Introduction

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

*Alexander Hamilton, Federalist 78*

The election of Donald J. Trump to the presidency of the United States disrupted the otherwise abstract and politically disconnected world of American political science. Scholars once content to publish in journals hidden behind paywalls began writing opinion pieces in print media sources and granting interviews with broadcasters, radio stations, and podcasts, all questioning whether American democracy was indeed in danger. With the assistance of a young journalist core committed to evidence-based reporting, scholars mobilized to bring decades of research on the nature of authoritarianism to the public discourse.¹ As the field promoted past research, it also created new measurement strategies designed to characterize changes in important elements of democratic life, engaging the whole discipline in the process of data production.²

In a global context in which right-wing populist leaders are stressing democratic projects in a diverse set of states including Hungary, Poland, France, Italy, Austria, the Philippines, and Brazil, scholars have questioned the durability of the American system. In a *New York Times* opinion piece in December of 2016, Steven Levitsky and Daniel Ziblatt put the matter bluntly, writing

> Is our democracy in danger? With the possible exception of the Civil War, American democracy has never collapsed; indeed, no democracy as rich or as established as America’s ever has. Yet past stability is no guarantee of democracy’s future.


² See, for example, the work of John Carey, Gretchen Helmke, Brendan Nyhan, and Susan Stokes developing Bright Line Watch, [http://brightlinewatch.org/about-us-new/](http://brightlinewatch.org/about-us-new/)
survival. We have spent two decades studying the emergence and breakdown of democracy in Europe and Latin America. Our research points to several warning signs.

Noting that many Americans place their faith in the US system of checks and balances, Levitsky and Ziblatt remind us that the ultimate success of formal checks on the politically powerful depends on a variety of informal norms, including the notion of a legitimate opposition, partisan and presidential restraint. To this list, we should add respect for general rule of law values, including a deep societal commitment to an independent judiciary as the arbiter of fundamental constitutional norms.

Just eight days after President Trump’s inauguration, the American system of checks and balances was tested. On January 27, 2017, with little input from the Departments of State, Homeland Security or Defense, President Trump issued Executive Order 13769, which immediately prohibited entry into the United States for nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. The order also suspended the US Refugee Admissions Program (USRAP) for a period of 120 days, widening the policy’s impact beyond the seven named states. As a consequence of requiring the immediate implementation of the order hundreds of individuals were detained at the nation’s airports, some of whom enjoyed permanent US residency status.

Almost immediately, dozens of legal challenges to the executive order were launched. Many of the initial challenges took the form of habeas corpus petitions seeking the release of individuals who were detained at the nation’s airports. The State of Washington filed for declaratory and injunctive relief in order to protect its “residents, employers and educational institutions,” which it argued would be powerfully harmed by the executive order. On January 28, Judge Ann Donnelly of the US District Court for the Eastern District of New York issued an emergency stay of removal, which arguably halted the continued enforcement of Trump’s order; and on February 3, US District Court Judge for the Western District of Washington James L. Robart issued a temporary restraining order on a nationwide basis enjoining the most important sections of Executive Order 13769. This decision was affirmed by a three-judge panel of the Ninth Circuit Court of Appeals on February 9. Reflecting on Judge Donnelly’s emergency stay, American Civil Liberties Union (ACLU) Executive Director Anthony Romero exclaimed,
"What we’ve shown today is that the courts can work. They’re a bulwark in our democracy."6

Weeks after the Ninth Circuit’s decision, the Trump administration issued a second executive order in March and a proclamation in late September 2017, which modified the original order, changing the states subject to the ban and adding a variety of exemptions resulting in a more limited travel ban. Revisions to the first executive order ultimately produced more than fifty separate litigations carried out across most of the country’s legal system. In June 2018, a divided Supreme Court upheld the proclamation, finding among other things that there was a facially valid rationale for the administration’s restrictions.7

Ultimately, the Trump administration succeeded in some aspects of its original plan. Travelers from a number of majority Muslim countries have been effectively banned from entry. The court declined to find an unconstitutional religious rationale for the restrictions. Instead the court found a facially neutral explanation based in the president’s authority to protect national interests through immigration policy. Yet the policy that survived judicial scrutiny was considerably changed from the original. Lawful permanent residents and individuals who will be granted asylum are exempted, among many other cases.

Our book considers Anthony Romero’s claim that the courts of the United States are a bulwark of democracy. Under what conditions, if any, can courts be defenders of democratic regimes? If they can, how do they do it?

1.1 Defenders of Democracy

The notion that judges should act as defenders of democratic systems, their values, and their processes is a common and well-developed position. Writing in the Harvard Law Review, former Israeli Supreme Court President Aharon Barak clarifies the breadth of Anthony Romero’s proposition, placing it in historical context. He writes:

The [role] of the judge in a democracy is to protect the constitution and democracy itself. Legal systems with formal constitutions impose this task on judges, but judges also play this role in legal systems with no formal constitution. Israeli judges have regarded it as their role to protect Israeli democracy since the founding of the state, even before the adoption of a formal constitution. In England, notwithstanding the absence of a written constitution, judges have protected democratic ideals for many years. Indeed, if we wish to preserve democracy, we cannot take its existence for granted. We must fight for it. This is certainly the case for new democracies, but it is also true of the old and well. Anything can happen. If democracy was perverted and destroyed in the Germany of Kant, Beethoven, and Goethe, it can

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happen anywhere ... I do not know whether the supreme court judges in Germany could have prevented Hitler from coming to power in the 1930s. But I do know that a lesson of the Holocaust and of the Second World War is the need to enact democratic constitutions and ensure that they are put into effect by supreme court judges whose main task is to protect democracy. (Barak, 2002)

Judge Barak’s position reflects a consensus that developed in the twentieth century among the global legal community, which mobilized around the goal of promoting democratization and human rights. A highly professional and independent judiciary came to be understood as one of the central pillars of rule of law advocacy efforts aimed at supporting new democracies and encouraging reform in authoritarian contexts. The clear recognition of an obvious theoretical tension between majoritarian values and legal limits on authority notwithstanding (e.g. Friedman, 2002), judges exercising various forms of constitutional review came to be viewed as key defenders of democratic norms. In the introduction to its 2002 report on the promotion of judicial independence and impartiality, the US Agency for International Development writes

Judicial independence is important for precisely the reasons that the judiciary itself is important ... In democratic, market-based societies, independent and impartial judiciaries contribute to the equitable and stable balance of power within the government. They protect individual rights and preserve the security of person and property. They resolve commercial disputes in a predictable and transparent fashion that encourages fair competition and economic growth. They are key to countering public and private corruption, reducing political manipulation, and increasing public confidence in the integrity of government. (Miklaucic, 2002)

In times when core democratic norms appear to be threatened, when historical understandings of the limits of state power are suddenly called into question, there is an undeniable optimism in these perspectives. Norms of legislative and executive constraint may be violated, perhaps discarded entirely, yet as long as the courts of law are open for business and judges are willing to constrain the state, democracies may backslide but they are unlikely to collapse. It is a comforting story.

The story is comforting not only because of its clear normative appeal but also because of well-known examples in which courts have either claimed or been explicitly delegated a role for protecting democratic norms. In its 1951 Southwest States Case (1 VBerfGE 14), the German Federal Constitutional Court was asked to invalidate two federal statutes designed to reorganize three Laender created during the period of allied occupation, Baden-Württemberg, Baden, and Württemberg-Hohenzollern, into the single Land Baden-Württemberg. The first statute extended the lives of the Laender parliaments until the reorganization could be completed, thus suspending upcoming elections. The second statute laid out the procedures for the reorganization. In its opinion, the court wrote
An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of the other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate ... Thus this Court agrees with the statement of the Bavarian Constitutional Court, “That a constitutional provision itself may be null and void, is not conceptually impossible just because it is part of the constitution. There are constituent principles that are so fundamental and such an extent an expression of a law that precedes even the constitution that they also bind the frame of the constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.” (As quoted in Jackson and Tushnet, 2006, p. 588)

Against the backdrop of the principle that the Basic Law ought to be thought of as a logical whole, the nature of which is itself limited by certain higher principles of law, the court continued, writing

“The Basic Law has decided in favor of a democracy as the basis for the governmental system ... As prescribed by the Basic Law, democracy requires not only that parliament control the Government, but also that the right to vote of eligible voters is not removed or impaired by unconstitutional means ... It is true that the democratic principle does not imply that the life of a Landtag must not exceed four years or that it cannot be extended for important reasons. But this principle does require that the term of a Landtag, whose length was set by the people in accepting their constitution, can only be extended through procedures prescribed in that constitution, i.e., only with the consent of the people. (As quoted in Jackson and Tushnet, 2006, p. 588)

By extending the Laender parliaments’ life without consent of the voters in the affected areas, the federation had violated the right to vote. Beyond invalidating federal statues in order to preserve fundamental democratic liberties, the court endorsed a powerful principle restricting amendments to the Basic Law that might contravene fundamental norms of a democratic society. Conceived of in this way, constitutional review serves as a backstop against any legislative effort that might undermine basic democratic principles.

An extraordinary variant of this power was conferred upon the South African Constitutional Court during its transition to democracy. A key element of the compromise that allowed for the relatively peaceful transition to democracy involved an agreement at the Multiparty Negotiating Process to 34 Constitutional Principles which would guide the drafting of South Africa’s new constitution. The constitutional court was explicitly delegated the power to certify that the constitution conformed to the thirty-four principles (see Constitutional Court of South Africa Case 23/96).

By the end of the twentieth century, providing a form of constitutional review had become a common piece of transitioning states’ institutional architecture. Notably,
democratic reforms across post-communist Europe were accompanied by forms of constitutional control relying on powerful constitutional courts whose initial appointments were drawn from pools of highly qualified and well-regarded jurists (see the excellent discussion in Schwartz, 2000). Despite clear variation in the level of activism, courts across the region were credited with decisions helping transition from an authoritarian past to a democratic form of government. Indeed, the Constitutional Court of Hungary played such an important role in the provision of social and economic rights during the 1990s that Kim Scheppele called it “arguably more democratic than the Parliament even though the judges are not directly elected” (Scheppele, 2005).

So too in Latin America have courts been a part of the story through which democratic norms come to be fully adopted. The Constitutional Court of Colombia is recognized internationally for giving meaning and force to core commitments of the 1991 Constitution, requiring the state to provide the social and economic rights which the highest law demands (e.g. Cepeda-Espinosa, 2004; Uprimny, 2003). The constitutional court is also credited for developing a flexible jurisprudence on the limits of military jurisdiction, which has allowed for the successful negotiation of civil–military relations during a prolonged period of violent conflict (Ríos-Figueroa, 2016). Similarly the Constitutional Chamber of the Costa Rican Supreme Court is credited with massively expanding access to justice over social and economic rights claims, especially in the context of health (Wilson and Rodríguez Cordero, 2006). And following a notorious delay, in the late 1990s, the judiciary of Chile eventually began to investigate credible claims of gross human rights abuses under the Pinochet regime, a critical source of accountability in the aftermath of the democratic transition (e.g. Huneeus, 2010; Sikkink, 2011).

Across many years and multiple political contexts, courts have been empowered to speak to the nature of a state’s democratic practices. They have developed jurisprudence identifying the limits of state authority under democratic constitutions, and they have provided access to citizens seeking redress for violations of core democratic principles. In all of these ways, judges look to be defenders of democracy.

1.2 DEFENSIVE FAILURES

Just as there are powerful stories of judges coming to the defense of democratic states, it is clear that courts, even courts that are formally independent and unconnected politically from sitting governments, are far from successful sources of democratic restraint in all cases. Created by the communist regime in 1982, the Polish Constitutional Tribunal (CT) emerged through the democratic transition as an important source of constitutional control. Beginning in the middle of the 2000s, the CT would become a locus of conflict in the political competition between the Christian democratic Civic Platform (PO) and the conservative, national Law and
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Justice Party (PiS). The battle would come to a dramatic head in the weeks following the October 2015 parliamentary election.

Following eight years as the dominant coalition partner in Poland’s government, public opinion polling in the summer of 2015 strongly suggested that PO was likely to lose a considerable number of seats in the October parliamentary elections. In June, the PO government enacted a new statute on the CT, which permitted it to replace five judges, all of whom had terms that were set to expire after the pending election. Two terms would expire after the seating of the new parliament. Under the prior institutional framework, the new government would have been empowered to appoint these judges.

The five additional PO appointments meant that it had appointed fourteen out of fifteen CT judges; however, Andrzej Duda, the president of Poland, refused to administer the oath of office for the five new appointees. After taking office following an election that gave it a majority of seats in the Sejm, the PiS amended the PO’s constitutional court act, annulling the appointment of the five PO judges. The amendment created five new positions, limited the term of office for the president of the tribunal, ended the tenure of the sitting president and vice president, and stipulated that a judge’s term begins only after the administration of the oath of office before the president of Poland. On December 2, the PiS-controlled Sejm appointed five new judges in direct defiance of a CT order demanding the Sejm abstain from doing so until the constitutionality of the amendment could be reviewed. President Duda administered the oath of office to the new PiS judges.

By the end of January 2016 the government had passed a budget bill cutting the CT’s yearly budget by roughly 10 percent. Ignoring concerns expressed by the European Commission that it was undermining judicial independence and democracy, the PiS continued its efforts to reform the judiciary well into 2018, amending rules for appointing and removing judges across the system and at all levels (Venice Commission, n.d.).

The Polish experience is far from unique. Courts seeking to constrain leaders are often the target of institutional attacks. Judges are removed from their posts. Key institutions of judicial powers are reformed or eliminated altogether. Appointment rules are changed so as to concentrate staffing authority in a single power center (Helmke, 2010; Pérez-Liñán and Castagnola, 2009). Some of the attacks are so serious that they effectively eliminate the courts as a source of constraint. Indeed, in 2007, Bolivia’s Constitutional Tribunal was rendered inquorate as a consequence of
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Figure 1.1 reveals a key empirical pattern. It shows a plot of an index of attacks on judicial institutions on a measure of de facto judicial independence (Coppedge et al., 2018; Linzer and Staton, 2015). The points in the figure show the combination of judicial attacks and judicial independence for all states of the world in 2015. As the figure displays, judiciaries are less likely to be the target of government attacks as independence increases; however, the integrity of courts is called into question and judges are purged for political reasons even on courts that enjoy a relatively high level of independence.

The Polish case also reminds us that judicial orders are broadly understood to not be self-enforcing, a challenge that is particularly pressing when the target of an order is the state itself (Becker and Feeley, 1973; Birkby, 1966). Critically, although there are many examples of noncompliance in settings characterized by low levels of the rule of law (Ginsburg and Moustafa, 2008), courts are not always obeyed in states characterized by high levels of the rule of law (Carrubba, Gabel, and Hankla, 2008; Chilton and Versteeg, 2018; Vanberg, 2005). The Constitutional Bench of Costa Rica’s Supreme Court confronts a variety of compliance challenges in its amparo jurisdiction (Staton, Gauri, and Cullell, 2015). The Netanyahu government’s pattern of evading high court and administrative court decisions across a very wide set of issue areas is particularly notorious (Association for Civil Rights in...
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Figure 1.2, which plots the Varieties of Democracy (V-Dem) measure of high court noncompliance on judicial independence underscores the point. There is a negative association between noncompliance and judicial independence, but independent courts are not always obeyed.

Perhaps of greatest concern, scholars have suggested that in order to avoid conflict and noncompliance, judges often engage in politically deferential patterns of decision-making, at least in particularly salient cases, which render the constraints they might place on governments practically nonbinding (e.g. Bill Chávez, Ferrer-John, and Weingast, 2011; Carrubba, Gabel, and Hankla, 2008; Rodríguez-Raga, 2011). Summarizing these challenges, the United States Agency for International Development’s (USAID) Office of Democracy and Governance writes:

[I]n several countries, governments have refused to comply with decisions of the constitutional court (e.g. Slovakia and Belarus) and substantially reduced the court's power (e.g. Kazakhstan and Russia). This illustrates the dilemma constitutional courts often face: Should they make the legally correct decision and face the prospect of non-compliance and attacks on their own powers, or should they make a decision that avoids controversy, protects them, and possibly enables them to have an impact in subsequent cases? Bold moves by constitutional courts can be instrumental in building democracy and respect for the courts themselves. However, the local political environment will determine the ability of the courts to exercise independent authority in these high stakes situations. (Office of Democracy and Governance, 2002)
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These facts raise serious questions about the capacity of courts to serve as defenders of democracy. If judges attempting to hold leaders accountable are often the target of institutional attacks; if courts are constructed to represent the political interests of appointers; if jurisdiction can be tailored to reduce constraints of courts on political power; if court orders can be ignored even in states with seemingly significant commitments to the rule of law; and if politically savvy judges avoid conflict precisely when they are needed, how is it that courts can serve as bulwarks of democracy?

1.3 ARGUMENT SUMMARY

Our argument knits together and elaborates upon ideas from related but separate research traditions. Understanding whether, and if so under what conditions, courts might be bulwarks of democracy requires a model of what democracy is, what challenges groups confront when they organize themselves democratically, and an account of how courts influence these challenges, if they do so at all.

Drawing on a robust literature on political regimes, we conceive of democracy as a kind of social equilibrium in which groups exchange risky and violent lotteries over complete control of the state for peaceful lotteries over the transfer of power via elections (Acemoglu and Robinson, 2006; Boix, 2003; Boix, Miller, and Rosato, 2012; Przeworski, 2005). Favorable outcomes of conflict are more profitable and potentially more enduring than the favorable outcomes of elections; however, the unfavorable outcomes of conflict can be worse than electoral losses. At its core, democracy requires compromise across a community’s salient political cleavage(s). Supposing that compromises necessary to sustain democracy are possible, a fundamental challenge of sustaining these compromises will involve policing limits on the authority of the state. Democracies commonly institutionalize compromises over the allocation of resources and values via a series of limits on the powers of governing parties. These limits, which we refer to as “regime rules,” are typically entrenched in constitutions. If it were possible to classify every action of the state with respect to the regime’s rules – that is, if it were clear when a policy has exceeded a limit on the authority of the state – groups out of power could police regime rules alone (e.g. Przeworski, 2005). Yet, because there is uncertainty about what governments do, why they do it, and in many cases what regime rules genuinely imply, policing the rules that structure democratic compromises involves resolving a critical informational problem over whether leaders are in fact remaining faithful to regime rules (Carrubba and Gabel, 2014; Reenock, Staton, and Radean, 2013).

We argue that courts can influence regime instability by affecting the informational problem inherent in policing regime rules. They do so in three ways: (1) by providing a mechanism through which private information about the rationale