
Article:
Castillo Ortiz, P. orcid.org/0000-0003-4540-1855 and Roznai, Y. (2024) The democratic self-defence of constitutional courts. ICL Journal, 18 (1). pp. 1-24. ISSN 2306-3734

https://doi.org/10.1515/icl-2024-0001

The Democratic Self-Defence of Constitutional Courts

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ICL JOURNAL - VIENNA JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW (forthcoming)

Abstract:

Keywords: Democracy, Courts, Legal Constitutionalism, Illiberalism, Democratic decay, Militant Democracy

1. Introduction: Protecting democracy through constitutional court self-defence

There is a paradox related to contemporary attempts at reforming institutions with powers of constitutional review. Such paradox is most visible with regards to the issue of the appointment of judges. In the United States, the Supreme Court has become the object of passionate debates given its composition, and 'expanding' or 'packing' the court has been suggested as a possible way ahead to deal with the political crisis surrounding the institution.[1] Ironically, however, court-packing was part of the strategy followed by illiberal governments in countries like Poland to control constitutional courts.[2]

These unexpected concomitances between debates over the politics of judicial appointments in the US and Poland point to a more general difficulty when it comes to reforms of these institutions: it is hard to know when we are before a legitimate reform of a constitutional court that should be admissible from a democratic perspective, and when we are before an illiberal attack on constitutional review that should be countered. Such question has, of course, theoretical and comparative dimensions that can be and should be discussed by academics.[3] But the problem goes beyond theoretical and scholarly considerations, and has a clear practical dimension. That is the case because, in practice, courts (constitutional or supreme) will have to decide how to react to reforms of their own institutional design. For institutions whose

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[1] See e.g. Rivka Weill, 'Court Packing as an Antidote' (2021) 42(7) Cardozo Law Review 2705; Arron Belkin, 'The Case for Court Expansion' (June 27, 2019), https://static1.squarespace.com/static/5ce33e8da6bbec0001ea9543/t/5d14e7ae04c5970001fa4cb1/1561651120510/The+Case+for+Court+Expansion.pdf; Kermit Roosevelt III, 'I Spent 7 Months Studying Supreme Court Reform. We Need to Pack the Court Now', Time (December 10, 2021), https://time.com/6127193/supreme-court-reform-expansion/

[2] Bojan Bugarič & Tom Ginsburg, 'The Assault on Postcommunist Courts' (2016) 27 The Journal of Democracy 69; Tímea Drinóczi & Agnieszka Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20 German Law Journal 1140; Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019), 58-131.

[3] On these questions, see e.g. Mark Tushnet & Bojan Bugaric, *Power to the People: Constitutionalism in the Age of Populism* (Oxford University Press, 2021)148-176; David Kosar & Katarína Šipulová, 'Comparative court-packing' (2023) 21(1) International Journal of Constitutional Law 80; Benjamin Garcia Holgado & Raúl Sánchez Urribarri, 'Court-packing and democratic decay: A necessary relationship?' (2023) 12(2) Global Constitutionalism 350.

institutional telos is, very generally, linked to democracy protection, whether such reform of their design poses a risk for democracy should matter.[4]

This article tackles this complex issue. In particular, the article responds to the question *under which conditions should constitutional courts veto reforms of their institutional design*. The argument of this article is thus complementary to, but distinct from, previous debates in the field that seek to elucidate *how* should constitutional courts respond to attacks to democracy[5], or the extent to which constitutional court action is effective in protecting democratic systems.[6]

The response to the research question of this article is *the theory of democratic self-defence of constitutional courts*. In short, this theory posits that constitutional courts should always declare the unconstitutionality of reforms on their institutional design when these are instrumental to a process of democratic decay. In this article, we develop such theory and explain how its main elements should be interpreted. The article thus seeks not only to clarify an obscure question of constitutional law, but also to provide doctrinal tools for real-world courts to protect democracy through defending themselves from attacks by illiberal and authoritarian reformers.

This article is structured as follows. After this introduction, we present some methodological considerations, and in particular we explain the main conceptual and methodological priors that underpin our argument in this article. Next, we present the background problem that justifies this research: the fact that constitutional courts have often been taken over by illiberal or authoritarian actors before they engage in processes of democratic decay. The following section presents the theory of democratic self-defence of constitutional courts as a reaction to that background problem. The section discusses in detail the main three aspects of such theory, that delimit its content and applicability: why it is a duty (and not just a right) for these institutions to protect themselves, which types of attacks are relevant to this theory, and when should we consider that an attack on the constitutional court is an attack on democracy. The following section anticipates and responds to some potential criticisms of the theory. The penultimate section of the article applies the theory to the Israeli case study. The last section concludes.

2. Methodological remarks

This article seeks to combine theoretical and doctrinal approaches in discussing the idea of self-defence of courts. We could differentiate between a *theory* and a *doctrine* of democratic self-defence of courts, albeit both are strongly linked an intertwined. The *theory* of democratic self-defence of constitutional courts is normative, in the sense that it provides for an assessment of whether and when constitutional courts should protect themselves to protect democracy. It does so at the level of ideas, even if these will be often political and legal in nature. It operates at an abstract level, and seeks to provide at least a common denominator that could apply to all courts in democratic polities.

The *doctrine* of democratic self-defence of courts seeks to use law and legal authorities and put them at the service of the theory. It seeks to provide for an interpretation of an existing legal system in such a way

[4] For different institutional safeguards against court-packing, see David Kosar & Katarina Sipulova, 'How to Fight Court-Packing?' (2020) 6 Constitutional Studies 133.

[5] Tom Ginsburg, 'The Jurisprudence of Anti-Erosion' (2018) 66 Drake Law Review 823; Yaniv Roznai, 'Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy' (2020) 29 William & Mary Bill of Rights Journal 327.

[6] Tsai Robert L., 'Why Judges Can't Save Democracy' (2022) 72 Syracuse Law Review 1541; András Jakab, 'What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law' (2020) 6 Constitutional Studies 5. Compare with Sergio Verdugo, 'How Judges Can Challenge Dictators and Get Away with It: Advancing Democracy while Preserving Judicial Independence' (2021) 59 Columbia Journal of Transnational Law 554.

that the core aspects of the theory of democratic self-defence of court can be implemented through a sound legal reasoning. That being the case, this doctrinal approach will be specific to each legal system, so rather than speaking of a general doctrine of democratic self-defence of courts we should speak of a Spanish doctrine of democratic self-defence, a French doctrine, a Chilean doctrine, an Israeli doctrine etc.

Table 1

	Theory	**Doctrine**
Task	Normative assessments of political situations	Interpretation of legal authorities
Scope	All democracies with constitutional review	Specific to each polity with constitutional review
Questions to respond	why and when should constitutional courts self-defend to protect democracy?	how can the legal system be interpreted so that constitutional courts can legitimately self-defend to protect democracy?

This article deals with the relationship between constitutional courts, democracy and democratic decay. Thus, for reasons of clarity and transparency, and for the sake of methodological rigour, these three concepts need to be defined before we start engaging with them in our discussion.

By *constitutional court* we refer in this article to any judicial-type organ that has the final say on the constitutionality of legislation. Thus, the definition includes not only Kelsenian-style constitutional courts that monopolize the control of constitutionality, such as the German Federal Constitutional Court. It also covers apex courts in systems that follow the model of diffuse review of legislation, such as the US Supreme Court or the Supreme Court of Israel. The notion of 'constitutional court' is thus used in a loose sense in this article.

Democracy is defined in this article in a thick sense. It thus includes a system of government that allows the governed to remove incumbents from power via free and fair elections. But the definition includes also other elements, such as respect for the rule of law, basic rights and checks on governmental power.[7]

Democratic decay is defined in this article, following Daly, as 'the incremental degradation of the structures and substance of liberal constitutional democracy'.[8] The incremental nature of the decay of democracy, that Daly defines as a 'subtle, step-by-step hollowing out of democratic governance',[9] is particularly appropriate to the purposes of this article: attacks on democracy via attacks on constitutional courts will very often be featured by this incremental nature.[10] This does not mean that many of the arguments put forward in this article cannot apply to situations of abrupt democratic breakdown. Rather, it simply means that the article is developed with situations of democratic decay in mind.

[7] See also Roznai (n 5) 330-334.

[8] Tom Gerald Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 Hague Journal on the Rule of Law 9, 17.

[9] Id.

[10] See also Yaniv Roznai, 'The Straw that Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendments', in Alejandro Linares-Cantillo, Camilo Valdivies-Leon and Santiago Garcia-Jaramillo (eds.), *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press, 2021), 147.

At the level of methodological priors, the research rests of a number of assumptions. Given space constraints we cannot develop in detail the normative justification for each of such priors. But we at least make them explicit transparently, so that the reader can know that this is the background framework of our argument. The research has, in particular, three methodological priors:

Democratic desirability. The first prior of this article is the normative assumption that democracy is a good thing. It is a desirable form of political organization. And this is not just the case for instrumental reasons, such as its potential to create economic prosperity or bring peace, or not only because of them. Democracy is a desirable form of political organizations for reasons that are inherent to it, and that have to do with human dignity. It is based on the expression of pluralism, that is a key defining element of free human societies.[11]

Militant democracy. Second, democracies can and must defend themselves. Democracies are not only normatively desirable but also, because of that, should create the arrangements to ensure their own viability and resilience vis-à-vis authoritarian threats. This prior is thus inspired by the ideas of militant democracy, that were best systematized by Karl Loewestein in the 20th Century.[12] Recent literature, however, suggests that traditional tools of militant democracy prove ineffective against contemporary forms of authoritarianism.[13] This article takes note of these observations. Acknowledging this insufficiency of the traditional toolkit of militant democracy, but vindicating its telos, the article aims to providing a new tool for democracy protection, contributing to update militant democracy.

Pluralist legal constitutionalism. The last prior has to do with the debate between legal and political constitutionalists, and the general debate on the constitutional powers of judicial institutions. For legal constitutionalism, judicial enforcement of a normative constitution is essential to ensure the viability of the democratic order.[14] Political constitutionalists, on the other hand, are constitutional review sceptics, and generally consider that the last say on policy issues should belong to democratically elected branches of government.[15] This article takes legal constitutionalism as a methodological starting point: at the end of the day there needs to be an institution with powers of constitutional review in order for the theory of democratic self-defence of courts to make sense at all. Yet, it takes a pluralist approach to legal constitutionalism. While legal constitutionalism requires constitutional review as a necessary condition, a pluralist approach to legal constitutionalism can admit diverse types of design, as well as different degrees of powers, of courts.[16] This prior would thus admit as acceptable forms of constitutional review

[11] See, for instance, John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 The University of Chicago Law Review 765.
[12] See Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 The American Political Science Review 417; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31 The American Political Science Review 638. More recently, see Jan-Werner Müller, 'Militant Democracy' in Michel Rosenfeld & András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012); online edn., Oxford Academic (21 Nov. 2012), https://doi.org/10.1093/oxfordhb/9780199578610.013.0062, last accessed 15 Dec. 2023; András Sajó (eds.), *Militant Democracy* (Eleven International Publishing, 2004); Markus Thiel, *'The 'Militant Democracy' Principle in Modern Democracies* (Routledge, 2016).
[13] David Landau, 'Abusive Constitutionalism' (2013) 47 University of California Davies Law Review 189, 193.
[14] András Sajó & Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press, 2017).
[15] See, among others, Inter alia Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004); Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 62; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007)
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[16] For diverse roles and powers of courts, see David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55 B.C. Law Review 1500, 1503; Amal Sethi, 'Towards a Pluralistic Conception of Judicial Role' (2021–2022) 90 University of Missouri Kansas-City Law Review 69.

that partly accommodate the claim of political constitutionalists that policy choices should be made by democratically elected politicians.[17] The only condition would be that the constitutional court has the capacity to enforce the rules that protect democracy, in line with our two previous priors.

3. The problem to tackle: constitutional courts and democratic decay

One of the aims behind the implementation of constitutional review in most countries where it exists is that of democracy protection.[18] In order to protect democracy, however, constitutional courts accumulate a wide range of powers, that often intersect with the political process.[19] For this reason, the capture of courts by illiberal politicians is particularly dangerous. As Ginsburg and Hug suggest, when they are under their control courts can become a powerful instrument in the hands of illiberal politicians to 'turn the law loose on their enemies'.[20]

This is exactly what seems to have occurred in a number or countries around the world: from Poland to Venezuela, from Hungary to Turkey, political control over constitutional courts has been described by an increasing body of literature as a catalyst of democratic decay and rule of law backsliding.[21]

The danger is twofold: first, once courts are weakened, captured or controlled, it becomes much easier to undermine other democratic values and institutions. As the introduction for this symposium states:

> Comparative experience shows that weakening the ability of courts to supervise the government and review its actions is a central pillar of democratic erosion, as it removes a crucial obstacle for a government seeking to consolidate its power, and makes it easier for it to make further changes later. In other words, because the judiciary is the last line of defense of democracy, in order to capture and undermine democratic institutions the first thing that governments do, once in power, is to threaten, limit and if possible, to capture and court. Once the court is weakened or captured, it then becomes easier to weaken or capture other democratic institutions.[22]

Second, once courts are captured, they themselves become instrumental for the process of democratic decay, by affirming and advancing anti-democratic agenda by the government. Indeed, the paradox is thus that institutions created to protect democracy have been put at the service of processes of democratic

[17] For instance Pablo Castillo-Ortiz, 'The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions, (2020) 39 Law and Philosophy 617; see also the discussion by Maartje De Visser, 'Prevention is Better than Cure: Rethinking Court Behaviour and Design' (2020) 29 William & Mary Bill of Rights Journal (online) 1, 8, http://wm.billofrightsjournal.org/wp-content/uploads/2021/01/Visser.pdf

[18] See Kelsen's approach in Lars Vinx (ed. & tran.), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015); See amongst more recent literature on the emergence of constitutional courts, Francisco Ramos, The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions (2006) 2(1) Review of Law & Economics 103; Tom Ginsburg & Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 The Journal of Law, Economics, and Organization 587; Yaniv Roznai, 'Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review' (2020) 14(4) ICL Journal 355.

[19] Landau (n 16); Sethi (n 16); Samuel Issachroff, 'Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World' (2019) 98 N.C. Law Review 1.

[20] Tom Ginsburg & Aziz Huq, *How to Save a Constitutional Democracy* (University of Chicago Press2018) 190.

[21] See inter alia Laurent Pech & Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3; Sadurski (n 2); Drinóczi & Bień-Kacała (n 2).

[22] Christoph Bezemek & Yaniv Roznai, 'Introduction: The Most Endangered Branch' (2023) 17(3) ICL Journal 203, 206.

decay. This what Rosalind Dixon and David Landau term "abusive judicial review".[23] The theory of democratic self-defence of courts aims at providing remedies for this situation. It does so by presenting a general justification to veto attacks on constitutional courts. Furthermore, it provides for a nuanced analysis of which reforms of the design of constitutional courts are democratically legitimate, and which are not and thus should be overturned.

4. A theory of democratic self-defence of constitutional courts

The theory of democratic self-defence of constitutional courts poses that *it is a duty for these institutions to defend themselves from attacks that are part of a larger process of democratic decay*. This simple presentation of the theory has thus three elements that require more in-depth explanation.

a. A duty – not just a right – for constitutional courts

The theory of democratic self-defence of constitutional courts does not simply suggest that constitutional courts can defend themselves from certain attacks, but that they *must* do it when the viability of the democratic system of government is at stake. This is for reasons of two orders: theoretical and doctrinal-constitutional.

The theoretical level refers to the values that are embedded in constitutionalism and in the telos of constitutional courts. Following Sartori, we can understand constitutionalism as a system of limited government in which the rights of citizens are protected.[24] Thus, the existence of a constitutional court in a constitutional democracy involves that the first and most prominent task of the court is the protection of the democratic system of government upon which the constitution is based. Put in other terms, democracy is at the core of the constitution that the constitutional court ought to protect. "Without an independent judiciary, democracy is in deep peril."[25]

The doctrinal-constitutional level refers to the positive regulation of constitutional courts. In this case, the doctrinal-constitutional justification for the application of the idea democratic self-defence of constitutional courts must be analysed in a case-by-case basis. Each legal system is different, and each constitutional court will need to find out to what extent these is a basis for the application of the theory, and which is this. But at the very least, constitutional judges should look at the constitution at two levels.

The first level points at a specific constitutional provisions. Ideally, constitutional judges would look at specific provisions mandating the constitutional court to protect democracy. In fact, an extension of the democratic self-defence theory is that constitution drafters should include this type of explicit and specific provisions in the constitution. The reason is to facilitate the self-defence of the court in case the polity suffers, at any point, from political leaders with authoritarian tendencies. Specific provisions that mandate the constitutional court to protect democracy have important advantages. They offer constitutional judges willing to defend democracy an unambiguous legal basis to protect the court, that political leaders will find more difficult to dismiss. And if there are some constitutional judges reluctant to protect the

[23] David Landau & Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2023) 53 UC Davis Law Review 1313. See also Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal globalization and the subversion of liberal democracy* (Oxford University Press, 2021) ch.5.

[24] Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 The American Political Science Review 853 (1962).

[25] Andreas Paulus, 'Reflections on Constitutional Adjudication in a Democracy' (forthcoming) Israel Law Review.

institution in order to protect democracy, a specific provision might provide for strong incentives to interpret the constitutional framework in a proactive, pro-democratic way.

The second level is that of a systematic interpretation of the constitution. A systematic reading of constitutional provisions dealing with democracy, even when they do not provide the court with a specific mandate, can be an alternative to the the use of specific constitutional provisions. In this case the constitutional court would discover its mandate of democratic self-defence in a systematic reading of the constitution. For instance, a certain constitution might not be explicit that the role of the constitutional court is, ultimately, to protect democracy. But the constitutional text might entrust the constitutional court with the task to enforce the normativity of the constitution, including provisions that declare the polity to be organized along democratic lines.

b. Self-defence from attacks

In order to be able to protect democracy, courts must be able to protect themselves. To defend themselves, constitutional courts should consider using the main weapon that is available to them: declarations of unconstitutionality. However, the idea of self-defence implies the existence of an attack on the court which, as explained before, is linked to a more general attack against democracy in the country.[26] These attacks can in fact be of many types, and can be classified according to many different criteria.

The first criterion is content. By their content, the most typical attacks on constitutional courts will target either their independence or their powers of review.[27]

Attacks on judicial independence usually seek to render the institution or its members subject to the power of external actors, most notably the executive. Most frequently, these attacks are instrumented through alterations of the procedure of appointment of constitutional judges or the composition of the court. This does not mean, however, that every institutional reform of the procedure of appointment or the composition of the court falls within the realm of the democratic self-defence theory. In fact, there will be clear instances of such reforms that do not pose a priori a threat to democracy. For instance, reforms disempowering the executive in the procedure of judicial appointment, making it more pluralistic or consensual.[28]

Attacks on the powers of review of the court, on the other hand, seek to strip the institution from its jurisdiction. The later will fall within the scope of the theory of democratic self-defence when they curtail the powers of the court to protect democracy via constitutional review, but not otherwise. For instance, the democratic self-defence theory would not cover a situation in which a political majority constrains the powers of the court to make choices of ordinary policy. This is in line with this article's prior about pluralist legal constitutionalism. This prior poses that there might be different, legitimate approaches to

[26] Schnutz Rudolf Dürr, 'Constitutional Courts: An Endangered Species?', in Dominique Rousseau (ed.), *Les Cours constitutionnelles, garantie de la qualité démocratique des sociétés?* (LGDJ, 2019) 111.

[27] See for the cases of Poland, Hungary and Turkey, Pablo Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' (2019) 15 European Constitutional Law Review 48.

[28] Consider, for example, the recent reform in Ireland, in which the Judicial Appointments Commission Bill 2022 aimed to create a new commission to select and interview potential candidates to become judges, replacing the current Judicial Appointments Advisory Board, and limiting the Government's authority on deciding who is appointed as a judge. The Supreme Court has upheld the constitutionality of the Bill. See The Supreme Court, In The Matter of Article 26 of The Constitution and In the Matter of The Judicial Appointments Commission Bill 2022 [2023] IESC 34, https://www.courts.ie/acc/alfresco/af4b1773-a5c7-4626-9b01-9b8ab9b690e2/2023_IESC_34.pdf/pdf#view=fitH

the legal protection of constitutional democracy, some of which might give more prominence to democratically elected actors to make policy choices. If that is the case, then the democratic self-defence theory must accept a situation in which policy areas that are not part of the core democratic process are kept away from the powers of constitutional review.[29] For these policy areas, it is acceptable for the purposes of our theory to give democratically elected political actors the ultimate say.

The second criterion for classification refers to legal sources. By their legal source, we can classify attacks on the constitutional court into those operated via administrative amendments or statutory amendments of the institution and those via constitutional amendment. The former – administrative or statutory amendments – are easier to tackle by the court, because being administrative or statutory attacks the constitutional court can always declare the unconstitutionality of the regulation or statute amending its own institutional design when it contradicts a statutory or a constitutional provision, respectively.

The latter – formal constitutional amendments – are much more difficult to tackle. When the constitutional court is attacked via a constitutional amendment of its design, then we might be well witnessing a case of abusive constitutionalism.[30] Landau defines abusive constitutionalism as "the use of mechanisms of constitutional change – constitutional amendment and constitutional replacement- to undermine democracy".[31] In these cases, the constitutional court will have to resort to a combination of the doctrine of 'unconstitutional constitutional amendments'[32] and the theory of democratic self-defence of constitutional courts. The doctrine of unconstitutional constitutional amendments will provide for the basis of legal legitimacy to a declaration of unconstitutionality of a constitutional reform of the design of the constitutional court. According to this doctrine, there might be constitutional amendments that can be declared unconstitutional if they conflict with explicit unamendable provisions or even in the absence of an explicit unamendability clause. This would be the case when such constitutional amendment is deemed as revolutionary, for instance when it "collapses the existing order and its basic principles and replaces them with new ones, thereby changing its identity".[33] The theory of democratic self-defence would, in turn, provide for a conceptual link between such "collapse of the existing order" and the reform of the constitutional court:

> considering how detrimental attacks on the judiciary were to democratic decline, and considering how the weakening of judicial institution facilitated the capture of political institutions, in countries such as Poland, Hungary, and Turkey, in the context of abusive constitutionalism, there is strong justification for applying the UCA [unconstitutional constitutional amendments – P.C.O. & Y. R.] doctrine especially in cases concerning judicial independence and separation of powers.[34]

Simply put, the reform of the constitutional court is deemed – in this doctrine – to be part of and instrumental to a process of democratic deconsolidation, the most radical form of such collapse of the existing order for a constitutional democracy.

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[29] Compare with the concept of the "democratic minimum core" of Dixon and Landau (n 23), which includes a system of: (i) multi-party, free and fair, regular elections; (ii) political rights and freedoms, and (iii) institutional checks and balances.

[30] See Landau (n 13); Dixon & Landau (n 23).

[31] Landau (n 13) 191.

[32] See generally, Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017).

[33] Ibid., at 8. On revolutionary constitutional changes, see Gary J. Jacobsohn & Yaniv Roznai, *Constitutional Revolution* (Yale University Press, 2020).

[34] Yaniv Roznai & Tamar Hostovsky Brandes, 'Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine' (2020-2011) 14(1) Law & Ethics of Human Rights 19, 47.

c. That are part of larger processes of democratic deconsolidation or rule of law backsliding.

If a reform of the design of constitutional courts is *instrumental* to a process of democratic decay, then it may justify a veto by the institution in the form of a declaration of unconstitutionality. The problem, however, is what 'instrumental' means in this context. The reason is that this is a relatively vague concept that can be interpreted from two very different perspectives:

A teleological perspective would pose that the reform of the court falls within the democratic self-defence theory when it is *aimed* at provoking democratic decay, regardless of the actual practical outcome of the reform. This approach involves an element of deliberate intent by the reformers, who reform the design of the court precisely seeking to deconsolidate democracy in the country. This conforms with existing literature on court-capture that focus on "the motivations behind court-packing",[35] "the character and motivations of those elected or appointed to high office",[36] the "'purpose—the need for a full articulation of the reform's aims",[37] whether the reform is "intended for potential abuse".[38] As Tushnet and Bugarič argue, predicting court-packing's effects requires taking into account the actors' goals, that means "making some judgment about what else the people proposing the policy want to do".[39] Holgado and Urribarri distinguish between "two types of court-packing: (1) policy-driven, in which the alteration of the composition of a court aims to promote public policies; and (2) regime-driven, in which the alteration of the composition of a court aims to assist the executive in replacing the existing regime with a new one."[40] The difficulty here has to do with the epistemic hurdles to know if such aim, motivation or intention exists, as even authoritarian rulers often hide their purpose to undermine democratic rule.

A consequentialist perspective would pose that the reform of the court falls within the democratic self-defence theory when it will *result* in a deterioration of the democratic quality of the polity, regardless of whether this outcome is intended or unintended by the reformers. The difficulty with the application of this perspective is again epistemic, as it is often difficult to know in advance what the actual results of a certain reform of the constitutional court will be for the polity as a whole.

Everything that has been said in this section so far leads to two important problems for the theory of democratic self-defence of constitutional courts. First, there is the conceptual problem linked to having two different criteria to define what an attack 'instrumental' to democratic deconsolidation mean. The second problem is epistemic, and is derived from the fact that it will be often difficult to know if the two different criteria – or at least one of them – concurs in the case at stake.

[35] Kosar & Šipulová (n 4) 135.
[36] Aziz Huq, 'Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design' (2018) 65 UCLA Law Review 1506, 1530.
[37] Tom Gerald Daly, '"Good" Court-packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay' (2022) 23 German Law Journal 1071, 1074.
[38] András Sajó, *Ruling by Cheating. Governance in Illiberal Democracy* (Cambridge University Press, 2021), 154–55.
[39] Tushnet & Bugarič (n 3) 161–62, 76.
[40] Holgado & Urribarri (n 3) 355.

Table 2

	Aimed at deconsolidating democracy	**Not aimed at deconsolidating democracy**
Results in democratic backsliding	Criteria met for the application of the doctrine	Difficult cases
Does not result in democratic backsliding	Difficult cases	Criteria not met for the application of the doctrine

Table 2 explores the first conceptual problem that just mentioned above. The theory of democratic self-defence of constitutional courts poses that these institutions must veto reforms on their institutional design that are instrumental to democratic decay. However, as discussed earlier the 'instrumental' nature of these reforms can be seen from the perspective of their outcome and from the perspective of their intent. Table 2 simply presents how these two dimensions combine. Two of these combinations are relatively easy to deal with. When the reform is both aimed at and has as its consequence democratic decay, then it is clear that such reform falls within the area of application of the theory of democratic self-defence of constitutional courts: it should be vetoed. If a reform is neither aimed nor has as a consequence democratic decay, then it should be considered as a legitimate reform of the design of the institution that falls beyond the area of application of the theory. This does not mean that the reform cannot or should not be declared unconstitutional. It just means that, if that is the case, it would be unconstitutional on grounds other than the theory of democratic self-defence of constitutional courts. If such alternative grounds do not exist either, the reform should not be declared unconstitutional, as it would be a constitutionally legitimate institutional reform. Finally, there are two situations that could be described as 'difficult cases'. First, if there is an intent to erode democracy but the reform of the constitutional court is unlikely to provoke it. This can happen, for instance, in the case of illiberal yet clumsy rulers, whose reform of the constitutional court will not produce the effects they desire or when the reform may cause such an effect but only to a minimal degree which would make it difficult for a court to exercise the extreme remedy of invalidation. Second, there is the situation in which a reform of the constitutional court is not aimed at provoking democratic decay but might produce such outcome. Such could be the case for liberal rulers unable to understand that potentially illiberal, unintended consequences of a reform of the constitutional court. The two 'difficult cases' put the court before a difficult, problematic scenario.

A second problem, which is epistemic in nature, is even more difficult to tackle. In this case, it is only the court on a case by case basis that will be able to decide if there is sufficient information to ascertain whether there is an aim to deconsolidate democracy, or if that will be the result of the reform. There will be cases of epistemic clarity, in which these things are easy to know with the information available to the court. But very frequently, the court will have to make a decision in a scenario of imperfect information.

The theory of democratic self-defence confronts in scenarios of 'difficult cases' and of 'imperfect information' similar trade-offs. If the court opts in these cases for the application of the theory, it will maximize protection of a core democratic institution – itself –, but that will be at the cost of overturning a decision of democratically elected decision-makers which might have been, after all, innocuous for democracy. This might also harm the legitimacy of the court itself as it might be regarded as if the court is acting in self-dealing simply to preserve its powers.[41] Alternatively, the court might opt for giving democratic decision-makers the benefit of the doubt and defer to their decisions, but this will be at the

[41] See infra section 5.

cost of risking a potential – yet uncertain – democratic deterioration. This trade-off faced by the court in difficult scenarios is a limit of the theory of democratic self-defence.

5. Some potential objections against the theory: a response to the critics

So far, we have argued that constitutional courts should defend themselves from attacks that can endanger democracy. But we understand that our argument might raise some objections.

A first potential criticism against our argument has to do with the epistemic problem that we acknowledged above, as well as with the acknowledged existence of 'difficult cases' in which the teleological and the consequentialist criteria for the determination of a risk for democracy do not match. For instance, sometimes it will not be easy for constitutional courts to know the intentions or the outcomes of a certain reform on their institutional design. We already acknowledge that, in these cases, the application of the theory of democratic self-defence encounters difficulties, as it faces a trade-off: either to declare unconstitutional a reform of its design that could not be in the end a threat for democracy, or declaring the constitutionality of a reform that could turn out instrumental to a process of democratic decay. But the problem is actually more acute in contemporary democracies, as given the strategies followed by illiberal actors, such difficulties are doomed to arise very frequently. The criticism could thus be that the theory of democratic self-defence is unable to meet one of its declared goals: to update militant democracy and make it more functional at a time in which democratic decay – as opposed to abrupt democratic breakdown – becomes more frequent.

The theory of democratic self-defence of constitutional courts can only respond to this criticism by reminding what it can still do and by simultaneously acknowledging its limitations. The theory of democratic self-defence of constitutional court faces indeed difficulties in these scenarios. Such difficulties would need to be solved on a case-by-case basis, with whatever level of information is available to the court. The trade-off described above will be however, in many instances, unavoidable. But even in these cases, the theory of democratic self-defence of constitutional courts is useful for two reasons. First, it will be helpful to remind constitutional courts that one of the criteria against which they have to assess the constitutionality of a reform of their own design is the extent to which it can be instrumental to democratic decay. Second, in making explicit the trade-off that courts might confront in many cases, the theory helps the constitutional court think about the choice they are down to make and its potential implications.

Besides, not all cases will be difficult cases. The theory of the democratic self-defence will have a rather straight-forward application in many instances, when the court has enough information to conclude that a reform of its design is both intended at and will likely cause democratic decay. Such cases will be the most blatant ones, and thus the most necessitated of a conceptual apparatus like the one developed in this article. The greater challenge will arise when democratic backsliding is subtle and incremental.[42]

The theory of democratic self-defence of constitutional courts is designed for scenarios in which the court is attacked via a reform of its institutional design. But very often, attacks on constitutional courts do not require of such reforms. This might occur in two different scenarios. First, it might happen because attacks on the court operate through the existing institutional design of the court, which in certain circumstances allow illiberal politicians to neutralize or control the court. Second, it might also be because the attack on

[42] On this challenge to constitutional adjudication and the need to consider aggregated and accumulative judicial review, see Roznai & Hostovski Brandes (n 34).

the constitutional court proceeds not through formal but through informal mechanisms, such as corrupting constitutional judges.

Both these two scenarios might be thought of as a failure of institutional design. Constitutional courts ought to be designed in such a way that control of the court cannot occur, neither through the abuse of the existing formal mechanism nor through the use of informal mechanisms.

In any case, because there is no formal amendment of the design of the court, there is no option to declare such amendment unconstitutional, and thus the theory will not be of direct use in these cases. This is not to say, however, that the theory cannot be of some help even in these scenarios. At the very minimum, some of its elements – even if not the theory in its entirety– can help provide for an assessment of the situation and take action. If the telos of constitutional courts is to protect democracy, and constitutional courts have a duty to counter attacks on them that are instrumental to democratic decay, this duty applies not only when formal amendments are considered but also when informal mechanisms are applied.

Another possible objection that the theory might encounter is of a practical nature. The theory of democratic self-defence of constitutional courts expects these institutions, in certain cases, to declare the unconstitutionality of reforms of their own design. However, because of the complex context this entails, it will be easy for authoritarian political actors to argue that the constitutional court is behaving unlawfully.

Imaging for instance an illiberal reform aimed at packing a constitutional court with judges loyal to an illiberal government. Existing constitutional judges might declare such reform unconstitutional. But the illiberal political actors behind the reform might respond that the declaration of unconstitutionality is invalid, because it has been issued by the old constitutional judges who, according to the new legislation, are no longer the legitimate members of the institution. Or consider a reform that makes it more difficult to strike down legislation, for example by requiring a super-majority of the panel; a declaration of unconstitutionality by an ordinary majority might be regarded as invalid.[43]

We have two responses to this criticism. The first is that problems of a practical nature are not enough to invalidate the theory at the conceptual level. The second is that, at the practical level, these problems might well exist. In the worst case scenario, they provoke a constitutional crisis, in which different constitutional organs have different, irreconcilable views on the constitutional way ahead. But a constitutional crisis will often be better than the suppression of liberal constitutionalism altogether.

A related challenge concerns legitimacy considerations. When the court is to apply the self-defence doctrine to strike down legislation, and even more so to strike down a constitutional amendment, the court may be seen as acting to preserve its powers, its superiority over other branches of government and to enhance its self-interests, and be criticized for that. Such claims of misuse of the unconstitutional constitutional amendment doctrine have been made regarding judicial application of the doctrine in India, Pakistan and Bangladesh in cases concerning judicial appointments and removal.

However, as Po Jen Yap and Rehan Abeyratne demonstrate, not every judicial review of constitutional amendments concerning the powers and status of the judiciary is problematic, when the theory is used to block interference by the executive in judicial functions, and considering the legal and political context

[43] On this dilemma see, Mauro Arturo Rivera Leon, 'Judicial review of supermajority rules governing courts' own decision-making: A comparative analysis' (2023) Global Constitutionalism, First View 1-25, https://doi.org/10.1017/S2045381723000047; For an argument in favour of supermajority rules see, Cristóbal Caviedes, 'A core case for supermajority rules in constitutional adjudication' (2022) 20(3) International Journal of Constitutional Law 1162.

of the country. When judicial independence is in danger, judicial intervention even in constitutional amendments concerning the judiciary itself may be justified, especially in fragile democracies.[44]

If preserving judicial independence is vital to the survival of democratic order, then protecting the court seems more important than perceived legitimacy; but more than that, if the court does not intervene in such cases, it may lose its independence and thereby allowing democratic decay. The result of such non-interference might thus also have negative effects on the court's legitimacy. If the choice is between suffering legitimacy harm and protecting democracy or suffer legitimacy harm and undermining democracy, the former is preferred.

A final criticism is that such judicial intervention will not prevent democracy decay anyways.[45] Out of all the criticisms explored in this article, this is probably the most consequential one. In a way, it poses an existential criticism to the theory of democratic self-defence. Since the idea behind the theory is for constitutional courts to protect themselves in order to protect democracy, whenever democracy protection through the theory fails the very theory becomes futile.

Against this backdrop, is it still worth wasting any efforts in such an idea as the theory of democratic self-defence of constitutional courts? we believe that is indeed the case, for at least the following reasons.

First, it is not entirely true that the theory is only worth if it achieves the desired effects. This is a consequentialist argument and, while it is powerful, it is not the only way to approach the theory. To this consequentialist argument we could contrapose a different, more conceptual argument: this theory is simply the logical corollary of the ideas implicit in the very concept of constitutional review. Constitutional courts are conceptually designed to protect democracy, and thus have a duty to pursue democracy protection through the enforcement of the constitution regardless of whether they achieve this goal.

Second, taken to the extreme, the criticism that formal checks on power are unable to deter democratic decay when political actors do not commit to democracy leads to a somehow absurd scenario. This is because, if that were the case, why have formal checks on power at all? We could in this scenario dispense not only with constitutional courts, but also with rigid constitutions, ombudsmen, supranational democratic clauses, organs for judicial governance, and a long list of other formal and institutional checks on power. Democracies, however, generally do rely on these sorts of arrangements.

In Israel, a similar argument against authorizing the court to review Basic Laws (i.e., laws of a constitutional status), was made, according to which courts cannot protect democracy because in any case, when a basic law that would truly harm democracy will arrive, its invalidation by the court would simply be ignored. As former Minister of Justice, Ayelet Shaked stated, "If Parliament would enact a law that says 'all redheads must be hanged'—the court will not be able to assist because society has become so corrupted", or "If the Knesset were to pass a law rescinding the voting rights of women or red-haired people . . . this would signal the collapse of our democracy. In such a case, I don't think that even the court could save us from ourselves."[46]

[44] Po Jen Yap & Rehan Abeyratne, 'Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia' (2021) 19(1) International Journal of Constitutional Law 127.

[45] Elsewhere, one of us cited the son of the Israeli Prime Minister Netanyahu, Yair Netanyyahu who twitted "Fact check: in Germany before the rise of the Nazis, the court had the authority to invalidate laws!", in response to a speech by the President of the Supreme Court on the importance of judicial review as a lesson from the Holocaust. Roznai (n 5) 337.

[46] Cited in Roznai, ibid., at 339-340.

With all respect, this argument falls to the false dichotomy of democratic failure: either we have a perfectly functioning democracy or a complete failure, Weimar style. But that is never the case; the court's influence on democracy is not measured in the final hypothetical law that transforms a country from a democratic one to an autocracy but incrementally and gradually in a series of judgments in the life of a nation. The dichotomy between a perfectly functioning democracy and a complete failure is a false one. Between these two extremes there is a vast spectrum in which courts can function as a useful stop sign or a speed bump against constitutional and legal reforms aiming to undermine or erode the democratic order.[47]

To say that institutions do not matter mischaracterizes the problem and underestimates the role of formal institutions, precisely, in regulating the behaviour of political actors through incentives, constraints and values.

For that reason, the theory of democratic self-defence of constitutional courts can be helpful. At a very basic level, it has the capacity to change the cost-benefit calculus by illiberal political actors. Insofar as it gives the constitutional court a doctrinal tool to protect itself from attacks and fight-back, it creates an incentive for illiberal political actors to be restrained. Thus, even before a constitutional reform is enacted, the mere possibility of its judicial invalidation has an "anticipatory effect" that assists in protecting democracy.[48] As Mark Tushnet correctly notes, the mere existence of unamendability doctrines "may serve as a political check on the amendment process, as a 'sword of Damocles' that, because it occasionally drops, cautions political actors against devoting too many resources to attempting to alter the existing specification of some component of the [constitution's] basic structure."[49]

Paradoxically, the theory would be most successful in cases in which it is not utilized. Of course, if a court can use the theory to break the causal chain that links a reform of its design with a process of democratic decay that would be a success. But the theory can be particularly successful if it is not used because the very awareness of its existence deters illiberal politicians from seeking an assault on the court.

Finally, there is the issue of the assumptions. We should indeed not assume that the theory will be something akin to a universal solution to prevent democracy decay everywhere. But the assumption that it would not work also lacks empirical grounding. Because this is a novel theory, we have little evidence about how it would perform in real world scenarios. It might well be that the theory fails to protect democracy in all cases, or that it is very effective in fostering democratic resilience, or that its effectiveness depends on its specific application in specific settings. Because of the novelty of the theory we cannot have enough evidence to argue in favour or against its effectiveness. We do have, however, instances of constitutional courts that tried to resist authoritarian assaults and of courts that managed to protect democracy.[50]

6. Case study: Israeli Supreme Court

So far in this article we have provided for a rather theoretical outline of the idea of democratic self-defence of constitutional courts. In this section, we aim at sketching how this idea could apply in practice. To do so, we use the case study of Israel. We chose the Israeli case study because, as highlighted in the

[47] Ibid., at 341.

[48] Ibid., at 349. Building on Georg Vanberg, 'Abstract Judicial Review, Legislative Bargaining, and Policy Compromise' (1998) 10(3) Journal of Theoretical Politics 299, 314.

[49] Mark Tushnet, 'Amendment Theory and Constituent Power', in Gary Jacobsohn & Miguel Schor (eds.), C*omparative Constitutional Theory* (Edward Elgar, 2018), 317, 332.

[50] Roznai (n 5).

introduction to this symposium, the country has witnessed in 2023 a judicial overhaul by a right-wing and populist government, that has proposed major constitutional reforms to the judicial system, including limiting the power of constitutional review, enacting an override clause that would allow enacting unconstitutional laws notwithstanding court's decisions, limiting court's authority of administrative review, weakening the status and independence of government's legal advisors and changing the manner by which judges are selected.[51] In this section, we shall focus on two elements within this reform (although all the elements have accumulative effect and the whole is greater than the sum of its parts): changing the manner by which judges are selected and limiting administrative review.

Judicial selection: On 4 January 2023, Israel's Minister of Justice, Yariv Levin presented his plan to overhaul the judiciary by reducing its powers and giving the government more control over judicial selection. The current committee for selecting judges is composed of nine members: three Supreme Court judges, two Ministers, two Knesset Members and two members of the Israeli Bar Association. In order to appoint a judge to the Supreme Court a super-majority of 7 out of 9 is required. This means that no branch controls that process and an agreement must be achieved between the politicians and the judges in order to appoint a Supreme Court judge. Instead, the proposal sought to change the composition of the committee so that the process for selecting judges (to all courts in Israel, not only to the Supreme Court), would be controlled by the government and the coalition that supports it in the Knesset. The explanatory notes of the bill stated that intention was to "strengthen the influence of the public's elected officials – the representatives of the executive and the legislature" in the selection of judges, in order for those judges to reflect "the values of the public", yet the proposal would simply allow the government to completely capture the judiciary: "Rather than democratic legitimacy and judicial accountability – principles that are legitimately involved in judicial appointments and justify legislative and executive involvement – what the bill promoted was the capture of the courts, through absolute executive control of judicial selection and promotion."[52]

The bill passed first reading and was prepared for second and third reading, yet the legislative process was paused in response to the unprecedent and massive public protest against the reform.[53] However, if the constitutional amendment would have been enacted, we claim that the Supreme Court could have applied the self-defence doctrine and declare the bill as an unconstitutional constitutional amendment. In light of Israel's anyway relatively weak system of checks and balances,[54] the capture of the judiciary by the government would have granted the government almost absolute powers and put at risk the very democratic character of the regime. The consequences for the democratic character are clear, but even the intentions of the legislatures make this case an easy case, because revealing the entire package of proposed reforms also revealed the government's intentions: to weaken external checks and balances on its power, and granting it absolute powers of law-making without limitations. Considering the already ongoing process of democratic erosion in the country,[55] this attack was part of a larger process of democratic decay. Accordingly, the court would have been justified, in our mind, to strike down this reform, had it been enacted.

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[51] Bezemek & Roznai (n 22).

[52] See Guy Lurie, 'The Attempt to Capture the Courts in Israel' (forthcoming) Israel Law Review.

[53] Yaniv Roznai, 'We the Fourth Branch? The People as an Institution Protecting Democracy', in Vicki Jackson & Madhav Khosla (eds.), *Comparative Constitutional Law: Redefining The Field* (Oxford University Press, forthcoming 2024).

[54] Yaniv Roznai & Amichai Cohen, 'Populist Constitutionalism and the Judicial Overhaul in Israel' (forthcoming) Israel Law Review.

[55] See e.g. Nadiv Mordechay and Yaniv Roznai, 'Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel', 77(1) Maryland Law Review (2017), 244; Yaniv Roznai, 'Israel – A Crisis of Liberal Democracy?', in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018), 355.

The second example is the law the limited the court's authority of administrative review. This law – Amendment Number 3 to Basic Law: The Judiciary, stated that no court will hear cases about or issue an injunction against the government, the Prime Minister or the ministers, based on the reasonableness of their decisions, including appointments and inaction. Again, the aim was to eliminate judicial review and grant the government unlimited power.[56] One may claim that the amendment does not completely grant the government absolute powers without administrative oversight because other doctrines, such as proportionality conflict of interest still apply, yet these do not necessarily overlap with the reasonableness doctrine, they are much more difficult to prove, and lastly, without reasonableness, important gatekeepers such as legal advisors or the attorney general may be replaced with less independent once, who may allow the government to continue with the process of democratic decay.[57] This law was enacted in July 2023. It is the only part from the Minister of Justice's package of reforms that was enacted thus far. Multiple challenges were submitted to the Supreme Court, which heard the petitions in a full bench of 15 judges, for the first time in its history.

Should the court intervene in this case? This example is more challenging than the previous one. In the beginning of the article, we have claimed that we accept that policy issues should belong to democratically elected branches of government. This is true. Removing court's authority to review the reasonableness of government's actions aims to allow the government to advance its preferred policies. Thus, prima facie that court should not veto the amendment. However, a deeper observation that include the larger context of democratic decay process, the aims of the government (revealed by the other components of the reform), and the importance of the reasonableness standard to checks on the governmental powers in the Israeli context, brings to the conclusion that this reform (if interpreted as a complete ban on any form of review of reasonableness or arbitrariness), "could be viewed as a significant erosion of the institutional checks and balances on executive power – an erosion of the democratic minimum core."[58] Accordingly, the court may be justified if it declares this amendment as unconstitutional as part of the democratic self-defence doctrine of constitutional courts.

Of course, this analysis is specific and context based. A different conclusion may be reached if the analysis applies to different jurisdictions, considering local conditions, institutions and context.

7. Conclusion

As explained earlier in this article, the theory of democratic self-defence of constitutional courts is largely tributary of the work of Karl Loewestein. As he himself put it: "Democracy stands for fundamental rights, for fair play for all opinions, for free speech, assembly, press. How could it address itself to curtailing these without destroying the very basis of its existence and justification? At last, however, legalistic self-complacency and suicidal lethargy gave way to a better grasp of realities. A closer study of fascist technique led to discovery of the vulnerable spots in the democratic system, and of how to protect them".[59] Loewestein's argument was, we believe, that democracies should not allow authoritarians to take advantage of democratic freedoms in their quest to undermine democracy itself. That democracies should protect themselves.

[56] Mordechai Kremnitzer, 'Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness' (forthcoming) Israel Law Review.
[57] Ibid.
[58] Yaniv Roznai, Rosalind Dixon & David E. Landau, 'Judicial Reform or Abusive Constitutionalism in Israel' (forthcoming) Israel Law Review.
[59] Loewenstein, supra note 9 at 430–431.

The theory of democratic self-defence of constitutional courts is an application of this idea to the question of reforms of these institutions. It seeks to provide the theoretical and doctrinal basis that should allow constitutional courts to protect themselves from attacks by authoritarian politicians, not in order to protect court per se, but precisely in order to protect democracy. The militant-democratic character of the theory is particularly clear when it comes to abusive constitutional reforms: reforms of the design of constitutional courts that look formally constitutional but which are linked to a risk of democratic decay. In these situations, the theory of democratic self-defence of constitutional courts provides for a solid basis that allows for action in defence of these institutions and of democracy. The theory seeks to afford such democratic protection while preserving the margin of democratically elected political to engage in legitimate reforms of the architecture of the court: those that do not pose a risk for democracy. The overall aim of the theory is thus to facilitate protection of democracy through protection of certain aspects of the constitutional court, without fully entrenching all aspects of the design of these institutions. Since courts are the final gatekeepers of democracy, democracy should have a 'militant protection' of courts.