

# Stealth Authoritarianism

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*ABSTRACT: Authoritarianism has been undergoing a metamorphosis. Historically, authoritarians openly repressed opponents by violence and harassment and subverted the rule of law to perpetuate their rule. The post-Cold War crackdown on these transparently authoritarian practices provided significant incentives to avoid them. Instead, the new generation of authoritarians learned to perpetuate their power through the same legal mechanisms that exist in democratic regimes. In so doing, they cloak repressive practices under the mask of law, imbue them with the veneer of legitimacy, and render anti-democratic practices much more difficult to detect and eliminate.*

*This Article offers a comprehensive cross-regional account of that phenomenon, which I term “stealth authoritarianism.” Drawing on rational-choice theory, the Article explains the expansion of stealth authoritarianism across different case studies. The Article fills a void in the literature, which has left undertheorized the authoritarian learning that occurred after the Cold War and the emerging reliance on legal, particularly sub-constitutional, mechanisms to perpetuate political power. Although stealth authoritarian practices are more prevalent in nondemocracies, the Article illustrates that they can also surface in regimes with favorable democratic credentials, including the United States. In so doing, the Article aims to orient the scholarly debate towards regime practices, rather than regime types.*

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*The Article concludes by discussing the implications of stealth authoritarianism for scholars and policymakers. The existing democracy-promotion mechanisms in the United States and elsewhere are of limited use in detecting stealth authoritarian tactics. Paradoxically, these mechanisms, which have narrowly focused on eliminating transparent democratic deficiencies, have provided legal and political cover to stealth authoritarian practices and created the very conditions in which these practices thrive. In addition, stealth authoritarianism can ultimately make authoritarian governance more durable by concealing anti-democratic practices under the mask of law. At the same time, however, stealth authoritarianism is less insidious than its traditional, more repressive alternative and can, under some circumstances, produce the conditions by which democracy can expand and mature, in a two-steps-forward-one-step-backward dynamic.*

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## I. INTRODUCTION

*“For my friends, everything. For my enemies, the law.”*  
*Óscar Benavides, former Peruvian President*<sup>1</sup>

Authoritarianism brings to mind repressive dictators to the likes of Adolf Hitler, Joseph Stalin, and Saddam Hussein. Historically, authoritarians deployed their massive security apparatus to torture and murder dissidents, jail journalists, rig elections, and shut down courts and legislatures. They disregarded laws and constitutions and systematically engaged in numerous extra-legal and extra-constitutional efforts to eliminate horizontal and vertical checks on their power and perpetuate their rule.

The Cold War ushered in an era of expansive democracy-promotion programs intended to detect and eliminate these transparently authoritarian practices.<sup>2</sup> The United States enacted numerous laws and regulations to promote democracy, and by 1998, it had set up democracy-promotion programs in more than 100 countries.<sup>3</sup> Non-governmental organizations (“NGOs”) also joined the democracy-promotion chorus, working on the ground to ensure the implementation of democratic laws, constitutions, and legal institutions.<sup>4</sup> Democracy clauses were placed in international agreements to sanction regimes that assume power through extra-legal means.<sup>5</sup> Those measures significantly raised the costs of maintaining transparently repressive regimes and led to the elimination of many authoritarian governments. In the late 1980s and the early 1990s, dictatorships collapsed across post-communist Europe, Asia, and Latin America.<sup>6</sup> According to the Freedom House, the percentage of countries determined to be “not free” decreased from 46% in 1972 to 24% in 2012.<sup>7</sup>

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1. *Knock, Knock: The Government Unleashes the Tax Agency Against Its Opponents*, ECONOMIST (July 21, 2012), <http://www.economist.com/node/21559384>.

2. Carl Gershman, President, Nat'l Endowment for Democracy, Address to the Sydney Institute: Responding to the New Backlash Against Democracy (Aug. 14, 2006), *available at* <http://www.ned.org/about/board/meet-our-president/archived-presentations-and-articles/responding-to-the-new-backlash-ag> (noting that, since the end of the Cold War, there “has been a proliferation of democracy-assistance programs funded by governments, multilateral bodies such as the United Nations, . . . international financial institutions, and independent foundations”).

3. THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 7 (1999).

4. For a list and discussion of several major, United States-based NGOs involved in democracy-promotion efforts, see Alexandra Silver, *Soft Power: Democracy-Promotion and U.S. NGOs*, COUNCIL ON FOREIGN REL. (Mar. 17, 2006), <http://www.cfr.org/democratization/soft-power-democracy-promotion-us-ngos/p10164>.

5. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 193 (2013).

6. STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 3 (2010).

7. FREEDOM HOUSE, *FREEDOM IN THE WORLD 2013: DEMOCRATIC BREAKTHROUGHS IN THE BALANCE* 24 (n.d.), *available at* <http://www.freedomhouse.org/sites/default/files/FIW%202013%20Charts%20and%20Graphs%20for%20Web.pdf>.

At the same time, multiparty elections—the centerpiece of democracy—spread across the globe.<sup>8</sup>

The post-Cold War international crackdown on transparently authoritarian practices provided significant incentives to avoid them. Much like a virus that mutates to adapt to new antidotes, authoritarians or would-be authoritarians<sup>9</sup> learned to play by the same rules that exist in democratic governments. Although laws have always been valuable tools in an autocrat’s arsenal, modern authoritarians began to deploy, to a much greater extent than their historical predecessors, the same laws and legal institutions that exist in democratic regimes for anti-democratic purposes. In so doing, the new generation of authoritarians cloak repressive measures under the mask of law, imbue them with the veneer of legitimacy, and render authoritarian practices much more difficult to detect and eliminate. In the modern era, authoritarian wolves rarely appear as wolves. They are now clad, at least in part, in sheep’s clothing.

The scholarly comprehension of authoritarianism has failed to keep pace with the evolution of authoritarian regimes. The burgeoning literature on authoritarianism has focused primarily on traditional, more transparent mechanisms of authoritarian rule. These mechanisms include overtly defying or disregarding laws and constitutions;<sup>10</sup> imposing emergency laws or martial

8. Leah Gilbert & Payam Mohseni, *Beyond Authoritarianism: The Conceptualization of Hybrid Regimes*, 46 *STUD. COMP. INT’L DEV.* 270, 271 (2011) (“The third wave of democratization and the end of the cold war dramatically increased the global number of regimes that hold multiparty elections with the full adult franchise.”).

9. Throughout the Article, I use the term “would-be authoritarian” to refer to incumbents in democratic regimes who utilize stealth authoritarian practices to make the regime less democratic than it was before.

10. JAN-ERIK LANE, *CONSTITUTIONS AND POLITICAL THEORY* 9–10 (1996) (explaining the difference between constitutional formalia and constitutional realia in façade constitutions); Miguel González Marcos, *Comparative Law at the Service of Democracy: A Reading of Arosemena’s Constitutional Studies of the Latin American Governments*, 21 *B.U. INT’L L.J.* 259, 278 (2003) (“In Latin America, constitutions are often ‘paper’ constitutions because they are not followed.”); Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 3, 8 (Douglas Greenberg et al. eds., 1993) (discussing the “spectrum of authority” on which constitutions fall); Samuel C. Nolutshungu, *Constitutionalism in Africa: Some Conclusions*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD*, *supra*, at 366, 366; Richard Sakwa, *The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism*, 48 *STUD. E. EUR. THOUGHT* 115, 118 (1996) (noting that the Soviet Union’s Communist Party engaged in “sham constitutionalism” by “plac[ing] itself above constitutional constraints”); Qianfan Zhang, *A Constitution Without Constitutionalism? The Paths of Constitutional Development in China*, 8 *INT’L J. CONST. L.* 950, 952 (2010) (describing China’s constitution as a “façade”). See generally David S. Law & Mila Versteeg, *Sham Constitutions*, 101 *CALIF. L. REV.* 863 (2013) (documenting the prevalence and severity of “constitutional noncompliance” over the last three decades). But see NATHAN J. BROWN, *CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT* 91–92 (2002) (noting that “Arab constitutions have never been routinely violated facades or mere pieces of paper unconnected with political reality”).

law; silencing dissidents through harassment and violence;<sup>11</sup> shutting down newspapers and television stations; banning publications;<sup>12</sup> manipulating the vote count through vote buying, intimidation, and electoral fraud;<sup>13</sup> disregarding or evading term limits;<sup>14</sup> packing courts and other state institutions with loyalists;<sup>15</sup> establishing direct control over the media and civil society;<sup>16</sup> and amending or replacing constitutions to eliminate checks and balances on their power.<sup>17</sup>

As voluminous as this literature is, it suffers from a blind spot. The existing scholarship has been preoccupied with fairly transparent mechanisms of authoritarian control detected relatively easily by both domestic and international actors. But there exists comparatively little scholarship on the new, more subtle, mechanisms of authoritarian control that rely on the same legal rules that exist in regimes with favorable democratic credentials.

This Article fills that academic void by offering a comprehensive, cross-regional account of that phenomenon, which I term “stealth authoritarianism.” Stealth authoritarianism serves as a way to protect and entrench power when direct repression is not a viable option. Stealth authoritarian practices use the law to entrench the status quo, insulate the

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11. LEVITSKY & WAY, *supra* note 6, at 8–9.

12. Gordon Silverstein, *Singapore: The Exception That Proves Rules Matter*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 73, 90 (Tom Ginsburg & Tamir Moustafa eds., 2008) (“The traditional response to unflattering foreign press coverage from authoritarian states is to arrest and imprison the offenders or, at the least, to expel them and ban their publications.”).

13. ANDREAS SCHEDLER, *THE POLITICS OF UNCERTAINTY: SUSTAINING AND SUBVERTING ELECTORAL AUTHORITARIANISM* 1 (2013) (noting that “[i]n electoral authoritarian regimes, governments . . . ban parties, prosecute candidates, harass journalists, intimidate voters, forge election results, and so forth”); William Case, *Manipulative Skills: How Do Rulers Control the Electoral Arena?*, in *ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION* 95, 103–105 (Andreas Schedler ed., 2006) (providing examples of incumbent regimes using disenfranchisement, vote buying, intimidation, and electoral fraud to ensure favorable election outcomes).

14. COLETTA A. YOUNGERS, *WASH. OFFICE ON LATIN AM., DECONSTRUCTING DEMOCRACY: PERU UNDER PRESIDENT ALBERTO FUJIMORI* 2–3 (2000) (noting that Peruvian President Alberto Fujimori disregarded the two-term presidential limit in Peru’s Constitution by running for a third term in office).

15. Kim Lane Scheppele, *Not Your Father’s Authoritarianism: The Creation of the “Frankenstate,”* *EUR. POL. & SOC’Y* (Am. Political Sci. Ass’n), Winter 2013, at 5, 7 (analyzing how the Viktor Orbán government in Hungary appointed loyalists to state institutions, including “the ombudsman, state audit office, public prosecutor, media board, election commission, monetary council, budget council, and judicial administration office”).

16. LEVITSKY & WAY, *supra* note 6, at 27–28.

17. Landau, *supra* note 5, at 200–11 (documenting the use of constitutional amendment and replacement by the incumbent governments of Colombia, Venezuela, and Hungary to consolidate power and erect barriers to opposition parties); Scheppele, *supra* note 15, at 5 (analyzing how constitutional amendment and replacement led to the creation of a “Frankenstate” in Hungary).

incumbents from meaningful democratic challenges, and pave the way for the creation of a dominant-party or one-party state.<sup>18</sup>

The Article discusses the primary mechanisms of stealth authoritarianism and how they differ from traditional strategies of authoritarian control. For example, instead of jailing journalists or shutting down media outlets, incumbent politicians sue them for libel, which raises the costs of critical commentary. Rather than imprisoning political opponents without due process, they prosecute them for violations of the existing criminal laws. They employ seemingly legitimate and neutral electoral laws, frequently enacted for the purported purpose of eliminating electoral fraud or promoting political stability, to create systematic advantages for themselves and raise the costs to the opposition of dethroning them. Often with the backing of international organizations, they adopt surveillance laws and institutions with the purported purpose of combatting organized crime and terrorism, but use those laws to blackmail or discredit political opponents. They rely on judicial review, not as a check on their power, but to consolidate power. To shape perceptions and deflect attention from anti-democratic practices, they frequently enact democratic reforms and invoke rule-of-law rhetoric. These practices permit the incumbents to retain their seats even in the face of changing political preferences by the electorate. That, in turn, undermines a core component of democracy: competitive, multi-party elections and the resulting alternation in government power.

The Article makes three primary contributions to the scholarship. First, the Article adds to a growing body of literature that analyzes how modern authoritarian governance relies on formal rules far more than has been appreciated.<sup>19</sup> Much of the literature assumes that authoritarians and would-be authoritarians primarily rely on informal mechanisms of coercion and control to perpetuate their power and that formal rules and institutions are of limited utility to them.<sup>20</sup> Stealth authoritarianism, which utilizes formal

18. A one-party state is a regime where no political opposition exists and a dominant-party state refers to a regime where a single, dominant party governs subject to political opposition. Axel Hadenius & Jan Teorell, *Pathways from Authoritarianism*, J. DEMOCRACY, Jan. 2007, at 143, 147.

19. See generally CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2014) (exploring the role of constitutions in authoritarian states and how constitutions function within authoritarian frameworks); Silverstein, *supra* note 12. See also Landau, *supra* note 5, at 195 (defining “‘abusive constitutionalism’ as the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before”); Scheppele, *supra* note 15, at 1 (coining the term “Frankenstate” to describe regimes that perpetuate authoritarianism through the use of constitutional processes).

20. See, e.g., LEVITSKY & WAY, *supra* note 6, at 79 (“In most competitive authoritarian regimes, formal rules and agencies designed to constrain governments were frequently circumvented, manipulated, or dismantled . . . .”); YOUNGERS, *supra* note 14, at 1–2 (noting that, in Peru, “[f]ormal democratic institutions have been at least partially dismantled, often through ‘legal’ mechanisms, or laws passed by Congress”); Zachary Elkins et al., *The Content of Authoritarian Constitutions*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES, *supra* note 19, at 141, 161 (“[T]he source of authoritarian power is, in many cases, informal and extra-constitutional.”); Henry E.

legal mechanisms for anti-democratic purposes, bucks this conventional wisdom.<sup>21</sup>

In focusing on the use of formal rules as mechanisms of stealth authoritarianism, I do not suggest that informal mechanisms of control play an insignificant role in modern authoritarian governance. To the contrary, informal mechanisms still remain significant and often work in combination with formal mechanisms of control to enable political monopoly. The Article's primary focus is on formal mechanisms of control because the authoritarian reliance on formal rules—particularly sub-constitutional rules that exist in regimes with favorable democratic credentials—has been undertheorized in the literature.

Second, the Article aims to orient the scholarly debate towards regime *practices*, rather than regime *types*. The existing literature conceives of regimes as democratic, authoritarian, or hybrid regimes that exist somewhere in between. These labels, though certainly helpful for categorical purposes, can also cause conceptual confusion and obscure anti-democratic practices that exist in those regimes placed on the democratic side of the scale. Stealth authoritarianism is not a new regime type. Rather, stealth authoritarianism refers to government *practices*, analyzed in detail below, which render that regime less democratic than it was before. The tendency to entrench political power and lock up the political marketplace also exists in democratic regimes,<sup>22</sup> which can manifest itself through the use of stealth authoritarian practices, albeit to a lesser extent than nondemocracies. Throughout, the Article draws attention to instances of stealth authoritarianism in regimes with favorable democratic credentials, including the United States. In so doing, the Article informs important questions in legal theory by demonstrating the limits of democratic processes and their vulnerability to abuse.

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Hale, *The Informal Politics of Formal Constitutions: Rethinking the Effects of "Presidentialism" and "Parliamentarism" in the Cases of Kyrgyzstan, Moldova, and Ukraine*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES, *supra* note 19, at 218, 218 (noting the prevailing view in the literature that in hybrid regimes, "[w]hat matters instead is said to be *informal* politics . . . those unwritten and officially uncodified norms, habits, and practices that actually guide political behavior"); H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, *supra* note 10, at 65, 66 ("[F]ew African governments have valued [constitutions] other than as rhetoric." (internal quotation marks omitted)).

21. See Landau, *supra* note 5, at 212 ("It is a mistake to ignore the importance of formal constitutional rules to hybrid regimes.").

22. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998) ("In political markets, anticompetitive entities alter the rules of engagement to protect established powers from the risk of successful challenge."); Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, in OUT OF AND INTO AUTHORITARIAN LAW 125, 127 (Andr s Saj  ed., 2003) (arguing that politics should be seen "in terms similar to markets: the organizations that compete in political markets—principally, political parties—will similarly seek to dominate and eliminate their competition").

Finally, existing democracy-promotion mechanisms in the United States and elsewhere are of limited use in detecting stealth authoritarian tactics. Paradoxically, these mechanisms, which narrowly search for obvious democratic deficiencies through one-size-fits-all checklists, have provided legal and political cover to stealth authoritarian practices and created the very conditions in which these practices thrive. Although these checklists are efficient and work relatively well in detecting traditional, more transparent mechanisms of authoritarian control, they are much less effective in detecting the subtle reconfigurations of the political order that stealth authoritarianism effectuates. The prevailing democracy-promotion mechanisms have thus facilitated a certain level of authoritarian learning that has prompted the replacement of transparently authoritarian mechanisms with more stealth mechanisms of control.

The remainder of the Article proceeds in three parts. Part II elucidates the concept of stealth authoritarianism. Part III examines the most prominent mechanisms of stealth authoritarian governance. Part IV then discusses three related theoretical questions: (1) What conditions enable stealth authoritarianism? (2) Why do political leaders deploy mechanisms of stealth authoritarianism, as opposed to more traditional, and overt, mechanisms of authoritarian control? and (3) What regime types are more likely to adopt stealth authoritarian practices? The Article concludes by discussing the implications of stealth authoritarianism for scholars and policymakers.

## II. THEORIZING STEALTH AUTHORITARIANISM

The study of political regimes is marked by “[t]he proliferation of modified terms and . . . conflicting definitions.”<sup>23</sup> Because this is an area where precise use of terminology is important, I begin with definitional and theoretical preliminaries. Part II.A defines authoritarianism and democracy and briefly summarizes the burgeoning literature on hybrid regimes that describes governments that lie somewhere between those two conceptual extremes. Part II.B introduces and begins to elucidate the concept of stealth authoritarianism.

### A. AUTHORITARIANISM, DEMOCRACY, AND HYBRID REGIMES

As Larry Diamond and his co-authors have observed, the boundary between democratic and nondemocratic regimes is “a blurred and imperfect one.”<sup>24</sup> To navigate that blurred boundary, most scholars have adopted a continuum approach to conceptualizing democratic and nondemocratic regimes.<sup>25</sup> If regime types are placed on a one-dimensional conceptual

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23. Gilbert & Mohseni, *supra* note 8, at 271.

24. 3 DEMOCRACY IN DEVELOPING COUNTRIES: ASIA, at xvii (Larry Diamond et al. eds., 1989).

25. See, e.g., LARRY DIAMOND, DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION 8–15 (1999); Marc Morjé Howard & Philip G. Roessler, *Liberalizing Electoral Outcomes in Competitive*

continuum, authoritarianism and democracy would appear at the polar ends of that continuum.

Authoritarianism traditionally refers to a legal order in which there is little or no political pluralism and the incumbent party acts, “via legal or extra-legal means, to suppress political opposition. . . . The ruling leader or leaders often lack an elaborate and guiding ideology and exercise power within ill-defined norms.”<sup>26</sup> Corruption is rampant, as is abuse of state resources. In authoritarian regimes, it is prohibitively difficult to unseat the incumbent party through elections. Regime change is possible primarily through a pacted transition, revolution, coup, or foreign intervention.<sup>27</sup>

On the other end of the continuum is democracy. Democracy itself exists on a continuum, with procedural democracy and constitutional democracy on polar ends. A procedural democracy, under Samuel Huntington’s definition of the term, is a regime in which political leaders are selected through free and fair elections.<sup>28</sup> Robert Dahl defines procedural democracy in slightly more demanding terms that feature four key attributes: (1) free, fair, and competitive elections; (2) universal adult suffrage; (3) protection of civil liberties necessary to facilitate free and fair elections, including freedom of speech, press, and association; and (4) the absence of unelected tutelary institutions (e.g., the military) that limit the authorities of elected leaders.<sup>29</sup> Even more demanding is a “constitutional democracy,” which is often interchangeably referred to as a “liberal democracy.” A constitutional democracy contains both a procedural and a substantive component. Although definitions vary, a constitutional democracy ordinarily refers to a

*Authoritarian Regimes*, 50 AM. J. POL. SCI. 365, 366–67 (2006); Gerardo L. Munck, *Drawing Boundaries: How to Craft Intermediate Regime Categories*, in ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION, *supra* note 13, at 27; Andreas Schedler, *The Menu of Manipulation*, J. DEMOCRACY, Apr. 2002, at 36.

26. Ozan O. Varol, *The Democratic Coup d’État*, 53 HARV. INT’L L.J. 292, 300 (2012).

27. There is another type of regime, termed totalitarianism, where the ruling party has consolidated power to a greater extent than in authoritarian regimes.

In a totalitarian system, the ruling party has eliminated almost all political, social, and economic pluralism that existed before the advent of that regime. The official party of the state has a virtual monopoly on power that it exercises to further a unified utopian ideology. The political leaders of the ruling party govern the nation, usually charismatically, with undefined limits on their authority and great vulnerability and unpredictability for both members and non-members of the ruling party.

*Id.* The Article does not include totalitarian regimes in its study because such regimes, which are rare in the modern era, do not typically rely on stealth authoritarian practices, and opt for more blatant forms of government control. *See* Hadenius & Teorell, *supra* note 18, at 144 (noting that “very few regimes fit the totalitarian type”).

28. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 7 (1991).

29. *See* Richard W. Krouse, *Polyarchy & Participation: The Changing Democratic Theory of Robert Dahl*, 14 POLITY 441, 458–62 (1982).

pluralistic legal order where multiple opposition parties compete for the incumbent seat in free and fair elections, the electoral playing field is reasonably level, protection of civil liberties is high, a robust civil society exists, and state actors respect the legal-constitutional boundaries that restrain them.<sup>30</sup>

Recently, there has been a burgeoning literature that examines regimes that lie somewhere between the polar ends of the democracy–authoritarianism continuum and combine features of both. Scholars have branded these regimes “competitive authoritarianism,”<sup>31</sup> “electoral authoritarianism,”<sup>32</sup> “semi-authoritarianism,”<sup>33</sup> “hybrid regimes,”<sup>34</sup> or “Frankenstates.”<sup>35</sup> Although definitional differences exist between these brands,<sup>36</sup> most bear the same hallmark: Multiparty electoral competition<sup>37</sup> is real but unfair because the incumbents enjoy systematic advantages vis-à-vis their opponents.<sup>38</sup> As a result, the incumbents tend to stay in power indefinitely and a core purpose of democracy—competitive elections and the resulting turnover of government power—becomes significantly impaired.<sup>39</sup>

30. See generally DENNIS C. MUELLER, *CONSTITUTIONAL DEMOCRACY* (1996).

31. See generally LEVITSKY & WAY, *supra* note 6 (discussing the rise of competitive authoritarian regimes after the Cold War).

32. See generally Case, *supra* note 13 (documenting the use of electoral manipulation to retain political power).

33. See generally MARINA OTTAWAY, *DEMOCRACY CHALLENGED: THE RISE OF SEMI-AUTHORITARIANISM* (2003) (describing the rise of regimes that exhibit both democratic and authoritarian characteristics).

34. The term “hybrid regime” was first introduced by Terry Lynn Karl, who defines it as a regime that combines both democratic and authoritarian elements. See Terry Lynn Karl, *The Hybrid Regimes of Central America*, J. DEMOCRACY, July 1995, at 72, 73; see also Larry Diamond, *Thinking About Hybrid Regimes*, J. DEMOCRACY, Apr. 2002, at 21, 24–25 (adopting Karl’s definition of hybrid regimes and referring alternatively to hybrid regimes as “electoral authoritarian” or “psuedodemocratic”).

35. Scheppele, *supra* note 15, at 5 (using the Viktor Orbán regime in Hungary to illustrate the concept of a “Frankenstate”).

36. Gilbert & Mohseni, *supra* note 8, at 274 (“[T]here is still considerable debate about the definition of a hybrid regime and its conceptual boundary with authoritarianism.”).

37. “Competitive elections are those in which more than one center of power with different socio-economic interests can participate,” *id.* at 278, and “present a serious electoral threat to incumbents.” Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, J. DEMOCRACY, Apr. 2002, at 51, 55.

38. LEVITSKY & WAY, *supra* note 6, at 3, 5 (defining competitive authoritarianism); Gilbert & Mohseni, *supra* note 8, at 280 (“Hybrid regimes occupy the conceptual void of competitive regimes with unfair competition.”); Andreas Schedler, *The Logic of Electoral Authoritarianism, in ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION*, *supra* note 13, at 1, 3 (noting that in electoral authoritarian regimes, although elections are “minimally competitive,” they “are subject to state manipulation so severe, widespread, and systematic that they do not qualify as democratic”). To be sure, there are conceptual distinctions between these labels that produce some substantive differences. For example, Schedler characterizes Egypt and Kazakhstan as hybrid regimes, whereas the same countries are described as fully authoritarian by Levitsky and Way. Compare Schedler, *supra*, at 3, with LEVITSKY & WAY, *supra* note 6, at 6–7.

39. Landau, *supra* note 5, at 199.

B. *STEALTH AUTHORITARIANISM*

I describe the mechanisms of stealth authoritarianism in the next Part, but the concept can be articulated here briefly: Stealth authoritarianism refers to the use of legal mechanisms that exist in regimes with favorable democratic credentials for anti-democratic ends. Although the various ends that incumbent officeholders pursue are not always clear, anti-democratic ends, as used here, refer to the erosion of “partisan alternation,” defined as the cycling of political power among more than one party.<sup>40</sup> Turnover in government control is a core component of democracy and evinces an electoral system that responds to change in electoral preferences and confirms that “[t]he incumbent[s] . . . can be dethroned.”<sup>41</sup> The erosion of partisan alternation can, in turn, enable the creation of a political monopoly.

Stealth authoritarianism undermines partisan alternation by significantly increasing the costs of unseating the incumbent. Through the practices described below, stealth authoritarianism erodes mechanisms of accountability, weakens horizontal and vertical checks and balances, allows the incumbents to consolidate power, exacerbates the principal-agent problem<sup>42</sup> by curtailing the public’s ability to monitor and sanction government policies, and paves the way for the creation of a dominant or one-party state where the electoral field is uneven and the incumbent enjoys systematic advantages. These practices make it significantly more difficult to dethrone the incumbents and undermine a core component of democracy: free, fair, and contested elections and the resulting turnover in government control. In other words, as a result of stealth authoritarian practices, partisan alternation might not occur even in the face of changing political preferences by the electorate.

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40. See Adam Przeworski, *Self-Government in Our Times*, 12 ANN. REV. POL. SCI. 71, 81 (2009); see also Gilbert & Mohseni, *supra* note 8, at 278 (noting that “turnover confirms incumbent defeat and hand over of power,” which “indicates a real challenge to the incumbent and . . . concretely impacts the distribution of power amongst the political elite”). See generally JENNIFER GANDHI, POLITICAL INSTITUTIONS UNDER DICTATORSHIP (2008); HUNTINGTON, *supra* note 28; Barbara Geddes, *What Do We Know About Democratization After Twenty Years?*, 2 ANN. REV. POL. SCI. 115 (1999). As Przeworski and his co-authors have observed, lack of turnover is an imperfect indicator of a nondemocratic regime. ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990, at 51–54 (2000). It is possible that the incumbents will retain long-term political control, not due to anti-democratic practices, but because of “a highly satisfied populace.” Gilbert & Mohseni, *supra* note 8, at 279 n.18. Conversely, turnover is not a sufficient condition for a democracy. *Id.* at 278. In authoritarian Iran, for example, turnover is fairly frequent, as evidenced by the unpredictable victories of Mohammad Khatami in 1997 and Mahmoud Ahmadinejad in 2005. *Id.* at 292.

41. See Przeworski, *supra* note 40, at 81.

42. The principal-agent problem refers to the failure of the agent to act in the best interests of the principal. See Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 ECONOMETRICA 7, 7 (1983). In this context, the agents are the politicians, and the principals are their constituents. See Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203, 207 (2005).

Stealth authoritarianism creates a significant discordance between appearance and reality by concealing anti-democratic practices under the mask of law. In so doing, stealth authoritarian practices avoid, to a great extent, the costs associated with transparently authoritarian practices that are much more likely to draw the opprobrium of both the domestic and the international community. Practices that appear clearly repressive in a transparently authoritarian regime appear more ambiguous in a regime that employs stealth authoritarian practices.

This is not to suggest that stealth authoritarian practices go completely unnoticed. As discussed in Part III, some cases of stealth authoritarianism are not so stealthy in that they draw the attention and opprobrium of the relevant domestic and global actors. The mechanisms of stealth authoritarianism are, however, relatively more difficult to detect than transparently repressive authoritarian strategies. Because stealth authoritarianism relies on the exercise of legal mechanisms that exist in regimes with favorable democratic credentials, it becomes more difficult to differentiate between their abuse and legitimate application.

Although stealth authoritarianism utilizes legal mechanisms that exist in regimes with favorable democratic credentials, these mechanisms are not always verbatim replicas of their democratic counterparts. In some cases, the relevant laws may be subject to subtle reconfigurations that deviate in meaningful ways from those laws typically found in democracies. I examine these differences below in discussing the mechanisms of stealth authoritarianism. In some cases, however, the deviations from the typical democratic laws also exist in one or more established democracies, so that the deviation does not appear transparently anti-democratic. For example, as discussed below, Russia has criminalized defamation, which represents a deviation from the non-criminal nature of defamation in most democracies. But criminal defamation laws also exist in a number of regimes with favorable democratic credentials, such as Canada, Italy, and the United States. The criminalization of defamation by established democracies allows Russian officials to rebut any criticism directed at their criminal libel laws by citing prominent democracies that also deviate from the norm.

Although underexamined in the literature, formal rules are not entirely foreign to authoritarian governance. Historically, authoritarian leaders used formal rules to constrain rogue bureaucratic agents who operated the government.<sup>43</sup> They also used the legal system to maintain control over the populace.<sup>44</sup> In other words, laws were deployed, not to regulate and constrain the government, but to enable it to constrain others and ensure their

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43. See Roger B. Myerson, *The Autocrat's Credibility Problem and Foundations of the Constitutional State*, 102 AM. POL. SCI. REV. 125, 135–36 (2008).

44. Tom Ginsburg, *Constitutionalism: East Asian Antecedents*, 88 CHI.-KENT L. REV. 11, 18–19 (2012).

compliance with government authority.<sup>45</sup> Commentators have referred to this as the “rule by law” tradition, in contrast to the “rule of law” tradition in modern democracies.<sup>46</sup> The formal rules in rule-by-law regimes typically reflect their authoritarian nature with “brutal candor.”<sup>47</sup> For example, the Saudi Arabian Constitution requires the media to “employ civil and polite language” and conform their publications to state regulation.<sup>48</sup> Likewise, the first constitution of the Soviet Union committed the state to “deprive[] individuals and sections of the community of any privileges which may be used by them to the detriment of the Socialist Revolution.”<sup>49</sup> Pre-modern China and, to a lesser extent, pre-modern Korea are also good illustrations of a rule-by-law regime.<sup>50</sup>

This Article’s focus is different. Formal rules in rule-by-law regimes transparently express their authoritarian nature. In contrast, the mechanisms described in this Article obscure anti-democratic practices under the appearance of legal mechanisms that exist in regimes with favorable democratic credentials. Through the more complex, and more interesting, phenomenon of stealth authoritarianism, modern-day authoritarian practices are becoming increasingly more difficult to detect and eliminate for both domestic and global actors.

The full story, however, is more nuanced. Modern authoritarian governments have not completely abandoned traditional, more transparent mechanisms of authoritarian control. Even in the case studies I discuss in the next Part, stealth authoritarian mechanisms are sometimes complemented by more transparently authoritarian strategies of control. Later in the Article, I analyze, drawing on rational-choice theory, why political leaders may adopt stealth authoritarian practices, how they are able to do so, and which types of regimes are more likely to benefit from the adoption of stealth authoritarian practices. But first, I discuss the mechanisms of stealth authoritarianism.

### III. MECHANISMS OF STEALTH AUTHORITARIANISM

In this Part, I analyze the primary mechanisms of stealth authoritarianism. This is not meant to be an exhaustive list of all such practices; rather, I focus on the most prominent examples. Part III.A analyzes the use of judicial review to consolidate power. Part III.B discusses the use of libel lawsuits against dissidents to create a culture of self-censorship. Part III.C studies the adoption of electoral laws, such as voter identification laws,

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45. *See id.* at 31.

46. *See* Silverstein, *supra* note 12, at 74 (“The rule of law may be a necessary precondition for liberal democracy, but liberal democracy is not necessarily the product of the rule of law.”).

47. *See* David S. Law & Mila Versteeg, *Constitutional Variation Among Strains of Authoritarianism*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES, *supra* note 19, at 165, 165.

48. BASIC REGULATION ON GOVERNANCE [CONSTITUTION] Mar. 1, 1992, art. 39 (Saudi Arabia).

49. KONSTITUTSIJA SSSR (1918) [KONST. SSSR] [USSR CONSTITUTION] art. 23.

50. *See generally* Ginsburg, *supra* note 44.

electoral barriers to entry, and campaign finance laws, to disenfranchise the opposition and raise the costs of unseating the incumbents. Part III.D analyzes the use of non-political crimes, such as laws criminalizing tax evasion or embezzlement, to prosecute political dissidents. Part III.E explains the use of internationally-backed surveillance laws and institutions to blackmail or discredit political dissidents. Part III.F discusses the enactment of democratic reforms and use of rule-of-law rhetoric to shape perceptions and deflect attention from anti-democratic practices. Each Subpart first explains the applicable theory and then illustrates the theory through case studies.

#### A. JUDICIAL REVIEW

Judicial review is ordinarily assumed to be a check on the political branches of government. In this Subpart, I discuss three ways in which judicial review may function as a tool of stealth authoritarianism. Specifically, I analyze how judicial review may serve as a mechanism for consolidating power, bolstering the democratic credentials of the incumbent regime, and allowing the incumbents to avoid political accountability for controversial policies.

##### 1. Consolidating Power

Tom Ginsburg and Ran Hirschl have set forth separate theories on why political elites may choose to create and empower autonomous courts. According to Professor Ginsburg's "insurance model" of judicial review, if politicians drafting a new constitution "foresee themselves losing [power] in postconstitutional elections, they may . . . entrench judicial review [in the constitution] as a form of political insurance."<sup>51</sup> Even if the constitutional drafters lose the elections, another avenue—judicial review—remains available to challenge legislation passed by their opponents.<sup>52</sup> Likewise, Professor Hirschl has argued that threatened political elites transfer power from political institutions to the judiciary to preserve their political hegemony and entrust their policy preferences to unelected judges who share the elites' ideology and shield the elites' policies from the vagaries of domestic politics.<sup>53</sup> Even if the political elites lose power, unelected judges continue to enforce the elites' policy preferences via judicial fiat.<sup>54</sup>

Unlike the elites in Ginsburg's and Hirschl's models who empower a judiciary because they may lose power, my focus is on elites who desire to retain power indefinitely. At first blush, the creation of an autonomous judiciary may appear inconsistent with that quest. After all, the judiciary,

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51. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 18 (2003).

52. *Id.*

53. Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1857 (2004). See generally RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

54. See Hirschl, *supra* note 53, at 1857.

empowered with judicial review, can strike down anti-democratic legislation and expand individual rights and liberties related to the democratic process, thereby leveling, at least to some extent, the unlevel electoral playing field that may be crafted by the incumbents. That account, however, underestimates the extent to which judicial institutions can be structured to generate substantive outcomes that favor regime interests. The structure of the courts, the appointments process, and the rules of access to judicial review can all be adjusted to further the interests of the incumbents.

The creation of the Turkish Constitutional Court is illustrative. The 15-member court was created following a military coup in 1960.<sup>55</sup> The military leaders structured the appointments process to the Court to ensure, to the extent possible, the appointment of justices favorable to their interests.<sup>56</sup> According to the Constitution, which was drafted under military tutelage:

Eight of the fifteen permanent members would be selected by other appellate courts (Council of State, High Court, and Court of Accounts), three by the Parliament, two by the Senate, and two by the President of the Republic. The power to select a majority of the members on the Constitutional Court was thus given to the unelected judiciary, whose members were more likely to be aligned with the military's policy preferences than were elected political actors.<sup>57</sup>

To be sure, judicial autonomy can be a double-edged sword for the incumbent regime. Judiciaries may disappoint the leaders that established them or appointed their members. Judicial institutions can turn the relative autonomy provided to them against the political elites and challenge their policies and shed light on stealth authoritarian practices. In addition, any regime attempts to penalize the judiciary for unfavorable rulings may backfire by damaging regime credibility. For example, in Pakistan, Chief Justice Muhammad Chaudhry publicly resisted General Musharraf's attempts to remove him from office in 2007, damaging Musharraf's credibility and legitimacy.<sup>58</sup> Likewise, the impeachment of Peruvian Constitutional Court judges for attempting to limit President Fujimori's third term in office sparked major protests and drew the opprobrium of the international community.<sup>59</sup>

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55. Varol, *supra* note 26, at 329.

56. *Id.*

57. *Id.* (footnote omitted).

58. Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, *supra* note 12, at 1, 14. Musharraf responded by suspending Pakistan's Constitution. *Id.*

59. YOUNGERS, *supra* note 14, at 30.

Although occasional judicial resistance remains a real possibility, consistent counter-establishment jurisprudence is unlikely.<sup>60</sup> Judges are strategic actors. They do not operate in a vacuum. The judiciary is influenced by the political environment in which it operates, and judges are unlikely to engage in a sustained resistance effort against powerful incumbents. As Professor Hirschl explains, “When contemplating highly charged political questions, constitutional courts—as a result of a combination of their members’ ideological preferences and their own astute strategic behavior—tend to adhere closely to prevalent worldviews, national meta-narratives, and the interests of influential elites when dealing with political mega-questions.”<sup>61</sup> The judiciary, whose structure may have been established or shaped by the incumbents or many of whose members may have been appointed by them, may thus turn out to be a reliable partner on questions of particular importance in protecting the political status quo.<sup>62</sup>

For example, Vladimir Putin deployed judicial review to help consolidate his power in Russia. For the purported purpose of creating a unified political space, he authorized federal courts to nullify regional laws inconsistent with the federal constitution.<sup>63</sup> That authorization appears, at least on its surface, to be nothing more than a neutral, straightforward assertion of vertical federal supremacy and is consistent with the models in other federal states, including the United States. According to Putin, the new federal judicial authority to strike down regional laws would thus merely reemphasize “Russia’s commitment to ‘legality and the state.’”<sup>64</sup> The Russian federal courts deployed their newfound power with zeal and struck down thousands of regional laws.<sup>65</sup> The elimination of those regional laws allowed Putin to centralize and consolidate his power and reduce the vertical checks on his power by regional governments.<sup>66</sup>

Putin also enlisted support from the Russian Constitutional Court and its chairman, Valery Zorkin.<sup>67</sup> Once “[d]escribed as ‘Russia’s answer to Chief Justice John Marshall,’” Zorkin had unsuccessfully strived to preserve

60. HIRSCHL, *supra* note 53, at 210.

61. Ran Hirschl, Reply, *Constitutionalism, Judicial Review, and Progressive Change: A Rejoinder to McClain and Fleming*, 84 TEX. L. REV. 471, 481 (2005); see also HIRSCHL, *supra* note 53, at 171–72; KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 9 (2007) (“The judiciary may assert its own supremacy over constitutional interpretation, but such claims ultimately must be supported by other political actors making independent decisions about how the constitutional system should operate.”).

62. See Moustafa & Ginsburg, *supra* note 58, at 14–21 (analyzing how authoritarian regimes constrain judicial activism without violating judicial autonomy).

63. William Partlett, *Putin’s Artful Jurisprudence*, NAT’L INT., Jan./Feb. 2013, at 35, 37.

64. *Id.* at 39.

65. *Id.* at 37.

66. See *id.* at 39.

67. See *id.* at 40–41.

constitutional legality during the strife between Boris Yeltsin and the Russian Parliament.<sup>68</sup> The Zorkin court struck down as unconstitutional Yeltsin's 1993 decree disbanding the Parliament, and Zorkin himself openly criticized Yeltsin for his disregard of the rule of law.<sup>69</sup> After assuming the presidency, Putin commended the Zorkin court's decision against Yeltsin, stating that the court had legitimately fought back against "politicians who appeal to political expediency rather than the standards of law."<sup>70</sup> The current Russian Constitutional Court, chaired by Zorkin, paid back Putin's commendation in spades. Recent Constitutional Court opinions upheld pro-government legislation, such as a law that gives the President the authority to appoint regional governors, on the basis that Russia needs a strong executive amidst a fragile transition process to democracy.<sup>71</sup>

To gain their acquiescence, incumbents may also strategically reward judges with increased authorities, especially in areas of little importance to political control. For example, Zorkin's support for the Putin government has regained the court many of its former authorities.<sup>72</sup> The same errant executive power against which Zorkin rallied in the 1990s became more palatable once the same power was exercised to bolster the authorities of Zorkin and his court.<sup>73</sup>

Judicial review may also be established to maintain control over the state's often unwieldy administrative hierarchy and mitigate principal-agent problems that arise when the lower-level administrative agents fail to act in the best interests of the principal, the incumbent officeholders.<sup>74</sup> Avenues for judicial relief may permit challenges to the actions of bureaucratic subordinates,<sup>75</sup> which serve two purposes. First, judicial review of administrative actions provides a legitimizing function, especially in states where corruption or abuse of state resources may be commonplace. Judicial review provides the appearance, if not the reality, of some level of relatively neutral checks on errant administrative practices. Second, it also allows regime elites to monitor the actions of subordinate administrative agents and discipline them where necessary,<sup>76</sup> thereby mitigating the principal-agent problem.

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68. *Id.* at 40.

69. *Id.* at 40-41.

70. *Id.* at 41 (internal quotation marks omitted).

71. *Id.*

72. *Id.* at 43.

73. *Id.*

74. *See* Moustafa & Ginsburg, *supra* note 58, at 7-8.

75. *Id.* at 7.

76. *See id.* *But see* Jonathan Remy Nash & Rafael I. Pardo, Essay, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 IOWA L. REV. 331 (discussing the perceived principal-agent problem in appellate review of bankruptcy decisions and finding no empirical evidence of such a problem).

A relatively autonomous judiciary may thus be helpful in consolidating authority and retaining political power. A judiciary so empowered can safeguard the interests of the authoritarian elites even where the elites are deposed. For example, the Mubarak appointees in Egypt's courts have rendered a number of decisions in the post-Mubarak era—such as a recent decision that bans the Muslim Brotherhood—that appear to promote political configurations that existed during the Mubarak autocracy.<sup>77</sup>

## 2. Bolstering Democratic Credentials

In addition to enlisting the courts in order to consolidate control, judicial review can also be used to bolster democratic credentials at home and abroad. Judicial review portrays the constitutional framework to the world as one imbued with checks and balances on arbitrary rule,<sup>78</sup> especially where the judiciary enjoys a better reputation than the political branches as a relatively neutral, impartial body. That, in turn, serves to promote the regime's image before domestic and global audiences and allows the regime to cite independent judicial review to rebut any criticism regarding anti-democratic practices.<sup>79</sup>

For the judiciary to serve that legitimizing function, it must enjoy relative autonomy from the political branches and must, at least occasionally, act against the wishes of the incumbent regime.<sup>80</sup> Incumbents might thus tolerate, or perhaps even welcome, adverse decisions by the judiciary to maintain the veneer of checks and balances, so long as the judiciary does not pose a real threat to central areas of political control. For example, under Mubarak, the Egyptian judiciary enjoyed a large measure of judicial independence until the early 2000s.<sup>81</sup> The court enjoyed structural autonomy from the political branches and also selectively wielded the power of judicial review to expand and protect individual liberties.<sup>82</sup> The court also found electoral fraud in hundreds of elections and required judicial supervision of

77. Shadia Nasralla, *Egyptian Court Bans Muslim Brotherhood*, REUTERS (Sept. 23, 2013, 6:40 PM), <http://www.reuters.com/article/2013/09/23/us-egypt-brotherhood-idUSBRE98MoQR20130923>.

78. Moustafa & Ginsburg, *supra* note 58, at 5–6.

79. *See id.* at 6.

80. *See id.*

81. OTTAWAY, *supra* note 33, at 45.

82. NATHAN J. BROWN, CARNEGIE ENDOWMENT FOR INT'L PEACE, EGYPT'S JUDGES IN A REVOLUTIONARY AGE 3 (2012), *available at* [http://carnegieendowment.org/files/egypt\\_judiciary.pdf](http://carnegieendowment.org/files/egypt_judiciary.pdf) (noting that under Presidents Anwar Sadat and Hosni Mubarak, “[t]he [Egyptian] Supreme Court evolved into a more independent Supreme Constitutional Court that actually issued a long series of rulings quite politically inconvenient for the regime from the mid-1980s until the early 2000s, in some years striking down more laws than it upheld”). In the early 2000s, after the Chief Justice of the Supreme Court passed away, Mubarak packed the Court with his supporters. Clark B. Lombardi, *Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally 'Islamic' State*, 3 J. COMP. L. 234, 250–51 (2008).

the 2000 elections.<sup>83</sup> Remarkably, the Mubarak government complied with these decisions.<sup>84</sup> At the same time, however, it largely refrained from accepting any challenges to emergency laws or the trial of civilians in military tribunals, which were the primary tools of authoritarian control in Egypt.<sup>85</sup> Likewise, the same Zorkin court that upheld Putin's reform agenda, as discussed above, also accepted a number of constitutional challenges to criminal laws and surveillance laws that target members of the opposition.<sup>86</sup>

The legitimacy provided by autonomous courts may also be helpful in attracting foreign investment and trade.<sup>87</sup> Judicial review can provide legal assurances to foreign investors by protecting property rights and ensuring stability in the economic sphere, especially in regimes with some level of government corruption.<sup>88</sup> For that reason, the World Trade Organization ("WTO") requires judicial supervision in trade-related areas, the establishment of which can convince a skeptical international community to invest in a state, despite any anti-democratic practices.<sup>89</sup> For example, the Egyptian Constitutional Court was provided interpretative power over the constitution in part to attract foreign investment and assure international investors that the court would deter any changes to a free market economy.<sup>90</sup>

### 3. Avoiding Accountability

Judicial review can also be established to avoid accountability by delegating controversial questions to the judiciary.<sup>91</sup> By entrenching its policy preferences in a relatively autonomous judiciary, the regime can allow the judiciary to protect its interests, authorize judges to issue controversial decisions that political elites approve but cannot publicly champion, and insulate themselves from political accountability in the process.<sup>92</sup> For

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83. OTTAWAY, *supra* note 33, at 45.

84. *Id.*

85. *See id.* at 44-45 (describing the use of a state of emergency to maintain control and the transfer of sensitive cases to military tribunals).

86. Partlett, *supra* note 63, at 43.

87. *See* Moustafa & Ginsburg, *supra* note 58, at 8-9 (describing, generally, the international economic benefits that an autonomous judiciary may generate).

88. *See id.* at 8.

89. *See* Susan Ariel Aaronson & M. Rodwan Abouharb, *Unexpected Bedfellows: The GATT, the WTO and Some Democratic Rights*, 55 INT'L STUD. Q. 379, 382 (2011) (describing the WTO and its regulatory components within the rule of law).

90. TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* 76-79 (2007). To be sure, the assurances provided to foreign investors can be limited since authoritarian leaders can back away from their initial commitments and become interested in expropriation, in which case neither the constitution nor judicial review may be sufficient to restrain the regime. Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 426 (2015).

91. Moustafa & Ginsburg, *supra* note 58, at 9-10.

92. *See* HIRSCHL, *supra* note 53, at 39 ("If delegation of powers can increase credit and/or reduce blame attributed to the politician as a result of the policy decision of the delegated body,

example, in a series of controversial decisions, the Egyptian Constitutional Court overturned socialist policies to the alacrity of the ruling elite, who avoided the political backlash that would have resulted from the enactment of the contentious reforms through the political process.<sup>93</sup>

### B. LIBEL LAWSUITS

As early as 1765, John Adams wrote that “liberty cannot be preserved without a general knowledge among the people, who have a right . . . and a desire to know . . . the characters and conduct of their rulers.”<sup>94</sup> The media, non-profit organizations, think tanks, and other independent groups play a crucial role as public watchdogs in promoting government transparency by providing information and critical commentary on the people’s representatives and their policies.<sup>95</sup>

Libel laws, which exist in various forms in all democratic countries, have become a powerful legal tool for undermining the public’s ability to monitor their political leaders. Although definitions vary, libel generally refers to a written statement that defames others by injuring their reputation.<sup>96</sup> Deployed against dissidents, libel lawsuits can raise the costs of criticism by exposing the speaker to a costly libel lawsuit or a criminal libel prosecution, create a “chilling effect” on speech, and thus lead to self-censorship of critical commentary.<sup>97</sup> A culture of self-censorship can undermine the public’s ability to observe the incumbent politicians’ behavior, obtain critical inquiry regarding the incumbents’ actions and inactions, and mitigate the

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such delegation can be beneficial to the politician.”); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 43 (1993) (noting that the dominant party “pray[s] that the electorate will blame the judiciary for making controversial policy choices”).

93. MOUSTAFA, *supra* note 90, at 6–9.

94. See JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW (1765), reprinted in 3 *THE WORKS OF JOHN ADAMS* 447, 456 (Charles C. Little & James Brown eds., 1851).

95. TIMOTHY BESLEY, *PRINCIPLED AGENTS?: THE POLITICAL ECONOMY OF GOOD GOVERNMENT* 37 (2006).

96. See, e.g., *Cummins v. Suntrust Capital Mkts., Inc.*, 649 F. Supp. 2d 224, 238 (S.D.N.Y. 2009).

97. *Dyuldin v. Russia*, App. No. 25968/02 ¶ 43 (Eur. Ct. H.R. July 31, 2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82038>. As the European Court of Human Rights has explained:

If all State officials were allowed to sue in defamation in connection with any statement critical of administration of State affairs . . . journalists would be inundated with lawsuits. Not only would that result in an excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation, it would also inevitably have a chilling effect on the press in the performance of its task of purveyor of information and public watchdog.

*Id.*

informational asymmetry between the regime and the citizenry.<sup>98</sup> That, in turn, curtails the public's ability to effectively reward or punish incumbent behavior, thereby tilting the electoral field in favor of the incumbents<sup>99</sup> and exacerbating the principal-agent problem, which refers to the failure of the agents (the politicians) to follow the best interests of the principals (the citizens). Political debate is at the very core of a democratic society,<sup>100</sup> and the excessive use of libel lawsuits against political dissidents can stifle political speech necessary to the healthy functioning of the democratic marketplace. Even where the libel lawsuit does not succeed, the costs of a protracted libel litigation can intimidate all but the most well-funded opponents and deter critical commentary.

During the Civil Rights Movement in the United States, for example, several Southern officials used libel lawsuits to silence critics and curb media coverage of the civil rights struggle.<sup>101</sup> The absence of national media scrutiny would have allowed segregationists to crack down on civil rights activism with impunity.<sup>102</sup> For instance, by 1964, Southern officials had filed numerous libel actions seeking a cumulative \$388 million in damages from various media outlets and civil rights leaders.<sup>103</sup> The Supreme Court's famous First Amendment decision in *New York Times Co. v. Sullivan* itself was a libel lawsuit filed by Police Commissioner Lester Sullivan in Montgomery, Alabama, against the *New York Times*, which had published an advertisement with charges of police brutality against civil rights activists.<sup>104</sup> *Sullivan* and its companion cases sought a total of \$5.6 million in damages, which "threatened the financial solvency of the *Times*."<sup>105</sup> Libel lawsuits also intimidated other publications, which could dispatch a reporter to cover civil rights

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98. Cf. BESLEY, *supra* note 95, at 37, 99; John Ferejohn, *Incumbent Performance and Electoral Control*, 50 PUB. CHOICE 5, 10 (1986) ("With perfect information the voter is able to extract most of the rents in the transaction. . . . Intuitively, the greater the informational advantage that officials hold, the greater their ability to earn rents from office-holding."); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 767 (1984) (noting that informational asymmetry impairs the less informed group's ability to effectively oversee and control the more informed group's behavior).

99. Gilbert & Mohseni, *supra* note 8, at 285 ("[T]hose regimes that . . . constrain the possible avenues of meaningful citizen participation in social, economic, and political life . . . have unfair competition.").

100. See, e.g., *Roth v. United States*, 354 U.S. 476, 484 (1957) (noting that political speech is at the heart of the First Amendment); *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 11, 26 (1986) (noting that "freedom of expression . . . constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment").

101. See generally Aimee Edmondson, *In Sullivan's Shadow: The Use and Abuse of Libel Law Arising from the Civil Rights Movement, 1960-89*, 37 JOURNALISM HIST. 27 (2011).

102. *Id.* at 28.

103. *Id.*

104. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

105. Edmondson, *supra* note 101, at 28.

demonstrations in the South only under the looming threat of a costly lawsuit.<sup>106</sup> The U.S. Supreme Court's decision in *Sullivan* created a heightened threshold for libel lawsuits by public figures and required them to establish actual malice (a knowing or reckless disregard of the truth),<sup>107</sup> curbing what might have been an onslaught of libel suits against press coverage of the civil rights movement.<sup>108</sup>

In many cases, the use of libel laws to silence dissent is less costly than overt repression. Oppression of dissidents through direct harassment or violence admittedly is more efficient than a protracted libel lawsuit through the judicial system, which may produce uncertain outcomes. But the overt oppression of dissidents through non-legal means can also damage the credibility and the legitimacy of the government at home and abroad. A government's response to free expression with overt repression may serve to galvanize activists against the government, strengthen their resolve, and allow them to leverage the repression to obtain domestic and global resonance for their movement.<sup>109</sup> In Singapore, for example, banning a publication typically increases its luster and provides grounds for attacking the incumbents for restricting free speech.<sup>110</sup> Likewise, in Turkey, the government's pre-publication seizure of a book titled *The Imam's Army*—which described the infiltration of the Turkish police force by members of an Islamist movement—had the counterproductive effect of drawing more attention to it.<sup>111</sup> The text of the book was posted online and was downloaded by more than 100,000 readers in one day, many of whom may not have read the book without the publicity generated by its seizure.<sup>112</sup>

In contrast, the use of libel lawsuits is less likely to impose the same costs on the regime as overt repression. To be sure, selective use of libel laws towards dissidents, especially prominent journalists, can also grab the attention of both domestic and global audiences. Nevertheless, where the

106. *Id.*

107. *Sullivan*, 376 U.S. at 279–80.

108. Edmondson, *supra* note 101, at 27–28; *see also* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 153–63 (1991) (analyzing the impact of the *Sullivan* decision on constitutional law).

109. *See* Lynette J. Chua, *Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore*, 46 LAW & SOC'Y REV. 713, 719 (2012); *cf.* ERICA CHENOWETH & MARIA J. STEPHAN, WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT 50 (2011) (“Backfiring creates a situation in which the resistance leverages the miscalculations of the regime to its own advantage, as domestic and international actors that support the regime shift their support to the opposition because of specific actions taken by the regime.”).

110. Silverstein, *supra* note 12, at 88.

111. Jürgen Gottschlich, *'The Imam's Army': Arrested Journalist's Book Claims Turkish Police Infiltrated by Islamic Movement*, SPIEGEL ONLINE INT'L (Apr. 6, 2011, 7:03 PM), <http://www.spiegel.de/international/world/the-imam-s-army-arrested-journalist-s-book-claims-turkish-police-infiltrated-by-islamic-movement-a-755508.html>.

112. *See id.*

prosecution of the libel lawsuit adheres to existing laws—as it often does—its use portrays the curtailment of dissent as an application of the rule of law. That, in turn, makes it more difficult to differentiate between legitimate application and abuse. In addition, any opprobrium directed at the regime can also be mitigated by the prosecution of libel cases through a relatively autonomous domestic judiciary, as well as review of libel judgments by a supranational court, such as the European Court of Human Rights, for conformity with international norms.

The use of civil libel lawsuits against government critics has been popular in modern-day Russia. Although there is no conclusive data on the number of defamation lawsuits filed each year, some reports indicate that between 5000 and 10,000 defamation cases are filed in Russian courts annually.<sup>113</sup> The Mass Media Defence Centre estimates that approximately 60% of all defamation cases are filed against journalists.<sup>114</sup>

In addition to civil lawsuits, criminal charges are also often brought against Russian journalists and media companies. After Vladimir Putin returned to Russia's presidency in May 2012, he "reintroduced criminal liability for libel," which had been decriminalized by President Dmitry Medvedev in November 2011.<sup>115</sup> Notably, the bill was supported by the Moscow-based Russian Union of Journalists.<sup>116</sup> The Union Chairman explained that he is "categorically against libelous and ordered articles" and those who write and publish them "must be held responsible."<sup>117</sup> The law also permits the reopening of libel prosecutions that "were suspended or scrapped" during Medvedev's term.<sup>118</sup> Since 2004, Russian journalists convicted of defamation have filed 36 claims before the European Court of Human Rights for violations of Article 10 (freedom of expression) of the European Convention on Human Rights.<sup>119</sup> Russian authorities accept the jurisdiction of the Court, albeit grudgingly, and pay any compensation that

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113. ARTICLE 19, *THE COST OF REPUTATION: DEFAMATION LAW AND PRACTICE IN RUSSIA* 27–28 (2007), available at <http://www.article19.org/data/files/pdfs/publications/russia-defamation-rpt.pdf>.

114. *Id.* at 28.

115. See Partlett, *supra* note 63, at 43.

116. Elena Milashina, *Criminalization of Speech a Serious Setback for Russia*, COMMITTEE TO PROTECT JOURNALISTS (Aug. 23, 2012, 5:04 PM), <http://cpj.org/blog/2012/08/criminalization-of-defamation-a-serious-setback-fo.php>.

117. *Id.*

118. *Id.*

119. *Id.*

may be awarded to the complainants.<sup>120</sup> Yet, the Court has been unable to prevent the onslaught of defamation lawsuits, which remain prevalent.<sup>121</sup>

Likewise, Turkey has recently experienced an upsurge of libel lawsuits against government critics. During his term as Prime Minister, Recep Tayyip Erdoğan

su[ed] perhaps hundreds of private individuals for insulting him . . . [including] a student theater troupe that does skits wearing long black hippie wigs; unemployed siblings who posted a song about Mr. Erdoğan on the Internet; and a British teacher-cum-anti-Iraq war activist-cum-fortune teller, who made a collage showing Mr. Erdoğan's head on a dog.<sup>122</sup>

In July 2013, prominent journalist Ahmet Altan was fined 2800 euros for insulting Erdoğan in an article.<sup>123</sup> In another case, Erdoğan sued columnist Mahir Zeynalov for his Twitter posts about a corruption investigation that targeted several high-ranking government officials in Turkey in December 2013.<sup>124</sup> In May 2014, another prominent journalist was sued for waging a “psychological campaign” to defame Erdoğan on Twitter.<sup>125</sup>

Turkey has also deployed other laws against journalists, including ones that prohibit “breaching the confidentiality of an investigation’ and ‘influencing a fair trial’ through news coverage.”<sup>126</sup> Many of these laws were carefully constructed to comport with the free speech provisions in Article 10 of the European Convention on Human Rights, which permits limitations on free speech “for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”<sup>127</sup> In July 2012,

120. IAN JEFFRIES, *POLITICAL DEVELOPMENTS IN CONTEMPORARY RUSSIA* 557 (2011) (“We consider some rulings of the European court to be politicized . . . but despite the fact that we do not agree with certain rulings of the court in principle, we do comply with them.” (alteration in original) (quoting Sergei Lavrov, Russian Foreign Minister)).

121. Iva Savic, *The Russians and the Courts*, N.Y. TIMES (Aug. 10, 2007), <http://www.nytimes.com/2007/08/10/opinion/10iht-edsavic.1.7073484.html?> (noting that “Russia makes little apparent effort to prevent further violations” of the European Convention on Human Rights).

122. Marc Champion, *Call the Prime Minister a Turkey, Get Sued*, WALL ST. J. (June 7, 2011), <http://www.wsj.com/articles/SB10001424052702304563104576357411896226774>.

123. Ekin Karaca, *Journalist Ahmet Altan Receives 11 Months of Prison*, BIANET (July 18, 2013, 5:49 PM), <http://bianet.org/english/freedom-of-expression/148576-journalist-ahmet-altan-receives-11-months-of-prison>.

124. Tim Arango, *In Scandal, Turkey's Leaders May Be Losing Their Tight Grip on News Media*, N.Y. TIMES (Jan. 11, 2014), <http://www.nytimes.com/2014/01/12/world/europe/in-scandal-turkeys-leaders-may-be-losing-their-tight-grip-on-news-media.html>.

125. *Erdoğan Sues Journalist for Retweeting Critical Posts*, TODAY'S ZAMAN (May 13, 2014, 10:29 PM), <http://www.todayszaman.com/news-347728-erdogan-sues-journalist-for-retweeting-critical-posts.html>.

126. COMM. TO PROTECT JOURNALISTS, *TURKEY'S PRESS FREEDOM CRISIS* 27 (2012), available at <http://cpj.org/reports/Turkey2012.English.pdf>.

127. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10.2, Nov. 4, 1950, 213 U.N.T.S. 221.

in response to European pressure, the Turkish government made largely cosmetic changes to these laws but retains an extensive arsenal of libel laws to use as sticks against criticism and dissent.<sup>128</sup> That arsenal, and its effects on media coverage, were on full display during the widespread protests against the incumbent government in summer 2013. On June 7, 2013, at the height of the protests, six popular mainstream newspapers published identical headlines, all trumpeting Erdoğan's commitment to democracy.<sup>129</sup>

In Singapore, the incumbent government also tends to respond to critical commentary "instantly and with enormous litigation efforts."<sup>130</sup> These lawsuits have been successful in bringing several prominent publications to heel.<sup>131</sup> For example, to prevent an onslaught of libel lawsuits, Dow Jones & Company apologized for several articles published in the *Asian Wall Street Journal* in 1985, 1986, and 1989 and withdrew articles in *Far Eastern Economic Review*, another Dow-Jones-owned publication.<sup>132</sup> Likewise, the *International Herald Tribune*, owned by the *New York Times* and *Washington Post*, issued apologies for published articles, and libel lawsuits against *The Economist* also produced withdrawals, apologies, as well as significant libel judgments in 1993, 2004, and 2005.<sup>133</sup> Libel lawsuits in Singapore are particularly effective tools of stealth authoritarianism since Singapore's electoral rules prohibit people with undischarged bankruptcies from assuming public office.<sup>134</sup> For example, between 1971 and 1993, 11 opposition leaders declared bankruptcy after being sued, becoming ineligible for public office.<sup>135</sup>

Examples from other nations abound. In Malaysia, Prime Minister Mahathir Mohamad launched a "suing craze," using defamation suits to silence dissidents.<sup>136</sup> Likewise, the Cameroon government prosecuted 50 journalists for libel in the late 1990s and fined several newspapers out of business.<sup>137</sup> In Croatia, the government launched 230 libel suits in 1997 against independent newspapers.<sup>138</sup> In some nations—such as Belarus, Cambodia, and Russia—the repeated use of libel lawsuits led to the closure of many media outlets.<sup>139</sup> In other cases—such as Malaysia, Ukraine, and

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128. COMM. TO PROTECT JOURNALISTS, *supra* note 126.

129. Sibel Utku Bila, *Young Turks Use 'Disproportionate Wit' to Shake Up Erdogan*, AL-MONITOR (June 9, 2013), <http://www.al-monitor.com/pulse/originals/2013/06/turkey-protests-humor-resistance.html>.

130. Silverstein, *supra* note 12, at 90.

131. *Id.* at 90–91.

132. *Id.* at 91.

133. *Id.*

134. See Tushnet, *supra* note 90, at 401–02.

135. Li-ann Thio, *Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L.J. 1, 19–20 (2002).

136. Greg Felker, *Malaysia in 1999: Mahathir's Pyrrhic Deliverance*, 40 ASIAN SURV. 49, 51 (2000).

137. LEVITSKY & WAY, *supra* note 6, at 9.

138. *Id.*

139. *Id.*

Turkey—the threat of libel lawsuits caused widespread self-censorship,<sup>140</sup> which in turn undermined the public’s ability to monitor and sanction their leaders.

To be sure, the libel laws that exist in the above legal regimes are not verbatim replicas of their democratic counterparts. The U.S. Supreme Court, for example, imposes heightened proof standards in defamation lawsuits on public figures, such as prominent politicians, who must show that the defamatory statement was published with actual malice.<sup>141</sup> In contrast, in Singapore, both public and private figures are subject to the same evidentiary requirements.<sup>142</sup> Singapore’s approach does not represent an extreme outlier, however, since a number of legal regimes with favorable democratic credentials have also rejected a heightened evidentiary standard for public figures in defamation cases.<sup>143</sup> For example, the High Court of Australia places the burden, not on the public official, but on the speaker to prove that the published information was true, it was not published recklessly, and the decision to publish it was justifiable.<sup>144</sup> The Australian approach has been influential in a number of other jurisdictions, including South Africa.<sup>145</sup> Singapore’s electoral rules, which ban bankrupt individuals from running for public office, are also not uncommon.<sup>146</sup> As Mark Tushnet observes, with the possible exception of a rule that imposes higher damages for libel when the target is a public official, the regulations that Singapore imposes on freedom of expression have counterparts in nations generally considered constitutionalist.<sup>147</sup>

Another variation in libel laws concerns their criminal nature. Russia, for example, has both criminal and civil laws against defamation. Defamation is not criminalized in many democratic regimes and various international organizations have called for the abolition of criminal defamation.<sup>148</sup> There are, however, established democracies with criminal defamation laws. As of

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140. *Id.*

141. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that public officials must prove that the defamatory statement “was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”). The European Court of Human Rights has adopted a similar approach. *See Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 11, 26 (1986) (“The limits of acceptable criticism are . . . wider as regards a politician as such than as regards a private individual.”).

142. Silverstein, *supra* note 12, at 89–90.

143. Tushnet, *supra* note 90, at 458 (noting that although Singapore’s libel laws are “old fashioned,” they seem to be “within the bounds of liberal constitutionalism”).

144. *See* Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, 13 HARV. HUM. RTS. J. 263, 276–77 (2000).

145. *Id.* at 278 (citing *Nat’l Media Ltd. & Others v. Bogoshi* 1998 (4) SA 1196 (CC) at 1210 (S. Afr.)).

146. Tushnet, *supra* note 90, at 402 n.45.

147. *Id.* at 409.

148. Docherty, *supra* note 144, at 272.

2005, 17 states and two territories in the United States had criminal libel statutes.<sup>149</sup> Likewise, Italy and Canada criminalize defamation<sup>150</sup> and the United Kingdom did so until November 2009.<sup>151</sup> The European Court of Human Rights has also permitted member states to adopt criminal laws against defamation.<sup>152</sup> Although a criminal prosecution carries a greater social stigma, as well as the possibility of imprisonment, criminal convictions also typically require a higher standard of proof and juries can award, and have awarded, damages in civil lawsuits that significantly exceed the maximum criminal fines for defamation.<sup>153</sup>

### C. ELECTORAL LAWS

A particularly fertile ground for stealth authoritarianism is the structuring of electoral laws. As Richard Pildes explains, “democratic processes must be structured through law, but those in control of designing those laws are themselves self-interested political actors.”<sup>154</sup> Since these laws provide the basic rules of the democratic game, they are ripe for manipulation by self-interested political leaders with a mind to insulate themselves from meaningful democratic challenges. Electoral laws regulate the conditions under which voting will occur, the qualifications for appearing on the ballot and obtaining legislative representation, the method for aggregating individual votes, and a host of other decisions with significant

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149. ORG. FOR SEC. & CO-OPERATION IN EUROPE, LIBEL AND INSULT LAWS: A MATRIX ON WHERE WE STAND AND WHAT WE WOULD LIKE TO ACHIEVE 171 (2005), available at <http://www.osce.org/fom/41958?download=true>. Those states and territories include Colorado (COLO. REV. STAT. § 18-13-105 (repealed 2012)), Florida (FLA. STAT. §§ 836.01–.11 (2012)), Idaho (IDAHO CODE ANN. §§ 18-4801 to -4809 (2014)), Kansas (KAN. STAT. ANN. § 21-4004 (repealed 2011)), Louisiana (LA. REV. STAT. ANN. § 14:47 (2014)), Michigan (MICH. COMP. LAWS § 750.370 (2014)), Minnesota (MINN. STAT. § 609.765 (2014)), Montana (MONT. CODE ANN. § 45-8-212 (2014)), New Hampshire (N.H. REV. STAT. ANN. § 644:11 (2014)), New Mexico (N.M. STAT. ANN. § 30-11-1 (2014)), North Carolina (N.C. GEN. STAT. § 14-47 (2014)), North Dakota (N.D. CENT. CODE § 12.1-15-01 (2013)), Oklahoma (OKLA. STAT. tit. 21, §§ 771–781 (2014)), Utah (UTAH CODE ANN. § 76-9-404 (2014)), Virginia (VA. CODE ANN. § 18.2-417 (2014)), Washington (WASH. REV. CODE § 9.58.010 (repealed 2009)), Wisconsin (WIS. STAT. § 942.01 (2014)), Puerto Rico (P.R. LAWS ANN., tit. 33, §§ 4101–4104 (repealed 2005)), and the Virgin Islands (V.I. CODE ANN. tit. 14, § 1172 (2014)).

150. See ORG. FOR SEC. & CO-OPERATION IN EUROPE, *supra* note 149, at 78 (Italy); *id.* at 39 (Canada).

151. Press Release, Article 19, United Kingdom: Defamation Decriminalised (Nov. 13, 2009), available at [www.article19.org/data/files/pdfs/press/united-kingdom-defamation-decriminalised.pdf](http://www.article19.org/data/files/pdfs/press/united-kingdom-defamation-decriminalised.pdf).

152. See *Castells v. Spain*, 14 Eur. Ct. H.R. (ser. A) 445, 477 (1992) (Frowein & Basil, dissenting) (“[I]t remains open to the competent State authorities to adopt [laws], in their capacity as guarantors of public order, . . . even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations.” (emphasis added)).

153. Docherty, *supra* note 144, at 272; see also *City of Chicago v. Tribune Co.*, 139 N.E. 86, 90 (1923) (“A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions.”).

154. Pildes, *supra* note 22, at 126.

consequences.<sup>155</sup> These laws can be reconfigured for the seemingly legitimate and neutral purpose of eliminating electoral fraud or promoting political stability in order to raise the costs of unseating the incumbents.<sup>156</sup>

To be sure, the prevention of fraud and the protection of political stability are important state interests. Electoral fraud can itself lead to the extra-legal entrenchment of power, and political instability can create power vacuums, ushering in extra-legal changes in government authority, such as a military coup. Some level of regulation is thus necessary for the electoral system to function with integrity. But magnanimous-sounding interests like fairness and stability can also mask more insidious and anti-democratic purposes. Although many electoral regulations—including well-worn methods like gerrymandering of election districts—provide fertile grounds for stealth authoritarianism,<sup>157</sup> this Subpart discusses three less-transparent sets of electoral laws that are particularly prone to abuse: (1) voter registration laws; (2) electoral barriers to entry; and (3) campaign finance laws.

### 1. Voter Registration Laws

Laws that regulate voter registration, which exist in virtually all democratic nations to ensure electoral fairness, afford the opportunity to disenfranchise portions of the population.<sup>158</sup> For example, an electoral law adopted in Zimbabwe by President Robert Mugabe required urban residents, many of whom were strongly opposed to Mugabe's rule, to show "proof of residency . . . to register for the 2002 presidential elections."<sup>159</sup> That law had the effect of disenfranchising thousands who lived with friends or family or did not pay utility bills—a common form of proof of residency—because they did not have electricity or running water.<sup>160</sup>

Voter registration processes can also place prohibitive obstacles to voting by those in rural areas located far from official registration sites.<sup>161</sup> In some regimes, voters living in rural, often neglected, areas of the country are more dissatisfied with the incumbent government.<sup>162</sup> That dissatisfaction makes them a preferred target for disenfranchisement through stringent registration processes that might require rural voters to make multiple trips

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155. *See id.*

156. OTTAWAY, *supra* note 33, at 141.

157. *See* Pildes, *supra* note 22, at 126 (noting that in the southern United States, for much of this century, "authoritarian control of politics was accomplished through techniques like the gerrymandering of election districts").

158. OTTAWAY, *supra* note 33, at 141.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

to distant registration sites to register, pick up their registration cards, and then vote.<sup>163</sup>

Voter registration laws can also be deployed to discourage or promote voting by the diaspora.<sup>164</sup> Senegal, for example, establishes polling stations in major American and French cities to allow its diaspora to participate in elections because the Senegalese diaspora tend to identify with the incumbents.<sup>165</sup> In contrast, President Hugo Chavez hampered the voting ability of dissident Venezuelan citizens residing in Miami who were unlikely to support him.<sup>166</sup> Likewise, refugees, who are more likely to be dissatisfied with the incumbent government, can also be excluded from voting on the facially neutral basis that they reside outside the country.<sup>167</sup>

Voter identification laws, which require voters to show proof of identification to combat voter fraud, are also prone to abuse.<sup>168</sup> These laws exist in democratic nations, such as the United States, Germany, and Canada, and are often adopted for the purpose of preventing electoral fraud. But they can also be used to exclude opposition voters from electoral participation.<sup>169</sup> In many African nations, for example, voter identification laws have been used to disenfranchise ethnic minorities frequently denied formal identification or excluded as citizens of other nations.<sup>170</sup> The adoption of voter identification laws in the United States has also given rise to concerns about disenfranchisement. Democrats criticize these laws on the basis that they disenfranchise the poor, who are more likely to support the Democratic Party.<sup>171</sup> Republicans, in contrast, argue that the laws are necessary to prevent voter fraud.<sup>172</sup>

## 2. Electoral Barriers to Entry

Electoral barriers to entry refer to those laws that set restrictions on the ability of individuals and political parties to compete in elections and obtain legislative representation. These barriers are often enacted to prevent voter confusion and protect political stability. Yet, they can also exclude new and emerging political parties and candidates, protect the incumbents, and entrench the political status quo.

Electoral thresholds are a good example of entry barriers. They refer to the percentage of votes that a political party must attain in national elections

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163. *Id.*

164. *Id.*

165. *Id.* at 142.

166. *Id.*

167. *See id.*

168. *Id.* at 141.

169. *Id.*

170. *Id.*

171. Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 19–20 (2007).

172. *Id.* at 19.

in order to obtain parliamentary representation.<sup>173</sup> Electoral thresholds exist in many democratic nations that have adopted an electoral system of proportional representation, including Austria (4%), the Czech Republic (5%), Germany (5%), and Greece (3%).<sup>174</sup> They are often introduced in the name of promoting stability in a fractious political marketplace.<sup>175</sup> Too much political competition and too many small political parties can lead to the formation of weak and unstable coalition governments and foment legislative deadlocks and political instability.<sup>176</sup>

Although these are important purposes, high electoral thresholds can also curb political competition and unreasonably tilt the electoral playing field towards the incumbents.<sup>177</sup> High electoral thresholds skew parliamentary representation because the seats awarded to the parties that clear the threshold tend to be significantly disproportionate to the number of votes they receive. Electoral thresholds may also set prohibitively high entry barriers for new or emerging political parties. These political parties must raise funds, organize, expand, and obtain national visibility to become a viable alternative to incumbents. Often, that is an incremental process. An emerging political party may be unable to clear a high electoral threshold in the first elections in which it participates. That, in turn, deprives the party of national visibility that parliamentary representation brings and places significant impediments

173. See Sinan Alkin, Note, *Underrepresentative Democracy: Why Turkey Should Abandon Europe's Highest Electoral Threshold*, 10 WASH. U. GLOBAL STUD. L. REV. 347, 351–52 (2011) (describing Turkey's 10% electoral threshold).

174. Manuel Álvarez-Rivera, *Parliamentary Elections in the Czech Republic—Elections to the Chamber of Deputies*, ELECTION RESOURCES ON THE INTERNET (last updated May 25, 2014), <http://www.electionresources.org/cz/>; *European Election Database: Austria*, NORWEGIAN SOC. SCI. DATA SERVICES [http://www.nsd.uib.no/european\\_election\\_database/country/austria/parliamentary\\_elections.html](http://www.nsd.uib.no/european_election_database/country/austria/parliamentary_elections.html) (last visited Mar. 23, 2015); *European Election Database: Germany*, NORWEGIAN SOC. SCI. DATA SERVICES, [http://www.nsd.uib.no/european\\_election\\_database/country/germany/european\\_parliament\\_elections.html](http://www.nsd.uib.no/european_election_database/country/germany/european_parliament_elections.html) (last visited Mar. 23, 2015); *European Election Database: Greece*, NORWEGIAN SOC. SCI. DATA SERVICES, [http://www.nsd.uib.no/european\\_election\\_database/country/greece/european\\_parliament\\_elections.html](http://www.nsd.uib.no/european_election_database/country/greece/european_parliament_elections.html) (last visited Mar. 23, 2015).

175. Cf. Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INT'L POL. SCI. REV. 297, 303 (1997) (noting that proportional representation in parliamentary elections correlates with a multiplicity of small political parties).

176. See, e.g., Seyfettin Gürsel, *Electoral Threshold Becomes a Critical Issue*, TODAY'S ZAMAN (July 29, 2013), [http://www.todayszaman.com/columnists/%20seyfettin-gursel\\_322219-electoral-threshold-becomes-a-critical-issue.html](http://www.todayszaman.com/columnists/%20seyfettin-gursel_322219-electoral-threshold-becomes-a-critical-issue.html) (“Our view with regard to the election threshold is this: In systems where there are no election thresholds, you do not find confidence and stability. Over the past decade, we have obtained stability and confidence in our country, which were possible thanks to a government structure without coalitions. We cannot ignore this. . . . We don't want to ruin the performance of our country.” (alteration in original) (quoting Recep Tayyip Erdogan, Turkish Prime Minister)); *Less Is More: Russia Reduces Electoral Threshold*, RT (Oct. 21, 2011, 8:13 PM), <http://rt.com/news/prime-time/russia-reduces-electoral-threshold-325/> (noting that the 7% threshold in Russia was adopted “to stimulate the process of enlargement and structuring of political parties”).

177. Gerrymandering, which refers to the manipulation of constituency boundaries, can serve a similar function of protecting the incumbents from electoral competition. See, e.g., Tushnet, *supra* note 90, at 458–59.

to achieving national recognition. The lack of national visibility increases the costs to a political party of raising sufficient political funding to organize and mount a political campaign capable of elevating the party above the threshold. What is more, in nations with high electoral thresholds, voters can be dissuaded from voting for emerging or smaller parties on the basis that their “vote[s] will not count.”<sup>178</sup> These high entry barriers can award systematic advantages to the incumbents and create a vicious cycle that can exclude at least some opposition parties from the political marketplace.

For example, at 10%, Turkey’s electoral threshold is the highest in the world.<sup>179</sup> To obtain representation in the Parliament, a political party must obtain at least 10% of the popular votes in the general parliamentary elections.<sup>180</sup> The electoral threshold was implemented in the early 1980s for the purpose of bolstering legislative stability following two decades of weak coalition governments.<sup>181</sup> But the threshold has also had the effect of significantly skewing parliamentary representation in Turkey.

The November 2002 parliamentary elections are illustrative. Out of the approximately 32 million votes cast, the Justice and Development Party (*Adalet ve Kalkınma Partisi*) obtained approximately 11 million votes and the Republican People’s Party (*Cumhuriyet Halk Partisi*) received approximately six million votes.<sup>182</sup> The remaining 15 million votes were cast for parties that could not clear the threshold.<sup>183</sup> Those 15 million votes were reallocated between the parties that cleared the threshold, landing the Justice and Development Party 64% of the parliamentary seats with only 34% of the popular vote.<sup>184</sup>

Although the electoral threshold in Turkey has been subject to domestic criticism, it was blessed by the European Court of Human Rights. In 2008, the Court held that the 10% electoral threshold did not violate the European Convention on Human Rights.<sup>185</sup> The Court reasoned that, so long as elections are free, are held by secret ballot, and “ensure the free expression of the opinion of the people,” member states are free to hold elections as they please.<sup>186</sup> Applying that principle, the Court held that the 10% threshold was within the margin of appreciation afforded to Turkey, which, on the Court’s

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178. Cem Toker, *Why Is Turkey Bogged Down?*, 7 *TURK. POL’Y Q.* 25, 28 (2008).

179. *Id.* at 27.

180. *Id.*

181. *See Yumak v. Turkey*, 2008 Eur. Ct. H.R. (GC) 425, 466.

182. Toker, *supra* note 178, at 27.

183. *Id.*

184. *Id.* at 28. To circumvent the high electoral threshold, smaller political parties in Turkey—most notably, the Peace and Democracy Party (*Baris ve Demokrasi Partisi*), which represents the historically disenfranchised Kurdish population in Turkey—often run candidates as independents. The independents, however, do not receive any public financing from the Treasury, which is accorded only to political parties that receive over 7% of the popular vote. *See id.*

185. *See Yumak*, 2008 Eur. Ct. H.R. at 466.

186. *Id.* at 456 (internal quotation marks omitted).

account, had implemented the threshold for the legitimate aims of decreasing legislative fragmentation and preserving a unitary state.<sup>187</sup>

During his second term as Russian President, Vladimir Putin also increased the electoral threshold from 5% to 7%.<sup>188</sup> Various commentators have argued that the threshold was increased to solidify United Russia's dominance over Russian politics.<sup>189</sup> With United Russia in control, Putin could comply with the two-term presidential limit by stepping down from the presidential office in 2008 without risking his reelection prospects when he ran for the presidential office in 2012 after a four-year term as Prime Minister.<sup>190</sup>

Egypt provides yet another illustration. Under pressure from the United States to liberalize the Egyptian political system, Hosni Mubarak modified the presidential election process in 2005.<sup>191</sup> The new system provided that candidates could be nominated only from those political parties that had been in existence for five years and had received at least 5% of the seats in each chamber of the legislature.<sup>192</sup> The only political party that met the threshold was Mubarak's party (the National Democratic Party), but, pursuant to a waiver procedure that applied only to the first elections held under the new system, other political parties were permitted to nominate a candidate.<sup>193</sup> The adoption of these new electoral procedures allowed Mubarak to preserve his political dominance while claiming to global audiences that he was liberalizing Egypt's political system.<sup>194</sup> U.S. Secretary of State Condoleezza Rice commended "the new [electoral] system as 'one step in the march towards the full democracy that the Egyptian people desire and deserve.'"<sup>195</sup>

### 3. Campaign Finance Laws

Campaign finance laws intended to curb foreign influence on the domestic political process are common in many nations. In the United States,

187. *Id.* at 464, 466.

188. See *Less Is More: Russia Reduces Electoral Threshold*, *supra* note 176. In 2011, Russia adopted a new law, to take effect in 2016, that will lower the electoral threshold to 5%. *Id.*

189. See, e.g., Joan Debardeleben, *Russia's Duma Elections and the Practice of Russian Democracy*, 63 INT'L J. 275, 281 (2008); Thomas F. Remington, *Presidential Support in the Russian State Duma*, 31 LEGIS. STUD. Q. 5, 25 (2006).

190. Bryon Moraski, *Electoral System Reform in Democracy's Grey Zone: Lessons from Putin's Russia*, 42 GOV'T & OPPOSITION 536, 549 (2007).

191. Kristen Stilt, *Constitutions in Authoritarian Regimes: The Egyptian Constitution of 1971*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES, *supra* note 19, at 111, 123–24.

192. *Id.* at 124. Under an alternative nomination procedure, candidates who were independents or candidates whose party did not have the required number of parliamentary seats could get on the ballot if they had "the support of at least 250 members from the People's Assembly, Consultative Assembly, and regional parliaments combined" and "the support of at least ten members from at least fourteen of the twenty-six regional parliaments." *Id.*

193. *Id.*

194. *Id.* at 125–26.

195. *Id.* at 126.

for example, foreign nationals have been banned from making political contributions and expenditures since 1966 with the enactment of amendments to the Foreign Agents Registration Act (“FARA”). The purpose of the amendments “was to minimize foreign intervention in U.S. elections by establishing a series of limitations on foreign nationals.”<sup>196</sup> In 1974, the prohibition was incorporated into the Federal Election Campaign Act, which now prohibits foreign nationals<sup>197</sup> from contributing, donating, or spending funds in any federal, state, or local election, whether directly or indirectly.<sup>198</sup> Foreign nationals are also prohibited from directly or indirectly participating in the decision-making process of any person, corporation, labor organization, or political organization with regard to that entity’s election-related activities, including decisions related to finances and funding.<sup>199</sup> In addition to these restrictions that apply to foreign nationals, U.S. citizens are also prohibited from soliciting campaign funds from foreign nationals and from providing “substantial assistance” to foreign nationals to spend money in domestic elections.<sup>200</sup>

Although they exist in countries with favorable democratic credentials, such as the United States, campaign finance laws intended to curb foreign influence on the domestic political process have also been deployed as a tool of stealth authoritarianism. These laws have been frequently used to sanction or evict foreign NGOs that support the domestic civil society or opposition groups. For example, in 2012, Russia enacted a “foreign agents” law that requires nongovernmental groups that receive foreign funding and engage in political activities to register as “foreign agents.”<sup>201</sup> Pursuant to that law, Russian authorities launched audits of prominent NGOs, such as Memorial, Amnesty International, Human Rights Watch, and Transparency

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196. *Foreign Nationals*, FED. ELECTION COMMISSION (July 2003), <http://www.fec.gov/pages/brochures/foreign.shtml>.

197. The term “foreign national” also includes “foreign principals,” such as governments, political parties, and corporations. 22 U.S.C. § 611(b) (2012).

198. 2 U.S.C. § 441e (2012). This provision has been interpreted fairly broadly. For example, pursuant to this provision, the Federal Election Commission “prohibited a foreign national artist from donating” volunteer services to create an original work of art “in connection with fundraising for a Senate campaign.” *Foreign Nationals*, *supra* note 196.

199. 11 C.F.R. § 110.20(h)(2)(i) (2014).

200. *See id.* § 110.20(h).

201. HUMAN RIGHTS WATCH, LAWS OF ATTRITION: CRACKDOWN ON RUSSIA’S CIVIL SOCIETY AFTER PUTIN’S RETURN TO THE PRESIDENCY 12 (2013), available at [http://www.hrw.org/sites/default/files/reports/russia0413\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/russia0413_ForUpload.pdf); Elena Milashina, *Russia Steps Up Crackdown on Rights Groups, Internet*, COMMITTEE TO PROTECT JOURNALISTS (Mar. 26, 2013, 3:40 PM), <http://cpj.org/blog/2013/03/russia-steps-up-crackdown-on-rights-groups-interne.php>; *see also* Editorial, *Russia Again Tries to Intimidate Civil Society Groups*, WASH. POST (Mar. 27, 2013), [http://articles.washingtonpost.com/2013-03-27/opinions/38067397\\_1\\_civil-society-human-rights-watch-north-caucasus](http://articles.washingtonpost.com/2013-03-27/opinions/38067397_1_civil-society-human-rights-watch-north-caucasus).

International, among others.<sup>202</sup> In condoning the audits, President Putin was careful to not admonish civil society activism.<sup>203</sup> Instead, he stated that the audits were motivated by rule-of-law concerns—to “check whether the groups’ activities conform with their declared goals and whether they are abiding by the Russian law that bans foreign funding of political activities.”<sup>204</sup> Pursuant to the same law, the Russian government evicted the U.S. Agency for International Development (“USAID”), which financed much of local civil society, on the basis that USAID was impermissibly using foreign funds to influence Russian elections.<sup>205</sup> The Egyptian government likewise brought numerous charges against dissidents for unlawfully accepting foreign funds<sup>206</sup> and instituted widespread crackdowns on NGOs for the purported purpose of preventing the use of foreign funds to influence the local political process.<sup>207</sup>

Even where foreign funding of civil society organizations is permitted, the government can impose excessive taxes on foreign grants, as in Belarus.<sup>208</sup> The pertinent regulations may also require that the foreign funding be channeled through designated banks that may refuse to release the funds to civil society groups, as in Uzbekistan.<sup>209</sup> These actions significantly raise the costs of political opposition by demobilizing civil society groups and depriving them of critical funding necessary to effectuate their purposes.

#### D. NON-POLITICAL CRIMES

Another popular stealth authoritarianism strategy is the use of non-political crimes to prosecute political dissidents. Prosecution often involves selective, though legally accurate, application of the existing criminal laws that do not overtly concern political opposition, such as tax evasion, fraud, and money laundering. The prosecutions are also often supported with sufficient evidence of guilt, which makes it more difficult to detect whether the motive for the prosecution is political. A non-political prosecution of a dissident reduces the costs associated with overt repression, which might draw domestic and international opprobrium. It also allows the regime to portray

202. Editorial, *supra* note 201; Milashina, *supra* note 201; Max Seddon, *Putin: Raids on NGOs Are to Check Foreign Funding*, ASSOCIATED PRESS (Mar. 28, 2013, 3:38 PM), <http://bigstory.ap.org/article/russia-searches-check-illegal-ngo-activity>.

203. Leah Gilbert & Payam Mohseni, *The Backlash Against Democracy Promotion in Hybrid Regimes 1* (Aug. 29, 2014) (unpublished manuscript) (on file with author).

204. Seddon, *supra* note 202 (internal quotation marks omitted).

205. Milashina, *supra* note 201.

206. OTTAWA, *supra* note 33, at 45.

207. See Hamza Hendawi, *Egypt NGO Crackdown Threatens Relations with Washington*, WORLD POST (Apr. 8, 2012, 5:12 AM), [http://www.huffingtonpost.com/2012/02/07/egypt-ngo-crackdown\\_n\\_1260780.html](http://www.huffingtonpost.com/2012/02/07/egypt-ngo-crackdown_n_1260780.html).

208. Gershman, *supra* note 2.

209. *Id.*; Carl Gershman & Michael Allen, *The Assault on Democracy Assistance*, J. DEMOCRACY, Apr. 2006, at 36, 41–42.

the prosecution to domestic and global audiences as an application of the rule of law. The legitimacy provided by a non-political prosecution increases where the conviction is blessed by a supranational arbiter, such as the European Court of Human Rights.

This strategy is not new. Beginning in the late 1950s, segregationists in the Southern United States began to use laws unrelated to race to prosecute civil rights activists, including disorderly conduct, trespass, disturbing the peace, defamation, and tax laws.<sup>210</sup> For example, Alabama prosecuted Martin Luther King, Jr., on charges of “tax evasion and perjury related to the filing of his tax forms.”<sup>211</sup> Likewise, Virginia went after the NAACP under the façade of enforcing legal ethics requirements.<sup>212</sup>

A modern illustration is the conviction of former Russian oil executive Mikhail Khodorkovsky for tax evasion and fraud. Khodorkovsky drew the ire of the Putin government by funding opposition parties and media critical of the Kremlin.<sup>213</sup> In April 2003, Khodorkovsky confirmed that he would leave the business world and enter politics himself in support of the opposition.<sup>214</sup> A few months later, in June 2003, Khodorkovsky was charged with and later convicted of tax evasion and fraud.<sup>215</sup> He was sentenced to eight years in prison.<sup>216</sup> In December 2010, Khodorkovsky and former business partner Platon Lebedev were further convicted of embezzlement for allegedly stealing 218 million tons of oil and laundering \$27 billion in proceeds between 1998 and 2003, and sentenced to an additional term of six years in prison.<sup>217</sup> Khodorkovsky’s defense attorneys argued that the prosecution was politically motivated and the resulting trial was tainted by judicial misconduct.<sup>218</sup> Yet, the Russian government largely prevailed before the European Court of Human Rights. Although the Court found that the conditions and process of Khodorkovsky’s detention violated the European Convention on Human Rights, it found insufficient evidence that the prosecutions were politically motivated.<sup>219</sup>

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210. See Christopher W. Schmidt, *New York Times v. Sullivan and the Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293, 295 (2014).

211. *Id.* at 302. A jury acquitted King of all charges. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 289 (1988).

212. NAACP v. Button, 371 U.S. 415, 423–26 (1963); see also Schmidt, *supra* note 210, at 300.

213. Partlett, *supra* note 63, at 38.

214. See Khodorkovsky v. Russia, App. Nos. 11082/06, 13772/05, 2013 Eur. Ct. H.R. 1, 8.

215. *Id.* at 8, 48–49.

216. *Id.* at 57.

217. Maureen Cosgrove, *Russia Court Finds Khodorkovsky Guilty of Embezzlement*, JURIST (Dec. 27, 2010, 10:21 AM), <http://jurist.org/paperchase/2010/12/russia-court-finds-khodorkovsky-guilty-of-embezzlement.php>.

218. *Id.*

219. Khodorkovsky v. Russia, App. No. 5829/04, 2011 Eur. Ct. H.R. 1, 65; see also Khodorkovsky, 2013 Eur. Ct. H.R. at 194–95.

The Khodorkovsky prosecution is an example of stealth authoritarianism that received global visibility. His conviction generated widespread international criticism, including from the U.S. State Department.<sup>220</sup> In December 2013, President Putin granted amnesty to Khodorkovsky after he served ten years of his prison term in a thinly veiled attempt to alleviate some of the criticism ahead of the Winter Olympics.<sup>221</sup> That amnesty, however, hardly addresses the bigger problem of stealth authoritarianism in Russia, which has many more cases that are less visible than the Khodorkovsky case.

In Turkey, tax audits and fines have become a popular tool for punishing political dissidents. Most media companies in Turkey are subsidiaries of larger corporations, which in turn allows the government to reward corporations with loyal media subsidiaries with government contracts and punish corporations with dissident media subsidiaries with tax fines.<sup>222</sup> For example, a \$2.5 billion tax fine was levied in 2009 against the largest media company, Dogan Media Group, a few months after Prime Minister Erdoğan asked the Turkish public to boycott its newspapers for publishing critical commentary.<sup>223</sup> Although the fine was reduced to approximately \$600 million, the Group was forced to downsize by selling two of the country's largest newspapers and its main television station.<sup>224</sup>

Turkey's largest company, the Koc Group, also became the subject of tax audits after a hotel owned by the Koc Group offered refuge to protestors escaping from tear and pepper gas during protests in summer 2013.<sup>225</sup> In response, Prime Minister Erdoğan accused Koc Group of aiding and abetting unlawful activities.<sup>226</sup> A few weeks thereafter, the Ministry of Finance raided the three major energy-sector companies of Koc Group to conduct financial audits.<sup>227</sup> Although the Ministry of Finance branded the audits as "routine," investors were more skeptical.<sup>228</sup> The day after the raids, all three companies

220. Press Statement, Hillary Rodham Clinton, U.S. Sec'y of State, Verdict in the Khodorkovsky-Lebedev Case (Dec. 27, 2010), *available at* <http://www.state.gov/secretary/20092013clinton/rm/2010/12/153716.htm>.

221. Isabel Gorst & Kathy Lally, *Putin Says He Will Pardon Yukos Oil Tycoon Mikhail Khodorkovsky*, WASH. POST (Dec. 19, 2013), [http://www.washingtonpost.com/world/putin-says-he-will-pardon-yukos-oil-tycoon-mikhail-khodorkovsky/2013/12/19/e48aca1c-68b6-11e3-8b5b-a77187b716a3\\_story.html](http://www.washingtonpost.com/world/putin-says-he-will-pardon-yukos-oil-tycoon-mikhail-khodorkovsky/2013/12/19/e48aca1c-68b6-11e3-8b5b-a77187b716a3_story.html).

222. Mehul Srivastava et al., *Erdogan's Media Grab Stymies Expansion by Murdoch*, TIME WARNER, BLOOMBERG (Mar. 3, 2014, 5:00 PM), <http://www.bloomberg.com/news/2014-03-03/erdogan-thwarts-murdoch-as-graft-probe-reveals-turkey-media-grab.html>.

223. Kadri Gursel, *Is Audit of Koc Companies Erdogan's Revenge for Gezi Park?*, AL-MONITOR (July 29, 2013), <http://www.al-monitor.com/pulse/originals/2013/07/koc-audit-raid-turkey-interest-rate-lobby-gezi.html>.

224. Dexter Filkins, *The Deep State*, NEW YORKER (Mar. 12, 2012), [www.newyorker.com/magazine/2012/03/12/the-deep-state](http://www.newyorker.com/magazine/2012/03/12/the-deep-state).

225. Gursel, *supra* note 223.

226. *Id.*

227. *Id.*

228. *Id.*

registered losses on the Istanbul stock market and the Koc Group is estimated to have lost approximately \$930 million in one day.<sup>229</sup> The audit could result in heavy fines and cause the Koc Group to lose its energy licenses.<sup>230</sup>

Other examples abound. In Malawi, President Bingu wa Mutharika imprisoned his opponent, ex-President Bakili Muluzi, on corruption charges.<sup>231</sup> Likewise, in Ukraine, President Leonid Kuchma launched corruption charges against Prime Minister Pavlo Lazarenko to derail Lazarenko's presidential bid.<sup>232</sup> Finally, in the United States, allegations of political bias have also been levied against the Internal Revenue Service, which has been charged with selectively targeting political opponents for increasing scrutiny under the guise of enforcing the tax laws.<sup>233</sup>

#### E. SURVEILLANCE LAWS AND INSTITUTIONS

The attacks of September 11, 2001, ushered in a new era of surveillance to combat organized crime and terrorism.<sup>234</sup> In the United States, for example, the enactment of the USA Patriot Act provided additional surveillance authorities to federal government agencies.<sup>235</sup> Many other countries followed suit pursuant to Security Council Resolution 1373, which requires states to change their domestic laws to criminalize terrorism and enact certain surveillance measures.<sup>236</sup> Because these surveillance laws are often enacted with the imprimatur of international organizations, they also enjoy a certain level of legitimacy both domestically and internationally.

Despite the protections they offer, surveillance laws and institutions can also be employed for two primary anti-democratic purposes. First, surveillance can chill the exercise of civil liberties. As Lilian Mitrou puts it, "Under pervasive surveillance, individuals are inclined to make choices that conform to mainstream expectations."<sup>237</sup> That inclination to support the status quo

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229. *Id.*

230. *Id.*

231. LEVITSKY & WAY, *supra* note 6, at 9.

232. *Id.*

233. See generally JOHN A. ANDREW III, POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON (2002); Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41 (2013).

234. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1936–37 (2013); Kim Lane Scheppele, *The Empire of Security and the Security of Empire*, 27 TEMP. INT'L & COMP. L.J. 241, 247 (2013); Clifford G. Gaddy & William Partlett, *Russia's Financial Police State*, NAT'L INT. (July 19, 2013), <http://nationalinterest.org/commentary/russias-financial-police-state-8746>.

235. Scheppele, *supra* note 234, at 258–59.

236. See S.C. Res. 1373, ¶¶ 1–2, U.N. Doc. S/RES/1373 (Sept. 28, 2001); Scheppele, *supra* note 234, at 253–54.

237. Lilian Mitrou, *The Impact of Communications Data Retention on Fundamental Rights and Democracy—The Case of the EU Data Retention Directive*, in SURVEILLANCE AND DEMOCRACY 127, 138 (Kevin D. Haggerty & Minas Samatas eds., 2010).

may impede political and intellectual diversity<sup>238</sup> and help protect and entrench the incumbent's stronghold on government power. In addition, the fear of being watched by the government may cause people to think and speak differently and foment self-censorship.<sup>239</sup>

Second, governments can use surveillance mechanisms for blackmail. Surveillance can permit the incumbents to gather information about dissidents to blackmail them into silence or discredit them by revealing sensitive, and perhaps embarrassing, secrets to the public.<sup>240</sup> In many post-communist states in Eastern Europe, for example, "secret surveillance files are routinely turned into a weapon in political struggles, seriously undermining democratic processes and freedoms."<sup>241</sup> The information gathered through surveillance can also serve as evidence to prosecute political opponents for non-political crimes.

Financial surveillance laws have been a particularly expedient tool of stealth authoritarianism. These laws are often enacted with the backing of the Financial Action Task Force ("FATF"), an intergovernmental body founded to "combat[] money laundering, terrorist financing and other related threats to the integrity of the international financial system."<sup>242</sup> The FATF serves as a policy-making body that works to generate domestic legislative and regulatory reforms in financial surveillance.<sup>243</sup> To that end, the FATF has developed a series of recommendations intended to be of "universal application" to combat financial crimes.<sup>244</sup> In addition to issuing recommendations, the FATF also "monitors the progress of its members,"<sup>245</sup> which include 34 countries and two regional organizations.<sup>246</sup> The FATF's mission expanded considerably over time and most notably following the September 11, 2001, attacks.<sup>247</sup> After September 11, the FATF specifically "urged its member states to enhance their domestic financial surveillance" by establishing "centralized

238. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . ."); Richards, *supra* note 234, at 1948.

239. Richards, *supra* note 234, at 1948–49.

240. *Id.* at 1953. The FBI's surveillance of Dr. Martin Luther King, Jr., for example, revealed "evidence of his marital infidelity." *Id.* at 1953–54.

241. Maria Los, *A Trans-Systemic Surveillance: The Legacy of Communist Surveillance in the Digital Age*, in *SURVEILLANCE AND DEMOCRACY*, *supra* note 237, at 173, 180.

242. *Who We Are*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/> (last visited Mar. 24, 2015).

243. *Id.*

244. *Id.*

245. *Id.*

246. *FATF Members and Observers*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/membersandobservers/> (last visited Mar. 24, 2015).

247. Gaddy & Partlett, *supra* note 234.

financial intelligence unit[s].”<sup>248</sup> These units, according to the FATF, should be “operationally independent and autonomous” and should “have access to the *widest possible range* of financial, administrative and law enforcement information.”<sup>249</sup>

Russia was among the nations that welcomed the FATF’s post-September 11 recommendations with alacrity. Russia had been blacklisted by the FATF after being branded a haven for money laundering and financial crimes.<sup>250</sup> To eliminate that blemish, the FATF asked Russia to comply with a number of demands, including the establishment of a financial intelligence unit.<sup>251</sup> Under Putin’s leadership, Russia then passed comprehensive legislation intended to combat money laundering to satisfy the FATF’s recommendations.<sup>252</sup> In addition, Russia created a financial intelligence unit—the Russian Financial Monitoring Service—composed of KGB veterans subject to Putin’s formal control.<sup>253</sup> The Service was accepted to the Egmont Group, an international umbrella group of financial intelligence units.<sup>254</sup> Following the adoption of these reforms, Russia became a full-fledged member of the FATF.<sup>255</sup> The Russian Financial Monitoring Service was praised by the FATF as “exemplary” and listed in 2011 as among the world’s best financial intelligence units.<sup>256</sup> With the imprimatur of the FATF and the Egmont Group, the Russian Financial Monitoring Service obtained legitimacy at home and abroad and its establishment portrayed the image of a valiant modern Russia taking a stance against its historical struggle with financial crime. On July 1, 2013, the presidency of the FATF passed to Russia.<sup>257</sup>

Under the FATF-sanctioned façade of legitimacy, however, lies an institution that bolsters Putin’s stronghold on Russian politics.<sup>258</sup> From its inception, the Russian Financial Monitoring Service served as “Putin’s personal surveillance unit,” intended to gather sensitive financial information on Putin’s opponents to blackmail or discredit them before the public or prosecute them for non-political crimes, such as tax evasion or money laundering.<sup>259</sup> Compared to direct repression of opponents, the gathering of

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248. *Id.*

249. *Id.* (internal quotation marks omitted).

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*; *About*, EDMONT GROUP FIN. INTELLIGENCE UNITS, <http://www.egmontgroup.org/about> (last visited Mar. 24, 2015).

255. Gaddy & Partlett, *supra* note 234.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* A KGB veteran at the head of the Service described his job as follows: “Our job is not to intervene. Our job is to know everything about everybody. Everyone knows that we do, and

financial information about them through the use of a FATF-backed financial intelligence unit serves as a more legitimate and credible method of stifling opposition.<sup>260</sup>

#### F. BOLSTERING DOMESTIC AND GLOBAL LEGITIMACY

This Subpart discusses two mechanisms that incumbent officeholders use to bolster their domestic and international legitimacy: (1) the provision of a space for discontent against the incumbent government and (2) the implementation of democratic reforms, coupled with the frequent use of rhetoric that invokes the rule of law, democracy, and constitutionalism. These techniques, as detailed below, primarily surface in hybrid regimes where the democratic credentials of the incumbents have been called into question. And to be sure, these strategies might also be genuine attempts by the incumbents at democratic reform. My claim here is limited: When used, the strategies described in this Subpart allow the incumbents to rebut criticisms of anti-democratic behavior, regardless of whether such strategies are genuine attempts at democratic reform or mere fig leaves for concealing anti-democratic practices.

##### 1. Space for Discontent

Unlike their historical predecessors, authoritarians or would-be authoritarians increasingly allow some space for the expression of discontent against them through opposition political parties, civil society organizations, and an independent press.<sup>261</sup> So long as the space for discontent is relatively limited and the existing civil society groups remain weak, any costs imposed on the incumbent government by its existence are likely to be outweighed by its benefits. The public display of discontent can create the appearance of a pluralistic society where the incumbent government accepts, if not welcomes, criticism of its policies. That, in turn, can create the illusion of meaningful electoral choice among competing political actors. A space for discontent also provides “a way to blow off steam” to domestic opposition groups.<sup>262</sup> The unavailability of a space, however limited, for the expression of discontent may serve to galvanize the political opposition and turn political disagreements into violent confrontations. If the expression of discontent exceeds acceptable limits, the incumbent regime can control it through the stealth authoritarian mechanisms already discussed. The incumbents, for

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they know what we can do if we see someone going too far. And that’s why they don’t go too far.” *Id.* (internal quotation marks omitted).

<sup>260.</sup> *Id.*

<sup>261.</sup> OTTAWAY, *supra* note 33, at 185.

<sup>262.</sup> Daniel Brumberg, *Liberalization Versus Democracy: Understanding Arab Political Reform* 6 (Carnegie Endowment for Int’l Peace, Working Paper No. 37, 2003), available at <http://carnegieendowment.org/files/wp37.pdf>.

example, can sue the political dissidents for violating libel laws or charge them with the violation of a non-political crime.

Azerbaijan under Heydar Aliyev was a good example of a hybrid regime with significant space for the expression of discontent. Despite the government's semi-authoritarian nature, opposition political parties continued to operate, a relatively independent press continued to publish, and civil society organizations continued to proliferate and accept foreign funds.<sup>263</sup> Azerbaijan also developed a wide array of civil society organizations, appealing international institutions that look to the existence of such organizations as indicators of a robust democracy.<sup>264</sup>

Although civil society organizations can provide some space for the expression of discontent against the incumbents, their functioning may be limited through registration and reporting regulations.<sup>265</sup> For example, a number of governments have implemented expensive and time-consuming requirements for registration of civil society groups, which are often held up by excessive delays, separate and more cumbersome requirements for international civil society groups, as well as re-registration requirements every few years.<sup>266</sup> These mechanisms, though content neutral on their surface, can significantly raise the costs to entry.<sup>267</sup> Likewise, extensive reporting requirements for already registered organizations, burdensome procedures to apply for and receive foreign funding, and provisions permitting the discretionary auditing of civil society organizations can also raise the costs of operation and impede their organizational objectives.<sup>268</sup> Examples of these barriers to entry and operation can be found in Egypt,<sup>269</sup> Turkey,<sup>270</sup> Russia,<sup>271</sup> Venezuela,<sup>272</sup> Algeria, Azerbaijan, and Ethiopia,<sup>273</sup> among other countries.

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263. OTTAWAY, *supra* note 33, at 58–59.

264. *Id.*

265. Gilbert & Mohseni, *supra* note 203, at 11.

266. Gershman, *supra* note 2.

267. Gilbert & Mohseni, *supra* note 203, at 11. An NGO leader in Russia lamented the “insane amount of details” required under a Russian law on the registration of civil society organizations. Gershman, *supra* note 2 (internal quotation marks omitted).

268. Gilbert & Mohseni, *supra* note 203, at 11.

269. STEVEN HEYDEMANN, BROOKINGS INST., UPGRADING AUTHORITARIANISM IN THE ARAB WORLD 7 (2007).

270. Gilbert & Mohseni, *supra* note 203, at 17–18.

271. *NGO Law Monitor: Russia*, INT’L CENTER FOR NOT-FOR-PROFIT L., <http://www.icnl.org/research/monitor/russia.html> (last updated Nov. 24, 2014) (“The 2006 Russian NCO [non-commercial organization] Law introduced burdensome and difficult-to-meet reporting requirements for NCOs, accompanied by severe penalties for non-compliance; new and similarly burdensome registration procedures for Russian and foreign NCOs operating in Russia; and new broad powers of the registration bodies to audit the activities of NCOs.”).

272. Gilbert & Mohseni, *supra* note 203, at 26 n.47.

273. Gershman & Allen, *supra* note 209, at 41.

Finally, incumbent politicians in many countries have established government-organized NGOs (“GONGOs”).<sup>274</sup> By creating these government-friendly organizations, incumbents project the illusion of a functioning civil society, use funds to support preferred causes, and channel funding away from independent NGOs.<sup>275</sup> GONGOs tend to focus on apolitical and non-threatening areas, such as education, sports, training, and youth development.<sup>276</sup> GONGOs have been formed in Tunisia, Egypt, Jordan, Syria, and Russia, among other countries, for these purposes.<sup>277</sup>

## 2. Democratic Reforms and Democratic Rhetoric

To imbue their regimes with the veneer of legitimacy and legality, authoritarians or would-be authoritarians frequently implement democratic reforms and employ rhetoric that invokes the rule of law, democracy, and constitutionalism. This sleight of hand can distract domestic and international audiences who often fail to detect anti-democratic measures through the fog of democracy rhetoric and reforms.

For example, Prime Minister Erdoğan’s government in Turkey instituted a widespread array of democratic reforms after assuming power in 2002. During Erdoğan’s term, ethnic and religious minorities in Turkey have obtained increased legal and constitutional protections.<sup>278</sup> Likewise, through a series of legal and constitutional measures, the Erdoğan government established civilian control over the country’s once-untouchable military that staged four coups since 1960.<sup>279</sup> The Special Security Courts, which were notorious for handing out swift and brutal punishments, were also abolished during Erdoğan’s term.<sup>280</sup> Many of these measures, however, remain largely cosmetic. For example, other courts ended up with the same sweeping powers previously held by the now-defunct Special Security Courts. And despite increased legal protections on paper, religious and ethnic minorities continue to experience disparate treatment by the government.<sup>281</sup>

Russia likewise underwent a democratic overhaul of its legal system under Putin’s rule. In his first term as President, Putin introduced ten new legal codes that create the foundation for free market economics.<sup>282</sup> Putin also

274. *Id.* at 44.

275. *Id.*

276. HEYDEMANN, *supra* note 269, at 8.

277. *Id.*; Gershman & Allen, *supra* note 209, at 44–45.

278. Hugh Pope, *Erdoğan’s Decade: Has the Justice and Development Party Changed Turkish Politics Forever?*, CAIRO REV., Apr. 2012, at 43, 44, available at <http://www.aucegypt.edu/GAPP/CairoReview/Lists/Articles/Attachments/149/CR4-Pope.pdf>.

279. *Id.* at 46.

280. *Special Security Courts Abolished*, MINISTRY EUR. UNION AFF. (June 30, 2004), <http://www.abgs.gov.tr/index.php?p=33328&l=1>.

281. *World Report 2013: Turkey*, HUM. RTS. WATCH, <http://www.hrw.org/world-report/2013/country-chapters/turkey> (last visited Mar. 24, 2015).

282. Partlett, *supra* note 63, at 36.

eliminated a number of Soviet-era criminal laws, including laws that allowed near-unlimited pretrial detention and searches without judicial authorization.<sup>283</sup> These laws were replaced with a new criminal code that expands access to jury trials, limits prosecutorial power, and reduces the time permitted for pretrial detention.<sup>284</sup> Putin also substantially increased the funding of legal institutions, raised judicial pay, and required the use of licensed lawyers in criminal trials.<sup>285</sup> On the international sphere, Putin's Russia ratified the United Nations Convention Against Corruption, joined the Financial Action Task Force, and faithfully implemented adverse decisions rendered by the European Court of Human Rights.<sup>286</sup>

Several nations across the Arab world modified their electoral laws to ease restrictions on opposition parties.<sup>287</sup> In several instances, the modifications produced real reforms. For example, during Hosni Mubarak's rule, 88 members of the Muslim Brotherhood emerged victorious in the 2005 parliamentary elections.<sup>288</sup> Likewise, in Morocco, the September 2007 elections landed the Islamist Justice and Development Party 47 seats in the Parliament.<sup>289</sup> Although these reforms drew praise from foreign officials, as Steve Heydemann puts it, the "reforms . . . have less to do with democratization than with making elections safe for authoritarianism."<sup>290</sup>

Another popular area for strategic reform is the economy. The adoption of tax, fiscal, and trade liberalization policies allows regime officials to enter into rent-seeking arrangements.<sup>291</sup> The relevant regulations often provide government officials with discretion to award exemptions from taxes or customs duties, among other types of privileged treatment, which permit incumbents to form and cement alliances with business elites and reinforce their hold on political power.<sup>292</sup> In addition to rewarding loyalists, incumbents can penalize dissidents by denying them access to economic opportunities, significantly raising the costs of political opposition.<sup>293</sup> Rather than creating political openings, economic liberalization can generate financial and political benefits for the incumbents.<sup>294</sup>

In addition to democratic reforms, rhetoric that invokes the rule of law, democracy, or constitutionalism is often used to distract audiences from anti-

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283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. HEYDEMANN, *supra* note 269, at 10.

288. *Id.*

289. *Id.*

290. *Id.* at 11.

291. *Id.* at 15.

292. *Id.*

293. *Id.*

294. *Id.* at 18.

democratic practices. Now-President Erdoğan in Turkey, for example, frequently reiterates his grand vision of creating an “advanced democracy” in Turkey.<sup>295</sup> He also rebuts criticisms levied at controversial government measures either by citing a constitutional or legal basis for the measure or invoking comparative law and pointing to a democratic country (usually in the West) that has implemented the same measure. For example, a set of constitutional amendments that packed the Turkish Constitutional Court in September 2010 were adopted as part of a “democratization” package intended to increase the involvement of the political branches in judicial appointments and bring the appointments process in line with liberal democracies, such as Germany.<sup>296</sup>

Similar rhetoric also features prominently in statements by the Putin government in Russia. In his pre-election “Millennium Manifesto,” Putin proclaimed his desire to create a powerful Russian state with an emphasis on law and what he termed “constitutional security.”<sup>297</sup> In his very first month in office, Putin delivered four major speeches on the importance of law to his governing philosophy.<sup>298</sup> To support his legal reform agenda to increase the powers of his central government, Putin frequently draws an unlikely historical parallel to the experience of the United States during the Great Depression.<sup>299</sup> According to Putin, the American experience shows that the central government plays an imperative role in negotiating a national crisis and that he will relinquish his stronghold on the central government only “after we create the necessary legal conditions and mechanisms, when all parts of a market economy work to the full extent.”<sup>300</sup>

President Viktor Orbán in Hungary likewise habitually responds to criticisms against the laws and constitutional provisions adopted by his government by citing similar laws and provisions in democratic states. For example, Orbán defended a controversial media law on the grounds that the law simply emulates those that exist in other democracies. The law authorized a newly established National Media and Communications Authority to impose fines for unbalanced or offensive coverage.<sup>301</sup> To critics who suggested that

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295. Ayla Albayrak, *Half of Turks Say Erdogan Is Becoming Authoritarian*, WALL ST. J. (June 17, 2013, 6:17 PM), <http://blogs.wsj.com/emerging europe/2013/06/17/half-of-turks-say-erdogan-is-becoming-authoritarian/>.

296. See *Turkey Backs Constitutional Changes*, BBC NEWS (Sept. 12, 2010), <http://www.bbc.com/news/world-europe-11278602>.

297. Partlett, *supra* note 63, at 39.

298. *Id.* For example, in a speech to his law school alma mater, Putin declared: “For people like me who are now engaged in the construction of a new Russian state, we know that this project must be founded on the principles that have for decades been developed within the walls of the Faculty of Law of the University of St. Petersburg.” *Id.*

299. *Id.* at 42.

300. *Id.* at 42–43.

301. Judy Dempsey, *Hungary Waves Off Criticism over Media Law*, N.Y. TIMES (Dec. 25, 2010), <http://www.nytimes.com/2010/12/26/world/europe/26hungary.html>.

the law can be misused to curb media independence, Orbán responded: “There is not a single passage in the law that does not correspond to the media law in E.U. countries.”<sup>302</sup> Orbán defended on similar terms his decisions to restructure the judicial branch, impose supermajority appointment requirements and longer terms of office to institutions packed with his loyalists,<sup>303</sup> and adopt restrictions on political advertising.<sup>304</sup>

This Part analyzed the most prominent, but non-exhaustive, mechanisms of stealth authoritarianism. The next Part returns to the theory to discuss three related questions. Because the answers to all three questions draw on rational-choice theory and strategic-choice theory, I begin with a brief exposition of these theories.

#### IV. RATIONAL CHOICE AND STEALTH AUTHORITARIANISM

Strategic-choice theory falls within the broad rubric of rational-choice theory, which posits that rational actors make choices based on an analysis of the costs and benefits of potential courses of action.<sup>305</sup> In strategic-choice theory, which is similar to game theory,<sup>306</sup> the relevant cost-benefit assessment includes an analysis of other relevant actors whose future behavior may alter that assessment.<sup>307</sup> In other words, under strategic-choice models, an actor’s ability to further its goals depends on how other actors behave.<sup>308</sup> Since actors often cannot know for certain how other relevant actors will behave, they frequently make inferences about future behavior based on available information about past behavior.<sup>309</sup>

Applying strategic-choice theory, this Part considers three related theoretical questions. Part IV.A discusses the conditions that enable stealth authoritarianism. Part IV.B analyzes why governments choose to deploy mechanisms of stealth authoritarianism, as opposed to more traditional,

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302. *Id.* (internal quotation marks omitted).

303. Scheppele, *supra* note 15, at 8.

304. Danny Hakim, *How Did Hungary’s Election Become a Circus?*, N.Y. TIMES (Mar. 1, 2014), <http://www.nytimes.com/2014/03/02/sunday-review/how-did-hungarys-election-become-a-circus.html> (“In a statement, Mr. Orban’s administration noted that many other members of the European Union also put various restrictions on political advertising, including bans or sharp limits on television ads in countries like Spain and France.”).

305. David Collier & Deborah L. Norden, *Strategic Choice Models of Political Change in Latin America*, 24 COMP. POL. 229, 229–30 (1992).

306. Game theory “uses applied mathematics to attempt to explain the strategic choices that actors make in an environment where outcomes are dependent upon decisions made by others.” Andrew Strauss, *Cutting the Gordian Knot: How and Why the United Nations Should Vest the International Court of Justice with Referral Jurisdiction*, 44 CORNELL INT’L L.J. 603, 646 n.221 (2011).

307. Collier & Norden, *supra* note 305, at 230.

308. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 488 n.33 (2011); *see also* David A. Lake & Robert Powell, *International Relations: A Strategic-Choice Approach*, in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 3, 4–6 (David A. Lake & Robert Powell eds., 1999).

309. Whytock, *supra* note 308, at 489.

transparent mechanisms of authoritarian control. Part IV.C studies which regime types are more likely to adopt stealth authoritarian practices. After analyzing these questions, Part IV.D concludes by discussing the implications of stealth authoritarianism.

#### A. IMPLEMENTING STEALTH AUTHORITARIANISM

An essential component of strategic-choice models is discretion.<sup>310</sup> H.L.A. Hart, in a newly published essay, defines discretion as a “choice to be made . . . which is not determined by principles which may be formulated beforehand.”<sup>311</sup> Discretion is embedded into many laws, even in democratic regimes.<sup>312</sup> Judges in the United States, for example, have discretion in sentencing defendants<sup>313</sup> and certain aspects of their own jurisdiction.<sup>314</sup> Police officers likewise exercise wide latitude in enforcing criminal laws<sup>315</sup> and prosecutors enjoy “extraordinary, almost unreviewable[] discretion” in charging decisions and plea bargaining.<sup>316</sup> Administrative agencies also possess significant discretion.<sup>317</sup> The discretion accorded to these institutional actors may be constrained through various formal and informal mechanisms. The fewer informal and formal restraints on discretion, the more room there is for selective enforcement of laws. Selective enforcement refers “to selection of parties against whom the law is enforced and selection of the occasions when the law is enforced.”<sup>318</sup>

The possibility of selective enforcement, in turn, fuels stealth authoritarianism. As Kenneth Davis explains in his seminal book, *Discretionary Justice: A Preliminary Inquiry*, “[w]here law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.”<sup>319</sup> As discussed above, some stealth authoritarian practices rely on selective enforcement of laws,

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310. Collier & Norden, *supra* note 305, at 4–5, 21, 23.

311. H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652, 661 (2013); *see also* KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 4 (1969) (“A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.”).

312. DAVIS, *supra* note 311, at 17 (“Every governmental and legal system in world history has involved both rules and discretion.”).

313. *Mistretta v. United States*, 488 U.S. 361, 390 (1989).

314. *See, e.g.*, David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (explaining how the principles of judicial discretion are embedded in the concept of jurisdiction).

315. Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 908 (1962).

316. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20–21 (1998).

317. *See generally* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013).

318. DAVIS, *supra* note 311, at 163.

319. *Id.* at 3.

such as libel laws or criminal laws. In criminal cases, prosecutors often have the discretion to bring charges against a suspect, and that discretion enables selective enforcement. For example, in a society where tax evasion is prevalent, prosecutors can selectively apply the criminal tax laws against political dissidents while permitting other violators to go unpunished. Likewise, in libel lawsuits, government officials have discretion as to the publications or journalists to target with litigation.

Bureaucratic subordinates often exercise discretion in the exercise of stealth authoritarian mechanisms. For example, it is often a police officer who decides whether to make an arrest and a prosecutor who decides whether to bring charges. For stealth authoritarianism to work effectively, the regime must possess sufficient mechanisms for controlling the behavior of these lower-level regime actors and mitigating the principal-agent problem, which may arise when the bureaucratic agents fail to act in the best interests of the principal, the regime leaders. In other words, a system must be in place for ensuring that the relevant legal mechanisms are enforced only against political dissidents. With sufficient tools for punishing or rewarding agents—such as by firing, reassigning, or promoting them—the regime can ensure that the agents exercise their discretion in conformity with the principal's interests. Judicial review, as discussed above, can also provide the incumbents with the opportunity to monitor and sanction the behavior of bureaucratic agents.<sup>320</sup>

In democracies, the discretion of the relevant actors tends to be more tightly constrained than in nondemocracies. In the United States, for example, sentencing guidelines constrain the discretion of judges, district policies constrain the discretion of police officers and prosecutors, and statutes restrict agency discretion. In addition to these formal mechanisms, informal mechanisms may also impose restraints. Repeated discretionary decision-making may accumulate in a set of informal norms or precedents that help inform, if not constrain, discretion.<sup>321</sup> Calculations related to self-interest, such as a desire to retain employment or political office, may also constrain the exercise of discretion. For example, a prosecutor or a police officer who selectively enforces criminal laws may be fired. Other checks on the exercise of discretion in democracies include judicial review of discretionary decision-making by a neutral arbiter and political leaders from opposition parties with an interest in revealing arbitrary or self-interested uses of discretion by the incumbents.<sup>322</sup> The abuse of discretion by public decision-makers is also more likely to be detected and sanctioned in democracies with

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320. See *supra* Part III.A.

321. See Nicola Lacey, Essay, *The Path Not Taken: H. L. A. Hart's Harvard Essay on Discretion*, 127 HARV. L. REV. 636, 644 (2013).

322. DAVIS, *supra* note 311, at 142.

an independent press and active civil society, which further constrains discretion.

In nondemocracies, there are relatively fewer formal and informal restraints on discretion. That, in turn, permits more latitude for selective enforcement of laws, which explains in part why stealth authoritarian strategies are more prevalent in hybrid or fully authoritarian regimes. In nondemocracies, due to restrictions on political opposition and public watchdogs such as the media, the informational asymmetry between the public and the incumbents tends to be greater.<sup>323</sup> That, in turn, makes detection and sanction of selective enforcement more difficult.

Discretionary decision-making in nondemocracies is also amplified by the use of vagueness in the relevant laws that serve as the foundation of stealth authoritarian practices. Vague laws are those “that have indefinite application to particular cases,” which can create indeterminacies in legal rights and obligations.<sup>324</sup> Vagueness, in turn, fuels discretion and stealth authoritarianism. For example, legislation regulating civil society organizations in Russia has been criticized as “impossibly vague.”<sup>325</sup> Similar objections have been lodged against laws in Turkey,<sup>326</sup> Hungary,<sup>327</sup> Algeria, Azerbaijan, and Ethiopia<sup>328</sup> that have been used as mechanisms of stealth authoritarianism. These laws function like the sword of Damocles, leaving relevant actors uncertain and anxious about the legality of their actions and exposing them to threats of punitive measures should they overstep poorly defined or undefined boundaries.<sup>329</sup>

Even in democracies, however, some level of vagueness is inevitable in crafting statutes of general applicability.<sup>330</sup> In drafting statutes, legislatures cannot address all of the unforeseen circumstances that can come up in their application or resolve all instances of vagueness or ambiguity that might permit discretionary decision-making.<sup>331</sup> In addition, statutes that shun all

323. Cf. Moe, *supra* note 98, at 767 (noting that informational asymmetry impairs the less informed group’s ability to effectively oversee and control the more informed group’s behavior).

324. Lawrence Solum, *Legal Theory Lexicon: Vagueness and Ambiguity*, LEGAL THEORY BLOG (Feb. 9, 2014), <http://lsolum.typepad.com/legaltheory/2014/02/legal-theory-lexicon-vagueness-and-ambiguity.html>.

325. Seddon, *supra* note 202; see also HUMAN RIGHTS WATCH, *supra* note 201, at 23.

326. Sarah Posner, *UN Rights Committee Criticizes Turkish Counterterrorism Laws*, JURIST (Nov. 2, 2012, 8:22 AM), <http://jurist.org/paperchase/2012/11/un-rights-committee-criticizes-turkish-counterterrorism-laws.php>.

327. Miklós Bánkuti et al., *Disabling the Constitution*, J. DEMOCRACY, July 2012, at 138, 140–41; *Memorandum to the European Union on Media Freedom in Hungary*, HUM. RTS. WATCH (Feb. 16, 2012), <http://www.hrw.org/news/2012/02/16/memorandum-european-union-media-freedom-hungary>.

328. Gershman & Allen, *supra* note 209, at 41.

329. HEYDEMANN, *supra* note 269, at 8.

330. DAVIS, *supra* note 311, at 18 (“We have not yet found a way to eliminate discretion with respect to arresting, prosecuting, sentencing, paroling, and pardoning without destroying crucial values we want to preserve.”).

331. *Id.* at 16.

discretion would also prevent individualized justice that tailors results according to the unique circumstances of each case.<sup>332</sup>

The prevalence of discretion across different legal regimes renders its abuse more difficult to detect. For example, where there is sufficient evidence to support a criminal conviction of a dissident for a non-political crime, it becomes more difficult to determine whether the motive for the prosecution is political, absent any direct evidence. In other words, the motive for the conviction appears more ambiguous than the transparently repressive case of a political opponent jailed without due process. It might be possible to establish a case for selective prosecution if there is a strong enforcement trend of the relevant norms only against political dissidents, but evidence of such trends are often difficult to develop. Even in the United States, where constitutional claims based on selective prosecution remain theoretically available, it is extraordinarily difficult for a defendant to prevail on such claims.<sup>333</sup>

### B. CHOOSING STEALTH AUTHORITARIANISM

Having described what makes stealth authoritarianism possible, the Article turns to a related theoretical question: Why adopt mechanisms of stealth authoritarianism over other available alternative mechanisms of authoritarian control? An incumbent can achieve her desire to retain political power through a number of different strategies, which present different costs and benefits.<sup>334</sup> Of specific concern here is the choice that incumbents face between what I would term “transparently authoritarian” and “stealth authoritarian” strategies. These are admittedly oversimplified categories, and the line of separation between transparent and stealth is not always clear, but they provide helpful frameworks for analyzing the relevant cost-benefit calculus.

Transparently authoritarian mechanisms represent the traditional strategies of authoritarianism and have been well-explored in the literature. These mechanisms include overtly defying or disregarding laws and constitutions; imposing emergency laws or martial law; silencing dissidents through harassment and violence; shutting down newspapers and television stations; banning publications; manipulating the vote count through vote buying, intimidation, and electoral fraud; disregarding constitutional term limits; packing courts and other state institutions with loyalists; establishing direct control over the media and civil society; and amending or replacing

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332. *Id.* at 15–17.

333. MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION 209 (4th ed. 2011).

334. Strategy, an essential component of strategic-choice theory, refers to “a calculus of behavior adopted to enhance the likelihood of achieving” an objective. Collier & Norden, *supra* note 305, at 4–6.

constitutions to eliminate checks and balances.<sup>335</sup> I term these strategies transparently authoritarian because these mechanisms are patently antithetical to modern democratic norms.

The second set of regime strategies, those that I call stealth authoritarian, represent more subtle mechanisms of authoritarian control. As analyzed above, they involve the use of legal, primarily sub-constitutional, mechanisms that exist in regimes with favorable democratic credentials. They may have been adopted with the express imprimatur of global actors, and they often involve legally accurate applications of the existing laws. Because these legal mechanisms exist in regimes with favorable democratic credentials, their use is imbued with a certain level of legitimacy, making it more difficult to differentiate between their abuse and legitimate application.

The choice between these two sets of practices—transparently authoritarian and stealth authoritarian—is not made in a vacuum. It is influenced by the behavior of other actors, domestic and international, and the social, economic, and political struggles that the interactions with these actors produce.<sup>336</sup> Internationally, the relevant actors include foreign countries, supranational organizations (e.g., the United Nations, the European Union, etc.), and foreign non-governmental organizations. Domestically, the relevant actors comprise, among others, political actors, the citizenry, the civil society, and the armed forces.<sup>337</sup>

In the next three Subparts, the Article explores the relevant behavior of three sets of actors: international actors, domestic actors, and the incumbent officeholders. The first two Subparts present a historical background of the international and domestic responses to the authoritarian epidemic. That background sets the stage to next describe how the behavior of relevant international and domestic actors has altered the cost-benefit calculus of incumbent politicians and the resulting metamorphosis that took place in authoritarian practices.

### 1. The United States and Other International Actors

Being a modern-day authoritarian is no easy task. In the post-Cold War era, there are significant costs associated with maintaining a transparently authoritarian regime. International crackdown on blatant authoritarian practices in the aftermath of the Cold War has led to a marked reduction in regimes that openly embrace autocracy. In the late 1980s and the early 1990s, dictatorships collapsed across post-communist Europe, Asia, and Latin America.<sup>338</sup> According to the Freedom House, the percentage of countries

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335. See *supra* notes 10–17 and accompanying text.

336. HIRSCHL, *supra* note 53, at 164–65.

337. Adam Przeworski, *Some Problems in the Study of the Transition to Democracy*, in TRANSITIONS FROM AUTHORITARIAN RULE: PROSPECTS FOR DEMOCRACY 47, 53 (Guillermo O'Donnell et al. eds., 1986).

338. LEVITSKY & WAY, *supra* note 6, at 3.

determined to be “not free” decreased from 46% in 1972 to 24% in 2012.<sup>339</sup> Authoritarian regimes that do not comply with democratic criteria may be expelled from international organizations and face significant economic and military sanctions.<sup>340</sup> Transparently authoritarian states may also lose domestic and global legitimacy, which is a form of reputational cost.<sup>341</sup>

This Subpart surveys the democracy-promotion programs in place in the United States and in the international front. These programs have adopted one-size-fits-all checklists that target transparently authoritarian practices.<sup>342</sup> Although these checklists are efficient and work relatively well in detecting traditional mechanisms of authoritarian control, they are much less effective in detecting the subtle reconfigurations of the political order that stealth authoritarianism effectuates. That, in turn, has provided significant incentives to avoid the overt appearance of authoritarianism through the adoption of stealth authoritarian practices. The prevailing approaches to democracy promotion in the United States and elsewhere have therefore facilitated a certain level of authoritarian learning and created the very conditions in which stealth authoritarian practices thrive.<sup>343</sup> What is more, the label of “democracy” is often awarded to a state that satisfies the applicable democracy-promotion criteria, which can obscure stealth authoritarian practices and provide legal and political cover to them.

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339. FREEDOM HOUSE, *supra* note 7, at 24.

340. See, e.g., U.N. Human Rights Council, Rep. of the Int’l Comm’n of Inquiry on Libya, 19th Sess., Feb. 27–Mar. 23, 2012, U.N. Doc. A/HRC/19/68 (Mar. 8, 2012), available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.68.pdf> (documenting the anti-democratic activity of the Gaddafi regime and the international military response); HUMAN RIGHTS FIRST, SYRIA SANCTIONS FACT SHEET (2012), available at [http://www.humanrightsfirst.org/wp-content/uploads/pdf/Syria\\_Sanctions\\_Fact\\_Sheet.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/Syria_Sanctions_Fact_Sheet.pdf) (discussing sanctions imposed on Syria’s authoritarian regime for engaging in anti-democratic, oppressive behavior); YOUNGERS, *supra* note 14, at 1 (noting “[t]he widespread international condemnation of anti-democratic practices in Peru” after the 1992 presidential coup by Alberto Fujimori); Law & Versteeg, *supra* note 47, at 165 (“[C]ountries that openly defy the values of ‘world society’ . . . invite ostracism from the international community.”); Donald M. Seekins, *Burma and U.S. Sanctions: Punishing an Authoritarian Regime*, 45 ASIAN SURV. 437, 440 (2005) (noting that the United States imposed economic sanctions on the anti-democratic Burmese government in part to express disapproval of that government’s “objectionable behavior”).

341. See LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 58–60 (2d ed. 1979) (including reputational consequences among the factors in a country’s decision to conform to international law); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1845–46 (2002) (describing harm to a nation’s reputation as a form of sanction); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L.J. 487, 496–99 (1997) (explaining and critiquing the theory that state actors make decisions in the international arena in part out of concern for their state’s reputation).

342. See Susan Stewart, *Democracy Promotion Before and After the ‘Colour Revolutions’*, 16 DEMOCRATIZATION 645, 648 (2009) (noting that a one-size-fits-all approach is “present in both American and European approaches to democracy promotion”).

343. See also HEYDEMANN, *supra* note 269, at 31 (arguing that authoritarian regimes in the Arab world “have the system gamed” and “exploit for their own authoritarian purposes the democracy promotion strategies that have long been favored by the United States”).

a. *The United States*

The United States has been at the vanguard of global democracy promotion. Democracy-promotion programs have been a central component of American foreign policy, with some notable interruptions, since at least the First World War.<sup>344</sup> The Cold War spurred a heightened interest in democracy promotion in the United States. In 1976, Congress established the Commission on Security and Cooperation in Europe (more commonly known as the “Helsinki Commission”) to ease government repression and promote democratization in areas controlled by the Soviet Union.<sup>345</sup> The now-renamed Organization for Security and Cooperation in Europe (“OSCE”) supports democratic development in 56 member states, which include nations of the Caucasus and Central Asia.<sup>346</sup>

That support continued after the fall of the Soviet Union through democracy assistance programs in the budding post-Soviet republics in Central and Eastern Europe.<sup>347</sup> Congress enacted major pieces of legislation, including the Support for East European Democracy (“SEED”) Act of 1989 to support democratization in Hungary and Poland<sup>348</sup> and the FREEDOM Support Act of 1991 to promote “freedom and open markets” in the former Soviet republics, specifically Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.<sup>349</sup> The 1990s also marked the emergence of the Washington Consensus, which represented the belief that democracy, free markets, and the rule of law would develop in unison.<sup>350</sup> By 1998, these efforts had culminated in the establishment of democracy-promotion programs in more than 100 countries.<sup>351</sup>

Democracy promotion also became a focus of American national security policy. Every U.S. National Security Strategy issued since 1990 emphasized that democracies are the most effective partners for addressing transnational

344. SUSAN B. EPSTEIN ET AL., CONG. RESEARCH SERV., RL34296, DEMOCRACY PROMOTION: CORNERSTONE OF U.S. FOREIGN POLICY? 1 (2007). According to President Woodrow Wilson, the purpose of the war was to “make the world safe for democracy.” *Woodrow Wilson*, WHITE HOUSE, <https://www.whitehouse.gov/about/presidents/woodrowwilson> (last visited Mar. 24, 2015). The United States supported some authoritarian governments during the Cold War “as a perceived bulwark against . . . communism.” EPSTEIN ET AL., *supra*, at 28. In more recent history, authoritarian governments in the Middle East have also received American support.

345. 22 U.S.C. §§ 3001–3009 (2012); EPSTEIN ET AL., *supra* note 344, at 28.

346. EPSTEIN ET AL., *supra* note 344, at 28.

347. *Id.* at 29.

348. Support for East European Democracy (SEED) Act of 1989, Pub. L. No. 101-179, 103 Stat. 1298 (codified as amended in scattered sections of 22 U.S.C.).

349. FREEDOM Support Act, Pub. L. No. 102-511, 106 Stat. 3320 (codified as amended in scattered sections of 22 U.S.C.).

350. See generally John Williamson, *What Washington Means by Policy Reform, in* LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? 7 (John Williamson ed., 1990).

351. CAROTHERS, *supra* note 3, at 7.

security issues, such as terrorism, nuclear proliferation, climate change, and disease.<sup>352</sup> Defense agreements with nations such as Japan, Spain, Greece, and Turkey made democratic principles a foundation of the agreement.<sup>353</sup>

Currently, the United States continues to operate a complex and multifaceted democracy-promotion machine. It contributes to multilateral efforts to promote democracy, including the United Nations Development Program, the United Nations Democracy Fund, the Community of Democracies, the Freedom House, the World Bank, and the Organization of American States (“OAS”).<sup>354</sup> The State Department funds its own initiative, titled *Governing Justly and Democratically*, and also provides funding to two NGOs whose mission is to promote democracy: The National Endowment for Democracy (“NED”) and the Asia Foundation.<sup>355</sup> Congress also continues to play a significant role in democracy promotion.<sup>356</sup>

Many of these programs operate on checklist criteria that look for obvious deficiencies in the political order. For example, to be eligible for foreign aid under the Millennium Challenge Corporation, which is a U.S. foreign aid agency, a foreign country must “demonstrate a commitment to just and democratic governance, investments in its people, and economic freedom as measured by different policy indicators,”<sup>357</sup> including “the rule of law,” “political rights,” and “civil liberties.”<sup>358</sup> Countries that have satisfied the financial assistance criteria despite questionable democratic credentials include Burkina Faso, Honduras, Namibia, Jordan, and Uganda.<sup>359</sup>

Also illustrative of American democracy promotion is the criteria used to allocate foreign assistance to the independent states of the former Soviet Union. In awarding financial assistance, the President is required to “take into account,” among other factors, the extent to which the candidate country is “mak[ing] significant progress toward, and is committed to the comprehensive implementation of, a democratic system based on principles of the rule of law, individual freedoms, and representative government determined by free and fair elections.”<sup>360</sup> These criteria erroneously conflate

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352. See, e.g., EPSTEIN ET AL., *supra* note 344, at 7 (noting that democracy promotion plays a key role in the War on Terror); WHITE HOUSE, NATIONAL SECURITY STRATEGY (May 2010), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

353. EPSTEIN ET AL., *supra* note 344, at 30 n.82.

354. *Id.* at 22.

355. *Id.* at 18–19.

356. *Id.* at 22–23.

357. *Selection Criteria*, MILLENNIUM CHALLENGE CORP., <http://www.mcc.gov/pages/selection> (last visited Mar. 24, 2015).

358. *Selection Indicators*, MILLENNIUM CHALLENGE CORP., <http://www.mcc.gov/pages/selection/indicators> (last visited Feb. 28, 2015).

359. *Countries & Country Tools*, MILLENNIUM CHALLENGE CORP., <http://www.mcc.gov/pages/countries> (last visited Mar. 24, 2015).

360. 22 U.S.C. § 2295a (2012).

the requirements for the rule of law with those of a liberal democracy.<sup>361</sup> The former are a necessary, but not sufficient, condition of the latter, and the adoption of formal rules does not necessarily lead to the establishment of a democracy,<sup>362</sup> as evinced by the mechanisms of stealth authoritarianism.

*b. Other International Actors*

The approach of other international actors to democracy promotion is in accord with the United States. Historically, a country's form of government was viewed as a matter of internal governance and beyond the purview of international law.<sup>363</sup> More recently, however, there has been a heightened interest in democracy promotion at the international level.<sup>364</sup> In the 1990s, commitment to democracy became an express criterion for NATO membership, and Poland, Hungary, the Czech Republic, and Slovenia were admitted to membership on the grounds that they had established democratic regimes.<sup>365</sup> The United Nations Charter, the Universal Declaration on Human Rights, and the International Covenant on Civil and Political Rights also refer to democratic principles.<sup>366</sup> The 2005 U.N. World Summit likewise declared democracy to be a "universal value."<sup>367</sup>

In addition, treaties and international agreements have increasingly come to include so-called "democracy clauses."<sup>368</sup> For example, the Inter-American Democratic Charter and the charters of the OAS and the African Union include democracy clauses that require member nations to fulfill democracy criteria in order to be eligible for membership or trade benefits.<sup>369</sup> The clauses also permit the imposition of sanctions, such as the suspension of membership, on states that undergo "unconstitutional interruptions" in their democratic order.<sup>370</sup> These clauses are effective at detecting blatant disruptions in the political or constitutional order, but are of limited or no use in detecting or eliminating more subtle reconfigurations.<sup>371</sup>

The democracy criteria established by the Community of Democracies are also illustrative. The Community "is a global intergovernmental coalition of states . . . pursui[ng one] common goal: supporting democratic rules and

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361. Silverstein, *supra* note 12, at 74.

362. *Id.*

363. Landau, *supra* note 5, at 247.

364. *Id.*

365. EPSTEIN ET AL., *supra* note 344, at 29–30.

366. *Id.* at 30 n.82.

367. *Democracy and the United Nations*, UNITED NATIONS, [http://www.un.org/en/global/issues/democracy/democracy\\_and\\_un.shtml](http://www.un.org/en/global/issues/democracy/democracy_and_un.shtml) (last visited Mar. 24, 2015).

368. EPSTEIN ET AL., *supra* note 344, at 29.

369. Landau, *supra* note 5, at 249.

370. *Id.* at 248.

371. *Id.*

strengthening democratic norms and institutions around the world.”<sup>372</sup> Over 100 countries who meet democratic standards participate in meetings every two years to discuss issues of common concern. Membership in the Community is based on the adoption of the following norms: (1) “[f]ree, fair and periodic elections”; (2) “[t]he rule of law”; (3) “[t]he obligation of an elected government to protect and defend the constitution, refraining from extra-constitutional actions and to relinquish power when its legal mandate ends”; (4) “[s]eparation of powers”; (5) “equality before the law”; and (6) a laundry list of individual rights to be protected, including freedom of speech and assembly, freedom of the press, protection against cruel and inhumane punishment and detention, the right to a fair trial, and the right to non-discrimination.<sup>373</sup> The Community includes nations such as Azerbaijan, Hungary, Russia, Turkey, Venezuela, and Yemen,<sup>374</sup> who have fulfilled these democracy criteria by enacting the required legal-constitutional reforms but whose democratic credentials are subject to serious challenge.<sup>375</sup>

International financial institutions have also adopted democracy criteria that target obvious democratic defects. In 1989, following a three-year study of Africa’s economic problems, the World Bank concluded that the improvement of the political conditions on the continent were essential to reversing Africa’s economic decline.<sup>376</sup> That conclusion shifted the focus to “the rule of law as an essential component of good governance.”<sup>377</sup> By the late 1990s, nearly 78% of conditions imposed by international financial institutions in loan agreements targeted legal reform and the promotion of “the rule of law.”<sup>378</sup> Although effective at detecting regimes that blatantly eschew the rule of law, these criteria are significantly less effective at identifying stealth authoritarian practices, which utilize formal legal mechanisms to perpetuate power and project the illusion of a rule-of-law society.

Similar checklists are also prevalent in the academic scholarship. For example, in the widely used Polity dataset, the existence of free and fair elections is the primary criterion for determining whether a country is

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372. *Who We Are*, COMMUNITY DEMOCRACIES, <http://www.community-democracies.org/The-Community-of-Democracies/Our-Community> (last visited Mar. 24, 2015).

373. EPSTEIN ET AL., *supra* note 344, at 26–27.

374. *The World Factbook, Appendix B: International Organizations and Groups, Community of Democracies (CD)*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/appendix/appendix-b.html> (last visited Mar. 24, 2015).

375. See generally FREEDOM HOUSE, *FREEDOM IN THE WORLD 2014* (2014), available at <https://freedomhouse.org/sites/default/files/FIW2014%20Booklet.pdf> (surveying the relative “freedom” of all countries in 2013).

376. HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION* 65–66 (2000).

377. *Id.* at 66.

378. *Id.*

democratic.<sup>379</sup> Several countries with prevalent stealth authoritarian practices have scored relatively well in the dataset, where the scores range from -10 to +10. For example, according to the dataset, Hungary is a model constitutional democracy with a score of 10 out of 10, and Turkey enjoys a fairly high score of 9 out of 10.<sup>380</sup>

Stealth authoritarian practices have taken hold even under the watchful eye of the European Union, which was left powerless to stop the creation of a competitive authoritarian regime in Hungary under the Fidesz government led by Viktor Orbán. As Kim Lane Scheppele has demonstrated across a series of articles, the Fidesz government staged a “constitutional coup” by using the mechanisms of constitutional amendment and replacement to systematically eliminate checks on its power.<sup>381</sup> For example, the Fidesz government lowered the retirement age of judges in order to remove much of the leadership of an active and powerful judiciary that threatened Fidesz interests.<sup>382</sup> The European Court of Justice resisted and held that the lowering of the judicial retirement age violated E.U. law.<sup>383</sup> Orbán, dissatisfied with the decision, eventually reinstated the judges.<sup>384</sup> Since E.U. law did not require the assignment of the judges back to their former leadership positions, however, Orbán managed to circumvent the ruling by assigning the judges to other, less influential positions, while projecting the appearance of compliance with E.U. law.<sup>385</sup>

In sum, the prevailing democracy-promotion mechanisms in the United States and elsewhere have focused primarily on detecting obvious deficiencies in the democratic order. That focus has facilitated a certain level of authoritarian learning that, for the reasons discussed below, prompted the

379. See MONTY G. MARSHALL ET AL., POLITY IV PROJECT, POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800–2013: DATASET USERS’ MANUAL 15 (2014), available at <http://www.systemicpeace.org/inscr/p4manualv2013.pdf> (defining a mature democracy “as one in which (a) political participation is unrestricted, open, and fully competitive; (b) executive recruitment is elective, and (c) constraints on the chief executive are substantial”); Andrew Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUD. S205, S220 (2002) (“[The Polity III data set’s] measure of democracy attempts to capture the extent to which a polity is characterized by broad participation in a competitive political process.”).

380. Monty G. Marshall, *Polity IV Project: Political Regime Characteristics and Transitions, 1800–2013: Polity IV Individual Country Regime Trends, 1946–2013*, CENTER FOR SYSTEMIC PEACE, <http://www.systemicpeace.org/polity/polity4.htm> (last updated June 6, 2014) (follow “Hungary” or “Turkey” hyperlinks).

381. Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)*, 23 TRANSNAT’L L. & CONTEMP. PROBS. 51, 61–62 (2014); see also Scheppele, *supra* note 15 (discussing Hungary’s transformation to a “Frankenstate”).

382. Scheppele, *supra* note 15, at 8.

383. *Id.*

384. *Id.*

385. *Id.*

replacement of transparently authoritarian mechanisms with more stealth mechanisms of control.

## 2. Domestic Actors

In addition to the international community, the actions of domestic actors influence political behavior. Transparently authoritarian practices can discredit an incumbent government and foment rifts within its support structures, thereby raising the political, economic, and military costs to the government of maintaining the status quo.<sup>386</sup> It can also galvanize opposition movements, strengthen their resolve, and allow them to leverage on the repression to win the sympathy of others and obtain domestic and global resonance for the movement.<sup>387</sup> For example, social movements that organized during the 2011 Arab Spring were successful in overthrowing the incumbents in Tunisia and Egypt, which had maintained openly authoritarian governments for decades.<sup>388</sup> Likewise, the Color Revolutions—such as Georgia’s Rose Revolution in 2003 and Ukraine’s Orange Revolution in 2004—also led to the popular overthrow of authoritarian leaders.<sup>389</sup> Finally, the domestic armed forces may also play a role in combatting authoritarian practices and stage a coup d’état to effectuate a democratic regime change. Authoritarian regimes in Turkey in 1960, Portugal in 1974, and Egypt in 2011 all suffered that same fate from their domestic militaries.<sup>390</sup>

Political leaders therefore have significant incentives to conceal obvious authoritarian practices and the appearance of authoritarianism to avoid resistance or backlash from the relevant domestic actors. To be sure, the possibility of domestic backlash has more salience for some regimes than others, as I discuss below. But first I analyze how political leaders may respond to the relevant behavior of international and domestic actors in determining whether to choose transparent or stealth mechanisms of authoritarianism.

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386. Cf. CHENOWETH & STEPHAN, *supra* note 109, at 44 (noting that the defection of regime loyalists raises the political cost of repression and may destabilize the regime).

387. Chua, *supra* note 109, at 719; cf. CHENOWETH & STEPHAN, *supra* note 109, at 50 (“Backfiring creates a situation in which the resistance leverages the miscalculations of the regime to its own advantage, as domestic and international actors that support the regime shift their support to the opposition because of specific actions taken by the regime.”).

388. See Thomas Schiller, *Tunisia—A Revolution and Its Consequences*, KAS INT’L REP., May 2011, at 6, 11–13, available at [http://www.kas.de/wf/doc/kas\\_22802-544-2-30.pdf?110516131310](http://www.kas.de/wf/doc/kas_22802-544-2-30.pdf?110516131310) (discussing the popular protests that forced the resignation of Tunisia’s authoritarian president); Karl Vick, *Egypt’s Last Pharaoh? The Rise and Fall of Hosni Mubarak*, TIME (Feb. 12, 2011), <http://content.time.com/time/world/article/0,8599,2048689,00.html> (describing the Tahrir Square protests that catalyzed the demise of Egypt’s authoritarian ruler).

389. See Tristan Landry, *The Colour Revolutions in the Rearview Mirror: Closer Than They Appear*, 53 CAN. SLAVONIC PAPERS 1, 8–13 (2011).

390. See generally Varol, *supra* note 26; Ozan O. Varol, *The Military as the Guardian of Constitutional Democracy*, 51 COLUM. J. TRANSNAT’L L. 547 (2013).

## 3. Incumbent Officeholders

This Subpart begins with two theoretical premises based on rational-choice theory. First, politicians are self-interested actors who seek to minimize costs and risks and maximize the payoff.<sup>391</sup> Second, politicians follow their own self-interest of advancing their prospects for retaining power, rather than serve as the faithful agents of the citizenry, which may produce outcomes at odds with the national interest.<sup>392</sup>

Rational choice admittedly presents a reductive account of political behavior. It may not fully capture the entire complexity of the incentives and motivations of relevant public decision-makers.<sup>393</sup> It also neglects the “suboptimal choices” that politicians make as a result of their cognitive limitations.<sup>394</sup> The theory of political behavior described here accepts, and works within, these limitations. This Subpart first delineates expected political behavior under traditional rational-choice assumptions. The next Subpart explains patterned behavioral deviations that result from contextual differences and the introduction of cognitive biases and high information costs.

A significant benefit of traditional, repressive authoritarian mechanisms is their efficiency. For example, subjecting civil society organizations to intense regulatory oversight to impede their operation is likely to be less efficient and more costly than immediately shutting them down. Likewise, imprisoning a journalist for critical commentary may also be more efficient at chilling speech than a protracted libel lawsuit. A decision to adopt these openly authoritarian practices may increase today’s payoff, but it will also generate significant costs that may reduce tomorrow’s.<sup>395</sup>

391. See Robert J. Barro, *The Control of Politicians: An Economic Model*, 14 PUB. CHOICE 19, 19 (1973) (assuming that a public officeholder “act[s] to advance his own interests, and these interests do not coincide automatically with those of his constituents”); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1944 (2002) (noting that, under rational-choice models, “[c]ompliance [with international law] does not occur unless it furthers the self-interest of the parties by, for example, improving their reputation, enhancing their geopolitical power, furthering their ideological ends, avoiding conflict, or avoiding sanction by a more powerful state”); Law & Versteeg, *supra* note 47, at 169 (adopting the “premise . . . that authoritarian regimes can be understood as self-interested, rational actors whose constitution-writing choices are shaped by the respective costs and benefits of each option”). This theoretical premise is also consistent with the strategic-realist theory of law and constitutionmaking. Under that theory, domestic institutions are the product of political bargains, and laws and constitutions reflect the self-interest of political elites. See Ran Hirschl, *The Strategic Foundations of Constitutions*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 157, 165–66 (Denis J. Galligan & Mila Versteeg eds., 2013).

392. See Guzman, *supra* note 341, at 1841; Issacharoff & Pildes, *supra* note 22, at 650.

393. Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2143 (1990).

394. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1069 (2000).

395. Cf. Guzman, *supra* note 341, at 1849.

As discussed above, maintaining an openly authoritarian regime can be a costly proposition given the international crackdown on authoritarian practices in the post-Cold War era<sup>396</sup> and the domestic overthrow of authoritarian leaders in the aftermath of the Color Revolutions and the Arab Spring. Stealth authoritarianism provides an optimal decoy by manipulating information output about anti-democratic practices and modifying the perceptions of the relevant actors.<sup>397</sup> Practices that appear clearly repressive in a transparently authoritarian regime appear more ambiguous in a regime that employs stealth authoritarian practices. Stealth authoritarianism raises the actual or apparent costs of detecting and eliminating authoritarian practices for both domestic and global actors, which generates significant payoffs.

As to domestic actors, opposition becomes more costly if the governing regime utilizes mechanisms that exist in regimes with favorable democratic credentials to perpetuate its rule. As an initial matter, detection of anti-democratic measures can be more difficult than in a transparently authoritarian regime. Repressive practices, masked by the rule of law, may go undetected by significant segments of the polity, which, in turn, can raise the costs of mobilization against the incumbents. For example, where a criminal prosecution (backed with sufficient evidence) or a libel lawsuit is employed against a political dissident, it can be difficult to differentiate between legitimate application and abuse, at least compared to transparently authoritarian practices. For similar reasons, as Christopher Schmidt explains, segregationists in the Southern United States abandoned costly direct legal methods of oppression, such as expressly legalized discrimination, in favor of indirect, less transparent, and race-neutral legal methods to defend white supremacy.<sup>398</sup>

Even where detected, stealth authoritarian practices may be less objectionable to segments of the domestic polity than direct repression. Stealth authoritarianism becomes even more palatable where the regime couples stealth authoritarian practices with desirable democratic reforms. In addition, the existence of a limited space for political opposition and discontent can create the illusion of political competition and meaningful electoral choice among competing political actors. The illusion of choice can pacify the polity by allowing citizens to experience participation in the democratic process, without providing a meaningful opportunity to displace the incumbents. Especially in fully authoritarian regimes, the use of stealth

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396. Cf. Leah Gilbert, *State Mobilization Strategies and Political Competition in Hybrid Regimes* 85–86 (June 6, 2012) (unpublished Ph.D. dissertation, Georgetown University), available at [https://repository.library.georgetown.edu/bitstream/handle/10822/557607/Gilbert\\_georgetown\\_0076D\\_11885.pdf](https://repository.library.georgetown.edu/bitstream/handle/10822/557607/Gilbert_georgetown_0076D_11885.pdf) (demonstrating empirically that hybrid regimes increasingly employed regulatory legal mechanisms to restrict civil society organizations in the aftermath of the Cold War).

397. Collier & Norden, *supra* note 305, at 236–37.

398. See Schmidt, *supra* note 210, at 307.

authoritarian practices can also be praised as signs of democracy since these practices rely on formal legal mechanisms that exist in regimes with favorable democratic credentials. The ability to challenge the incumbents, raise political arguments, and establish reputations may justify participation in the electoral marketplace by opposition activists.<sup>399</sup> As a result, the public incentive to oppose a regime that applies stealth mechanisms of control may be less than an openly repressive one. That, in turn, may impede the opposition's mobilization efforts. Without participation by broad segments of the population, the opposition movement runs the serious risk of being disregarded as an unrepresentative fringe faction.<sup>400</sup> As Adam Przeworski explains, "[a] regime does not collapse unless and until some alternative is organized in such a way as to present a real choice for isolated individuals."<sup>401</sup> In a regime that perpetuates its power through the same mechanisms that exist in democratic regimes, constructing that alternative reality often presents a costlier proposition.

Stealth authoritarianism also increases the costs of detection and sanction for global actors. Stealth authoritarian practices transform the domestic legal framework to appear consistent with the normative expectations of international actors. Subtle reconfigurations of the existing order through the use of stealth authoritarian practices are more difficult to detect than long-condemned authoritarian practices that portray an openly repressive regime with ubiquitous government control. International actors, sitting at a distance from the domestic political arena, may have even more difficulty in detecting stealth authoritarian practices than domestic actors.

In addition, the adoption of democratic reforms may help incumbent officeholders build coalitions with international institutions, which, in turn, bolsters regime legitimacy. For example, several human rights groups supported Hugo Chavez for some time after he inserted language they proposed into Venezuela's Constitution.<sup>402</sup> Likewise, semi-authoritarian Ugandan leader Yoweri Museveni increased his popularity by enacting a new law on land ownership and inheritance in response to demands by international human rights groups.<sup>403</sup>

What is more, many of the sub-constitutional mechanisms that serve as the foundation for stealth authoritarian practices exist in countries with

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399. HEYDEMANN, *supra* note 269, at 12.

400. Marko Papić & Sean Noonan, *Social Media as a Tool for Protest*, STRATFOR GLOBAL INTELLIGENCE (Feb 3, 2011, 9:54 AM), <http://www.stratfor.com/weekly/20110202-social-media-tool-protest#axzz3OKaKXpGh>.

401. Przeworski, *supra* note 337, at 52.

402. OTTAWAY, *supra* note 33, at 207.

403. *Id.* at 207–08; Justin Shore, *Land Reform and Forced Evictions in Uganda*, HUM. RTS. BRIEF (July 8, 2009), <http://hrbrief.org/2009/07/land-reform-and-forced-evictions-in-uganda/> (noting that “the Centre on Housing Rights and Evictions . . . praised President Yoweri Museveni for taking a ‘strong public stand against illegal evictions’”).

favorable democratic credentials or are adopted with the imprimatur of international organizations. The adoption of financial surveillance laws with the backing of the FATF provides a good illustration.<sup>404</sup> International institutions are less likely to criticize legal mechanisms or institutions whose adoption they advocated or endorsed, as evidenced by the FATF's continuing commendation of financial surveillance laws in Russia despite evidence of abuse.

Likewise, foreign political actors can also be loath to resist stealth authoritarian practices if such practices enforce laws that exist in their own legal systems, lest they be criticized as hypocritical. For example, Turkey's high electoral threshold—whose anti-democratic effects were discussed above—has, for the most part, escaped the opprobrium of the international community and even obtained the blessing of the European Court of Human Rights.<sup>405</sup> One reason might be that electoral thresholds exist in many democratic countries and serve useful purposes for the incumbent regime. In Germany, for example, an electoral threshold was adopted for the purpose of creating some stability in a fractious political marketplace.<sup>406</sup> German political actors' criticism of Turkey's electoral threshold may call into question the wisdom of the German threshold. For that reason, many incumbent officeholders who deploy stealth authoritarian practices attempt to deflect criticism by citing democratic foreign countries that have adopted the same criticized legal mechanisms.<sup>407</sup> That provides some legitimacy to those mechanisms before domestic audiences, but also raises the costs to the global community of detecting their abuse and resisting their adoption.

### C. REGIME TYPES AND THE COST-BENEFIT CALCULUS

The previous Subpart discussed why the relevant cost-benefit calculus may lead to the adoption of stealth authoritarian practices in light of domestic and global backlash against transparently authoritarian regimes. The full story, however, is more nuanced. If the benefits of stealth authoritarianism always exceeded their costs, then all authoritarian governments would replace transparently authoritarian practices with more stealth mechanisms of control. That is at odds with the empirical evidence. Although the number of openly authoritarian regimes has significantly decreased in the aftermath of

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404. See *supra* notes 242–60 and accompanying text.

405. See *supra* notes 185–87 and accompanying text (discussing the decision of the European Court of Human Rights that upheld Turkey's 10% electoral threshold).

406. See EVA-MARIA POPTCHEVA, EUROPEAN PARLIAMENTARY RESEARCH SERV., ELECTORAL THRESHOLDS IN EUROPEAN ELECTIONS: DEVELOPMENTS IN GERMANY 1 (2014), available at [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130606/LDM\\_BRI%282013%29130606\\_REV2\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130606/LDM_BRI%282013%29130606_REV2_EN.pdf) (noting that Germany's threshold for European Parliament elections is 3%, rather than 5% as required in domestic elections, due to the absence of the need to "sustain an EU government by means of stable majorities").

407. See *supra* Part III.F.2.

the Cold War, transparently authoritarian practices still exist.<sup>408</sup> This Subpart discusses why. Here, I relax the traditional rational-choice assumptions and explain patterned behavioral deviations that result from contextual differences and the introduction of cognitive biases and high information costs.

Context matters to political behavior.<sup>409</sup> Political leaders do not all face the same cost-benefit calculus. As a result, they are not equally likely to adopt stealth authoritarian practices. As discussed above, the adoption of stealth authoritarian practices is driven primarily by a desire to appease the international community, satisfy the normative preferences of global actors, and assuage the domestic populace. Those objectives carry more salience for some regimes than others. In other words, some regimes are more dependent on international approval, global legitimacy, and domestic popular support than other regimes that derive their support structures and legitimacy from other sources. Stealth authoritarianism is more likely to take root in regimes with a quantum of democratic responsiveness and a viable threat of destabilization, which renders reliance on direct repression too costly.<sup>410</sup>

These regimes are, in turn, likely to occupy the gray zone of hybrid regimes between democracy and authoritarianism. Hybrid regimes are less likely to resort to overt mechanisms of repression—such as violence or harassment—than fully authoritarian regimes.<sup>411</sup> In a regime that can categorically repress political opposition with impunity, there is no need for stealth authoritarian mechanisms, such as libel lawsuits or non-political crimes. In addition, the reputations of fully authoritarian regimes may already have been sufficiently tarnished that attempts to rebuild global goodwill by concealing openly authoritarian practices may not produce significant benefits.<sup>412</sup> What is more, “a reputation for toughness” can itself generate benefits for fully authoritarian regimes.<sup>413</sup>

408. See *supra* text accompanying note 7 (noting that, according to the Freedom House, the percentage of countries determined to be “not free” decreased from 46% in 1972 to 24% in 2012).

409. See Korobkin & Ulen, *supra* note 394, at 1069.

410. See Law & Versteeg, *supra* note 47, at 172 (“The more that a regime needs popular support in order to remain in power, the less plausible that a strategy of repression becomes, and the more concessions that the regime must make to the people.”); see also Daron Acemoglu & James A. Robinson, *Paths of Economic and Political Development*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 673, 681 (Barry R. Weingast & Donald A. Wittman eds., 2006); Steven A. Cook, *The Promise of Pacts*, J. DEMOCRACY, Jan. 2006, at 63, 68; Marc Morjé Howard & Philip G. Roessler, *Liberalizing Electoral Outcomes in Competitive Authoritarian Regimes*, 50 AM. J. POL. SCI. 365, 365 (2006).

411. Gilbert & Mohseni, *supra* note 203, at 9; Andreas Schedler, *Sources of Competition Under Electoral Authoritarianism*, in DEMOCRATIZATION BY ELECTIONS: A NEW MODE OF TRANSITION 179, 183 (Staffan I. Lindberg ed., 2009) (noting that hybrid regimes “do not rely on naked repression”).

412. Cf. Guzman, *supra* note 341, at 1850.

413. Cf. *id.* at 1851.

Fully authoritarian regimes might shun stealth authoritarian practices also because they ground their legitimacy in sources other than international or domestic approval. Take, for example, monarchies, which rely primarily on family and kinship to perpetuate their rule against any domestic resistance.<sup>414</sup> Many monarchies, such as Saudi Arabia, base their legitimacy on historical or religious grounds, which serve as a substitute for adopting the trappings of the democratic, modern nation-state.<sup>415</sup> If historical or religious claims ensure the perpetuation of monarchical rule, monarchies have relatively less need for employing stealth authoritarian strategies. The adoption of stealth authoritarianism may likewise be unnecessary in military dictatorships, which are controlled by one or more military leaders who rely on brute force through the military apparatus to consolidate control.<sup>416</sup> Military dictatorships have historical pedigree in various countries across Latin America (e.g., Chile under Augusto Pinochet) and Africa (e.g., Libya under Muammar Gaddafi).<sup>417</sup> Because military dictatorships rely primarily on instruments of coercive power to perpetuate their rule, the global reputational costs discussed above of maintaining an openly authoritarian regime are less salient for them.<sup>418</sup>

Regimes that are dependent on foreign investment are also more likely to employ stealth authoritarian practices. Investors often require legal assurances that their investments will be protected and the domestic economic sphere will remain relatively stable.<sup>419</sup> Especially in regimes with high levels of government corruption, the appearance of the rule of law can provide skeptical investors the necessary confidence to invest.<sup>420</sup> The same laws and institutions that protect foreign investors can be applied selectively in the domestic sphere against political dissidents. As noted above, the Egyptian Constitutional Court was provided interpretative power over the constitution in part to attract foreign investment and assure international investors that the Court would deter any changes to a free market economy.<sup>421</sup>

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414. Law & Versteeg, *supra* note 47, at 168.

415. *Id.* at 171.

416. *Id.* at 168.

417. Hadenius & Teorell, *supra* note 18, at 146; Yahia H. Zoubir & Erzsébet N. Rózsa, *The End of the Libyan Dictatorship: The Uncertain Transition*, 33 *THIRD WORLD Q.* 1267, 1267–69 (2012).

418. *Cf.* Guzman, *supra* note 341, at 1849 (“The existence of a reputational effect impacts country incentives, but in some instances that impact will be insufficient to alter country behavior.”). Even monarchies or military dictatorships, however, may resort to stealth authoritarian practices. These practices can be useful if monarchs or military dictators find the need to bolster their support structures or legitimacy. The adoption of stealth authoritarian practices can also result from irrational behavior. In other words, monarchs and military dictators may irrationally adopt stealth authoritarian practices even where they are unnecessary to maintain political dominance and have the potential to produce democratic progress and authoritarian breakdown.

419. *See* Moustafa & Ginsburg, *supra* note 58, at 1, 8.

420. *Id.* at 8–9.

421. MOUSTAFA, *supra* note 90, at 91.

The same Constitutional Court, however, also protected regime interests by rejecting challenges to emergency laws and military tribunals, which were the primary tools of authoritarian control under Mubarak's rule.<sup>422</sup>

For three primary reasons, a regime's use of stealth authoritarian practices does not necessarily imply its absolute rejection of more transparently authoritarian behavior. First, structural constraints, including existing political and legal configurations, may prevent the abolishment of transparently authoritarian practices even where the incumbents desire to do so.<sup>423</sup> Second, adoption of stealth authoritarian practices may prove insufficient to maintain the desired level of control. Although these practices undermine the healthy functioning of the democratic marketplace, political leaders may need to resort to more overt authoritarian practices to consolidate control. For example, if the use of libel lawsuits or selective prosecution of political opponents fails due to pushback from the judiciary, the regime may adopt the more transparently authoritarian function of reorganizing or packing the courts to make them more complacent. In Singapore, for example, the government terminated judicial review, in compliance with established procedures in its Constitution, after the judiciary moved to expand individual rights.<sup>424</sup>

Third, the persistence of transparently authoritarian practices may also result from high information costs and cognitive biases. Due to high costs of processing information about regime practices and the behavior of other relevant actors, the regime in question may not have adapted to the new trends in authoritarian governance and, as a result, failed to implement stealth authoritarian practices. One can refer to this phenomenon as the lack of dictatorial learning.<sup>425</sup> The operation of "the status quo bias, which refers to an irrational preference for the current state of affairs," may also be at work.<sup>426</sup> Affected by the status quo bias, the authoritarian government may rely on traditional mechanisms of control even where stealth authoritarian practices would reduce costs and yield more benefits. That suboptimal choice, however, often comes at a price. Incumbents, who opt for transparently authoritarian mechanisms where it is irrational to do so, will be driven out of the authoritarian market. The empirical data, which shows a significant decline in transparently authoritarian regimes since the end of the Cold War, largely supports that theory.<sup>427</sup>

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422. See *supra* text accompanying note 85.

423. Cf. Lucan A. Way, *Deer in Headlights: Incompetence and Weak Authoritarianism After the Cold War*, 71 SLAVIC REV. 619, 621 (2012).

424. Silverstein, *supra* note 12, at 78–79.

425. See Way, *supra* note 423, at 619 (explaining one type of authoritarian incompetence "that emerges out of disorientation and the persistence of older regime practices in the face of rapid political change").

426. Ozan O. Varol, *Temporary Constitutions*, 102 CALIF. L. REV. 409, 432 (2014).

427. FREEDOM HOUSE, *supra* note 7, at 24.

As illustrated above, stealth authoritarianism can also entice incumbents in democratic regimes. Stealth authoritarianism may be especially attractive to democratic leaders given the additional cover of well-established democratic credentials. Because of the democratic reputation of the regime that implements them, stealth authoritarian practices might be condoned as legitimate, as opposed to abusive, exercises of discretion. Nevertheless, the discretion afforded to relevant decision-makers tends to be more constrained in democracies through formal and informal mechanisms, which, in turn, inhibits opportunities for stealth authoritarianism. In addition, stealth authoritarian strategies, when employed in democracies, are subject to criticism by political opponents, the media, and civil society actors for their entrenchment tendencies. Abuse of legal mechanisms in democracies can also result in civil lawsuits or criminal prosecutions against the relevant decision-makers. Because the possibility for monitoring and sanction of public decision-makers in democracies is higher than in nondemocracies, stealth authoritarian practices in democratic regimes are more likely to cause domestic backlash, which constrains their use.

#### D. STEALTH AUTHORITARIANISM: IMPLICATIONS

As noted above, the phenomenon of stealth authoritarianism is regime neutral and can be observed in both democracies and nondemocracies. This Subpart first discusses the implications of stealth authoritarianism for democracies, followed by nondemocracies.

For democracies, the consequences of stealth authoritarianism depend on the magnitude of their use. Sporadic use of these practices in established democracies is not uncommon and should not necessarily present a cause for concern since, as noted above, their use is more likely to be detected and sanctioned by an informed public. The extensive use of stealth authoritarianism in democracies can, however, erode partisan alternation, restrict civil liberties, and lead to the creation of a political monopoly. The precise point at which this happens is highly context dependent, which makes accurate calibration difficult. But the absence of turnover in several electoral cycles in either the executive or legislative branch,<sup>428</sup> coupled with the prevalence of stealth authoritarian practices, is a strong indicator that the regime is sliding towards the authoritarian end of the democracy-authoritarianism continuum. For example, for much of the 20th century, the United States South, largely through the manipulation of electoral laws, was a one-party political monopoly.<sup>429</sup>

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428. See *supra* text accompanying notes 40–41.

429. Pildes, *supra* note 22, at 125, 149. See generally J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 (1974) (explaining the electoral mechanisms of authoritarian control in Southern states from 1880 to 1910).

More uncertain, however, are the implications of stealth authoritarian practices in authoritarian or hybrid regimes. As an initial matter, stealth authoritarianism, in many cases, presents a lesser moral evil than traditional mechanisms of authoritarian control. The use of formal legal mechanisms as a method of repression is often preferable to the use of arbitrary force.<sup>430</sup> Libel lawsuits, for example, are preferable to torture and harassment of journalists. Likewise, a criminal prosecution that permits avenues for judicial relief before domestic and international tribunals is preferable to imprisonment without a trial or due process. A regime that permits a limited space of discontent is also morally preferable to a regime that tolerates no dissent.

In that sense, democracy-promotion programs in the United States and elsewhere have achieved success by persuading authoritarians to adopt less morally questionable practices. As discussed above, however, existing democracy-promotion mechanisms have also facilitated a certain level of authoritarian learning and created the very conditions in which stealth authoritarian practices thrive. Because these mechanisms narrowly focus on detecting obvious democratic deficiencies, they are substantially less effective in detecting the subtle erosion of political competition that stealth authoritarianism effectuates. That, in turn, has provided significant incentives to authoritarians to replace transparently authoritarian mechanisms of control with stealth authoritarian practices. In addition, a state that satisfies the applicable democracy-promotion criteria is often bestowed with the label of “democracy,” which can provide legal and political cover to stealth authoritarian practices.

What does the prevalence of stealth authoritarianism in an authoritarian or hybrid regime portend for the regime’s future? There are three primary paths: The regime can persist in its present form, decay into a more authoritarian regime, or mature into a democracy.

Although less insidious than traditional forms of authoritarianism, stealth authoritarianism may also generate a more durable form of authoritarianism that allows the regime to persist in its present form or become more authoritarian. In the post-Cold War era, the use of transparently authoritarian mechanisms can reduce the lifetime of a repressive regime, whereas stealth authoritarianism can prolong it. As discussed above, the use of stealth authoritarian mechanisms can allow the incumbents to retain power by appeasing both global and domestic audiences, providing a limited space for the expression of discontent, and disabling political opponents through seemingly legitimate means. Because it relies on formal legal mechanisms that exist in regimes with favorable democratic credentials, stealth authoritarianism is more difficult to detect and eliminate than its more

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430. As Aristotle put it, “The rule of law is preferable to that of any individual.” DAVIS, *supra* note 311, at 28.

transparent counterpart, which can bolster its durability. Stealth authoritarianism can also permit incumbents to retain their political monopoly even with the arrival of democratic reforms.

Even where it is possible to dethrone the incumbent regime, the replacement regime can rely on the same legal mechanisms and structures set up by the incumbent to perpetuate its rule.<sup>431</sup> Newly elected political leaders often have little incentive to change a legal system that provides systematic advantages to the incumbents. As Steven Levitsky and Lucan Way observe, numerous electoral turnovers after the Cold War brought little institutional change, and successor parties did not govern democratically.<sup>432</sup> In Russia, for example, the constitutional order constructed by President Boris Yeltsin, with a strong executive and weak checking institutions, has allowed the persistence of a competitive authoritarian regime long after Yeltsin's resignation.<sup>433</sup> Electoral turnover in hybrid regimes can therefore permit the perpetuation of stealth authoritarian practices.

Stealth authoritarianism can also be pernicious because it can facilitate authoritarian learning and spread to other regimes.<sup>434</sup> Stealth authoritarian practices that generate durability in one regime can be emulated in others for anti-democratic purposes. Information that teaches incumbent officials how to retain political power while appeasing domestic and global audiences can effectively spread across different legal regimes via emulation or inter-regime dialogue, generating a stealth authoritarianism playbook.

There remains, however, the possibility that the use of stealth authoritarianism can eventually usher in democratization. The use of stealth authoritarian practices may mark the beginning of the end of a repressive government.<sup>435</sup> Stealth authoritarianism, in other words, may represent a temporal snapshot in a regime's gradual transformation from a fully authoritarian government to a democracy. Although stealth authoritarian practices are anti-democratic in effect, they might, in some cases, produce the conditions by which democracy can mature, even if it does so in a manner that, on the surface, defies democracy. The rejection of openly repressive authoritarian tactics, and the adoption of legal mechanisms that exist in

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431. Landau, *supra* note 5, at 214.

432. LEVITSKY & WAY, *supra* note 6, at 22–23 (“Such cases are too numerous to be ignored or treated as exceptions.”).

433. Landau, *supra* note 5, at 214 n.96.

434. Cf. Steven Heydemann & Reinoud Leenders, *Authoritarian Learning and Authoritarian Resilience: Regime Responses to the ‘Arab Awakening,’* 8 *GLOBALIZATIONS* 647, 651 (2011) (noting that “there is . . . a level of interconnectedness and learning, and a process of updating of probabilities and strategies, among authoritarian leaders”).

435. Cf. Schmidt, *supra* note 210, at 334 (arguing that the replacement of transparent, legalized discrimination with more, subtle race-neutral tactics in the United States South “was an indication that the system of white supremacy was in retreat [and that its] central legal props were being undermined, forcing white Southerners to rely upon more indirect methods of protecting the world of Jim Crow”).

democratic countries, can open up a democratic Pandora's box and foment further democratic reforms. It may be possible for subsequent generations to breathe democratic life into formal legal mechanisms that were initially adopted or used for stealth authoritarian purposes. As a result, even though formal legal mechanisms can provide the tools for stealth authoritarianism, they can also, in some cases, produce democracy-enhancing benefits.

## V. CONCLUSION

The scholarly comprehension of authoritarianism has failed to keep pace with the evolution of authoritarian regimes. The voluminous scholarship on authoritarianism has focused primarily on explicating traditional, and fairly transparent, mechanisms of authoritarian control. These traditional, transparent strategies still persist, to be sure, but the narrow focus on them has left undertheorized an emerging trend in authoritarian governance.

This Article provided a comprehensive, cross-regional account of that trend, which I termed stealth authoritarianism. In response to the post-Cold War crackdown on transparently authoritarian practices, the new generation of authoritarians or would-be authoritarians learned to resort to more subtle forms of control. Specifically, they learned to perpetuate their power through the same legal, primarily sub-constitutional, mechanisms that exist in regimes with favorable democratic credentials. Drawing on rational-choice theory, the Article argued that stealth authoritarian mechanisms generate significant benefits for many regimes, while raising the actual or apparent costs of detecting and eliminating authoritarian practices for relevant domestic and global actors.

The rise of stealth authoritarianism is significant for three primary reasons. First, it challenges the conventional wisdom in the literature, which has largely eschewed the role that formal legal mechanisms play in authoritarian control. Second, the study of stealth authoritarianism informs important questions in legal and democratic theory by demonstrating the limits of democratic processes and their vulnerability to authoritarian abuse. As the Article explained, stealth authoritarianism is a regime-neutral phenomenon and, with the appropriate level of discretion embedded in the relevant rules, these mechanisms are subject to use and abuse by both nondemocracies and democracies. Third, existing democracy-promotion mechanisms, though effective in detecting traditional strategies of authoritarian governance, are much less effective in detecting stealth authoritarianism, which relies on more subtle reconfigurations of the political order. Paradoxically, these democracy-promotion mechanisms, which narrowly search for obvious democratic deficiencies, have provided legal and political cover to stealth authoritarian practices and created the very conditions in which these practices thrive. Although stealth authoritarianism may foment a more durable authoritarian order, it might also produce, in

some regimes, the conditions by which democracy can mature and expand in a two-steps-forward-one-step-backward dynamic.