3

Constitutions and Abusive Electoral Regulation

Rosalind Dixon and David Landau

3.1 INTRODUCTION

Free and fair multiparty elections are essential to constitutional democracy. Without them, a constitutional system will, at best, be competitive authoritarian, and at worst, fully authoritarian in nature.[1] Both electoral freedom and fairness can also be undermined in a range of ways: voters may be legally or practically prevented from enrolling or turning out to vote at democratic elections. Or they may be allowed to cast a ballot but have their votes thrown out or diluted by illegal ballots. Electoral fairness can also be undermined through subtle forms of interference – including the intimidation and harassment of opposition candidates and voters and allocation of government benefits and programs to supporters of the government.

Democratic constitutions can play a vital role in constraining and deterring electoral abuse: they can entrench guarantees of electoral fairness and integrity and empower a range of independent institutions to enforce these guarantees. This includes constitutional courts, specialized electoral courts, and independent electoral monitoring and oversight commissions ("electoral integrity" bodies).[2] And as many of the contributions to this volume show, there are notable cases in which these institutions have served to protect and promote democratic commitments to electoral freedom and fairness.

Electoral integrity bodies have relied on these guarantees to postpone and set aside elections that cannot or have not been conducted freely and fairly and to exclude candidates and parties unwilling to comply with constitutional

The authors thank Vishal Karnamadakala for outstanding research assistance.

[1] Mikael Wigell, "Mapping 'Hybrid Regimes': Regime Types and Concepts in Comparative Politics," *Democratization* 15: 230 (2008).

[2] Mark Tushnet and Rosalind Dixon, "Weak-Form Review and Its Constitutional Relatives: An Asian Perspective," in *Comparative Constitutional Law in Asia* ed. Tom Ginsburg and Rosalind Dixon. Edward Elgar, 2014.

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requirements. They have also relied on these guarantees to order the counting or discounting of certain votes and recount of electoral tallies.

This relationship – between electoral integrity bodies and democracy – however, is not one-way. Democratic constitutional norms can be used to protect electoral integrity but also to undermine it. For instance, electoral integrity bodies may begin life as independent bodies but gradually be captured or co-opted by the incumbent regime. They may then apply constitutional requirements in ways that restrict rather than advance electoral participation, or undermine the political opposition, rather than support it. This, we suggest, is an example of a broader phenomenon in contemporary constitutional discourse – the problem of "*abusive constitutional borrowing*."[3]

There is growing knowledge worldwide of comparative constitutional norms and practices. This knowledge also extends to authoritarian and would-be authoritarian regimes, and would-be authoritarian actors are willing to use this knowledge both to *inform* and *justify* their actions. In some cases, this will involve the use of openly illiberal ideas and discourses to attack liberal democracy or liberal constitutionalism outright. But more often, it will involve the ostensible *adoption* of liberal democratic ideas, but in ways that are radically superficial, selective, acontextual or anti-purposive in nature, and which thus have antidemocratic effects.

In this chapter, we illustrate this problem of abusive constitutional borrowing in broad conceptual terms, but with a particular focus on its relevance to constitutional electoral regulation.

3.2 DEMOCRATIC CONSTITUTIONS, ELECTORAL REGULATION AND THE PROBLEM OF ABUSIVE BORROWING

Constitutional democracy arguably entails a range of *socio-cultural* commitments on the part of citizens and their elected representatives, including commitments to fair terms of political cooperation and norms of restraint among political parties.[4] But constitutional democracy also has an important institutional dimension: at minimum, it requires a commitment to regular, free and fair multiparty elections, and the political freedoms and institutions necessary to ensure this in practice. Previously, we have called this the idea of the "democratic minimum core" – that is, the core set of norms and institutions that almost all democratic theorists agree are essential to true democracy.[5] But we also note the degree to which constitutional

[3] Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*. Oxford University Press, 2021.

[4] Steven Levitsky and Daniel Ziblatt, *How Democracies Die: What History Reveals about Our Future*. Broadway Books, 2018.

[5] David Landau and Rosalind Dixon, "Abusive Judicial Review: Courts Against Democracy," *UC Davis Law Review* 53: 1313 (2020).

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democracy can be understood to entail a range of thicker institutional commitments, to democratic deliberation and minority rights protection.[6]

Moreover, one of the functions of a democratic constitution is to *protect* this democratic minimum core from erosion by temporary political majorities and promote this broader set of deliberative and rights-protective norms. Constitutions can achieve this in a range of ways: They can provide principles governing the rights of voters and parties to participate in the electoral process. They can provide for, and encourage, norms of democratic deliberation. They can prohibit – or provide for legislation prohibiting – certain forms of electoral manipulation or interference or laws burdening minority rights. They can create electoral integrity bodies and empower them to ensure the fairness of elections. And finally, they can give special protection to these electoral integrity norms and institutions, by making it more difficult to amend the provisions creating them, compared to ordinary constitutional provisions.[7] In each case, the role of constitutional norms will be to advance commitments to democracy and especially the democratic minimum core.

Instead of being deployed to advance democratic aims, however, these same constitutional commitments can be used – or misused – to justify the erosion of electoral integrity and pluralism. This, we have argued, is the essence of "abusive borrowing" as a practice.

Instead of being used to ensure an equal playing field, electoral institutions and norms can instead be used to tilt the playing field in favor of incumbents, moving a regime toward competitive authoritarianism or outright authoritarianism. They can, for example, repress competition by using a wide range of mechanisms and give undue advantages to incumbents. Of course, abuse of the electoral machinery is not the only way in which this is done – recent scholarship has highlighted a number of tools, including control over the media, the judiciary, and civil society. But electoral norms and institutions have emerged as one key tool that is, unfortunately, often ripe for abuse.

3.3 ABUSIVE ELECTORAL REGULATION IN PRACTICE

Abusive borrowing can take numerous forms: for one, would-be authoritarian actors may seek to de-couple the form and substance of constitutional democracy in many different ways, including via radically superficial, selective, acontextual, and anti-purposive usages of liberal democratic norms and ideas.[8]

Superficial forms of borrowing involves the rhetorical invocation of liberal democratic norms, without any of their substance. Selective usages involve reliance on

[6] Ibid.

[7] David Landau and Rosalind Dixon, "Tiered Constitutional Design," *George Washington Law Review* 86: 438 (2018).

[8] Dixon and Landau, *Abusive Constitutional Borrowing*, at 43.

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liberal democratic structures or institutions, without the accompanying protections or exceptions necessary to make those institutions truly democratic in function. Or they involve the partial and selective grant of democratic rights and privileges to some groups (i.e., government and party loyalists), when democracy is premised on the idea of self-government among citizens as free and *equal*. Acontextual borrowing involves the adoption of norms and structures that help promote democracy under certain conditions (e.g., institutional independence or democratic competition), in the clear absence of such conditions. And anti-purposive borrowing consists in the deliberate adoption of institutions or structures designed to promote one goal for the exact opposite purpose – for example, restricting instead of empowering civil society.

Abusive borrowing can likewise have different audiences: Competitive authoritarian or hybrid regimes, for example, may rely on abusive forms of justification in order to preserve support from voters committed to liberal democratic norms. More fully authoritarian regimes, in contrast, may rely on such tactics only with international audiences in mind: at home, they may rely on a mix of intimidation and coercion to diffuse the risk of political opposition, but abroad, they may rely on the abusive use of liberal democratic principles to mollify donors, lenders, and defense partners.[9] In some cases, the two audiences and sets of tactics may also overlap.

Abusive tactics can also be combined with explicitly illiberal tactics and discourses. As we note in prior work, one of the justifications for some of the recent anti-constitutional populist regimes is that they are "illiberal" but "democratic" in nature. Defenders of this model oscillate between emphasizing illiberal models and precedents (e.g., Russia, China, and Singapore) and democratic comparators (e.g., Germany and the United States), with the latter used abusively.[10] This is, in effect, a form of political gaslighting. But it seems to be relatively common: in the United States, for example, we have seen a turnover the last five years toward a more nativist, exclusionary discourse of who counts as the true "people" for democratic purposes.[11] Yet former President Trump and proponents of this "Make America Great Again" (MAGA) narrative maintain that they are seeking to uphold existing democratic constitutional traditions.[12]

3.3.1 *Voting Rights and Participation*

Take norms of equal participation, or equal access to the franchise. Norms of this kind are central to individual political rights and free and fair elections. They help

[9] This seems to have been the case in Rwanda, for example. See notes 22–23 *infra*. It could likewise be seen to explain the actions of the Supreme Court in Cambodia. See note 32.

[10] Rosalind Dixon and David Landau, "1989–2019: From Democratic to Abusive Constitutional Borrowing," *International Journal of Constitutional Law* 17(2): 489 (2019).

[11] Michael Harriot, "'Patriots' Are Undermining American Democracy," *The Guardian* (December 30, 2021).

[12] Ibid. See also sources notes 38–39.

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ensure that all voters have equal political freedoms and that rival political parties compete on terms of substantive equality.

Practices that undermine rights of political participation, therefore, can have wide-ranging effects. Think of measures in the United States that increase hurdles to voter registration: these laws undermine the political equality of poorer or minority voters, and the electoral prospects of those parties and individuals they are most likely to vote for (i.e., Democrats).[13] The same is true of the citizenship laws passed in India in 2019, which effectively disenfranchised large numbers of potential Muslim voters and further undermined electoral support for the Congress party compared to the (Hindu-nationalist) BJP.[14]

By enshrining the right to vote, democratic constitutional norms aim to guard against these risks. Yet the right to vote can also be the target of abusive constitutional borrowing: Laws that expand access to the franchise can be passed not with a view to levelling the electoral playing field but, rather, to tilting it in favor of the incumbent political regime. Often, this will simply involve the *selective* expansion of voter rights, or rolls, in ways predicted to favor the government.

Laws passed in Hungary and Fiji illustrate the danger. In Hungary, after adopting a new constitution in 2011, the Hungarian Parliament passed legislation expanding access to citizenship for many people of Hungarian descent living outside of the country, including approximately one million people in neighboring countries in Eastern Europe.[15] At the same time, it made it more difficult for existing Hungarian expatriate citizens to vote. The logic was simple: Hungarians in neighboring countries were known to be more supportive of the government than the median voter within the country, whereas those in the West were seen be more critical than the average domestic voter.[16] And this prediction was borne out in increased electoral support for the incumbent Fidesz government at subsequent parliamentary and presidential elections.[17]

In Fiji, there has been a long-running battle for political control between rival factions and parties loosely allied to Indo-Fijian versus ethnic Fijian interests. There have also been a series of military coups, in 1987, 2000, and 2006. The most recent coup, in 2006, was led by Commodore Frank Bainimarama and led to the suspension of the 1997 Fijian democratic constitution. A key part of the rhetorical justification for the suspension of constitutional democracy by Bainimarama was a claim

[13] Brennan Center for Justice, "The Impact of Voter Suppression on Communities of Color," Fact Sheet (January 10, 2020), www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color.

[14] "Citizenship Amendment Bill: India's New 'Anti-Muslim' Law Explained," BBC News (December 11, 2019), www.bbc.com/news/world-asia-india-50670393.

[15] Dixon and Landau, *Abusive Constitutional Borrowing*, at 66.

[16] Ibid. at 67–68.

[17] Ibid.

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that his post-coup regime was promoting greater political equality between indigenous and Indo-Fijians.[18]

3.3.2 *Electoral Equality and Quotas*

Another core democratic commitment is to ensure equal access to political office. This principle guarantees equality among citizens seeking high office and, even more important, equality among citizens in their ability to elect representatives able to represent their experiences and concerns. But, of course, in practice there are many obstacles to realizing this commitment, including voter prejudices and differential access to political networks and resources.

One common constitutional response is the creation of "reserved seats" or quotas within the legislature for disadvantaged groups. In India, for example, the Constitution provides that at least one-third of seats in "panchayats" or local councils are reserved for women as well as allowing for reserved seats (in proportion to population) for both "Scheduled castes" and tribes.[19] In Kenya, the 2010 Constitution likewise provides for reserved seats for a range of disadvantaged groups, including women, young people, and the disabled.[20] These provisions are seen to advance the goals of democratic participation and equality.

Electoral quotas, however, are also potential targets for abusive borrowing. That is, they can be used contextually and anti-purposively to advance the interests of incumbent political regimes, rather than ordinary voters.

Take gender quotas in Rwanda. Rwanda is widely celebrated internationally for achieving high levels of descriptive representation for women – in parliament and the judiciary. Indeed, Rwanda leads the world on most league tables for female representation in parliament.[21] And it has achieved this in part through ambitious gender quotas, which reserve 30 percent of seats in parliament for women.[22] The problem with these quotas, however, is that women are appointed rather than elected to these seats, in ways that further advance the electoral dominance of the ruling political party (the Rwandan Patriotic Front). In effect, they therefore advance the authoritarian, rather than democratic, nature of Rwandan politics.

[18] Ibid. at 69–71; Rosalind Dixon, "Constitutional Rights as Bribes," *Connecticut Law Review* 50: 767, 802–803 (2018).

[19] Constitution of India 1949 Art. 243D.

[20] Constitution of Kenya 2010 ss 97–98.

[21] "Proportion of Seats Held by Women in National Parliaments (%) – Rwanda," World Bank, Data, https://data.worldbank.org/indicator/SG.GEN.PARL.ZS?locations=RW; "Revisiting Rwanda Five Years after Record-Breaking Parliamentary Elections," UN Women (August 13, 2018), www.unwomen.org/en/news/stories/2018/8/feature-rwanda-women-in-parliament.

[22] "Revisiting Rwanda Five Years after Record-Breaking Parliamentary Elections."

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3.3.3 *Electoral Integrity, Timing, and Oversight*

A third democratic principle is the principle of fair elections, or elections free from coercion or intimidation of voters, irregular voting, or the loss or destruction of votes cast for the political opposition.

Democratic constitutions advance this principle directly and indirectly. In some cases, they expressly regulate the fairness of elections. Section 81(e) of Kenya's Constitution, for instance, provides that the electoral system must ensure free and fair elections, which are: "(i) by secret ballot, (ii) free from violence, intimidation, improper influence or corruption, conducted by an independent body, (iv) transparent and (v) administered in an impartial, neutral, efficient, accurate and accountable manner."[23]

Many constitutions also indirectly regulate electoral fairness by providing for electoral oversight by independent electoral integrity bodies. Section 190 of the South African Constitution, for example, provides that the Electoral Commission must (a) manage elections of national, provincial, and municipal legislative bodies in accordance with national legislation; (b) ensure that those elections are free and fair; and (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.[24] More recent constitutions – including the Kenyan Constitution – have adopted similar provisions modeled on the South African approach.

Together with courts, these electoral integrity bodies have exercised their powers to uphold guarantees of electoral fairness. In Kenya, for example, there were credible suggestions in the 2017 presidential election of millions of votes being lost or discounted due to difficulties with electronic voting.[25] The Supreme Court invalidated the election and ordered the Electoral and Boundaries Commission to organize a new one.

The same machinery for upholding electoral fairness, however, can also be used – pretextually – to undermine it. Courts and electoral commissions can rely on the *language* of unfairness to undermine confidence in the results of a democratic election, or to indefinitely postpone fresh elections, in ways that create a form of de facto electoral dictatorship.

In Myanmar in 2020, for example, the Electoral Commission repeatedly canceled elections across the country, but especially in Rakhine state. As Renshaw and Lidauer note, these decisions "on election cancellations and postponements temporarily disenfranchised 1.2 to 1.3 million voters and left 22 seats in the Union parliament vacant. In Rakhine State, three quarters of all registered voters were

[23] Constitution of Kenya 2010 s 81(e).
[24] South African Constitution 1996.
[25] Kimiko de Freytas-Tamura, "Kenya Supreme Court Nullifies Presidential Election," *New York Times* (September 1, 2017), www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html.

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disenfranchised by these measures."[26] The reason given was that the security environment did not allow free and fair elections, but the consequence was an ongoing and selective suspension of democracy.

Following a coup by the military junta in 2021, the new military-appointed government also appointed an eleven-member State Administration Council (SAC), headed by the Commander-in-Chief, which appointed new members to the Union Election Commission.[27] Shortly after the Commission announced that it had "begun its investigation on the voter fraud in the 2020 general elections."[28] On this basis, it also sought to discredit the prior democratic government, when most independent observers saw only minor rather than widespread irregularities.[29]

3.3.4 *Militant Democracy and Party Banning*

Following the important example of postwar Germany, a number of modern constitutions have instantiated militant democracy clauses that allow for anti-democratic or anti-constitutional parties to be banned. The basic idea of a militant democracy clause is that there are limits to the kinds of parties and movements that a liberal democratic order should tolerate and that some movements should be prohibited before they can become a threat to the democratic order itself. The rise of the Nazi party is often taken as an example of this kind of threat; and in the immediate aftermath of World War II, the new Constitutional Court in West Germany twice was used to ban political parties, first a neo-Nazi party and then, in a more difficult and longer decision, the Communist party.[30] Globally, work by Elkins and Ginsburg has found that the power to ban political parties is one of the most common "ancillary powers" of a constitutional court, with about one-third of courts having this power.[31]

But naturally, the extraordinary power to ban a political party is one that can be used to entrench authoritarianism rather than staving it off. Cambodia offers probably the most dramatic recent example. In the country's 2013 elections, in a shock result, the opposition Rescue party nearly won control of the Parliament, winning 55 of 125 seats in the national Parliament. The authoritarian regime in Cambodia, under the grip of the Cambodian People's Party (CPP), looked to be on the verge of democratizing.

[26] Catherine Renshaw and Michael Lidauer, "The Union Election Commission of Myanmar 2010–2020," *Asian Journal of Comparative Law* 16(1): 136 (2021).
[27] Ibid.
[28] "Global New Light of Myanmar," Announcement of the UEC, GNLM (February 5, 2021), www.gnlm.com.mm/announcement-of-union-election-commission-2/.
[29] Ibid.
[30] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts*. Cambridge University Press, 2015.
[31] Tom Ginsburg and Zachary Elkins, "Ancillary Powers of Constitutional Courts," *Texas Law Review* 87: 1431 (2009).

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But after initial negotiations failed, the CPP instead turned to the Cambodian Supreme Court, asking it to ban the Rescue Party. The Court, which was completely controlled by the regime, complied in 2017. It technically issued a default judgment against the Rescue Party, but it dove deeply into the merits and found the charges against the party to be substantiated.

The Court found that the party was under the control of a foreign power – in this case, the United States – by citing some of the speeches of its leadership. Most interestingly for our purposes, the decision sounded in the language of militant democracy, albeit abusively. The Court held that the Rescue Party itself was a threat to "multiparty democracy." It found support for this view in the fact that speeches and statements by party leaders used so-called color revolutions, such as those found in the post-Soviet world, as a model for what might lead to transition in Cambodia. Of course, these color revolutions were themselves generally attempts to democratize an authoritarian regime.

The result of this decision was quite dramatic. The Rescue party itself was dissolved: it lost all 55 seats in parliament and 100 of its party leaders were banned from politics for five years. In the next election, the CPP essentially ran an uncontested election, and won all 125 parliamentary seats. Rather than forming a "near miss" for a slide into authoritarianism, the Cambodian case perhaps situates the Supreme Court's decision as a "near miss" for democratization.[32]

The Cambodian case is not the only potential example of judicial use of militant democracy to undermine rather than support free and fair elections. Thailand offers what is in many respects a more ambiguous and difficult, but potentially interesting, example. Not long after the populist Thaksin Shinawatra won power in 2001, the judiciary began issuing decisions overturning his electoral victories and banning him and his allies from politics. Intermixed with a militant democracy cast was, as well, a kind of technical conception of the rule of law. The 2006 parliamentary elections, for instance, were annulled by the Supreme Court in their entirety on the grounds that the incumbent regime had breached several relatively technical aspects of national electoral law.

In 2007, Thaksin's party was banned by the Constitutional Court; in 2008, the Court also dissolved a successor party, and in 2014, it removed Thaksin's sister from the role of caretaker prime minister.[33] Between 2005 and 2014, the judiciary annulled the results of the 2006 election, removed three prime ministers, banned several incarnations of Thaksin's parties, and prevented much of its leadership from seeking political office.

[32] Tom Ginsburg and Aziz Huq, "Democracy's 'Near Misses.'" *Journal of Democracy* 29(4): 16 (2018).

[33] Hannah Beech, "A Political Party Banned in Thailand," *Time* (May 31, 2007), http://content.time.com/time/world/article/0,8599,1626711,00.html.

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These actions occurred in a climate of increasing authoritarianism in Thailand. In 2006, the military carried out a coup and seized power in order to rewrite the constitution; a second coup in 2014 had more permanent effects, and the country has not had elections since. We have little doubt that the effects of the Thai decisions were negative for the democratic minimum core. What makes the case difficult, at any rate, are two features. The first is that, unusually, the actions were being taken against what was often the incumbent regime, not in favor of incumbents. In comparative terms, this is unusual. McCargo has argued that these actions were being taken by a diffuse set of actors labeled the Thai "network monarchy," a group including large parts of the judiciary and military, essentially a set of actors with ambivalent views toward democracy and who strongly disliked Thaksin.[34]

The second, more fundamental point is that Thaksin and his allies were, without question, themselves something of a threat to democracy, unlike (say) the Rescue Party in Cambodia. As a populist, Thaksin took steps to seek to consolidate power and undermine opposition groups. He undermined the independence of key checking institutions, including the Electoral Commission as well as other institutions like the Human Rights Commission. The Thai case thus may show how difficult the balance involving militant democracy can be in a new democracy, where anti-democratic threats may emerge from multiple sides.

3.3.5 *Electoral Commissions and Fraud to Stymie Democracy: Venezuela*

Venezuela offers a textbook example of the use of electoral commissions and courts as tools to undermine rather than support democracy. Over a long period of time during the Chavez and Maduro administrations, these institutions have been used to tilt (increasingly aggressively) the electoral playing field in favor of the regime, while making life increasingly difficult for political opponents.

After Chavez's death in 2013, Maduro won a close election. The Venezuelan constitution contains an unusual clause in comparative perspective, one that allows a recall of sitting presidents, although only within a fairly narrow period of time. Chavez famously faced (and easily won) such a contest in 2004, a survival that actually helped him consolidate power.

After the opposition won overwhelming control of the National Assembly (the unicameral legislature) in 2015, it sought to hold a recall vote in order to remove Maduro from power. Given the political context, one in which Maduro's allies had just been trounced despite an uneven playing field, there is a very good chance Maduro would have lost such a recall. But it was never allowed to go forward.

The recall process is multistage. After the opposition surpassed the first stage by gaining signatures from 1 percent of voters, the process moved to a second stage,

[34] Duncan McCargo, "Network Monarchy and Legitimacy Crises in Thailand," *Pacific Review* 18: 499 (2005).

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requiring gathering of signatures of 20 percent of voters, a very onerous percentage to trigger the recall election itself. The National Electoral Commission (CNE) set what were essentially impossible conditions for the recall. On dubious textual grounds, it required that the 20 percent quota be met in every state, rather than merely nationally as in the 2004 recall election. More importantly, it provided an incredibly short time period for the signatures to be gathered – three days. Even with these impossible conditions, the CNE never allowed the second stage to go forward. Instead, it suspended the entire process based on rulings from lower courts that "fraud" had occurred in the gathering of signatures.

Similarly, accusations of electoral fraud were foundational to the regime's effort to nullify the power of the opposition-led National Assembly. The Electoral Chamber of the Supreme Court held that three electoral results in the 2015 election had been tainted by fraud. These three seats were important because they would have given the opposition a two-thirds supermajority. When the Assembly rejected the accusations and seated the three legislators anyway, the Supreme Court held the Assembly in contempt, beginning a long process through which the Court would essentially strip all power from the Assembly, leaving it unable to legislate, while transferring most of this power to Maduro.

This is a key point we shall return to in Section 3.4 – accusations of fraud, whether fictitious or just highly selective, seem to be key tools in an abusive discourse that uses electoral rules to undermine democracy.

3.4 ABUSIVE ELECTORAL INTEGRITY DISCOURSE

Another dimension to modern democratic governance is transnational in nature and involves the monitoring of electoral fairness by governmental and nongovernmental actors. These electoral monitors observe elections in new or at-risk democracies and hold governments to account by informing donors, allies, and international civil society about the fairness of the electoral process.

The Carter Center, established by former US President Jimmy Carter, is a good example. The Center has sent electoral monitors to observe 115 elections in 40 countries, and states the role of these observers as follows:[35]

> Election observation missions start long before election day, with experts and long-term observers analyzing election laws, assessing voter education and registration, evaluating fairness in campaigns, and monitoring the impact of social media. On election day, observers assess the casting and counting of ballots. In the days and weeks after the election, observers monitor the tabulation process, electoral dispute resolution, and the publication of final results. Before, during, and after an election, the Center's findings are reported through public statements.[36]

[35] The Carter Center, www.cartercenter.org/peace/democracy/index.html.
[36] Ibid.

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Where voting irregularity is detected, the Center frequently calls these irregularities out, including in the international media. And this combination of electoral monitoring – and discourse about democratic fairness and integrity – has undoubtedly contributed to fairer elections. The discourse of electoral integrity, however, has also been the increasing target of abusive borrowing in the United States.

In the lead up to, and following, January 6, 2021, former President Trump and his supporters have consistently advanced the claim of electoral irregularities in the November 2020 presidential election. They use those claims to encourage supporters to undermine the minimum core of American democracy. They have drawn on pro-democratic arguments about electoral integrity to do so. In 2005, for instance, the Carter Center issued a report focused specifically on the dangers of fraud in postal voting.[37] Mail-in voting has been at the center of Trump's baseless claim that the election was stolen.

#Stopthesteal is therefore not just any anti-democratic discourse: it is a discourse that involves the abusive borrowing of commitments to electoral integrity to erode democratic commitments to alternation in office and the peaceful transfer of power.

Even before the 2020 election, Republicans used the claim of fraud as a tool to tilt the electoral playing field in their favor. In September 2020, for example, Senator Rick Scott introduced the federal "VOTER" Act, which would have made it more difficult for citizens to obtain and return mail-in ballots (despite the ongoing pandemic) and would have set an absurd, essentially impossible deadline for the counting of those ballots. Yet Scott defended the law as an effective expansion of the right to vote, emphasizing that the right to vote was "fundamental to our democracy" and "a sacred right that we must protect and cherish."[38] In effect, the proposal used the (essentially nonexistent) specter of fraud in federal U.S. elections to frame major voting restrictions as pro-democratic. The same discourse, of course, has animated a series of state-level Republican laws since the 2020 election, which (unlike Scott's federal bill) have passed and imposed new restrictions on mail-in voting and other topics.

As we discussed above, claims of fraud seem to be a particularly pervasive part of an abusive discourse that seeks to use electoral norms and institutions for anti-democratic ends. We discussed the example of Venezuela above; Varol – in a piece on "stealth authoritarianism" – has collected other examples.[39]

In Brazil, Jair Bolsonaro has also relied heavily on an electoral discourse that emphasizes voter fraud. Gearing up for a possible loss in 2022 to prior president Lula, Bolsonaro in 2021 launched a series of interviews and speeches alleging that the country's electronic voting system could well be rigged and that there would be no

[37] Amy Sherman, "Much Has Changed Since Jimmy Carter's Report on Fraud in Mail Voting," PolitiFact (September 22, 2021), www.politifact.com/article/2021/sep/22/much-has-changed-jimmy-carters-report-fraud-mail-v/.

[38] Dixon and Landau, *Abusive Constitutional Borrowing*, at 207.

[39] Ozan O. Varol, "Stealth Authoritarianism," *Iowa Law Review* 100: 1673 (2015).

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way to know.[40] As in the United States, these claims fueled violent outbursts aimed at national institutions in the aftermath of Bolsonaro's loss.

3.5 HOW AND WHY ABUSIVE ELECTORAL DISCOURSE SUCCEEDS

An important question raised by these patterns is what underpins the success of abusive electoral tactics. One key factor is that in most democracies, electoral integrity depends on a series of honest and competent actions (e.g., ballot distribution and vote tallying) by a large number of decision-makers, none of whom are directly known to or visible to the public. This means that electoral integrity is a matter of elite institutional culture and competence, as well as public trust.

Trust can be eroded in a range of interconnected ways: first, governments may choose systematically to erode the independence, professionalism, and competence of relevant oversight institutions. Second, political elites may choose to make claims that exaggerate the magnitude or unusual nature of electoral misfeasance or misconduct, in ways that ordinary voters are poorly placed to assess. And third, populist movements may decide to target all forms of representative, trust-based models of decision-making, in ways that contribute to a narrative of distrust of voting systems and electoral processes.

As Muller explains, this plays into the argument of authoritarian populist leaders that they are the only legitimate representatives of the people. Thus, opponents can only win by cheating, and in turn accusations of cheating play into accepted narratives about the behavior of those opponents. This also explains why many narratives of voter fraud involve the "other" in populist narratives. Consider the frequency with which Trump and other Republican claims of fraud have involved baseless claims involving undocumented immigrants.[41]

The use of voter fraud as an abusive tactic is a case in point. Claims of fraud will often be especially powerful tools for abuse – in part because they have an emotional and democratic charge that technical violations of legal rules simply do not have. The requirement of a free and fair election is, after all, at the core of democracy, so an accusation that the opposition is not playing fair is a damning argument. It is not simply that the opposition has failed to comply with some technical requirement: they are cheaters.

Moreover, some claims of fraud may have at least a whiff or kernel of truth, even if the underlying claims that they swayed electoral results are completely baseless.

[40] Tom Phillips, "Brazil's Election Authority to Investigate Bolsonaro over Baseless Fraud Claims," *The Guardian* (August 4, 2021), www.theguardian.com/world/2021/aug/03/brazil-election-authority-bolsonaro-fraud-claims.

[41] Jazmine Ulloa, "G.O.P. Concocts Fake Threat: Voter Fraud by Undocumented Immigrants," *New York Times* (April 28, 2022), www.nytimes.com/2022/04/28/us/gop-vote-fraud-immigrants.html.

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In some new or more fragile democracies, various forms of fraud are relatively common, and so captured courts and regime allies can point to plausible examples. But even in well-functioning democracies, there will generally be some examples of voting irregularities. What is critical for democratic functioning is that (a) these examples are few and far between and (b) examples of this kind often tend to be more or less random from the perspective of overall electoral outcomes.

In the United States, for example, academic and policy reports find fraud to be extremely rare. But it is not unheard of. Some voters actually do vote twice, as uncovered in media reports and highly uneven legal responses. And in extremely close elections, fraud may even place the outcome in doubt. In a 2018 congressional election in North Carolina, for example, an operative for the Republican candidate was accused of engineering an absentee ballot scheme involving several hundred absentee ballots, and the razor-thin election was ordered nullified and rerun by the state board of elections.[42] But in the vast majority of elections, minor voting irregularities have no impact on the overall result, and a small number of invalid votes are cast that benefit both major parties.

When in these circumstances political elites cite fraud to cast doubt on the result of a democratic election, they are engaging in a classic form of an abusive borrowing tactic: they are knowingly exaggerating both the magnitude of irregularities and the degree to which they are likely to benefit one side over another.[43] This is also the hallmark of abusive forms of selective, acontextual discourse or "borrowing."[44]

3.6 CONCLUSION

What if anything can be done to counter these abusive tactics as tools for the erosion of democracy and the democratic minimum core? The problem is obviously complex and the range of potential solutions relatively few. Yet understanding the causes of the problem also helps point to some limited responses.

As other contributors note, the strength and independence of electoral oversight can be constitutionally guaranteed or entrenched via heightened super-majority or popular approval requirements for their repeal or amendment. Indeed, this accords with our argument elsewhere that aspects of the democratic minimum core should receive heightened protection under a "tiered" model of constitutional amendment and design.[45]

Further, constitutional democracies can do more to recognize the importance of repeat players to their health and functioning: long-run players generally have a

[42] Michael Graff and Nick Ochsner, "'This Smacks of Something Gone Awry': A True Tale of Absentee Vote Fraud," Politico (November 29, 2021) www.politico.com/news/magazine/2021/11/29/true-tale-absentee-voter-fraud-north-carolina-523238.

[43] Dixon and Landau, *Abusive Constitutional Borrowing*.

[44] Ibid.

[45] Landau and Dixon, *Tiered Constitutional Design*.

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strong incentive to maintain *justified* public trust and confidence in the political system. Doing so increases the chance that the existing democratic system will survive and their individual position within it will be meaningful and respected.

"One-shot" players – that is, independents, third-party candidates, or mavericks (such as President Trump) engaged in a hostile take-over of an established party – in contrast, will have quite different incentives.[46] Their incentives will be to use rhetoric that can challenge the status quo and encourage their entry into the political system, even if it comes at the cost of a long-run loss of faith in the system as a whole. And while this does not mean that there is no role for such players in redirecting and revitalizing democratic politics, it does suggest that this role necessarily comes with risks. Political parties and their representatives are not immune from these incentives, but they have counterbalancing incentives to maintain faith in democratic electoral processes.

Finally, political incumbents could do more to adopt a mix of reforms and public rhetoric designed to increase public trust in democracy. One of the challenges for constitutional democracies is that public trust in the electoral process is essential to the preservation of democracy but that rebuilding trust is extremely complex. In the long run, measures such as stricter electoral monitoring, voter identification requirements, and integrity norms may help strengthen public trust in democracy.

But in the short run, their enactment may actively decrease public trust: minority voters may experience the decision to adopt measures, such as voter ID laws, as a deliberate attempts to disenfranchise or dilute their voting power, thus undermining trust in democracy as a system based on principles of equality. The challenge for defenders of democracy is to adopt measures that are helpful to promoting electoral integrity, without overplaying the necessity of such measures or the "broken" nature of the current electoral system.

Similarly, political incumbents could do more to educate citizens and voters about the residuum of "error" in ordinary constitutional politics. By itself, awareness may do little to increase trust in decision-making. In fact, it may increase distrust and cynicism. But if that awareness is accompanied by a repeated emphasis on the small-scale, insignificant nature of this error, the salutary benefits may be far greater. Instead of being blindsided by a claim of voter fraud and then being ready to discard a valid electoral outcome as a result, voters may be more willing to ask: How much fraud, when, where, and with what effect? In some cases, the answer may be too much for an electoral result to be accepted. But more often than not, in most consolidated democracies, the answer will be different: not enough to cast doubt on the result of a democratic election, or to buy in to abusive attempts to discredit it.

[46] Compare Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9: 95 (1974). See also Rosalind Dixon and David Landau, "Constitutional End Games: Making Presidential Term Limits Stick," *Hastings Law Journal* 71: 359 (2020).

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