Courts Against Backsliding: Lessons from Latin America[1]

Abstract

The recent wave of autocratization in Latin America has put courts at the center of debates about regime and regime change. Much of the literature on the judicial politics of democratic backsliding focuses on incumbents' efforts to capture judiciaries and weaponize them against the regime. Our approach is different. We provide illustrations of independent courts in Argentina, Colombia and Mexico that successfully fought back when presidents pushed for reforms that jeopardized democratic stability. With the goal of furthering our knowledge of how judges can also complicate autocratization, the paper thus focuses on a type of horizontal accountability intervention that we refer to as "constitutional balancing." We also shed light on the reasons why constitutional balancing is well-equipped to slow down or stop backsliding via a comparison with another type of horizontal accountability intervention: public administration policing. These interventions are increasingly common in Latin America, usually in the form of high-profile corruption prosecutions. Unlike constitutional balancing, however, public administration policing has proven highly disruptive, and ultimately unable to settle regime-threatening political conflict.

[1] We are grateful for the comments and suggestions provided by four anonymous reviewers.

Throughout most of the 20th century, Latin American courts had a troubled relationship with democracy. Between irrelevance and subservience, they did not help advance democratic regimes. The third wave of democratization changed that. With the birth of new democracies, judges entered the political arena as referees between different branches of government and courts became battlegrounds to advance rights and deepen democratization (Sieder, Schjolden and Angell 2005; Couso, Huneeus and Sieder 2010; Helmke and Rios-Figueroa 2011). The new wave of autocratization (Gamboa 2022; Papada et al. 2023; Boese, Lindberg, and Lührmann 2021) has put courts back at the center of debates about regime and regime change (Aguiar-Aguilar 2023). Have Latin American courts successfully responded to executive attempts to gradually undermine democracy?

Much of the literature on the judicial politics of contemporary democratic backsliding rightly zeroes in on would-be autocrats' often lethal efforts to capture the courts and weaponize them against the regime. In other words, judges are depicted as victims and agents of autocratization. Our approach is different. We provide illustrations of independent courts in the three Latin American countries that successfully fought back when incumbents pushed for reforms that threatened democracy.[2] With the goal of furthering our knowledge of how judges can also complicate autocratization, the paper thus focuses on a type of horizontal accountability intervention that we refer to as "constitutional balancing." Such interventions comprise rulings against measures designed to enhance executive power, the core attribute of democratic backsliding processes. Put differently, they are rulings that strike or water down reforms that seek

[2] We are of course not the only ones who take this approach. See, for example, Sipulova (2024), Staton, Reenock, and Holsinger (2022), and Zambrano et al. (2023).

to alter the existing distribution of power and prerogatives between the branches of government. In so doing, judges re-calibrate the system of checks and balances.[3]

We choose to shed light on the reasons why constitutional balancing by high courts is well-equipped to slow down or stop backsliding via a comparison with another type of horizontal accountability intervention: public administration policing. The latter refers to attempts by the courts to combat grand corruption in an effort to preserve the public character of the state and prevent incumbents from rigging the electoral playing field. Though also intended to protect democratic integrity, public administration policing interventions, including the famous Lava Jato Operation in Brazil, Peru and Ecuador, rarely settle conflict in the same way as we observe in our cases of constitutional balancing.

As we explain in more detail below, there are obvious differences in (a) the subject matter of both types of interventions, (b) the types of actors involved in the legal process, and (c) the dynamics of the lawsuits. Some readers could reasonably suspect that these differences make the comparative exercise untenable. We disagree. The contrast between such starkly different types of judicial checks on executive behavior helps put into sharp relief why it is that "constitutional balancing" attempts can prove quite effective at stopping or delaying democratic erosion. In other words, the comparison is theoretically productive because it allows us to start thinking systematically about what makes constitutional balancing distinctive, that is, the conditions under which it may be a good antidote to backsliding. Furthermore, these apparently “strange bedfellows” represent the most salient and politically consequential pathways chosen by Latin

[3] Our use of the term “balancing” should not be confused with some hermeneutic practices which involve the balancing of rights, such as proportionality tests. As we will show in our case studies, constitutional balancing can be achieved via a variety of methods of legal interpretation and argumentation, including highly proceduralist and formalistic readings of the law.

American courts in recent times to police politicians with the goal of putting clear limits on policies or actions that could jeopardize the integrity of democratic regimes.

The contrast between constitutional balancing and public administration policing reveals a series of factors that may explain the comparative benefits of constitutional balancing. First, the stakes in constitutional balancing interventions tend to be lower, even when designed to thwart autocratic projects. They don't involve existential threats to politicians and therefore reduce the incentives for fierce backlash. Second, they are one-shot interventions as opposed to involving protracted investigations and decisions in a variety of interrelated cases by a multiplicity of prosecutorial and judicial actors. This allows for more careful strategizing and reduces the risk of making mistakes that embolden courts' opponents. Third, public administration policing requires a degree of legal unorthodoxy that judges can usually avoid when engaging in constitutional balancing. The result in the latter cases are decisions that are easier to defend from a jurisprudential standpoint. By contrast, anti-corruption efforts often allow embattled politicians, including some enemies of democracy, to cry foul and claim victim status. Finally, the rhetoric around constitutional balancing tends to be in line with classic republican conceptions of liberal democracy, whereas aggressive public administration policing gains momentum by spreading an anti-politics message, often in an illiberal fashion. This can open the door to populist outsiders and further destabilize democracy.

The next section discusses the role of Latin American high courts in regime politics. We outline the types of horizontal controls available in the judicial toolkit, and the ways in which Latin American judges have used them in the past. We then present three examples of recent attempts to protect democracy via constitutional balancing. Using the cases of Colombia, Argentina and Mexico, we discuss what constitutional balancing entails and its possible effects on regime

integrity. Finally, we contrast constitutional balancing with public administration policing, and explain why these different types of horizontal accountability can yield very different outcomes.

Courts and Democracy in Latin America

Contrary to contemporary visions of constitutionalism, throughout most of the 20th century Latin American judges were far from being defenders or architects of fundamental rights. Instead, that history is one of irrelevance at best and subservience to authoritarian interests at worst. For example, Argentina's Supreme Court was stifled by a doctrine of "self-restraint in political questions" (Oyhanarte 1972, 96), which found its most radical expression when –in the wake of the 1930 military coup– the justices recognized the legitimacy of the new authorities, or when –after the ousting of President Frondizi in 1962– they accepted the irreversibility of democratic breakdown. Similarly, an ideology of "apoliticism" (Hilbink 2007) led the Chilean judiciary to acquiesce to and deepen Pinochet's authoritarianism. And during internal armed conflicts such as the one experienced by Peru in the 1980s, the judiciary passively endorsed draconian counter-insurgency measures and failed to defend the constitutional order, thus becoming yet another "agent of violence" (Comisión de la Verdad y Reconciliación 2003, Vol II, 249-250).

The onset of the third wave of democratization changed this. According to Botero, Brinks and Gonzalez-Ocantos (2022: 1), "[a]s never before, judges entered the political maelstrom, serving as arbiters between the branches of government in heated debates over policy and the reach of presidential or legislative prerogatives." Courts were also turned into highly consequential "battlegrounds for the realization and expansion of civil, political, cultural, and socio-economic rights." In specific areas such as transitional justice, courts actually played a direct role in democratic consolidation (Gonzalez-Ocantos 2016). As Kim and Sikkink (2010,

940) put it, human rights trials are "high-profile symbolic events that communicate and dramatize norms." Apart from advancing victims' right to truth and justice, these trials strengthened the rule of law by sending a clear message that no one is above the law, that the costs of subverting the democratic order are high, and that under democracy even those who perpetrated the most heinous crimes are guaranteed a fair day in court (Smulovitz 1995; Smulovitz and Acuña 2000).

After many years of growth, however, democracy in Latin America is once again in steep decline: an average of 12.4% points in V-Dem's Electoral Democracy Index since 2003. Out of 18 democracies in 2001, five became authoritarian (Venezuela, Nicaragua and El Salvador), four are struggling (Perú, Ecuador, México and Guatemala) and two (Bolivia and Honduras) experienced authoritarianism. Such developments put courts back and center of debates over regime type.

Like elsewhere in the world, current assaults on democracy in Latin America do not tend to come in the form of outright coups. Leaders with hegemonic ambitions hollow democracy out in an "incremental" process (Haggard and Kaufman 2021, 28) that gradually erases its defining features and promotes "executive aggrandizement" (Bermeo 2016). As Gamboa (2022, 25) explains, "[g]overnments that successfully erode democracy gravely weaken formal institutions that promote horizontal accountability and guarantee free and fair elections to such an extent that they thwart electoral accountability as well." Because the erosion of democracy happens over time, courts have come to play an important role in these contemporary autocratization processes across regions.

In places as diverse as Venezuela (Garcia Holgado and Sánchez Urribarri 2023), Ecuador (Garcia Holgado 2023a), Israel (Shultziner 2023), Hungary (Bankuti et al. 2012; Bugaric 2014;

Pech and Scheppele 2017; Halmai 2017) or Poland (Karolewski 2016; Sadurski 2018; Bakke and Sitter 2022; Stambulski 2022), wanna be autocrats seek to coat their projects with a "legal façade" (Lührmann and Lindberg 2019, 1104) and promote a type "autocratic legalism" (Corrales 2015; Scheppele 2018) that simultaneously undermines the rule of law and rules by law (Moustafa and Ginsburg 2008). In these cases, courts function as victims and, later, agents of erosion:

> *"Using arguments touting efficiency, public austerity, governability, or the fight against judicial corruption, false democrats remove (legally and surreptitiously) judges and/or justices from the bench [...] With the court in their pockets, we can expect false democrats to request their court to decide in favor of the constitutionality of their reelection, to drop corruption cases targeting the ruling elite, or to validate restrictions imposed on free speech or freedom of association—in short, to clear their way to legally and successfully aggrandize their power, unleashing democratic erosion" (Aguiar-Aguilar 2023, 12).*

When incumbents co-opt the courts, loyal judges engage in "abusive judicial review," interpreting the constitution with the goal of undermining liberal democracy (Landau and Dixon 2020: 1325, 1334). In particular, co-opted courts can help executives attack democracy in two ways (ibid, 1345-1363). First, when courts behave as defensive weapons they validate the legal instruments (laws, decrees, or constitutional amendments) championed by the executive as part of the anti-democratic push. Although in 2007 Hugo Chávez lost a referendum to lift term limits, in 2009 the Venezuelan Supreme Court supported Chávez's call for another referendum to annul term limits. This was despite the fact that the Constitution prohibited re-debating amendments already rejected during the current legislative session (Casal 2020: 947). Second, when courts behave as offensive weapons, judges are themselves the tools through which the executive is able to undermine a specific dimension of democracy. For example, in 2016 Bolivia's Evo Morales lost a referendum to amend the Constitution in order to run for a fourth time. However,

in 2017 co-opted justices ruled that constitutional limits on presidential re-election violated Morales' political rights as established by the American Convention on Human Rights (Inarra Zeballos 2019: 241-250).

Yet, because the third wave improved levels of judicial independence, which in turn encouraged rights activism and allowed courts to secure a more prominent and autonomous role in constitutional exchanges, the participation of judicial branches in contemporary backsliding is not always reduced to being victims (and then agents) of autocratization. In this regard, a global study by Boese et al. (2021, 896) finds that "stronger judicial constraints on the executive are significantly associated with greater democratic resilience to experiencing autocratization."

In most democratic regimes, existing checks and balances exist in an equilibrium that is often quite tense. In part due to the tendency for politics to become increasingly judicialized, and for courts to have a say over myriad policies, politicians are very interested in meddling with judges. Reforming the courts and tinkering with their membership and prerogatives therefore frequently makes it onto the agenda. In some cases, especially in new democracies, this can become a bread and butter issue (on Latin America and Africa see Llanos et al. 2015; Castagnola and Perez-Liñan 2016; Castagnola 2012, 2017, 2020), while in others, it tends to be more episodic (for example, on the USA see Clark 2010). These shenanigans, however, are usually not existential, allowing courts room for maneuver and to continue to play a salutary role in the preservation of democracy. To be sure, political elites sometimes turn up the volume, launching potentially existential threats to the rule of law. But here too we see judicial resistance efforts, both on and off the bench (Trochev and Ellett 2014; Laebens and Lührmann 2021; Šipulová 2021).

Reflecting this reality, our article focuses on instances in which Latin American courts contributed to the prevention or derailment of democratic erosion via the exercise of horizontal accountability functions. We describe examples of courts actively seeking to constrain politicians. This is in contrast to previous work (and some contributions to this symposium), that explores cases where once courts were neutralized by the executive they were used as tools in the assault on democracy (Figueroa García-Herreros 2016; Aguiar-Aguilar 2023; Sadurski 2022**)**. Specifically, we ask the following questions: Is the resolute enforcement of the law or attempts at constitutional balancing always beneficial for democracy? What types of horizontal accountability by judges thwart, slow down, and complicate politicians' efforts to entrench their power, disrupt the level playing field, and engage in state capture?

Helmke and Rios Figueroa (2011) helpfully identify courts' dual function in democracies as one of horizontal and vertical control. Vertical control, which refers to judges' involvement in "interpreting the scope of individual and human rights" (2011, 7), is essential for deepening democracy but does not concern us here because it does not speak directly to the core dimension of democratic erosion: the disruption of constitutional checks and balances (executive aggrandizement or hegemony; see Pérez-Liñán, Schmidt, and Vairo 2019, 606). Horizontal control, by contrast, "involves arbitrating interbranch or intergovernmental disputes" (Helmke and Rios Figueroa 2011, 7) including efforts to police the exercise of power in order to avoid forms of state capture (for instance, via grand corruption) that have the potential to tilt the electoral playing field. This type of accountability is the main focus of our article.

To use Martin Shapiro's (1981) timeless "prototype of courts" as a vertex in the conflict resolution "triad," the horizontal control function requires judges to act as arbiters of procedure and of the reach of the formal prerogatives of institutional actors. Courts intervene such that the

actions of these agents (in our case the key one is usually the executive but also sometimes acting in tandem with the legislature), do not fundamentally alter the constitutional balance of power or undermine the public character of the state, thus reducing the reasonable expectation of incumbent turn-over.

The nature of democratic erosion opens up a space for judicial horizontal control to matter in ways that prevent the worst outcomes. Erosion is not an event but a process; it "happens gradually over time" (Gamboa 2022, 24). This is important. In classic breakdowns, "once the authoritarian civilian or military leader comes to power it is too late to save democracy" (Gamboa 2022, 30). By contrast, in more gradual transitions, regime assaults are piecemeal, perhaps even peripheral or not directly designed with regime change in mind. While these tend to accumulate and reinforce each other, adding momentum to the process and eventually turning it into an unstoppable force, the diachronic character of the phenomenon means there is room for institutional interventions that complicate authoritarian ambitions. Opposition actors have numerous opportunities to challenge the executive and try to stop and reverse this autocratization process (Gamboa 2022: 15). As arbiters, courts are capable of channeling these attempts, invalidating erosive legislation or uncovering and punishing malfeasance. Put differently, courts may be able to "settle political conflict" (Gibson and Caldeira 1995, 446) and allow other actors to "move on with politics." When incumbents have strong hegemonic ambitions, courts may not be able to put regime disputes to bed, but can certainly allow democracy to live another day or raise the cost of future attempts to erode democracy. For instance, a steadfast court may force executives to reveal their true colors by launching more overt, plainly illegal and internationally unacceptable attacks, thus undermining the putative legitimacy of their agenda or strengthening the opposition's hand.

We remain agnostic as to the reasons why judicial actors are sometimes willing to embark in interventions that put them on a collision course with the ruling elite. Rational choice theorists of judicial behavior (e.g., Epstein, Knight, Shvestova 2001; Iaryczower, Spiller and Tommasi 2002; Helmke 2005; Rios-Figuera 2007) may point to the presence of a strategic space that leads courts to expect to come out of the battle relatively unscathed (e.g., lack of congressional supermajorities to sanction maverick judges). Those of a sociological institutionalist persuasion may instead emphasize the development of professional role conceptions, legal preferences, and institutional interests that indicate the need for and appropriateness of seemingly irrational jurisprudential adventures (e.g., Nunes 2010; Couso 2010; Arantes 2011; Hilbink 2012; Gonzalez-Ocantos 2016). Whatever the motivation, as we show below, Latin American judicial actors often challenge elites and work as bulwarks of democracy.

We identify two types of horizontal control interventions that are relevant for preventing or curbing democratic erosion: "constitutional balancing" and "public administration policing" interventions. The lion share of the paper is devoted to a discussion of examples of "constitutional balancing." These interventions aim to stop what appear to be efforts by the political branches to expand their prerogatives or limit the voice of the opposition, including laws or decrees that increase the legislative powers of the president (e.g., decree, budgetary, referenda powers); increase the non-legislative powers of the executive (e.g., appointment of oversight officers); or change electoral rules (e.g., term limits, gerrymandering, campaign financing).

Our examples suggest that "constitutional balancing" has the potential to be quite effective at thwarting authoritarian projects. This shows the judiciary's potential to act against

types of behavior that are either part of explicit democratic erosion efforts or could imperceptibly open the door to it. To better understand why, we contrast this type of horizontal control with "public administration policing," which refers to inquiries into allegations of corruption by top bureaucrats and elected officials. Grand corruption may seem orthogonal to backsliding, but it is not. In fact, as a form of state capture it represents a direct threat to the integrity of the electoral playing field. Corruption is a source of incumbency advantage, especially because graft is not only directed at personal enrichment but also at securing resources to fund campaigns (Manzetti 2014; Figueroa 2021). As Laurence Whitehead (2021) astutely points out, endemic bribery schemes around, for instance, large infrastructure projects, constitute one of Latin America's most worrisome "democratic delinquencies." These are structural forms of malfeasance that reduce the quality of government and undermine the public character of the state. In more extreme circumstances, as recently seen in Guatemala, entrenched delinquencies create strong incentives to ban candidates and derrail elections (Schwartz 2022).

The Latin American experience suggests there are important differences in the ability of "constitutional balancing" and "policing public administration" to settle political conflict in ways that effectively prevent the worst outcomes. On the one hand, we describe how courts in Colombia, Argentina, and more recently Mexico, stopped potential autocrats' from enhancing their powers, extending their time in office, or re-engineering the legal contours of the electoral process. On the other hand, when it comes to anti-corruption interventions, we discuss how judicial actors in countries such as Argentina, Brazil, Ecuador, and Peru, were less able to lower the voltage of politics. In fact, they tended to exacerbate rather than settle conflict. Moreover, this is a type of intervention that often demonizes politics and strengthens the hand of outsiders with dubious democratic credentials, thus multiplying the threats to regime stability.

There are several reasons why different types of horizontal control may have such different implications for democratic erosion. First, "policing public administration" interventions constitute - or can quickly morph into - existential threats for politicians. Being accused of (and punished for) corruption not only tarnishes the reputation of parties and their leaders, but is often associated with a *de jure* exclusion from the electoral game. After "constitutional balancing" interventions, by contrast, politicians may struggle to realize their hegemonic ambitions but further attempts are by no means off the table. Consequently, incentives for orchestrating intense backlash are weaker.

Second, "constitutional balancing" interventions are discrete phenomena, that is, they involve courts deciding on the validity of single pieces of legislation. Because these decisive actions can only be taken by top courts, the question is easier to settle via judicialization. Anti-corruption probes, by contrast, involve multiple decisions on a single case by rank-and-file judges and prosecutors, and are often protracted affairs due to the nature of evidence gathering and the structure of the criminal legal process. All of this multiplies the potential for setbacks and controversies, and means the judiciary may fail to speak in one voice.

Third, returning to Martin Shapiro's conflict resolution framework in which courts are a vertex in a triad, "when [the judge] decides in favor of one of the disputants, a shift occurs from the triad to a structure that is perceived by the loser as two against one [...] A substantial portion of the total behavior of courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one" (1981, 2). In this regard, there is a relative difference in the clarity of the rules being enforced in our types of horizontal control. This affects the degree to which the triad structure risks collapse. While both types are not exempt from the need to exercise some degree of jurisprudential unorthodoxy in order to make the law bite, the

need is higher in the case of anti-corruption inquiries, where the evidence can be quite thin, criminal types ill-defined, and zealous prosecutorial aggression required to make progress (Gonzalez-Ocantos et al. 2023). As a result, politicians often find space for practicing the polarizing politics of victimhood and denounce "lawfare" (Smulovitz 2022). This can easily turn the tables, with "democratic delinquents" claiming to be the victims of autocratic legalism. By contrast, "constitutional balancing" can remain a highly formalistic exercise, prioritizing procedural niceties and steering away from thorny arguments about fundamental principles of law. All of this means that the legitimacy of judicial interventions stands on firmer grounds. Legitimacy is a critical determinant of courts' ability to placate conflict and recruit allies to fend off relentless spoilers.

In what follows, we present three examples of "constitutional balancing" in Latin America to illustrate our main argument and then contrast their effectiveness with that of attempts at "public administration policing." Since the primary goal is to contribute to theory building efforts about the conditions under which courts may successfully thwart autocratic projects, we selected positive cases, that is, cases in which high court judges blocked corrosive reforms (Goertz 2017: 63-66; Beach and Pederson 2019: 270-277). Ours are relatively independent courts because that is one of the key scope conditions for the argument: contexts in which backsliding has not yet altered the institutional landscape to a degree that the regime could be said to be changing in character. Once courts are coopted, which are the types of cases most frequently studied by scholars of the judicial politics of backsliding, the game is a completely different one. In particular, courts can no longer be expected to act as bulwarks of democracy, as noted by Staton, Reenock, and Holsinger (2022: 12).

Like any small-N design, ours cannot make generalizable claims. Yet, differences between the Argentine, Colombian and Mexican cases indicate certain potential for generalisability across theoretically relevant contexts. For instance, while the Colombian Constitutional Court and the Argentine Supreme Court are cited as examples of highly interventionist courts at the forefront of the so-called "judicialization of politics" (Botero 2023), the Mexican Supreme Court is often depicted as a regional laggard, with less frequent and consequential interventions (Ansolabehere 2010; Magaloni et al. 2011; Gonzalez Ocantos 2016). Similarly, the subjects of our constitutional balancing interventions (presidential reelection in Colombia, judicial reform in Argentina, and electoral reform in Mexico) are also different, suggesting that success does not necessarily hinge on the type of policy being challenged.

Protecting Democracy via Constitutional Balancing

Colombia (2002-2010)

Between 2002 and 2010, Colombia's democracy was under attack. During his eight years in government, President Alvaro Uribe (2002-2010) introduced several reforms to enhance his powers and extend his time in office. Despite enjoying favorable conditions for doing so, he failed in his attempts to erode democracy. Unable to fully co-opt democratic institutions and change the constitution to run for office a third time, he had to step down and give way to another democratically elected president.

Key in understanding Colombia's failed erosion of democracy is the Constitutional Court (hereafter CCC; Mayka 2016). With the help of the opposition (Gamboa 2022), the high court served as the backstop for Uribe's most outrageous anti-democratic reforms. Uribe was highly

popular throughout his government, and the third most popular president in Latin America between 1978 and 2019. The CCC, while popular, was never as popular as the president. According to LAPOP, in 2008 (the year Uribe's supporters introduced a constitutional reform to allow him to serve a third consecutive term as president), trust in the high court was on average 4.34, while trust in the president was 5.22. Yet, in 2010 the CCC ruled against the executive's reelection ambitions.

At the heart of the ruling were arguments put forward by members of the opposition and pro-democracy NGOs. Constitutional reforms in Colombia cannot be reviewed by the CCC based on their content, only their procedural irregularities (Art. 242, Constitución). Throughout Uribe's government the opposition in congress worked hard to create and signal these procedural irregularities to the court (Botero and Gamboa 2021, 2022). During the debate on the referendum asking citizens if they wanted to change the constitution to allow a second presidential reelection, for example, opposition candidates used parliamentary procedure to buy time and search for irregularities in the process by which the signatures in support of the referendum had been collected. They then made sure these irregularities appeared in the congressional record. Once the bill went to the Court, the fact that these irregularities had been introduced into the record allowed the CCC to expand the scope of its review powers.

Though usually constrained to evaluate developments that take place between the moment the bill is introduced in congress and the moment in which it is approved by the legislature, thanks to the irregularities recorded in congressional gazettes, the court was able to justify an earlier starting point for its legal analysis. Based on objections raised by opposition members of congress during legislative debates (reported in the gazettes and repeated in lawsuits against the bill) to the way signature collection was financed, the court also reviewed this aspect

of the process. Using information gathered by members of congress and NGOs, it was able to determine problems with the funds that supported the campaign and used this as the central argument to rule against the third reelection reform.

Interestingly, the CCC's ruling also references the "constitution substitution theory." This theory argues that although the Constitution can be "modified" by Congress, by citizens (via referenda) or by a Constitutional Assembly (Art. 374), it can only be completely "replaced" by a Constitutional Assembly. As a result, any constitutional reform that threatens to de facto "substitute" the Constitution and is done via congress or referenda is unconstitutional. In other words, changes that carry the risk of substantially altering the system of checks and balances, such as having a president serve for nearly a decade and a half, cannot go through unless decided in a Constitutional Assembly. Though increasingly popular (Botero and Gamboa 2022), the doctrine was relatively new in the 2000s, when the CCC considered Uribe's attempt to run for office for a third time. The Colombian constitution does not have explicit "irrevocable clauses" (i.e. *clausulas pétreas*). It is unclear which kind of reform does or does not substitute the constitution.[4] Accordingly, the original decision written by Justice Humberto Sierra Porto and debated by the judges made no allusions to "constitution substitution."[5] If the CCC was going to rule against a popular president it had to do it on solid grounds. References to "constitution substitution" were only added later on, after the court had already ruled, with an eye on future executives tempted to try a similar move.

The Colombian case shows a court willing to innovate slightly in order to justify why looking at campaign financing was within its remit, and thus find cause to invalidate a reform

[4] Interview with Germán Zafra, Constitutionalist, Bogotá, December 10, 2013.

[5] El Tiempo. 2010. "Esta es la ponencia de Humberto Sierra Porto que dice 'no' al referendo reeleccionista." El Tiempo. https://www.eltiempo.com/archivo/documento/CMS-7137447 (September 8, 2023).

that threatened democracy. But it innovated in a rather formalistic manner, paying almost exclusive attention to procedural matters. There was no question that the constitution allowed the court to engage in that type of procedural review. By contrast, it steered away from more controversial doctrinal questions. Doing so could have strengthened the hand of its detractors, in particular, the president. While in the end the court did reference the fledgling "constitution substitution" doctrine, this was not part of the ruling's *ratio decidendi*. Instead, the judges used the decision as an opportunity to build, in a piecemeal fashion, a more robust argumentative toolkit to deal with future, perhaps more virulent, attempts at democratic backsliding via constitutional reform. This formalistic approach may go a long way to explain why the decision effectively settled political conflict over the reelection question: out of time to try a different strategy, and without arguments that could delegitimize the CCC's decision, President Uribe obeyed the decision and did not run for a third term.[6]

Argentina (2007-2015)

Between 2007 and 2015, Argentine president Cristina Kirchner tried to implement a series of reforms that could have negatively affected two crucial components of liberal democracy: freedom of expression and judicial independence. During that period, the executive became progressively radicalized against journalists, media owners, and judges. After judges started to block the implementation of new media regulations, Cristina Kirchner developed an illiberal narrative about the proper role of the judiciary. This narrative directly challenged the

[6] This outcome was far from certain. In the past, Uribe had tried to undermine both the Supreme and the Constitutional Court (Gamboa 2022, Rubiano 2009, Bejarano 2010). He had criticized them in public and his administration used illegal wiretaps to persecute some of their members.

classic understanding of what judges are required to do in a liberal democracy, and clashed with the liberal-republican counter-narrative espoused by the Supreme Court.

In line with its populist understanding of what a legitimate judiciary should look like, towards the end of April 2013 the incumbent party passed a comprehensive judicial reform package called "The Democratization of the Judiciary Act." Crucially, the reform called for the direct election of members of the Judicial Council (the state entity tasked with appointing, sanctioning, and removing lower court judges) and changed the proportion of votes required to sanction magistrates. Due to a cunning design of the electoral process, and the decision to make the first judicial council election concurrent with the upcoming legislative elections, Kirchner reasonably expected to secure total control over this key institution (Bianchi 2014).

Less than two months after the law was passed, the Supreme Court ruled in *Rizzo* that the Judicial Council reform was unconstitutional, thus thwarting the president's plans.[7] The judges argued that the bill amounted to an attack on the constitutionally mandated role of the judiciary to preserve liberal democracy. For the justices, the constitution mandated that judges, lawyers, and academics should choose their own representatives in the Judicial Council. Furthermore, the reform risked politicizing the process of appointing, removing, and sanctioning judges by mandating the direct election of councilors. Finally, changing the decision rule for sanctioning and removing judges from two-thirds to absolute majority of the Council represented a threat to judicial independence.

Given that Kirchnerism had been spreading a populist narrative that severely challenged the judiciary's legitimacy to conduct judicial review, individuals with knowledge of the decision-making process that led to *Rizzo* told one of the authors that many of the justices felt the need to

[7] The ruling is available at www.cij.gov.ar/nota-11694-La-Corte-declar--inconstitucional-cambios-en-el-Consejo-de-la-Magistratura.html

explain at length the legal and doctrinal foundations that justified a robust defense of the role of the judiciary in a liberal-democratic regime.[8] After all, challenging the law entailed a full frontal attack on the executive's argument that the judiciary had no legitimacy in declaring the unconstitutionality of the 'popular will' (i.e., of majority decisions taken by the legislature; Garcia Holgado 2023b).

Rizzo presents a series of arguments that have a long intellectual lineage dating as far back as Alexander Hamilton's Federalist 78 and *Marbury v. Madison*. All deeply entrenched in Argentine jurisprudence. In other words, the justices were at pains to avoid unorthodoxy in order to prevent piling more controversy onto what would most likely prove an extremely controversial ruling. First, the justices stated that *the people* are the ultimate source of all political power.[9] However, they astutely specified that the people established in the Constitution that Argentina is a "democratic republic" in which state power is divided among three branches of government, "each one with its function and modes of election"[10] and with "identical democratic legitimacy."[11] Therefore, no branch of government can secure for itself greater powers than those conferred upon it by the Constitution.[12]

Second, the decision argues that the people gave judges the mandate to conduct judicial review when the Constitution is under threat: "judges have received from the Argentinian people - through the constituents - the legitimate democratic mandate to defend the supremacy of the Constitution."[13] Contrary to what the populist executive argued at the time, the judiciary's goal was to secure the supremacy of the Constitution, not the predominance of the judiciary over the

[8] *Rizzo, Jorge v. Estado Nacional* (2013), Points 6 a 13.
[9] *Rizzo*, Point 10.
[10] *Rizzo*, Points 8 and 6.
[11] *Rizzo*, Point 6.
[12] *Rizzo*, Points 7 and 10.
[13] *Rizzo*, Point 12 (see also point 8)

executive and legislative branches.[14] In order to make this argument more persuasive, the justices enumerated fourteen cases in which the Supreme Court had ruled that laws were unconstitutional. Astutely, the justices included *only* cases in which the Court's decision was aligned with the government's progressive ideology.[15] In fact, some of these rulings had been vocally celebrated by the populist executive.[16] The justices thus rebuked the idea that the judiciary is an enemy of the people because it sometimes nullifies decisions taken by the representatives of the people. To strengthen this point, the justices also argued that the division of state power and the equilibrium between different branches of government is necessary for the protection of individual rights.[17] In particular, an independent and autonomous judiciary with the capacity to conduct judicial constitutional review is necessary both for the protection of fundamental rights and the republican form of government.[18] Chief Justice Lorenzetti added that a "constitutional democracy" requires the judiciary to limit circumstantial legislative majorities in order to harmonize majority rule with the protection of individual rights (Lorenzetti 2015: 178-181).

Third, according to the Supreme Court, the Constitution establishes that the people can only express their will through constitutionally authorized procedures: "it is not possible to defend the violation of the legal order by invoking the protection of the popular will since nothing contradicts the interests of the people more than transgressing the constitution."[19] Furthermore, since they were established by the people, constituted powers can only improve

[14] *Rizzo*, Points 10 and 11.
[15] *Rizzo*, Point 8.
[16] For example, *Arancibia Clavel, Enrique Lautaro* (2004), *Simón, Julio Héctor y otros* (2005), *Lariz Iriondo, Jesús María* (2005), *Massa, Juan Agustín* (2006), and *Mazzeo, Julio Lilo y otros* (2007)
[17] *Rizzo*, Points 10 and 13.
[18] *Rizzo*, Point 10.
[19] *Rizzo*, Point 10.

democracy within the parameters set by the constitution.[20] As a result, pronouncements by representatives of the people that violate the rule of law cannot be considered the will of the people.[21] The people, when exercising their constituent power, established that their will can only be expressed by following constitutional mechanisms (Trejo 2021: 102).

The Supreme Court's assertive intervention was somewhat unexpected, especially due to prior episodes of political subordination of the judiciary to the executive branch. Given the determination of the Supreme Court to block the judicial reform and the total support they found among opposition parties in Congress, the executive had few options other than accept the decision. One interesting feature of this instance of constitutional balancing was that the judges relied on a liberal-republican discourse about the proper role of the judiciary in a democracy to explain their "insubordination." This was especially important given that populist attacks on the judiciary had tried to question the alternative source of legitimacy that judges invoke when they act as independent, professional, and impartial arbiters (Sadurski 2022: 108-110).

Mexico (2018-2023)

Andrés Manuel López Obrador came to power in Mexico in 2018 with a qualified majority in Congress. Shortly after being sworn in, he began introducing regime threatening reforms (Aguilar-Rivera 2021, Dresser 2022). Using "re-founding" rhetoric and what Monsiváis-Carrillo calls "deceitful legitimation" (Monsiváis-Carillo 2023), López Obrador refers to his administration as the country's "Fourth Transformation" - the previous three being the War of Independence, the Reform War, and the Mexican Revolution – and has championed several reforms to enhance his powers and extend his party's time in office. Between September 2018

[20] *Rizzo*, Point 13 (Petracchi and Argibay vote).
[21] *Rizzo*, Point 10.

and June 2023, Congress approved 22 constitutional reforms, of which at least 5[22] sought to increase the powers of the executive and the ruling party. In addition, the government used its legislative prowess to pack the Supreme Court,[23] undermine civil society, and gut the budget of oversight agencies (Petersen and Somuano 2021).

Lopez Obrador was quick to co-opt the Supreme Court and other parts of the judiciary. Using his qualified majorities in Congress he was able to name four new justices (enough to influence most decisions). Though many thought this would mean the end of judicial checks on the executive, the relationship between the court and the government has been more complex. Though the Court has refused to intervene to stop some abuses of power, it has also ruled against the president in important cases (Ríos-Figueroa 2022, Villanueva Ulfgard 2023). One of these cases is the electoral reform introduced in 2022.

On April 28 2022, López Obrador submitted a constitutional reform to overhaul the electoral system. The reform included changes to electoral rules, local electoral systems, and campaign rules, as well as a major overhaul of the *Instituto Nacional Electoral* (INE). The creation of INE's predecessor in 1994 (IFE), marked a watershed moment in the Mexican transition to democracy (Magaloni 2006). López Obrador's proposal, which emerged in response to a series of decisions against the ruling party[24] and was further fueled by a longstanding feud between the president and the electoral body, was therefore quite concerning. At the time,

[22] Our calculations based on data available in the Cámara de Diputados web site. We only count reforms that directly enhance the powers of the executive, that is reforms that create (and enlarge) a police body ascribed to the executive, expand the executive's ability to forfeit assets, expand the president's (and his supporters') ability to call for referenda and get the thresholds required to make them binding, and concentrate the power of the judiciary in the Supreme Court coopted by the goverment (see Ríos-Figueroa 2021 and 2022 for a deeper analysis). It is possible that other constitutional reforms enhance the powers of the executive, but do so indirectly.

[23] López Obrador appointed four new justices and tried to pass legislation that would have allowed loyalist justice Arturo Zaldivar to extend his time on the bench for five years instead of stepping down in 2024, as expected (Ríos-Figueroa 2021, 2022, Villanueva Ulfgard 2023).

[24] In 2018 INE fined Morena for campaign finance irregularities. Furthermore, In 2021 INE disqualified two of MORENA's gubernatorial candidates (Wirtschafter and Sarukhan 2023).

however, the president had lost his qualified majorities in Congress. This meant the reform lacked the votes needed to pass. With the support of mobilized civil society activists, opposition legislators resisted the president's pressure to vote on the bill and the proposal was rejected in December 2022.

That same day, MORENA introduced a new proposal known as "Plan B." In order to avoid the two-thirds majority required to pass constitutional reforms, this piece of legislation sought to modify the electoral law and the electoral body without reforming the constitution. Plan B was approved separately on December 27, 2022 and March 2, 2023. Together, these reforms sought to change the appointment of electoral authorities, cut down the number of local electoral bodies, diminish the number of electoral districts, end public financing for political parties, and diminish the requirements to organize referenda.[25]

In the midst of massive protests in support of INE, the Supreme Court ruled against "Plan B" in May and June 2023. Similar to what happened in Argentina and Colombia, it did so using procedural arguments. In their rush to get this legislation approved, MORENA legislators had failed to publish the bill before it was debated. Having deemed the bill an urgent matter, they decided to disregard the rules in order to accelerate the legislative process. Moreover, the Senate and the Chamber of Deputies amended the bill after it had been approved by both chambers, but the relevant committees in each chamber failed to discuss these matters in a joint session, as required by law.[26] While some of the lawsuits put forward other arguments such as the effect

[25] Zerega, Georgina. 2023. "Menos poder para el INE y más libertad para las campañas: las claves del 'plan B' de la reforma electoral." *El País (México)*. https://elpais.com/mexico/2023-02-23/menos-poder-para-el-ine-y-mas-libertad-para-las-campanas-las-claves-del-plan-b-de-la-reforma-electoral.html (September 9, 2023).
[26] Suprema Corte de Justicia de la Nación. La Corte Declara La Invalidez de La Primera Parte Del Paquete de Reformas Político-Electorales 22-23, Por Violaciones al Procedimiento Legislativo. Ciudad de México: May 8, 2023. Comunicado de Prensa. Suprema Corte de Justicia de la Nación. La Corte Declara La Invalidez de La Segunda Parte Del Paquete de Reformas Político-Electorales 22-23, Por Violaciones al Procedimiento Legislativo. Ciudad de México: June 22, 2023. Comunicado de Prensa..

these reforms would have on INE's ability to organize and regulate elections in a manner that guarantees an even playing field,[27] procedural arguments were low hanging fruits that the justices used to minimize controversy around their decision to invalidate both pieces of legislation.

Before López Obrador came to power, the Supreme Court had become increasingly autonomous and independent. Key reforms introduced in 1994 transformed the Supreme Court into a constitutional tribunal (Olaiz-González 2021). The primary goal of these changes was to turn the court into an arbiter of interjurisdictional and inter-branch conflict in a polity that was transitioning away from one-party rule (Rios-Figueroa 2007). The judges also became increasingly interventionist in debates over fundamental rights (Ansolabehere 2010; Sanchez et al. 2011). Prior to these reforms, by contrast, the Mexican judiciary in general and the Supreme Court in particular, had been mere appendices of the presidency (Magaloni 2008). Justices systematically relied on highly formalistic criteria to show deference to the political branches and via its restrictive jurisprudence limit the discretion of lower courts.

Despite these encouraging trends, a decisive repudiation of one of the administration's signature policies was far from guaranteed. To rule against a bill, the Supreme Court needs a minimum of 8 votes (out of 11). Having put four loyalists on the Court, that number was now harder to reach. Yet, the clarity of the violations of procedure and the support of civil society emboldened the justices to rule against the president and gave political cover to some of the president's appointees. Plan B was rejected by nine justices, including Arturo Zaldívar Lelo de Larrea (considered one of the president's staunchest allies in the court) and Ana Margarita Ríos

[27] Zerega, Georgina. 2023. "Menos poder para el INE y más libertad para las campañas: las claves del 'plan B' de la reforma electoral." *El País* (México). https://elpais.com/mexico/2023-02-23/menos-poder-para-el-ine-y-mas-libertad-para-las-campanas-las-claves-del-plan-b-de-la-reforma-electoral.html (September 9, 2023).

de Farjat (who was appointed by López Obrador). Zaldívar, for example, quoted procedural irregularities as his main concern with the project.[28]

Why Constitutional Balancing Works: A Comparison with Public Administration Policing

In order to shed light on the reasons why constitutional balancing in three high stakes lawsuits succeeded in settling political conflict at least temporarily, that is, why the "conflict resolution triad" (Shapiro 1981) worked and held, we compare judicial behavior in these cases with another type of horizontal control intervention: public administration policing. As we noted in the Introduction, the many differences between these two types of judicial interventions put into sharp relief the features of constitutional balancing that render it an effective antidote, and also provide clues regarding the conditions under which it might be a particularly useful tool for judges interested in countering backsliding.

In recent years, Latin American politicians have experienced the wrath of anti-corruption probes, some of which evolved into historic "anti-corruption crusades" (Gonzalez-Ocantos et al. 2023, chapter 1). Chief among them was Operation Lava Jato, a bribery investigation that started in Brazil in 2014 and quickly spread throughout Latin America, upending the politics of the entire region. Between 2014 and 2020, Brazilian prosecutors and judges arrested at least 546 suspects; issued 195 indictments; and convicted 219 defendants. Among those implicated in the scandal was former president Luiz Inácio "Lula" Da Silva of the Workers' Party, as well as congressional leaders, former ministers, and advisors belonging to twenty-eight political parties. The case contributed to President Dilma Roussef's downfall. Crucially, Lula's arrest transformed

[28] Landeros, Mario Andrés. 2023. "¿Cómo Votaron Los Ministros de La Suprema Corte Sobre El Plan B de AMLO? | El Universal." El Universal. https://www.eluniversal.com.mx/nacion/como-votaron-los-ministros-de-la-suprema-corte-sobre-el-plan-b-de-amlo/ (September 9, 2023).

the 2018 presidential race and facilitated the rise to power of far-right Jair Bolsonaro (Hunter and Power 2019).

In 2016, it emerged that one of the Brazilian public works companies at the heart of the scandal, construction giant Odebrecht, had used the same modus operandi to offer kickbacks to public officials all over the region. These revelations prompted judicial authorities in several countries to launch their own chapters of Lava Jato, leading to the "largest foreign bribery case in history."[29] In Peru, for example, the investigation started with a narrow focus on three public works projects, but quickly expanded and wreaked havoc on the political class. Five former presidents, as well as leading opposition figures and regional executives, were investigated and ordered to spend time in detention. Lava Jato also contributed to a presidential resignation in 2018, the shutdown of Congress in 2019, and the impeachment of yet another president in 2020. In Ecuador, where the case similarly became a crusade, Lava Jato led to several convictions, including of a sitting vice-president. The courts also convicted former President Correa and banned him from running for office. Correa, who remains in exile, is yet to abandon his ambitions to stage a comeback. Those ambitions partly explain some of the current tensions in Ecuadorian politics, which like in Peru, have returned to a cycle of acute instability.

Far from lowering the political voltage, these public administration policing interventions exacerbated a kind of conflict that endangers democracy.[30] The first and most obvious reason for this is that while constitutional balancing may thwart politicians' autocratic ambitions, zealous forms of public administration policing endanger their political careers and personal freedom.

[29] Linda Pressly, "The Largest Foreign Bribery Case in History," BBC (20 April 2018).
[30] It is worth noting that not all national chapters of Lava Jato had the same problematic consequences, and that the shortcomings we identify here do not suggest the fight against corruption should be abandoned. For a more comprehensive normative assessment of Lava Jato, as well as for the reasons why some national chapters may have proven less "disruptive" than others, see Da Ros and Taylor (2022a and 2022b) and Gonzalez-Ocantos et al. (2023, Chapters 4 and 9).

The stakes are therefore much higher, and the incentives to orchestrate fierce backlash much stronger. In contexts like Brazil, Argentina and Ecuador, where defendants such as Lula, Kirchner or Correa had non-trivial levels of popular support, their instinct was to cry foul when facing corruption allegations. With an audience ready to believe them, both for emotional reasons and political expediency, the so-called "lawfare" narrative (Smulovitz 2022) quickly gained traction and led to high levels of polarization around anti-corruption.

More dangerous were attempts to erode the autonomy and independence of the institutions tasked with investigating and punishing graft. In a move we see replicated in other Latin American (and European) contexts, for instance, Keiko Fujimori, at the time leader of the Peruvian opposition and daughter of former dictator Alberto Fujimori, responded to her indictment and pre-trial detention with vicious attacks against the courts. These ranged from clumsy attempts to rig congressional proceedings to elect like-minded Constitutional Court judges; secure favorable Supreme Court jurisprudence on pre-trial detentions and the correct use of the criminal types cited in her indictment; and modify legislation to weaken prosecutors' ability to extract confessions from bribe-payers. Similarly, in Argentina, embattled Cristina Kirchner[31] tried a scorched earth response against those responsible for her judicial plight, including attempts to significantly curb the power of the prosecution services and of federal judges, and efforts to criminalize "lawfare" and thus annul all corruption-related convictions.[32]

A second reason for the effectiveness differential is that when they engage in "constitutional balancing" high courts usually make a single decision on a case, one they have time to strategize about. Our case studies in the previous section suggest high court judges

[31] She was convicted for corruption in 2022 while being sitting vice-president for crimes perpetrated while she was president (2007-2015). These crimes are unrelated to the Lava Jato investigation.
[32] For similar attempts to weaken judges' and prosecutors' ability to investigate corruption in Brazil see Gonzalez-Ocantos et al. (2023: 68-70). For Italy, see Della Porta and Vanucci (2007).

carefully evaluated what kinds of arguments would best protect their decision from executive backlash. The pace of public administration policing interventions, especially when they are part of a full-blown anti-corruption crusade, is much more frenetic. Investigators must plough through hostile political and evidentiary landscapes, making moves they sometimes regret. In addition, due to the nature of evidence-gathering and the structure of the criminal legal process, criminal cases are more protracted affairs and involve multiple decisions in interrelated inquiries. All of this has implications for the likelihood that public administration policing interventions can lower the political voltage or ultimately deter practices that compromise the public character of the state. In particular, the aforementioned complexities and time frames multiply the chances of making mistakes, stirring controversy or facing setbacks, thus undermining the already precarious legitimacy of anti-corruption probes.

The clearest example is that of the "Vaza Jato" scandal that broke out in Brazil in 2019 as Lava Jato gained momentum. Leaked WhatsApp messages revealed an inappropriate relationship between one of the judges and the prosecutorial taskforce overseeing parts of the investigation, as well as certain animosity against the Brazilian left. In response, former president Lula da Silva took the case to court. In March 2021, the Supremo Tribunal Federal (STF), the highest court in the land, ruled that the judge had indeed been "partial" and ordered Lula's retrial. The episode not only created the perception that investigators were overzealous and had overplayed their hand, but also decisively undermined the effectiveness of the inquiry.

Similarly, after securing charges against high profile defendants in January 2018, Ecuador's Chief Prosecutor held a press conference to denounce that he and his family had received threats. He then played the recording of a conversation between two "correista" heavyweights discussing plans to get rid of him and stop the investigation. While probably a

necessary defensive move, the prosecutor's actions were not legal: the recordings had been collected as part of the inquiry and ought to have been presented in court. This led to his impeachment and complicated the prosecutorial effort.

Another leak, this one allegedly coming from the Peruvian prosecutorial task force in 2020, spread rumors that investigators were negotiating a plea deal with someone who claimed that the sitting president had received bribes during a previous stint as regional governor. This gave legislators the excuse they were looking to impeach the president. Because the legal grounds for doing so were rather dubious, citizen indignation ensued. Demonstrators were met with violence, leaving two dead and thousands injured. Following domestic and international condemnation, the interim government resigned within a week. Amid this political turmoil, a highly respected journalist published an exposé in which he argued that "the statement of the would-be informants against former president Martín Vizcarra for alleged acts of corruption in Moquegua was not spontaneous. It was suggested, conditioned, and promoted by the team of prosecutors in the Lava Jato case." Public figures who had previously backed the prosecutors thus turned against them in a serious blow to the investigation's prestige. Intentionally or not, the taskforce had suddenly become an accessory not only to the impeachment of a president, but also to what was widely seen as a violent power grab.

Third, if the frenetic pace of the inquiry often leads to hazy decisions that backfire, the evidentiary complexities of grand corruption cases force prosecutors and judges to embrace a degree of legal unorthodoxy that can undermine their legitimacy. Jurisprudential innovation designed to make the law bite is, as we saw previously, often consciously avoided and unnecessary in cases of constitutional balancing. When they engaged in constitutional balancing, our three courts portrayed themselves as non-activist. To do so, they relied primarily on

procedural arguments supported by evidence of formal irregularities supplied by opposition actors. Judges seemed to be aware of potential legitimacy problems and therefore used procedural unconstitutionality as a shield. This language and line of reasoning are more difficult to question.

The situation is different when it comes to public administration policing due the opacity of the criminal networks and the activities that constitute corruption, the transnational nature of the crimes, the highly experimental nature (at least in Latin America) of the the tools needed to investigate them (e.g., plea bargains and corporate leniency agreements), and the inadequacy of accepted criminal liability doctrines.[33] Herein lies the paradox of this type of horizontal accountability. The prosecutorial zeal and unorthodoxy that makes anti-corruption crusades possible is also the likely source of their undoing: "Zeal is threatening [...and…] extremely controversial from a rule of law standpoint; it strengthens the hand of critics and can put the champions of transparency in a difficult spot. In other words, zeal turns what is a noble cause that everyone should in principle welcome, into something incredibly contested" (Gonzalez-Ocantos et al. 2023: 149). Indeed, the "lawfare" narrative is never more credible than when judicial actors toy with legal orthodoxy, allowing embattled politicians, including some who in the past attempted backsliding, to claim to be victims of autocratic plans. Due to the tensions that these zealous prosecutions generate between, on the one hand, citizens' distaste for corruption, and on the other, their partisan loyalties and rule of law commitments, public administration policing interventions can fail to amass broad and stable anti-corruption coalitions. The result is usually highly precarious, controversial, and feeble transparency springs.[34]

[33] For a thoughtful critique of the innovations championed during Brazil's Lava Jato, for example, see Mota Prado and Rodriguez Machado (2022).
[34] On the precarity of anti-corruption coalitions, see Gonzalez-Ocantos et al (2023, Chapters 5-8).

Fourth, there is an interesting contrast in the rhetoric that judicial actors rely on to justify constitutional balancing and public administration policing interventions. As our case studies demonstrate, in particular the Argentine example, judges coat their decisions with a classic republican narrative that stresses the importance of power checking power. This is entirely consistent with the proper functioning of liberal democratic regimes. The nature of corruption probes, more so those that acquire crusade-like qualities, leads to a very different kind of discourse.

Specifically, judges and prosecutors proclaim to be cleaning house. There is of course something noble about this. As Brazilian Judge Moro put it quoting Teddy Roosevelt, "the exposure and punishment of corruption is an honor to the nation, not a disgrace." But the message can be decoded rather differently. When authorities manage comprehensively to reconstruct the puzzle of systemic corruption, they create space for generalizations about the crass nature of politics. Anti-corruption crusades portray corruption as constitutive of political activity, rather than the product of circumstantial individual greed. Add to this the use of medical metaphors or religious invocations, and the result can be quite explosive. For instance, one of the lead Lava Jato prosecutors in Brazil described corruption as a "metastasising cancer" and, as a committed Evangelical Christian, ascertained that "God is clearing the way for change" (see de Sa e Silva 2020).

Politics by establishment politicians all of a sudden begins to look irredeemable. In a ruling that marked the beginning of the end of the Supremo Tribunal Federal's love affair with Lava Jato in Brazil,[35] Justice Toffoli warned of the judiciary becoming a tutelary force akin to the military in the 1960s: "[It is problematic] if you criminalize politics and think that the judicial

[35] After this, the supreme court's decisions made life much harder for the investigations, including the aforementioned annulment of Lula's conviction.

system will solve the problems of the Brazilian nation with moralism […] destroying the Brazilian [...] political class." In this sense, a fascinating study of the rhetoric around Lava Jato by Bastos dos Santos and Solano Gallego (2022) shows how the moralizing discourse espoused by Brazilian judges and prosecutors to galvanize support for their cause and their unorthodox methods, found (intentionally or not) an elective affinity with anti-rights and anti-left forces, in particular, Bolsonarismo. They trace the emergence of a "political grammar" developed by supporters of Lava Jato, one that favors an extreme form of punitivism and that "values a super-majoritarian model and the concentration of power to deal with the 'existential threats' posed by mainstream political parties [...] Judges can thus pave the way to an illiberal version of democracy" (290). In other words, the demonization of politics and the impatience to see the house cleaned once and for all, can embolden outsiders with dubious democratic credentials. This suggests that some horizontal accountability interventions may add to the pressures on already embattled democracies, instead of easing them.

Conclusion

Incumbents in Colombia, Argentina and Mexico complied with rulings that neutralized their attempts to undermine democracy with relative ease. They obviously verbally attacked the courts, accusing them of being counter-majoritarian at best and part of an anti-democratic coalition at worst. At the end of the day, however, political conflict over reelection, judicial independence, and electoral institutions, was at least temporarily settled. It is possible executives found no viable way to circumvent the decisions handed down by their respective top courts or decided to acquiesce, focusing instead on planning other attacks or choosing handpicked successors that they hoped would allow them to retain hold over power. Whatever the reason, democracy lived to fight another day and judges emerged from these battles relatively unscathed.

To be clear, a successful event of constitutional balancing (where a court effectively stops an anti-democratic institutional reform) does not mark the end of the backsliding process. Mexico is a case in point. After seeing several of his reforms thwarted by the Supreme Court, López Obrador came up with a new power grab. In December 2023, he announced a constitutional amendment that would lead to the popular election of justices (from lists proposed by the government-controlled legislature and the executive) and to the creation of a (also popularly elected) disciplinary tribunal with broad powers to sanction other members of the judicial branch. Though seemingly innocuous, if enacted, this reform would enhance the president's hold over the judiciary (Magaloni 2024). These developments highlight an important shortcoming of judges as bulwarks of democracy: their one-shot forays into complex debates over the nature of checks and balances are no silver bullet and therefore insufficient to "lock democracy in" (Staton, Reenock, and Holsinger 2022: 17-19). It remains true, however, that constitutional balancing does obstruct backsliding in important ways. Denying the executive the ability to enhance her control over institutions of horizontal accountability today, reduces (in most cases) the maneuvering space for doing so in the future. Given that democratic erosion is incremental, presidents leverage control over one actor to later co-opt other actors. Successful constitutional balancing prevents the executive from using some co-opted actors to control others, inevitably delaying the process of democratic backsliding.

The precarity of constitutional balancing interventions is also related to one of the factors that bolster their effectiveness in the short term, namely judges' reliance on proceduralist arguments. While our three cases point to the advantages of a certain degree of formalism and unorthodoxy in the interpretative approach that courts use to defy executives with hegemonic ambitions, proceduralism often falls short of a more substantive defense of democracy. For

example, it does not champion a robust system of checks and balances with references to fundamental rights or an explicit normative defense of the structural/institutional conditions that favor respect for fundamental rights. This might explain why, in rulings that followed the one we explore here, the Colombian Constitutional Court made an effort to further develop the "constitution substitution" doctrine. It is also worth noting that the proceduralism we deem so effective in these cases can be the tool courts use to help incumbents erode democracy. Proceduralism can be the perfect excuse for timid or co-opted courts to decide not to block illiberal laws/decrees. But given the co-opted nature of judges such as the ones who enabled backsliding in Venezuela, it is hard to attribute their contribution to erosion to proceduralism. In the absence of this type of argument they would have surely found others to assist the incumbent's plan.

All in all, this article contributes to ongoing efforts to theorize the conditions under which courts can complicate the process of democratic backsliding. Further research could, for example, expand the universe of cases to identify instances in which constitutional balancing was attempted but failed, or study other "positive cases" to see if the same causal mechanisms we identified in this article were also at play in those cases.This would afford greater insight into the conditions that make pro-democracy judicial interventions more or less successful.

References

Aguiar-Aguilar, Azul. 2023. "Courts and the Judicial Erosion of Democracy in Latin America," *Politics & Policy*, 51(1): 7-25

Aguilar-Rivera, José Antonio. 2022. "Dinámicas de La Autocratización: México 2021." *Revista de ciencia política* (Santiago) 42(2): 355–82.

Arantes, Rogelio. 2011. “The Federal Police and the Ministerio Publico,” in Matthew Taylor and Tim Power eds. *Corruption and Democracy in Brazil: The Struggle for Accountability*. South Bend: University of Notre Dame Press

Bakke, Elizabeth and Nick Sitter. 2022. “The EU’s Enfants Terribles: Democratic Backsliding in Central Europe Since 2010,” *Perspectives on Politics,* 20(1): 22-37

Bankuti, Miklos et al. 2012. “Hungary’s Illiberal Turn: Disabling the Constitution,” *Journal of Democracy*, 23(3): 138-146

Bastos dos Santos, João and Esther Solano Gallego. 2022. “Fighting Corruption, Dismantling Democracy: Antagonism, Communication, and the Political Use of Lava Jato in Brazil,” in Daniel Brinks, Sandra Botero and Ezequiel Gonzalez-Ocantos eds. The Limits of Judicialization. Cambridge: Cambridge University Press.

Beach, Derek, and Rasmus Brun Pedersen. 2019. *Process-Tracing Methods: Foundations and Guidelines*. 2nd ed. Ann Arbor: University of Michigan Press.

Bejarano, Ramiro. 2010. “La Justicia Sitiada.” In *Las Perlas Uribistas*, Bogotá, Colombia: Debate, 11–24.

Bermeo, Nancy. 2016. “On Democratic Backsliding,” *Journal of Democracy*, 27(1): 5-19

Bianchi, Alberto. 2014. “Una Reforma Inconstitucional,” in Santiago Alfonso ed. *Historia de la Corte Suprema Argentina, Tomo III: El período de la restauración democrática (1983–2013)*. Buenos Aires: Marcial Pons

Boese, Vanessa, Staffan Lindberg, and Anna Lührmann. 2021. “Waves of Autocratization and Democratization: A Rejoinder,” *Democratization* 28(6): 1202-1210

Boese, Vanessa et al. 2021. “How Democracies Prevail: Democratic Resilience as a Two-Stage Process,” *Democratization*, 28(5): 885-907

Botero, Sandra. 2023. *Courts that Matter: Activists, Judges, and the Politics of Rights Enforcement*. Cambridge: Cambridge University Press

Botero, Sandra, Daniel Brinks, and Ezequiel Gonzalez-Ocantos eds. 2022. *The Limits of Judicialization: From Progress to Backlash in Latin America*. Cambridge: Cambridge University Press.

Botero, Sandra and Laura Gamboa. 2021. “Corte al Congreso: Poder Judicial y Trámite Legislativo en Colombia.” *Latin American Research Review* 56(3).

Botero, Sandra and Laura Gamboa. “Legislating through the Court: Congress and the Constitutional Court in Colombia” Presented at Anno-Rep Workshop, New York City, April 28-29, 2022.

Bugaric, Bojan. 2014. “Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge,” LEQS Paper No. 79

Casal, Jesús María. 2020. “The Constitutional Chamber and the Erosion of Democracy in Venezuela.” Research Paper Series 2021-02, Max Planck Institute for Comparative Public Law and International Law.

Castagnola, Andrea. 2012. “I want it all, I want it now: The Political Manipulation of Argentina’s Provincial High Courts,” *Journal of Politics in Latin America*, 4(2): 39-62

Castagnola, Andrea. 2017. *Manipulating Courts in New Democracies: Forcing Judges Off the Bench in Argentina*. London: Routledge.

Castagnola, Andrea. 2020. “La trampa de la manipulación judicial: Un análisis histórico del control político de la Suprema Corte Argentina,” *Revista Uruguaya de Ciencia Política* 29(1): 49–79

Clark, Tom S. 2010. *The Limits of Judicial Independence*. Cambridge: Cambridge University Press.

Corrales, Javier. 2015. “Autocratic Legalism in Venezuela,” *Journal of Democracy*, 26(2): 37-51

Couso, Javier. 2010. “The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America,” in Javier Couso, Alexandra Huneeus, and Rachel Sieder eds. *Cultures of Legality*. Cambridge: Cambridge University Press

Couso, Javier, Alexandra Huneeus, and Rachel Sieder eds. 2010. *Cultures of Legality: Judicialization and Political Activism in Latin America*. Cambridge: Cambridge University Press

Comisión de la Verdad y Reconciliación 2003, Vol II

Da Ros, Luciano and Matthew Taylor. 2022a. “Kickbacks, Crackdown, and Backlash: Legal Accountability in the Lava Jato Investigation,” in Daniel Brinks, Sandra Botero and Ezequiel Gonzalez-Ocantos eds. The Limits of Judicialization. Cambridge: Cambridge University Press

Da Ros, Luciano and Matthew Taylor. 2022b. B*razilian Politics on Trial: Corruption and Reform Under Democracy*. Boulder: Lynne Reinner

Della Porta, Donatella, and Alberto Vannucci. 2007. “Corruption and Anti-corruption: The Political Defeat of ‘Clean Hands’ in Italy,” *West European Politics* 30(4): 830–853.

de Sa e Silva, Fabio. 2020. “From Car Wash to Bolsonaro: Law and Lawyers in Brazil’s Illiberal Turn (2014-2018),” *Journal of Law and Society*, 47: 90-110

Dresser, Denise. 2022. “Mexico’s Dying Democracy.” *Foreign Affairs* (November/December 2022). (March 16, 2023).

Epstein, Lee, Jack Knight, and Olga Shvestova. 2001. “The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government,” *Law and Society Review*, 35(1): 117-164

Figueroa, Valentin. 2021. “Political Corruption Cycles: High Frequency Evidence from Argentina’s Notebooks Scandal,” *Comparative Political Studies*, 54(3): 482-517

Figueroa García-Herreros, Nicolas. 2016. “A Critique of Populist Jurisprudence: Courts, Democracy, and Constitutional Change in Colombia and Venezuela.” Unpublished Ph.D. Dissertation, The New School, USA

Gamboa, Laura. 2022. *Resisting Backsliding*. Cambridge: Cambridge University Press

Garcia Holgado, Benjamin and Raul Sánchez Urribarri. 2023. “Court Packing and Democratic Decay: A Necessary Relationship?,” *Global Constitutionalism* 12(2): 350-377

Garcia Holgado, Benjamin. 2023a. “The Judicial Bulwark: Courts and the Populist Erosion of Democracy.” PhD diss., University of Notre Dame.

Garcia Holgado, Benjamin. 2023b. “Radicalization and the Origins of Populist Narratives about the Courts: The Argentinian Case, 2007–2015,” *Journal of Illiberalism Studies* 3(2): 43-64.

Gibson, James and Gregory Caldeira. 1995. “The Legitimacy of Transnational Legal Institutions,” *American Journal of Political Science*, 39(2): 459-489

Ginsburg, Tom and Tamir Moustafa eds. 2008. *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press

Goertz, Gary. 2017. *Multimethod Research, Causal Mechanisms, and Case Studies: An Integrated Approach*. Princeton: Princeton University Press.

Gonzalez-Ocantos, Ezequiel. 2016. *Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America*. Cambridge: Cambridge University Press

Gonzalez-Ocantos et al. 2023. *Prosecutors, Voters, and the Criminalisation of Corruption in Latin America: The Lava Jato Case*. Cambridge: Cambridge University Press.

Haggard, Stephan and Robert Kaufman. 2021. *Backsliding: Democratic Regress in the Contemporary World*. Cambridge: Cambridge University Press

Halmai, Gabor. 2017. "The Rise and Fall of Constitutionalism in Hungary," in Paul Blokker ed. *Constitutional Acceleration Within the European Union and Beyond*. London: Routledge

Helmke, Gretchen. 2005. *Courts Under Constraints*. Cambridge: Cambridge University Press

Helmke, Gretchen and Julii Rios-Figueroa eds. 2011. Courts in Latin America. Cambridge: Cambridge University Press

Hilbink, Lisa. 2007. *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*. Cambridge: Cambridge University Press

Hilbink, Lisa. 2012. "The Origins of Positive Judicial Independence," *World Politics*, 64(4): 587-621

Hunter, Wendy and Timothy Power. 2019. "" Bolsonaro and Brazil's Illiberal Backlash," *Journal of Democracy,* 30(1): 68-82

Iaryczower, Matias, Pablo Spiller and Mariano Tommasi. 2002. "Judicial Independence in Unstable Environments: Argentina, 1935-1998," *American Journal of Political Science*, 46(4): 699-716

Inarra Zeballos, Luis Gonzalo (2019). "La limitación constitucional a la reelección de autoridades ejecutivas, su convencionalidad y legitimidad popular: una crítica a la sentencia del Tribunal Constitucional Plurinacional boliviano," *Razón Crítica*, 6: 237-255,

Karolewski, Ireneusz Pawel. 2016. "Protest and Participation in Post-Transformation Poland: The Case of the Committee for the Defense of Democracy (KOD)," *Communist and Post-Communist Studies*, 49(3): 255-267

Kim, Hunjoon and Kathryn Sikkink. 2010. "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries," *International Studies Quarterly* 54(4): 939-963

Laebens, Melis and Anna Lührmann. 2021. "What Halts Democratic Erosion? The Changing Role of Accountability," *Democratization*, 28(5): 908-928

Landau, David and Rosalind Dixon. 2020. "Abusive Judicial Review: Courts Against Democracy," *UC Davis Law Review,* 53: 1313-

Llanos, Mariana, Cordula Tibi Weber, Charlotte Heyl, and Alexander Stroh. 2015. "Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases," *Democratization* 23(7): 1236–53

Lorenzetti, Ricardo L. 2015. *El arte de hacer justicia. La intimidad de los casos más difíciles de la Corte Suprema de Argentina*. Bogotá: Temis.

Lührmann, Anna and Staffan Lindberg. 2019. "A Third Wave of Autocratization is Here: What is New About it?," *Democratization*, 26(7): 1095-1113

Manzetti, Luigi. 2014. "Accountability and Corruption in Argentina During the Kirchners' Era," *Latin American Research Review*, 49(2): 173-195

Ana Laura, Magaloni Kerpel. 2024. "¿Adiós a la Corte?" *Reforma*. https://www.reforma.com/adios-a-la-corte-2024-02-10/op265458 (February 27, 2024).

Magaloni, Beatriz. 2006. *Voting for Autocracy*. Cambridge: Cambridge University Press.

Mayka, Lindsay R. 2016. "Colombia's Surprising Resilience." Journal of Democracy 27(3): 139–47.

Monsiváis-Carrillo, Alejandro. 2023. "Disloyal Incumbents and Deceitful Legitimation: Subverting Democracy Through Electoral Reform in Mexico." Presented at the Conference of the American Political Science Association, Los Angeles, August 31-September 3.

Mota Prado, Mariana and Marta Rodriguez Machado. 2022. "Turning Corruption Trials into Political Tools in the Name of Transparency: The Lava Jato Case," in Daniel Brinks, Sandra

Botero and Ezequiel Gonzalez-Ocantos eds. *The Limits of Judicialization.* Cambridge: Cambridge University Press.

Nunes, Rodrigo. 2010. "Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health," *Latin American Politics and Society*, 52(3): 67-97

Olaiz-González, Jaime. 2020. "Mexican Supreme Court at Crossroads: Three Acts of Constitutional Politics." *ICL Journal* 14(4): 447–71.

Oyhanarte, Julio. 1972. "Historia del Poder Judicial," *Todo es Historia*, 61: 86-121

Papada, Evie, David Altman, Fabio Angiolillo, Lisa Gastaldi, Tamara Köhler, Martin Lundstedt, Natalia Natsika, Marina Nord, Yuko Sato, Felix Wiebrecht, and Staffan I. Lindberg. 2023. "Defiance in the Face of Autocratization. Democracy Report 2023." Varieties of Democracy Institute, University of Gothenburg.

Pech, Laurent and Kim Lane Scheppele. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU," *Cambridge Yearbook of European Legal Studies*, 19: 3-47

Perez-Liñan, Anibal, and Andrea Castagnola. 2016. "Judicial Instability and Endogenous Constitutional Change: Lessons from Latin America," *British Journal of Political Science*, 46(2): 395-416

Pérez-Liñán, Anibal, Nicolas Schmidt, and Daniela Vairo. 2019. "Presidential Hegemony and Democratic Backsliding in Latin America, 1925-2016," *Democratization*, 26(4): 606-625

Petersen, German, and Fernanda Somuano. 2021. "Mexican De-Democratization? Pandemic, Hyper-Presidentialism and Attempts to Rebuild a Dominant Party System." *Revista de ciencia política* (Santiago) 41(2): 353–76.

Rios-Figueroa, Julio. 2007. "Fragmentation of Power and the Emergence of An Effective Judiciary in Mexico, 1994-2002," *Latin American Politics and Society,* 49(1): 31-57

Ríos Figueroa, Julio. 2021. "Mexico's Constitutional Reforms: Threats to Judicial Independence from Within?" ConstitutionNet. https://constitutionnet.org/news/mexicos-constitutional-reforms-threats-judicial-independence-within (August 15, 2023).

Ríos-Figueroa, Julio. 2022. "El Poder Judicial Ante El Populismo y La Erosión Democrática. El Caso de México, 2018-2021." *Revista de Estudios Políticos* (198): 187–217.

Rubiano, Sebastián. 2009. “La Corte Constitucional: Entre La Independencia Judicial y La Captura Politica.” In *Mayorías Sin Democracia: Desequilibrio de Poderes y Estado de Derecho En Colombia, 2002-2009*, eds. Mauricio García and Javier Eduardo Revelo. Bogotá: Dejusticia.

Sadurski, Wojciech. 2018. “How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding,” *Judiciary Forum Review*, 1: 104-178

Sadurski, Wojciech. 2022. *A Pandemic of Populists*. Cambridge: Cambridge University Press.

Schwartz, Rachel A. 2022. “Guatemala 2021: Reconsolidating Impunity and Reversing Democracy” *Revista de Ciencia Política*, 42(2): 209-222

Scheppele, Kim Lane. 2018. “Autocratic Legalism,” *The University of Chicago Law Review*, 85(2): 545-584

Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press

Shultziner, Doron. 2023. “The Movement Against Democratic Backsliding in Israel,” *Sociological Forum*, 38(3): 896-903

Sieder, Rachel, Line Schjolden and Alan Angell eds. 2005. *The Judicialization of Politics in Latin America*. New York: Pelgrave

Šipulová, Katarína. 2021. “Under Pressure: Building Judicial Resistance to Political Inference,” in Denis J. Galligan ed. *The Courts and the People: Friend or Foe? The Putney Debates 2019*. Oxford: Hart Publishing.

Smulovitz, Catalina. 1995. “Constitución y Poder Judicial en la nueva democracia argentina. La experiencia de las instituciones,” in Carlos Acuña ed. *La nueva matriz política argentina*. Buenos Aires: Ediciones Nueva Visión.

Smulovitz, Catalina. 2022. “Del Descubrimiento de la Ley al Lawfare, o cómo las uvas se volvieron amargas,” *Revista SAAP*, 16(2): 231-259

Smulovitz, Catalina and Carlos Acuña. 2000. “Guarding the Guardians in Argentina,” in Ruti Teitel ed. *Transitional Justice*. Oxford: Oxford University Press

Stambulsk, Michal. 2022. “Constitutional Populism and the Rule of Law in Poland,” in Martin Krygier et al. eds. *Anti-Constitutional Populism*. Cambridge: Cambridge University Press

Staton, Jeffrey K., Christopher Reenock, and Jordan Holsinger. 2022. *Can Courts be Bulwarks of Democracy? Judges and the Politics of Prudence*. Cambridge: Cambridge University Press.

Trejo, Lisi. 2021. *¿Qué es la democracia para la Corte Suprema de Justicia de la Nación?* Buenos Aires: Editores del Sur.

Trochev, Alexei and Rachel Ellett. 2014. "Judges and Their Allies: Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistence," *Journal of Law and Courts,* 2(1): 67-91

Villanueva Ulfgard, Rebecka, and César Villanueva. 2020. "The Power to Transform? Mexico's 'Fourth Transformation' under President Andrés Manuel López Obrador." *Globalizations* 17(6): 1027–42.

Whitehead, Laurence. 2021. "Latin America Erupts: The Danger of Democratic Delinquencies," *Journal of Democracy*, 32(3): 78-93

Wirtschafter, Valerie, and Arturo Sarukhan. 2023. "Mexico Takes Another Step toward Its Authoritarian Past." Brookings Institution. https://policycommons.net/artifacts/4139687/mexico-takes-another-step-toward-its-authoritarian-past/4948364/ (September 10, 2023).

Zambrano, Diego A., Ludmilla Martins da Silva, Rolando Garcia Miron, and Santiago P. Rodríguez. 2024. "How Latin America's Judges are Defending Democracy." *Journal of Democracy* 35(1), 118-133