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One Size Does Not Fit All Courts: A Commentary on "Who will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy"

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A RESPONSE TO

Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy

by Yaniv Roznai

This essay was written as part of a series of responding to Professor Roznai's article published in Volume 29, Issue 2 of the *Bill of Rights Journal*, to continue the academic discussion introduced therein. The series has not been substantively edited by the *Bill of Rights* editorial staff, and the views expressed are solely those of the individual authors.

Yaniv Roznai's contributions to the debates on formal constitutional change and judicial review of amendments are undeniable. His *Unconstitutional Constitutional Amendments* is one of the first systematic attempts to understand –from the angle of comparative law and constitutional theory– the notion of an unconstitutional amendment and why a court should be endowed with the power to assess whether it passes constitutional muster.[1] *Who will Save the Redheads?* constitutes a new stage in his scholarly interest on the matter, and this time, the perspective taken is closer to that of judicial politics and the literature on courts and democratization rather than of constitutional theory.[2] A realistic dose about what courts can do in the context of unfavorable political circumstances is helpful for the field, as it can provide an accurate mapping of the actual alternatives that judges have in concrete scenarios. Being aware of the political constraints judges face in politically controversial cases allows us to adjust to the type of normative requests we ask courts to discharge.[3] As such, Roznai's article is a useful addition to the literature engaging with a strategic perspective on what courts can do to enforce relevant democratic principles in scenarios of authoritarian, hybrid regimes or political systems that are experiencing an authoritarian turn or a sort of democratic decay. In that literature, some scholars highlight examples suggesting that courts can play a useful role to prevent such authoritarian turns or to serve as speed bumps for a process of democratic regression,[4] while others show a more pessimistic approach identifying the limitations that courts have.[5] Consequently, the strategic accounts on how courts should behave in these types of scenarios usually distinguish a normative assessment celebrating and highlighting the experience of courts that decide to confront the regimes,[6] and more cautious approaches suggesting judicial strategies that aim to preserve the judges' authority and wait until the storm passes. Those strategies include weak judicial review types of behavior,[7] judicial avoidance,[8] or –as one of us has called those strategies– "survival" judicial tactics aimed at preventing a possible political backlash.[9]

Within this field, Yaniv Roznai's paper offers two arguments that seem to reconcile the pessimistic approaches suggesting cautious strategies with the more optimistic perspectives highlighting

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[1] YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS. THE LIMITS OF AMENDMENT POWERS (2017).

[2] See Yaniv Roznai, *Who will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy*, 29 WM. & MARY BILL RTS. J. (forthcoming, 2020. The references this commentary will make to this article will correspond to the SSRN version and its page numbers). This perspective is also employed in Yaniv Roznai & Tamar Hostovsky Brandes, 14(1) *Democratic Erosion, Populist Constitutionalism and The Unconstitutional constitutional amendments doctrine*, L. & ETH. HUM. RTS., 19 (2020).

[3] See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005).

[4] For example, Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L. J. 961–1012 (2011); SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES. CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015).

[5] For example, see TOM GERALD DALY, THE ALCHEMISTS. QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS (2017).

[6] See for example, Kim Lane Scheppele, *Democracy by Judiciary. Or, why Courts Can be More Democratic than Parliaments*, *in* RETHINKING THE RULE OF LAW AFTER COMMUNISM 25–60 (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 2005).

[7] Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 285–320 (2015).

[8] Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE LAW JOURNAL 1–67 (2016); Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683–731 (2016).

[9] See an overview of these strategies in Sergio Verdugo, *How can Judges Challenge Incumbent Dictators and Get Away with it?*, ON FILE WITH AUTHOR (2020).

successful judicial experiences engaging with leaders that show authoritarian or antidemocratic tendencies. His first argument is of a normative nature and shows a relatively optimistic approach: courts should be encouraged to enforce democratic principles when those enforcements are possible. We agree with this claim. In fact, we believe that this claim is not, in the end, controversial. The second argument is prescriptive and offers a cautious approach to how courts should behave in unfavorable contexts: courts should distinguish the type of decision that they can enact considering their possibilities to advance those democratic values. In this part, he uses the "bully" theory to add a new perspective to the field and identifying a useful –yet under-theorized– strategy: the possibility that courts develop a kind of "business-as-usual" tactic. Roznai's paper is both (i) narrower and (ii) broader in scope compared to what other authors in the field, cited above, typically suggest. It is (i) narrower because the range of his argument only deals with the possibility of declaring constitutional amendments unconstitutional,[10] and it is (ii) broader because it is both a normative and a prescriptive project.

Both of Roznai's arguments need to be read together. If we only take into consideration the first argument, the temptation to ask judges to become sorts of Dworkinian Hercules-types of actors will be too risky in the political contexts that interest Roznai's scholarly project. If we only take into consideration the second argument, then someone could think that Roznai is too pessimistic or cautious. But, by taking these two arguments together, the reader will find a more balanced approach that points in the right direction –to fight for democratic and liberal principles–with sufficient pragmatic caution to make that fight effective.

So we agree, in general terms, with the route that Roznai's article takes, especially with his normative argument. Indeed, one of us has previously argued in favor of the normative account. If possible and plausibly effective, courts should preserve and promote relevant democratic principles and enforce a democratization agenda in unfavorable scenarios.[11] However, and as the adage goes, the *devil is in the details*. Especially in the details of the second (prescriptive) argument. Does Roznai succeed in building a convincing framework to explain how courts can get away with an undemocratic or hybrid regime?

In this short post, we will focus on his proposal according to which courts should take a business-as-usual approach when dealing with constitutional amendments promoted by governmental "bullies." We argue that such an approach might be overinclusive as it is not sensitive enough to the real capabilities that courts and bullies, alike, could have, in particular cases. A business-as-usual stance that challenges one of the interests of the regime might be useful to counteract anti-democratic impulses in lower-stakes cases but not in cases where the government has intense preferences.[12] Roznai's proposal can have much more value if he succeeds in classifying and distinguishing the types of cases involved—and not only the types of judicial strategies available. Nevertheless, as the cases

[10] Roznai, *supra* note 2, at 4 "[T]his article explores the more general question: can courts protect democracy through judicial review?, focusing especially on particular type of judicial exercise – judicial review of formal constitutional amendments by using the 'unconstitutional constitutional amendments doctrine' […]".

[11] Verdugo, *supra* note 9.

[12] We borrowed this distinction from an article by Julious Yam, who shows that courts in Hong Kong are more likely to rule cases against the Chinese regime's interests when the stakes are low or medium. Julious Yam, *Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts*, FORTHCOMING (ON FILE WITH AUTHOR). One of us used a modified version of that distinction to build a framework aiming to predict the chances of success that a court can have when fighting these types of regimes. See Verdugo, *supra* note 11.

that matter for a crucial democratization agenda are typically connected to controversies where the regime has strong preferences, it would be useful if we focus the analysis on those types of cases. Roznai's framework centers on the judicial decisions engaging with unconstitutional constitutional amendment cases, and those cases typically involve high-stakes scenarios for the regimes advancing those amendments, as the amendments normally aim to help the regime to become hegemonic or to remove relevant limits to its political power. Thus, the right question should be whether the business-as-usual approach can be effective in those types of cases.

Regrettably, as we will show, in high-stakes cases such as the unconstitutional constitutional amendment cases, the business-as-usual strategy may either backfire or become ineffective to keep the power of the ruler in line, unless other considerations are taken into account. To sum up, a universal application of the business-as-usual model of adjudication does not always yield salutary democratic outcomes, while its effectiveness depends on the relative level of power of both the bully and the court.

1) Looking Beyond the Bully: A Refinement to the Anti-Bully Theory of Judicial Review of Amendments

As Roznai and others have aptly observed, courts have limited resources at hand to confront the sheer power of inherently stronger branches.[13] Therefore, he is right when he claims that courts' ability to prevail depends, to a large extent, on the attitude and actions of external actors.[14] Their attitudes and actions could weaken the dominant position of the bully as the power of bullies sometimes is contingent on what some other players do or refrain from doing. A bully could lose a great deal of influence if friends and allies withdraw their support to their decisions and, vice versa, their power could augment when more people ignore their abuses or support this behavior. The gist of this argument is that it is a good idea for courts to look at the bully's footing.[15] It makes a huge difference if a court is dealing with a populist president who has just begun the presidential term vis-à-vis a lame-duck populist leader who has been defeated in their reelection bid.[16] Although this approach seems to be novel –we are not aware of other authors that have theorized these issues using a *bully* approach– its lessons do not differ much from the ideas that scholars engaging with separation-of-powers games have proposed.[17] The difference, perhaps, is that Roznai makes his argument in the context of a

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[13] Roznai, *supra* note 2, at 32-33. See, for example, Michaela Hailbronner & David Landau, *Introduction: Constitutional Courts and Populism*, INT'L J. CONST. L. BLOG (Apr. 22, 2017), http://www.iconnectblog.com/2017/04/introduction-constitutional-courts-andpopulism/

[14] Roznai, *supra* note 2, at 30 ("[N]ot all bullies are the same, and their reactions may be different […] the ability to successfully face a bully also depends on whether there are other kids in the playground and what their likely reaction will be. Just as when facing a bully, the role of third parties is important, one cannot examine courts as standing alone.").

[15] *Id.*

[16] See, for example, Gretchen Helmke, *Checks and Balances by Other Means: Strategic Defection and Argentina's Supreme Court in the 1990s*, 35(2) COMPARATIVE POLITICS, 213 (2003).

[17] See, for example, Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 446–474 (2003); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEORGETOWN LAW JOURNAL 565–582 (1992); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 263–279 (1992); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM POLIT SCI REV 28–44 (1997); Rosalind Dixon & David Landau, *Constitutional End Games: Making Presidential Term Limits Stick*, 71 HASTINGS LAW JOURNAL 359–418 (2020).

specific type of judicial decision –the one declaring the unconstitutionality of a constitutional amendment– and in specific contexts of institutional fragility.

But focusing on the bully is not enough. Not all bullied courts are equal, and they should also look at themselves in the mirror of politics to determine what they can do. Thus, courts are better off deciding whether a business-as-usual tactic is a feasible and normatively appealing option after making other considerations (including an assessment of their own institutional power) and pondering other alternatives. The point we are trying to make is this: the relative (im)balance of power between courts and bullies is a crucial factor for courts to consider when deciding the sort of stance they will adopt when reviewing contested amendments endorsed by a bully government. And the answer to this question is not always business-as-usual.[18]

We can illustrate the point with two examples. As Richard Albert and his coauthors have stated, the doctrine of unconstitutional constitutional amendments is not yet, a global norm of constitutionalism.[19] There are several courts around the world that still abstain from engaging on judicial supervision of constitutional reforms. One of these cases is that of the French Constitutional Council.[20] France is a good example, as the French Council famously avoided to enact the doctrine of unconstitutional constitutional amendment in a critical case that helped to cement Charles de Gaulle's power when he reformed the 1958 Constitution using a clearly unconstitutional procedure that undermined the legislative assembly's authority.[21] Assume for a moment that a leader with authoritarian inclinations but with relatively weak support from political institutions promotes an abusive amendment that seeks to postpone, indefinitely, presidential elections, or like in France, to bypass the legislative institutions to appeal directly to the citizens and consolidate its presidential ruling. If the business-as-usual framework means following the established judicial doctrines, then it would tell us that the court –or the Constitutional Council in the French example– should rubber-stamp the constitutional reform. If the business-as-usual frame means following a legalistic narrative and using a regular procedure but allowing the court –or the Council– to rule against the incumbent leader with authoritarian inclinations, then the appeal of having a business-as-usual approach is not obvious. In fact, that appeal can disappear due to the importance and high profile character of the case because it would be impossible to hide the judicial decision under a legalistic disguise if the case itself involves such a relevant controversy, and the regime has a strong interest in the case being decided in a certain way. As these types of cases are normal when courts engage with constitutional amendments –as the reforms will typically require changing critical aspects of the political system–

[18] The balance of power between a court and a bully is something frequently in flux and the right judicial stance depends, consequently, on the particulars of the case. To be more specific, as long as the power of a court (similar to that of the government) is tied to the attendant political circumstances, this power is not a fixed variable but a movable one and this variability might impact the choice the court makes with respect to which model is to be adopted. See Georg Vanberg, *Establishing and Maintaining Judicial Independence*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 100, 116 (Gregory A. Caldeira, R. Daniel Kelemen, & Keith E. Whittington eds., 2008) (noting that "[m]aintaining a system of effective judicial checks depends on the right external circumstances.").

[19] Richard Albert, Malkhaz Nakashidze, & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendments,* 70(3) HASTINGS L.J., 639 (2019).

[20] *Id.* at 661-665.

[21] See, among other works, France's chapter included in BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS. CHARISMATIC LEADERSHIP AND THE RULE OF LAW (2019).

that version of the business-as-usual strategy, other things being equal, will possibly fail either to protect important constitutional values or to preserve the judges' authority or independence.

Let us now introduce the court's level of power in the equation. Assume that the court in question shows a firm institutional standing, while the populist government is in a weak position. Wouldn't it be sensible to directly confront the bully using more than a business-as-usual scrutiny? The answer to this query seems to be yes, especially if the would-be authoritarian leader –as Charles de Gaulle at that time– does not have an hegemonic supporting coalition, and there is an opposition that might be willing to support the judicial decision.

Second, take the opposite case, that is, that of a relatively weak court and a strong bully. The Constitutional Court of Georgia has consistently refused to evaluate the constitutionality of amendments[22] in the midst of a relatively hostile political setting where there is a ruling party that dominates the political system and a judiciary with a low degree of independence.[23] In this type of situation, the business-as-usual strategy would collapse with the going-under-the-bunker alternative, as they will become a single category. In this scenario, Roznai's contribution would not differ much from the avoidance strategies that other scholars –cited above– have promoted. Declining to analyze the constitutionality of an amendment passed by the incumbent party would be, presumably, a sound course of action to prevent a potential retaliation from the political branches. But this business-as-usual decision would also amount to a bunker-down approach.[24]

The crux of the argument is that deciding as if nothing were happening and without paying heed to the actual power of the bully and the potential bullied person, is not the only option available out there. Sometimes, adopting a more active stance is a more effective option to tame the encroachments of power, whereas in some other scenarios waiting for better times could be a more promising path.

2) The Colombian Court's Cautious Approach as an Example of Judicial Stewardship

It could be argued, against our previous points, that the cases Roznai has in mind presuppose the existence of the courts' formal power to scrutinize constitutional amendments. Nevertheless, even assuming that a court is legally empowered to exercise review of constitutional amendments, a strategic approach is not always "doomed to fail."[25] The Colombian Constitutional Court –which is referred to by Roznai as a successful instance of a court counteracting authoritarian measures implemented via amendments– is a case in point.[26]

As one of us has argued elsewhere, the political circumstances under which the Constitutional Court issued its first presidential reelection decision were not favorable, by any means, to the Court. Even

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[22] Albert, Nakashidze, & Olcay, *supra* note 19, at 648-654.
[23] See Giorgi Chitidze, *Georgia's Coronation of an Orwellian Doublethink*, VERFBLOG (May 22, 2020), https://verfassungsblog.de/georgias-coronation-of-an-orwellian-doublethink/
[24] Compare this with the case of Niger's Court which adopted a bold stance and quashed an amendment that extended the incumbent president's tenure, but was later disbanded by then President Tandja. See Mila Versteeg et al., THE LAW AND POLITICS OF PRESIDENTIAL TERM LIMIT EVASION, 120(1) COLUM. L. REV., 173, 218-220 (2020).
[25] Roznai, *supra* note 2, at 32.
[26] Another successful experience mentioned by Roznai is found in Uganda. *Id.* at 15. Nonetheless, and assuming that this country's Court never engaged in judicial strategies, this case seemingly militates against the business-as-usual attitude for the Constitutional Court of Uganda apparently reached a compromise with the political forces (it struck down the MP's tenure extension but authorized the amendment that removed age limits to run for presidential office).

though the Court's image was very positive among the population, virtually the entire country was rallying behind the possibility of a new term for Álvaro Uribe. At the same time, some prominent figures of the political opposition who disagreed with a new term voiced their discomfort in a rather soft way. Uribe, on his part, enjoyed extraordinary levels of popularity, and many influential actors wanted him to remain in office. In fact, some congress members, as well as the Minister of Justice, explicitly suggested a series of alternative "Plan B" options aimed at circumventing a possible adverse decision.[27] The political landscape was certainly charged with populist rhetoric geared towards the continuation of the agenda of the charismatic leader.

In this challenging juncture, the Court held that the amendment permitting Uribe to run for a second term was not a replacement of the Constitution. At first sight, it seems as if the Court went into the bunker—it conducted a relatively formalistic analysis that ignored the potential undemocratic effects that, down the road, this reelection could have on separation of powers. But there is more to it than meets the eye. The Court did not merely back down to weather the storm. While the Court retreated to its shelter and pleased the government, it quietly asserted twice that just "one presidential reelection" does not constitute an infringement of the Constitution's fundamental principles. In other words, the Court's strategy did not consist merely in seeking refuge from the bully, but it also tried to prepare the legal terrain to fight him in better times and with the help of more allies.

This is precisely what happened some years later in the second reelection case. In 2010, the governmental coalition shattered to the point that even some high-ranking officials loyal to Uribe and members of the government's congressional coalition explicitly declared their opposition to a third term for the incumbent. Moreover, no one suggested a "Plan B" to defy the Court's judgment. And this time, an impressive collage of actors (law schools, the church, the media, political analysts and international actors, among others) expressed their rejection of this amendment.[28] Through the prism of a non-formalistic analysis and after recalling that only "one presidential reelection" (or the second period in office) was compatible with the Constitution, the Court concluded that a second presidential reelection subverted basic pillars of the Constitution and, hence, was unconstitutional.[29] The Court not only prevented the erosion of democracy, but it also consolidated its institutional presence in the country.[30]

To be sure, the case of Colombia does not disprove the business-as-usual model. However, it offers a twofold lesson that helps to nuance Roznai's approach: a one-size-fits-all approach is not a reasonable solution for all situations, and strategies are not always poised to fail.

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[27] Vicente F. Benítez-R, *We the People, They the Media: Judicial Review of Constitutional Amendments and Public Opinion in Colombia*, in CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA 143, 157-158 (Richard Albert, Carlos Bernal & Juliano Zaiden Benvindo eds., 2019).

[28] *Id.* at 159.

[29] On the differences between the Court's approach in 2005 and in 2010 see Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13(3) INT'L J. CONST. L. 606, 626 (2015) and Samuel Issacharoff, Santiago García Jaramillo & Vicente F. Benítez-R., *Judicial review of presidential re-election amendments in Colombia'*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Rainer Grote, Frauke Lachenmann, & Rüdiger Wolfrum eds., 2020).

[30] Benítez-R., *supra* note 27, at 160.

3) Conclusions

It could be argued, contra these conclusions from Colombia and the previous ones from France and Georgia, that our analyses heavily rely on many alternative possibilities, and this would make it difficult to draw a firm conclusion or a clear theoretical framework on how courts should proceed. But that is precisely the case we are making. We acknowledge that Roznai's prescriptions are, in and of themselves, valuable models that widen and organize the gamut of options courts could eventually have at their disposal under challenging times.[31] Of course, Roznai's options should not be read as a closed list of alternatives. Nevertheless, the decision on what model to employ will necessarily depend on two factors. First, on the specific political conditions under which each court operates, or following Stephenson, on whether in the case at hand "people with money and guns [will…] submit to people armed only with gavels".[32] Secondly, and very importantly, courts should try to choose the model that, according to the circumstances, best serves the normative values they must uphold.[33]

In the end, Roznai's article is right in pointing out that the dichotomy between completely failed and optimal democracies is untenable. The constitutional regimes that are currently wielding battles against processes of democratic decay are usually located in between these two polar extremes.[34] Nevertheless, it is reasonable to think that this also implies that there is a continuum between these two categories. Thus, there is no a single intermediate category all regimes facing democratic backsliding would necessarily fit in, but only ideal models. Some states might be closer to one end of the spectrum than to the other. This means, in turn, that if a given regime is quite far from the utterly-failed-type democracy and under the rule of a weak populist bully, there might be some room for heightening the judicial scrutiny of abusive amendments.

Similarly, in a country relatively distant from that somber Weimar-like scenario but governed by a strong populist ruler, there could still be some time before the collapse of democracy, and it could be appropriate to postpone a more assertive judicial decision against the government while prudently devising a doctrine or theory to be used in the near future.[35] Once more, a one-size model does not fit all countries nor all circumstances. Yet, caution is advised, and judicial strategies should be conjugated with the normative duties all courts ought to discharge. A judicial deferral should be a temporary and principled strategy implemented with an eye towards the attainment, in the future, of the goals set out in the constitution. A court that permanently gives up its mission to defend the

[31] Expanding the judicial toolkit is even more relevant if we take into consideration that, from an empirical standpoint, courts' intervention has been fundamentally ineffective against the flexibilization or suppression of presidential term limits. It could be the case that courts have chosen the wrong path or did not know about its existence. See Versteeg *supra* note 24, at 178-179.

[32] Matthew C. Stephenson, *"When the Devil Turns…": The Political Foundations of Independent Judicial Review*, 32(1) J. LEG. STUD., 59, 60 (2003).

[33] This is the main thrust behind Roni Mann's interesting proposal. See Roni Mann, *Non-ideal theory of constitutional adjudication*, 7(1) GLOB. CONST. 14 (2018).

[34] Roznai, *supra* note 2, at 13-14.

[35] See Dixon & Issacharoff, *supra* note 8. There are, at least, two additional scenarios: courts working in countries which are in the vicinity of democratic collapse either with strong or weak populist rulers. However, in these cases courts might be unable to halt or reduce the speed with which the country heads towards autocracy.

constitution or that puts off its decisions to achieve self-interested or private ends cannot avoid the decline of democracy.[36]

Understanding how courts can develop alternative strategies is all the more critical when supervising the constitutional regularity of amendments, as determining whether an amendment destroys or harms basic features of the constitution places the court at the center of an important political controversy even under fully democratic conditions. Since courts usually ground their decisions on a highly contested basis –implied limitations on the amendment power–, such a scrutiny might pit the court against the legislative super-majorities or the citizens who, after completing an arduous amending process, passed the reform.[37] Likewise, it could foreclose the last legal/constitutional opportunity the political branches or the people have at their disposal to have a say on constitutional matters for it amounts to a sort of super-counter majoritarian difficulty—not even an amendment can override a judicial interpretation.[38] Therefore, it is wise to furnish some margin for courts to maneuver in these legal and institutional hard cases.

We think that Roznai concurs with the prospect of a court capable of calibrating their judicial lens in accordance with the circumstances. In several of his writings he has proposed standards of review for courts in democracies –a relatively strict one with governmental amendment powers, a lenient one with popular amendment powers[39] and, maybe, a very deferential one when there is a reasonable and good-faith enacted amendment to the judiciary– and for courts in populist scenarios –a rigorous examination over amendments on the judiciary and an aggregated analysis to tackle incremental abusive changes–.[40] But a business-as-usual model for confronting any kind of populist bully seems to be, in principle, at odds with this contextual approach.

[36] On the perils of unprincipled and permanent judicial strategies see Kim Lane Scheppele, *The New Judicial Deference,* 91(1) B.U. L. REV., 89, 166-70 (2012).

[37] This showdown could be even more dramatic if the amendment can be challenged, right after its promulgation, via abstract judicial review. Abstract review makes courts a sort of third legislative chamber and is prone to elicit the discomfort of the parliamentary majority. On these two ideas see, respectively, Alec Stone-Sweet, *The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe*, 19(1) POLICY STUD. J., 81, 92-93 and John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication, Italian Style*, in COMPARATIVE CONSTITUTIONAL DESIGN 294, 297 (Tom Ginsburg ed., 2012).

[38] See Richard Albert, *Nonconstitutional Amendments*, 22(1) CAN. J. LAW SOC., 5, 42-43 (2009).

[39] See Roznai, *supra* note 1, at 218-225.

[40] See Roznai & Hostovsky-Brandes, *supra* note 2, at 40-44, 46-47.