

The Ghost of Lochner, the Specter of Dictatorship, and Judicial Enabling of Presidential Power

Chapter Six

Presidential Power: Lessons from Losing Democracy in Our Day

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The original intent to craft an American Constitution preventing monarchy and the oath judges swear to support the Constitution gives US courts, as guardians of the law, a responsibility to contribute to defending democracy against autocracy. To defend democracy, the judges (and citizens) must understand how countries have lost democracies. When we think about losing democracy, we tend to imagine a sudden coup or revolution. But scholars studying loss of democracy, especially in recent years, find democracies often undergo a gradual decline. In the opinion of one leading scholar, it often takes more than a decade before “the pretense of democracy and constitutional government disappears entirely.”¹ For the United States, gradual decline leading to substantial impairment or loss of a democracy poses a more significant risk than a sudden coup.

This chapter analyzes democratic decline in Hungary, Poland, and Turkey. Three lessons for presidential power jurisprudence emerge from this analysis. First, the threat to democracy comes primarily from the head of state.² For convenience, this chapter refers to this threat as an issue of “presidential” power even though the heads of state in Poland and Hungary do not carry the title of President. Second, creating a unitary executive by bringing administrative functions under the control of the head of state paves the way for autocracy.³ Once a government establishes a unitary executive, democracy can perish, because a single leader can use the executive branch to entrench himself and his supporters in power.⁴ Third, the leader’s use of emergency power can accelerate the establishment of autocracy.

This chapter claims that abuse of executive power plays a big role in destroying democracy, but that it does not constitute the only institutional means of subverting democracy. Indeed, the history of democratic erosion teaches us that presidential manipulation of legislative and constitutional processes and politicization of the judiciary facilitate abuse of executive power to destroy democracy over time. But presidential power and creation of a unitary executive consistently play an important role, even in parliamentary systems designed to keep the head of state under the legislative branch’s thumb. In a presidential system, the head of state faces fewer impediments to establishing an autocracy than he does in a parliamentary system.

This analysis blends previous work by comparative law and politics experts on the legal dimensions of democracy loss with detailed analysis of presidential power’s role in democratic backsliding in Hungary, Turkey, and Poland. The general accounts indicate that the central lessons about presidential power and the unitary executive drawn from these case studies likely apply to all countries experiencing democratic erosion, even though the details of the story vary in each individual case. Emergency power can play a potent role, but does not figure prominently in all cases.

¹ See Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 555 (2018).

² See Tom Ginsburg & Aziz Huq, *How to Save a Democracy* 101 (2018).

³ Id. at 72-73 (citing centralization and politicization of executive power as one of five mechanisms central to democratic erosion).

⁴ See Ozan O. Varol, *Stealth Authoritarianism in Turkey*, in *Constitutional Democracy in Crisis* 339, 344-45 (Mark A. Graber, Sanford Levinson, & Mark Tushnet eds. 2018) [hereinafter *Constitutional Democracy*] (explaining that stealth authoritarians prosecute political opponents for violations of criminal laws).

We may imagine that we are safe from autocracy because we have separation of powers. In fact, Poland and Hungary, both parliamentary democracies, had more robust checks on presidential power than we do. In a parliamentary system, the parliament chooses the head of state (the prime minister) and can end the head of state's mandate, which is why so many European societies establishing democracies after surviving the Nazis and later communist rule chose a parliamentary system. Because the citizens do not elect the prime minister, the head of state in a parliamentary system starts out with much more limited power than a President. These countries also limited presidential control over the executive branch and the courts in ways that emulate the best US practices (in terms of limiting authoritarian potential) or improve upon them. As we shall see, they sometimes depoliticize selection of key government officials. For example, councils of judges, rather than politicians, select most judges in many European democracies.⁵ Or they require multiparty representation on important administrative bodies or in the selection of key officials, whether through explicit constitutional mandate, legislation, or custom.

In the American system, the President selects key officials and can remove many of them unilaterally, although we do have requirements of multiparty representation for some independent agencies. While the framers intended requirements of Senate confirmation to ensure that the President selects officials likely to faithfully execute the law, a strong new norm of giving the President the people he wants has taken hold even when they clearly plan to subvert the law. We have seen that partisan capture of the Senate without constitutional or legislative change has significantly eroded the rule of law already, and it could go much further unless restrained somehow. We shall see that autocrats in Hungary, Poland, and Turkey, needed to make much more institutional change to establish autocracies.

Democratic Erosion: Style and Substance

While every story of democratic decline has unique aspects, comparative law and politics scholars describe key approaches that play a large role across countries. With respect to modern cases like those of Hungary, Poland, and Turkey, scholars emphasize that elected leaders establishing autocracy usually do so within established legal forms. They tend to rewrite laws (including constitutions) or break customary norms, rather than just ignore written law altogether. In the words of Kim Lane Sheppelle, the “new autocrats look like democrats playing hardball.”

These hardball players frequently can find precedent for their autocratic legal changes in one or another democratic country. By combining worst practices, tweaking them slightly, and employing discretionary authority creatively, they create an autocracy in ways that can escape the timely notice of many observers. The ordinariness of many measures establishing autocracy matters, because legal scholars looking at a single measure with little understanding of how all the measures fit together and operate in practice can easily underestimate democratic erosion. Indeed, autocrats put into place a huge number of cumulatively significant measures with blinding speed in order to confuse and overwhelm opposition.

While the new autocrats relentlessly pursue their objective of establishing an autocracy, checks and balances occasionally limit them and cause at least tactical adjustments. Thus, for example, Hungary's Constitutional Court struck down government regulation of the content of print media and the online press. The government relaxed the rules somewhat, but continues to regulate the more important mass media and bring individualized or less direct pressures to bear on print journalists. In Poland, President Duda vetoed a controversial bill that would have ended the terms of all sitting Supreme Court Justices, but later accepted a bill that would replace 40% of the Justices, thus allowing capture of the Court by subtler means.⁶ A drive toward authoritarianism can succeed with some tactical adjustments and setbacks disguising the overall direction. This means that one can lose democracy even when checks and balances sometimes operate. This adds to the difficulty of detecting serious threats to democracy in a timely manner.

⁵ See (Kosar, David 2018).

⁶ Scheppele, at 574 n. 101.

The substantive similarities apply to a broader range of countries than the stylistic similarities uniting new autocrats. Indeed, democratic theory suggests that the substantive similarities must play a role in all cases.⁷

Elections constitute a necessary condition for democracy, but not a sufficient condition. Russia and China have elections, but nobody characterizes these countries as democratic. Meaningful democratic competition, a real chance that people can “throw the bums out” and substitute new officeholders from another party constitutes a key condition of democracy.

The substantive similarities scholars identify across cases contribute to the defeat of meaningful electoral competition. In the new autocracy model (sometimes called “competitive authoritarianism”)⁸ elections continue, but in all autocracies little opportunity exists to disempower the autocrat and his party. Destruction of genuine electoral competition therefore necessarily constitutes a key substantive component of autocratic efforts to subvert democracy.

Tilting the Electoral Playing Field

Elected heads of state leading autocratic parties establish rules and practices tilting the electoral playing field in their favor. In Hungary, Poland, and Turkey, for example, persecution of regime opponents, partisan gerrymandering, and manipulation of the right to vote sharply limited the electoral competition at the heart of a democracy. An autocrat can entrench himself in power without winning every election. Hence, even in Hungary and Turkey, which have strong autocracies at this point, opponents of the regime occasionally win elections. But the game is too well rigged to allow opposition a real chance of winning back control of the central government. In Poland, while democracy has eroded, there remains, as of this writing, some hope of effective political opposition stemming the march toward autocracy, partly because a court, the European Court of Justice, has vigorously opposed manipulation of the Polish Constitution and because the opposition seems quite robust. Because democratic erosion is a more subtle process than a military coup and the new autocrats limit rather than completely destroy elections and opposition parties, scholars and other informed observers sometimes disagree about whether democracy has perished or just become weaker in some cases of democratic erosion.

Shrinking the Public Space

A second and closely related key component of destroying democracy involves shrinking the public space, making it nearly impossible for civil society to effectively challenge the government.⁹ The modern autocrats in these countries do not completely destroy free speech. But they lessen its value by asserting direct or indirect government control over the major media, limiting opposition’s access to the general public. And they find ways of intimidating and silencing many key dissenting voices.

Undermining the Rule of Law

A third component involves an attack on the rule of law. As mentioned previously, the new autocrats in these countries rely on legal forms, so law continues to exist, just as it does in Russia or China. Indeed, as we shall see, modern autocrats in these countries often articulate plausible sounding, but often bogus, rationales for many democracy eroding legal changes. But a rule of law requires more than a mere collection of rules.

A rule of law requires equal treatment under the law. If a country has laws on the books, but it only applies them to those opposing the government, law masks and legitimates autocratic rule. Legal principles

⁷ See Huq & Ginsburg, at 72-73.

⁸ (Levitsky, Steven and Way, Lucan 2010).

⁹ Id. at 107-113.

appear to govern, but in fact, arbitrary decisions having little connection to the law's stated goals control outcomes. These arbitrary decisions aim to enhance the wealth and power of the autocrat and his supporters, not to advance stated public interest goals.

In countries that have a robust rule of law, non-political actors, such as independent judges and civil servants, usually administer most of the law. In both Hungary and Poland, reformers constructing democracy in the wake of communism's collapse created a powerful and independent judiciary. In Turkey too, efforts at democratic modernization involved creating an independent judiciary. Efforts to dismantle democracy attack the independence of the courts and the civil service.

The suggestion that an independent civil service supports democracy may seem odd, as scholars find faceless bureaucrats making and administering law democratically problematic. But civil servants in functioning democracies usually work only in an assigned field and have a professional identity that makes them take technical argument and law seriously. They may sometimes overreach in pursuit of their bureaucratic mission. But the denizens of programs establishing regulations and providing services to individual citizens do not have the platform, desire, inclination, or resources necessary to establish an autocracy.

An independent and honest civil service usually makes the law's administration dependent on somewhat expert and non-partisan judgment. This independent judgment functions as an obstacle to autocratic rule.

When independent civil servants do not administer the law, loyalists staffing the government agencies deploy prosecution and administration as mechanisms of autocratic rule. As we shall see, the destruction of independent administration allows autocrats to persecute their political opponents, thereby aiding the project of eliminating electoral competition, shrinking the public space, and substituting arbitrary actions for a rule of law. And this destruction allows the ruler to protect and benefit his political supporters, thereby entrenching himself and his supporters in power.

The Autocrat's Role

In Turkey and Hungary (and almost all places whence democracy disappeared) a single elected leader drove the undermining of democracy. In Turkey, the parliament elected Recep Tayip Erdogan as Prime Minister in 2002. After fifteen years in office, Erdogan pushed through a constitutional referendum to change to a presidential system and then ran successfully for President. He gradually weakened Turkish democracy and then destroyed it. In Hungary, Viktor Orban, the Prime Minister, led the charge.

Poland, however, seems to violate the rule that democracies erode when the head of state assumes too much power. Analysts of the decline of Polish democracy do not identify the Polish Prime Minister or President as the primary sources of democratic decline. Instead, they identify the head of the Peace and Justice Party (called by the Polish acronym PiS), Jaroslaw Kaczynski, as the de facto head of state.¹⁰ But they describe the Prime Minister and President as "puppets" of Kaczynski. And they point out that in practice Kaczynski controls PiS, which controls Parliament. While Kaczynski and his supporters vilify Russian communism, Kaczynski's government follows the communist model of autocracy based on having the head of a political party control the government.¹¹ So, Poland presents a case of a de-facto head of state assuming too much power and subverting democracy.

Even formal heads of state like Erdogan and Orban, however, cannot destroy democracy all by themselves. They demand and receive loyal backing from a majority political party, Fidesz in the Hungarian case and the Justice and Development Party (AKP) in the case of Erdogan. And they move from that base to establish control over other institutions, most prominently, the judiciary, which might otherwise check

¹⁰ See Anthony Levitas, *What is Happening in Poland and Why it Matters (Again)*, <https://www.youtube.com/watch?v=rao7f0Q0OIU> (showing that 57% of Poles consider Kaczynski the most powerful person in Poland, whilst only 17% think that the Prime Minister or the President is the most powerful person).

¹¹ Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study in Anti-Constitutional Backsliding*, Sydney Law School Research Paper No. 18/01 10 (January 18, 2018).

their power. They also establish effective control over administration. That control over administration constituted in all three cases (and many more) an important contributor to stifling electoral competition, shrinking the space for civic opposition, and defeating the rule of law.

The Unitary Executive, Emergency Powers, and the Erosion of Democracy

While all three autocrats undermined the independence of the civil service, the most radical example of creation of a unitary executive undermining democracy comes from Turkey. Erdogan proposed Russian-style constitutional amendments to entrench himself firmly in control of the government, primarily by creating a unitary executive.¹² His proposal would give the Turkish President the authority to “unilaterally remove all cabinet members and heads of all administrative agencies.”¹³ It would allow him to appoint half of the members of the Constitutional Court, the Council of State (Turkey’s highest administrative court), the Supreme Board of Judges and Prosecutors, and the Higher Education Council.¹⁴ It combined these formidable powers with an authority to issue executive orders that have the force of law on all “subjects necessary to execute the law.”¹⁵ Thus, Erdogan proposed to create the unitary executive that American unitarians promote (except that he did not have authority to appoint *all* heads of crucial government organs).¹⁶

A failed coup attempt against Erdogan enabled him to overcome the opposition to his unitary executive proposal.¹⁷ Rattled by the coup and its aftermath, the electorate narrowly approved Erdogan’s proposal in a tainted referendum.¹⁸ President Trump called Erdogan to congratulate him on passage of his power-consolidating constitutional referendum.¹⁹

Emergency powers played a key role in accelerating the establishment of a unitary executive in Turkey. Erdogan used them to justify detaining 2,777 judges and prosecutors, 6,823 soldiers, and dozens of governors. He removed 49,321 civil servants from their positions. This attack on the civil service and judicial independence accelerated the establishment of presidential control over administration, which Erdogan had pursued diligently for many years prior to the coup.

Orban and Kaczynski undermined the civil service’s independence without a coup or heavy reliance on emergency powers. These autocrats, however, did seek to stoke popular support for a unitary executive by railing against immigrants, portraying themselves as the true nationalists, and, in true populist style, vilifying the opposition.

Viktor Orbán consolidated power by taking control of prosecution, the bureaucracy over-seeing the media, the electoral commission, and the taxation authority.²⁰ He removed opposition figures and neutral experts from public institutions.²¹ Kaczynski’s PiS party likewise gutted the civil service.

Scheppele explains that the new autocrats generally avoid gross, massive and violent human rights violations in favor of using economic repression to consolidate their power and control opposition.²² The creation of the unitary executive plays a key role in jump-starting this process. In Hungary, for example, Orban amended the labor law protecting the civil service, implementing the key reform advocated by unitarians—provision for at-will removal of government employees.²³ With this accomplished, “critics of

¹² Id. at 350-53.

¹³ Id. at 350.

¹⁴ Id.

¹⁵ Id.

¹⁶ The proposal also authorized a legislative veto and declaration of martial law. Id.

¹⁷ See *id.* at 351-53.

¹⁸ Id. at 353.

¹⁹ Id.

²⁰ See Scheppele, *supra* note 1, at 549-50.

²¹ See *id.* at 550.

²² Id. at 575.

²³ See *id.* n. 105.

the Hungarian government” began to lose “their jobs at an astonishing rate.”²⁴ The government then pressured private firms to fire opponents of the regime, primarily by signaling that doing so was necessary for firms desiring state contracts.²⁵ Economic repression creates fear, which makes it easier to create further economic pressures to avoid opposing the regime.

Bearing in mind that a unitary executive can pave the way for establishing a generalized climate of fear useful for establishing an autocracy, the remainder of this chapter focuses on how the leader’s control over particular state organs advances autocracy. This approach permits a detailed look at the links between the creation of a unitary executive and the key substantive elements creating an autocracy—reducing electoral competition, shrinking the public space, and destroying the rule of law.

Prosecution Sidelining Opponents, Shrinking the Public Space, and Destroying the Rule of Law

These new autocrats, like the old ones, compromise the independence of prosecutors and assert political control over the prosecutor’s office. When this happens, prosecutors become useful instruments in carrying out several of the tasks necessary to democracy destruction.

In Hungary, Fidesz secured the resignation of a respected chief public prosecutor, probably by blackmail. Orban then replaced him and his subordinates with Fidesz loyalists. Through constitutional amendment, Fidesz put itself (and therefore Orban) in charge of selecting the chief prosecutor, by getting rid of the requirement for multiparty support from parliament (a requirement of 2/3 approval of Hungary’s unicameral parliament).²⁶ It then passed “transitional provisions” giving Orban’s chief prosecutor the power to control case assignments. This ensured that an Orban-approved prosecutor could control the exercise of prosecutorial authority.

Poland’s leader also subverted the political independence of prosecutors.²⁷ Legislation passed on January 28, 2016, accomplished this politicization by merging the positions of Minister of Justice and the Prosecutor General, bringing both under the control of Kaczynski’s Minister of Justice, Zbigniew Ziobro (a leading politician).²⁸ The new legislation assigns this Minister comprehensive power to reassign cases among prosecutors and give orders in specific cases, a striking departure from democratic norms prevailing in Europe’s parliamentary democracies and the customary norms governing the Department of Justice in the United States.²⁹ It also breaks down the tradition of walling off prosecution from control of the de-facto head of state, by explicitly allowing the Justice Minister to share information with outside parties.³⁰ This provision legitimized Ziobro’s prior practice of consulting with Kaczynski about ongoing investigations and prosecutorial decisions.³¹ The government justified these measures on efficiency grounds, but nobody has documented any improvement in the processing of cases.

Even before the military coup, Erdogan took steps to establish central control over prosecution.³² He began to change the mechanisms for prosecutorial control through a constitutional amendment restructuring the High Council of Judges and Prosecutors (HSYK), which appoints and disciplines

²⁴ Id.

²⁵ Id.

²⁶ Venice Commission on Democracy Through Law, Opinion on CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and Other Prosecution Employees and the Prosecution Career, CDL-AD(2012)008, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)008-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)008-e), ¶ 14.

²⁷ Sadurski, *supra* note 11, at 44.

²⁸ Id.

²⁹ See *id.* at 44-45. Cf. JAMES COMEY, A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP 234 (2018) (discussing the norm of the FBI director not meeting privately with a President, lest the meeting undermine the bureau’s integrity and independence).

³⁰ See Sadurski, *supra* note 11, at 45.

³¹ See *id.*

³² Huq & Ginsburg at 106.

prosecutors (and judges). In order to curtail investigation and arrest of AKP members for corruption, including high-ranking government officials, Erdogan started attacking the prosecutors verbally and then brought them under the control of the central government. He did this partly by curtailing the power of prosecutors to secure police support for investigation independently. Erdogan then transferred prosecutors (and judges) away from the corruption cases and brought the HSYK under the control of political appointees. As we have seen, Erdogan used the coup to replace career prosecutors with loyalists in huge numbers, thus completing the establishment of a key element of the unitary executive.

Once the head of state has effective control over prosecution, he can use this power to tilt electoral competition. Government prosecutors attack the regime's opponents and protect its supporters. The forms these attacks take vary based on national law and culture, but in all cases the unitary executive paves the way for selective prosecution to undermine electoral competition.

In Hungary, Fidesz prosecutors have used the law as a political weapon by charging opposition politicians with corruption.³³ The prosecutor's office announces and publicizes prosecution at times calculated to influence elections. The government usually drops the charges after the election, but charging a politician with corruption often suffices to end her career. At the same time, Fidesz corruption does not generally trigger prosecution.

Turkey's prosecutors sideline the regime's political opponents with slightly different techniques.³⁴ Prior to the coup, they usually charged opponents with minor crimes unrelated to elections. The prosecution focuses on laws that many people violate in Turkey, such as building codes and tax laws. The government also employs tax audits to harass opponents, a tactic usually unavailable in societies with independent public administration.³⁵ With increasing frequency, especially after the coup, they arrest opposing legislators for supposedly supporting terrorist groups.³⁶ We have already seen that presidential exercise of authority to remove prosecutors prevented prosecution of AKP corruption.

Turkey also uses prosecution as a weapon to shrink the public sphere.³⁷ The government arrested 500 defendants at one point, including some journalists, and charged 86 of those arrested. The court of appeals, however, dismissed those charges for lack of evidence. The government sued journalists and other critics for libel. The costly lawsuits had a chilling effect, as journalists self-censored to avoid civil suits, and later, criminal prosecution for libel. The government also levied a \$2.5 billion fine against the Dogan Yayin media conglomerate, which forced it to sell off important media outlets to groups aligned with the government.³⁸

While Poland's unitary executive prosecutor's office is relatively new, Kaczynsky has likewise exploited his control over the public prosecutor to shrink the public sphere. Following in Erdogan's footsteps, he has brought libel actions to silence critical media and the PiS Minister of Defense instructed the military prosecution office to launch an investigation under the penal code against a writer who had written a book criticizing the Minister.³⁹ But the government backed away from some repressive measures under pressure from the European Court of Human Rights.

Hence, in all of these countries establishment of an elected leader's control over prosecution undermined the rule of law. It led to selective enforcement where law functions not as a set of general principles limiting everybody's conduct, but as a source of power to sideline opponents. The regimes used prosecutorial power not to implement a rule of law, but to tilt electoral competition in favor of the governing head-of-state and his party and to shrink the space available for criticizing and opposing the government.

³³ BALINT MAGYAR, *POST-COMMUNIST MAFIA STATE: THE CASE OF HUNGARY* 50-51, 223-24 (CEU Press, 2016).

³⁴ See Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1707-10 (2015)

³⁵ See *id.*

³⁶ See Varol, *supra* note 4, at 346.

³⁷ Erdogan was originally elected by parliament. But he secured a constitutional amendment to establish popular election of the President and then became President via the popular vote.

³⁸ (George, Ella 2018)

³⁹ (Council of Europe Platform to Promote the Protection of Journalism and the Safety of Journalism 2019)

Ending Independent Electoral Commissions in Order to Tilt Elections

Most successful democracies around the world use independent electoral commissions to establish the ground rules for and administer elections. By not allowing a single leader or political party, to control election law and administration, democracies provide an important structural safeguard to ensure free and fair elections.

Since autocrats want to rig elections, they compromise electoral commission's independence, allowing the autocrat to control them, either directly or indirectly. In Hungary, under the pre-Fidesz system, the Election Commission resembled the Federal Election Commission and the electoral commissions in the US states, in that it contained people from more than one political party. Each of the five leading parties in parliament controlled one seat and the parties filled the remaining seats by mutual agreement.⁴⁰ Fidesz terminated the mandates of members slated to remain through 2014 and replaced the members formerly chosen by agreement among the parties with its own members.⁴¹ This arrangement allowed Fidesz to defeat a key mechanism for challenging its monopoly on power, a referendum. Under Hungarian law, the Electoral Commission must certify referenda before they are placed on the ballot, and the Fidesz-controlled board blocked this avenue of challenging the ruler's power.⁴² Blocking a referendum entrenches the government, as a rebuke of a government through a referendum in Hungary had in the past provided a means of bringing down the government.⁴³

A similar effort to bring the administrative apparatus supervising elections and funding political parties under the control of PiS and therefore Kaczynski lies at the heart of the Polish government effort to end meaningful electoral competition.⁴⁴ Prior to Kaczynski's ascent, Poland's National Electoral Commission, which supervises Polish elections, consisted of judges, selected by fellow judges, an arrangement well designed to prevent a single party from rigging elections.⁴⁵ PiS, citing non-existent "monstrous" irregularities in elections that they kept losing, passed a bill giving the Kaczynski-controlled lower house of parliament the right to select the vast majority of members of the electoral commission.⁴⁶ The new law also authorized commissioners indirectly controlled by PiS to gerrymander election districts in order to rig the elections.⁴⁷

Turkey also interfered with the independence of its electoral commission, the Supreme Board of Elections (SBE) (a group of judges as in Poland) and lower level administrative bodies. AKP replaced 8 of the SBE's 11 members (placing three in custody) and 221 "lower-level election board chairpersons" (placing 67 in custody).⁴⁸ It also placed over 500 electoral board staff in custody.⁴⁹

⁴⁰ Miklos Bankuti, Gabor Halmai, & Kim Lane Schepppe, Hungary's Illiberal Turn: Disabling the Constitution, 23 *Journal of Democracy* no. 3, 138, 140 (2012).

⁴¹ *Id.*

⁴² See Gabor Atilia Toth, *Constitution for a Disunited National: On Hungary's 2011 Fundamental Law 256* (CEU Press 2012).

⁴³ *Id.* n. 31.

⁴⁴ Cf. Richard Albert & Michael Pal, *The Democratic Resilience of the Canadian Constitution*, in CONSTITUTIONAL DEMOCRACY 117, 127-132 (arguing that Canada's independent electoral commission and other administrative entities have contributed to Canada's constitutional resilience); see generally Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

⁴⁵ See Sadurski, *supra* note 11, at 54.

⁴⁶ *Id.*

⁴⁷ See *id.* at 54-55; Wojciech Sadurski, *Constitutional Crisis in Poland*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 257, 260 (Mark A. Graber, Sanford Levinson, & Mark Tushnet eds., 2018).

⁴⁸ (Organization for Security and Co-operation in Europe 2017) at 2, 7, 8.

⁴⁹ *Id.* at 8.

Sometimes, as in Poland and Turkey, the autocrats relied on their control over electoral agencies to do almost all of the dirty work. In those cases, the head-of-state's effective control of the executive branch provides the primary means of tilting elections.

In Hungary and Turkey, however, legislation also played a role.⁵⁰ The Fidesz-controlled parliament heavily gerrymandered legislative districts and passed laws making it hard for ethnic minorities and those fleeing the regime to vote, while authorizing and easing voting among supportive ethnic Hungarians living in countries near Hungary to vote. Turkey employed a legislative gerrymander as well, but it does not appear to have had a large impact on electoral results.

Even when the parliament passed legislation tilting elections, the partisan electoral commissions made their own contributions to the project. In Turkey, the electoral commission disobeyed Turkish law by accepting unstamped ballots in the referendum establishing authoritarian rule. Instances of fraud and interference with civil liberties during the state of emergency also contributed to this narrow victory for autocracy. In Hungary, the partisan Electoral Commission sent out confusing information to groups likely to vote against Fidesz while making it easy for groups thought supportive of Fidesz to vote.⁵¹

Thus, the unitary executive regularly contributes to tilting the electoral playing field, as electoral commissions brought under the political control of the autocrat's party shape the electorate to tilt electoral outcomes in the autocrat's favor. But legislation also plays a role, especially in Hungary.

Ending Independent Media Authorities in Order to Shrink the Space for Dissent

Most democratic countries have independent media regulators of some kind, which typically regulate electronic communication, but not print media. The US Federal Communications Commission (FCC) came into existence as radio took off, as the US needed to ration the airwaves to make radio effective. The FCC also has authority to regulate other forms of telecommunications, such as television and social media.

Hungary, Poland, and Turkey likewise established independent media regulators. To prevent their capture by a single ruler and his party, they established mechanisms to ensure multiparty representation on their media councils.

The new autocrats' political parties brought the administrative agencies regulating the media under the effective control of the head of state by allowing the leader's party to select all or most of their members. Ignoring norms of minority party participation and independence, they stacked the media authorities with their supporters.

Their supporters then used the media authorities to shrink the public space for opposition. Orban's media council exploited authority to levy hefty fines on broadcast media for failing to provide "balanced" news coverage to intimidate opposition media.⁵² The media council also fired unsympathetic journalists employed in public broadcasting and cancelled long running shows with perspectives at odds with the Orban government.⁵³ It allocates digital, terrestrial, and cable frequencies on the basis of political criteria. The authority also declined to renew the broadcast license of the country's only private FM radio station and subjects online media to content restrictions.

Similarly, Turkey's AKP-dominated Supreme Council of Radio and Television (RTUK) supplemented prosecution of journalists with broader attacks on media organizations. That body issued 50 warnings and 112 fines against television channels and 7 warnings and 11 fines to radio stations under very broad laws and under quite a bit of political pressure in 2016 alone.⁵⁴ In the wake of the coup, this body

⁵⁰ See Kim Lane Scheppele, Hungary: An Election in Question Part Two: Writing the Rules to Win: The Basic Structure (N.Y. Times, February 28, 2014), <https://perma.cc/95M5-6573>; {Citation}.

⁵¹ See Kim Lane Scheppele, Hungary: An Election in Question, Part 4: The New Electorate (In Which Some are More Equal Than Others), N.Y. Times, February 28, 2014, <https://perma.cc/69HC-4XJ5>.

⁵² Bankuti, Halmai, & Scheppele, *supra* note 40, at 139-40.

⁵³ Toth, at 258-59.

⁵⁴ Freedom House, Freedom of the Press 2017: Turkey, <https://freedomhouse.org/report/freedom-press/2017/turkey>

closed two dozen television and radio outlets in the same year. The government also ordered the closure of 50 newspapers.

Turkey has a Directorate General of Press and Information that controls press accreditation necessary for access to the Prime Minister and his press office. In 2015, the government brought this organization firmly under Erdogan's control by reducing the number of seats held by media representatives from more than 50% to a third. In the crackdown after the coup, the Directorate revoked nearly 800 press cards.

Turkey also centralized procurement at the highest level of the executive branch as part of the effort to establish a unitary executive. Turkey used this authority over procurement to bring additional financial pressures to bear on its drive to suppress dissent and support sympathetic media. A few large holding companies that earn a majority of their revenue in construction, energy, mining, and financial services own most of the important private media properties in Turkey. Erdogan's government uses government procurement and licensing to punish dissent and put important media assets in friendly hands. For example, the government determined which holding company would purchase the Sabah-ATV media group in exchange for a multibillion-dollar airport construction contract. It also withholds state advertising from critical outlets, pressuring them to fire critical journalists. Purges of journalists insufficiently supportive of Erdogan through the combination of prosecution and financial pressures to fire critical journalists put 10,000 journalists out of work by the end of 2016.

Kaczynski's PIS party passed legislation establishing a Council of National Media in order to supplant the constitutionally established independent National Broadcasting Board.⁵⁵ President Duda has appointed the majority of the Council of National Media, which oversees public broadcasting.⁵⁶ That body, which takes instructions directly from Kaczynski, has purged hundreds of journalists from public broadcasting.⁵⁷ The National Broadcasting Board, which has authority to regulate all media public and private, has also lost its independence from Kaczynski. In the past, the government ran this Board like an independent agency, with representatives from more than one party.⁵⁸ It now consists entirely of members of PiS.⁵⁹ It has begun to penalize critics of Kaczynski's regime severely, thereby chilling political opposition.⁶⁰ The government justified the suppression of opposing voices by citing the need to "depoliticize" the airwaves.

Undermining the Independent Judiciary

Both Poland and Hungary established highly respected constitutional courts as bulwarks to protect their new democracies after the collapse of communism. They also established independent lower courts. Turkey's courts also enjoyed some independence; we have already seen that they checked some of Erdogan's efforts to prosecute opponents.

In all three systems, the head of state sought to create a judiciary that would cease to check the autocrat's initiatives or, better yet, enhance the regime's legitimacy and therefore its power by approving them. Elected leaders attacked judicial independence, in part, because doing so helped legitimize actions establishing a unitary executive, which would create an autocracy.

The story of how the new autocrats undermined judicial independence has commanded a great deal of comparative law scholar's attention, because the constitutional courts especially have sometimes resisted many of the legislative and even constitutional measures establishing an autocracy. These scholars, therefore, see them as linchpins of democracy. Also, an independent judiciary constitutes a key requirement of the European Union (EU), so EU institutions have paid a great deal of attention to measures undermining

⁵⁵ See Sadurski, *supra* note 47, at 260.

⁵⁶ See Sadurski, *supra* note 11, at 47

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

the judiciary in these countries. Hungary and Poland are EU members and Turkey advanced constitutional reforms in hopes of joining.

For purposes of drawing jurisprudential lessons about the unitary executive potentially useful to the United States federal courts, the key story involves the lower courts. The United States President clearly has the power to nominate Article III judges, including Supreme Court Justices, so there is no real legal issue of presidential power there (although this arrangement can create problems for democracy to be mentioned later). But the question of who controls article II administrative law courts remains a live issue of presidential power jurisprudence.⁶¹ These courts have enormous influence. They adjudicate cases establishing immigration status, tax liability, regulatory compliance, and rights to public benefits. Congress generally lodges administrative law judge (ALJ) appointments somewhere within the agency administering the statutes creating the claims that need administrative adjudication. And they enjoy substantial civil service protections, so that the agencies they serve can only remove them for cause. The design, in short, seeks to create independent expert adjudication insulated from political influence.

Hungary, Poland, and Turkey developed constitutional mechanisms to prevent a single leader or his party from controlling the appointments process for lower courts, some of which have jurisdiction over administrative law cases. Hungary adopted a constitutional amendment in 1997 creating a judicial council to control the nomination process in response to criticism of a holdover provision from the Communist period allowing the Minister of Justice to appoint lower court judges.⁶² The Polish Constitution likewise contains strong mechanisms preventing politicization of the judiciary. It establishes a National Council of the Judiciary, which has the power to nominate candidates for judicial positions and to govern judicial operations in order to ensure the judiciary's independence.⁶³ This Council consists primarily of judges, mostly elected by the judiciary, but also included six parliamentary representatives.⁶⁴ Turkey appeared to have a similar system prior to 2017. Its Constitution established a Supreme Board of Justices and Prosecutors to appoint judges to Turkey's high court and its Council of State.⁶⁵ Turkey's leaders changed this system repeatedly from the time of its introduction in 1961 until the present day, and it has rarely if ever been wholly insulated from the ruling party's influence. While the systems vary in detail (and sometimes over time) all three countries used a model based on substantial judicial control or influence over judicial appointments and discipline to ensure the independence of judges (excepting the constitutional courts).

The new autocrats ended the arrangement of judicial self-government to pack the courts with their own party members.⁶⁶ Orban's government created a National Judicial Office headed by a Fidesz loyalist and empowered her to control judicial promotion, the assignment of cases, and, to a large degree, the

⁶¹ See *Lucia v. SEC*, 138 S. Ct. 2044, 2064 (2018) (accusing the Court of risking step-by-step unraveling of the administrative adjudication system and perhaps of the civil service); Jennifer L. Mascott, *Federalism and Government Structure*, 2018 *Cato Sup. Ct. Rev.* 305, 308 (pointing out that the government had argued that the President must have the ability to remove an administrative law judge); Catherine, Y. Kim, *The President's Immigration Courts*, 68 *Emory L. Rev.* 1 (2018) (assessing presidential politicization of adjudication of immigration cases); *Guidance on Administrative Law Judges after Lucia v. SEC*, 132 *Harv. L. Rev.* 1120 (2019) [hereinafter *Guidance*] (discussing administrative guidance using *Lucia* as an excuse to erode ALJ independence); *Lucia v. SEC*, 132 *Harv. L. Rev.* 287 (2018) (finding that *Lucia* opens up politicization of adjudication of social security benefits cases).

⁶² Gabor Atilia Toth (ed), *Constitution for a Disunited National: On Hungary's 2011 Fundamental Law 251* (CEU Press 2012).

⁶³ See *id.* at 38.

⁶⁴ See *id.*

⁶⁵ Ozan Varol, *Turkey's New Majoritarian Difficulty* (September 30, 2010), <http://www.iconnectblog.com/2010/09/turkeys-new-majoritarian-difficulty>; Basak Cali, Betül Durmus, *Judicial Self-Government as Experimental Constitutional Politics: The Case of Turkey*, 19 *German L. J.* 1671 (2018); Ozon O Varol, Lucia Dalla Pellegrina, and Nuo Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 *Am. J. Comp. L.* 187 (2017); Asli U. Bali, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 *Va. J. Int'l L.* 235 (2012).

⁶⁶ See Sadurski, *supra* note 11, at 37.

selection of judges. By combining these powers with a lowered retirement age, Orban has substantially eroded the independence of the lower courts.

In December of 2018, however, Orban's government went further. It created a new "administrative court" system. The government justified this on the grounds of enhancing efficiency and expertise. While the new law has complicated procedures for appointing judges, these give Orban indirect control over the appointments, without the need to terminate the terms of existing judges, as with the rest of the judicial system. (Venice Opinion Due 3/20?). This law offers a potent tool to tilt the electoral playing field, shrink the public space, and deny redress when the government uses licensing as an economic tool to help its supporters and hurt its detractors. The government plans to create this system in 2019 and start using it in 2020.

The immediate post-communist period in Poland produced a right to appeal a government body's decision directly to an administrative law court.⁶⁷ A constitutional amendment in 1997 authorized the President to appoint the President of the Supreme Administrative Court to a six-year term from nominees provided by a general assembly of administrative law judges.⁶⁸ Kaczynski's government passed a much-criticized statute that paved the way for packing the ordinary courts with Kaczynski's supporters.⁶⁹ This same law may interfere with independent adjudication of some administrative law claims, as it gives the newly constituted Supreme Court jurisdiction over electoral cases, social security cases, and labor cases.⁷⁰

We have already seen that Erdogan ended the independence of the Council of State, Turkey's highest administrative law court. He did this through both constitutional amendment and abuse of emergency powers. A 2017 constitutional amendment brought the council appointing the main judges under the control of Erdogan and his AKP party by vesting some appointments in President Erdogan and others in the parliament. Having brought the council under control, Erdogan issued a state of emergency decree authorizing the council to dismiss judges viewed as part of the opposition as national security threats. This led to the removal of 4,279 judges and prosecutors through October 2017. Thus, all of these autocracies found impairment of the independence of the courts that review agency actions (and other lower courts) through indirect control of the head-of-state important in establishing an autocracy.

The story of the effort to destroy the Constitutional Courts in Poland and Hungary merits retelling here even though comparative law scholars know it well. The story's relevance to presidential power stems from the role efforts to establish a unitary executive played in motivating efforts to constrain the constitutional court. The story also has some relevance to a question that will arise in the next chapter: can the judiciary check an autocrat? Furthermore, this chapter will close with some observations about the extent to which US democracy has eroded in ways similar to those occurring in these countries, so that comparing this story of judicial decline with the US story will help round out the picture.

In Hungary, Poland, and Turkey, autocrats eroded the constitutional court's independence by securing appointment of judges aligned with their own party and likely to support the autocrat's "reforms." To do this, they destroyed constitutional traditions of non-partisan appointment and shortened appointment terms to retire judges insufficiently supportive of the regime's measures early.

Orbán destroyed the independence of Hungary's highly respected constitutional court using these methods. To do this, he had to abolish the constitutional requirement that 2/3 of the parliament approve of nominees to the Constitutional Court. So he had his party pass a constitutional amendment abolishing this constitutional requirement, which had in the past ensured that members of the Court commanded multiparty support. His party then approved supportive judges through lockstep party line votes.⁷¹ Fidesz also passed

⁶⁷ (Turlukowski, Jaroslaw 2016) at 131-32.

⁶⁸ *Id.* at 132.

⁶⁹ Sadurski, *supra* note 47, at 264-66.

⁷⁰ Venice Commission, Opinion on the Draft Act Amending the Act on the National Council of the Judiciary; on the Draft Act Amending the Act on the Supreme Court; and on the Act on the Organization of the Ordinary Courts, CDL-AD(2017)031-e, ¶¶ 35-36.

⁷¹ Kim Lane Scheppele, Constitutional Coups and Judicial Review: How Transnational Institutions can Strengthen Peak Courts at Times of Crisis, 23 *TRANSNAT'L L. & CONTEMP. PROBS.* 51, 72 (2014).

legislation expanding the Court's membership, thereby giving it an opportunity to appoint more loyal judges.⁷²

Hungary also relied on jurisdiction stripping to emasculate Hungary's Constitutional Court. One of the jurisdiction stripping moves required the Hungarian Court to authorize judicial review solely at the behest of parties who suffered concrete injuries.⁷³ While the U.S. courts themselves have created the same rule, it was not part of Hungarian practice. In the Hungarian context, this rule probably made separation of powers cases unreviewable.⁷⁴ Fidesz also stripped the Constitutional Court of jurisdiction over budget and tax cases.⁷⁵ And Fidesz lowered the judicial retirement age in order to purge the Court of jurists who might check its efforts to consolidate Orbán's control.

In Hungary, emasculating the Constitutional Court served as an essential first step to pave the way for actions entrenching Orbán in power. Many of these actions involved establishing a unitary executive as a practical matter, where Orbán effectively controls not only the Prosecutor's Office, the Media Authority, and the Electoral Commission, but also the State Audit Office, the Budget Council, the National Bank, and the ombudsmen charged with preventing human rights abuses.

Kaczynski mounted a very similar attack on the independence of Poland's esteemed Constitutional Court. It lowered retirement ages, packed the court, and limited jurisdiction. The politicization of the Constitutional Court has converted it from an impediment to authoritarian rule to an active enabler of PIS and its campaign to make administration subordinate to its leader.⁷⁶ Capturing the Constitutional Court paved the way for supplanting the constitutionally established National Broadcast Board with a Kaczynski controlled Council of National Media, passing legislation establishing control over prosecution, and reconstituting the electoral commission.

Turkey presents a more complicated path to a similar result of placing sympathetic judges on the Constitutional Court. Turkey established a system providing for substantial independence of the Constitutional Court in 1961 (albeit with some institutional bias in favor of the military) by allowing judges to appoint the majority of Justices.⁷⁷ In 1982, the military secured a constitutional amendment giving the President the power to appoint members of the Constitutional Court, but keeping the nomination power primarily in the judiciary.⁷⁸ In 2010, Erdoğan's AKP secured passage of a constitutional amendment increasing the President's power over appointments to the Constitutional Court. Erdoğan's constitutional amendment did this by expanding the size of the Constitutional Court by more than 50%. It gave the President the appointment power for fourteen of the judges, allowing Parliament (also controlled by Erdoğan) to appoint the remaining three. This diversification of appointment power disguised the real source of increased presidential control, a diversification of the groups making nomination and requirements that the judicial bodies involved nominate three candidates from whom the political authorities could select the appointee.⁷⁹ The 2010 constitutional amendment also eroded judicial independence by limiting the tenure of the Constitutional Court's Justices to a twelve-year term.⁸⁰ These structural changes shifted the Court's ideology in ways favoring Erdoğan's positions.⁸¹

The Constitutional Court then aided establishment of the unitary executive. Erdoğan took advantage of the coup to promulgate emergency measures increasing his control over the Council of State and abrogating its non-binding pre-promulgation review of administrative regulations promulgated by the

⁷² See *id.* at 71; LEVITSKY & ZIBLATT, at 80.

⁷³ Scheppele, *supra* note 71 at 75.

⁷⁴ Bankuti, Malmai, and Scheppele, *supra* note 40, at 141-42.

⁷⁵ Scheppele, *supra* note 71, at 74.

⁷⁶ See Sadurski, *supra* note 47, at 260.

⁷⁷ Ozon O Varol, Lucia, Dalla Pellegrina, and Nuo Garoupa, An Empirical Analysis of Judicial Transformation in Turkey, 65 Am. J. Comp. L. 187, 192 (2017).

⁷⁸ *Id.* at 194.

⁷⁹ See *id.* at 197-98.

⁸⁰ *Id.* at 198.

⁸¹ *Id.* at 210-16.

whole cabinet. The Court reversed a prior ruling claiming a power to review emergency decrees' relationship to a declared emergency in order to allow these abuses of emergency power to stand.

On the Role of Legislation and Constitutional Amendment

The autocrats in Hungary, Poland, and, to some extent Turkey, created a unitary executive and impaired judicial independence through legislation and, in Turkey and Hungary, constitutional amendment. Doing this required disregarding or changing constitutional norms that require participation of minority parties and civil society in passing legislation and amending the constitution. Hungary and Poland evaded these norms by passing crucial government measures through private bills, which are exempt from the normal legislative procedures creating deliberative democracy. Fidesz evaded a requirement that a constitutional amendment have 4/5 support in Parliament, by simply using its 2/3 majority to change the 4/5 rule. These governments' autocrats obtained sufficient support from the ruling party to enable them to secure passage of extremely significant changes through quick lock step votes, riding rough shod over minority parties. Many of the key legislative proposals and constitutional amendments passed in this way created a unitary executive and undermined the judiciary.

Parallels to the America's Democratic Erosion

American scholars after Donald Trump began to ask the question: Can it happen here? Can America lose its democracy? The correct answer is that our democracy has already declined significantly but we do not know if we will lose it altogether. And, more importantly (for this book), a Supreme Court Justice who must decide how much weight to give the possibility of autocracy in making rulings on presidential power cannot know either. Experience in adjudicating single cases may not help a judge see how numerous incremental changes (many of which lie outside of the federal judiciary's competence) can together erode and even destroy democracy over time. And the question of a democracy's vulnerability is so complex, that the notion that anybody knows whether America will lose its democracy seems quite brazen. The danger is that judges will credit their own intuition, instead of thinking through what they should do when they cannot predict if democracy will survive the myriad challenges confronting it. The next chapter addresses how to take the prospect of democracy loss or erosion into account under conditions of complex uncertainty.

Bearing in mind that that democracy loss often occurs slowly in many incremental steps, we have some cause for concern. Recent American experience disconcertingly parallels that of Hungary, Poland, and Turkey in many ways, although our democratic decline so far does not go as far as the decline in these countries. Over the long term, the picture looks even more disconcerting in light of history's lessons across a broad range of polities.

The Unitary Executive and Presidential Power

Start with the unitary executive. We have seen that the United States has established a unitary executive to a greater degree than many realize. But the unitary executive has a firmer basis, as of this writing, in politics than in law. Congress has not passed laws like those enacted in Hungary, Poland, and Turkey establishing a unitary executive. Nor has the Court thoroughly embraced a unitary executive theory. The process of establishing presidential control has accelerated greatly under President Trump, but remains incomplete as of this writing (see previous chapter).

A unitary executive headed by a power hungry autocrat will likely prove quite dangerous, precisely because we have a presidential system where the public has grown accustomed to seeing the President formulate policy, not just implement legislation. Delegation over the years of vast powers to the President compounds the difficulty. Appreciating the degree of danger would require a separate book. The analytical task would involve imagining how all of the authority delegated the President in the U.S. Code and bestowed upon him by the Supreme Court could be stretched and abused to persecute opposition and

entrench the President in power. This assessment would include, of course, looking at the potential scope of emergency powers, scattered among numerous sections of the U.S. Code.

On the other hand, the American President has potent tools at his disposal to combat democracy that arguably played no role in these case studies, but did play a role in Nazi Germany. The President, as we have seen, now has, effectively, a unilateral war power, which enables him to capitalize upon or manufacture a crisis to rally the country around accepting (or at least not stopping) drastic measures to empower the President and weaken civil liberties. Because the United States has a long history of military intervention, public acceptance of a power enhancing war may prove greater than it would in countries that are not world powers.

Ending Deliberative Democracy.

The Republican Party, when in control of Congress (and many state legislatures), has acted quite a bit like the ruling parties in Poland, Hungary, and Turkey. It has dispensed with “regular order”—our constitutional custom of consulting with the minority and civil society in the formulation of important legislation. Its members almost always votes in lock step along party lines.

Tilting Elections

Determined gerrymandering employing state-of-the-art computer-models to rig the game as effectively as possible (mostly by the Republican Party) has influenced many elections, but not sufficiently for Republicans to remain in control of the House in 2018. This gerrymandering led to political polarization, which substantially impaired deliberative democracy in the federal and some state legislatures. It has also produced skewed electoral outcomes.

But in the United States, states have substantial control over election laws and the Supreme Court has limited gerrymandering to some degree by requiring that congressional districts have nearly equal populations. As a result, rigging elections through gerrymandering on a scale sufficient to allow capture of the federal government here can prove more difficult than in a unitary state.

We have seen repeated efforts to limit the franchise through voter ID and other mechanisms designed to discourage poor minority voters from exercising their rights. As in our case studies, proponents of these measures use bogus excuses (voter fraud in this case) to justify measures tilting electoral competition. In addition, we have seen repeated efforts to politicize federal prosecution to support those efforts, albeit without apparent dramatic results so far.⁸² We have seen some electoral fraud in North Carolina, but a bipartisan electoral commission corrected it. President Trump’s election was tainted, just as Erdogan’s unitary executive referendum’s passage was. In Trump’s case, the taint came primarily from Russian efforts to manipulate voters through social media and through efforts to hack voter registration systems. We do not know if the hacks changed voting in sufficient numbers to have affected the outcome (just as we do not know if the better understood irregularities in Turkey’s referendum determined the outcome).⁸³

Electronic voting machines and registration records create new opportunities to manipulate electoral results in the United States through hacking over the Internet. The new opportunities could prove more potent than the old-fashioned techniques of gerrymandering and voter suppression.

We also have inherited constitutional vulnerabilities to majority rule that have made our elections less representative of majority views than we like to think. The original constitutional choice to give two Senators to each state regardless of population created the possibility that 30% of the electorate could create a Senate majority. Today, less than 12% of the population can create a majority in the Senate (although in

⁸² See (Driesen, David 2008).

⁸³ See (Director of the Office of National Intelligence 2017) i (noting that “we did not make an estimate” of the impact of Russian activities on the 2016 election’s “outcome”).

practice the theoretical worst outcome has not been realized). Minority control of the Senate has accelerated, with the Senate in 2019 having a Republican majority after 57% of the electorate voted for Democratic Senatorial candidates in 2018. Structural constitutional deviations from majoritarianism also played a role in the rise of autocracy in Hungary, Poland, and Turkey. In Turkey, Erdogan's AKP obtained a 2/3 majority in Parliament with just 34% of the vote in 2002, thanks to a law denying representation to parties winning less than 10% of the vote. The constitutional compromises at the founding of Hungary's post-Soviet Democracy also gave a boost to larger parties in order to avoid excessive fragmentation in Parliament. That led to Fidesz capturing a 2/3 majority in Hungary's legislature with only 53% of the vote in 2010. That supermajority enabled Fidesz to transform the Hungarian system to empower Viktor Orban partly through constitutional amendment. Similarly, Poland's PiS party obtained a parliamentary majority with only 38% support. Anti-majoritarian features in a Constitution can enable an autocrat to take power or even obtain a supermajority without majority support. The ability of an autocrat and his supporters to gain power without majority support makes a system vulnerable to autocratic capture.

Shrinking the Public Space

Our public space has shrunk, because we have a less robust media than we once did. Relaxation of rules limiting media concentration and the fairness doctrine have combined with technological changes to destroy most independent sources of news and make the public highly dependent on social media and a handful of large corporate owned media outlets. At least some of these outfits exhibit so much loyalty to the government that they function as propaganda outlets and purveyors of abusive lies can manipulate social media to a regime's advantage.⁸⁴ President Trump has emulated authoritarian tactics by bringing libel suits, by attacking the press as enemies of the people, and by excluding critical journalists from press conferences (a tactic borrowed from Erdogan). The teachings of the new autocrats indicate that the government can shrink the public space further by manipulating media ownership and bringing economic pressures to bear on critical journalists and outlets. A unitary executive could pave the way for even more presidential control over the FCC and antitrust authorities in order to bring that about. These cases also teach that a complete throttling of the opposition media is not essential to establishing an autocracy. Securing the loyalty (or at least the non-opposition) of the most important media suffices.

The Judiciary

Politicians have pursued efforts to interfere with judicial independence most vigorously in the states, where legislators have tried to follow the practice of autocratic parties abroad to entrench themselves in power. In West Virginia, a heavily gerrymandered House recently voted to impeach all of the Justices on the State Supreme Court citing primarily lavish spending on office furniture.⁸⁵ This spending, however, violates no law, as West Virginia's Constitution gives the Justices discretion over such spending.⁸⁶ In spite of objections from the Chamber of Commerce and the AFL-CIO, this power grab worked. Under this pressure, two democrats on the Court resigned, and the Governor replaced them with prominent Republican politicians. The state legislature brought impeachment proceedings against the three remaining Justices, voting to impeach two. The West Virginia courts invalidated the impeachments based on separation of powers. The federal government prosecuted two of the Justices, both of whom resigned in response to federal convictions for misuse of state credit cards and vehicles (one based on a plea to a single count of wire fraud, the other based on conviction on 10 counts). They agreed to reimburse the state for losses of \$800 in one case and \$1,273 in the other. Thus, Republicans acting very much like PiS or Fidesz, undermined judicial independence in West Virginia through impeachment of its Justices.

⁸⁴ (MAYER 2019)

⁸⁵ See Campbell Robertson, A Coup or the Couch: What's Behind the Impeachment of West Virginia's State Supreme Court, N.Y. TIMES (August 24, 2018).

⁸⁶ Id.

In Pennsylvania, Republican legislators filed articles of impeachment against state Supreme Court Justices who found a partisan gerrymander unconstitutional. When this effort failed, they sought a constitutional amendment converting all appellate court judgeships in the state into elected offices.

In North Carolina, the executive director of the Republican Party threatened Justices with impeachment if they rejected a Republican ballot initiative to take the power to make interim court appointments away from the Governor, currently a Democrat. The State Supreme Court, however, stood up to this pressure and invalidated the ballot measure. The legislature did not impeach them. In short, in the wake of gerrymandering creating extremist majorities in legislatures out of proportion to the support for extremism in the public, judicial independence has come under assault in some states, with mixed results so far.

The federal courts have also begun to lose some of their independence, due to the politicization of the appointments process. This politicization puts a premium on loyalty to the ruling President and his party, making a judge's likely fealty to party goals a major criterion for nomination. Trump has arguably used the politicized appointments process to pursue his own goals as an autocrat by nominating executive power proponents to the Supreme Court and very clearly sought to put ideological allies on all federal benches.

When US democracy was more robust, Presidents usually chose widely respected nominees perceived by all parties to be fair, and the Senate usually approved judicial nominations by wide margins. The U.S. had a norm demanding multiparty support for judges in the form of the filibuster rule in the Senate, an analogue to provisions found in the Hungarian constitution that require multiparty support of nominees to its Constitutional Court prior to the election Orban. Any member, under the Senate rule, could block a nomination by threatening to talk continuously on the Senate floor. Overcoming the filibuster required a 2/3 vote, which in practice, meant that a judge must have support from both parties to obtain Senate approval. This norm protected judicial independence by allowing judges who refused to display loyalty to a particular party's preferences or to the President nevertheless to obtain nomination and confirmation.

The Republican-majority in the Senate abolished the U.S. requirement for multiparty support for Supreme Court Justices recently through a simple amendment of the Senate rules. The Democratic Party had abolished the rule with respect to lower court judges when it was in the majority. Thus, erosion of the American customary norm of bipartisan support for judicial nominees has paved the way for court packing as judges retire.

Franklin Delano Roosevelt had proposed to use a technique seen in the new autocracies when the U.S. Supreme Court threatened his "New Deal" legislation—expansion of the membership of the high court. Bipartisan opposition in defense of the informal norm of not subordinating the Court to partisan agendas defeated the scheme.⁸⁷ The Republicans, however, defied this informal norm against partisanship in deciding about the size of the Court by, in effect, shrinking the Court temporarily for partisan advantage when the Senate refused to consider President Obama's nomination of Merrick Garland to the Supreme Court in the last year of Obama's presidency.⁸⁸

Emulating another authoritarian tactic, forcing federal Article III judges likely to oppose the regime's consolidation of power to retire early, would likely prove impossible in the United States through a formal legal rule. Since the US Constitution provides lifetime appointments for federal judges, lowering the retirement age would require a constitutional amendment, which is extremely difficult under the US Constitution.⁸⁹ An American autocrat seeking to get federal judges to retire early or to countenance acts they thought unconstitutional would probably have to resort to informal means, such as blackmail, to accomplish this result and that would make it harder to accomplish. A President could also force early retirement through abuse of the impeachment power (as in West Virginia), but that would require the

⁸⁷ See Levitsky & Ziblatt, at 119.

⁸⁸ See *id.* at 166-67.

⁸⁹ See *id.* at 75-76.

capture of both houses of Congress. Lifetime appointments do not prevent an autocrat from packing the courts, but they slow down the process, giving political processes some chance to regroup.

On the other hand, the Trump administration has laid the groundwork for authoritarian term ending-tactics with respect to administrative law courts. Using a narrow pro-unitary executive ruling prohibiting SEC staff from appointing an administrative law judge as a pretext, the Trump administration has begun to erode the for-cause removal provisions ensuring the independence of administrative law judges (and paved the way for politicized appointments by exempting some administrative law judges from requirements to pass a competitive exams).⁹⁰ This approach could help the President avoid the rule of law, by getting administrative confirmation of results at odds with the law's policy goals.

Autocrats abolished the right of any citizen to seek judicial review of allegedly unconstitutional government actions, which allowed the Court to function robustly as a check on unconstitutional efforts to entrench a regime in power. We have seen that the U.S. Courts have frequently disabled themselves from regular enforcement of the separation of powers, especially with respect to war powers, by creating and applying justiciability doctrines to insulate claims of excessive presidential power from judicial review.

Of course, if an American autocrat packs the federal courts with reliable loyalist judges no audience will exist for this book's argument. But to the extent we have judges who are seriously willing to listen to arguments against enhanced presidential power rooted in the Framers' concerns about autocracy, they should understand that we do not have as robust a democratic system as we did a number of years back and that presidential power constitutes a potential threat to continued democracy. Even without the protection of lifetime tenure, the Polish and Hungarian constitutional courts did recognize the danger at times and struck down some government measures as unconstitutional. With lifetime tenure, there is always hope that even judges appointed to approve the governing regime may give the reality of how autocracy arises some credence in at least some cases.

Complexity and Uncertainty

This sketch shows that our democracy has declined, but it also shows that we have not yet lost it. The key to understanding why no federal judge (and no analyst) can answer the question of whether American can lose its democracy in the medium term involves understanding the complexity of the system dynamics that could unravel the system in the future. A court cannot predict whether a President removing prosecutors from office can secure the appointment of cronies determined to sideline his most important opponents, and how successful those efforts might be (bearing in mind the lesson from Hungary that convictions are not a necessity). President Trump clearly has indicated that he wants to follow the lead of his fellow autocrats and wanted the Justice Department to lay off prosecution of Republicans and go after Hilary Clinton and James Comey.⁹¹ Just as the firm support of AKP, PiS, and Fidesz allowed autocrats to use prosecution as a weapon to entrench himself in power, a Senate with a bare majority of determined supporters of an authoritarian President can enable him to use prosecution to persecute the President's opponents and protect his supporters. Over the long term, our legal system is much more vulnerable to that sort of attack than a parliamentary system, because our Constitution authorizes presidential appointment of the chief prosecutor (the attorney general). Furthermore, the President's ability to fire attorneys general and perhaps other prosecutors makes the system more legally vulnerable to an effort to weaponize prosecution than parliamentary systems.

A court cannot predict how a President might be able to intimidate critics in the media through antitrust prosecution, abuse of regulatory authority, libel actions, and other abuses of authority. It cannot predict how much damage a President might inflict upon our democracy by declaring an emergency and using all of the authority given the President (or the executive branch under his control) in the U.S. Code while claiming additional implied powers.

⁹⁰ See *Guidance*, *supra* note 61.

⁹¹ (Liptak, Adam 2018); (Schmidt, Michael and Haberman, Maggie 2018).

We have described autocrats' substantial determined efforts to tilt elections. No court can predict whether gerrymandering, electronic manipulation, and other election tilting measures will prove decisive in an election that might implicate the future of an authoritarian President or his supporters. The Erdogan referendum's success highlights the difficulty of prediction. Most observers expected the referendum to pass by a wide margin, owing to the shock of the coup attempt, the curtailment of civil liberties in the resulting state of emergency, and AKP's domination of the media. The vote, however, proved close. A fairly technical electoral board decision to accept unstamped ballots has received a lot of scrutiny, but even in hindsight, EU authorities could not determine whether this and other irregularities were decisive. In a struggle to preserve democracy against a determined autocrat, minor defects in electoral integrity can have ripple effects that enable autocracy in a close election.

Over the long-term, prediction proves even more difficult, but even greater cause for concern exists. Partisan division, which we have suffered from for some time and may well continue, often proves fatal to democracies in the long run.⁹² When government cannot meaningfully address key problems because of partisan division and politicians substitute constitutional hardball for compromise and reasoned debate, people sometimes support autocrats in desperation. That problem played a key role in the destruction of Weimar Germany, in democracy loses in Latin America, and in many other cases. An autocrat (or several autocrats) attacking the democratic system may eventually succeed unless the people with positions of power in our institutions stop them.

Autocrats know this, sometimes instinctively. They demonize and attack their opponents and the media, hoping to secure sufficient public support to allow them to compromise the rule of law to tilt elections and shrink the public space. They stir up fear and anger against outside forces (immigrants in the case of Hungary and Poland, Kurds and an exiled Gulen leader in Turkey), in order to rally populist support against elites. They then manipulate these fears by castigating their political opponents as elitist allies of the despised groups. Division and fear can outlive a single President's term in office.

Thus, a non-trivial risk exists that the United States may lose its democracy sooner or later because a President will take control of the nation, establishing a unitary executive, abusing the authority a unitary executive has, and perhaps deploying emergency powers to overcome resistance. In taking this threat into account, one must remember that a President in control of a unitary executive can, in theory, avoid legal constraints entirely. Only the executive branch disciplines and constrains citizens. The executive branch alone can lock up opponents, levy debilitating fines, and harass its opponents. The abuse of executive power in the US has been sporadic rather than constant, because Presidents customarily obey court orders and seek to remain within the bounds of their constitutional powers. But if a substantial minority of the public comes to accept the idea that a President should solve the nation's problems himself, that external threats demand this, and that the President's opponents are evil, democracy can unravel.

The fact that even in countries with less well established democracies than we have, Presidents feel obliged to capture constitutional courts is encouraging in a way. It suggests that courts play an important role in legitimizing and delegitimizing legal change. It suggests that regimes regard rebukes by a court having neither purse nor sword impede absolute power. It suggests, in short, that courts might have a role to play in defending democracy.

That is especially important in the United States, because democratic amendment of the Constitution (like that occurring in Hungary and Turkey) proves extremely difficult. The judiciary amends the Constitution over time, by adding to its rather sparse provisions and by interpreting them to address questions coming before it. And it can amend the Constitution to sanction or at least tolerate the establishment of autocracy that the framers sought to avoid. Or it can use its power to slow down and contribute to the defeat of autocratic tendencies that can undermine a Republic. The next chapter addresses the question of how courts should respond to the lessons gleaned from study of the role of presidential power in eroding and perhaps destroying democracy.

⁹² Cf. Christopher R. Browning, *The Suffocation of Democracy*, NEW YORK REVIEW OF BOOKS (October 25, 2018) (discussing the extent to which democratic erosion in the US resembles developments in the Weimar Republic).

