive, was “somewhat closer to Yeltsin than its 1991-93 counterpart” due to the addition of the new justices.⁴² The move was a response to the Court’s interventions in the struggle for power allocation between the president and parliament in the early 1990s, which famously reached its nadir when Yeltsin sent tanks to shell the parliament building, risking the potential for civil conflict. The 1993 Constitution was produced in a strongly executive-controlled process sidelining parliament (which had previously refused to adopt a compromise draft), through a hand-picked constitutional assembly followed by a constitutional referendum passed by a 58.4 per cent majority, with a 54.8 per cent turnout.⁴³ Even earlier again, in the 1950s, figures within the Adenauer government of West Germany were eager to pack and control the Federal Constitutional Court in the context of a bitter conflict surrounding ratification of the European Defence Community (EDC) Treaty with France; a measure only averted through the French parliament voting down the treaty.⁴⁴

Court-packing through unilateral action continues to spread today as governments with ant-democratic agendas worldwide take aim at independent institutions. Impeachment has been employed to remove the Chief Justice of Sri Lanka in 2013 under the strongman Rajapaksa government, and against Chief Justice Maria Lourdes Sereno in 2018, a vocal critic of another strongman, President Duterte of the Philippines.⁴⁵ In Brazil, a constitutional amendment proposed in October 2019 by the deputy leader of President Bolsonaro’s party (Social Liberal Party; PSL) in the House of Deputies aims to reverse a constitutional amendment of May 2015 that raised the retirement age of Supreme Court justices from 70 to 75 years, raising concerns about attempts to pack the Court given the overtly illiberal and

³⁹ See e.g. ‘Hungary’s iPad Constitution’ Common Sense Society 11 March 2011 <http://bit.ly/2GKMKdZ>.

⁴⁰ M Rojszczak, ‘Surveillance, Legal Restraints and Dismantling Democracy: Lessons from Poland, Democracy and Security’ *Democracy and Security* (2020), published online 18 November 2020.

⁴¹ See W Sadurski, ‘Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler’ (2018) 11 *Hague Journal on the Rule of Law* 63.

⁴² E Lee, J Knight & O Shvetsova, ‘The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government’ (2001) 35 *Law & Society Review* 117, 143.

⁴³ See ch.3 ‘Overview of the 1993 Constitution of the Russian Federation’ in J Henderson, *The Constitution of the Russian Federation: A Contextual Analysis* (Bloomsbury Publishing, 2011).

⁴⁴ See J Collings, *Democracy’s Guardians: A History of the German Federal Constitutional Court, 1951-2001* (Oxford University Press, 2015) 68; and A Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006* (Cambridge University Press, 2008) 116.

⁴⁵ See AF Tissa Fernando, Procedure for removal of superior court judges in Sri Lanka and the issue of ‘quis custodiet ipsos custodes?’ (2013) 39(4) *Commonwealth Law Bulletin* 717; and DC Steelman, ‘Judicial Independence in a Democracy: Reflections on Impeachments in America and the Philippines’ (2018) 9(2) *International Journal for Court Administration* 1.

anti-democratic nature of the Bolsonaro administration.⁴⁶ In each case, it is necessary to look at the measure in context: in Sri Lanka, for instance, impeachment has been characterised as a government reprisal against Supreme Court judgments upholding human rights and blocking the establishment of a new government department permitting direct executive control of welfare payments. Perhaps most tellingly, the Chief Justice was replaced by an advisor of the President. The broader international context, too, merits attention: in this case, the impeachment was strongly criticised by the International Commission of Jurists (ICJ).⁴⁷

The norm against political interference with the courts is evidently not, then, just a convention of the US constitutional order. It is one of the totems of the narrative of democratic superiority that reached its fullest expression during the Cold War. It has been constructed in an oppositional manner, in the sense that political interference with the courts is generally viewed as something despots, tyrants and autocrats do; one need only think of the concept of *telefonnoe parvo* (“telephone justice”) in contemporary Russia, which captures the direct political pressure felt by judges and the obstacles facing individuals in obtaining independent and impartial justice.⁴⁸ By contrast, in the democratic tradition, it is portrayed as something generally *not* done. Institutionally, it is an ideal that marks out the lingering socialist-era institution of the procurator in post-Soviet states such as Russia, Belarus or Ukraine – invested with significant powers of general supervision of the courts – as difficult to fit into a democratic framework.⁴⁹ Indeed, Partlett describes the post-1989 abolition of such supervision in the Baltic states as reflecting “a strong desire to move away from Russian and Soviet legacy and return to their Western European roots.”⁵⁰ It is, in short, one of those bedrock ideas that permits us to imagine a common civilisational inheritance of liberal constitutional democracy shared by democracies worldwide.

Yet, a comparative perspective on court-packing reveals significant nuance regarding its democratic legitimacy. As Kosař and Šipulová recently observed, “court packing has flourished all over the world” but our conceptual understanding of packing is underdeveloped.⁵¹ Defining packing as “an intentional irregular change in the composition of the existing court, in quantitative as well as qualitative terms, that creates a new majority at the court or restricts the old one”, they highlight the problematically thin line between justifiable reforms aimed at improving the functioning of the judiciary and illegitimate interference with the courts, and set out a taxonomy of mechanisms employed, and key distinctions to look out for in determining on what side reforms might lie. Thus, while the term ‘court packing’ and its most famous historical context in 1930s US politics tends to evoke gambits to increase a court’s size (‘expansion’, as seen in Hungary and Turkey), two key additional techniques are employed: decreasing a court’s size (‘emptying’, as seen in Poland in the 2010s, or the US in

⁴⁶ See e.g. Katya Kozicki & RD Pianaro, ‘From Hardball to Packing the Court: “PEC do Pyjama” and the Attempt to Attack the Brazilian Supreme Court’ in TG Daly & W Sadruski (eds), *Democracy 2020: Assessing Constitutional Decay, Breakdown, and Renewal Worldwide* (International Association of Constitutional Law, 2020) 59. Available at: < <https://www.iacl-democracy-2020.org/ebook>>.

⁴⁷ See TV Ananthavinayagan, *Sri Lanka, Human Rights and the United Nations: A Scrutiny Into the International Human Rights Engagement with a Third World State* (Springer Singapore, 2019) 102.

⁴⁸ See J Keane, *The New Despotism* (Harvard University Press) 182.

⁴⁹ See e.g. W Partlett, ‘The historical roots of socialist law’ in H Fu, J Gillespie, P Nicholson & WE Partlett (eds), *Socialist Law in Socialist East Asia* (Cambridge University Press, 2018) 62-64.

⁵⁰ Partlett (n 49) 61.

⁵¹ Kosař & Šipulová (n 15) 133.

1801, when the Supreme Court was reduced from six to five members⁵²); and replacing sitting judges to achieve a change in personnel rather than size ('swapping', as seen in post-2016 Turkey, discussed below). Some states have seen varying measures at different junctures: the Supreme Court of Argentina has experienced emptying, expanding, and swapping since the 1950s). Measures taken can be formal (e.g. constitutional or statutory amendment) or informal (e.g. offering sitting judges monetary or promotional incentives to retire, or forcing judges to take vacation), direct (where court composition transformation is the principal purpose of reform) or indirect (where composition change is a welcome but secondary benefit of other reforms).⁵³

Where these manoeuvres can, in hindsight, be confidently portrayed as part of a broader plan to hollow out institutional constraints on executive power, they are often pursued alongside additional measures, such as jurisdiction-stripping. A good example is Hungary, where the Constitutional Court's jurisdiction was restricted under a new constitution (the Basic Law of 2012), followed by a constitutional amendment of March 2013 annulling all of the Court's decisions prior to that date.⁵⁴ Evidently, no government aiming to achieve a friendlier court is express about its aims: measures are inevitably presented as necessary democratic reforms to improve the efficiency of the court, or its legitimacy; as seen in Poland, where a central argument has been the need to remove Communist-era judges from the courts.⁵⁵

It is also important to emphasise that, in discussing court-packing, Kosař and Šipulová canvass a wide diversity of states, from fully authoritarian states (e.g. Bolivia or Egypt in the 1960s), to recognised liberal democracies that have experienced acute democratic degradation in recent years (e.g. Poland and Hungary), to states navigating shifts from undemocratic rule to a troubled democratisation process featuring a complex mix of indicators of democratisation and democratic reversal simultaneously (e.g. Argentina in the 1980s, or Turkey since the early 2000s). Evidently, different overarching political contexts will colour even our initial assessment of court-packing measures. Court-packing in an authoritarian state is unlikely to be independence-enhancing. By contrast, some form of packing can be one of the only responses to remake the courts in the new democratic image of the state following, or during, a democratic transition; contexts in which, as the transitional justice scholar Ruti Teitel argues, a lesser fidelity to ordinarily cardinal precepts such as consistency and predictability in the law can be tolerated⁵⁶— especially, it might be argued, if presented as a single-instance 'once and done' measure that is not to be repeated, and in the context of a relatively clear new constitutional settlement. In more ambiguous contexts, where the overall democratic quality and trajectory of the state is contested, as it is in the USA, it is even more difficult to assess court-packing proposals and they cannot simply be rejected outright as – or even framed as – an anti-democratic move. Nor, by turn, can packing be treated as self-evidently required due to the perceived partisan nature of the Court, as Belkin seems to suggest.

⁵² FAO Schwarz, 'Saving the Supreme Court' *Democracy: A Journal of Ideas* (Fall 2019, No. 54).

⁵³ Kosař & Šipulová (n 15) 139.

⁵⁴ See KL Scheppele. 'Understanding Hungary's Constitutional Revolution' in von Bogdandy & Sonnevend, *Constitutional Crisis*.

⁵⁵ Kosař & Šipulová (n 15) 142; and Sadurski (n 33) 98.

⁵⁶ R Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Journal* 2035.

One way of thinking through the legitimacy of court-packing in the US context is to engage in ‘time travel’. Rivka Weill in a recent paper analyses the current proposals against US constitutional history, arguing that it is both empirically and constitutionally correct to say that a president can nominate a justice to the Court at any point during the presidency; that it is ultimately the Senate’s responsibility to police for frustration of the popular will in such nominations, that the clear convention has required bipartisan consent for nominations in an election year; and that court packing itself can be understood as a mechanism rooted in popular sovereignty to off-set partisan capture of the Court, which forms part of the intentional design of the Founding Fathers. The implication of this is that serious moves toward partisan capture can legitimise (if not invite) packing as a counter-measure.⁵⁷ Thomas Keck, also based on historical experiences of court-packing in the US, expressly distinguishes ‘constitutional hardball’ court-packing in service of democratic erosion from packing in service of democratic restoration. Discussing examples including Federalists’ packing of the courts in advance of Jefferson assuming the presidency on foot of the 1800 elections, and Jefferson’s subsequent undoing of these measures by ousting the ‘packed’ judges, he argues:

When a governing regime intentionally packs the courts with partisan loyalists, and those judges then use their power in explicitly partisan ways, the regime’s supporters cannot credibly appeal to norms of judicial independence when an opposition regime tries to un-pack those courts.⁵⁸

Yet, in his own historical analysis, while noting that the Supreme Court’s size has been altered seven times, Joshua Braver sounds a strong note of caution, emphasising that past packing experiences before the Civil War occurred in a very different historical and institutional context, that packing has not occurred for over 150 years, that the 1801 instance involved repeal of a previous law that had reduced the Court’s size (accompanied by express condemnation of packing), and that present arguments for a court-packing bill raise unprecedented risks due to the present context of hyper-polarisation, especially compared to the one past example of “successful packing” in the 1860s where the president’s lack of support from either party produced a low-risk scenario. Defining court-packing in a similar way to Kosař and Šipulová – as “the manipulation of the Supreme Court’s size primarily to change [its] ideological composition” – Braver, like Schwartz and others, perceives packing by the current administration as presenting an unacceptable risk of incentivising the opposition to pack when they next gain power.⁵⁹

In considering how we can achieve a thicker understanding of legitimate packing, its risks, and what this tells us about democratic restoration in contexts of democratic decay more widely, the next sections seeks to build on these ‘time travel’ analyses by engaging in ‘space travel’ by analysing the impact of court packing and purges on courts in Turkey and Argentina in detail, both of which present contexts that challenge the presumptive starting point that packing is anti-democratic: in both cases, court packing has been initially justifiable but has become inextricably captured by deep-seated or developing pathologies of the political system.

⁵⁷ R Weill, ‘Court Packing as an Antidote’ *Cardozo Law Review*, 2020 (forthcoming).

⁵⁸ T Keck, ‘Court Packing and Democratic Erosion’ in S Mettler, R Lieberman & K Roberts (eds), *Democratic Resilience: Can the United States Withstand Rising Polarization?* (Cambridge University Press, forthcoming). P.7 of Draft text available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476889.

⁵⁹ J Braver, ‘Court-Packing: An American Tradition?’ Harvard Public Law Working Paper No. 19-44 (*Boston College Law Review*, forthcoming) 3, 25-32, 56.

II Turkey: Ambiguous Court-Packing in an Increasingly Authoritarian Context

The Turkish context presents an illuminating instance of court-packing that is easy to judge as anti-democratic with the advantage of hindsight, but whose nature was far more nuanced than straightforward political capture of the Constitutional Court. The case-study is an illuminating example where expanding the court could be justified as necessary as part of a broader transformation process to achieve a liberal-democratic system with appropriate respect for popular control and elected actors, but where the manner and context of reforms undermined the apparent potential of 'good' packing.

Background to Packing the Constitutional Court (1961-2012)

The Constitutional Court was established in 1962, not long after a number of other post-war European constitutional courts: Austria (1945), Germany (1951) and Italy (1956). However, being a creature of the post-*coup* Constitution of 1961, its role in the Turkish constitutional order has differed in significant respects from the roles of these other courts in their respective states, due to the particular historical, constitutional and political contexts in which it was established and in which it operated for its first 50 years.

Three factors may be viewed as particularly salient. First, the very founding of the Turkish State was based on the aim of producing a modern and secular polity, with the result that certain values, such as secularism, have been central pillars of each successive constitution and have rested in significant tension with other values such as popular sovereignty and individual rights protection. Second, the power framework in the State has not mirrored the classic tripartite division of government power among the executive, legislative and judicial branches. Rather, alongside these powers, the military has played an overarching tutelary role, accompanied by the civilian State bureaucracy as representatives of an elite wedded to the foundational values of the Republic – reflected in a conceptual division of the state between the 'permanent' civilian and military state (*devlet*) and the 'changeable' elected organs of government (*hikimel*).⁶⁰ Where these values have been viewed as threatened by developments in the electoral arena, the military has at crucial junctures seized the reins of power through *coups d'état* (in 1960-61, 1971 and 1980-83), twice adopting a new constitution (those of 1961 and 1982). Third, the lack of any direct complaint mechanism led to a perception of the Court's primary role as guardian of the founding values of the Republic rather than guardian of individual fundamental rights.⁶¹ Yegen described the post-1982 court as "a politicized Constitutional Court whose members are appointed solely by the president and acts as a mechanism of tutelage".⁶²

The Court's case-law from 1961 to 2012 was also strongly criticised by many observers as failing to provide sufficient protection to individual rights and as blocking liberalising reforms. Most strikingly, the Court made astonishingly frequent use of its power to ban political parties, banning no less than 25 parties in 26 years on grounds of threatening

⁶⁰ A Bâli, 'The Perils of Judicial Independence: Constitutional Transition and the Turkish Example' (2012) 52 *Virginia Journal of International Law* 235, 263.

⁶¹ See, in particular, AÜ Bâli, 'The Perils of Judicial Independence: Constitutional Transition and the Turkish Example' (2012) 52(2) *Virginia Journal of International Law* 235; and E Örucü, 'The Constitutional Court of Turkey: The Anayasa Mahkemesi as the Protector of the System' (2009) 3(2) *Journal of Comparative Law* 254.

⁶² O Yegen, 'Debating Unamendability: Deadlock in Turkey's Constitution-Making Process' in R Albert & B Oder, *An Unamendable Constitution?: Unamendability in Constitutional Democracies* (Springer, 2018) 284.

secularism or the state's territorial integrity, including the four-million member Refah Partisi (Welfare Party) in 1998.⁶³ Two decisions in 2008, concerning removal of the ban on headscarves in universities and banning of the ruling AKP party, placed the Constitutional Court centre-stage in the tension between guarding the founding principles of the State and democratic demands for liberalisation of the State apparatus, pushed by the Justice and Development (AKP) party, which first entered government in 2002. The Court's assertion of the power to assess the constitutionality of properly-enacted constitutional amendments, and its decisions finding those amendments invalid, while upholding the AKP's validity by the slimmest of margins, placed the Court at the centre of the political structure, generated tensions with other State powers, and drew significant criticism from the public and civil society.⁶⁴

Democratic Court-Packing?

It is against this background that sweeping reforms to the Court, including expansion of its membership, were introduced. In 2012 major structural changes were made to the Court as part of a package of reforms to the 1982 Constitution adopted in 2010 and approved in a popular referendum on 12 September 2010. Ostensibly aimed at improving access to the Court and enhancing the system of rights protection in order to address the high number of applications taken against Turkey to the European Court of Human Rights, the reforms permitted direct individual applications to the Court for the first time in its 50-year history. The individual application system formed part of a package encompassing twenty-six constitutional amendments focused in large part on addressing the most illiberal elements of the 1982 Constitution by constraining the tutelary power of the military (e.g. reducing the jurisdiction of military courts), initiating significant judicial reform, and enhancing access to government records and individual privacy rights against State interference.⁶⁵

As regards reform context, these changes were just the latest in a succession of seemingly democracy-strengthening reforms that had taken place since the 1990s. After ending the State's monopoly on television and radio broadcasting in 1993, a suite of reforms had been introduced in 1995: eliminating the rationale for the 1980 coup from the Constitution's preamble; removing bans on the political activities of trade unions, associations, and public professional organizations; and lowering the voting age to 18. After eliminating military judges from the State Security Courts in 1999, another more widespread raft of reforms in 2001 amended 33 articles of the Constitution, and the preamble, to remove the general restrictions on rights and freedoms, enhance civil and political rights, broaden the scope of economic and social rights, shorten pre-trial detention, remove the ban on the Constitutional Court's power to review laws passed under the previous military regime; and remove the phrase "language prohibited by law" from the constitutional text. A further round of reforms from 2002 to 2006 abolished the state security court, lowered the threshold age for holding public office, and amended Article 90 of the Constitution to enhance the status of

⁶³ A Zarakol, 'Is Judicialization Good for Democracy? A Comparative Discussion' in G Areshidze, P Carrese & S Sherry (eds), *Constitutionalism, Executive Power, and the Spirit of Moderation: Essays in Honor of Murray P. Dry* (State University of New York Press, 2016) 80.

⁶⁴ Bâli (n 60), especially 250 *et seq.*

⁶⁵ Bâli *ibid* 297.

international human rights law in the domestic constitutional order by providing for international law to prevail in the event of any clash.⁶⁶

Based on the expectation of a higher workload, the 2012 Constitutional Court reforms increased the Court's membership from 11 permanent (and 4 alternate) judges to 17 permanent judges (without alternates) – a case of straightforward expansion under Kosař and Šipulová's taxonomy. This was accompanied by institutional restructuring: the Court, which previously heard all cases as a plenary court, introduced two Sections and six Commissions.⁶⁷ (Membership of the High Council of Judges and Prosecutors (HSYK), with very significant powers over judicial officers, was also expanded). This court expansion has been presented in recent years as a clearly negative step. As Ozan Varol put it in 2018, expansion "permitted the government to pack [the Constitutional Court and High Council] with members favourable to its ideology".⁶⁸

Yet, at the time, despite concerns raised (e.g. the continuing membership of the Minister for Justice on the HSYK⁶⁹), to many observers this did not appear as an instance of negative court-packing due to the broadly positive overarching context of political and constitutional reform. For Aslı Bâli, writing in 2013, the move brought "greater representation of the judicial and legal profession onto the Court in line with democratic judicial appointments procedures in Europe and beyond."⁷⁰ Venice Commission analysis of the reform plans identified various deficiencies (e.g. concerning the lack of full clarity as to whether abstract constitutional review of laws and regulations was excluded), but did not centre on the expansion of the Court's membership as a problem *per se*.⁷¹ As for reform options, unlike many states where democratic transitions from 1945 onwards included establishment of an entirely constitutional court as a central institutional innovation, the presence of an existing constitutional court seemed to narrow the available reform options: expansion of the Court's membership was more politically feasible than a total re-founding.

It is important, nevertheless, to emphasise the reform process itself; especially the manner in which the breakneck speed of reform was generally approached. As Bozkurt has noted, the hallmark of then Prime Minister Erdoğan's governance style has been a "'my way or the highway attitude,"⁷² unilaterally driving the reform agenda without wider consultation with stakeholders, including opposition forces and those directly affected by reforms. Constitutional reforms and legislation tended to be drafted by a small cadre of advisers in the Prime Minister's Office and dropped on Parliament with little warning or time for debate.

⁶⁶ Yegen (n 62) 285-286.

⁶⁷ See the Court's website, 'Structure and Decision Making' <<http://www.constitutionalcourt.gov.tr/inlinepages/constitutionalcourt/TheStructureDutiesOfTheCourt/Plenary/StructureDecisionMaking.htm>>.

⁶⁸ O Varol, 'Stealth Authoritarianism in Turkey' in M Graber, S Levinson & M Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018) 349.

⁶⁹ HE Tomuş, 'Reluctant Democratization: The Case of the Justice and Development Party in Turkey' (2013) 20 *Constellations* 312, 322.

⁷⁰ A Bâli, 'Courts and constitutional transition: Lessons from the Turkish case' (2013) 11(3) *International Journal of Constitutional Law* 666, 694.

⁷¹ See Venice Commission, Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey (Law No. 6216) CDL-REF(2011)047 (30 March 2011) 33 (hereinafter, 'Venice Commission Opinion 2011'). See also Venice Commission, *Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey* (18-19 June 2004) CDL-AD(2004)024 p6 (hereinafter, 'Venice Commission Opinion 2004').

⁷² See ch.1 'How Erdoğan Governs Turkey' in A Bozkurt, *Turkey Interrupted: Derailing Democracy* (Blue Dome Press, 2015) 9.

A focus on reform effects further complicates the picture. The Court's jurisprudence after the reforms seemed to reflect, at least to some extent, an independent organ capable of effectively guarding rights and the democratic system, in a different manner to the Court's previous role as a guardian of the Kemalist order. The Court delivered a steady stream of important decisions and by July 2014 – less than two years after the introduction of individual applications – the Court had already delivered 165 judgments finding violations of individual rights.⁷³ These judgments appeared to transform its role by strongly upholding free speech protections, the right to fair trial, individual autonomy, the right to privacy and the right to equality, among others.⁷⁴ Members of the Court deemed the new mechanism 'an effective instrument for protecting basic rights'⁷⁵ and a 'promising' development.⁷⁶ Over 70 per cent. of these judgments (119) concerned the right to fair trial, followed by the right to personal liberty at 12% (21 judgments), with the remaining 18 per cent. concerning the rights to life, physical and mental integrity, political participation, privacy, freedom of religion and freedom of expression.⁷⁷

In July 2014, Judge Arslan (elected President of the Court in 2015) – admittedly not a disinterested observer – set out a number of landmark cases in a speech delivered to a conference in Strasbourg.⁷⁸ In the *Twitter* and *Youtube* judgments, decided in Spring 2014, the Court ruled separate State-imposed blanket bans on access to Twitter and Youtube to be invalid on the basis that they were not prescribed by law. In the *Twitter* case, the Court found the ban, as imposed by the relevant administrative body to have no basis in law.⁷⁹ By contrast, in the *Youtube* judgment, drawing on a relevant Strasbourg decision, the Court found the law on which the ban was based to lack the requisite character of certainty and foreseeability. Also in line with Strasbourg jurisprudence, the Court emphasised the crucial role played by the internet and social media play in democratic societies as a means of freedom of expression.⁸⁰ In the *Öcalan* case,⁸¹ decided in 2014, the Constitutional Court again underlined the importance of free speech in a democratic society, declaring the official confiscation and destruction of the book *Kurdistan Revolution Manifesto* by the Kurdish political leader Abdullah Öcalan to be a disproportionate restriction of his right to freedom of expression. In response to State justifications concerning the identity of the author and the book's purpose to propagate a terrorist organisation (the Kurdistan Workers' Party, or PKK), the Court noted that the overall message of the book was a call for a peaceful solution to the Kurdish question, and State action was not a proportionate measure under the legitimate aim of protecting national security and public order.

⁷³ Z Arslan, 'Constitutional Complaint in Turkey: A Cursory Analysis of Essential Decisions', Conference on 'Best Individual Complaint Practices to the Constitutional Courts in Europe', Strasbourg 7 July 2014 p.1 <http://www.coe.int/t/dgi/hr-natimplement/Source/echr/Conference_07072014_Speech_Arslan.pdf>.

⁷⁴ See e.g. See e.g. Application No: 2012/171, 12/2/2013; Application No: 2012/837, 5/3/2013; Application No: 2012/752, 17/9/2013; Application No: 2012/171, 12/2/2013; Application No: 2013/1158, 21/11/2013; Application No: 2014/12225, 14/7/2015; Application No: 2012/13, 2/7/2013; Application No: 2012/1049, 26/3/2013.

⁷⁵ Arslan (n 73).

⁷⁶ B Kiliç, 'The Establishment of the Individual Application System in Turkey: A Promising Experience' (2015) 5(5) *Uyuşmazlık Mahkemesi Dergisi* 571.

⁷⁷ Ibid.

⁷⁸ Arslan (n 73).

⁷⁹ Application No: 2014/3986, 2/4/2014.

⁸⁰ Application No: 2014/4705, 28/5/2014.

⁸¹ (The Plenary) Application No: 2013/409, 25/6/2014.

The Court also handed down a number of landmark judgments concerning the right to fair trial. In one case, the Court declared the practice of applying the maximum term of imprisonment (5 years) under the Criminal Code separately to each crime committed by a convicted defendant, which led to excessively long period of imprisonment, to be an unconstitutional infringement of the right to liberty.⁸² In a subsequent case concerning multiple applications by detained MPs, the Court highlighted the importance of political participation in a democracy. Ruling that the MPs' detention impeded representation of their electorates, the Court held that the restrictions imposed were disproportionate and not necessary in a democratic society.⁸³ In June 2014 the Court in the *Sledgehammer* case ruled that the trials of 230 applicants convicted of an attempted military coup d'état to remove the AKP government violated two aspects of their right to fair trial – the right to a reasoned judgment and the procedural principle of equality of arms – due to the trial court's handling of suspect evidence and refusal to hear certain witnesses.⁸⁴

For its part, the Strasbourg Court ruled that the mechanism provided, in principle, an effective judicial remedy within the meaning of Article 6 of the European Convention on Human Rights (ECHR)⁸⁵ and the number of applications to the Strasbourg Court steadily decreased. It has been observed that the Turkish public, too, had 'great expectations' of the expanded Court and the individual application procedure after its introduction. The number of individual applications certainly seemed to reflect significant interest, and perhaps hope, in the new procedure amongst the public and civil society. Applications were made to the Court immediately after introduction of the procedure⁸⁶ and as early as 20 January 2014, a total of 11,974 individual applications had been submitted,⁸⁷ rising to 32,000 by January 2015.⁸⁸

Erdoğan's Authoritarian Turn and the Impossibility of Independence

From 2013 onward⁸⁹ the political context became increasingly constrained for the Court as incremental and ongoing subversion of democratic rule under President Erdoğan increasingly recast the governance system in a more authoritarian mould. In 2013 a major corruption investigation initiated against four cabinet ministers, their relatives, and senior bureaucrats led to AKP claims of a 'coup' by the faith-based Gülenist movement (led by Fethullah Gülen, a former AKP ally) and government measures to increase control over prosecutors and the judicial council (HSYK). By 2015, the AKP government appeared increasingly vulnerable, losing its 13-year majority in June elections, but achieving a landslide victory in a snap election held in November, after a concerted campaign to stoke polarization and collapse the fragile unity of the opposition. The government also brought an end to the fragile peace process and the informal two-and-a-half year ceasefire between the State and Kurdish militants in Summer

⁸² Application No: 2012/1137, 2/7/2013; Application No: 2013/776, 20/3/2014.

⁸³ Application No: 2012/1272, 4/12/2013; Application No: 2013/9894, 2/1/2014; Application No: 2013/9895, 2/1/2014; Application No: 2014/9, 3/1/2014; Application No: 2014/85, 3/1/2014.

⁸⁴ (The Plenary) Application No: 2013/7800, 18/6/2014.

⁸⁵ *Hasan Uzun v. Turkey* App. no.10755/13 (30 April 2013).

⁸⁶ Kiliç (n76) 576.

⁸⁷ Council of Europe, Needs Assessment Report on The Individual Application to the Constitutional Court of Turkey (Council of Europe, 2014) 2.

⁸⁸ See 'Turkish Constitutional Court head complains of 'pressure' on members' *The Journal of Turkish Weekly* (2 January 2015).

⁸⁹ See L Diamond, 'Facing Up to the Democratic Recession' (2015) 26(1) *Journal of Democracy* 141, 145-146.

2015 brought a fresh wave of applications to the national courts, and the Strasbourg Court, concerning curfews, killings, excesses in military action and free speech restrictions. In February 2016 the Vice-President of the Strasbourg Court, Ayşe Işıl Karakaş, highlighted that Turkey had the highest number of complaints filed against it concerning freedom of expression violations.⁹⁰

The Constitutional Court's rights-respecting independence provoked significant displeasure in government circles. By Spring 2015, the ruling AKP party began to raise the need to review the individual application system on the basis that it threatened to overload the Court—a claim the current President of the Court, Zühtü Arslan, publicly refuted.⁹¹ In early 2015 former President Kılıç of the Court spoke of the 'intense pressure' placed on members of the Court by external powers, especially in the context of its decision to admit an individual application seeking to remove the 10 percent electoral threshold for political parties to enter parliament – a key mechanism supporting the AKP's retention of power.⁹² The Court decided in January 2015 to decline to hear the application,⁹³ but there are various reasons for this, not least that the application appeared to require the Court to assess the constitutionality of the existing electoral law, which lies outside its competence under the individual application procedure.

On 15 July 2016 an attempted coup d'état by the military, albeit quickly ended by security forces with the assistance of members of the public, left over 250 dead and led to successive rounds of purges of the judiciary, military, state organs, and universities – over 160,000 individuals in total were removed from their posts, many arrested and prosecuted (on questionable grounds, in many cases), including some 4,000 of the country's 21,000 judges.⁹⁴ On 4 August 2016 the Constitutional Court, sitting *en banc*, approved the removal of two of its 17 members and permanently barred them from the legal profession.⁹⁵ Having removed five members of the judicial council (HSYK) shortly after the coup attempt, in April 2017 the government amended the legislation governing the HSYK to halve its membership to 13 people, granting the president power to directly appoint six members and Parliament power to appoint the remaining seven: with the latter dominated by Erdoğan, he effectively had full control of appointments. The result was a stark aggrandizement of the executive at the expense of other sites of power and accountability.

The *de facto* concentration of power in Prime Minister Erdoğan's hands was accorded *de jure* force by a 2017 referendum which shifted the parliamentary system to a strong presidential system – albeit passed by a thin 52 per cent. margin. The élite-controlled staunchly secularist governance system, which had been slowly democratising for decades, was formally replaced by a more Islamist strong-man system dominated by President Erdoğan. As Akman and Akçalı note, serious concerns had been raised about the plans beforehand as

⁹⁰ European Commission, 'The ECHR and human rights violations against Kurds in Turkey' (9 October 2018).

⁹¹ See e.g. O Armutçu, 'Turkey's top court chief and gov't in disharmony over individual access burden', *Hurriyet Daily News* (25 April 2015).

⁹² See n88.

⁹³ A Kandemir, 'Turkey's top court declines to lower 10 percent electoral threshold' *Reuters* (6 January 2015).

⁹⁴ See T Ruys & E Turkut, 'Turkey's Post-Coup 'Purification Process': Collective Dismissals of Public Servants under the European Convention on Human Rights' (2018) 18(3) *Human Rights Law Review* 539.

⁹⁵ T Olcay, 'Firing Bench-mates: The Human Rights and Rule of Law Implications of the Turkish Constitutional Court's Dismissal of Its Two Members' (2017) 13 *European Constitutional Law Review* 568.

creating a “constitutional dictatorship” due to the president’s broad decree powers, wide powers of appointment and parliamentary dissolution.⁹⁶

The 2017 constitutional amendments also made a number of tweaks to the courts, including: enshrining the guarantee that the judiciary is not only “independent” but also “impartial”; expanding the Constitutional Court’s jurisdiction to receive referrals from parliament for review (both concrete and abstract) the constitutionality of presidential decrees; abolishing the military court system; and lowering the number of members of the Court from 17 to 15 (Article 146 of the Constitution).⁹⁷ However, in Akman and Akçalı’s view, this did little to mitigate the wholesale transfer of power to the president. The provisions empowering the parliament to petition the Constitutional Court for the annulment of decrees and to refer decrees (or selected provisions thereof) to referendum provided little reassurance in light of the president’s power to dominate and control parliament. More importantly, for present purposes, they viewed the measures as ineffective in light of “concerns about the independence of the judiciary” in practice.⁹⁸

In sum, while expansion of the Court initially appeared to improve its functioning along both the liberal and democratic axes, the room to manoeuvre for any independent institution in Turkey became vanishingly small in a short period of years due to a broader political context fuelled by executive aggrandizement and the weakening of any independent constraints on the executive. The Constitutional Court expansion itself is not at the heart of this development. Indeed, it is possible to imagine an alternative scenario in which, in a more supportive political context, and on foot of an open and participatory constitutional reform process, the expansion of the Court could have produced, overall, a more independent Court capable of holding the executive to account, constraining its excesses, and vindicating fundamental rights. However, even then, as regards repetition risk, it would have been necessary to somehow signal that expansion itself is an utterly exceptional measure to be used extremely sparingly, and to somehow guard against normalisation of the practice.

At the time of its court-packing moves Turkey was, unlike the USA, not an established liberal democracy but recognised as a slowly democratising state, engaged in a complex process of diminishing the power of unelected actors unresponsive to the idea and practical exigencies of popular control, and loyal to a secularist statist ideology that had too often been invoked to justify outright repression of the popular will and democratic organs. Yet, developments in recent years might be viewed as, not the subversion of this democratisation process, but possibly a reflection of the true nature and trajectory of the process itself: in 2012, for instance, Bâli, described the AKP (and Kurdish political forces) as “accidental democrats” to the extent that political liberalisation was viewed as the best way to grow their political power.⁹⁹ Tombus argues that occasional demonstrations of independence by the

⁹⁶ CA Akman & P Akçalı, ‘Changing the system through instrumentalizing weak political institutions: the quest for a presidential system in Turkey in historical and comparative perspective’ (2017) 18(4) *Turkish Studies* 577, 591.

⁹⁷ Constitutional Court of Turkey, ‘Introductory Booklet’ 11. Available at <<https://www.anayasa.gov.tr/media/6616/introductoryend.pdf>>. Currently, 16 members sit on the Court, including one member appointed from the High Military Court under the previous arrangements, whose seat will be abolished after retirement.

⁹⁸ Akman & Akçalı (n 96) 593.

⁹⁹ A Bâli, ‘The Perils of Judicial Independence: Constitutional Transition and the Turkish Example’ (2012) 52 Va. J. Int’l L. 235.

Constitutional Court mask an overall lack of independence.¹⁰⁰ The potential of positive reforms to enhance liberal-democratic rule was, in this overall context, impossible to realise.

Viewed against the five-dimensional analytical framework sketched in the introduction, when contemplating the democratic legitimacy of court-packing, the Turkish context underscores the importance of understanding the overall reform context and the nature of the reform processes (whether unilateral and closed, or open and inclusive), as well as the possibility of ‘good’ packing suggested by a finer-grained picture of the reforms’ impact on adjudication, and finally, the threats posed by the failure to place any limits or cap on the pace or frequency of reforms, which opens the door to ‘abusive constitutionalism’ endlessly re-shaping the Constitution, law, and institutions to the benefit of the executive.

III Argentina: Background to the Packing Saga

The Argentine experience goes back to the 1980s and has not registered loudly in the debate thus far. However, it is a source of significant insights, presenting an even clearer-cut case of ‘good’ court-packing in the context of transition from authoritarianism to democracy, which initially produced promising results but ultimately established a problematic precedent for the post-authoritarian period that was exploited by a later president less faithful to liberal democracy and adequate constraints on executive power. This part briefly sets out the political, constitutional and institutional background to court-packing in Argentina, before discussing the experience of packing, first as a democratic remedy, and later reversion to packing as a deeply-rooted pathology in the state’s constitutional and political order.

Dictatorship, Autocracy, Democracy

Argentina has often been portrayed as the poster-child of stereotypical deficiencies affecting polities in South America: a history of military meddling in civilian politics; oscillation between democratic and dictatorial rule; hyperpresidentialism; strong ideological cleavages in political life; an ineffective supreme court; an underdeveloped culture of constitutionalism and the rule of law; and deficient protection of fundamental rights; all occurring within an ongoing succession of political and economic crises. However, there is much nuance beneath this stereotype.

The State had been on a trajectory of democratic and economic development similar to Western democracies until the coup of 1930, after which it became harder to distinguish civilian and military governments; Juan Perón, for example, was initially appointed to the presidency by a military junta in 1943, then elected president in 1946, yet ruled the country as a dictator throughout.¹⁰¹ Following years of political violence between left-wing guerrillas and State forces from 1969,¹⁰² the military coup of 1976 began with the strong support of the

¹⁰⁰ Comments at the International Society of Public Law annual conference, ‘Mundo – The Future of Public Law’, Panel 178: ‘Strategic Courts and Democratic Backsliding’ 7 July 2021. Others indicate no statistical difference in the Court’s practices: O.O. Varol, L Dalla Pellegrina & N Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey* (2017) 65 *American Journal of Comparative Law* 187.

¹⁰¹ See M Feinrider, ‘Judicial Review and the Protection of Human Rights Under Military Governments in Brazil and Argentina’ 5 *Suffolk Transnational Law Quarterly* 187 (1981) at 186.

¹⁰² See JS Elias, ‘Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina’s “Amnesty” Laws’ 31 *Hastings International and Comparative Law Review* 587 (2008) at 591-592.

public, hoping for a return to peace and order. However, governance worsened under the military regime – “arguably the most repressive in the region”.¹⁰³ A toxic combination of human rights abuses (including 5,000 deaths and 30,000 disappearances¹⁰⁴), economic mismanagement, and military folly brought the regime to an end. A transition to electoral democracy in 1983 began with the financial collapse of 1981-82, the quick collapse of support for the military junta following Argentina’s decisive defeat in the Falklands War with the United Kingdom in 1982, and collapse of the regime itself in 1983. Elections held in October 1983 ushered in a Radical party (Unión Cívica Radical; UCR) administration under President Raúl Alfonsín, which governed from 1983 to 1989; the first time the party had entered government.

Leading a party that had long stood for free elections, civilian control of the military, liberal democratic values and constitutionalism, Alfonsín’s time as president brought notable improvements in democratic governance, including an annulment of junta decrees, an easing of censorship, and creation of the National Commission on the Disappearance of Persons (CONADEP), which documented human rights violations under the military junta.¹⁰⁵ However, the new government faced serious constraints. With Alfonsín’s political capital being spent on military trials, the political context precluded the adoption of a new constitution and wholesale rupture with the previous constitutional order, or widespread institutional reform. Reaffirming the 130-year-old 1853 Constitution as the “supreme law of the land”¹⁰⁶ entailed the paradoxical use of an old constitution to anchor a “new democratic founding” and “a new social contract”, whereby the Argentine people had definitively rejected the National Security State of the military era, renounced any further appeals to the military power, and committed themselves to democratic governance.¹⁰⁷ Deprived of a suite of options to reform the judiciary, such as the establishment of a constitutional court (as seen in neighboring countries), Alfonsín purged the Supreme Court, discussed in detail below.

The new president elected in May 1989 – Carlos Menem of the right-wing Justicialist Party – swung the pendulum back to a more authoritarian mode of governance: rule by presidential decree again became the norm; constitutional constraints were disregarded; constitutional restrictions on presidential re-election were removed; the Supreme Court was packed without justification; and the military leaders convicted in 1985 were pardoned, in 1989 and 1990.¹⁰⁸ Political resistance led to a political pact on further reform (the *Pacto de Olivos*) between Menem and the opposition, still led by Alfonsín, followed by amendment of the constitutional text by a constitutional convention in 1994; the first significant amendments in almost 40 years.¹⁰⁹ These aimed at curtailing the president’s power to issue emergency decrees; changing the appointment process for supreme court judges; and—in an

¹⁰³ TC Bruneau, ‘The military’ in in *Routledge Handbook of Democratization* (Routledge, 2012) 211.

¹⁰⁴ Bruneau, *ibid.*, 211. Mark Osiel provides different figures, asserting 9,000 murders: MJ Osiel, ‘Dialogue with Dictators: Judicial Resistance in Argentina and Brazil’ 20 *Law and Social Inquiry* 481 (1995).

¹⁰⁵ See, e.g., E Viola and S Mainwaring, ‘Transitions to Democracy: Brazil and Argentina in the 1980s’, Kellogg Institute Working Paper No.21, July 1984..

¹⁰⁶ Elias (n 102) 588.

¹⁰⁷ Elias (n 102) 590-600.

¹⁰⁸ L Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing, 2008) 104.

¹⁰⁹ The Constitution had previously been amended a number of times: in 1860, 1866, 1898, 1949 and 1957. 1949 reforms were aimed at modernising the text, adding social and economic rights and permitting indefinite re-election of the president; largely undone by the reform of 1957 following the military coup of 1955.

unusual move—leaving the existing rights provisions of the constitution intact, but expressly according constitutional status to nine international human rights treaties, including the Universal Declaration of Human Rights, the Convention against Torture, and the two regional human rights instruments: the American Declaration of the Rights and Duties of Man; and the American Convention on Human Rights.

These amendments have had limited impact up to the present day – through the post-Menem period of intense crisis (1999-2003); the Kirchner era (2003-2015); and post-Kirchner era (2015-present). One of the central challenges facing development of a robust democratic system based on the rule of law has been the ‘original sin’ of how Alfonsín approached re-making the Supreme Court in 1989 as a justifiable reform in the democratic transition, and how this arguably facilitated the return to a cycle of unjustifiable court-packing. The next Part analyses these developments in detail. First, the final section in this part provides some necessary background on the Supreme Court as an institution.

The Supreme Court(s) of Argentina until 1983

The Supreme Court had a history of moderate significance in the political system, and was relatively independent from 1853 to 1930.¹¹⁰ Established in the liberal constitutional tradition, the Court had arrogated the power of constitutional review in the 1880s; echoing the US Supreme Court’s *Marbury v. Madison* moment some 80 years earlier.¹¹¹

However, the Court became increasingly drawn into the distortions of Argentine politics as the twentieth century wore on, epitomized in its development of a practice of pragmatically bestowing legitimacy on *de facto* governments by issuing resolutions (*acordadas*) recognising them as constitutional, in return for pledges to respect the Constitution. This approach was never successful; military leaders flouted the Constitution with impunity, and the Court proved unable to constrain them. During the relentless political upheaval of the twentieth century, the independence of Argentina’s judiciary was put under continuous pressure, with constitutional guarantees regularly suspended, and the Supreme Court not only required to swear oaths of loyalty to new regimes, but purged repeatedly; in 1946, 1955, 1966, 1973 and 1976; the latter involving dismissal of all judges of the Court.¹¹²

While the Court had shown flashes of defiance and assertiveness in its history, it generally struggled to constrain the executive in the past or to exert any consistent authority in the constitutional order. In 1981 Feinrider concluded: “Despite examples of assertions of judicial power in Argentina...the Argentine courts seem to have followed a pattern of asserting their authority in cases that were of little importance for the preservation of the military’s power and authority.”¹¹³ Though it is, as Osiel asserts, an oversimplification to characterize the Court’s stance under the military dictatorship as one of capitulation,¹¹⁴ the Court was, if not quite an irrelevance during military rule, at most an inconvenience to the

¹¹⁰ See CJ Walker, ‘Toward Democratic Consolidation - The Argentine Supreme Court, Judicial Independence, and the Rule of Law’ (2008) 4 *High Court Quarterly Review* 54, 74.

¹¹¹ The primary judgment is in *ex parte Sojo*, 32 *Fallos de la Corte Suprema* 120 (1887); 84 years after *Marbury v. Madison* 5 U.S. 137 (1803).

¹¹² Feinrider (n 101) 177, 196.

¹¹³ Feinrider, (n 101) 196. See contra, C Larkins, ‘The Judiciary and Delegative Democracy in Argentina’ 31 *Comparative Politics* 423 (1998) at 427-435, arguing that the Court has been more independent than ‘conventional wisdom’ suggests.

¹¹⁴ Osiel (n 104) 518, 526.

juntas. It was not the case that the regime meddled regularly with the Court, but that the regime appointed persons known to be unwilling to challenge military policies.¹¹⁵

IV Court-packing: From Remedy to Pathology

Court-packing as Remedy

It was therefore in a sorry state—weak, timid, unloved—that the Supreme Court limped into the new era of electoral democracy in 1983. The Court reaped few benefits from the return to democratic rule: the lack of an immediate process of constitutional renewal as part of the initial democratisation process offered little real opportunity to seize on reform; nor was any real reform pursued through ordinary law. Unlike apex courts in neighbouring states, the Court saw no formal enhancement of its constitutional standing or its powers, and no reform of its jurisdiction. It remained a supreme court of general jurisdiction, operating as the court of final appeal and the ultimate judicial power in interpretation of the Constitution.

Due to the rapidity of the transition to electoral democracy after the collapse of the military junta, the sole effort made by the Alfonsín government to render the Court fit for purpose in the new democratic climate was a purge of its membership. Importantly for present purposes, this was not pursued through an open and inclusive process that could fully articulate the need for, and democratic legitimacy of, such an extraordinary measure; rather, it was effected by judges' resignations once Alfonsín's plans to remove judges by decree became public; an unusual case of 'emptying' the Court, within Kosař and Šipulová's analytical framework.¹¹⁶ As Rebecca Bill Chavez has noted, President Alfonsín could have emphasized the new dispensation's commitment to the supremacy of the Constitution by employing the formal impeachment procedure, justified for once on democratic grounds due to the sitting judges' ties to the military dictatorship. However, opting instead for more informal means, he "reinforced an informal practice that had undermined judicial autonomy since Perón's first term" in the 1930s.¹¹⁷

Although achieved by questionable means, the purge initially ushered in a more assertive Court, comprising various 'star' jurists. The first Supreme Court operating following the return to electoral democracy and Alfonsín's purge of its membership appears to have been of an entirely different character to the Court it succeeded. In its short life of some six years it handed down a number of significant decisions, attenuating the impact of the prior legal regime, and taking generally assertive stances on fundamental rights questions and progressive positions on social issues—entirely at odds with the deference to State and submission to Catholic orthodoxy beloved by the military regime. The literature converges on a number of key decisions of the Court¹¹⁸: diminishing the binding validity of *de facto* laws issued under military rule on democratic governments; striking down a prohibition on

¹¹⁵ See, e.g., Walker (n 110) 77-78.

¹¹⁶ Walker (n 110) 78.

¹¹⁷ R Bill Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Stanford University Press, 2004) 39-40.

¹¹⁸ These decisions are cited almost unanimously by Walker (n 110), Elias (n 102), and R Gargarella, 'In Search of Democratic Justice – What Courts Should Not Do: Argentina, 1983-2002' in S Gloppen, R Gargarella and E Skaar (eds), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Routledge, 2004).

remarriage following divorce and provisions criminalising mere drug possession; and upholding the freedom of the press, the right to conscientious objection, and constitutional due process guarantees governing search and seizure, confessions and the exclusionary rule.

By rolling back the oppressive presence of the State in both the public and private sphere and asserting the supremacy of democratic laws, the Court appeared – in a way comparable to the Turkish Constitutional Court post-2012 – to be breathing life into the new democratic founding discussed above: the promises and guarantees of the Constitution would be firmly put into effect, and thereby, the character of the Argentine polity was slowly being remade in the democratic image. For the first time in over 50 years, serious steps were being taken at the judicial level to entrench the Constitution, and to bring substance and meaning to the hollow husk constitutional law had become.

Granted, these decisions were in line with government policy under President Alfonsín.¹¹⁹ The Court did, however, take independent positions, which tended towards rebalancing the separation of powers: for example, roundly rejecting in the *Zappa* case, at the height of the economic crisis, executive arguments that the state of “economic emergency” permitted it to reduce retirement support without congressional approval.¹²⁰ This may be viewed as a democracy-enhancing decision in three ways: it tended toward entrenchment of the existing distribution of powers under the constitutional text; it moved toward disentanglement of the old order by challenging the longstanding executive tendency to circumvent the legislature in difficult situations; and by taking an independent stance, the Court was asserting its proper role in the constitutional schema and engaging in ‘institution-building’.

Of perhaps greater significance was the Court’s refusal to address key transitional justice questions. Most importantly, despite the febrile atmosphere of 1986-1987 following the trial of the juntas, with talk of a *coup* once again in the air, and with Alfonsín eager to assuage fears of prosecution among lower military officers, the Court refused to provide, as Alfonsín hoped, an interpretation of the *Law on Due Obedience* that would pacify the lower ranks.

In its landmark decision in the *Camps* case¹²¹, concerning prosecution of General Ramón Camps for torture committed against political prisoners when he was Chief of Police in Buenos Aires, the Court upheld the *Law on Due Obedience* and ordered release of three defendants, who had been sentenced to imprisonment in December 1986 by a lower court. In a judgment fundamentally based on the principle of the separation of powers, the Court evinced a strong reluctance to review the constitutionality of the amnesties granted by the political organs; emphasising that, as regards the law, Congress has power to seek its policy objectives in a reasonable manner, and ‘[w]hereas other values and solutions may be preferable to the one embodied in this Law, it is not the province of this Court but of Congress to decide on the path to take under the present circumstances.’¹²²

Justice Bacqué, in a lone dissent, strongly contended that the impugned law could not be constitutional given that it provided amnesty concerning crimes of such severity that they

¹¹⁹ Walker (n 110) 79-81.

¹²⁰ *Victor Rolón Zappa v. Estada Nacional*, Corte Suprema de Justicia de la Nación, 30 September 1986.

¹²¹ Corte Suprema de Justicia [CSJN], 22/6/1987, ‘General Ramón J Camps, incoada en virtud del Decreto No 280/84 del Poder Ejecutivo Nacional (Decision on the Law of Due Obedience)’

¹²² Quoted by Mallinder (n 108) 233.

could not be characterized as common or political crimes.¹²³ However, his stance did little to sway the majority and in its subsequent 1988 decision in the case of *Raffo, José Antonio and others*, concerning torture accusations, the Court again declined to strike down the Due Obedience law, on the claimed basis of precedence of international treaty law over national law: both, the Court asserted, with Justice Bacqué once again a lone voice to the contrary, had equal status in the constitutional order.¹²⁴

By the end of Alfonsín's presidency, his purge of the Supreme Court appeared to be vindicated: the Court had started to carve out for itself a realm of meaningful independence and autonomy, with a clear intention to weave the paper promises of the constitutional text into the very fabric of Argentine society and politics.

Court-Packing as Pathology

Further unjustified court packing under President Menem stopped this development short. Upon winning the presidential elections in 1989, Menem lost no time in sending a proposal to add four new judges to the Court in 1990, to increase the number of justices from five to nine.¹²⁵ Unlike the purge under Alfonsín, aimed at achieving a Court untainted by experience of military rule, for Menem there was no broader justification for changing the Court's membership. He rather baldly declared: "Why should I be the only president in fifty years who hasn't had his own court?"¹²⁶ Harsh criticism by the First Court of the court-packing measures, in its *Resolution 44*, failed to stem the rising tide.¹²⁷

Ultimately, a number of judges resigned, and Menem over the first years of his tenure made every effort to free himself from any judicial oversight. The Supreme Court returned to a something closer to its pre-1983 status, as a 'rubber-stamp' of executive action. Much of the promise of the new democratic era, for the Court as both engine and subject of democratisation, was snuffed out at a stroke. Argentina has been described as 'a country on the margin of the law'¹²⁸ and this phrase also encapsulates the Supreme Court during the Menem period. Following Menem's packing of the Court, it was, essentially a different body. Crucially, unlike Alfonsín, who purged the Court but installed judges independent of the executive and thereafter respected its independence, Menem installed judges of "questionable impartiality"¹²⁹ and critics of the First Court's jurisprudence; to act, in essence, as extensions of the executive arm, according a judicial imprimatur to his actions as president.

As both Gargarella and Larkins recount, this became immediately apparent in its jurisprudence.¹³⁰ In the same way that Menem lost no time in reversing the advances made

¹²³ See Larkins (n 113) and Mallinder (n 108) 210. 'General Ramón J Camps, incoada en virtud del Decreto No 280/84 del Poder Ejecutivo Nacional (Decision on the Law of Due Obedience)' (Arg) (No 547) 8 *Human Rights Law Journal* (1987); Dissenting Opinion of Judge Bacqué.

¹²⁴ Mallinder (n 108) 221.

¹²⁵ Kosař & Šipulová (n 15) 140-141.

¹²⁶ Walker (n 110) 83.

¹²⁷ Larkins (n 113).

¹²⁸ C Nino, *Un país al margen de la ley: Estudio de la anomia como componente del subdesarrollo argentino* (Emece Editores, 1992), cited by MI Bergoglio, 'Argentina: The Effects of Democratic Institutionalization' in Friedman, L.M. and Pérez-Perdomo, R., *Legal Culture in the Age of Globalization* (Stanford University Press, 2003) p.25.

¹²⁹ Larkins (n 113) 428.

¹³⁰ See Gargarella (n118) and Larkins (n 98).

by Alfonsín, the Menem Supreme Court lost no time in reversing the jurisprudential momentum made by the First Court. The validity of *de facto* laws was restored in *Godoy*, according them equal status to democratically-enacted legislation.¹³¹ Excessive executive authority was restored, with the Court upholding the validity of a presidential decree instituting an extreme economic programme, despite the absence of any such presidential power under the Constitution¹³²; permitting the president to remove an attorney general focused on high-level corruption investigations¹³³; and enforcing an executive decision to transfer a more ‘amicable’ judge to replace a more independent voice.¹³⁴ The First Court’s refusal to bow to arguments based on economic emergency was overturned, with the Court removing any constraints on the president in economic matters.¹³⁵ Even more starkly, in a case against the Central Bank, the Court removed a completed judgment from its official register and replaced it with a more favourable decision to the government.¹³⁶ The core achievements of the First Court’s fundamental rights jurisprudence were reversed, reducing protection of free speech, personal autonomy, and freedom from abuse of State powers in criminal investigations. For example, in *Fiscal v. Fernández, Victor Hugo*, the Court reversed the First Court’s *Fiorentino* decision expanding due process guarantees.

In constitutional terms, it must be emphasized that the dismantling of the First Court’s democracy-enhancing jurisprudence was not achieved through simply a different interpretive approach, but by disregarding the value of, and ‘disentrenching’ the legal constitution, i.e. the text of the 1853 Constitution. In its place, the autocratic political constitution, of rule by decree, was re-entrenched. In this way, the capacity of the legal constitution to constrain political actors simply dissipated. The Court became, not simply a victim of autocratic rule, but an engine of democratic decay.

The constitutional reform package of 1994, discussed in Part III, included removal of the two most pliant judges of the Supreme Court and the creation of a Magistrates’ Council aimed at enhancing judicial independence.¹³⁷ It appears that it was only from 1997, with a divided government following congressional elections, that the Court regained some space to reassert its authority *vis-à-vis* the executive.¹³⁸

The Long-Term Effects of the Packing Spiral

The failure to ensure that packing of the Supreme Court in 1983 was presented as an exceptional measure necessary for the transition from authoritarianism to democracy, to provide a full public justification for the measure, and to proceed through a fully defensible democratic process complying with rule-of-law standards set the scene for repeated packing under Menem in 1989, which itself necessitated further purging in the mid-1990s and beyond. It has also, arguably, allowed a much broader practice of manipulation of the wider judiciary

¹³¹ *Godoy*, Corte Suprema de la Nación, 27 December 1990.

¹³² *Peralta v. Argentina*, Corte Suprema de la Nación 313 Fallos 1513 [1990].

¹³³ *Molinas*, Corte Suprema de la Nación, 314 Fallos 1091 [1991].

¹³⁴ *Judge Miguel del Castillo*, Corte Suprema de la Nación, 22 March 1990.

¹³⁵ See *Dromi, José R s/ Avocación*, Corte Suprema de la Nación, 6 September 1990.

¹³⁶ *Banco Patagónico, S.A. v. Metalúrgica Skay*, Corte Suprema de la Nación, 16 September 1993.

¹³⁷ Larkins (n 113) 431.

¹³⁸ R Bill Chávez, JA Ferejon and BR Weingast, ‘A Theory of the Politically Independent Judiciary’ in G Helmke and J Ríos-Figueroa (eds.), *Courts in Latin America* (Cambridge University Press, 2011) 240 *et seq.*

to take root.¹³⁹ Indeed, the easing of executive interference with the Court, culminating in Kirchner's reforms of 2003, has again required problematic reforms. Although constraining the executive in appointing Supreme Court judge,¹⁴⁰ Kirchner's fresh start once again involved changes to the Court's membership; an unfortunate third 'purge' since 1983, when one should have sufficed. Again, importantly, the measure was carried out by unilateral executive means rather than a fuller, more inclusive, process: the president urged allies in Congress to launch impeachment proceedings and by the end of 2004 had achieved his aims of ridding the Court of Menem's appointees.¹⁴¹

This repeated crashing and rebooting of the Supreme Court has had notable effects on its operation as an institution and its jurisprudential output. There is a significant literature on the lack of judicial independence in the Court; most relevant being perhaps Helmke's theory of 'strategic deference', elaborated on the basis of the Argentine context, whereby a Court with a history of external threats and purges will show deference to the government of the day until it perceives support for the incumbent regime weakening, and its decisions against the government increase as a form of 'signaling' to the incoming regime, in an attempt to avoid any purge under the new dispensation.¹⁴²

Helmke's thesis is borne out by various studies of the Court. Scribner, for instance, suggests that for much of Menem's rule (1989-1999) the Court was reduced to little better than its function during the military dictatorship: ruling against the State solely where there was no conflict with central policy preferences of the executive power. Indeed, she has observed:

The greater willingness of Argentinean judges to check executive power under dictatorship versus under democracy owes much to the degree to which the supreme court has been open to political pressure and manipulation. The Argentinean Supreme Court has been as, if not more, politicized during democracy than during dictatorship.¹⁴³

It appears that judgments against the Menem government increased towards the end of his second term, which finished in 1999, although achievements of the First Court were still being dismantled and the Court is viewed as having walked a fine line between the policy preferences of the two contenders for the presidency; Eduardo Duhalde and Fernando de la Rúa.¹⁴⁴ Thereafter, the Court found itself in the eye of the economic storm, required to adjudicate on the extreme measures, including the current account freeze (*corralito*), imposed to address the economic crisis that reached its zenith in 2001-2002; ultimately finding them unconstitutional.¹⁴⁵ Key here is that the Court made no attempt to distinguish

¹³⁹ Castagnola indicates the prevalence of 'vacancy creation' at the sub-national level: A Castagnola, *Manipulating Courts in New Democracies: Forcing Judges off the Bench in Argentina* (Routledge, 2017).

¹⁴⁰ D Brinks, 'Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium' (2004) 40 *Texas International Law Journal* 595, 609.

¹⁴¹ E Epstein & D Pion-Berlin (eds), *Broken Promises: The Argentine Crisis and Argentine Democracy* (Lexington Books, 2006) 14

¹⁴² See G Helmke, *Courts Under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press, 2012); in particular, Ch.5, 'The Reverse Legal-Political Cycle' 98-125.

¹⁴³ D Scribner, 'Courts, Power, and Rights in Argentina and Chile' in G Helmke & J Rios-Figueroa (eds), *Courts in Latin America* (Cambridge University Press, 2011) 264.

¹⁴⁴ See ch.5 in Helmke (n 142) 91.

¹⁴⁵ See, e.g., BL Jacobs, 'Pesification and Economic Crisis in Argentina: The Moral Hazard Posed by a Politicized Supreme Court' (2003) 34 *University of Miami Inter-American Law Review* 391, 407.

its judgment from the previous decision in *Peralta* (1990), where similarly extreme measures were found to be constitutional.¹⁴⁶

Later judgments provided as evidence of the Court's greater independence after 2003, such as the Court's 2005 decision in *Simon*, in which a 7-1 majority struck down the amnesty laws of 1986 and 1987, also raise questions. The amnesty laws had already been repealed (but not nullified) by Congress, and Kirchner had pushed strongly for their nullification.¹⁴⁷ Moreover, to the lawyer's eye, the reasoning exacted a high price: rather than basing their judgments on the constitutional text, as Justice Bacqué had done in *Camps* in 1987, discussed above, the majority of judges hitched their wagon to international norms, including *jus cogens* and human rights treaties, arguing that the 1994 reforms, according constitutional status to nine such treaties, would require, at times, exceptions to the Constitution to be recognized; or 'bubbles' in the constitution into which the Court would insert external norms; without elaborating firm criteria for doing so.¹⁴⁸ One can only surmise why the Court took such an interpretive approach, but it is possible that the travails of the Supreme Court since 1989 had rendered resort to earlier jurisprudence problematic, as well as factual realities, including Justice Bacqué's resignation due to Menem's court packing plan.

In this sense, poorly managed packing may give rise to a host of problems. Under the Menem Court, threads of jurisprudential authority were regularly ripped from the fabric of the meta-Constitution; leaving an irregular pattern that does not invite close analysis. The judgments of purged judges may become harder to employ in constructing later judgments (bearing in mind that the Supreme Court does not operate on the basis of US-style *stare decisis* in any case). It is, then, not simply that court-packing affects the court as a *political* institution, in terms of its authority and perception of its independence – which has been the core preoccupation of the literature – but that it also has repercussions for the court as a *legal* institution, preventing the court from building up any jurisprudential momentum; or, at least, complicating the relationship between pre-packing and post-packing jurisprudence. Packing also potentially affects the Court as a *deliberative* institution, as regards the relationships between existing and 'packed' judges.

Even at the time of writing, the leftist government of President Alberto Fernandez, elected in December 2019, is under fire for controversial plans to transform the federal judiciary. Roberto Gargarella, for instance, has described the underlying motive for the plans as a "search for impunity" given the multiple corruption cases before the courts, including against the former president, and current vice-president, Cristina Fernandez de Kirchner. Rather than an exceptional measure to be employed sparingly and with great care, then, fundamental transformation of the courts has continued as a mainstay of the political cycle in the post-authoritarian period.¹⁴⁹

V The US Court-Packing Debate: Lessons for the World

¹⁴⁶ Ibid.

¹⁴⁷ Levitsky, 'Argentina: From Kirchner to Kirchner' (2008) 19 *Journal of Democracy* 16, 21.

¹⁴⁸ Elias (n 102) 628-644.

¹⁴⁹ See R Gargarella, 'Concerns Mount About Rule of Law in Argentina During COVID-19' *Bill of Health* (15 September 2020); and H Alconada Mon, 'Reforma de la justicia argentina: 10 razones para un fracaso' *The New York Times* (11 August 2020).

This section seeks to draw key lessons from the analysis above to analyse the court-packing debate in the USA, while also drawing out the distinctiveness of the US context as a case-study of contested democratic restoration in the context of democratic decay, as opposed to contexts of ‘ordinary’ constitutional reform or clear transitions from authoritarian to democratic rule. This section also seeks to emphasise the international salience of the US debate, by examining five key dimensions of the US debate based on the analytical framework set out in the introduction.

What is the reform context? As indicated at the outset, the US debate is not situated within an unremarkable context for reform, and also does not neatly mirror full political system transitions: in Argentina, as discussed above, the collapse of the military dictatorship marked a swift and sharp shift to a new democratic constitutional settlement; albeit one based on an old constitution. There is certainly nothing facially comparable to past democratic transitions or democratic restoration processes in states such as Germany or Brazil, where an entirely new constitution embodied a symbolic and politico-legal break with the past. Yet, when one looks at the combined arguments in the US debates for Supreme Court, electoral system and Senate reform, the difference does not seem so stark. One might capture it in the Spanish term *ruptiforma* – a system shift that involves both rupture and reform – and one that is not so different, in its internal dynamics, from the Argentine case, despite the very stark differences in the macro-political context.¹⁵⁰

However, the context of democratic decay adds further layers of complexity. One is the greater level of contestation regarding the nature of the moment and the need for any reform. Although the more partisan arguments (whether speaking of ‘retaliating’ against or ‘rebalancing’ Republican-era measures) present packing as almost self-evidently necessary, as the Biden administration’s Commission on Supreme Court reform has noted, there are diametrically opposed views on the nature, or even existence, of a democratic crisis justifying an exceptional measure such as court-packing.¹⁵¹ Unlike the evident capture of the state by the military in 1970s Argentina, scholars like Fishkin and Pozen, resonating with Müller’s argument, discussed in Part I, contend that since the 1990s the US has suffered “asymmetric polarization” as the Republican Party has moved further to the right than the Democratic Party has moved to the left, and by extension, “asymmetric constitutional hardball” due to greater Republican willingness to “not only or primarily on judicial nominations but across a range of spheres.”¹⁵² Viewed from a comparative perspective, this points to a broader challenge that contemporary democratic decay as a process poses: its relative subtlety, incrementalism, and maintenance of a somewhat thicker democratic façade compared to yesteryear’s swift installation of more evident authoritarian rule through Communist takeover, military coups d’état, *autogolpes* and other means complicates the task of democratic restoration due to opponents framing the debate as alternative visions of democracy rather than democracy and its alternatives.

Second is the issue of rationality. While hyper-polarization, as a feature of the US political landscape as well as other democratic decay contexts, evidently shrinks the potential

¹⁵⁰ See F Biagi, *European Constitutional Courts and Transitions to Democracy* (Cambridge University Press, 2020) 87.

¹⁵¹ See Presidential Commission on SCOTUS, ‘Membership and Size of the Court’ (n 5) p.17. See also I Somin, ‘Biden Releases Names of Members of His Supreme Court Commission [Updated]’ *The Volokh Conspiracy* (9 April 2021).

¹⁵² J Fishkin & DE Pozen, ‘Asymmetric Constitutional Hardball’ (2018) 118 *Columbia Law Review* 915, 918.

and political terrain for genuine bipartisanship to achieve reforms acceptable to both parties, it may be argued that a more difficult challenge is the decline of rationality in partisan contestation. This presents a marked contrast to the more rational (if still highly contested) post-authoritarian and post-Communist past transitions in states such as Brazil or Poland, where opposing forces were relatively evenly matched.

Third, and strongly related to the above, where past democratic transition (or restoration) was marked by a shift from government monopolies on information production to a plural regime, negotiations on democratic restoration in contexts of democratic decay take place against a seriously degraded and fractured shared epistemic space, due to information excess, fragmentation, and disinformation, amplified by long-term assaults by governmental and political actors on the very notion of objectivity, or of objective non-partisan institutions.¹⁵³ This all clearly denudes the reform landscape of honest brokers capable of facilitating a reform process. Unlike Europe, where actors such as the Council of Europe's Venice Commission may retain sufficient credibility to assist democratic restoration processes, in the US context international intervention of this nature appears out of the question, and data (albeit imperfect) from disinterested or external actors, such as international democracy assessments, tending to concur that the democratic system has been significantly degraded due to voter suppression, gerrymandering and other measures cannot cut through the fragmented political and epistemic landscape. Faced with competing narratives of 'constitutional restoration' – an older, Tea Party-era narrative and the ascendant progressive narrative – seeking to discern good faith or bad faith is acutely challenging. Two things, at least, seem clear. Citing historical precedent for packing, from an era defined by different democratic standards and understandings, appears a weak legitimating basis for contemporary reforms, as Braver argues. Second, a focus on the interaction of articulated purpose and reform process, which have not been prominent in the debate, can aid assessment.

What is the articulated purpose? The second dimension of the analytical framework for contested democratic restoration reforms refers to the importance of a full articulation of the reform's aims and to what degree it is exceptional; as discussed above, this has been sorely lacking in cases such as Turkey and Argentina.

In the US context, President Biden has expressly indicated an aversion to court-packing while declining to rule it out entirely – as indicated by the reform commission's composition, discussed below.¹⁵⁴ It remains to be seen whether his administration will coalesce around a specific option. Beyond the president, the two dominant purposes articulated in both the academic and political debates lie in opposition to one another. The first, focused on 'rebalancing' the ideological composition of the Court (voiced by progressive proponents), would arguably heighten the risk of retaliatory packing, given its conception of the need for the Court to align with prevailing political cleavages – in a sense, viewing the Court, as Epps and Sitaraman put it, as "simply one more political institution".¹⁵⁵ The second, focused on the wider aim of 'depoliticising' the Court, generally seeks to weaken the partisan perception and character of the Court, thereby strengthening its liberal character. Further complicating the debate, as Braver notes, various contemporary proponents of packing are long-time critics of

¹⁵³ See e.g. S Rosenfeld, *Democracy and Truth: A Short History* (University of Pennsylvania Press, 2018) ch.1.

¹⁵⁴ B Sprunt, 'Biden Says He's 'Not A Fan' Of Expanding The Supreme Court' NPR (13 October 2020).

¹⁵⁵ Epps & Sitaraman (n 27) 198.

judicial supremacy, for whom a significantly (or even fatally) undermined court might not be viewed as a constitutional ill.¹⁵⁶

What are the reform options? As discussed in Part I, the US court-packing debate clearly encompasses a wide range of reform proposals, including variations of court-packing as well as options such as term-limits and narrowing the Supreme Court's jurisdiction. One way to approach proposals is to ask whether the articulated purpose of packing can be achieved by less controversial means. If we take 'rebalancing' as the main purpose, court packing does appear to be the only immediately effective choice available. However, if depoliticisation and enhancing the legitimacy of the Court is the main purpose, other long-term options might make more sense. A broader question is whether a specific reform forms part of a broader suite of reforms, and what those reforms are. Clearly, as seen in the Turkish context, a reform context dominated by excessive amplification and centralising executive power raises questions about the reform process as a whole. By contrast, the reform package proposed by some packing proponents in the US context can be objectively assessed as dispersing power in ways that render the electoral and constitutional system more inclusive and pluralistic. Yet, learning lessons from Argentina, reformers need to have a full sense of the risks as well as potential rewards, including the potential internal impact on institutions, as discussed in the Argentine context.

What might a justifiably democratic reform process look like? The fourth dimension of the analytical framework identifies the salience of the openness, pluralism, and length of the reform process. Four main points may be made here. First, openness and pluralism in constitutional reform (more broadly construed here than formal amendment of the text), viewed as a spectrum, can range from the closed and controlled amendment processes in Turkey or Hungary, at one end, to the highly participatory use of citizens' assemblies in states such as Ireland.¹⁵⁷ The Biden commission, firmly couched in the established US tradition of presidential commissions to examine reform, rests somewhere in the middle, with independent experts in central control but mandated to run a participatory process including other experts, civil society, and the public. Ilya Somin has offered that it is a "genuinely bipartisan and cross-ideological group" whose terms of reference appear to include endorsing or rejecting specific reform proposals, but that proponents of court-packing will struggle to find support from members openly opposed to packing. Observing that presidential commissions have a record of issuing reports that are "quickly forgotten, doomed to gather dust on bookshelves", he opines that this commission could prove the exception if it can build consensus around a specific reform (e.g. term-limits).¹⁵⁸

Second, as regards length, the express 180-day time-limit for the commission's report clearly differs from the rushed and opaque processes in other states discussed in Parts I-IV. The calculus here is not that greater length is always desirable, but that meaningful democratic deliberation requires *sufficient* length, and this may need to be balanced against other considerations.

Third, compared to the top-down, closed packing processes from Poland to Argentina, which had a pre-conceived outcome, the commission does not pre-judge the reforms to be

¹⁵⁶ Braver (n 59) 48 *et seq.*

¹⁵⁷ See S Suteu & S Tierney, 'Squaring the Circle? Bringing Deliberation and Participation together in processes of Constitution-making' in Ron Levy et al. (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018).

¹⁵⁸ Somin (n 26).

made, although its composition does appear to lean toward some reform options more than others. In this connection, much will depend on how the commission manages, and responds to, public hearings, and how these are perceived in the political and public spheres. Although bipartisanship is itself a challenge in the prevailing hyper-polarized US context, viewed from a global perspective, public participation in constitution-making and constitutional change has developed to the point that it has been described as “a new norm”.¹⁵⁹ As such, hearing from those beyond the two-party system may be viewed as important in overcoming the bipartisan trap: the two main parties together represent at best some 60 per cent. of the electorate, and the growing percentage of the electorate that has no partisan affiliation is larger than either party (counted as between 36 and 45 per cent. in all monthly Gallup polls during 2020).¹⁶⁰ The above might suggest that broadening the reform process to include a deliberative process, such as a citizens’ assembly, could help to address not only public ownership of democratic restoration reforms but also issues such as the fracturing of a shared epistemic basis for discussion and the need to indicate the exceptional nature of the reform.

However, it would be easy to lapse into an air of unreality in discussing democratic restoration: a key insight from constitution-building literature is that ‘windows’ for reform can close rapidly and must be seized upon if reform can take place.¹⁶¹ Viewed in this light, if one takes the view that restoring a more functional system of checks and balances, as well as a fairer electoral system, is an urgent challenge, the best can certainly be the enemy of the good. In other words, an excessive focus on process – deliberative, participatory, slowed-down, transparent – may fatally undermine the achievement of substantive aims that can objectively assessed as democracy-enhancing. Evidently, each context will be different: path dependence will shape the parameters of, and mechanisms for, reform; as will issues such as the electoral cycle and the sustainability of political coalitions. On a principled basis, while ‘ordinary’ contexts of constitutional reform may increasingly tend toward a longer and more participatory and inclusive process, viewing democratic restoration in the context of democratic decay as a specific category of constitutional transition may provide legitimation for a shorter and somewhat less inclusive process, although *sufficient* length, inclusiveness and openness remain important.

How to mitigate the repetition risk? The final dimension of the analytical framework asks how we can ensure that good faith reforms do not trigger a tit-for-tat reform spiral under successive governments, which would threaten heightening constitutional hardball into an ongoing constitutional tug-of-war that would further fray the bonds of the Constitution as a shared basis of rules for the political community. In current US debates on court-packing, repetition risk is plainly discussed in hypothetical terms: fears centre on packing as “politically inflammatory and unstable”, leading to successive packing episodes as each party gains power; although scholars such as Tushnet argue that there are other scenarios where packing itself could achieve a “stable equilibrium”, especially if Democratic governments stay in power long enough to enact measures to address voter suppression and gerrymandering.¹⁶² While remaining cognisant of the differences in context, the Argentine case-study counsels caution

¹⁵⁹ See ch. 1, A Saati, ‘Participation – To Unveil a Myth’ in T Abbiate, M Böckenförde & V Federico (eds), *Public Participation in African Constitutionalism* (Routledge, 2017).

¹⁶⁰ See Gallup, ‘Party Affiliation’ <https://bit.ly/31wYGeD>.

¹⁶¹ C Bell & K Zulueta-Fülscher, *Sequencing Peace Agreements and Constitutions in the Political Settlement Process*. Policy Paper No. 13 (International IDEA, November 2016) 47.

¹⁶² Epps & Sitaraman (n 27) 176-177.

in this regard, suggesting not only that packing today risks retaliatory packing tomorrow, but that it might raise immediate risks for how the Court operates internally should 'packed' judges suffer a taint of illegitimacy (even if individually blameless).

It may be argued that this risk is overstated and based on the contemporary political landscape, which could be fundamentally altered by electoral and Senate reforms. However, this merely lessens the risk, and it is important to note that governments of all hues can be tempted to pack the courts, especially if the norm against doing so has been weakened. That point can be widened to encompass proposals for norm-breaking in Hungary and other contexts to restore a functioning liberal-democratic system, discussed in the introduction. A central challenge, whose importance increases with reforms viewed as norm-breaking, is articulating their exceptional nature in a way that dissuades repetition. One option, as Tamir has suggested, is for reformers to make "self-negating" statements recognising the act of norm-breaking while simultaneously insisting on the importance of the norm itself.¹⁶³ As argued in this paper, rhetoric itself is important. However, articulation of the purpose of norm-breaking should be contemplated alongside potential practical and processual means to mark out its exceptional nature.

Conclusion: Addressing Today's Challenges of Democratic Restoration

What does the US debate on court-packing tell us about contemporary challenges of democratic restoration? This paper has sought to emphasise the wider relevance of the US debate to comparative constitutional law, as well as adding to the US debate itself. The paper has sought to demonstrate the value of adopting a comparative perspective to contemporary challenges of democratic restoration and the many theoretical and empirical insights that can be drawn through connecting four key research areas: democratic decay, democratisation, constitution-building, and transitional justice. It is clear that democratic restoration in a polity that has suffered significant (yet contested) democratic decay differs significantly from democratic transition from authoritarianism. The latter have always featured layers of contestation, but the former present distinctive challenges, and further layers of complexity and contestation, that require careful attention. While recent years have witnessed comparative constitutional lawyers racing to understand democratic decay as an increasingly global phenomenon, now is the time to forge intellectual frameworks for understanding today's challenges of democratic restoration in contexts of democratic decay, which is set to become an emergent central challenge for constitutional law. We cannot know what the future brings, but the debates ongoing in the USA, and intensifying in countries such as Hungary and Brazil, present highly challenging constitutional questions which will require us to move beyond our established frameworks and real-world toolkits for constitutional change. This paper has sought to take the first steps toward, and a framework for, this wider discussion.

¹⁶³ O Tamir, 'Constitutional Norm Entrepreneurship' (2021) 80(4) *Maryland Law Review* 881, 957.