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Constitutional Repair: A Comparative Theory

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Constitutional Repair Working Paper Series

We are increasingly confronted by a pressing question: how can a constitutional democracy be repaired after being deeply degraded, but not ended, during a period of anti-democratic government? Hosted on the knowledge platform Democratic Decay & Renewal (DEM-DEC) at www.democratic -decay.org, this occasional working paper series aims to provide a space to showcase works in progress and forthcoming publications on these challenges.

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As well as extensive experience in the university sector (at Melbourne, Edinburgh and Copenhagen universities), Tom has worked in a variety of roles in government and international organisations, including clerking for the Chief Justice of Ireland, managing a €3m Council of Europe project concerning judicial ethics in Turkey, and designing a pan-continental African Judicial Network for the African Union. He has also worked on democracy and rule of law projects for organisations such as the United Nations, the Council of Europe and Irish government in states and territories including Ireland, Georgia, Sri Lanka, Kyrgyzstan, Lebanon, the Pacific, Palestine, and Uzbekistan.

‘Constitutional Repair: A Comparative Theory’

Tom Gerald Daly*

Note: This is an advanced draft but feedback is still welcome and may be sent to thomas.daly@unimelb.edu.au.

We are increasingly confronted by a pressing question: how can a constitutional democracy be repaired after being deeply degraded, but not ended, during a period of anti-democratic government? This study contemplates the transnational craft of constitutional repair and elaborates a novel syncretic theory of repair. Integrating diverse theoretical frameworks and comparative case-study analysis, the paper pursues four normative arguments: (i) assessing ‘constitutional damage’ requires a methodological design alive to conceptual clarity, disciplinary and perspectival limits, context, and core damage; (ii) ‘constitutional repair’ is best understood as a distinct paradigm of constitutional transition separate from both major constitutional change in stable democracies and democratic transitions from authoritarianism; (iii) reparative measures departing from rule-of-law norms can be deemed legitimate subject to both context and conditions; and (iv) constitutional scholars should approach onerous and risky processes of formal constitutional change with extreme caution if sub-constitutional fixes are sufficient to achieve initial repair.

Keywords: democratic decay – democratic backsliding – constitutional transition – constitutional repair – constitutional reform – populism – authoritarianism

Introduction: Kintsugi and Contemplating Repair

As anti-democratic governments have been ousted—at least temporarily—in the USA, Brazil and Poland, and pro-democratic opposition forces have mounted meaningful electoral challenges elsewhere, constitutional scholars are increasingly confronted by a pressing question: what is distinctive about the challenge of repairing a constitutional democracy that has been deeply degraded, but not ended, during a period of anti-democratic government? A useful, if unconventional, starting point may be to

* Associate Professor, Melbourne Law School; Director, Democratic Decay & Renewal (DEM-DEC) www.democratic-decay.org; thomas.daly@unimelb.edu.au. The author is indebted to a range of institutions and scholars who have facilitated discussion of earlier drafts and have provided highly valuable feedback. Special thanks are owed to the participants at two events: the Stanford Rule of Law Roundtable for the launch of the Sally B. and William H. Neukom Center for the Rule of Law at Stanford University on May 25, 2023, including Kim Lane Scheppele, Mila Versteeg, Adam Chilton, Stephen Gardbaum, and Rosalind Dixon; and the event ‘Democratic Backsliding: Lessons Learned for Designing Democracy’ organised by the International Institute for Democracy and Electoral Assistance (IDEA) in Washington, D.C., June 5-6, 2023, including Tom Ginsburg, Samuel Issacharoff, Miriam Seifter, Vicki Jackson, and David Landau. I am also sincerely thankful for insights gained during a visit to Brazil in November 2023, especially Emerson Gabardo, Eneida Desiree Salgado, and Caroline Bittencourt.

contemplate the traditional Japanese art form of *kintsugi*.[1] This craft of repairing broken or cracked ceramics with lacquer and precious metals leaves visible gilded seams where the pieces have been reconnected or chips filled in; not only repurposing what might have been discarded, but also rendering the original object even more valuable. The practice reflects a deeper philosophical recognition that nothing stays the same forever and that a damaged object can be transmuted into a functional, beautiful, and more resilient form if we honor its history and address its defects creatively.

For the past decade, comparative constitutional law scholars (among others) have strained to keep pace with the global phenomenon of democratic backsliding, [2] interrogating its patterns, sources, and threats, as well as considering how incumbent anti-democrats can be defeated at the ballot box,[3] with repair understandably relegated to a secondary position. Now we need to grapple more systematically with the specific suite of difficult theoretical and practical questions repair raises, including the legitimacy of court expansion to 'unpack' apex courts, whether to seek 'big bang' or incrementalist repair, or the possibilities of transitional constitutional legislation. This is terrain where democrats' initial euphoria at electoral success is mingled with anxiety and nostalgia, foundational rule-of-law principles meet transitional exigencies, and academic and political debates can starkly diverge. It requires constitutional scholars to revisit and depart from orthodox theories and frameworks for understanding constitutional change. It requires us to honor the deepest desiderata of the rule of law without fetishizing legality to preclude necessary measures. It demands specificity rather than generalities or impracticable reforms, and it pushes us to interrogate our assumptions, preferences, disciplinary vanities, and analytical blind spots in the search for solutions. Most importantly, for scholars internal and external to contexts of democratic backsliding, it demands that we remain attuned to the limited window for action and the real-world stakes of constitutional damage and repair for individuals and communities.

The complexities of repair are rooted in the ambiguities of democratic backsliding. Even where backsliding culminates in electoral violence, as seen in the capitol attacks in

[1] Also known as *kintsukuroi*, for an illuminating account of the practice and its meaning see Michael Louw, 'The craft of memory and forgetting' (2017) 32(2) *South African Journal of Art History* 93.

[2] Key recent works in comparative constitutional law alone include: Alison L. Young, *Unchecked Power? How Recent Constitutional Reforms are Threatening UK Democracy* (Bristol University Press, 2023); Wojciech Sadurski, *A Pandemic of Populists* (Cambridge University Press, 2022); Tímea Drinoczi and Agnieszka Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge, 2022); Juliano Zaiden Benvindo, *The Rule of Law in Brazil: The Legal Construction of Inequality* (Hart Publishing, 2022); Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, 2021); András Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge University Press, 2021); Emilio Meyer, *Constitutional Erosion in Brazil* (Hart Publishing, 2021); Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14(1) *Law and Ethics of Human Rights* 49; Sanford Levinson and Jack M. Balkin, *Democracy and Dysfunction* (University of Chicago Press, 2019); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019); Aziz Z Huq and Tom Ginsburg, *How to Save a Constitutional Democracy* (University of Chicago Press 2018); Mark Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018); Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *The University of Chicago Law Review* 545; and Renáta Uitz, 'Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary' (2015) 13(1) *International Journal of Constitutional Law* 279.

[3] See e.g. ch 7 'Antidotes, Remedies, and Miracles' in Sadurksi, *A Pandemic of Populists* (n 2).

the USA and Brazil in 2021 and 2023 respectively,[4] much constitutional damage remains less visible. After all, anti-democrats' political projects are generally presented as returning power from elites to the people. The grand institutions of state still stand. Every day, elected representatives flock into their chambers. Judges don their robes and hear cases. Public servants operate the machinery of state. Elections, albeit often distorted, are still held and the outcomes matter. Citizens still enjoy substantial freedoms. Absent any clear sense of rupture in democratic governance, it can be hard to pinpoint where the damage truly lies, especially where narratives coalesce around a specific leader, party, or event. This has been the defining analytical and theoretical challenge animating the now expansive backsliding literature.[5] These are contexts where the familiar façade and structures of democratic government are in place, yet often the texture and true nature of governance, and the loci and exercise of political power, have been disfigured, relocated, and reorganized in profound ways.

Scholars thinking more systematically about "constitutional resurrection" [6] after serious backsliding include Dixon and Landau, whose ground-breaking preliminary comparative work on 'restorative constitutionalism' argues that abusive employment of constitutional replacement and amendment to degrade the democratic system, as well as changes to legislation, executive policies and practices, and judicial decision-making, can be reversed.[7] However, their definition of this challenge as "a project that attempts to return to a prior constitutional status quo, or, in other words, that seeks to reestablish some constitutional past" is arguably analytically limited: as the case-studies in this paper show, it is often difficult, if not impossible, to frame reparative action as straightforward restoration or as a return to any *status quo ante*, which underscores the need for a more nuanced conceptualization. Moreover, most existing analyses focused on anti-democratic governments' constitutional vandalism and, to a lesser extent, remedial measures tend to be state-specific,[8] even where the analysis is broadly comparative: for instance, in Ginsburg and Huq's landmark work, a wide-ranging conspectus of backsliding patterns, drawing on examples from states as diverse as Hungary, Turkey, Venezuela and Bolivia, is ultimately aimed at understanding what is ailing US democracy and what domestic remedial action might be taken.[9]

We need a fuller comparative theory of constitutional repair, which can have both explanatory and normative purchase across a diversity of states, as well as capturing the distinctiveness of the constitutional and political context of repair. Reflecting on the question of "how to do constitutional theory while your house burns down", Balkin in 2021 framed the challenge of addressing constitutional damage in the USA as involving

[4] Nicolò Ferraris, 'United States, Brazil, Political Polarization and Democratic Pushback: Assault on Democracy?' (2023) 258(1) *Il Politico* 46.

[5] See e.g. Tom Gerald Daly, Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11(1) *Hague Journal on the Rule of Law* 9.

[6] András László Pap, 'Constitutional restoration in hybrid regimes: The case of Hungary and beyond' (2022) 8(1) *East European Journal of Society and Politics* 191.

[7] Rosalind Dixon and David Landau, 'Healing Liberal Democracies: The Role of Restorative Constitutionalism' (2022) 36(4) *Ethics and International Affairs* 427. This short piece forms part of a special roundtable on 'Healing and Reimagining Constitutional (Liberal) Democracy' published in Winter 2022.

[8] See the citations in Part IV for all four case-studies.

[9] See Huq and Ginsburg (n 2) 70. See also Meyer (n 2), whose analysis of Brazil canvasses states such as Argentina, Peru, Thailand, Myanmar, and the USA.

four inter-linked questions concerning: constitutional diagnosis ("What has gone wrong with our constitutional system?"); repair ("What can we do in the short run to repair the damage that has already occurred to our democracy?"); reform ("What reforms are necessary, either through constitutional amendment or sub-constitutional means, to strengthen our constitutional democracy for the long run?"); and maintenance ("What institutions can we shore up or create to maintain our constitutional democracy as it meets the challenges ahead?"). [10] If we characterize constitutional reform and maintenance as relating to more wholesale reform with longer time-horizons, this paper focuses on a theory of constitutional repair as relating to more targeted fixes with shorter time-horizons, while also interrogating and illuminating the relationships between the different dimensions. On further inspection, the question of constitutional repair can be sub-divided into four inter-related factors: *specificity* (what is the precise damage we are trying to repair?); *feasibility* (what is within our power to repair?); *temporality* (what can we do in the short run as opposed to the long run?); and *priority* (what do we need to fix first?).

This study therefore aims to better understand the immediate challenge of restoring baseline democratic functioning and dealing with priority areas of damage rather than re-thinking the entire system, as well as sparking a broader conversation on constitutional repair as a transnational challenge. Drawing on comparative analysis of the USA, Brazil, Poland and Hungary, as well as critically integrating and building on the rich theoretical resources from the research fields of constitutional theory, comparative constitutional law, constitution-building, transitional justice, democratization, and democratic backsliding, this paper elaborates a syncretic theoretical framework that inhabits their interstices and intersections. This, in turn, is of potential relevance to other states currently facing serious backsliding—not least India and Indonesia as two of the world's largest democracies[11]—as well as states suffering chronic constitutional distress, such as the United Kingdom.[12]

The paper proceeds in four parts pursuing four inter-linked normative arguments. Part I argues that a carefully calibrated methodology departing from the dominant methodologies in comparative constitutional law is needed to better quantify the nature and extent of 'constitutional damage' in any given state and to ground unorthodox case-study selection. Part II argues that 'constitutional repair' is best understood as a distinct paradigm of constitutional transition separate to both major constitutional reform in stable democracies and transition from authoritarianism to democracy, while Part III

[10] Jack M. Balkin, 'How to Do Constitutional Theory While Your House Burns Down' (2021) 101(5) *Boston University Law Review* 1723, 1723.

[11] See e.g. Khaitan (n 2); Debasish Roy Chowdhury and John Keane, *To Kill A Democracy: India's Passage to Despotism* (Oxford University Press, 2021); Christophe Jaffrelot*, Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy* (Princeton University Press, 2021); Abdurrachman Satrio, 'Restoring Indonesia's (Un)Constitutional Constitution: Soepomo's Authoritarian Constitution' *German Law Journal* (published online: 3 March 2023); and Eve Warburton and Thomas Power, *Democracy in Indonesia: From Stagnation to Regression?* (ISEAS, 2020).

[12] Whether the UK is suffering democratic backsliding patterns that fits within the global paradigm is a live debate: see e.g. Young (n 2). We also see a fixation on Brexit—the UK's departure from the European Union—as produced by, and accelerating, democratic decline through the ascendance of a form of nativist populism: see e.g. Pippa Norris and Ronald Inglehart, *Cultural Backlash: Trump, Brexit, and Authoritarian Populism* (Cambridge University Press, 2019).

more fully conceptualizes and visualizes repair by critically analyzing key concepts and possible visual motifs, including *kintsugi*, that assist in appreciating repair's prismatic nature. Part IV applies the theoretical framework to the four case-studies to illuminate key reparative challenges and pursues the third and fourth normative arguments: that reparative measures disrupting rule-of-law norms can be legitimate subject to certain conditions; and that when contemplating repair, constitutional scholars should avoid fixating on onerous and risky processes of formal constitutional design, replacement, and amendment when the most immediate fixes can be found at the sub-constitutional level.

I Constitutional Damage: A Methodology of Assessment and Comparison

Any discussion of constitutional repair must begin with a clear understanding and assessment of 'constitutional damage'. This section offers a clear starting point and methodological guardrails by defining democracy as the object of attack, delineating the conceptual contours of constitutional damage, and justifying the choice of case-studies.

If we begin with Balkin's notion of constitutional diagnosis (what has gone wrong with the constitutional system?), the cross-disciplinary literature on democratic backsliding worldwide, which has reached a certain level of maturity since the mid-2010s, evidently canvasses an expansive suite of ills plaguing constitutional democracies in analyzing the rise of neo-authoritarians in states such as Russia, Turkey or Venezuela, the authoritarian populist turn in Hungary and Poland within the European Union (EU), the advent of Brexit in the UK and Donald Trump's election to the US presidency, and deeply troubling developments in Brazil, India and Indonesia, among others. We find everything from close, single-institution analysis to grand global narratives about the decline, crisis or even looming death of liberalism and democracy; presenting a marked departure from 1990s and 2000s Fukuyamaian talk of the 'end of history', the third wave of democratization, and the inexorable spread of liberal democracy.[13]

Global backsliding has proven to be a particularly rude awakening for comparative constitutional scholars. The rapid spread of liberal democracy in the late twentieth century left us accustomed to analyzing the expansion of liberal-democratic constitutions, bills of rights, judicial power, and the global convergence of constitutional law as a rash of constitution-making took place from the 1970s and accelerated after 1989, transforming our corner of constitutional law into a field of its own—and amplifying our relevance and epistemic power.[14] Entranced by our newfound centrality, it did not seem fanciful to think the future was not only democratic but dominated by a certain model of (often legal-constitutionalist) democratic *Rechtstaat*. With key exceptions, comparative constitutional scholars were therefore initially laggards in reorienting themselves to the challenge of backsliding, partly due to a seeming unwillingness to accept that perceived gold-standard constitutional models were failing. Although far from immune to post-1989 optimism, political scientists had long warned of a broader rot in the democratic world, charting the transnational transition from robust mass democracy to attenuated 'low intensity' democracy since the 1970s; Tormey, for instance, pointed to sharp declines in voter turnout, trust in

[13] See e.g. Alex Hochuli, George Hoare and Philip Cunliffe, *The End of the End of History: Politics in the Twenty-First Century* (Zero Books, 2021).

[14] See Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4(1) *National Taiwan University Law Review* 1.

politicians and parliaments, and membership in political parties, connected to sectoral capture of the political process and limited representative capacity of the political class across long-established democracies.[15] Carothers, in turn, was warning as early as 2002 that the global narratives of democratization were "over-optimistic and over-schematic".[16]

Political theorists rightly observe that longstanding debates on the meanings of democracy have become "freshly unsettled" by the souring of democracy's global advance, opening our eyes to new possibilities.[17] Yet, it remains inescapable that comparative constitutional literature has converged on a core definition of 'liberal constitutional democracy' comprising not only popular control through elections but also a commitment to liberal tenets such as respect for individual autonomy, judicial independence, minority rights, and constraints on government power (often discussed under the rubrics of constitutionalism or the rule of law).[18] This overlaps substantially with political science conceptions, although these tend to more fully delineate the 'democratic' and 'liberal' dimensions of genuinely democratic rule: for instance, Schmitter's conception 'of "'real-existing' democracy" identifies democratic principles (freedom to act collectively, equality for the exercise of citizenship, participation in decision-making, accountability of rulers, and public decision-making by majority vote or acclamation) and liberal principles (freedom from tyrannical rulers, competition between political representatives, rights for the protection of private property, checks and balances between governing institutions, and the rule of law and supremacy of constitutional courts).[19] Given that populism is an endlessly slippery concept and can have both a positive and negative relationship to these core features of democracy (if we compare the likes of the US Republican Party and Spain's Podemos party),[20] this analysis prefers the term 'anti-democrats', which is explained in more detail in Parts III and V.

The above commentary provides merely a backdrop and conceptual parameters for pinning down constitutional damage suited to repair in the terms set out in the introduction, namely: what is the precise damage we are trying to repair? (specificity); what is within our power to repair? (feasibility); what can we do in the short run as opposed to the long run? (temporality); and what do we need to fix first? (priority). These questions help us to avoid the analytical trap of simply tallying all kinds of damage, without making necessary distinctions between constitutional replacement and amendment, the volume of ordinary legislation, institutional capture, procedure and practice, and rhetoric, all of which can cause serious damage to the democratic system, but which are often dissimilar in nature, scale, depth, and susceptibility to legalistic forms of repair.

This analysis therefore draws a broad distinction between two forms of damage: 'constitutional damage' resulting from governmental attacks on core state institutions, which impair meaningful constraints on political power, an adequate diffusion of state power and

[15] See ch.1 'Contours of a 'Crisis'' in Simon Tormey, *The End of Representative Politics* (Wiley & Sons, 2015).
[16] Thomas Carothers, 'End of the Transition Paradigm' (2002) 13(1) *Journal of Democracy* 5.
[17] See Frederic Charles Schaffer and Jean Paul Gagnon, 'Democracies Across Cultures The Hegemonic Concept of Democracy has Dissolved, What Happens Now?' (2023) 10(1) *Democratic Theory* 91.
[18] See e.g. Huq and Ginsburg (n 2) and Scheppele (n 2).
[19] See e.g. Philippe C. Schmitter, 'Food for Thought about the Impact of the COVID-19 Virus Upon the Institutions and Practices of 'Real-Existing' Democracy' COVID-DEM (17 April 2020); and Philippe C. Schmitter, 'Real-Existing' Democracy and Its Discontents: Sources, Conditions, Causes, Symptoms, and Prospects' (2019) 4 *Chinese Political Science Review* 149.
[20] See e.g. Alonso Casanueva Baptista and Raul A. Sanchez Urribarri, 'Why 'populism(s)'?' (2018) 149(1) *Thesis Eleven* 3.

meaningful representation; and broader 'democratic damage', which includes the rise of often ambiguously populist-authoritarian leaders and parties, negative changes in the behavior of political actors, curbs on civil society actors, backlash against hard-won rights to equality, declining public trust in democratic institutions and fellow citizens, the decline of rationality and belief in objectivity, the disruption of a shared epistemic basis for democratic communities, anxieties about deepening anomie, and 'sharp power' attacks by authoritarian regimes on democratic rivals.[21] As discussed below, it is clear that constitutional damage does not occur in a vacuum, and cannot be repaired in a vacuum, and we must heed Uitz's methodological call for lawyers to take "a more comprehensive and context-sensitive approach" than standard doctrinal and institutional methodologies.[22] However, this analysis seeks to adequately distinguish between the types of institutional damage that constitutional lawyers are equipped to address, and wider political, cultural and societal shifts whose remedies lie far beyond the law (albeit raising issues such as legal regulation of disinformation and discrimination), as well as emphasizing that broader reform and resilience-enhancing measures—as well as restoring liberties such as reproductive freedom in Poland and the USA—will be difficult, if not impossible, to achieve without repairing core institutional damage.

A persistent predicament for this expanding literature has been the sheer pace of developments, which complicates efforts to locate and quantify constitutional damage. As Zaiden notes in his landmark analysis of Brazil: "the radicality of what was happening made everything look so surreal that my writing was just not quick enough to keep pace with the downturn that the country was enduring, aggravated by the COVID-19 pandemic."[23] A form of 'constitutional acceleration'[24] affecting all four case-studies analyzed in Part IV means that so much has been happening simultaneously, and in such a compressed time-scale, that the extent of the damage is inevitably ahead of the analyst. It is only where an anti-democratic government has been ousted that there might be some breathing space to fully assess the damage. However, even then, a legacy of key officials and laws remains in place and, in a federal system such as the USA, anti-democratic actors at the state level may continue to degrade the democratic system.[25]

This partly justifies the methodological design of this study, blending theoretical and conceptual analysis with a comparative case-study approach. Comprising two federal and two unitary states, and a mix of common law and civil law systems, the case-studies capture resonances as well as divergences in democratic backsliding, the constitutional damage experienced, and how the legal-constitutional framework, constitutional history, and political context can shape the parameters for repair. They also provide a useful comparison between three states where anti-democratic governments have been defeated at the ballot box (USA,

[21] On constitutional damage see the citations above (n 2). On democratic damage, see e.g. Stephan Haggard and Robert R. Kaufman, *Backsliding: Democratic Regress in the Contemporary World* (Cambridge University Press, 2021); Sophia Rosenfeld, *Democracy and Truth: A Short History* (University of Pennsylvania Press, 2019); and Larry Diamond, *Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition, and American Complacency* (Penguin, 2019).

[22] Uitz (n 2) 300.

[23] Zaiden Benvindo, *The Rule of Law in Brazil* (n 2) vii.

[24] See Raphaël Girard, 'Populism, Executive Power and 'Constitutional Impatience': Courts as Institutional Stabilisers in the United Kingdom' (2022) 8(1) *Constitutional Studies* 35.

[25] See, e.g., Miriam Seifter's work on state-level developments in the USA, e.g. 'Countering the New Election Subversion: The Democracy Principle and the Role of State Courts' (2022) *Wisconsin Law Review* 1337.

Brazil, and Poland) and one where anti-democrats remain in power (Hungary). Thicker analysis of four case-studies departs from the dominant methodologies of contemporary comparative constitutional studies analysis of democratic backsliding and possible remedial action, which tend to base qualitative analysis on large-n or medium-n studies. This produces admirably global comparison but deracinates each example and, in the search for globally applicable theory, can clothe a single system with universality (an 'everywhere democracy') or decontextualize patterns, threats and damage to the extent that theory is not representative of any particular state (a 'nowhere democracy'). As demonstrated in Part IV, the case-study model here aims to better capture significant cross-state variation in constitutional damage as-institutional-damage—the 'war on institutions', in Sadurski's apt description[26]—which includes wide variety in constitutional replacement (solely in Hungary), amendment (Hungary and Brazil), and staticity (Poland and USA) as well as diverse impacts on courts, legislatures, electoral processes, and 'fourth branch' organs (e.g. media regulators). In doing so, it interrogates the Hungarian-style scenario as a dominant paradigm: the case-studies reveal that 'autocratic legalism' is a common feature but with starkly varying intensity, and that 'abusive constitutionalism'—in its narrower sense as the use of formal mechanisms for constitutional change to degrade the democratic system—is far from universal.[27]

An inevitable question arises: can the USA, a longstanding constitutional democracy, be meaningfully compared to much younger post-authoritarian democracies? Certainly, mounting evidence of serious democratic regression has spurred a shift in the conversation from *whether* US democracy is under threat to an acceptance that backsliding, albeit arguably not as severe as states such as Hungary, has undeniably been in train.[28] The expanding literature indicates that backsliding has spurred a step-change in comparative analysis, blurring any perceived bright line between older 'well-functioning' democracies of the Global North (itself a contested category) and younger democracies of the Global South,[29] and replacing assumed categorical alterity with something more akin to a 'continuum of sameness'.[30] This shifts our gaze from labelling challenges as confined to younger democracies to contemplation of the differing configurations and intensities of democratic backsliding and the constitutional damage it produces, while requiring us to remain acutely mindful of eliding the many differences in context, constitutional history, and democratic development. To claim that the USA is comparable to younger democracies along specified axes is not a claim that these states are the same *in general*. An alternative approach is to ask what comparators within the Global North might be selected as suitable comparators: although countries such as Canada, Australia, Ireland, Germany, Costa Rica or Japan clearly

[26] See ch 2 'The War on Institutions' in Sadurksi, *A Pandemic of Populists* (n 2).

[27] See Scheppele (n 2). Dixon and Landau (n 7) 429 broaden Landau's original definition of abusive constitutionalism to encompass "a broader range of democratic constitutional tools and procedures."

[28] Note, for instance, the difference in tone between Cass Sunstein (ed), *Can It Happen Here?: Authoritarianism in America* (Harper Collins, 2018) and Haggard and Kaufman (n 21).

[29] See e.g. Graber, Levinson and Tushnet (n 2); and Tom Gerald Daly and Dinesha Samararatne, 'Decolonising Comparative Constitutional Law (and Democratisation Studies)?' in Tom Gerald Daly and Dinesha Samararatne (eds), *Democratic Consolidation and Constitutional Endurance in Asia and Africa: Comparing Uneven Pathways* (Oxford University Press, forthcoming).

[30] Florian Hoffmann, 'Facing *South*: On the Significance of An/Other Modernity in Comparative Constitutional Law' in Philipp Dann, Michael Riegner, and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press 2020) 55.

face their own democratic challenges, they do not face the same extent of institutional degradation and delegitimization of the courts and electoral processes as the USA.

Positionality, or the scholar as insider or outsider, is also a crucial methodological consideration. From Balkin to Zaiden, the most common scenario is that public law analysis of democratic backsliding and repair is by insiders; based in, or from, a single affected state—or former residents of the state, in the case of Scheppele as a leading expert on Hungary. Zaiden speaks not only of the pace of developments as an analytical challenge, but also partly writing on Brazil's democratic crisis while based in Germany.[31] Despite having extensive networks in all four states, the present author is not from, or embedded in, any of the case-studies. However, there can be methodological virtue in externality and the outsider's perspective: what one might lack in deep granular knowledge of the domestic constitutional, political and social context is balanced by the benefit of distance from highly polarised political and social struggles, from anxiety and nostalgia, and from often unacknowledged standpoints, such as the assumptions of exceptionalism that often hover over analysis of the USA, as discussed below. Yet, at all times, the outsider analyst must remain humble, aware of epistemic and perspectival limits, and vigilant to how polarisation affects domestic debates, necessitating a reaffirmation of foundational principles of robust methodological enquiry, including triangulating evidence and testing claims against the broader literature through cross-field, cross-disciplinary, and cross-domain reading (encompassing non-academic analysis), as well as considering practical means to mitigate these challenges, such as broader circulation of draft texts to a range of embedded experts across both the academic and policy spheres.

Most importantly, any theory of repair must remain acutely attuned to the real-world stakes of constitutional damage and repair for individuals and communities across diverse states in thinking through the pressing and complex challenges arising. There are a suite of luxuries, indulgences and biases that can be ill-afforded, including disciplinary vanity, impracticable or excessively general reform plans, approaching repair as a vehicle for achieving one's own normative preferences (e.g. for political constitutionalism or fuller constitutional reform) if this frustrates immediate repair, or rehashing debates between post-Cold War liberals and their detractors, which may include over-claiming the deficiency or resilience of the 'standard' post-1989 model of liberal democracy. In sum, this task requires a methodological position of self-awareness, humility, and vigilance to blind spots.

II Constitutional Repair as Constitutional Transition

With some methodological ground cleared above, this section argues that constitutional repair is best understood as a distinct paradigm of constitutional transition separate from two existing paradigms: transitions from authoritarianism to democracy; and major constitutional reform in stable democratic contexts.[32] Central to this account is the ambiguity of democratic backsliding, how its tendency to wear a thicker democratic façade can occlude the nature of constitutional damage, and how it often narrows the range of remedial measures to less palatable options.

[31] Zaiden (n 2) vii.

[32] Other paradigms include transition from conflict to peace, which is the subject of an expansive literature.

A. Transition from Authoritarian to Democratic Rule

The first paradigm of constitutional transition, transitions from authoritarian to democratic rule, is commonly understood as lying within the orthodox understanding of constitutional transition, defined by Colón-Ríos as "the period after a constitutional order has been abandoned and a new one is about to emerge." [33] He emphasizes that although the abandonment of a constitutional order is clearest in the case of a revolution or the collapse of a dictatorship, it may also occur in a more piecemeal fashion, such as incremental decolonization or an "orderly" transition from authoritarian to democratic rule. [34] As a somewhat stylized paradigm for the purposes of this analysis, democratic transitions from authoritarianism are reflected in a rich literature whose roots mainly lie in analyzing and theorizing the 'third wave of democratization'. That global shift, transforming liberal democracy from minority political system (and one side of the Cold War divide) to the most common system, enjoying exclusive legitimacy during the 'unipolar' decades of US hegemony after 1989, is commonly viewed as beginning in the 1970s with returns to democratic rule in Portugal and Spain, the ousting of military dictatorships in Greece and Latin America across the 1980s and 1990s (including Brazil in the mid-1980s), and the end of Communism in Central and Eastern Europe (CEE) after 1989—including Poland and Hungary—alongside diverse transitions in East Asia and Africa in the 1980s and 1990s.[35]

While these transitions have followed diverse patterns, they have tended to share three key characteristics. The first is the inability of the existing regime to continue, at least in its current form, and a clear understanding among political forces that the transition is toward a new form of democratic political regime. Among the three 'third wave' democracies in this paper's case-study cohort, this is reflected in the gradual and pacted democratic transition in Brazil from the late 1970s to the mid-1980s, managed throughout by the military regime, and the round-tables in Hungary and Poland bringing both the Communist and democratic political forces to the negotiating table. Second, these transitions have usually produced a democratic constitution to found the new regime, including Brazil's mammoth 1988 Constitution with its 250 articles, Hungary's 1989 Constitution, and Poland's 1997 Constitution.[36] The third feature is that fundamental constitutional rupture in third-wave transitions allowed for institutional innovation to address the perceived inability of authoritarian-era institutions to implement the new democratic constitution, the most paradigmatic and common being the global spread of constitutional courts established as engines of democratization, bypass mechanisms for existing courts, or as an alternative to purging or packing the existing courts in states including Poland and Hungary.[37] Some polities also adopted a new political structure, such as Poland's embrace of semi-presidentialism.

That these transitions took place in a context where constitution-making was becoming increasingly commonplace should not elide the fact that these were all complex, arduous, and ambiguous processes, captured perhaps best not in the language of "constitutional

[33] Joel Colón-Ríos, 'What is a Constitutional Transition?' (2017) 37(1) *National Journal of Constitutional Law* 43.
[34] Colón-Ríos (n 33) 1.
[35] See Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Oxford University Press, 1991) Chapters 1 and 2.
[36] This is not universal: in Argentina and Chile, for instance transition from authoritarianism to democracy was achieved in the 1980s and 1990s without a formal change of constitution.
[37] See ch. 2 in Tom Gerald Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (Cambridge University Press, 2017).

revolution"[38] but in the Spanish term 'ruptiforma', a dialectic between rupture and reform; or 'refolution', a mixture of revolution and reform.[39] In Hungary, a new constitution was achieved under cover of revision: a suite of over 100 amendments to the 1949 Constitution effected the transition from a communist to a liberal-democratic constitutional order, which we tend to call 'the 1989 Constitution'.[40] Poland did not adopt a fully new constitution until 1997; a full eight years after the initial political transition began in earnest. However, a range of measures in the intervening period significantly transformed the Communist-era 1952 Constitution. Amendments agreed at the 1989 Round Table talks, while according effective control of the presidency and army to Communist forces, rendered it a more recognizably liberal-democratic text (e.g. guaranteeing judicial independence), alongside a new electoral law guaranteeing political pluralism, with the "spectre" of Soviet invasion generating a context supporting compromise by both sides to achieve an agreement.[41] In 1991, persistent difficulties in achieving agreement on an entirely new constitutional text led to the adoption of a Constitutional Law. As Brzezinksi notes, this 'small Constitution', produced by an Extraordinary Commission and building on historical precursors in 1919 and 1947, provided not only a new hybrid interim framework for the functioning of democratic political processes under the aegis of the Communist-era Constitution, but also provided targeted solutions to key institutional dilemmas which had emerged during the first two years of post-transition government, such as the fuzzy delineation of executive powers between the president and prime minister.[42] While it is commonly understood that a stream (law) cannot rise higher than its source (the Constitution), in transitional contexts we are traversing a different landscape in which a stream can be the conduit from one source to another.

At times, the political and institutional context precluded the establishment of new institutions. In Brazil, for instance, despite overt rhetoric of rupture, not only did a strong attachment to presidentialism lead to retention of that system (albeit trammeling the president's law-making powers), Supreme Court judges also campaigned successfully against the establishment of an entirely new constitutional court during the constitution-drafting process of 1987-88.[43] In the end, a half-way house solution avoided purging the Supreme Court while reforms recast it as something more akin to a Kelsenian-model constitutional court with wider review powers and accessibility to a diverse range of applicants.[44] By contrast, neighboring Argentina reminds us that political capital is finite: the capital expended on trials of the military leadership after the regime's collapse in 1983 foreclosed the possibility of a new constitution, leaving a purge as the only response to remake a Supreme Court whose legitimacy was deeply damaged by complicity with military rule. Here, rule-of-law rupture to remake an institution in the new democratic image of the state during a democratic transition may be justified, in line with the transitional justice scholar Ruti Teitel's view that a lesser fidelity to ordinarily cardinal precepts such as consistency and predictability in the law can be

[38] See Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press, 2020).
[39] Francesco Biagi, *European Constitutional Courts and Transitions to Democracy* (Cambridge University Press, 2020) 88; and Pap (n 6) 194.
[40] See e.g. Scheppele (n 2) 549.
[41] See ch 2 'Democratic Rebirth and Constitutional Reform (1989–97)' *in* Mark Brzezinski, The Struggle for Constitutionalism in Poland (Palgrave Macmillan, 1998).
[42] Brzezinski (n 41) 93-94.
[43] Meyer (n 2) 82-84.
[44] Loiane Prado Verbicaro, 'Um Estudo Sobre as Condições Facilitadoras da Judicialização da Política no Brasil' (2008) 4 *Revista Direito GV* 389.

tolerated.[45] In the contemporary world, this form of transition would apply to states such as Venezuela in the unlikely event that President Maduro loses the 2024 presidential elections, given that democratic backsliding in that state further degenerated into a recognizable form of dictatorship.[46]

B. Major Constitutional Change in Stable Longstanding Democracies

The second paradigm is a less defined category relating to major constitutional reform in a stable democracy; categorized here as states meeting the definitions of 'liberal constitutional democracy' or 'real-existing' democracy' discussed in Part I for at least 50 years, and which continue to be recognised as functioning liberal-democratic states by democracy assessment organisations.[47] Such states meet Waldron's predicates of a "well-functioning democracy" in that elected and judicial institutions are performing adequately and a sufficient respect for individual and minority rights is shared across the political system, officialdom and the public, providing the basis for good-faith, meaningful and productive deliberation on governance, social, and moral questions.[48] Of course, an expanding literature on 'constitutional endurance' focuses on the optimal balance between constitutional rigidity and flexibility to achieve stable well-functioning democracy by setting down effective rules of the game superior to 'ordinary' politics while avoiding ossification of the constitutional order.[49] The paradigm here is both broader and narrower, encompassing wholesale constitutional replacement, which is rare in this category (e.g. Iceland's failed constitution-making process of 2010-2013) and the more common phenomenon of major alterations to institutions, power structures, constitutional values or conceptions of the state, which can be deemed a form of constitutional transition.

Examples might include: reunification of territories (vanishingly rare; as seen in Germany in 1990); deep changes to state structure or political organization (e.g. devolution in the UK in 1998); pooling sovereignty in a supra-national polity (e.g. Ireland joining the European Economic Community in 1973); measures altering the separation of powers and constraints on state power (e.g. Canada's introduction of a rights charter in 1982 or Costa Rica's establishment of a constitutional court in 1989); or transition from monarchy to republic (e.g. the failed Australian referendum of 1999). This does not always involve formal constitutional amendment: in the Australian context, for instance, Weis observes that constitutional amendment can occur through various sub-constitutional measures, such as ordinary legislation fundamentally transforming how the courts interpret the Constitution or deeply reshaping public or institutional culture.[50] That observation gains added salience where amendment is virtually impossible, in that reforms altering the constitutional system

[45] Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Journal* 2035.

[46] See Maryhen Jiménez, M, 'Contesting Autocracy: Repression and Opposition Coordination in Venezuela' (2023) 71(1) *Political Studies* 47.

[47] The indices relied on are Freedom House, V-Dem (Varieties of Democracy), and International IDEA's Global State of Democracy.

[48] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2005-2006) 115 *Yale L. J.* 1346, 1402.

[49] See Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009).

[50] Lael K. Weis, 'Legislation as a Method of Constitutional Reform: An Alternative to Formal Amendment?' IACL-AIDC Blog (29 March 2018); citing, inter alia, William N. Eskridge Jr. & John A. Ferejohn, 'Super-Statutes' (2001) 50 Duke Law Journal 1215.

senso latu are evidently still possible through landmark legislation (e.g. the US Civil Rights Act 1965) or the continual reinterpretation of the Constitution (e.g. the decades-long hollowing out of the renunciation of war and military capability in Article 9 of Japan's Constitution, which has facilitated significant rearmament[51]). As Colon-Rios observes, constitutional transition is not confined to formal constitutional change, but extends to constitutional change "in the material sense":

> [M]ost accounts … identify the material constitution with the form of government, with the rules that govern the relationship between the state and the citizens, with the basic structure of the state, and so on. Accordingly, they are particularly helpful for the identification of constitutional transitions: a constitutional transition, one may say, occurs whenever the material constitution changes (irrespective of the means through which those changes are achieved).[52]

Two features of this form of transition should be emphasized. First, unlike the first paradigm discussed above, there is no political regime transition. Whether recalibrating legislative power, transforming a unitary state into a 'union state', or rethinking the state's identity as a pacifist polity, the parameters are constitutional democracy, as reflected in, and bounded by, the specific domestic political and constitutional structures and understandings that give it expression. Second, while such changes can be deeply contested and controversial, and often crystallize hard-fought debates about the fundamental character of the polity and the constitutional order, they are characterized by legal continuity and ordinarily achieved in compliance with the procedures laid down in the Constitution or ordinary law.

With our four case-studies in mind, constitutional lawyers have long treated major constitutional change in the USA as lying within this category; Balkin, for instance, views US democratic development as featuring alternating 'cycles' of constitutional decay and constitutional renewal representing transitions between different democratic "constitutional regimes" (understood here as material constitutional settlements), such as the Reagan-era conservative neoliberal consensus, which displaced the "New Deal/Civil Rights" regime in place for decades.[53]

C. Constitutional Repair after Democratic Backsliding

The third paradigm contemplated here, constitutional repair in a state that has suffered serious backsliding, is a separate category distinguishable from the two paradigms just sketched. Unlike the first paradigm, it concerns 'consolidated' states that have achieved functioning liberal democracy, which includes both longstanding and younger democracies. Unlike the second paradigm, as discussed in Part IV, it relates to states where a critical degree of democratic deterioration has taken place that has degraded the core predicates of the democratic system, which has transformed the system into a less recognizably democratic form and necessitates some form of repair, but which has not produced full democratic rupture.

A starting question is whether these contexts of democratic backsliding can themselves be considered constitutional transitions. Proceeding from Colón-Ríos' definition, as the period

[51] Rosalind Dixon and Guy Baldwin, 'Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate' (2019) 67 *American Journal of Comparative Law* 145.
[52] Colón-Ríos (n 33) 45.
[53] Jack M. Balkin, *The Cycles of Constitutional Time* (Oxford University Press, 2020).

following abandonment of a previous constitutional order and the emergence of a novel order, the four case-studies here present significant complexity given that the hallmark of democratic backsliding is a transformation that simultaneously declares and denies itself: anti-democratic projects tend to claim continuity, and even enhancement, of democracy while undermining the core components of democratic rule. Transformation is often justified by exalting the past (e.g. 'make America great again' ambiguously encoding attachment to the era before the 1965 Civil Rights Act or harking back to Hungary as a Christian polity) or contesting the past (e.g. the PiS government's insistence that the 'false' liberal-democratic state constructed in Poland after 1989 needs to be replaced by a conservative Christian democracy[54]).

Here, one must guard against a range of analytical pitfalls. A clear analytical trap has been to start analysis from the perspective of the possible destination: for instance, asking "are we heading into fascism?" or "is this authoritarianism?" does little to clarify the precise nature of constitutional damage, and can even underplay the gravity of the constitutional damage wrought by an anti-democratic government by establishing an extreme comparator.[55] In addition, while all anti-democratic governments considered in the case-studies below share key features of authoritarian or anti-pluralist populism—such as anti-elite narratives, nativism, exclusionary depictions of 'the people', and an aversion to mediating and constraining institutions—they differ in many respects and a focus on whether they count as populist or not can divert our attention to how they present themselves rather than what they actually achieve in office. Similarly, 'backsliding' is a misnomer insofar as we see deep-seated strains of political thought and practice reappearing in all four case-studies—exclusionary minoritarian rule in the USA, hegemonic party-led statism in Hungary and Poland, and military-linked authoritarianism in Brazil—but no straightforward slide back into a prior political order. Rather, the old is enmeshed with the new, producing a hybrid, chimerical, and rapidly changing political regime.

Hungary is the most obvious candidate for a comprehensive constitutional transition to a less democratic order. It is the only case-study where a political narrative of shifting from liberal democracy to an 'illiberal democracy' based on hegemonic executive power and loyalty to the nation above fundamental rights has provided an ideological veneer to formal constitutional rupture through constitutional replacement with the adoption of the 2011 Constitution under the sitting FIDESZ government. In 2019, a decade after FIDESZ entered government, Hungary was recognised in at least some democracy indices as a 'hybrid regime', blending elements of authoritarian rule (e.g. concentration of power in the ruling party) and democratic rule (e.g. meaningful if highly imperfect elections), rather than an overtly authoritarian regime.[56] However, despite FIDESZ's systematic use of constitutional and legislative measures to transform a liberal-democratic system into a far less democratic regime, the dominant narrative has remained one of political-regime continuity. In particular the 2011 Constitution, on its face, remains recognizably liberal-democratic: as discussed in

[54] It has been observed that the ruling PiS party has a weak "programmatic" identity (i.e. policy platform) but a clear "political identity" with a central narrative of state capture by Communists and a return to traditional values. See Kate Korycki, 'Memory, Party Politics, and Post-Transition Space: The Case of Poland' (2017) 31(3) *East European Politics, Society and Culture* 518, 527.

[55] See Rose Parfitt, 'The Far-Right, the Third World and the Wrong Question' (2020) *Third World Approaches to International Law Review* Reflections #6/2019.

[56] See András Bozóki and Dániel Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union' (2018) 25 *Democratization* 7, 1173

Part IV, this has generated debates about whether repair requires replacement of a tainted constitution, or whether it is best to try and work with the text in the project to restore baseline democratic functioning.

Political rhetoric in both the USA and Poland suggesting a transformational constitutional-political project might, at first blush, appear undermined by formal constitutional continuity. However, this belies structural changes and fundamental transformation of the material constitution through ordinary law. In Poland, what Sadurski terms "anti-constitutional populist backsliding"[57] has been achieved through a flurry of legislation, facilitated by the capture of the Constitutional Tribunal, subordinating all political power to the PiS party; or more specifically, Jarosław Kaczyński as the holder of de facto power in the new political system, despite holding neither prime ministerial nor presidential office. This has produced a more completely undemocratic order compared to the USA. Despite growing Republican Party adherence to unitary executive theory during the Trump administration as the intellectual basis for a potentially fundamental material-constitutional shift toward relatively unfettered presidential plenary powers,[58] a significant degree of separation of powers and rights protection remains despite the intensifying illegitimacy and deficiencies of the Supreme Court, Congress and electoral system. Brazil's former President Bolsonaro, in power from 2019-2022, presented arguably the most overt "authoritarian project", lauding the military dictatorship of 1964-1985 and rejecting the post-1988 social-democratic constitutional order.[59] Indeed, Tanscheit argues that Bolsonarism's defining creed is primarily authoritarian, populist only insofar as it expresses a virulent 'anti-politics'—including extreme antipathy to the Worker's Party—and commitment to hard neoliberalism, the latter connecting it to strains of Trumpian politics but separating it from the welfare statism of PiS.[60] However, his ineffective administration, lack of any fully-fledged political ideology, and the continuing independence of the courts and Congress have left the 1988 Constitution largely intact.

As a broad division, then, and bearing in mind that this is a continuum rather than a system of hard categories, one might say that Hungary and Poland feature clear (albeit contested) constitutional transition to a different form of less democratic constitutional order, whereas Brazil and the USA present still-recognizable democratic orders that have suffered serious degradation. This, in turn, reflects the fact that the latter have suffered only one term of federal anti-democratic government while anti-democrats in Hungary and Poland have been in power from 2010-present and 2015-2023 respectively, winning multiple elections. Nevertheless, it can be argued that all four contexts at least raise the possible legitimacy of transitional techniques departing from rule-of-law norms to re-establish a functioning democratic system. Yet, as discussed in Part IV, in at least three of the case-studies (USA, Hungary, and Poland) we face the quandary of repair being hampered by an insistence on rule-of-law norms appropriate to a stable and well-functioning democracy: a yearning for

[57] Sadurski, *Poland's Constitutional Breakdown* (n 2) ch. 1.

[58] See Jeffrey Crouch, Mark J. Rozell and Mitchel A. Sollenberger, *The Unitary Executive Theory: A Danger to Constitutional Government* (University of Kansas Press, 2020).

[59] See Alessandro Pizzani, 'The Bolsonaro Government as an Authoritarian Project' in Maria Borges and Delamar Dutra (eds), *Justice and Democracy in Brazil* (Cambridge Scholars Publishing, 2023); and Tom Gerald Daly, 'Understanding Multi-Directional Democratic Decay: Lessons from the Rise of Bolsonaro in Brazil' (2020) 14(2) *Law and Ethics on Human Rights* 199.

[60] Talita Tanscheit, 'Jair Bolsonaro and the defining attributes of the populist radical right in Brazil' (2023) 22(3) *Journal of Language and Politics* 324.

normalcy and a functioning rule of law may itself preclude necessary measures by which 'normal' baseline democratic institutional functioning can be restored.

Some additional distinctions assist in further distinguishing constitutional damage across the case-studies. Although the literature commonly refers to an "authoritarian playbook", it also suggests a distinction between disciplined and undisciplined anti-democrats. The now-paradigmatic example of disciplined playbook-style anti-democratic government is Hungary since the FIDESZ government entered power in 2010, encompassing diverse measures to capture the democratic system over time, including wholesale constitutional replacement, court-packing (disguised as reform), restrictive laws on NGO funding, and media buyouts of independent media by government cronies.[61] Poland has followed a similar trajectory, although, lacking the two-thirds majority to amend the Constitution or adopt a new text since winning power in 2015, the government has achieved fundamental constitutional change through vigorous "statutory anti-constitutionalism"[62] or a "gradual constitutional *coup d'état*…through legislative sleight of hand".[63] By contrast, if we focus solely on the federal government, the Trump and Bolsonaro administrations in the USA and Brazil, respectively, appeared less disciplined and systematic in their attacks, which has limited their institutional impact, as discussed below. However, in the USA ongoing constitutional damage at the hands of disciplined and systematic anti-democrats at the state level includes increasingly prevalent gerrymandering and voter suppression achieved through ordinary legislation, which has not been policed by the federal Supreme Court.[64]

In addition, the overarching democratic context and history clearly matters: the USA as the only longstanding democracy among the four case-studies (the rest being 'third wave' democracies) potentially provides more sites and resources for constitutional repair. However, it also raises what the historian David Runciman calls the 'confidence trap': the overcoming of prior challenges, such as World War II or the McCarthy era, may foster the dangerous conviction that the democratic system can muddle through *any* crisis, which is reflected to some extent in frameworks such as Balkin's cycles, discussed above.[65] This can entail, to a far greater extent than a young democracy, a dangerous teleological perception of of 'natural' oscillation or a 'natural' state of democratic normalcy, to which a backsliding episode is merely an aberration, and which will somehow re-establish itself once an anti-democratic president is ousted. Backsliding in the USA takes on a different cast when viewed in its longer historical context of deeply exclusionary and minoritarian government including state-level 'authoritarian enclaves' or 'subnational authoritarianism',[66] with the Civil Rights Act 1965 as a marker of material-constitution transition to 'true' liberal democracy[67]

[61] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

[62] Maciej Bernatt & Michał Ziółkowski, 'Statutory Anti-Constitutionalism' (2019) 28 *Washington International Law Journal* 487.

[63] Tomasz Tadeusz Koncewicz, 'The "emergency constitutional review" and Polish constitutional crisis. Of constitutional self-defense and judicial empowerment' (2016) 2(1) *Polish Law Review* 73, 74.

[64] See Seifter (n 25).

[65] David Runciman, *The Confidence Trap: A History of Democracy in Crisis from World War I* (Princeton University Press, 2015).

[66] See e.g. Robert Mickey, *Paths Out of Dixie: The Democratization of Authoritarian Enclaves in America's Deep South, 1944-1972* (Princeton University Press, 2015).

[67] See e.g. Alfred Stepan, 'India, Sri Lanka, and the Majoritarian Danger' (2015) 26(1) *Journal of Democracy* 128, 128–129.

increasingly rolled back through aggressive gerrymandering and voter suppression measures. Combined with recent electoral violence, US democratic backsliding far exceeds mere sub-optimal democratic performance. Younger democracies, with a starker experience of full authoritarianism or totalitarianism, tend not to suffer from an equivalent level of complacency.

A third, crucial, distinction, between the backsliding-repair paradigm and the two outlined above is that, unlike the first paradigm, it concerns contexts in which anti-democratic forces have not exhausted themselves, decided to surrender power, been forced to at least share power, or collapsed. Unlike the second paradigm, partisan contestation is no longer framed by a context in which democracy is "the only game in town".[68] In the USA, at the time of writing a majority of polls for the 2024 presidential election show former President Trump at level pegging with President Biden or beating him by a slim or large margin, although attempts to bar him from contestation include pending court cases invoking the Fourteenth Amendment bar on insurrectionists holding public office.[69] That raises the very real threat of the radically transformed anti-democratic Republican Party, if in power for a second Trumpist term (even without Trump himself), making fuller use of the constitutional framework (including the Supreme Court and Electoral College, among other features) to further degrade the democratic system and even install minority rule.[70] In Brazil Bolsonaro is arguably a spent political force but 'Bolsonarismo' as an authoritarian or even "neo-fascist" political project is not.[71] In Poland, at the time of writing, three opposition parties have just formed a coalition government having won a combined vote of 53.7% in the October 2023 parliamentary elections. However, the ousted Law and Justice party (*Prawo i Sprawiedliwość*; PiS in the Polish acronym) remains a potent force on 35% of the vote and PiS-affiliated President Duda, in place until 2025, has done everything in his power to delay and deny the formation of an opposition government, and retains veto powers over major legislation.[72] In Hungary, anti-democrats remain in power and, even if ousted, will likely remain strong contenders in the political arena.

Questions hovering over these political forces, compared to Poland's Communist Party or Brazil's military dictatorship in 'third wave' transitions, include the place of rationality in their political calculations and whether they are only capable of operating on a zero-sum, 'scorched earth' approach to partisan contestation, which would mean that, unlike the political forces involved in third-wave transitions or prior transitions in the USA, they cannot conceive of at least minimal constitutional cooperation. Yet, on the positive side, anti-democrats' maintenance of a thicker democratic façade in backsliding contexts, including fuller protection of associative and expressive rights, provides useful democratic resources for repair.

[68] Juan Linz, 'Transitions to Democracy' (1990) 13 *The Washington Quarterly* 143, 158.

[69] See 538 Project, 'Latest Polls' ABC News (27 October 2023): https://projects.fivethirtyeight.com/polls/president-general/2024/national/; and Nicholas Riccardi, 'Lawyers argue whether the Constitution's 'insurrection' clause blocks Trump from the 2024 ballot' Associated Press (31 October 2023).

[70] See Steven Levitsky and Daniel Ziblatt, *Tyranny of the Minority: Why American Democracy Reached the Breaking Point* (Crown, 2023).

[71] Schargal uses the term "nazifascista" (Nazi-fascist): Sergio Schargel, 'O que resta do Bolsonarismo' (2023) 1(1) *Orbis - Boletim Trimestral do LEPEB/UFF* 5, 5.

[72] Jon Henley, 'Polish president delays appointing new government' The Guardian (27 October 2023).

III Visualizing Repair: Restoration, Upcycling, or *Kintsugi*?

This section further theorizes constitutional repair by critically analysing four concepts—reparative, aversive and redemptive constitutionalism, and restoration constitution-making—and considering visual motifs that assist in appreciating repair's prismatic nature.

As indicated above, Dixon and Landau's emerging theory of 'restorative constitutionalism' offers that measures to degrade the democratic system, including constitutional replacement and amendment, legislation, executive policies and judicial decision-making, can be reversed.[73] However, their definition of this challenge, as "a project that attempts to return to a prior constitutional status quo, or, in other words, that seeks to reestablish some constitutional past" is arguably analytically limited. As the case-studies below demonstrate, it is often difficult, if not impossible, to frame reparative action as straightforward restoration or a return to any *status quo ante*: we might call this, in shorthand, the Former Democratic Dispensation (or 'former dispensation'), which in rare cases might be a previous text and its penumbrae of jurisprudence and constitutional understandings (e.g. in Hungary) but in most cases will be a previous iteration of the material constitution operating under the same constitutional text (e.g. USA, Brazil, Poland). Certainly, constitutional repair is backward-looking in the sense that it employs a past form of the constitutional order as a normative benchmark and identifies key points of damage. However, this approach presents two key pitfalls. First, regarding the longer time-horizons of a focus on democratic resilience, it may overlook the weaknesses in the former dispensation that led to the process of significant democratic backsliding. Second, and more relevant to the shorter time-horizons of constitutional repair, it may well be impossible to recreate the former dispensation: in the US context, for instance, is it truly possible to recreate the prior (albeit deeply contested) legitimacy and authority of the Supreme Court since its legitimacy collapse in the period 2017-2022?

In this sense, constitutional repair might be better viewed as functionalist rather than formalist: whereas a formal institutionalist approach may seek to restore the system-as-it-was or institution-as-it-was, a functionalist approach will focus on restoring the core predicates of a functioning democratic order, including less politicized and partisan courts, by whatever means are available. It is notable, in this connection, that recent political science frameworks of "democratic repair" focus not on retrieving the past but on remaking the democratic system. For instance, Hendriks, Ercan and Boswell, arguing for "democratic mending" to remedy the fragmented and polarized public sphere, representative relationships, and policy-making process in the USA set their sights on forging new connective sites and processes, including exploring the potential of deliberative mechanisms.[74] Again, this theory of constitutional repair, while mindful of these evolving discussions and wider context, focuses more squarely on the core institutions of state. What connects it to discussions of democratic repair is a recognition that is not enough to merely recreate old systems and their attendant weaknesses. In this sense, a form of 'aversive constitutionalism' rests at the core of constitutional repair: the reparative constitutional project should be

[73] Dixon and Landau (n 7).

[74] See ch.1 'Repairing Democracy's Disconnects' in Carolyn M. Hendriks, Selen A. Ercan and John Boswell, *Mending Democracy: Democratic Repair in Disconnected Times* (Oxford University Press, 2020).

motivated by a strong disdain not only for the contemporary constitutional dispensation, but also a certain aversion to the shortfalls of the Former Democratic Dispensation.[75] While Dixon and Landau's conceptualization captures the first aversive dimension, it does not capture the second.

Other affective dimensions of repair also require consideration. Partlett's concept of "restoration constitution-making" presents the opposite end of the spectrum to aversive constitutionalism, referring to the partial or full restoration of a preexisting constitutional order.[76] This phenomenon was seen in the spate of constitution-making across the post-Soviet world, for instance, in which constitutions from the pre-Soviet world were resurrected after 1989 for three key reasons: they presented a form of 'short-cut' to a new democratic constitutional system; they held significant symbolic power as markers of a 'normal European' state; and, recasting the Soviet era as an aberration, they assisted in international recognition of newly independent states by emphasizing their previous independence. Here, the task is evidently different. There is no clear rupture in democratic governance, or (usually) in constitutional continuity. Yet, there is an intervening aberration, presented by the period of significant and documented democratic backsliding. While the dynamics are different, what restoration constitution-making shows us is that the normative pull of the past is strong, and that for states seeking to re-enter what is viewed as constitutional normalcy and rebuild international legitimacy, the urge to recreate a simulacrum of the Former Democratic Dispensation may be difficult to resist, even if it comes with significant functional costs and, as mentioned above, may deter those charged with reform from exploring measures disruptive of rule-of-law norms even where these present the clearest route toward sustainable repair.

Perhaps of most relevance is Kapczynski's concept of the "redemptive constitution",[77] revisiting Benjamin's concept of redemptive history to argue that much of constitutional theory (or at least US constitutional theory) can be characterized as either historicist or progressivist. The former is problematic in that its central claim that an authentic history can be known with certainty, which denies the agency and role of the theorist in interpreting constitutional history from the specific vantage point of the present, is untenable. For the present analysis, this matters because an approach to constitutional repair may all too easily be founded on the presentation of a somewhat certain and uncontested recent constitutional past. We must remain mindful of Baldwin's warning: "An invented past can never be used. It cracks and crumbles under the pressures of life like clay in a season of drought."[78] This is not to deny facticity, or the evidence that the former dispensation operated differently to the present constitutional dispensation shaped by a period of demonstrable democratic backsliding. Rather, it is to acknowledge that any approach to repair will inevitably interpret the former dispensation with the knowledge of backsliding, with a sense of what valuable dimensions of that dispensation have been lost or impaired in the eyes of the analyst, and with a clear eye to the future as well as the past. We are dealing not simply with the Former

[75] See Tarunabh Khaitan, 'Aversive Constitutionalism' in Kate O'Regan, Sujit Choudhry and Carlos Bernal (eds), *Elgar Research Handbook on Constitutional Interpretation* (Edward Elgar Publishing, 2023 forthcoming).

[76] William Partlett, 'Restoration Constitution-Making' (2015) 9(4) *Vienna Journal on International Constitutional Law* 514.

[77] Amy Kapczynski, 'Historicism, Progress, and the Redemptive Constitution' (2005) 26(3) *Cardozo Law Review* 1041.

[78] James Baldwin, *The Fire Next Time* (Turtleback, 1963) 89-90.

Democratic Dispensation as a set of aggregated facts, but as setting out the parameters for baseline acceptable democratic-constitutional functioning. Kapczynski also warns us against the strong lure of historical progressivism in constitutional theory, which tends to view continual improvement as the 'natural' and normal direction of travel rather than the product of continual struggle. In its simplest form, the lesson of redemptive constitutional theory is that we cannot approach constitutional repair as simply remembering and remaking the Former Democratic Dispensation. Rather, it inevitably involves revisiting, reframing, reimagining and repurposing the former dispensation. As with the repair of individual trauma, there is no going back: the only option is to move forward, encumbered, but also informed, by the experience of backsliding.

This discussion should adequately underscore that constitutional repair cannot be approached as a linear process: one cannot visualize it as akin to setting a broken leg. Perhaps a more accurate motif is 'constitutional upcycling', referring to the creative reuse of discarded objects or material to create an artefact of higher quality or value than the original. Limitations of that motif in the context of constitutional repair include that the Former Democratic Dispensation is not merely discarded: in the USA or Poland, the formal constitution remains in place, but the material constitution—the way power is authorized, organized and constrained—has been radically altered through a range of measures (e.g. electoral laws, judicial appointments, or institutional transformation). That holds true also for Hungary, where despite the adoption of an entirely new formal constitution, there is very significant continuity between the two texts and it is again mainly measures taken at the sub-constitutional level, and in the political sphere, that have produced a radical shift in the material constitution. Yet, it is a helpful metaphor to the extent that it captures the reuse of material already in place. In all four case-studies, while it may be abstractly attractive to sweep away the troubled past and start anew, the adoption of an entirely new constitution is not merely legally or politically difficult, or even impossible; it is also fraught with risk, as discussed in the US, Hungarian and Brazilian contexts below. As such, it could entail a form of analytical displacement activity, seeking to find refuge in the new and to wish away the difficult, slower, piecemeal or even tortuous nature of the reparative project.

Returning to the metaphor introduced at the start of this paper, the traditional Japanese art form of *kintsugi* provides a particularly valuable motif. Entailing the repair of broken or cracked ceramics with precious metals, leaving visible seams where the pieces have been reconnected and rendering the original object even more valuable, this not only reflects that one cannot simply replace the 'pot' (i.e. the constitution). It also usefully reflects what should be central to any project of constitutional repair: avoiding the temptation to subsume repair within a progressivist narrative of enhancing resilience and instead recognizing damage as part of the constitutional story, facing it for what it is, embracing creativity, and placing the damage-repair relationship centre-stage.

Where *kintsugi* finds its limitations as a visual motif is the fact that constitutional repair is often not a beautiful process; it can involve rule-of-law violations and acutely difficult legitimacy questions. Whereas full constitution-making tends toward the grand, the architectural, the aesthetic, the symbolic and the consensual dimensions of fundamental constitutional change—albeit evidently amidst inevitable horse-trading and compromise—repair skews more clearly toward the immediate, the functional, and the prosaic; seeking to achieve the elevated transformation of constitutional politics within the more confrontational modes of ordinary politics. That is not to say that it is grubby or lacking in vision, but rather, a necessary recognition that it is inescapably an exercise even more fully hemmed in by

practical and contextual constraints. Its beauty, perhaps, lies in its determination to restore baseline democratic functioning in highly challenging circumstances.

IV Case-Studies: Repair in the Real World

This section explores the theoretical, conceptual and practical complexities of constitutional repair in the real world through more detailed exploration of four case-studies: the USA, Brazil, Poland and Hungary, each illuminating the fact that repair is rarely straightforward, that different patterns of damage require different forms of repair, and that constitutional frameworks, history and traditions shape the parameters of repair. Two issues loom large in the case-studies: the legitimacy of rule-of-law rupture to repair the constitutional order; and the bias trap of focusing unduly on formal constitutional reform.

A. USA: Is Court-Packing Unavoidable?

As indicated in Part I, since the mid-2010s we have witnessed a shift in the conversation from *whether* US democracy is under threat to an increasing acceptance that serious backsliding is in train, albeit not as severe as states such as Hungary or Poland. The USA is certainly not alone among long-established democracies in suffering a dysfunctional legislature, starkly changing political party system, the advent of hyperpolarization, the decline of unwritten norms and ruse of "constitutional hardball"[79]— practices that are technically constitutional but violate existing constitutional understandings—and the emergence of not only post-truth but post-rational politics. However, it is one of the few such democracies that has experienced a genuinely anti-democratic leader in power, a collapse in the legitimacy of its apex court, deeply degraded electoral processes, and serious electoral violence. Taking Balkin's constitutional diagnosis as a starting point, one encounters an eclectic range of assessments as to what has gone wrong with the constitutional system: Mettler and Lieberman identify four recurring threats in US history that have combined in the present era: political polarization, racism and nativism, economic inequality, and excessive executive power. Balkin and Levinson's debates demonstrate diverging views on the extent of the democratic crisis and, by extension, the scale of reform required, but they tend to agree that political structures are insufficiently responsive to public opinion. Müller suggests a reform package of court expansion and stronger protections for voting rights, abolishing the filibuster to render the Senate more representative, and granting statehood to Puerto Rico and Washington, DC. [80]

We can tread a clearer path through this terrain by contemplating the four main factors central to contemplating repair. First is specificity: what is the precise damage we are trying to repair? As discussed at length above, the focus in this framework is on the damage to core state institutions caused by a period of democratic backsliding, including a functioning separation of powers and a well-functioning electoral system. From this narrower perspective, two areas of constitutional damage come into sharp focus: the judiciary and the electoral system. The second factor is feasibility: what is within our power to repair? Here, even if we confine ourselves to repairing the electoral process, it

[79] Mark Tushnet, 'Constitutional Hardball' (2004) 37 *John Marshall Law Review* 523.
[80] See Balkin and Levinson (n 2); Huq and Ginsburg (n 2); Suzanne Mettler and Robert C. Lieberman, *Four Threats: The Recurring Crises of American Democracy* (St. Martin's Publishing Group, 2020); and J-W Müller, 'Democrats Must Finally Play Hardball' Project Syndicate (25 September 2020).

is crucial that the Supreme Court has failed to address gerrymandering for decades, leaving states such as Wisconsin under Republican "one-party dominance", has undermined key portions of the Voting Rights Act, including removing federal oversight of electoral rule-making in states with a particularly poor record on racial discrimination, such as Alabama and South Carolina, and has facilitated extreme distortion of the electoral arena through its *Citizens United* decision permitting unlimited political donations by corporations.[81] As a result, the questions as to temporality (what can we do in the short run as opposed to the long run?) and priority (what do we need to fix first?) suggest that even minimal repair is impossible without addressing the Supreme Court itself.

It is this, more than anything, that explains why the court expansion debate has been so central to academic discussions of repair in the USA. Proponents of democracy-enhancing court-packing can be categorized across three main strands: retaliatory arguments that claim the Supreme Court had previously been packed through the 'constitutional hardball' tactic of violating longstanding judicial appointment norms, which justifies equally extreme measures to 'un-pack' or 'rebalance'' the Court ("fighting fire with fire" as Müller puts it[82]); normalization arguments emphasizing the prevalence of court-packing in US constitutional history to diminish the value of the anti-court-packing norm in place since the 1930s and open a space for its employment;[83] and constitutional design arguments, arguing that 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.[84] Others counsel caution: Braver, for instance, emphasizes that past packing experiences before the Civil War occurred in a very different historical and institutional context and that contemporary packing raises a clear risk of retaliation.[85]

Yet, for all this debate, court expansion has been a non-starter politically. Despite running on a campaign platform to restore US democracy,[86] President Biden appears to view it as an unnecessarily extreme measure.[87] This is a clear example of how the question of feasibility will depend on the type of measures a democratic government is willing to contemplate and how adherence to standard (as opposed to transitional) rule-of-law norms can straitjacket reform. This traps us in a binary assessment: is the measure disruptive of rule-of-law norms (and therefore unacceptable) or compatible with such norms (and therefore acceptable)? It is more productive to examine whether such a

[81] See e.g. Janine A. Parry , Andrew J. Dowdle, Abigail B. Long and Jessica R. Kloss, 'The Rule, Not the Exception: One-Party Monopolies in the American States' (2022) 22(2) State Politics & Policy Quarterly 226.

[82] Jan-Werner Müller, 'Democrats Must Finally Play Hardball' Project Syndicate (25 September 2020). See also Thomas Keck, 'Court Packing and Democratic Erosion' in S Mettler, R Lieberman & K Roberts (eds), *Democratic Resilience: Can the United States Withstand Rising Polarization?* (CUP, 2022).

[83] Aaron Belkin, 'Court Expansion and the Restoration of Democracy: The Case for Constitutional Hardball' (2019) 1 *Pepperdine Law Review* 19.

[84] Rivka Weill, 'Court Packing as an Antidote' (2022) 42(7) *Cardozo Law Review* 2706.

[85] J Braver, 'Court-Packing: An American Tradition?' (2020) 61(8) *Boston College Law Review* 2747

[86] A central plank of the Biden campaign was 'Restoring and Strengthening Our Democracy': *2020 Democratic Party Platform* 55-60.

[87] See e.g. Barbara Sprunt, 'Biden Says He's 'Not A Fan' Of Expanding The Supreme Court' NPR (13 October 2020); and Diana Glebova, 'Biden Remains Opposed to Court-Packing Despite Roe Reversal, White House Confirms' National Review (27 June 2022).

measure can be justified in the circumstances, due to the context and exigencies of repair. The present author has offered a five-dimensional framework for assessing legitimacy—encompassing democratic reform context, options, articulated purpose, process, and repetition risk—to argue that extensive constitutional damage can justify placing USA within the constitutional repair paradigm, that this recalibrates how we approach rule-of-law precepts, and that court expansion may be the only real option to depoliticize the Supreme Court given that other options such as eighteen-year term-limits would take much longer to take effect. [88] I suggest that the exceptionality of court expansion might be marked not only rhetorically, but also through processual innovation, including possibly involving citizens more directly to address the minimal possibility of elite cooperation, to reflect that some 40 per cent of the electorate are unaffiliated to either party, and to possibly mitigate risks of repeated packing. However, I also recognize that a certain level of strategic subterfuge or unilateral action might be necessary if the political circumstances and urgency of repair leave no other option. [89]

On the question of whether the USA can be considered to be a transitional backsliding-repair context, while scholars such as Müller, Keck and Belkin expressly frame packing in terms of democratic restoration, others resist such framing: Tushnet speaks of "ambitious reform agendas" rather than repair, Braver emphasizes continuity, calling the US Constitution "the longest-lasting liberal democratic constitution in effect today", [90] while Balkin suggests these are simply the birth pains of a transition to a new political regime not unlike the periods 1928-1933 or 1978-1984. [91] Looking at the evidence and intensity of extraordinary democratic threats, this brings to mind the 'confidence trap' briefly canvassed in Part I. Of course, even proponents of packing can fall into the trap of constitutional nostalgia discussed in Part II, focused on "rebalancing" the Supreme Court by recreating the perceived political balance on the Court before the Trump administration altered its composition rather than on "depoliticizing" the Court to produce an impartial and independent institution, in which case forming benches by lot, or a combination of both court expansion and sortition, may be more effective. [92] It is difficult to understand how attempting to recreate the institution-as-it-was, and its attendant weaknesses, would achieve a sustainable form of repair that is worth the cost of violating the acutely important norm against court-packing.

Overall, approaching the US debates as an outsider can be a disorienting experience: one encounters a multi-stranded debate as to what has gone wrong with the constitutional system, which often involves the re-enactment of longstanding debates and rivalries on constitutional governance, not least longstanding debates on legal constitutionalism versus political constitutionalism. There is also a palpable air of unreality surrounding grander reform (as opposed to reparative) projects when the threats are so immediate: for instance, it is hard to see how LaRue's (otherwise entirely commendable) proposal for a major constitutional amendment package enshrining a 'Bill of Structures' including an

[88] Tom Gerald Daly, ''Good' Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay' (2022) 23(8) *German Law Journal* 1071.
[89] Daly (n 88) 1102.
[90] Joshua Braver, 'Court-Packing and Democratic Context' IACL Blog (31 March 2022).
[91] See Balkin, *The Cycles of Constitutional Time* (n 53).
[92] See Ilya Somin, '"Court Balancing" is Just Court-Packing by Another Name' Reason (7 July 2018), <https://reason.com/volokh/2018/07/31/court-balancing-is-just-court-packing-by>.

obligation as well as a right to vote, replacement of the Electoral College by a national popular vote, and congressional term-limits can be achieved in the contemporary USA.[93] Perhaps most importantly, as a meta-theme that also runs through the case-studies of Brazil and Hungary below, any attempt to organize a constitutional convention in the current climate is fraught with the risk of further damaging the democratic system, which obviates what might seem like a superficially attractive measure to cut the Gordian knot. As Huq and Ginsburg noted in 2019:

> a constitutional convention is too risky a strategy for an established democracy such as the United States, *especially* if it is facing a clear and present risk of erosion through partisan degradation and charismatic populism. There would, most importantly, be no way to insulate against the risk that a convention would be captured by antidemocratic forces.[94]

Huq and Ginsburg's argument that a focus on sub-constitutional repair is a more productive line of enquiry is compelling. However, arguments that the Supreme Court could take issues such as gerrymandering more seriously inevitably bring us back to the challenge of fixing the Court.[95] In this sense, recent arguments by scholars such as Sethi on tweaking judicial appointments are worth considering, although his thoughtful proposals for sub-constitutional reforms to ensure that consensus candidates are generally nominated and appointed to the Supreme Court, including the establishment of a Federal Office of Federal Judicial Appointments (OFJA), would not produce immediate change and therefore may not meet the time-sensitive exigencies of immediate repair —especially given the very real threat of another Trump or Trumpist presidency.[96]

B. Brazil: Does Repair Require Constitutional Replacement?

Although Brazil presents some superficial similarities to the USA, including a federal system suffering a single-term anti-democratic presidency hostile to constraints on executive power, it is a contrasting scenario in which differing institutional responses and greater constitutional flexibility have produced contrasting outcomes, and where there is a greater possibility of repair compliant with rule-of-law norms.

It is fair to say that Bolsonaro's time in office from 2019-2022 presented the gravest threat yet to Brazil's young democracy since the transition from military dictatorship in the mid-1980s, catalyzing and deepening what Salgado and Gabardo term "rule of law erosion".[97] However, his avowed authoritarianism was hindered to some extent by the relatively undisciplined nature of his administration and his greater focus on rhetorical attacks than institutional and legal change.

[93] Rick LaRue, 'We Love the Bill of Rights. Can We Like a Bill of Structures?' (2022) 21(4) *Election Law Journal: Rules, Politics, and Policy* 308.
[94] Huq and Ginsburg (n 2) 206.
[95] Huq and Ginsburg (n 2) 210.
[96] Amal Sethi, 'Sub-constitutionally repairing the United States Supreme Court' *Common Law World Review* (published online: 5 October 2023).
[97] Eneida Desiree Salgado and Emerson Gabardo, 'The Role of the Judicial Branch in Brazilian Rule of Law Erosion' (2021) 8(3) *Revista de Investigações Constitucionais* 731.

Despite his pursuance of active destruction of constitutional democracy,[98] proposals to pack the 11-member Supreme Court with 10 additional justices to achieve 'impartiality', tabling (unsuccessful) proposals to remove Supreme Court judges by lowering the retirement age, coordinating campaigns against state institutions through the government's social media 'hate cabinet', inciting protests calling for both the Court and Congress to be shuttered (even leading protesters on horseback and flying above them in a military helicopter), subordination or diminution of other independent accountability agencies, interference with the federal police, and attempts to undermine critical independent media (e.g. reducing their funding), Bolsonaro generally did not manage to write this invective into law.[99]

Key institutions such as Congress, state governors, and the independent media continued to function and act as checks on the executive.[100] For example, during the Covid-19 pandemic, which hit Brazil particularly hard, Congress managed to overturn President Bolsonaro's veto of mask mandates in public, reinforcing the autonomy of states and municipalities.[101] Similarly, although the judiciary's post-1988 lack of accountability, self-dealing and corruption is perceived as a specific locus of democratic decay separate to those in the elected organs, the courts' insulation from political intervention—in stark contrast to the darkest days of the military dictatorship—means they have retained significant capacity to act. For instance, Bolsonaro's attempts to expand his legislative powers during the onset of the Covid-19 pandemic through suspension of the constitutional requirements governing presidential law-making powers were blocked by the Supreme Court.[102] As Zaiden offered in 2021:

> The judiciary has functioned as a shield against possible attacks on [the democratic system's] 'equilibrium' despite its own fragilities and increasing risks of takeover by the executive, especially in the circumstance of President Bolsonaro' s [possible] re-election.[103]

Brazilian institutions therefore arguably weathered the Bolsonarist storm at least as well as their far more venerable federal US counterparts in the face of Trumpism. Little wonder, then, that Brazilian scholars strongly criticized Ackerman's arguments in 2020 that, to address democratic crisis and declining public faith in the post-1988 constitutional order, Brazil needed to convene a constituent assembly to craft a new constitution by 2023; or, failing replacement, at least a shift from a presidential to a parliamentary system.[104] This debate again serves to train our minds on the opportunity costs of mischaracterizing solutions, as well as the need for much greater attention by the outsider scholar when wading into these debates.

Certainly, when Ackerman was writing in 2020, Brazilian democracy had been in crisis for almost a decade and Bolsonaro's rise and election can be understood as the culmination of an incrementally unfolding and complex form of democratic backsliding—or

[98] Meyer (n 99) 213.

[99] See Luciano Da Ros and Matthew M. Taylor, 'Bolsonaro and the Judiciary: Between Accommodation and Confrontation' in Peter Birle and Bruno Speck (eds), *Brazil Under Bolsonaro: How Endangered is Democracy?* (Ibero-Amerikaniches Institut, 2022) 49; and Meyer (n 2) 147-148

[100] See Meyer ch.8 (n 2) and Benvindo ch.8 (n 2).

[101] Meyer (n 99) 218.

[102] *Executive Law-making Case* judgment: ADPF 663 (27 March 2020) available at: portal.stf.jus.br/processos/downloadPeca.asp?id=15342775680&ext=.pdf.

[103] Benvindo (n 2) 207.

[104] Bruce Ackerman, 'O Brasil precisa de nova Constituição' *Correio Braziliense Acervo* (13 July 2020).

"constitutional erosion", as Meyer terms it—with long-running challenges such as denial and subversion of the 1988 Constitution as instantiating a transformational form of social democracy going far beyond standard liberal democracy, the distortions of coalitional presidentialism requiring presidents to manage unwieldy party coalitions to govern, which spurs corruption and pork-barreling, under-institutionalized political parties, corruption, the persistence and reinvigoration of authoritarian narratives in both political and military circles, the highly visible return of military candidates to electoral politics, an unaccountable yet politicized judiciary, and economic decline since 2014.[105]

In a joint response to Ackerman, six Brazilian scholars refute the claim that any of these issues would be solved by constitutional replacement or a move to parliamentarism, arguing that, despite serious political crises since the democratic transition, the Constitution has set the scene for successive alternations of government, enhanced institutional accountability, and enshrines a suite of political compromises that are entirely defensible. They note that the evidence supporting claims that parliamentary systems are less susceptible to democratic backsliding than presidential systems is contested and offer that contemporary crises "may be due not to the singularities of the 1988 Constitution, but to the longstanding deficit of confidence in the rule of law caused by centuries of constitutional instability." Chiming with the views of Huq and Ginsburg in the US context, they also note that constitution-making is a high-stakes and risky endeavor during febrile political moments, arguing that ultimately "there are no simple answers" or short-cuts.[106] This resonates with analysis by scholars such as Partlett, who over a decade ago warned of the dangers of constitutional replacement in circumstances where authoritarian political dynamics can subvert the process.[107]

Even in good times, focusing on constitutional amendment or replacement may undermine effective constitutional repair by devoting energy in the wrong direction. In crisis-hit Brazil, as a recent symposium discussed, and resonating with analysis by Meyer and Zaiden, priorities for phased repair might include holding Bolsonaro accountable, restoring the federal Attorney General's independence, or depoliticizing the military, rather than formal constitutional change.[108] Indeed, at the time of writing, congressional efforts to hold Bolsonaro accountable for his role in inciting the January 8, 2023 attacks on the Capitol are in train: on October 18, 2023, after five months of hearings and a 20-11 vote, an investigation commission comprising members of the federal Senate and the house of deputies approved a 1,333-page report calling for Bolsonaro's criminal indictment and naming 60 other individuals accountable for the attacks, including five former ministers and eight army generals, in what they described as a "wilful coup attempt."[109] That action, even if it remains symbolic, is clearly aimed at reaffirming the central importance of peaceful transfers of power through the electoral process, and dissuading others from falsely making claims of stolen elections in the future.

[105] Meyer (n 2).

[106] Thomas da Rosa Bustamante, Emilio Peluso Neder Meyer, Marcelo Andrade Cattoni de Oliveira, Jane Reis Gonçalves Pereira, Juliano Zaiden Benvindo and Cristiano 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).

[107] William Partlett, 'The Dangers of Popular Constitution-Making' (2012) 38(1) *Brooklyn J. of Int'l Law* 193.

[108] See 'Symposium on the Challenges of the Lula Government in Reversing Democratic Erosion in Brazil' *Int'l J. Const. L. Blog* (10 February 2023).

[109] 'Brazil's Congress inquiry names Bolsonaro accountable for attacks to three powers headquarters' Global Voices Brazil (30 October 2023).

Again, constitutional repair can require a broader approach to the systemic functioning of the democratic order than a narrow fixation on formal constitutional change, and has clear links to transitional justice. None of this would preclude broader reform measures once immediate repair has been achieved, such as reining in misuse of the impeachment process, addressing corruption in both the political and judicial spheres, or addressing the deficiencies of the highly fragmented political-party system.

C. Poland: Does a Tradition of 'Small' Constitutions Offer a Way Forward?

The opposition's victory in Poland's October 2023 parliamentary elections has raised the challenge of reversing eight years of systematic dismantling of democratic governance by the PiS party from the moment the party won power in October 2015, which has become one of the paradigmatic examples of ''playbook' democratic backsliding worldwide. While this process has generated a significant literature providing a fine-grained picture of the causes and processes for backsliding, analysis of constitutional repair remains less developed.[110]

Like the USA, democratic backsliding in Poland has left the serene face of the constitutional text untouched. However, through a years-long process of "legislative bombardment" the PiS party has effectively achieved a fundamental transformation of the constitutional order affecting the capacity of the opposition to act as a constraint on the ruling party in parliament, replacing the leadership of courts and the civil service, and displacing independent agencies through establishment of 'mirror bodies' (e.g. concerning media regulation). Sadurski frames the Polish experience as 'anti-constitutional populist backsliding', conjoining three elements. 'Anti-constitutional' denotes the wrenching dislocation of power from its constitutionally-mandated loci, with Kaczyński's concentration of power recasting him as a sort of exalted magisterium, outside and above the formal constitutional structures, ruling through repeated violation of the 1997 Constitution, and blurring the lines of what counts as a violation. 'Populist', for Sadurski, may be read as 'authoritarian populist' owing to its linkage of "the usual populist repertoire (nationalism, plebiscitary style of politics, xenophobia, and fear of others) with dismantlement of the institutional mechanisms that are essential to political democracy."[111] It also speaks, in his view, to the PiS government's preoccupation with popular support and measures employed to maintain sufficient support (e.g. generous welfare benefits).

Most notoriously, compared to the USA, executive capture of the courts is more obvious. Sadurski argues that the Constitutional Tribunal in particular, through the unconstitutional appointment of three judges and a change of leadership, has been transformed into a 'government enabler' clothing executive power with a veneer of legitimacy.[112] We find an increasingly schizophrenic constitutional order whose supreme law still proclaims the same separation of powers, individual liberties, and judicial independence, but which is mocked at every turn by how power now truly operates, centralized in the hands

[110] See generally Sadurski, *Poland's Constitutional Breakdown* (n 2); Drinoczi and Agnieszka Bień-Kacała (n 2); Fryderyk Zoll and Leah Wortham, 'Judicial Independence and Accountability: Withstanding Political Stress in Poland' (2019) 42(3) *Fordham International Law Journal* 875; and Bernatt & Michał Ziółkowski (n 62).
[111] Sadurski, *Poland's Constitutional Breakdown* (n 2) 26.
[112] Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2019) 11 *Hague Journal on the Rule of Law* 63, 71.

of the PiS party in ways reminiscent of (but far from identical to) authoritarian Communist governance.

Considering the four inter-related repair factors discussed above, as regards the first factor, *specificity* (what is the precise damage we are trying to repair?), Poland reminds us that constitutional damage is a moving target when anti-democrats remain in power for a long time. In 2019 Sadurski argued, shortly before the elections that handed PiS a second term, that the best solution was to seek straightforward restoration of the constitutional and legal *status quo ante* before PiS entered government in 2015, including simply removing the three packed judges and Chief Justice on the basis of their illegitimate appointment.[113] By 2022, Zoll and Wortham offered that any program of repair for "a transition back to the rule of law" should be based on the twin principles that "wrong must be undone but proportional to the remedy needed without causing excessive damage", including individual review of illegally appointed judges, reorganization of the justice ministry, and decentralizing the prosecution service. Since the opposition's victory in the October 2023 elections, additional measures raised include re-establishing media freedom by restoring the independence of the constitutional media regulator, as an independent body, abolishing the 'usurper' media regulator introduced by PiS, and reforming the government's broader approach to both public and private media.[114]

As regards the second factor, *feasibility* (what is within our power to repair?) Zoll and Wortham clearly view repair of the Tribunal, or of apex judicial authority more broadly, as presenting a particularly thorny challenge:

> The loss of respect for the Constitutional Tribunal is so deep that it is difficult to envision how it can be restored. The Constitution's framework limits the possible range of restructuring options. Nonetheless, only fundamentally deep reform, a kind of fresh start, offers hope for salvation.[115]

If part of that fresh start requires contemplation of remedial purging of the judiciary, legitimacy questions must be addressed. Here, from both a comparative and a principled standpoint, we see the limitations of the historical or time-travel approach dominant in the US debates as the basis for a more generally applicable theory of repair. Poland has no historical democratic experience of arguably justifiable court expansion, nor can it be convincingly argued that remedial packing rooted in popular sovereignty formed part of the constitution-drafters' designs. We are left with a return to text and fundamental democratic and rule-of-law principles. Here, the unchanged text of the 1997 Constitution itself provides a form of true North, but one that could be supplemented by reference to transnational law and standards, as Scheppele suggests.[116] As discussed in the US context above, if we accept that the context of serious democratic backsliding may justify careful packing to achieve constitutional repair, if other options are unavailable (e.g. establishing an entirely new court), if the need for reform is clearly articulated and self-negating statements as to its exceptionality are made, and a defensible process is followed to

[113] 'What happens after the Polish Elections? An Interview with Wojciech Sadurski' *V-blog* (18 August 2019).
[114] Anna Wójcik, 'Restoring Poland's Media Freedom' *Verfassungsblog* (20 October 2023).
[115] Zoll and Wortham (n 110), 947.
[116] See Kim Lane Scheppele, 'How International Law Can Restore Democracy' Institute for Human Sciences (IWM), undated, 2023: <https://www.iwm.at/publication/iwmpost-article/how-international-law-can-restore-democracy>.

ensure transparency, inclusion, and further emphasis of its exceptionality (albeit bearing in mind that the urgency of repair may preclude a 'perfect' process), one may argue that this could constitute 'good' packing.

Similar to the Hungarian context discussed below, none of this would be easy. As the new Prime Minister Donald Tusk's former policy adviser, Adam Jasser, has offered:

> You will need radical measures to restore proper governance, but if you apply some of these radical measures, then immediately [Tusk] will face accusations that he is using the same methods as his predecessor.[117]

Certainly, if one considers the third and fourth factors central to contemplating repair—temporality (what can we do in the short run as opposed to longer time-horizons?) and priority (what do we need to fix first?)—it is hard to see how many reparative measures can be achieved without first addressing the apex courts, and the Constitutional Tribunal in particular. Current debates on possibly doing away with the system of concentrated constitutional review would appear to require constitutional amendment, which would require a two-thirds parliamentary majority that is far beyond the opposition's combined 248 seats in the 460-seat Sejm (lower house of parliament) since the October 2023 elections.[118]

From the perspective of an outsider, one broader possibility perhaps more compliant with rule-of-law norms, as yet unexplored, might be to take a time-travel approach drawing on Poland's constitutional history, using the post-1989 legislative 'small Constitution' as a model for a 'law of repair' addressing key areas of constitutional damage and restoring systemic fidelity to the 1997 Constitution itself, including providing for ouster of the 'packed' Constitutional Tribunal judges, replacement of packed court presidents, and abolishing mirror bodies. However, such an approach could not be legitimized by reference to historical practice alone: it would require a rhetorical, ideological, institutional, and processual framework that emphasizes its exceptionality and ultimate adherence to fundamental liberal-democratic norms and objectives.

As regards institutional design, in the presumed absence of any willingness of the ousted PiS party to engage in a form of 1989-style constitutional round-table (although we cannot know this with certainty), and valid doubts as to whether President Duda will live up to his rhetoric that he is open to cooperation,[119] international actors or institutions might also be called in aid; for instance, including representation of the Venice Commission or eminent international judges or jurists from states that might be seen as honest brokers on a Constitutional Repair Commission. However, any such action must be approached assiduously to ensure a defensible and legitimate process where domestic democratic forces remain the primary actors. As former Constitutional Tribunal judge Marek Safjan offered less than a week before the new government finally took power, much now depends on the imagination and ingenuity of the legal community in toeing a line between being formulaic adherence to the Constitution and legality and

[117] Daniel Boffey, 'Donald Tusk's second coming: can returning PM remake Poland?' *The Guardian* (12 December 2023).

[118] See 'Final results show scale of pro-EU opposition victory in Poland' *Euronews* (17 October 2023); and Lech Garlicki and Marta Derlatka, 'Constitutional review in the abusive constitutionalism (continuation, corruption or disappearance?)' in Mirosław Granat (ed), *Constitutionality of Law without a Constitutional Court: A View from Europe* (Routledge, 2023).

[119] See 'Tusk's new Polish government sworn in by President Duda' Notes from Poland (13 December 2023).

avoiding the extreme of revolutionary law in the urgent challenge of repairing Polish democracy:

> We are indeed walking on a thin line over the abyss where the anti-law demons are hiding and risking the very existence of the rule of law in the future. But the alternative to such risky migration is to wait and do nothing.[120]

D. Hungary: Is 'Big Bang' or Incrementalist Repair Best?

Unlike their US, Brazilian and Polish counterparts, Hungarian democrats' contemplation of possible constitutional repair remains hypothetical given that the FIDESZ party, in power since 2010, has continued to win increasingly manipulated elections.[121] However, the viable potential of a united opposition winning an electoral majority in the 2022 parliamentary elections spurred fuller consideration of what constitutional repair might look like in the absence of the required two-thirds parliamentary majority to amend or replace the 2011 Constitution.

Mirroring the political-academic cleavage in US debates on constitutional repair, we see clear divergence between opposition plans and academic debates. In the political arena, during the campaign for the 2022 elections, opposition leader Péter Márki-Zay, leading a six-party coalition, invoked constitutional transition as legitimating key plans in a joint platform, insisting that the elections were about "regime change, not government change", with the objective to "restore the rule of law".[122] Beyond relatively straightforward measures to reverse the incumbent government's heavy-handed control over the media,[123] one measure stands out as a scaled-up version of the court-packing conundrum in the USA: Márki-Zay contended that, given that incumbent Prime Minister Orbán's constitutional changes were invalid, the opposition in forming a new government would not be bound by the express constitutional rule requiring a two-thirds parliamentary majority to amend or replace the Constitution and could have a new text approved by a popular referendum.[124]

In public interviews, while recognizing the serious difficulties raised by the constitutional damage the Orbán regime has caused—including reshaping institutions as insurance against potential electoral defeat[125]—constitutional scholar András Jakab described it as a "dangerous game" of "breaking legal continuity", offering that it could generate a constitutional crisis or even social unrest.[126] In scholarly research, Jakab argues that these risks could only be entertained in the event of something akin to a coup and offers that there is a legal route to achieve phased repair: a rather constrained first post-Orbán

[120] Marek Safjan, 'We Are Not Helpless: How Poland can restore the Rule of Law by referring to its constitutional foundations' *Verfassungsblog* (6 December 2023).

[121] At the time of writing, the next parliamentary elections are three years distant, scheduled for 2026.

[122] Ibid.

[123] See *Hungarian Politics in 2021* (Policy Solutions, 2022) 36-39.

[124] Jennifer Rankin, 'Orbán rival promises new constitution if he defeats Hungary PM' *The Guardian* (12 November 2021).

[125] This included installing his prime ministerial aide in the most important state supervisory authority, perceived as a 'deep state' manoeuvre to circumvent democratic control in the event of electoral defeat. Sándor Czinkóczi, 'Orbán just replaced one of his closest men in the summer to appoint him to check on key tasks for 9 years' *444.hu* (1 October 2021).

[126] Marton Dunai and Ben Hall, 'Hungary opposition leader vows 'regime change' if Orban defeated' *Financial Times* (10 November 2021).

government would reverse limited measures through ordinary legislation alongside policy changes including the state's stance toward the European Union and the Council of Europe; a second post-Orbán government with a two-thirds parliamentary majority could make targeted constitutional amendments (e.g. to facilitate removal of key Orbán-era officials); and a third administration (again, with a two-thirds majority) would adopt a new constitution. With four-year parliamentary terms, this plan would take over a decade. As Jakab himself observes:

> it is long, tiring, without theatrical grandstanding, difficult to sell as a campaign slogan, and moreover, it does not satisfy the emotions accumulated against the Orbán regime. However, from the point of view of the public good, this is still the way to go.[127]

In this debate we can discern two widely diverging schools of thought, each presenting a different configuration of benefits and drawbacks, which mirror, at least to some extent, live debates in the constitution-building literature regarding the relative merits and demerits of 'big bang' constitutional change compared to incrementalism.[128] The political opposition's reparative programs offer rapid transformation toward a recognizably democratic order while paying arguably insufficient attention to the demands of legality. Jakab, in turn, arguably fetishizes legality in offering an achingly slow program contingent upon arguably unachievable electoral discipline, success, and multi-government programmatic planning, on the basis that transitional reparative techniques can be justifiable only in the most extreme form of authoritarian overthrow of democratic rule.

Pap, surveying recent debates, succinctly summarizes the difficulty: [129]

> [Hungary] is situated in a context where the previous regime … pursued a continuous, well documented abuse of constitutionalism, yet a military or economic collapse of the state or of an international alliance is absent, and nor is there a revolution, or even a sweeping unified political support from 'the people' on the streets. […] Also, a broad, consensus-seeking negotiated round table-like discussion on a new constitution involving Orbán's party is not a realistic scenario…

Both Jakab and Pap raise what they view as very real threats of not only legal chaos and a "cycle of illegality", but also social unrest and violence in the event that extreme measures are used, which encompass not only enshrining a new constitution through referendum but also more rule-of-law compliant measures such as reorganizing and renaming institutions including the Constitutional Court and public prosecutor.[130] Yet, leading figures such as Imre Vörös, former judge of the Constitutional Court, propose a specific procedure for adopting a new 'republican' constitution by both parliamentary vote and popular referendum, while Sajó (also a former Constitutional Court judge) argues that extra-legal constitution-making can be legitimate where it meets requirements of procedural fairness, inclusive rational discourse, and participation of the citizenry, with constituent assemblies providing one model among many possibilities. Importantly, he also underscores the 'transitional' context by observing a family resemblance between FIDESZ and Germany's Nazi regime, while not claiming that they

[127] András Jakab, 'How to Return from a Hybrid Regime into a Constitutional Democracy. Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland' in Armin von Bogdandy, Adam Bodnar, Michal Bobek and Pál Sonnevend (eds), *Transition 2.0. Reestablishing Constitutional Democracy in an EU-Member State* (forthcoming, 2023) p.10 of the manuscript.

[128] See e.g. *Final Report from the Second Melbourne Forum on Constitution Building in Asia and the Pacific* (Constitution Transformation Network, 2017).

[129] Pap (n 6).

[130] Pap (n 6) 196-197.

are the same.[131] Taking a different tack, scholars such as Scheppele offer that the opposition in government could rely on European Union and Council of Europe judgments, infringement procedures, and reports to justify 'disapplying' Orbán-era laws.[132]

This debate emphasizes how deep the rot of autocratic legalism can go, and how difficult it is to address. As Pap observes: "There are no easy choices."[133] However, he remains hopeful that political and legal solution can be found, such as achieving constitutional amendments through negotiation with Orbán (as leader of the opposition) rather than adopting an entirely new text or relying on external legal standards. Whatever solutions are selected, Pap rightly emphasizes that focus must remain squarely on the procedural and practical aspects of repair, rather than flights into more abstracted symbolism. For any viable reparative project, the devil is in the details.

Conclusion: Repair as Defiance, Resolve, and Readiness

Constitutional scholars worldwide are at an inflection point. Having achieved a better grasp of anti-democrats' backsliding projects we are now struggling to keep pace with how to repair the damage they wreak, which may become a wider transnational challenge as more anti-democratic governments are ousted in the coming years. This paper has sought to set a research agenda, spur a global conversation, and provide a framework for approaching the acutely difficult theoretical, conceptual and practical questions constitutional repair poses. Much more remains to be said about the relationship between constitutional repair, reform, maintenance and resilience not only in the case-studies considered here but across backsliding states worldwide. Repair is, after all, a mere first step, but an indispensable step, rather than an acceptance of increasingly outmoded governance models. Key questions will include what one state may learn from another, grappling with the real-world choices made in these trying circumstances, the role of the people in repair, and the possible role of international actors in assisting repair. Returning to the philosophical craft of *kintsugi*, while those choices might look starkly different from state to state, the very project of repair reflects the animating core of constitutionalism, not as a set of high-minded ideals, but as a defiant refusal—even in the bleakest circumstances—to give in to damage, entropy, or decay, as well as a readiness to act whenever any window of repair presents itself. In this sense, repair connects committed democrats in a reaffirmation of our faith, worldwide, in constitutional democracy and its endless capacity to renew itself. Therein, ultimately, lies its beauty.

[131] Pap (n 6) 198-199. See also Sajó (n 2).

[132] Pap (n 6) 202-203. See Kim Lane Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', *Verfassungsblog* (21 December 2021). Petra Bárd and Viktor Zoltán Kazai, 'Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study' (2022) 14(2–3) *Hague Journal on the Rule of Law* 165.

[133] Pap (n 6) 197.