

ESSAY

THE LAW AND POLITICS OF PRESIDENTIAL TERM LIMIT EVASION

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Since the turn of the millennium, a remarkably large number of incumbent presidents have managed to stay past the end of their constitutionally mandated terms. Russia's Vladimir Putin, Rwanda's Paul Kagame, and Colombia's Alvaro Uribe represent a sizeable collection of presidents who were democratically elected but remained in power long past their original mandates. Such attempts to stay in office are not new, but in recent decades their nature has changed.

In this Essay, we present findings from an original and comprehensive survey of all evasion attempts since the year 2000. Tracing the constitutional strategies of 234 incumbents in 106 countries, we document the range of constitutional strategies these incumbents have pursued, along with how they succeeded or failed. This exercise has revealed a number of insights. First, evasion attempts are very common. Globally, no fewer than one-third of the incumbents who reached the end of their prescribed term pursued some strategy to remain in office. If we exclude the world's strongest democracies, we find that about half of the leaders that reached the end of their term attempted to overstay. Second, and perhaps most illuminating, none of these attempts involved ignoring the constitution outright. Instead, incumbents universally displayed nominal respect for the constitution by using constitutional rules and procedures to circumvent term limits, with about two-thirds attempting to amend the constitution. But constitutional amendment is not the only

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legal strategy at the would-be overstayer's disposal—presidents have tried many methods. Most notably, a number of incumbents have relied on their courts to interpret constitutional term limits out of the constitution. Other strategies uncovered by our study include: drafting a brand-new constitution and asserting that the new constitution effectively hits the reset button on term limits, finding a faithful agent replacement leader whom the incumbent can control after he is out of office, and delaying elections by citing some form of political instability.

Though evasion attempts are common, they are no sure thing, and often fail. Our survey is the first ever to document and analyze failed attempts. We discover that about one-third of incumbents who attempted to overstay were unsuccessful. Importantly, in the vast majority of these cases, they failed because the attempt encountered widespread popular resistance. By contrast, courts were mostly ineffectual in halting evasion attempts. This finding contradicts much of the existing literature on this subject, which has emphasized the potential role that courts can play in enforcing term limits, and thus in safeguarding states against democratic erosion. If anything, our survey reveals that courts mostly do the opposite: validate the president's attempt to remain past his term. For those who seek to enforce constitutional term limits, this finding implies that building broad resistance movements might be more effective than putting faith in courts.

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INTRODUCTION

In the spring of 2018, addressing a crowd of donors during an event at his Florida estate, President Donald J. Trump made what appeared to be a joke. He was talking about the recent amendment of China’s Constitution to remove presidential term limits, allowing President Xi Jinping to serve in that office indefinitely.¹ About Xi, Trump said: “He’s now president for life, president for life. And he’s great And look, he was able to do that. I think it’s great. Maybe we’ll have to give that a shot someday.”² The crowd cheered and applauded in response.³

President Trump’s suggestion may seem comically far-fetched to an American audience, even if by this point the joke—which he continues to make in one form or another on a regular basis—is starting to wear thin.⁴ Many foreign observers, however, would probably urge caution, as the evasion of constitutionally mandated presidential term limits is strikingly common around the world. China’s Xi Jinping is not the only incumbent who successfully extended term limits by amending the constitution: Leaders such as Rwanda’s Paul Kagame, Colombia’s Alvaro Uribe, and Algeria’s Abdelaziz Bouteflika, among many others, have taken this path.⁵ But if Trump really wanted to overstay, amendment is not the only way to “give [it] a shot.”⁶ One option is to emulate Russia’s Vladimir Putin and find a successor who can be controlled.⁷ Another is to follow Bolivia’s Evo

1. David Shepardson, *Trump Praises Chinese President Extending Tenure ‘for Life,’* Reuters (Mar. 3, 2018), <https://www.reuters.com/article/us-trump-china/trump-praises-chinese-president-extending-tenure-for-life-idUSKCN1GG015> [<https://perma.cc/PY7G-X5SX>].

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

3. *Id.*

4. President Trump has made similar comments live and via Twitter many times since taking office. See Chris Cillizza, *Donald Trump Just Keeps ‘Joking’ About Serving More than 2 Terms as President*, CNN (June 18, 2019), <https://www.cnn.com/2019/06/18/politics/donald-trump-term-limit/index.html> [<https://perma.cc/U598-T9RH>].

5. See *infra* section III.A.

6. Shepardson, *supra* note 1. The amendment strategy would require a change to the Twenty-Second Amendment of the U.S. Constitution, which establishes that “[n]o person shall be elected to the office of the President more than twice.” U.S. Const. amend. XXII. Article V’s amendment procedures require that three-fourths of state legislatures or ratifying conventions approve an amendment for it to become part of the Constitution. *Id.* art. V.

7. See *infra* section IV.C.

Morales and stack the highest court with sympathetic judges who are willing to reinterpret the constitution's term limit provision.⁸ Yet another is to use Peru's Alberto Fujimori's strategy of calling a constitutional assembly and arguing that the new constitution hits the reset button on term limits.⁹ While most of these strategies might be hard to implement in a consolidated democracy like the United States, American constitutional scholars have proposed potential work-arounds. Most notably, Yale Law Professor Akhil Reed Amar has argued that the President of the United States could potentially hold on to power for up to sixteen years, provided he or she alternated that office with the Vice Presidency.¹⁰ Professor Amar's argument is that the President—without violating the Twenty-Second Amendment—could resign (or transfer power under the Twenty-Fifth Amendment) prior to the end of his first term, be appointed as Vice President, win reelection as Vice President, switch back to the presidency, and subsequently be reelected as President—all while maintaining the ability to seek reelection again as Vice President.¹¹

These kinds of strategies are surprisingly common around the world. While many observers have pointed out that term limits are not set in stone, few have noted how regularly leaders attempt to evade those limits. In this Essay, we take stock. Based on a comprehensive and original survey of all countries with presidential term limits in their constitutions since 2000, we find that about one-third of all those who reached the end of their prescribed term attempted to remain in office. If we exclude the world's consolidated democracies with maximum democratic performance, about half of the leaders that reached the end of their term devised some strategy to stay in power past the constitutionally mandated expiration date. But the phenomenon is not limited to failing democracies or functional autocracies. Even in some mature democracies like Costa Rica and South Korea, constitutional term limits are the subject of ongoing debate.¹²

Notably, none of the twenty-first century's evasion attempts involved ignoring the constitution outright.¹³ Instead, incumbents universally showed

8. See *infra* notes 365–372 and accompanying text.

9. See *infra* notes 305–306 and accompanying text.

10. See Akhil Reed Amar, *Clinton–Obama, Obama–Clinton: How They Could Run Together and Take Turns Being President*, *Slate* (Mar. 21, 2008), http://www.slate.com/articles/news_and_politics/jurisprudence/2008/03/clintonobama_obamaclinton.html [<https://perma.cc/3LL4-LCC4>].

11. *Id.*; see also U.S. Const. amend. XXII.

12. See *infra* notes 122–123 and accompanying text.

13. Although the period from the late nineteenth century to the end of the twentieth century saw a number of leaders ignore the constitution outright, this has not happened in the twenty-first century. A prior study reports nine such cases historically: Costa Rica (1870, 1885), Angola (1979), Bolivia (1971), Eritrea (1993), Guatemala (1898), Nicaragua (1911), Paraguay (1880), and Peru (1933). See Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Term Limits*, 52 *Wm. & Mary L. Rev.* 1807, app. at 1869 tbl.A1, 1870 tbl.A2 (2011) [hereinafter Ginsburg et al., *On the Evasion*].

nominal respect for the constitution by using constitutional rules and procedures to circumvent term limits. The most common strategy to get around the constitution is simply to amend it: Sixty-six percent of the evasion attempts in our data involved amending the constitution in some way. For a powerful president, amendment is the most common strategy, presumably because it gives him the most solid legal footing. Once the constitution has been amended, what at first seems like an illegitimate evasion attempt has become authorized by the country's highest law. Amendment, however, can be risky: It requires the president to be sufficiently powerful to meet the supermajority that is required to change the constitution. Indeed, we find that in no fewer than forty percent of the cases in which presidents or their parties initiate constitutional amendments, they fail to pass them. In most cases, failure is caused by widespread popular resistance—as happened recently in Paraguay¹⁴ and Burkina Faso,¹⁵ where protesters literally burned down their national legislative chambers. Needless to say, such failures are politically costly; they require presidents to spend substantial political capital on what turns out to be a failed initiative, and their legacies may suffer. For that reason, amendment is not always a feasible strategy for incumbents seeking to overstay their terms.

Less noticed is that constitutional amendment is only one of a number of tools at a would-be overstaying president's disposal. The bulk of the existing literature focuses on constitutional amendment,¹⁶ but there are a number of other ways to remain in office beyond the expiration date without blatantly violating the constitution. We believe that our survey is the most comprehensive attempt to document the full range of evasion strategies. In addition to constitutional amendment, we identify four distinct methods that do not involve amendment but that arguably do not violate the constitution.¹⁷ Together, these strategies make up forty-four percent of the twenty-first century's evasion attempts. The first of these is what we call the "blank slate theory," which involves the drafting of a wholly new constitution along with the assertion that the new constitution means hitting the reset button on term limits.¹⁸ A second strategy is to use the courts to interpret away constitutional term limits. This strategy is remarkable, as term limit provisions are an example of a particularly clear constitutional rule—as opposed to a more ambiguous standard—and, at

14. See *infra* notes 205–221 and accompanying text.

15. See *infra* notes 222–228 and accompanying text.

16. See, e.g., John M. Carey, *The Reelection Debate in Latin America*, *Latin Am. Pol. & Soc'y*, Spring 2003, at 119, 123–25 (studying evasion through amendment); see also Gideon Maltz, *The Case for Presidential Term Limits*, *J. Democracy*, Jan. 2007, at 128, 128–29 (noting that between 1992 and 2006, twenty-six presidents worldwide exceeded their term limits by eliminating the limits, securing judicial decisions that their first terms did not count, or amending their constitutions). In each of these studies, the range of strategies documented is more limited than ours. Our study further includes the most recent attempts.

17. For discussion of the amendment strategy, see *infra* Part III.

18. See *infra* section IV.A.

face value, seem particularly difficult to reinterpret. Even so, presidents who control their courts have been able to secure judgements that effectively removed term limits.¹⁹ A third approach is what we call the “faithful agent strategy,” which involves presidents seeking a successor they can control so that they can continue to govern even while formally out of office.²⁰ Finding a faithful agent can be difficult, but the strategy has a very high-profile success story: President Vladimir Putin, who used Dmitry Medvedev as a “placeholder president” after Putin’s term was up, while Putin pulled all the strings.²¹ A final strategy is to delay elections by citing some form of political instability.²² The success rate of these strategies is higher than for amendment: Collectively, attempts to delay elections succeeded in about two-thirds of the attempts, with the blank slate theory succeeding every time it was tried and the use of courts failing only once.²³

Although evasion attempts are rampant and incumbents are increasingly savvy in overstaying without committing blatant constitutional violations, they often fail. About one-third of the incumbents who attempted to overstay were unsuccessful, especially those who attempted to amend the constitution risked failure: Forty percent of such attempts failed.²⁴ And while less common overall, the faithful agent theory proved particularly hard to execute: Two-thirds of the incumbents who tried this strategy failed. Ours is the first study to document failed attempts, allowing us to provide new insights into the reasons why some incumbents fail to overstay. While the collection of failed evasion attempts is in itself a rich treasure trove of noteworthy stories, this is far from its only value. We find two key insights about failed attempts to be novel and important.

The first is that courts do *not* play a strong role in preventing the erosion of term limits. Ever since the Colombian Constitutional Court prevented the highly popular President Alvaro Uribe from running a third time by declaring a constitutional amendment attempt to be unconstitutional,²⁵ legal scholars have used the case to point out how courts can safeguard against democratic erosion.²⁶ Yet our study reveals that faith in

19. See *infra* section IV.B.

20. See *infra* section IV.C.

21. See Fiona Hill & Clifford G. Gaddy, *Mr. Putin: Operative in the Kremlin* 7–8 (2015).

22. See *infra* section IV.D.

23. See *infra* Table 1.

24. See *infra* Table 1.

25. David Landau, *Presidential Term Limits in Latin America: A Critical Analysis of the Migration of the Unconstitutional Constitutional Amendment Doctrine*, 12 *Law & Ethics Hum. Rts.* 225, 231–33 (2018) [hereinafter Landau, *Presidential Term Limits*].

26. See, e.g., Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* 159 (2015) (describing the Constitutional Court decision as a “tremendous achievement” that prevented Colombia’s “descent into a one-man rule, with its attendant cronyism and compromise of governmental function”); Vicente F. Benítez R. & Germán A. González H., *El Rol de las Cortes y la Protección de la Democracia: Una Aproximación desde Regímenes Transicionales* [The Role of the Courts Sustaining

courts might be misguided. We find that the Colombian Constitutional Court is the only court that has ever halted an evasion attempt (in Niger, the Constitutional Court tried, but failed).²⁷ Perhaps more remarkably, we find that most of the time, courts act as agents of the incumbent and actually help him to serve beyond the original expiration date. In what looks to be a growing trend, a number of courts, chiefly in Latin America, have essentially interpreted away the term limit provisions enshrined in their constitutions. In other cases, courts have validated presidents' arguments that a new constitution represents a blank slate or that they can serve beyond their original expiration date when it is not possible to hold elections. In a full thirty percent of the cases where the incumbent successfully overstayed, the courts played some role in this success. For the most part, then, courts have actually *facilitated* the removal of term limits.

A second important insight is that sustained popular resistance is a more effective means to halt evasion attempts than reliance on the courts. The bulk of failed cases involve constitutional amendment, and in the overwhelming majority of cases where popular amendment failed, it was because of unexpected headwinds in the form of popular resistance. After all, amendment is a highly visible event and it gives the opposition something to mobilize around. Especially where opposition movements are able to build broad coalitions that include a range of actors, such as political parties, students, trade unions, business interests, clergy, ordinary citizens, and civil society groups, they can be quite effective in thwarting term limits evasion.

This Essay is a positive rather than normative exercise. There is a long-standing debate over the merits of term limits, going back to the American founding when the framers of the U.S. Constitution stood divided on the issue.²⁸ Since then, much ink has been spilled over the question of whether

Democracy: An Approach from Transitional Regimes], *Rev. Der. del Estado [R.D.E.]*, enero-junio del 2016, at 41, 48 (Colom.) (detailing the creation of a robust Colombian Constitutional Court designed with the power to annul laws or constitutional reforms when they are unconstitutional); David Landau, *Abusive Constitutionalism*, 47 *U.C. Davis L. Rev.* 189, 203 (2013) (characterizing the Colombian Constitutional Court judgment as a decision that averted "a significant erosion of democracy by preventing a strong president from holding onto power indefinitely"); Gonzalo Andres Ramirez-Cleves, *The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy*, in *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism* 213, 227 (Thomas Bustamante & Bernardo Goncalves Fernandes eds., 2016) ("The doctrine of substitution of the Constitution in Columbia that has been implemented since the Judgment C-551 of 2003, which led to the declaration of unconstitutionality of five amendments to the Constitution, has been a good way to protect constitutional democracy against a majoritarian conception of democracy . . .").

27. See *infra* notes 251–282 and accompanying text.

28. For example, Thomas Jefferson thought that term limits were necessary to curb executive ambition and considered the absence of term limits in the U.S. Constitution one of the biggest defects in the document. See Ginsburg et al., *On the Evasion*, *supra* note 13,

term limits are desirable.²⁹ Our own normative starting point is that it is good for presidents to rotate in and out of power. But this Essay does not dwell long on the merits or demerits of term limits; the main goal is to improve our understanding of how term limit evasion happens, whether constitutions and constitutional courts play a role, and whether evasion attempts can be stopped. A cynical critique of this exercise might be that it offers a guidebook for would-be dictators on how to evade their constitutions. While we are mindful of this criticism, we believe that it is important to understand how evasion attempts unfold. Further, the exercise offers critical insights for those who seek to resist evasion attempts, such as the lesson that opponents of overstay should not put their faith in the courts but mobilize, build broad coalitions, and stage mass protests. Because in many cases popular resistance played a decisive role in thwarting term limit evasion, it is our hope that a better understanding of the array of strategies incumbents employ will be useful in guiding popular resistance against future attempts.

We are not the first to explore term limit evasion in this manner, but we believe our study differs in critical ways from earlier exercises. First, our observations are global: Most of the prior literature consists of regional or single country studies. At least half a dozen regional studies have documented

at 1813, 1819; Marc P. Petracca, *Rotation in Office: The History of an Idea*, in *Limiting Legislative Terms* 19, 30 (Gerald Benjamin & Michael J. Malbin eds., 1993).

29. Compare Javier Corrales & Michael Penfold, *Manipulating Term Limits in Latin America*, *J. Democracy*, Oct. 2014, 157, 162–65 (suggesting that one of the most serious problems with consecutive reelection is the incumbency advantage and documenting that being the incumbent is the most powerful variable affecting the margin of victory in presidential elections), and Maltz, *supra* note 16, at 135–38 (arguing that term limits are important for party alternation, which in turn is crucial for democratization), with Paul Jacob, *From the Voters with Care*, in *The Politics and Law of Term Limits* 27, 38–39 (Edward H. Crane & Roger Pilon eds., 1994) (suggesting that opponents of term limits believe that they restrict democratic choice). For a middle approach, see Ginsburg et al., *On the Evasion*, *supra* note 13, at 1813–14 (characterizing term limits as default rules that may be overcome with sufficient political support).

term limit evasion attempts in Latin America³⁰ and Africa.³¹ Single-country studies have documented the nuances of evasion attempts in places like Colombia,³² Honduras,³³ Bolivia,³⁴ Argentina,³⁵ Russia,³⁶ Ecuador,³⁷

30. See generally Landau, *Presidential Term Limits*, supra note 25 (exploring recent attempts by incumbent presidents in Latin America to eliminate or weaken presidential term limits); Elena Martínez-Barahona, *Constitutional Courts and Constitutional Change: Analysing the Cases of Presidential Re-Election in Latin America*, in *New Constitutionalism in Latin America: Promises and Practices* 289 (Detlef Nolte & Almut Schilling-Vacaflor eds., 2012) (examining the role of courts in presidential reelections in Costa Rica and Nicaragua); Carey, supra note 16 (summarizing the history of presidential reelection across Latin America and noting historical and contemporary arguments for and against presidential reelection); Javier Corrales, *Can Anyone Stop the President? Power Asymmetries and Term Limits in Latin America, 1984–2016*, *Latin Am. Pol. & Soc’y*, Summer 2016, at 3 [hereinafter Corrales, *Power Asymmetries and Term Limits*] (studying thirty-six efforts to change presidential term limits in Latin America); Corrales & Penfold, supra note 29 (analyzing changes in reelection rules in Latin American countries by incumbent presidents); Tomáš Došek, *Reformas de Reelección Presidencial en América Latina en 2015: Estrategias e Intereses Electorales de las Élites Políticas [Presidential Reelection Reforms in Latin America in 2015: Strategies and Interests of Political Elites]*, *Rev. de Der. Electoral*, Primer Semestre 2018, at 63–73 (Costa Rica) (reviewing reelection reforms in Brazil, Colombia, the Dominican Republic, and Honduras in 2015).

31. See generally Adeolu Durotoye, *Resurgent Backsliding and Democracy in Africa*, 18 *Int’l J. Afr. & Asian Stud.* 39 (2016) (analyzing attempts by dictators in several African countries to abrogate term limits); Daniel N. Posner & Daniel J. Young, *The Institutionalization of Political Power in Africa*, *J. Democracy*, July 2007, at 126 (suggesting that term limit enforcement is the biggest challenge for limiting presidential power); Denis M. Tull & Claudia Simons, *The Institutionalisation of Power Revisited: Presidential Term Limits in Africa*, *Afr. Spectrum*, Aug. 2017, at 79 (using term limits as an indicator for the institutionalization of power); Daniel Vencovsky, *Presidential Term Limits in Africa*, *Conflict Trends*, Apr. 2, 2007, at 15 (providing an overview of the forms of departure used by African leaders since the 1990s).

32. Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 *Int’l J. Const. L.* 339 (2013).

33. David E. Landau, Rosalind Dixon & Yaniv Roznai, *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras*, 18 *Global Constitutionalism* 40 (2019) [hereinafter Landau et al., *From an Unconstitutional Constitutional Amendment*].

34. Alan E. Vargas Lima, *La Reelección Presidencial en la Jurisprudencia del Tribunal Constitucional Plurinacional de Bolivia: La Ilegítima Mutación de la Constitución a Través de una Ley de Aplicación Normativa [The Presidential Reelection in the Jurisprudence of the Plurinational Constitutional Court of Bolivia: The Illegitimate Mutation of the Constitution Through Normatively Applied Law]*, *Rev. Boliviana de Der.*, enero 2015, at 457–59.

35. Mario Serrafiero, *Reelección y Sucesión Presidencial: Poder y Continuidad: Argentina, América Latina y EE. UU. [Presidential Reelection and Succession: Power and Continuity: Argentina, Latin America, and the United States]* 125–28 (1997).

36. William A. Clark, *The 2012 Presidential Election in Russia: Putin Returns*, 32 *Electoral Stud.* 374 (2013).

37. Carlos Bernal Pulido, Aparicio Caicedo & Mario Serrafiero, *Reelección Indefinida vs. Democracia Constitucional: Sobre los Límites al Poder de Reforma Constitucional en el Ecuador [Indefinite Reelection vs. Constitutional Democracy: On the Limits of the Power of Constitutional Reform in Ecuador]* 11–15 (2015).

Brazil,³⁸ Venezuela,³⁹ Paraguay,⁴⁰ Zambia,⁴¹ Namibia,⁴² Malawi,⁴³ and Uganda,⁴⁴ among others. At present, there are two prior global surveys, one by Professor Gideon Maltz⁴⁵ and another by Professors Tom Ginsburg, Zachary Elkins, and James Melton.⁴⁶ Our study differs from these studies in at least three essential ways. First, and most importantly, ours is the first survey to include failed evasion attempts. Second, we create and apply a more granular and detailed classification of the evasion attempts that do not involve amendment. Finally, we analyze a set of remarkable attempts at evasion using the courts, an emergent strategy that has not been captured by the earlier studies.

The remainder of this Essay proceeds as follows. Part I reviews the different rationales for term limits. In doing so, it pays particular attention to the changing nature of authoritarianism. Though our analysis is not limited to authoritarian regimes, most of the term limit evasion strategies occur in countries with less than stellar democratic pedigrees. What is more, the nature of authoritarianism has changed profoundly since the 1990s. Instead of coming to power through coups d'état and governing through brute force, today's authoritarians tend to be democratically elected and operate with nominally democratic institutions, including facially liberal constitutions. Yet in many cases, presidents are able to abuse these institutions to suit their purposes. It is vital to understand that term limit evasion operates against this backdrop: Today's autocrats work around them by using the very constitutional processes that were meant to constrain overly powerful executives in the first place.

Part II introduces our original global survey and presents the key findings from our data. It records the prevalence of evasion attempts, alongside the prevalence of failures. We also document the characteristics of those that attempt to overstay. One small but notable finding is that every

38. Maria D'Alva G. Kinzo & Simone Rodrigues da Silva, *Politics in Brazil: Cardoso's Government and the 1998 Re-Election*, 34 *Gov't & Opposition* 243 (1999).

39. Michael Penfold, *La Democracia Subyugada: El Hiperpresidencialismo Venezolano* [Venezuela's Hyperpresidentialism: Democracy Subjugated], 30 *Rev. de Ciencia Política* 21 (2010) (Chile).

40. Ignacio González Bozzolasco, *Paraguay: La Reección Presidencial y los Inicios de la Carrera Electoral 2018* [Paraguay: The Presidential Reelection and the Beginnings of the 2018 Electoral Race], 37 *Rev. de Ciencia Política* 543, 544 (2017) (Chile).

41. Peter Burnell, *Zambia's 2001 Elections: The Tyranny of Small Decisions, 'Non-Decisions' and 'Not Decisions'*, 23 *Third World Q.* 1103 (2002).

42. Henning Melber, 'Presidential Indispensability' in Namibia: Moving out of Office but Staying in Power?, *in Legacies of Power* 98, 98–116 (Roger Southall & Henning Melber eds., 2006).

43. Seán Morrow, *Toxic Mushrooms? The Presidential Third-Term Debate in Malawi*, *in Legacies of Power*, supra note 42, at 151, 151–74.

44. Roger Tangri, *Politics and Presidential Term Limits in Uganda*, *in Legacies of Power*, supra note 42, at 175, 175–96.

45. See Maltz, supra note 16, at 128–29.

46. See Ginsburg et al., *On the Evasion*, supra note 13, at 1833–43.

one of the leaders that attempted to overstay was male. We highlight that here because, in the remainder of this Essay, we will use the male pronoun to refer to incumbents who seek to evade the constitution.

Parts III and IV take a deep dive into the particularities of the different evasion strategies. Part III focuses on amendment, which remains the most common method. It describes the different versions of the amendment approach and what it takes for amendments to succeed. Throughout, we provide examples from around the world, including Rwanda, Burundi, Tajikistan, Paraguay, Burkina Faso, Malawi, and others. Part IV focuses on strategies other than constitutional amendment that arguably still do not amount to a constitutional violation: the blank slate theory, using courts to reinterpret the constitution, the faithful agent strategy, and delaying elections. It reflects on what is required for these strategies to be successful and draws on examples from places like Bolivia, Nicaragua, Honduras, Guyana, and Sudan to reflect upon the rationales behind these strategies. Finally, we conclude by reflecting on what our research tells us about the constitution's ability to constrain the executive.

I. WHY TERM LIMITS?

One thing that China's Xi Jinping, Russia's Vladimir Putin, and Rwanda's Paul Kagame share is that they are autocratic leaders whose constitutions, at some point, required them to leave office. A further similarity is that they all managed to find a way around this requirement without ignoring the constitution outright. To understand why it is that powerful authoritarians purport to play by the rules set by the constitution, this Part first introduces term limits, their functions, their varieties, and how and why they are supposed to constrain incumbents. It next describes the changing nature of authoritarianism, and how modern-day autocrats consider themselves bound by the constitution in ways that their twentieth-century predecessors did not. In doing so, it introduces a body of literature from political science that has documented the key features of modern authoritarianism, the insights of which might not be well-known to legal scholars.

To be sure, our study is not limited to governments that are closer toward the autocratic end of the spectrum; we survey and analyze all countries with presidential term limits. Nonetheless, as noted, the majority of evasion attempts have come in states where democracy was never fully consolidated and elected leaders use liberal institutions to advance an illiberal agenda.⁴⁷ Thus, in order to understand our findings, it is important to place them in the context of the increasingly blurred line between democratic and authoritarian regimes.

47. See *infra* Part III.

A. *The Importance of Term Limits*

Limiting executives to a predetermined tenure in office is not a new idea—it dates back at least to ancient Greece⁴⁸—but it was in the 1990s, with the third wave of democracy that term limits became a truly widespread phenomenon across the globe.⁴⁹ By now, they have become a near-universal feature of presidential and semi-presidential systems (and are even found in some parliamentary systems); forty-three percent of the world’s constitutions have executive term limits, a figure that grows to an even higher proportion (over sixty percent) when examining only the world’s presidential and semi-presidential systems in which presidents are directly elected.⁵⁰

Term limits come in three basic varieties. Most common is a mandatory maximum of two consecutive terms, the U.S. Constitution’s Twenty-Second Amendment being a prominent example.⁵¹ Other countries force executives to leave after two consecutive terms but allow them to return to office after another has served at least one term.⁵² Russia’s Constitution offers a prominent example of this form of term limit.⁵³ A number of countries, mostly in Latin America, allow presidents only a single term in office.⁵⁴ This is an oversimplified rundown of the different kinds of term limits, but in general, they function as follows: An executive is allowed one or two fixed terms of four to seven years, after which time he must step down and allow another person to fill the role.

An important rationale for including term limits—likely on the mind of the constitution-makers from the 1990s, when genuine democratization seemed within reach—is that they can safeguard the democratic constitutional system. The fear is that when a constitution allows a president to remain in power for too long, he might be able to amass power and prestige in a such a way as to undermine the constitutional order. Leaders who stay in power for too long will start to have undue influence over other checking components of the government. A long-term president, for example, could pack key agencies and courts with loyal appointees over

48. Ginsburg et al., *On the Evasion*, supra note 13, at 1818–19.

49. *Id.* at 1838, 1839 fig.1 (documenting a steep increase in term limits and observing that “[s]ince the third wave of democratization, executive term limits have come back into fashion and are now as popular as ever”).

50. *Id.* at 1835–36.

51. U.S. Const. amend. XXII.

52. See Rosalind Dixon & David Landau, *Constitutional End Games: Making Presidential Term Limits Stick*, 71 *Hastings L.J.* (forthcoming 2020) (manuscript at 6) (on file with the *Columbia Law Review*) (arguing that weaker bans on nonconsecutive reelection are more likely to be complied with than all-out bans on reelection as they hold open the prospect of eventual return to power).

53. *Konstitutsiia Rossiiskoi Federatsii* [Konst. RF] [Constitution] art. 81.3 (Russ.).

54. Ginsburg et al., *On the Evasion*, supra note 13, at 1833–43. An example is the Constitution of Paraguay. *Constitución Política de la República de Paraguay* June 22, 1992, as amended by Constitutional Amendment No. 1 of 2011 (Oct. 17, 2011), art. 229 (Para.).

multiple terms.⁵⁵ Although a given country could be comfortable with an executive exercising such power over the course of four to ten years, at a certain point, the entire government might become the agent of the president. This would raise myriad constitutional concerns, including the potential for tyranny, nepotism, corruption, erosion of democratic or other civic norms, and the so-called “bad emperor” problem.⁵⁶ What is more, the incumbent can become so powerful that he has an unfair advantage over upstart politicians, a problem known as the “incumbency advantage.”⁵⁷ While he serves in office, the incumbent will have so much name recognition and prestige that voters will be unfairly prejudiced in his favor, which, in turn, undermines the fairness of elections.⁵⁸ Overall then, term limits are supposed to ensure that no single leader becomes too powerful.⁵⁹

Even in autocratic systems, term limits can be instrumental. Studies in political science have shown that term limits can promote regime stability by regularizing power sharing among politicians.⁶⁰ When term limits are in place, politicians understand that the party or regime provides an official channel in which to advance up the ranks.⁶¹ Term limits reassure elites that they will have an opportunity to vie for the presidency within institutional channels, rather than having to wait for the incumbent to die or voluntarily retire.⁶² By contrast, in a regime without term limits, potential challenging factions do not channel their energies toward advancing within the regime hierarchy but may instead plot coups d'état or rebellions.⁶³ This is because there is no institutionalized guarantee that the

55. See Sentencia [S.] No. C-141/10, 26 febrero 2010, Corte Constitucional [C.C.], Gaceta de la Corte Constitucional [G.C.C.], [Constitutional Court] (Colom.) (noting that a potential second presidential reelection would curtail the checks and balances against the president's power to appoint a limited number of political appointees per term).

56. Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* 383 (2014).

57. See Andrew Gelman & Gary King, *Estimating Incumbency Advantage Without Bias*, 34 *Am. J. Pol. Sci.* 1142, 1142–64 (1990); see also Corrales & Penfold, *supra* note 29, at 158.

58. See Corrales & Penfold, *supra* note 29, at 158.

59. Of course, there are also contrary arguments, chiefly that term limits are antidemocratic in that they may prevent voters from selecting their preferred leader. Nonetheless, these arguments mostly have lost out as term limits are now near universally adopted in presidential and semipresidential systems. For an overview of the different positions on term limits, see Ginsburg et al., *On the Evasion*, *supra* note 13, at 1823–27.

60. See Milan W. Svobik, *The Politics of Authoritarian Rule* 198–99 (2012).

61. See *id.*

62. See *id.* (“Key features of authoritarianism—including institutions, policies, as well as the survival of leaders and regimes—are shaped by the twin problems of power-sharing and control against the backdrop of the dismal conditions under which authoritarian politics take place.”).

63. See Anne Meng, *Constraining Dictatorship: From Personalized Rule to Institutionalized Regimes* (forthcoming 2020) (manuscript at 72) (on file with the *Columbia Law Review*).

incumbent will ever step down.⁶⁴ As a result, term limits can actually enhance regime survival, even when they force individual politicians out of office.

The reason that term limits are constitutionalized (as opposed to enshrined in ordinary law) is that this is supposed to make it harder to evade them. While ordinary laws can be changed by a simple majority in parliament, constitutions typically require more than that. Most constitutions require a supermajority in the legislative branch and/or a popular referendum, although there are of course differences across countries.⁶⁵ And while it is of course possible to meet this threshold under some circumstances, the higher bar ensures term limits can only be erased when the proposal enjoys broad popular support.⁶⁶ In addition, in the vast majority of countries, the constitution is enforced by the judiciary, which has the final say over its meaning and can strike down laws that violate it. While the ability to invalidate laws that contradict the constitution does not necessarily allow the judiciary to halt constitutional amendments, a growing number of courts have taken it upon themselves to scrutinize the constitutionality of constitutional amendments, either on procedural or substantive grounds.⁶⁷ The ability to declare amendments unconstitutional allows courts to potentially invalidate constitutional amendments that remove or extend term limits, although, as we will see, this has been rare in practice.⁶⁸ Overall, then, the constitution erects certain barriers that make it harder to stay past the term's expiration.

There is another feature of constitutional term limits that ensures that they are not easily evaded, which is that they are a bright-line constitutional rule: simple, categorical, and unambiguous.⁶⁹ Anyone who can count can

64. See *id.*

65. See Dieter Grimm, Types of Constitutions, *in* Oxford Handbook of Comparative Constitutional Law 98, 111 (Michel Rosenfeld & András Sajó eds., 2012) (noting the spectrum of flexibility on constitutional amendment procedure); Tom Ginsburg & James Melton, Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty, 13 *Int'l J. Const. L.* 686, 692 (2015) ("There is tremendous variation in the amendment procedures used from one country to the next The range of different actors and steps involved in constitutional design is very great."); Donald Lutz, Toward a Theory of Constitutional Amendment, 88 *Am. Pol. Sci. Rev.* 355, 360–65 (1994) (noting that one strategy is "to require that the national legislature approve an amendment by votes in two sessions with an *intervening election*").

66. See Mila Versteeg & Emily Zackin, American Constitutional Exceptionalism Revisited, 81 *U. Chi. L. Rev.* 1641, 1704 (2014) (noting that certain governments have used the citizenry's popular involvement to avoid outright erasure of term limits).

67. See generally Yaniv Roznai, Unconstitutional Constitutional Amendments: The Limits of Amendment Power *passim* (2017) (discussing judicial review of constitutional amendments).

68. See *infra* notes 248–258 and accompanying text.

69. See Ronald Dworkin, The Model of Rules, 35 *U. Chi. L. Rev.* 14, 25 (1967) ("Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."); Louis Kaplow, Rules Versus Standards: An

establish that an incumbent's time is up by simply comparing the number of years in each term and the number of terms allowed to the number of years and terms the current president has actually served. As a result, it is particularly easy for opposition groups to challenge a president that stays past his term limit, as the violation is there for everyone to see. For the incumbents that want to be seen as playing by the rules set out in the constitution and eschewing coercion and force, simply ignoring the constitution and staying past the end of the term is particularly hard to pull off. Although incumbents may get away with ignoring provisions that are broad, ambiguous, and whose violations are difficult to discern—notably provisions related to constitutional rights—this is not the case for term limits provisions.⁷⁰

Consider what has happened in China, where the government routinely violates the constitution's free speech clause without ever bothering to amend it.⁷¹ When Xi Jinping decided to serve in office for longer than the originally mandated ten years—a choice unlikely to encounter any resistance—he and his allies in the Chinese Communist Party (CCP) ensured that the Constitution was amended to allow him to do so.⁷² Thus, while vague or arguably ambiguous provisions may be safely ignored by regimes that never intended to respect them in the first place, clear rules—like term limits—are difficult to ignore, because their violation is so obvious. A blatant violation of the constitution is more likely to enflame criticism, opposition, and protest than a fuzzier infringement of something like free expression, which is held up as a value at the same time that it is violated.⁷³ Indeed, every single one of the incumbents that attempted

Economic Analysis, 42 Duke L.J. 557, 559 (1992) (noting that the distinction between rules and standards often depends on whether their content is given *ex ante* or *ex post*); Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 382–83 (1985) (“The paradigm example of a rule has a hard empirical trigger and a hard determinate response. For instance, the directive that ‘sounds above 70 decibels shall be punished by a ten dollar fine,’ is an example of a rule.”); Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 26 (1992) (discussing how certain Justices prefer the application of bright-line rules).

70. See David S. Law & Mila Versteeg, Sham Constitutions, 101 Calif. L. Rev. 863 app. II at 941–46 (2013) (documenting that constitutional rights provisions are frequently ignored).

71. See Xianfa, art. 35 (1982) [Constitution] (China) (“Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.”); Benjamin Haas, China Bans Winnie the Pooh Film After Comparisons to President Xi, *Guardian* (Aug. 6, 2018), <https://www.theguardian.com/world/2018/aug/07/china-bans-winnie-the-pooh-film-to-stop-comparisons-to-president-xi> [<https://perma.cc/38QJ-CS2G>] (discussing a recent case of censorship of viewpoints critical to the central government).

72. See *infra* notes 128–132 and accompanying text.

73. See, e.g., Tom Phillips, China’s Xi Jinping Says Internet Users Must Be Free to Speak Their Minds, *Guardian* (Dec. 16, 2015), <https://www.theguardian.com/world/2015/dec/16/china-xi-jinping-internet-users-freedom-speech-online> [<https://perma.cc/XVH5-J84Y>] (noting that Xi Jinping publicly advocated for free speech online only two days after the imprisonment of a citizen for sending seven tweets).

to evade term limits since the turn of the millennium at least pretended to play by the rules set out in the constitution: Nominal compliance, through constitutional amendment or another strategy, is preferable to outright violation. As the example of China demonstrates, this holds true even in states where constitutional rights are not customarily respected.⁷⁴

B. *The Changing Nature of Authoritarianism*

The vast majority of evasion attempts that we document take place in states where democracy was never fully consolidated.⁷⁵ But even though these countries lack stellar democratic credentials, their leaders are typically elected and they pay nominal respect to the constitution. Indeed, one of our more striking findings is that evasion attempts never ignore the constitution outright. To understand why this is the case, this section describes how the nature of authoritarian regimes has changed over the past several decades.

Dictatorships, also commonly referred to as authoritarian regimes, are generally defined as countries in which leaders and legislatures do not enter power through competitive national elections.⁷⁶ Dictatorships have historically been among the most common forms of government in the world.⁷⁷ Pharaohs ruled ancient Egypt, medieval Europe was dominated by monarchies, and empires governed China and Japan for hundreds of years. These trends extend into the present. Although eighty-five authoritarian regimes collapsed after the end of the Cold War—leading many to proclaim a “third wave” of democracy—progress quickly abated.⁷⁸ Many of the dictatorships that fell in the early 1990s did not consolidate into strong

74. See Law & Versteeg, *supra* note 70, at 866 n.4 (describing several states whose constitutions appear not to be followed); Qianfan Zhang, A Constitution Without Constitutionalism? The Paths of Constitutional Development in China, 8 *Int'l J. Const. L.* 950, 950–54 (2010) (arguing that autocratic regimes benefit from the façade of enacting good laws for their citizens without either providing any substance or subsequently executing these laws).

75. See *infra* Part II.

76. A broadly accepted definition of dictatorships are countries that violate any of the following criteria: (1) The executive is selected through competitive elections, (2) the legislature is elected through competitive elections, or (3) multiple political parties compete in elections. See José Antonio Cheibub, Jennifer Gandhi & James Raymond Vreeland, Democracy and Dictatorship Revisited, 143 *Pub. Choice* 67, 69–70 (2010). A fourth criterion, often referred to as the “Botswana Rule,” dictates that for a country to be considered a democracy, there must be an alternation in the party that is in power. *Id.* Though the Botswana Rule is often employed, scholars disagree on the inclusion of this criterion in definitions of democracy. *Id.* Notably, a leader can enter power through free and fair elections, but then become increasingly authoritarian by violating or eliminating democratic checks on executive power such as competitive elections.

77. We use the terms dictatorship, authoritarian regime, and autocracy interchangeably.

78. Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* 290 (1993).

and robust democracies and since then, democratization has stalled.⁷⁹ Indeed, up to the present day, authoritarian regimes remain a prevalent form of government.⁸⁰ Virtually all countries in the Middle East are ruled by monarchies;⁸¹ places such as China and Vietnam are governed by robust ruling parties that do not tolerate any real opposition;⁸² and leaders within Sub-Saharan Africa routinely remain in power for decades at a time.⁸³ What is more, there is a growing sense that democracy is eroding in places where it once thrived, and many have suggested that we are in a moment of democratic decline.⁸⁴ As of 2019, around forty percent of countries in the world are ruled by authoritarian governments.⁸⁵ In sum, authoritarianism has always been and continues to be the norm.

Yet while autocracy remains common, its character has changed. In popular imagination, authoritarian regimes are often perceived as totalitarian systems, in which the state regulates almost every aspect of life.⁸⁶ Classic examples of such regimes include Hitler's Germany, Mussolini's Italy, or Franco's Spain. Perhaps most characteristically, this form of authoritarian government did not attempt to gain stability through institutions that promoted the legitimacy of the government. Instead, these totalitarian systems maintained their dominance through complete and total control of security forces, the media, the economy, and even everyday

79. See, e.g., Nancy Bermeo, *On Democratic Backsliding*, *J. Democracy*, Jan. 2016, at 5, 8–14.

80. See Barbara Geddes, Joseph Wright & Erica Frantz, *How Dictatorships Work 1* (2018); see also Adam Przeworski, Michael E. Alvarez, José Antonio Cheibub & Fernando Limongi, *Democracy and Development* 59–69 (2000).

81. See Sean Yom, *How Middle Eastern Monarchies Survived the Arab Spring*, *Wash. Post* (July 29, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/29/the-emerging-monarchies-club-in-the-middle-east/> (on file with the *Columbia Law Review*) (naming eight Middle Eastern monarchies).

82. See *Is There Opposition in Vietnam?*, *Asia Sentinel* (Oct. 10, 2013), <https://www.asiasentinel.com/politics/is-there-opposition-in-vietnam/> [<https://perma.cc/R637-TP8B>]; Andrew Jacobs, *Non-Communist Parties Lend China an Air of Pluralism, Without the Mess*, *N.Y. Times* (Mar. 12, 2013), <https://www.nytimes.com/2013/03/13/world/asia/chinas-non-communist-parties-lend-an-air-of-pluralism.html> [<https://perma.cc/CP48-NL4T>].

83. See Vencovsky, *supra* note 31, at 17 (giving examples of African leaders who have remained in power for many decades).

84. See, e.g., Steven Levitsky & Daniel Ziblatt, *How Democracies Die* 204–06 (2018) (noting the increasing perception that democracy is in retreat, particularly under the Trump Administration); Bermeo, *supra* note 79, at 8.

85. See Geddes et al., *supra* note 80, at 1.

86. See Hannah Arendt, *The Origins of Totalitarianism* 6 (1973) (“A fundamental difference between modern dictatorships and all other tyrannies of the past is that terror is no longer used as a means to exterminate and frighten opponents, but as an instrument to rule masses of people who are perfectly obedient.”); Carl Joachim Friedrich & Zbigniew K. Brzezinski, *Totalitarian Dictatorship and Autocracy* 66–67 (1965) (discussing the indoctrination and role of youth in the Soviet Union and China); Juan J. Linz, *Totalitarian and Authoritarian Regimes* 66 (2000).

life. Coercion and force were used regularly in order to rule the populace and keep resistance at bay.⁸⁷

Today's authoritarians are different. Indeed, since the 1990s, the nature of authoritarianism has undergone a profound change. Many leaders of the regimes that we now consider authoritarian in nature did not come to power through force: They were democratically elected.⁸⁸ Autocratic leaders now routinely rise to power through the ballot box or via a ruling party, rather than through the barrel of a gun.

Contemporary dictatorships not only hold democratic elections, they also adopt nominally democratic institutions, such as parties, legislatures, judiciaries, and liberal constitutions. Leaders rely on the presence of these institutions to appear legitimate, eschewing the previous strategy of staying in power through coercion and force.⁸⁹ As a result, dictatorships now often resemble democracies, at least on paper, in terms of their formal laws and institutions.⁹⁰ From 1946–2008, autocratic leaders maintained a ruling party eighty-seven percent of the time and had a legislature eighty-five percent of the time.⁹¹ During that same period, ninety-three percent of all autocracies had constitutions.⁹² Between 1945 and 2006, a total of 2,122 elections were held in 124 countries—707 presidential elections and 1,415

87. Friedrich & Brzezinski, *supra* note 86, at 5. It is still important to note that even totalitarian regimes often used institutions to further their own agendas. Hitler, for example, initially rose to the national stage through the 1932 presidential elections in Germany. After becoming chancellor, he passed laws that suppressed the freedom of assembly and association. See Karl Loewenstein, *Law in the Third Reich*, 45 *Yale L.J.* 779, 802 n.86 (1936).

88. Indeed, the number of coups d'état has declined dramatically. From 1960 to 1969, there were a total of sixty-one coups. Just in 1966 alone, there were a total of nineteen coups, twelve of which resulted in successful overthrows of the incumbent. See Jonathan M. Powell & Clayton L. Thyne, *Global Instances of Coups from 1950 to 2010: A New Dataset*, 48 *J. Peace Res.* 249, 256 (2011). In 2017, there were only two, one of which was the coup that removed Robert Mugabe from power after he had ruled Zimbabwe for almost four decades. Even then, when the military appeared on television to declare that Mugabe had been ousted, they repeatedly reassured their viewers that this was “not a military takeover.” See Adam Taylor, *Zimbabwe: When a Coup Is Not a Coup*, *Wash. Post* (Nov. 15, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/11/15/zimbabwe-when-a-coup-is-not-a-coup/?utm_term=.01401de62a68 (on file with the *Columbia Law Review*).

89. See Andreas Schedler, *The Logic of Electoral Authoritarianism*, in *Electoral Authoritarianism: The Dynamics of Unfree Competition* 1, 6 (Andreas Schedler ed., 2006); Larry Diamond, *Elections Without Democracy: Thinking About Hybrid Regimes*, *J. Democracy*, Apr. 2002, at 21, 22; Steven Levitsky & Lucan A. Way, *Elections Without Democracy: The Rise of Competitive Authoritarianism*, *J. Democracy*, Apr. 2002, at 51, 53.

90. Ozan O. Varol, *Stealth Authoritarianism*, 100 *Iowa L. Rev.* 1673, 1715–18 (2015) (“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.”).

91. Cheibub et al., *supra* note 76, at 94.

92. See Zachary Elkins, Tom Ginsburg & James Melton, *The Content of Authoritarian Constitutions*, in *Constitutions in Authoritarian Regimes* 141, 146 (Tom Ginsburg & Alberto Simpser eds., 2014).

legislative elections.⁹³ The nature of state control over society has also changed: Violent repression and outright coercion are now used selectively to target certain sectors of the population, rather than employed against the entire populace. Regimes like North Korea are the exception, not the rule.⁹⁴

What is more, the democratic institutions found in authoritarian regimes are not mere “window dressing”: Recent work in political science has shown that they are used strategically by autocratic leaders.⁹⁵ These scholars have found that political parties help leaders solve intra-elite conflicts⁹⁶ and can divert to elites the benefits of state power.⁹⁷ Legislatures and elections have been shown to provide a controlled outlet for bargaining, cooptation, and dissent amongst both elites and the masses.⁹⁸ Courts are often used to delegitimize and imprison regime opponents⁹⁹ or to concentrate executive power.¹⁰⁰ Consider the case of Mexico, which was ruled by the dominant party, the *Partido Revolucionario Institucional* (PRI), for over seventy years.¹⁰¹ From 1938 until 2000, eleven presidents, all

93. Susan D. Hyde & Nikolay Marinov, Which Elections Can Be Lost?, 20 *Pol. Analysis* 191, 192 (2012).

94. See Svolik, *supra* note 60, at 22, 183.

95. Jennifer Gandhi, Political Institutions Under Dictatorship, at xviii (2008) (stating that autocrats may benefit from democratic institutions in that they provide a useful forum for organizing compromises and containing policy concessions to their opponents without appearing weak); Jennifer Gandhi & Adam Przeworski, Authoritarian Institutions and the Survival of Autocrats, 40 *Comp. Pol. Stud.* 1279, 1280 (2007) (“[P]artisan legislatures incorporate potential opposition forces, investing them with a stake in the ruler’s survival.”).

96. Jason Brownlee, Authoritarianism in an Age of Democratization 12–13 (2007); Beatriz Magaloni, Voting for Autocracy: Hegemonic Party Survival and Its Demise in Mexico 15–16, 18, 44–52, 79 (2006) [hereinafter Magaloni, *Voting for Autocracy*]; Ora John Reuter, The Origins of Dominant Parties: Building Authoritarian Institutions in Post-Soviet Russia 72–73 (2017); Carles Boix & Milan W. Svolik, The Foundations of Limited Authoritarian Government: Institutions, Commitment, and Power-Sharing in Dictatorships, 75 *J. Pol.* 300, 300–04, 306–07, 314 (2013).

97. Kenneth F. Greene, Why Dominant Parties Lose: Mexico’s Democratization in Comparative Perspective 6 (2007) [hereinafter Greene, *Why Dominant Parties Lose*]; Dan Slater, Ordering Power: Contentious Politics and Authoritarian Leviathans in Southeast Asia 50 (2010); Kenneth F. Greene, The Political Economy of Authoritarian Single-Party Dominance, 43 *Comp. Pol. Stud.* 807, 828 (2010).

98. See Lisa Blaydes, Elections and Distributive Politics in Mubarak’s Egypt 15, 48–49 (2011); Jennifer Gandhi & Ellen Lust Okar, Elections Under Authoritarianism, 12 *Ann. Rev. Pol. Sci.* 403, 405–06 (2009); Ellen Lust-Okar, Elections Under Authoritarianism: Preliminary Lessons from Jordan, 13 *Democratization* 456, 458–59 (2006); Edmund Malesky & Paul Schuler, Nodding or Needling: Analyzing Delegate Responsiveness in an Authoritarian Parliament, 104 *Am. Pol. Sci. Rev.* 482, 482–83, 485 (2010).

99. Fiona Shen-Bayh, Strategies of Repression: Judicial and Extrajudicial Methods of Autocratic Survival, 70 *World Pol.* 321, 323, 332–33, 344–45 (2018).

100. Dan Slater, Iron Cage in an Iron Fist: Authoritarian Institutions and the Personalization of Power in Malaysia, 36 *Comp. Pol.* 81, 88–89 (2003) (describing how Malaysian Prime Minister Mahathir Mohamed packed the country’s high court in order to facilitate his concentration of power within his cabinet and ruling party).

101. Magaloni, *Voting for Autocracy*, *supra* note 96, at 1.

belonging to the ruling PRI, were elected through multiparty elections.¹⁰² Though the PRI regime was accused of vote buying, controlling the media, and undermining opposition parties, its elections maintained a façade of rule through legitimacy and popular support.¹⁰³ Past and current leaders of China have similarly relied on the legitimacy of the ruling Chinese Communist Party, bolstered by the economy's strong performance, to maintain authority since the party seized power in 1949.¹⁰⁴ In sum, it has become easier for autocrats to remain in power through the veneer of institutional legitimacy, which sometimes even affords them true popular support.

Thus, with the rise of this “new authoritarianism,” the conventional line between democracy and dictatorship has been blurred. The model autocratic leader in 2019 attains office by winning multiparty elections, and maintains democratic-seeming parties, legislatures, and judiciaries.¹⁰⁵ Presidents Recep Tayyip Erdoğan in Turkey, Vladimir Putin in Russia, and Paul Biya of Cameroon, for instance, are all incumbents who fit this profile.¹⁰⁶ Yet, they are nonetheless different from democratic regimes. Elections in these regimes are not necessarily free and fair: The deck tends to be stacked against the political opposition. What is more, laws, courts, and political bodies do not necessarily hold these leaders accountable, but instead may amplify the leaders' personal authority. At the same time, these laws are an important part of modern-day autocratic governance. For most authoritarian leaders, the constitution is instrumental to their power and blatant violations are rare (more subtle violations, however, are quite common). It is for this reason that term limit provisions, which are an example of bright-line constitutional rules, are not ignored outright but have to be maneuvered around.

II. GLOBAL TRENDS IN TERM LIMITS EVASION

A. *Global Dataset*

To systematically survey term limit evasion, we compiled a global dataset cataloging evasion attempts, the first of its kind. Our database includes all countries that have had presidential term limits in their constitutions at any point after the year 2000.¹⁰⁷ For each country, we identify

102. *Id.* at 103, 257.

103. Greene, *Why Dominant Parties Lose*, *supra* note 97, at 72, 75; Magaloni, *Voting for Autocracy*, *supra* note 96, at 7.

104. See Svobik, *supra* note 60, at 179–80.

105. See Meng, *supra* note 63, at 4–5.

106. Lauren Leatherby & Mira Rojanasakul, *Elected Leaders Are Making the World Less Democratic*, Bloomberg (July 23, 2018), <https://www.bloomberg.com/graphics/2018-democracy-decline/> [<https://perma.cc/9C9B-ZVMR>].

107. To compile this list of countries, we used the variable ‘hosterml’ from the Comparative Constitutions Project. Download CCP Data, Comparative Constitutions Project, <https://comparativeconstitutionsproject.org/download-data/> (dataset on file with

the year that the incumbent's term is set to expire, starting in the year 2000. When a constitution permits one term, the expiration date is the last year of the first term; when the constitution permits two terms, the expiration date is the last year of the second term. If elections are held one year, and power turns over the next, we use the year that power turns over. By this logic, President Trump's term is set to expire in 2025 (while President Obama's term expired in 2017).¹⁰⁸ Using this approach we found 234 "events," meaning years that terms expired, in a total of 106 countries.

In identifying events, we had to make a number of judgment calls. First, we had to decide how to deal with the leaders that came to power before the period of our survey begins (the year 2000). Here, our approach is to use the year that the term expires to decide whom to include. If a leader came to power before the year 2000, but his term expired after 2000, that leader is included in our data. If a leader's term expired before 2000, he is not included in our data, even in cases when he manages to stay past the year 2000. Second, we had to decide how to deal with leaders who are still in office. Our general approach is to exclude ongoing events. That is, if, by August 2018, a leader was not yet past his term expiration date, he does not enter the database. Thus, if we were to count Trump's jokes as evasion attempts (which we do not, as explained below), he would not enter the database. We opt for this approach even in the cases where it is highly likely that a leader will successfully overstay. For example, Chinese President Xi Jinping's second term will end only in 2023;¹⁰⁹ yet, we know that the country recently passed an amendment to remove term limits from its constitution.¹¹⁰ The reason we nonetheless exclude this event is that it is technically still possible for Xi Jinping to make a timely exit. Further, while it is highly likely that Xi Jinping gets to stay, in other countries, it is often difficult to judge ongoing evasion attempts. Take the case of Mauritania, whose authoritarian former President Mohamed Ould Abdel Aziz claimed that he was not afraid to change the Constitution for his "personal interest" but who eventually stepped aside, even as members of his party petitioned for a constitutional amendment removing term

the *Columbia Law Review* (last visited Oct. 2, 2019). For countries for which the Comparative Constitutions Project did not have data, we surveyed their constitutions using the Constitute Project website. Explore Constitutions, Constitute Project, <https://www.constituteproject.org> [<https://perma.cc/WVH4-XJVB>] (last visited Oct. 2, 2019). We excluded a number of very small countries as well as countries that have particularly complicated arrangements because of historical breakup (such as Bosnia and Herzegovina, which has three presidents). We also excluded Eritrea, because its constitution was never implemented.

108. See U.S. Const. art. II, § 1; id. amend. XX, § 1.

109. Stephen McDonnell, China's Xi Allowed to Remain 'President for Life' as Term Limits Removed, BBC News (Mar. 11, 2018), <https://www.bbc.com/news/world-asia-china-43361276> [<https://perma.cc/PNT6-R8SJ>].

110. Xianfa [Constitution] art. 79, § 2 (1982, as amended by art. 45 (Mar. 11, 2018)) (China).

limits.¹¹¹ Until Abdel Aziz actually left office, it was hard to predict what might happen. Though we exclude ongoing events, leaders that remain in office after successfully evading term limits that expired before 2018 are included in the database. Again, the term expiration date is what determines inclusion.

Third, we had to decide on how to deal with those leaders who evade term limits more than once. Here, our approach is that when leaders brush up against multiple term expiration dates, they can enter the database more than once. For example, Colombian President Álvaro Uribe's term was initially up in 2006, but he successfully managed to amend the Constitution to extend the term by four years.¹¹² His new term expiration date, 2010, is a new event in our data (and indeed, Uribe again tried to evade this term limit, although this time he was unsuccessful).¹¹³

After having identified the relevant term limit expiration years, we surveyed each country for what happened in the years leading up to the expiration date. We did so by surveying both news sources and the secondary literature. Based on these sources, we wrote a memo for each country answering a set of standard questions, such as how the leader first came to power, whether he attempted to evade, what the main strategy (or strategies) for doing so was, whether the strategy was successful, what the public response was, and, if the strategy failed, what the main causes of failure were. All of the memos were written by the authors themselves. All the Latin America memos were written by a native Spanish speaker. For most other countries, we had to rely on English language sources. Yet, considering the political salience of term limit evasion, we found that there were always multiple sources describing the events in English, and therefore believe that language barriers did not constitute a significant obstacle to our research.

One issue we had to grapple with in answering these questions is how to define an evasion attempt. When a leader successfully stays in office past the end of his term, it is clear that he successfully evaded the constitution. Yet, cases of failure are harder to judge. Few would count President Trump's joke as a serious evasion attempt. Likewise, when supporters of former Brazilian President Lula Da Silva proposed a constitutional amendment to

111. Mauritanian President Determined to Respect the Country's Constitution, Pol. Analysis S. Afr. (Jan. 16, 2019), <https://www.politicalanalysis.co.za/mauritanian-president-determined-to-respect-the-countrys-constitution/> [<https://perma.cc/7M3W-NFCV>]; Nellie Peyton, Mauritanian President Says Has No Plans to Scrap Term Limits, Reuters (Oct. 21, 2016), <https://www.reuters.com/article/us-mauritania-politics-idUSKCN12L1X1> [<https://perma.cc/6JMW-TV9L>].

112. See *infra* note 160 and accompanying text.

113. See *infra* Part III. We should note that in some countries, such as Sri Lanka, elections can be called early, in which case the president's terms are reduced and we adjust term length accordingly. For example, then-President Chandrika Kumaratunga called elections in her first term one year early, and the Supreme Court decided that she lost a year of her term. See *Omalpe Sobhita Thero v. Dayananda Dissanayake*, [2008] 2 Sri L.R. 121, 142 (Sri Lanka).

allow him to seek a third term, Da Silva himself dismissed a potential re-election bid, and few took this to be a serious evasion attempt.¹¹⁴ Or, to give an example from a different continent, when Ahmed Tejan Kabbah of Sierra Leone remarked publicly once that he would consider extending his term, few considered this as a serious proposal, and no further actions were taken.¹¹⁵ In Ghana, former President Jerry Rawlings admitted to wanting to overstay but said he never took it anywhere because he knew it would never succeed.¹¹⁶ None of these cases represent serious evasion attempts, and we do not count them as such. On the other end of the spectrum, when a formal action is taken—such as the initiation of a constitutional amendment process or where a case is presented to the courts—the president is clearly trying to evade the constitution, and we count this as an evasion attempt.

Gray areas arise, however, where the president may in fact be serious about evading the constitution, but a proposal never gets formalized. There are two different scenarios here. The first is a proposal that never formalizes because the president never undertakes any real effort to do so. An instance of this scenario happened in Argentina, where unofficial suggestions in 2012 that President Cristina Fernández de Kirchner should run for a third term¹¹⁷ produced massive street protests.¹¹⁸ President Kirchner herself never commented on or took action on this proposal, and thus it never formalized.¹¹⁹ The second borderline scenario occurs when a president makes a serious proposal but encounters strong resistance early on and, therefore, withdraws it. An example is Zambia, where President Fredrick Chiluba pushed for a constitutional amendment and relentlessly harassed and bullied his political opponents into passing it.¹²⁰ A formal bill

114. See Ana Nicolaci da Costa, Many in Brazil Want Third Lula Term but He Says No, Reuters (Apr. 28, 2008), <https://www.reuters.com/article/us-brazil-politics/many-in-brazil-want-3rd-lula-term-he-says-no-idUSN2848213920080428> [<https://perma.cc/BW27-LD95>].

115. See Tull & Simons, *supra* note 31, at 86 fig.1 (2017). But cf. Boniface Madalitso Dulani, Personal Rule and Presidential Term Limits in Africa 200 & n.90, 220 (2011) (unpublished Ph.D. dissertation, Michigan State University) (on file with the *Columbia Law Review*).

116. See E. Annan, Make Presidential Term 5 Years—Rawlings Advocates, Pulse (Mar. 5, 2018), <https://www.pulse.com.gh/news/politics/make-presidential-term-5-years-rawlings-advocates-id8068595.html> [<https://perma.cc/R3A8-RHD5>].

117. Alejandro Rebossio, Argentina Comienza a Debatir una Segunda Reección de Fernández [Argentina Begins to Debate a Second Reelection for Fernández], El País (Sept. 1, 2012), https://elpais.com/internacional/2012/09/01/actualidad/1346521869_615086.html (on file with the *Columbia Law Review*).

118. Fuerte Rechazo a la Reforma de la Constitución y a la Reección de Cristina [Strong Rejection of Constitutional Reform and the Reelection of Cristina], Clarin (Nov. 3, 2012), https://www.clarin.com/politica/fuerte-reforma-constitucion-re-reeleccion-cristina_0-Bk1N1W0sDXx.html [<https://perma.cc/WX75-A8U2>].

119. See *id.*

120. See Dulani, *supra* note 115, at 5 (“While Chiluba remained non-committal about his true position on the debate, his supporters mounted a very aggressive, and sometimes violent, campaign for the removal of term limits.”).

was drafted, but the day before it was supposed to be introduced in Parliament, the President realized it might be defeated and withdrew his support.¹²¹ We code this as a failed evasion attempt. These are close cases, requiring judgment. Ultimately, we settled on two criteria for less formal proposals: first, whether the incumbent took any concrete steps to evade; second, whether the proposal generated some form of social unrest, such as major protests or campaigns of harassment and intimidation. In Zambia, President Chiluba took concrete steps to remain in office and supported the measure, and there was significant public controversy as a result. Thus, it was a failed evasion attempt. In Argentina, the suggestion that President Kirchner should remain past her term *did* generate public backlash, but Kirchner never took real action or appeared to support the idea, so we do not code it as a true attempt. Such classifications are perhaps unavoidably subjective in nature, but they concern only a small number of cases.

A final decision we had to make is how to treat debates over extending term limits that do not seem to benefit the current incumbents. In a small number of cases, the desired beneficiary of the evasion attempt is a past or future president, not the incumbent. For example, in Costa Rica former President Óscar Arias and his supporters petitioned the nation's supreme court to invalidate the single-term limit so that he could run again in the future.¹²² Likewise, in South Korea, there seems to be a general consensus that a single five-year term is not enough to govern effectively, and numerous proposals have been made to amend the constitution, but no one has proposed to allow the current incumbent to serve for more than a single term.¹²³ In Turkey, term limits were amended by an outgoing president to benefit his notorious successor: Recep Tayyip Erdoğan.¹²⁴ We decide to include these types of cases in our database but mark them as a separate type of evasion attempt. Overall, this scenario is uncommon and involves only six (out of sixty) cases.

B. *Basic Findings*

In the popular imagination, a president who overstays the limits of his office fits a certain profile. He is likely a dictator in all but name, with a chokehold on civil society, the military, and all branches of government. He probably came to power via a coup d'état. He and his loyal subordinates claim that various threats—foreign and domestic—loom on the

121. See Burnell, *supra* note 41, at 1111; Dulani, *supra* note 115, at 5–6.

122. See Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court of Justice] Apr. 4, 2003, Sentencia 2003-02771 (Costa Rica).

123. See Kyle Pope, *Breaking the Cycle of Presidential Corruption in South Korea*, E. Asia Forum (May 3, 2017), <http://www.easiaforum.org/2017/05/03/breaking-the-cycle-of-presidential-corruption-in-south-korea/> [<https://perma.cc/FZ84-JP5N>].

124. See Hakkı Taş, *Turkey—From Tutelary to Delegative Democracy*, 36 *Third World Q.* 776, 781 (2015) (explaining that Turkey amended its single seven-year presidential term limit to allow for five-year terms with the possibility of reelection).

horizon, threatening instability. He declares a national emergency, suspends the constitution, and rules by decree. In a phrase that has not lost its popularity in the media, he thus becomes “president for life,”¹²⁵ with no respect for constitutional requirements, the rule of law, and certainly not for term limits.

Some of this profile still fits the facts. Many of the leaders who overstay have authoritarian tendencies and tend to stack the deck against the political opposition. Without exception, they are all male.¹²⁶ But in crucial respects, this picture is outdated. First, as mentioned, most of the leaders who overstay came to power via popular election. In fact, according to our data, forty-six out of the sixty attempts to overstay were made by leaders who first came to power through democratic elections. Even those that started their political careers as coup-makers often have been able to boost their democratic pedigrees by subsequently winning elections. Second, it is exceedingly rare for presidents in the twenty-first century to suspend or outright *ignore* the constitution and remain in power on that basis. Indeed, not a single one of the presidents in our data ignored the constitution outright; instead, they employed a host of strategies that are arguably consistent with the constitution.

An important part of our contribution is to document and classify the precise strategies that overstaying or would-be overstaying presidents have deployed. We categorized the strategies as: (1) pursuing constitutional amendment; (2) writing a new constitution and proclaiming that the time served under the old constitution does not count (the “blank slate theory”); (3) using courts to reinterpret term limits out of the constitution; (4) finding a placeholder president that can be controlled by the exiting leader (the “faithful agent approach”); and (5) delaying elections. We document each of these strategies in greater detail in Parts III and IV. Figure 1 depicts the frequency of these evasion strategies. It shows that amendment is the most common strategy, used in forty out of sixty attempts. The blank slate theory was used in five attempts as the primary strategy (while in another three, it was the secondary strategy). Some six incumbents called upon the courts to reinterpret term limits (while in four cases this was a secondary strategy), while another six attempted to find a faithful agent (while for one, this was a secondary strategy). Finally, three incumbents attempted to overstay by delaying elections (and for one other, this was a secondary strategy).

125. See Emily Stewart, *China Votes to Allow Xi to Stay President for Life*, Vox (Mar. 11, 2018), <https://www.vox.com/world/2018/3/11/17106242/china-xi-jinping-president-for-life> [<https://perma.cc/2ML2-SB52>] (characterizing China’s constitutional change as “paving the way” for life tenure).

126. Forty out of forty successful evasions since 2000 have involved male presidents. If counting all attempts, only one out of fifty-four total attempts involved a female leader—President Kirchner of Argentina. Kirchner herself never publicly expressed an intention to overstay and the proposal—which had been initiated by her supporters—fizzled out before even reaching Congress. See *supra* notes 117–119 and accompanying text.

FIGURE 1: PREVALENCE OF EVASION ATTEMPTS

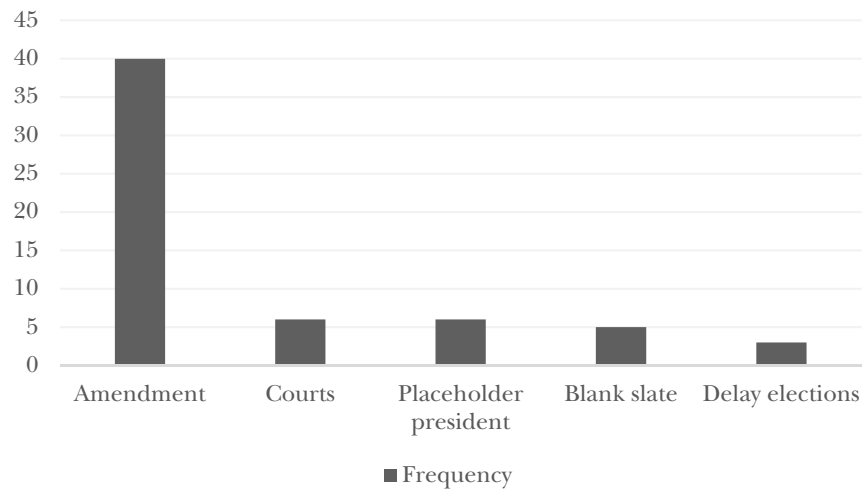


Table 1 provides the same information, along with these strategies' success rate. It shows that amendment attempts often fail: Only sixty percent of amendment attempts are successful. The faithful agent strategy has an even lower success rate: It failed four out of six times. By contrast, the blank slate theory and elections delay were successful every time they were tried. The strategy of using the courts to reinterpret the constitution failed only once (and only due to the involvement of a regional court).¹²⁷ Parts III and IV will discuss each of these strategies in detail.

127. See *infra* notes 395–399 and accompanying text.

TABLE 1: WHAT TYPES OF EVASION STRATEGIES DO LEADERS EMPLOY?

Evasion Strategy	Description	Frequency	Percent	Percent Success
Amendment	Amend the constitution to eliminate term limits or extend number of terms	40	63%	60%
Blank slate	Create entirely new constitution that resets term count	5	8%	100%
Courts	Rely on legal theory or the courts to reinterpret term limits	6	15%	83%
Placeholder President	Allow an associate to become incumbent, but still maintain control	6	15%	33%
Delay elections	Delay holding new elections when term is up	3	5%	100%
TOTAL		60	100%	67%
Multiple strategies	Any combination of the strategies listed above	9	14%	100%

III. EVASION THROUGH AMENDMENT

A. *The Basic Strategy*

In late February of 2018, the Communist Party of China unveiled a set of proposed constitutional amendments.¹²⁸ They were to be considered and voted on during the National People’s Congress’s annual session in early March.¹²⁹ The measures included changes to the preamble, the creation of new “supervisory commissions” to oversee provincial and local government activity, and several others.¹³⁰ Buried in the middle of the proposals was an amendment that would allow the Chinese president (and vice president) to serve an unlimited number of five-year terms.¹³¹ This

128. See China Focus: Proposed Constitutional Amendment Package Unveiled, Xinhuanet (Feb. 25, 2018), http://www.xinhuanet.com/english/2018-02/25/c_136999410.htm [<https://perma.cc/3UCZ-2S23>] [hereinafter China Focus].

129. See Chris Buckley, How Xi Jinping Made His Power Grab: With Stealth, Speed and Guile, N.Y. Times (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/world/asia/china-xi-jinping-party-term-limit.html> [<https://perma.cc/MDX5-7NZF>].

130. See China Focus, *supra* note 128.

131. See *id.*; see also Xianfa [Constitution] art. 60 (1982) (China).

measure, alongside all the others, passed through the National People's Congress, China's legislature, with 99.8% of the nearly 3,000 voting representatives in favor.¹³² Thus, President Xi Jinping, who had previously been scheduled to step down in 2023, may now choose to stand for as many additional five-year terms as he wishes and circumstances allow.¹³³

China is merely one of the most recent and prominent of a number of countries that have amended their constitutions to extend term limits. Of the sixty attempts at overstay since 2000, forty involved constitutional amendment. Of those, twenty-five were successful, making this the most popular strategy for evading term limits (but also the one most likely to fail, as we will elaborate below). Abdelaziz Bouteflika of Algeria,¹³⁴ Ilham Aliyev of Azerbaijan,¹³⁵ Danilo Medina of the Dominican Republic,¹³⁶ Alvaro Uribe of Colombia,¹³⁷ Aleksandr Lukashenko of Belarus,¹³⁸ among others, have all been able to extend their terms past the original expiration date using this method.

The most likely reason for why amendment is so popular is that it places the leader on solid legal footing. Once the constitution has been amended, what at first seems like an illegitimate evasion attempt becomes authorized by the country's highest law. Thus, a leader who overstays through amendment never violates the constitution, remaining in power while showing at least nominal respect for the constitution and the rule of law.

For some incumbents, like China's Xi Jinping, constitutional amendment is a smooth and easy path to extend term limits, reflecting

132. See Emily Rauhala, Xi Cleared to Rule Indefinitely as China Officially Scraps Term Limits, *Wash. Post* (Mar. 11, 2018), https://www.washingtonpost.com/world/china-approves-plan-to-abolish-presidential-term-limits-clearing-way-for-xi-to-stay-on/2018/03/11/973c7ab2-24f0-11e8-a589-763893265565_story.html (on file with the *Columbia Law Review*). Of the 2,964 legislators, 2,958 voted in favor, three abstained, two voted no, and one vote was invalid. *Id.*

133. See *id.*

134. See Algeria Deputies Scrap Term Limit, *BBC News*, <http://news.bbc.co.uk/2/hi/africa/7724635.stm> [<https://perma.cc/KGD6-UEYX>] (last updated Nov. 12, 2008).

135. See Nailia Bagirova, Azerbaijan's Aliyev Wins Fourth Term as President, *Reuters* (Apr. 10, 2018), <https://www.reuters.com/article/us-azerbaijan-election/azerbaijans-aliyev-wins-fourth-term-as-president-idUSKBN1HH3CJ> [<https://perma.cc/3EDH-5JMG>].

136. See Daniel Zovatto, Dominican Republic Opts for Continuity, *Brookings* (June 2, 2016), <https://www.brookings.edu/opinions/dominican-republic-opts-for-continuity-2/> [<https://perma.cc/4PD8-4J5S>].

137. See Michael Shifter, One More Time?, *L.A. Times* (Apr. 16, 2009), <https://www.latimes.com/archives/la-xpm-2009-apr-16-oe-shifter16-story.html> (on file with the *Columbia Law Review*).

138. See Observers Deplore Belarus Vote, *BBC News* (Oct. 18, 2004), <http://news.bbc.co.uk/2/hi/europe/3752930.stm> [<https://perma.cc/FNV3-SYKD>]; see also *Controversial Belarus Vote Scraps Term Limits*, *NBC News* (Oct. 18, 2004), http://www.nbcnews.com/id/6276009/ns/world_news/t/controversial-belarus-vote-scraps-term-limits/ [<https://perma.cc/UD8H-B4UG>].

strong de facto executive power.¹³⁹ The same was true in Rwanda, where highly popular President Paul Kagame benefitted from a constitutional amendment that would allow him to remain in office until 2034.¹⁴⁰ The Rwandan case illuminates the dynamics of amendment with a highly popular president. By the end of his term, Kagame had led the war-torn nation through a period of remarkable economic recovery and stability, and enjoyed high approval ratings.¹⁴¹ In 2015, heeding the calls of prominent members of Kagame's Rwandan Patriotic Front (RPF) party, a total of 3.6 million Rwandans (out of a voting pool of six million) signed popular petitions asking that Parliament draft a proposal to allow Kagame to run for another term.¹⁴² Once these petitions reached a certain threshold, the RPF announced its official support of the measure, and legislators proceeded to draft an amendment.¹⁴³ The constitution required that both chambers of Parliament approve the measure by a three-fourths majority;¹⁴⁴ it passed with overwhelming support.¹⁴⁵ The constitution also required that amendments involving term limits pass by a bare majority vote in a citizen referendum;¹⁴⁶ 98.9% of voters voted in favor.¹⁴⁷ Throughout the process, Kagame never officially announced whether he intended to stay in office past 2017, or otherwise commented on the amendment process. It was only at the very end of 2015, after the amendment passed, that Kagame made official his intention to run again in 2017, casting the move as merely following—with some reluctance—the will of the people: “You requested me to lead the country again after 2017. Given the importance and consideration you attach to this, I can only accept. But I

139. See Rauhala, *supra* note 132.

140. Jason Burke, Paul Kagame Re-Elected President with 99% of Vote in Rwanda Election, *Guardian* (Aug. 5, 2017), <https://www.theguardian.com/world/2017/aug/05/paul-kagame-secures-third-term-in-rwanda-presidential-election> [<https://perma.cc/T3J3-F2ZA>].

141. See Denise Bentrovato, Rwanda, Twenty Years On: Assessing the RPF's Legacy Through the Views of the Great Lakes Region's New Generation, 218 *Cahiers d'Études Africaines* 231, 242–43 (2015) (reporting on the positive views of Kagame's rule held by Africans of varying nationalities).

142. Claudine Vidal, Rwanda: Paul Kagame Is in Line to Stay in Office Until 2034, *Conversation* (Jan. 18, 2016), <https://theconversation.com/rwanda-paul-kagame-is-in-line-to-stay-in-office-until-2034-53257> [<https://perma.cc/X5AK-26N2>].

143. *Id.*

144. Constitution of the Republic of Rwanda June 4, 2003, art. 193; see also Only 10 Rwandans Against Paul Kagame's Third Term, Says Lawmakers' Report, *Daily Nation* (Aug. 11, 2015) (Kenya), <https://www.nation.co.ke/news/africa/Paul-Kagame-third-term-bid-MPs-report/-/1066/2827968/-/e9v9m2z/-/index.html> [<https://perma.cc/229B-UAB7>].

145. See Rwandan Senate Votes to Allow Third Term for Kagame, *Al Jazeera* (Nov. 17, 2015), <https://www.aljazeera.com/news/2015/11/rwanda-term-paul-kagame-151117145547331.html> [<https://perma.cc/38XZ-FCAN>]; Clement Uwiringiyimana, Rwandan Parliament Agrees to Extend Kagame's Rule, *Reuters* (Oct. 29, 2015), <https://www.reuters.com/article/us-rwanda-president/rwanda-parliament-agrees-to-extend-kagames-rule-idUSKCN0SN24W20151029> [<https://perma.cc/74H8-46S2>]; Vidal, *supra* note 142.

146. Constitution of the Republic of Rwanda June 4, 2003, art. 193.

147. See Vidal, *supra* note 142.

don't think that what we need is an eternal leader."¹⁴⁸ Throughout the entire process, there was scarcely any opposition at all. For example, the Democratic Green Party, which did not have any members in Parliament, petitioned Rwanda's highest court to challenge the move, but their case was dismissed as lacking any basis in Rwandan constitutional law.¹⁴⁹

For other incumbents, the path to amendment is not nearly as smooth. Consider Cameroon, where President Paul Biya successfully amended his country's Constitution so that he could run for an unlimited number of terms, but where the process was much rockier than in Rwanda or China. These amendments came in 2008, three years before Biya's constitutional tenure was set to expire.¹⁵⁰ Though Biya was able to secure a commanding majority in the legislature,¹⁵¹ and push through a set of amendments that not only removed term limits but also immunized the president from impeachment for virtually any activity,¹⁵² he faced a more serious opposition than Kagame or Xi did. First, opposition legislators stormed out of Parliament, boycotting the vote as invalid.¹⁵³ Though their numbers were too small to prevent the amendments' passage, it is notable that they so openly defied the president. Second, there were popular protests—inspired in part by the proposed amendment—that turned into riots against which Biya used force, leading to dozens of deaths.¹⁵⁴ Biya remains in power today, but he has continued to face protests and an angry opposition, in large part because of his lengthy stay in office and stranglehold on Cameroonian politics.¹⁵⁵ In short, amending term limits is not always an easy or seamless process.

There are different ways to amend the constitution to extend term limits—some represent more incremental change, while others are more radical in nature. The most radical form of amendment is simply to abolish

148. Rwandan President Paul Kagame to Run for Third Term in 2017, *Guardian* (Jan. 1, 2016), <https://www.theguardian.com/world/2016/jan/01/rwanda-paul-kagame-third-term-office-constitutional-changes> [<https://perma.cc/CJU5-JLDK>].

149. Clement Uwiringiyimana, *Rwanda's Top Court Clears Way for Kagame Third Term*, *Reuters* (Oct. 8, 2015), <https://www.reuters.com/article/us-rwanda-president/rwandas-top-court-clears-way-for-kagame-third-term-idUSKCN0S21AI20151008> [<https://perma.cc/N3FR-AKD8>].

150. Tansa Musa, *Cameroon's Biya Signs Law Allowing Third Term Bid*, *Reuters* (Apr. 15, 2008), <https://uk.reuters.com/article/cameroon-constitution-idUKL1529602420080415> [<https://perma.cc/97TC-YUCA>].

151. *Id.*

152. Law No. 2008/001 of 14 April 2008 to Amend and Supplement Some Provisions of Law No. 96/06 of 18 January 1996 to Amend the Constitution of 2 June 1972 (Cameroon).

153. Musa, *supra* note 150.

154. *Freedom in the World 2009: Cameroon*, Freedom House, <https://freedomhouse.org/report/freedom-world/2009/cameroon> [<https://perma.cc/UQ3N-6UFY>] (last visited Sept. 3, 2019).

155. See *Cameroon President Paul Biya to Stand for Seventh Term*, *Al Jazeera* (July 13, 2018), <https://www.aljazeera.com/news/2018/07/cameroon-president-paul-biya-stand-seventh-term-180713193154181.html> [<https://perma.cc/X7CP-LNZ3>] (reporting on the length of Biya's rule and the existence of occasional protest movements against the government).

term limits altogether, such that a president may serve an indefinite number of terms. This is what China did in 2018 when it passed an amendment to allow its president to serve an unlimited number of five-year terms.¹⁵⁶ Out of the forty evasion attempts through constitutional amendment in our data,¹⁵⁷ sixteen proposed to remove term limits entirely. In each case, the amendment was successful, likely reflecting the fact that it is particularly powerful presidents that opt for this approach.¹⁵⁸ When a president has the political clout to remove term limits entirely, he will likely do so, since it ensures that the issue will not come up again in the future.

Where a president lacks the power to scrap term limits entirely, he may opt for a more moderate approach and extend the number of terms. Especially in Latin America, where the constitution typically allows the president to serve a single term, this has been a popular proposal.¹⁵⁹ To illustrate, the highly popular Colombian President Uribe was elected to a second term in 2006 after he successfully amended the constitution to allow him to stay for another term.¹⁶⁰ This strategy was also used in the Republic of Congo to extend the number of terms from two to three, allowing President Denis Sassou Nguesso to serve a third term.¹⁶¹ The amendment in Congo simultaneously reduced the term length from seven

156. See *supra* notes 128–132 and accompanying text.

157. See *supra* section II.B.

158. Of course, this does not mean that these presidents no longer participate in elections. For example, even in Gabon, where overstay has been rampant, the younger President Ali Bongo still holds and runs in (sometimes competitive) elections every seven years. See Ruth Maclean, *Violence Erupts After Gabon Election as Incumbent Ali Bongo Named Victor*, *Guardian* (Aug. 31, 2016), <https://www.theguardian.com/world/2016/aug/31/gabon-election-results-disputed-incumbent-ali-bongo-victor-jean-ping> [<https://perma.cc/U7PW-P33Q>] (noting that President Bongo received 49.80% of the vote to his opponent's 48.23%).

159. See Ginsburg et al., *On the Evasion*, *supra* note 13, at 1843 (“Although one-term limits are relatively rare in the modern era, they are nearly all found in Latin America, with most such cases allowing nonsuccessive terms.”).

160. See *Closer to Uribe 3.0*, *Economist* (Sep. 3, 2009), <https://www.economist.com/the-americas/2009/09/03/closer-to-uribe-30> [<https://perma.cc/FL5P-5JPK>] (“In allowing the 2004 re-election amendment, the Constitutional Court said two consecutive terms were not a threat to the separation of powers.”); *Too Much of a Good Thing: Álvaro Uribe and the Dangers of Elected Autocracy*, *Economist* (Mar. 18, 2004), <https://www.economist.com/leaders/2004/03/18/too-much-of-a-good-thing> [<https://perma.cc/GXC4-SUTY>] (critiquing the 2004 reelection amendment to permit President Uribe to run for a second term as “rash”); *Colombia's Uribe Wins Second Term*, *BBC News* (May 29, 2006), <http://news.bbc.co.uk/2/hi/americas/5024428.stm> [<https://perma.cc/JKB8-RHN3>].

161. Philon Bondenga, *Congo Votes by Landslide to Allow Third Presidential Term*, *Reuters* (Oct. 27, 2015), <https://www.reuters.com/article/us-congo-politics-idUSKCN0SL0JW20151027> [<https://perma.cc/QT7E-QMKY>]; *Congo Votes over Denis Sassou Nguesso Third-Term*, *BBC News* (Oct. 25, 2015), <https://www.bbc.com/news/world-africa-34630366> [<https://perma.cc/U3AM-X8SM>].

to five years, something that is not uncommon when this strategy is pursued.¹⁶² Out of the forty evasion attempts through amendment, fifteen proposed to add a term. Strikingly, this strategy is least likely to be successful: In eleven out of fifteen attempts, it failed. Most likely, this is not because of the type of amendment but the type of president that pursues it: It is likely that presidents who are less certain of their ability to scrap term limits entirely opt for this more moderate approach.

An even more moderate method is to change the duration of the term. The approach here is to keep the same number of terms, but to increase the term length, buying the incumbent a couple of additional years in office. Of the forty evasion attempts through amendment, four followed this strategy (two were successful and two failed). For example, in 2018 Burundi held a constitutional referendum that passed an amendment that lengthened the presidential term from five to seven years while still allowing just two terms, though this will not change the duration of incumbent Pierre Nkurunziza's current term, which is still scheduled to expire in 2020.¹⁶³ Of course, with such a modest proposal, it is possible that presidents will seek to evade again once they reach the end of their extended term. For example, though President Nkurunziza has recently sworn that he will step down after 2020, observers fear that he may argue that the new, longer term provision, passed in the middle of his third term, actually gives him a clean slate and thus he should be able to run for up to two more seven-year terms.¹⁶⁴

Finally, in three cases incumbents amended the constitution such that the change applied to only themselves. Rwanda again offers an example.

162. See Bondenga, *supra* note 161; Freedom in the World 2016: Congo, Republic of (Brazzaville), Freedom House, <https://freedomhouse.org/report/freedom-world/2016/congo-republic-brazzaville> [<https://perma.cc/2QSW-SMQP>] (last visited Oct. 26, 2019). In fact, the duration and number of terms are often changed in the same amendment. See, for example, the case of Armenia, where in 2015 the maximum term was reduced from two five-year terms to a single seven-year term. See Armenia, Freedom House, <https://freedomhouse.org/report/freedom-world/2019/armenia> [<https://perma.cc/Q6QL-86AN>] (last visited Oct. 2, 2019); see also Armen Grigoryan, Armenia's Constitutional Referendum, *Cent. Asia-Caucasus Analyst* (Dec. 29, 2015), <https://www.cacianalyst.org/publications/analytical-articles/item/13317-armenias-constitutional-referendum.html> [<https://perma.cc/C3SK-FKEP>].

163. See Assoc. Press, *Burundi Leader to Quit in 2020*, N.Y. Times (June 7, 2018), <https://www.nytimes.com/2018/06/07/world/africa/burundi-president-pierre-nkurunziza.html> [<https://perma.cc/W89R-JH56>]; Amendments to Constitution of Burundi Approved: Electoral Commission, Xinhua (May 22, 2018), http://www.xinhuanet.com/english/2018-05/22/c_137195886.htm [<https://perma.cc/K43B-LF7R>]; Burundi Referendum: First a Third Term for Nkurunziza, Now Seven-Year Mandates, BBC News (May 16, 2018), <https://www.bbc.com/news/world-africa-44110338> [<https://perma.cc/56NF-X72W>].

164. See Assoc. Press, *supra* note 163. President Nkurunziza is in his third term, in spite of the Constitution allowing only two five-year terms, because he has already persuaded the country's Constitutional Court to declare that his first term, which began in 2005, did not count for purposes of the term limits provision. See *infra* notes 379–394 and accompanying text.

The highly popular amendment applied only to Kagame himself: He would be given one additional seven-year term. It is this term he is currently serving after winning the 2017 elections, and it will expire in 2024.¹⁶⁵ At the end of this term, the new presidential term limits will apply to him on a prospective basis.¹⁶⁶ The new provision allows for a president to serve two five-year terms.¹⁶⁷ Because this limit applies to Kagame only prospectively at the end of his third term, he may thus stand for another two five-year terms, potentially remaining in office until 2034, when Kagame will be seventy-seven years old.¹⁶⁸ By that point, he will have served as the president of Rwanda for thirty-five years, while future leaders will ostensibly be limited to only ten-year tenures.

Of course, presidents can combine these different strategies.¹⁶⁹ Sometimes leaders begin with a moderate amendment and only later scrap term limits entirely. Tajikistan is an illustrative case. Gaining independence in the early 1990s with the breakup of the Soviet Union, Tajikistan effected a difficult transition to self-governance. Protests against Tajikistan's first democratically elected president, Emomali Rahmon, gradually transformed into a bitter civil war between Rahmon's faction, representing former communists, and an Islamist opposition. The war ended in 1997 with a peace accord, and Rahmon won reelection in 1999.¹⁷⁰ As part of the peace agreement, the parties stipulated to a constitutional provision limiting the president to a single seven-year term.¹⁷¹ This was meant to facilitate power transfers and increase the chances that Islamist politicians would have a chance at the office.¹⁷² Thus, Rahmon's term was scheduled to expire in 2006. But, in 2003, he held a constitutional referendum that

165. See *Rwanda Election: President Paul Kagame Wins by Landslide*, BBC News (Aug. 5, 2017), <https://www.bbc.com/news/world-africa-40822530> [<https://perma.cc/E7D8-HT8U>].

166. See *Constitution of the Republic of Rwanda* June 4, 2003, as amended in 2015, art. 172; *Rwanda Election: President Paul Kagame Wins by Landslide*, supra note 165.

167. See *Constitution of the Republic of Rwanda* June 4, 2003, as amended in 2015, art. 101.

168. See *Rwanda Election: President Paul Kagame Wins by Landslide*, supra note 165.

169. Another example is Republic of the Congo, where the number of terms was increased while the duration of each term was shortened. Compare *Constitution de la République du Congo* Jan. 20, 2002, arts. 57–58, with *Constitution de la République du Congo* Oct. 25, 2015, arts. 65–66. Note, however, that our coding does not capture the combination of different strategies.

170. See *Focus on Constitutional Referendum*, *New Humanitarian* (June 26, 2003), <http://www.irinnews.org/feature/2003/06/26/focus-constitutional-referendum> [<https://perma.cc/NC29-RM25>].

171. See *id.*

172. See Matthew Crosston, *Compromising Coalitions and Duplicitous Diplomacy: US Support for Tajikistan After 9/11 and Its Security Implications*, 27 *Cent. Asian Surv.* 155, 165 (2008) (noting that the subsequent term extension undermined the purpose of the peace agreement, which was “to install a quota system that would gradually institutionalize the idea of peaceful negotiation and loyal opposition”) OR (“The purpose of the 1997 Peace Accord following the Tajik civil war was to install a quota system that would gradually institutionalize the idea of peaceful negotiation and loyal opposition. . .”).

extended term limits to two seven-year terms, applied prospectively, so he could run again in 2006 and 2013.¹⁷³ The referendum passed with ninety-three percent voter approval. Under this new provision, his term would finally come to an end in 2020.¹⁷⁴ Rahmon, however, did not wait that long, and in 2016 Tajikistan once again voted on term limits, this time removing them entirely.¹⁷⁵ A similar pattern occurred in a neighboring post-Soviet state, Kazakhstan, where President Nursultan Nazarbayev first remained in office through a one-time amendment that extended his first term, before later changing the length of terms again, before finally scrapping term limits entirely in 2007. Nazarbayev, like Rahmon, is now entitled to run for as many terms as he would like.¹⁷⁶

Incumbents who are particularly successful in overstaying may have to deal with constitutional age caps. Where a constitution has an age maximum, an overstayer can find himself in the rather comical situation of being eligible for unlimited terms, but ineligible because of age. Such was the case in Uganda, where term limits were entirely removed in 2005. Then, in 2017, President Yoweri Museveni, who has been in power since 1986, ran into a problem. By the time the next election was scheduled, in 2021, he would be seventy-seven years old, while the constitution required that a president be “not less than thirty-five years and not more than seventy-five years of age.”¹⁷⁷ To avoid being barred from the next election, Museveni then pushed an amendment through the legislature that simply removed the latter part of the provision, retaining the thirty-five year minimum, but losing the seventy-five year maximum.¹⁷⁸ Tunisia’s former President Zine El Abidine Ben Ali had a bit more foresight: In 2002, when scrapping term limits, he raised the cap from seventy to seventy-five years old at the same time, even though he was then only sixty-five years old.¹⁷⁹

B. *Ingredients for Success*

For a leader considering staying past his term limit through amendment, there is one primary qualification: He must be sufficiently powerful

173. See Focus on Constitutional Referendum, *supra* note 171.

174. See *id.*

175. Agence France-Presse, Tajikistan Votes to Allow President to Rule Indefinitely, *Guardian* (May 23, 2016), <https://www.theguardian.com/world/2016/may/23/tajikistan-votes-to-allow-president-emomali-rahmon-to-rule-indefinitely> [<https://perma.cc/9ZZX-Z2CQ>].

176. Kazakhstan Profile—Timeline, *BBC News* (Apr. 9, 2019), <https://www.bbc.com/news/world-asia-pacific-15483497> [<https://perma.cc/76BK-6G3H>].

177. Constitution of the Republic of Uganda Oct. 8, 1995, as amended in 2005, art. 102.

178. Jina Moore, Uganda Lifts an Age Limit, Paving the Way for a President for Life, *N.Y. Times* (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/world/africa/uganda-president-museveni-age-limit.html> [<https://perma.cc/QFQ7-UT6E>].

179. See Changing the Constitution to Remain in Power, *France 24* (Oct. 23, 2009), <http://www.france24.com/en/20091023-changing-constitution-remain-power> [<https://perma.cc/9Z76-88MZ>]; Win Confirms Tunisia Leader in Power, *BBC News* (May 27, 2002), http://news.bbc.co.uk/2/hi/middle_east/2009011.stm [<https://perma.cc/8PU9-KDRQ>].

and/or popular to be able to amend the constitution. There are two key ingredients here: (1) the president's power and (2) the ease of constitutional amendment.

Where presidents are truly popular or there is broad political consensus in favor of reform, it is relatively easy to amend the constitution. Of course, popularity is a difficult concept in authoritarian settings.¹⁸⁰ When leaders stack the deck against opponents and undermine free speech, it is hard to say whether they are genuinely popular. For example, there is a lively debate among Russia scholars about whether Vladimir Putin's high popularity ratings represent a genuine sentiment or reflect Russians giving disingenuous answers to pollsters.¹⁸¹ Nonetheless, presidents who can effectively project that kind of political power are likely to have a strong hold on the government. Moreover, leaders who have control over the legislative and judicial branches also exhibit the kind of political control necessary to usher through constitutional reform. China and Rwanda, discussed in detail above, are instructive examples. In each case, Xi Jinping and Paul Kagame had the necessary ingredients of perceived mass popularity and support, as well as sufficient control over key aspects of government, notably the legislature and courts.¹⁸² Both

180. See Corrales & Penfold, *supra* note 29, at 161–65 (2014) (“[O]nce presidents publicly reveal their desire to relax term limits, they tend to find the institutional and political means to achieve this aim. Of course, presidents usually make their wishes known to the public when they believe that their chances of succeeding are relatively high”); see also Daniel Buquet, *Entre la Legitimidad y la Eficacia: Reformas en los Sistemas de Elección Presidencial en América Latina* [From Legitimacy and Efficiency: Reforms on the Presidential Election Systems in Latin America], 16 *Rev. Uruguaya de Ciencia Política* 35, 45–46 (2007) (citing examples from Latin America of presidents who sought to amend term limits either because of their popularity or because their unpopularity threatened their power). See generally Javier Corrales, *Latin America's Neocaudillismo: Ex-Presidents and Newcomers Running for President . . . and Winning*, *Latin Am. Pol. & Soc'y*, Fall 2008, at 19–23 & fig.1 (explaining how voter characteristics influence the method by which former presidents try to obtain or retain power); Michael Penfold, *Re-Election in the Andes: Politics and Prospects* 6 (2010) (unpublished working paper), <http://archive.thedialogue.org/PublicationFiles/Re-election%20in%20the%20Andes%20Web%20Version.pdf> [<https://perma.cc/EH99-WTYF>] (relating the concept of the “tele-president,” leaders that use broadcast media to build voter bases).

181. See, e.g., Timothy J. Colton & Henry E. Hale, *Putin's Uneasy Return and Hybrid Regime Stability: The 2012 Russian Election Studies Survey*, 61 *Probs. Post-Communism* 3, 20 (2014) (concluding that answers given in opinion polls were overall reflective of voters true disposition); Timothy Frye, Scott Gehlbach, Kyle L. Marquardt & Ora John Reuter, *Is Putin's Popularity Real?*, 33 *Post-Soviet Aff.* 1, 1–2 (2017) (“[T]here is a nagging suspicion that [Putin's] approval ratings are inflated because respondents are lying to pollsters.”); Daniel Triesman, *Putin's Popularity Since 2010: Why Did Support for the Kremlin Plunge, then Stabilize?*, 30 *Post-Soviet Aff.* 370, 373 (2014) (recognizing that although “various scholars have concluded that in the hybrid regimes of post-communist Russia, self-censorship is unlikely to have distorted results significantly,” there was still the chance that respondents would “answer sensitive questions insincerely”).

182. See, e.g., Yuen Yuen Ang, *Autocracy with Chinese Characteristics*, *Foreign Aff.* (May/June 2018), https://www.foreignaffairs.com/articles/asia/2018-04-16/autocracy-chinese-characteristics?cid=nlc-fa_fatoday-20180425 (on file with the *Columbia Law Review*) (“The

leaders successfully changed term limits with essentially no opposition at all.¹⁸³ Leaders with such powers can amend the constitution with ease.

De facto executive power is not the only factor in evasion through amendment: The constitutional amendment threshold also matters. In almost every country, amending the constitution is harder than passing an ordinary law and requires a supermajority in parliament or in a referendum, or both.¹⁸⁴ Yet important differences exist across countries.¹⁸⁵ In some countries, constitutional amendment is extraordinarily difficult to accomplish. One example is the United States, which has a particularly rigid constitution.¹⁸⁶ (This is partially why Trump's joke about overstaying seems far-fetched.) Another example is Togo, where any amendment requires a four-fifths majority of the legislature (or, failing that, a two-thirds legislative vote followed by popular referendum),¹⁸⁷ and, in fact, recent efforts to *reinstate* term limits have been stymied exactly because of the high amendment threshold.¹⁸⁸ When the amendment threshold is high,

top one percent of the bureaucracy . . . make up China's political elite. These individuals are directly appointed by the party . . ."); Paul Kagame, *Feted and Feared*, *Economist* (July 15, 2017), <https://www.economist.com/briefing/2017/07/15/paul-kagame-feted-and-feared> [<https://perma.cc/H25A-XA9U>] (outlining the control that Kagame exerts over Rwanda, even in the countryside, where "RPF representatives watch over each unit of ten households").

183. See Rauhala, *supra* note 132; *supra* notes 140–148 and accompanying text.

184. Rosalind Dixon, *Partial Constitutional Amendments*, 13 *U. Pa. J. Const. L.* 643, 654 (2011); Ginsburg & Melton, *supra* note 65, at 690 (2015); Lutz, *supra* note 65, at 356 (1994).

185. See, e.g., Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 *Wake Forest L. Rev.* 913, 917 (2014) (recognizing "six amendment frameworks," which govern the formal amendment process in constitutional democracies); Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in *Oxford Handbook of Comparative Constitutional Law*, *supra* note 65, at 96, 106–07 (discussing the ease of amendment for constitutions around the world); John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 *Law & Soc. Inquiry* 501, 502 (1997) (reviewing *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Sanford Levinson ed., 1995)) ("How, for example, does requiring the use of legislative supermajorities or waiting periods for amendments or various ratification procedures influence the characteristic features of a constitutional regime?"); Grimm, *supra* note 65, at 98, 111 ("The rules on constitutional amendments vary greatly.").

186. See Stephen M. Griffin, *The Nominee Is . . . Article V*, in *Constitutional Stupidities, Constitutional Tragedies* 40, 40 (William N. Eskridge & Sanford Levinson eds., 1998) (noting that "the U.S. Constitution is one of the most difficult constitutions in the world to change). But see Vicki C. Jackson, *The (Myth of Un) Amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 *Int'l J. Const. L.* 575, 576 (2015) (suggesting that the belief among scholars as to the "impossibility" of amending the U.S. Constitution is "overstated"); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *Harv. L. Rev.* 1457, 1459 (2001) (arguing that the U.S. Constitution would not look very different if a formal amendment process did not exist and suggesting that precedent and other traditions are as important as the text of the amended Constitution).

187. *La Constitution de la IV^e République* Oct. 14, 1992, art. 144 (Togo).

188. John Zodzi, *Togolese to Vote on Presidential Term Limits After Parliament Impasse*, *Reuters* (Sept. 19, 2017), <https://www.reuters.com/article/us-togo-protests/togolese-to-vote-on-presidential-term-limits-after-parliament-impasse-idUSKCN1BU23S> [<https://perma.cc/VJW2-93PJ>].

the president needs to be particularly popular and powerful, or else consider alternative means of evasion.¹⁸⁹ Yet, in other countries, constitutions are far easier to amend, and presidents do not need to have the same level of power and/or popularity to amend the constitution.¹⁹⁰

Constitutional design can pose more of an obstacle when the constitution makes term limit provisions unamendable or subjects them to heightened amendment thresholds.¹⁹¹ In post-Arab Spring Tunisia, for example, mindful of the recent experience with notorious overstayer President Ben Ali,¹⁹² Tunisians enacted a constitution that explicitly makes term limits impossible to amend.¹⁹³ Other countries have “tiered” amendment structures, whereby term limit amendments are not impossible, but more difficult to amend than ordinary constitutional provisions.¹⁹⁴ These tiered amendment structures are adopted, often explicitly, in order to protect the democratic structure of the state.¹⁹⁵ A good example of this is Rwanda. Though ordinary amendments need only secure a three-fourths majority in each chamber of parliament, “if the amendment concerns the *term of office of the President* of the Republic or the system of democratic Government based on political pluralism, or the constitutional regime established by this Constitution,” then the amendment must pass through a three-fourths legislative supermajority *and* a majority vote in a popular

189. Corrales, Power Asymmetries and Term Limits, *supra* note 30, at 3, 4 (arguing that power asymmetries, measured by presidential approval ratings, are the best predictors of success in amending term limits).

190. There has in fact been a global trend toward more flexible constitutions. See Richard Albert, American Exceptionalism in Constitutional Amendment, 69 *Ark. L. Rev.* 217, 225–27 (2016) (comparing the U.S. Constitution to those of other nations and finding that “[o]ther democratic constitutions are today more frequently formally amended”); Mila Versteeg & Emily Zackin, Constitutions Unentrenched: Towards an Alternative Theory of Constitutional Design, 110 *Am. Pol. Sci. Rev.* 657, 658 (2016).

191. See Richard Albert, Constitutional Handcuffs, 42 *Ariz. St. L.J.* 663, 665–66 (2010); Aharon Barak, Unconstitutional Constitutional Amendments, 44 *Isr. L. Rev.* 321, 336 (2011); Rosalind Dixon & David Landau, Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment, 13 *Int’l J. Const. L.* 606, 624 (2015) [hereinafter Dixon & Landau, *Transnational Constitutionalism*]; David Landau & Rosalind Dixon, Constraining Constitutional Change, 50 *Wake Forest L. Rev.* 859, 862, 870–75 (2015); Ulrich K. Preuss, The Implications of “Eternity Clauses”: The German Experience, 44 *Isr. L. Rev.* 428, 440 (2011); Yaniv Roznai, Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea, 61 *Am. J. Comp. L.* 657, 665 (2013).

192. See Jean-François Letourneau, Tunisia—Sliding Back Towards Presidential Authoritarianism?, *Presidential Power* (June 26, 2018), <https://presidential-power.com/?cat=176> [<https://perma.cc/A9MP-BYLK>] (discussing President Ben Ali’s long rule and the context surrounding the post-Arab Spring constitutional amendments).

193. التونسية الجمهورية دستور [Constitution] Jan. 26, 2014, art. 75 (Tunis.).

194. Rosalind Dixon & David Landau, Tiered Constitutional Design, 86 *Geo. Wash. L. Rev.* 438, 476–77 (2018); David Landau, Selective Entrenchment in State Constitutional Law: Lessons from Comparative Experience, 69 *Ark. L. Rev.* 425, 432, 440 (2016) [hereinafter Landau, *Selective Entrenchment*].

195. See, e.g., Landau, *Selective Entrenchment*, *supra* note 194, at 433.

referendum.¹⁹⁶ In these cases, constitutional drafters appear to have been directly concerned with democratic erosion through term limit evasion.

Any president that nears the end of his term is likely to calculate the odds of successfully amending the constitution. Those presidents that lack the political clout to overcome the amendment threshold are unlikely to try.¹⁹⁷ After all, pursuing an amendment takes time, resources, and political capital that can also be spent on other things. What is more, overt failure to amend the constitution may hurt the President's reputation and legacy. As a result, it is likely that those who cannot overcome the amendment threshold will either exit or pursue some other evasion strategy.¹⁹⁸ Only those who believe that they have a real shot at successfully extending their term through amendment will initiate a serious attempt to do so.¹⁹⁹

C. *Causes of Failure*

Constitutional amendment can be risky. While the strategy is likely only attempted by those presidents who believe they have the political clout to meet the amendment threshold, they can still miscalculate their odds. Indeed, one of our more surprising findings is that a large percentage of those who try to amend the constitution fail to do so. Out of the forty incumbents that attempted to amend the constitution, fifteen (some thirty-eight percent) were unsuccessful. That is, they initiated a (formal or informal) proposal for amendment but were unable to get the required support for the amendment to pass. Most of the time—twelve of fifteen cases—such failure happens because they encounter unexpected resistance.

There are a number of reasons why amendment proposals to extend or remove term limits encounter resistance. The first is that it is easy for presidents in autocratic settings to misjudge their popularity. The political science literature has shown that, in such settings, citizens will sometimes

196. Constitution of the Republic of Rwanda June 4, 2003, art. 175 (emphasis added).

197. Cf. Corrales & Penfold, *supra* note 29, at 161 (“[P]residents usually make their wishes known to the public when they believe that their chances of succeeding are relatively high . . .”).

198. See *infra* Part IV.

199. There is not a lot of explicit literature on this point, but there is a related literature in political science that shows that leaders are likely to agree to democratization if they benefit from it somehow. See Daron Acemoglu & James A. Robinson, *Persistence of Power, Elites, and Institutions*, 98 *Am. Econ. Rev.* 267, 268 (2008) (finding that, after transitions, elites can set up economic institutions so that they still maintain *de facto* economic power); Alexandre Debs, *Living by the Sword and Dying by the Sword? Leadership Transitions in and out of Dictatorships*, 60 *Int'l Stud. Q.* 73, 82 (2016) (finding that leaders are more likely to step down if they know that they will be treated well after the transition); Joseph Wright & Abel Escribà-Folch, *Authoritarian Institutions and Regime Survival: Transitions to Democracy and Subsequent Autocracy*, 42 *Brit. J. Pol. Sci.* 283, 284 (2012) (finding that if the leader still has control of the legislature, he will have *de facto* political power after the transition). In a similar vein, leaders are unlikely to want to exit with a damaged reputation. Thus, if amendment is not in the cards, they are better off not pursuing it.

engage in what Professor Timur Kuran has called “preference falsification”—that is, “misrepresenting one’s genuine wants” about the regime because of “perceived social pressure[.]”²⁰⁰ This means that, when asked, citizens will state support for the regime, but this support is not genuine. As a result, a small protest can tap into repressed grievances in the broader population and balloon into a huge movement, catching the incumbent off guard.²⁰¹ This phenomenon indicates that authoritarian presidents can never be fully sure that they are actually popular, and there is always a risk of a small resistance being surprisingly successful.

Second, term limit amendments present a perfect opportunity to tap into such sentiments. Evasion attempts through term limits are highly visible and, in many cases, have to be approved by popular referendum. As such, they present an excellent opportunity for the political opposition to mobilize. A highly visible, and potentially unpopular,²⁰² amendment attempt provides different groups something to rally around—political scientists refer to this as a “focal point.”²⁰³ They can unite disparate groups by highlighting a common grievance, thereby providing a valuable source of cohesion for opposition parties, which tend to be splintered in new or transitional democracies.²⁰⁴ If religious groups and other civil society organizations join the political opposition, a broad and powerful alliance can take shape.

Among the presidents that miscalculate their odds of success, we see different responses. Of the twelve presidents that failed because they encountered resistance, four backtracked rather quickly when they noted that the proposal lacked popular support. In another eight cases, however,

200. Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification* 3 (1995).

201. See Timur Kuran, *Now out of Never: The Element of Surprise in the East European Revolution of 1989*, 44 *World Pol.* 7, 10–12 (1991) (describing the escalation of the East European “revolution” as surprising for its swiftness, bloodlessness, and mass support).

202. In many of the countries we surveyed, opinion polls revealed that term limits enjoy broad, albeit declining, popular support. See, e.g., Dulani, *supra* note 115, at 162–64 (describing the remaining public support for term limits in the five countries surveyed).

203. See Michael Albertus & Victor Menaldo, *Dictators as Founding Fathers? The Role of Constitutions Under Autocracy*, 24 *Econ. & Pol.* 279, 284 (2012) (“[A]n autocratic constitution may allow the members of the [launching organization] to coordinate to sanction a dictator by serving as a focal point.”); see also Roger B. Myerson, *The Autocrat’s Credibility Problem and Foundations of the Constitutional State*, 102 *Am. Pol. Sci. Rev.* 125, 134 (2008) (“[A]n individual’s status as a leader depends on an equilibrium relationship of trust with a group of supporters, who are confident of the leader’s reliability and of their own collective strength.”); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 *Am. Pol. Sci. Rev.* 245, 246, 257 (1997) (explaining how democratic stability occurs between citizens and “elites” constructing a focal solution).

204. See Leonardo Arriola, Jed De Varo & Anne Meng, *Subverting Electoral Competition: Elite Cooptation and Opposition Fragmentation* 2 (Aug. 22, 2019) (unpublished manuscript) (on file with the *Columbia Law Review*) (explaining how incumbents in “newly transitioning regimes” use patronage appointments “to undermine their opponents”).

they continued to push the proposal, often resorting to harassment and intimidation of those who opposed. In these cases, the amendment attempt caused major social unrest. Three illustrations outlined below fall in this latter category.

Consider Paraguay: Because the country has a long history of authoritarianism, the drafters of the 1992 Constitution allowed a president to serve only a single five-year term.²⁰⁵ Perhaps unsurprisingly, this strict requirement has invited a number of evasion attempts, the most recent one in 2018, when President Horacio Cartes's term was set to expire.²⁰⁶ At this time, Cartes's Colorado party had solid majorities in both chambers of Congress and the odds of successfully amending the constitution seemed pretty high.²⁰⁷ What is more, support in favor of the amendment extended beyond the Colorado party alone. The reason was that two of Cartes's predecessors, former Presidents Fernando Lugo and Blas Llanos (both from opposition parties) also wanted to run in—and win—the 2018 election (which was prohibited by the Constitution's strict single-term limit).²⁰⁸ Thus, Cartes was able to form a coalition consisting of his own dominant party and two significant opposition parties.²⁰⁹ To further ensure victory, the Colorado party first changed some procedural rules in the Senate that were meant to facilitate passage of an amendment. The proposed amendment then passed through the Senate.²¹⁰ Unexpectedly, however, before a vote could be held in Congress, members of another party—the Partido Liberal Radical Autentico (PLRA)—called on their supporters to take to the streets for a nationwide protest.²¹¹ Close to 3,000

205. See Constitución Política de la República de Paraguay June 20, 1992, art. 229 (Para.).

206. Horacio Cartes, who came into office in 2013, actually attempted to amend the constitution twice. The first attempt, in 2016, did not go far: Cartes and his Colorado party proposed an amendment but then backed off once it was clear that the measure lacked support. Paraguay: Sobre la Reección y Escenarios Electorales Posibles [Paraguay: On Reelection and Possible Electoral Scenarios], Celag (Mar. 17, 2017), <http://www.celag.org/paraguay-sobre-la-reeleccion-y-escenarios-electorales-positibles> [<https://perma.cc/D4PE-MYHB>] [hereinafter Paraguay: On Reelection].

207. Sanie López Garelli, Senado Paralelo de Paraguay Aprueba Proyecto de Enmienda Constitucional: ¿Qué Significa Esto? [Paraguay's Parallel Senate Passes Constitutional Amendment Bill: What Does This Mean?], CNN en Español (Mar. 31, 2017), <https://cnnespanol.cnn.com/2017/03/31/senado-paralelo-de-paraguay-aprueba-proyecto-de-enmienda-constitucional-que-significa-esto/> [<https://perma.cc/6YST-5T89>].

208. Paraguay: On Reelection, *supra* note 206.

209. Santi Carneri, Asaltado el Congreso de Paraguay tras el intento del Presidente de Abrir Paso a la Reección [The Congress of Paraguay Assaulted After the President's Attempt to Open the Way for Reelection], Diario El País (Apr. 1, 2017), https://elpais.com/internacional/2017/03/31/america/1490977940_157080.html [<https://perma.cc/R64F-AMCJ>].

210. Steven Wildberger, Paraguay Senate Lifts Presidential Term Limits, *Jurist* (Apr. 1, 2017), <https://www.jurist.org/news/2017/04/paraguay-senate-lifts-presidential-term-limits/> [<https://perma.cc/U8ZS-RK3U>].

211. Liberales se Suman a las Protestas Frente al Congreso [Liberals Join the Protests in Front of Congress], ABC Color (Mar. 31, 2017), <http://www.abc.com.py/nacionales/liberales-parten-rumbo-al-congreso-1579580.html> [<https://perma.cc/77FU-APGT>].

people joined the protests in Asunción, and several hundreds more took the streets in smaller cities of Paraguay as well.²¹² Police clashed with the protesters in what became major riots, with one protester dying from head trauma.²¹³ The protesters succeeded in burning the part of the Congress building where the Senate met.²¹⁴ The success of these protests would not have been possible without a strong coalition including political, civil society, and religious groups, such as political parties,²¹⁵ associations of journalists,²¹⁶ the political opposition,²¹⁷ and, most prominently, the Catholic Church.²¹⁸ The role of this latter institution was strong enough that, when President Cartes decided to withdraw from his plan to run for reelection, he first did it through a letter addressed to the Archbishop of Asunción.²¹⁹ Thus, weeks later Cartes formally withdrew his support for the

212. Marchan por la Democracia [They March for Democracy], ABC Color (Mar. 30, 2017), <https://www.abc.com.py/nacionales/miles-marchan-por-la-democracia-1579277.html> [<https://perma.cc/M4ZB-J95R>]; Noches de Disturbios en Paraguay que Terminan con un Muerto y el Congreso en Llamas [Nights of Riots in Paraguay End with One Death and Congress in Flames], El Periódico (Apr. 1, 2017), <https://www.elperiodico.com/es/internacional/20170401/paraguay-congreso-incendio-muerto-5943808> [<https://perma.cc/F4BV-XCW6>].

213. Paraguay Congress Set on Fire as Election Protests Turn Deadly, BBC News (Apr. 1, 2017), <https://www.bbc.com/news/world-latin-america-39465064> [<https://perma.cc/AC8V-FWVC>].

214. *Id.*

215. Liberales se Suman a las Protestas Frente al Congreso, *supra* note 211.

216. Periodistas Responsabilizan a Cartes [Journalists Blame Cartes], ABC Color (Mar. 31, 2017), <http://www.abc.com.py/nacionales/periodistas-responsabilizan-a-cartes-1579803.html> [<https://perma.cc/SD4E-K782>].

217. Piden a Cartes Frenar la Enmienda [Cartes Is Asked to Stop the Amendment], ABC Color (Mar. 31, 2017), <http://www.abc.com.py/nacionales/piden-a-cartes-frenar-enmienda-1579751.html> [<https://perma.cc/2WKV-RJU3>].

218. Arzobispo Pide a Cartes dar la Cara ante Violencia [Archbishop Asks Cartes to Confront the Violence], ABC Color (Mar. 31, 2017), <http://www.abc.com.py/nacionales/edmundo-valenzuela-pide-a-cartes-que-de-la-cara-1579595.html> [<https://perma.cc/NJ7V-W8LP>]; Obispos de Paraguay Invitan a Jornada de Ayuno y Oración por la Fraternidad del País [Bishops of Paraguay Call for a Day of Fasting and Prayer for National Unity], Aciprensa (Apr. 7, 2017), <https://www.aciprensa.com/noticias/-24741> [<https://perma.cc/L7K4-TMNI>]; Obispos de Paraguay: No Es Prudente Introducir la Reección Presidencial [Bishops of Paraguay: It Is Imprudent to Introduce Presidential Reelection], Aciprensa (Mar. 30, 2017), <https://www.aciprensa.com/noticias/obispos-de-paraguay-no-es-prudente-introducir-reeleccion-presidencial-30182> [<https://perma.cc/E23X-LA92>].

219. Cartes Renuncia a Su Candidature [Cartes Renounces His Candidacy], ABC Color (Apr. 17, 2017), <http://www.abc.com.py/nacionales/no-se-presentara-a-elecciones-1584665.html> [<https://perma.cc/Q7KB-X24H>]; Horacio Cartes Renuncia a Buscar Reección Presidencial en Paraguay [Horacio Cartes Declines to Seek Presidential Reelection in Paraguay], La Nación (Apr. 17, 2017), <https://www.nacion.com/el-mundo/conflictos/horacio-cartes-renuncia-a-buscar-reeleccion-presidencial-en-paraguay/APY5KUBV4BBEFBCU5WP6B4QOHE/story/> [<https://perma.cc/6TCQ-32VE>].

measure, and Congress voted down the proposal.²²⁰ Cartes did not contest the 2018 elections and has transferred power to a new president.²²¹

The burning down of Congress seems particularly radical, but it also worked as a deterrent in Burkina Faso where President Blaise Compaoré failed to extend his term beyond 2015.²²² Compaoré's amendment effort started early in his fourth term and he appeared to have enough support to pass an amendment through legislative supermajority, without needing to hold a popular referendum.²²³ But unexpectedly, an opposition movement emerged: By 2014, a number of prominent Compaoré allies defected and started their own opposition party.²²⁴ Tens of thousands of protesters turned out to voice their resistance, culminating, as in Paraguay, with the incineration of the parliament building.²²⁵ Finally, the military, sensing the

220. Laurence Blair, *Paraguay's Re-Election Crisis Is Over—For Now*, *World Pol. Rev.* (May 2, 2017), <https://www.worldpoliticsreview.com/articles/22024/paraguay-s-re-election-crisis-is-over-for-now> [<https://perma.cc/83T6-GTCT>].

221. See Daniela Desantis & Mariel Cristaldo, *Paraguay's Business-Friendly Colorado Party Keeps Presidency*, *Reuters* (Apr. 22, 2018), <https://www.reuters.com/article/us-paraguay-election/paraguays-business-friendly-colorado-party-keeps-presidency-idUSKBN1HT0A0> [<https://perma.cc/66UU-REHG>]; *Paraguay's President Horacio Cartes Offers Resignation*, *AlJazeera* (May 29, 2018), <https://www.aljazeera.com/news/2018/05/paraguay-president-horacio-cartes-offers-resignation-180529132812603.html> [<https://perma.cc/CYP5-8QZK>].

222. See Mathieu Bonkougou & Joe Penney, *Burkina Faso Declares State of Emergency After Protesters Burn Parliament*, *CBC* (Oct. 30, 2014), <https://www.cbc.ca/news/world/burkina-faso-declares-state-of-emergency-after-protesters-burn-parliament-1.2817985> [<https://perma.cc/9B9K-5ERD>]. President Compaoré was in power from a 1987 coup through his ouster in 2014. See Molly Ariotti, *The Fall of the Hegemon in Burkina Faso*, *Wash. Post* (Nov. 4, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/11/04/the-fall-of-the-hegemon-in-burkina-faso> (on file with the *Columbia Law Review*). He managed to stay in office so long in part through deft manipulation of term limits. The 1991 constitution called for two seven-year terms. *Constitution du Burkina Faso* June 2, 1991, art. 37. This limit was scrapped in 1997, allowing Compaoré to run for reelection as many times as he wished. See Andrea Cassani, *The 2015 Presidential Election in Burkina Faso: A Revenge of Term-Limit Politics in Africa?*, *Italian Inst. Int'l Pol. Stud.* (Nov. 26, 2015), <https://www.ispionline.it/en/publicazione/2015-presidential-election-burkina-faso-revenge-term-limit-politics-africa-14273> [<https://perma.cc/FAM9-78HH>]. In 2000, a limit of two five-year terms was subsequently imposed, but Compaoré was able to successfully argue that this did not apply retroactively, and thus he was allowed to stand for reelection in 2005 and 2010. *Id.* His term should have thus expired, under even the most charitable reading, by 2015. See Compaore's Decision to Bid for Re-Election Raises Opposition Hackles, *New Humanitarian* (Aug. 11, 2005), <http://www.irinnews.org/report/55816/burkina-faso-compaores-decision-bid-re-election-raises-opposition-hackles> [<https://perma.cc/C96H-26XH>].

223. See *Ruling Party Wins Majority in Burkina Faso Vote*, *Reuters* (Dec. 7, 2012), <https://www.reuters.com/article/us-burkina-elections/ruling-party-wins-majority-in-burkina-faso-vote-idUSBRE8B61DA20121207> [<https://perma.cc/9XYX-KUGH>].

224. *Burkina Faso Politicians Form New Anti-Compaore Alliance*, *Reuters* (Jan. 25, 2014), <https://www.reuters.com/article/burkina-opposition-idUSL5N0KZ00O20140125> [<https://perma.cc/UQ5M-KDD8>].

225. Bonkougou & Penney, *supra* note 222; *Burkina Faso Politicians Form New Anti-Compaore Alliance*, *supra* note 224.

political winds, stepped in and forced Compaoré to resign his office.²²⁶ Elections were subsequently held in 2015,²²⁷ and no term limits amendment came to fruition.²²⁸ In hindsight, observers have noted that the events revealed that Burkinabes were fed up with Compaoré's back-and-forth scheming to stay in power (at that point he had been in power for twenty-seven years).²²⁹

Less violent, but equally effective, was the popular resistance movement that halted two separate but closely related term limit evasion attempts in Malawi.²³⁰ When President Elson Bakili Muluzi's term was set to expire, he attempted to amend the constitution twice: first, in 2002, a proposal to scrap term limits entirely; second, in 2003, a proposal to simply allow one additional term, after the first proposal barely failed.²³¹ When the campaign for amendment began, Muluzi used all the methods at his disposal: He bribed influential politicians,²³² manipulated the rules of parliament to get rid of certain opposition members of Parliament (MPs),²³³ banned certain kinds of public gatherings,²³⁴ and used the youth militia of his party—United Democratic Front (UDF)—to intimidate opponents.²³⁵ The reason was that Muluzi's party did not have enough representatives to reach the necessary two-thirds majority without convincing a fair number of non-UDF legislators to vote their way.²³⁶ This alone presented a serious political hurdle to Muluzi's success, but the carrot-and-stick approach of bribery and force was so effective that when the limit-removing proposal made it to a parliamentary vote in July 2002, it fell short of the necessary two-thirds majority by only three votes, meaning it had significant support outside Muluzi's own party.²³⁷ In the

226. See Ariotti, *supra* note 222.

227. Burkina Faso Elections: Roch Marc Kabore Named New President, *Guardian* (Nov. 30, 2015), <https://www.theguardian.com/world/2015/dec/01/burkina-faso-elections-roch-marc-kabore-named-new-president> [<https://perma.cc/SLH6-P22J>].

228. David Smith, Burkina Faso: Violent Clashes Over Plans to Extend President's Rule, *Guardian* (Oct. 31, 2014), <https://www.theguardian.com/world/2014/oct/30/protesters-storm-burkina-faso-parliament-constitution-vote-president-blaise-compaore> [<https://perma.cc/T5CA-K276>] (reporting that Compaoré withdrew his proposed amendment in response to civilian protests).

229. See Ariotti, *supra* note 222.

230. See Dulani, *supra* note 115, at 6–9.

231. See Malawi Revives Third Term Debate, *BBC News* (Sept. 10, 2002), <http://news.bbc.co.uk/2/hi/africa/2249511.stm> [<https://perma.cc/X3VS-B88L>].

232. See Dulani, *supra* note 115, at 7.

233. *Id.* at 227–28.

234. Rachel L. Swarns, A Surprising Crackdown in Malawi, *N.Y. Times* (June 30, 2002), <https://www.nytimes.com/2002/06/30/world/a-surprising-crackdown-in-malawi.html> [<https://perma.cc/478F-VRHN>]. This law was later struck down by a judge as unconstitutional. No Third Term for Muluzi, *BBC News* (July 5, 2002), <http://news.bbc.co.uk/2/hi/africa/2096691.stm> [<https://perma.cc/2JJ3-G4A3>].

235. See Dulani, *supra* note 115, at 219–20.

236. *Id.* at 6.

237. *Id.* at 7; Swarns, *supra* note 234.

process, however, an opposition began to take shape, composed of students, civil society groups, religious leaders, and so on, as well as important donor countries like Norway and the United Kingdom.²³⁸ A crucial blow to Muluzi's effort came from eight UDF members who publicly campaigned against him, and voted down the proposal.²³⁹ Given that the measure barely lost, Muluzi's faction concluded that, were they to resubmit a more moderate proposal of simply allowing for three rather than unlimited terms, they could get the necessary two-thirds vote.²⁴⁰ Surprisingly, given how close Malawi came to an unlimited presidency only two months earlier, the new proposal never even came close to passing.²⁴¹ By late 2002, the public had soured on the idea of a longer term for Muluzi, and the political will to accomplish this goal was gone. Religious groups, non-governmental organizations (NGOs), and donor nations were joined in their opposition by a number of important Malawian businessmen, who were eager to see power transfer to someone with whom they might have better luck securing government contracts.²⁴² Opposition parties that had supported the first proposal refused to support the second, even though it was more modest.²⁴³ The bill to add a third term was sent to committee, from which it never emerged. In early 2003, Muluzi officially announced he would not seek a third term.²⁴⁴

1. *Other Causes of Failure.* — Popular resistance is the main cause of failure, but not the only one. In two cases—Zambia and Nigeria—the amendment failed because the president's party turned against him.²⁴⁵ Pushback from the party can be characterized as a form of elite resistance, driven by elites, rather than mass-based resistance in places like Burkina Faso or Paraguay.²⁴⁶ In many cases, parties establish strong norms—codified or otherwise—regarding leader turnover and succession practices. After all, parties often must balance a delicate cycling of power between different factions, regions, or ethnic groups.²⁴⁷ In fact, party elites often

238. Donors Urge Consultation over Third Term, *New Humanitarian* (Sept. 17, 2002), <http://www.thenewhumanitarian.org/news/2002/09/17/donors-urge-consultation-over-third-term-0> [<https://perma.cc/KF8Y-J85J>].

239. See Dulani, *supra* note 115, at 252–53.

240. *Id.* at 7–8.

241. *Id.* at 7–9.

242. See *id.* at 245–46.

243. See *id.* at 8. A contemporaneous survey found that Malawians supported the institution of term limits by a wide margin. *Id.* at 163.

244. *Id.* at 9.

245. *Id.* at 4–6 (Zambia); *id.* at 34–35, 248–50 (Nigeria).

246. See *supra* notes 205–222 and accompanying text.

247. See Gandhi, *supra* note 95, at 74–75, 77 (describing how dictators intimidate or buy off a variety of actors, specifically ruling elites and mass mobilizers, in order to gain the cooperation needed to maintain their power); Svolik, *supra* note 60, at 68–70, 99–100 (“When the dictator controls either a very large or a large share of power, he either successfully survives in office without any allies or entirely lacks the ability to credibly commit to sharing power.”); Beatriz Magaloni, *Credible Power-Sharing and the Longevity of*

simply understand that in order for the organization to survive, they must allow different politicians to advance within the party hierarchy, or risk mass defections.²⁴⁸ In such cases, even popular, ambitious presidents who have designs on evasion may be forced to step down by a strong and united party.

Courts can also cause constitutional amendments to fail by striking down the amendments. This is possible in the countries where term limit provisions are made unamendable or have a higher threshold for amendment. In such cases, courts can potentially step in and invalidate a constitutional amendment, thereby halting evasion attempts.²⁴⁹ This possibility has captured a lot of the scholarly imagination,²⁵⁰ but it has happened only once—in Colombia.

In a decision that made global headlines, the Colombian Constitutional Court prevented President Uribe from running for a third term. The decision came after an earlier (successful) evasion attempt; in December 2004, the Congress of Colombia, at the initiative of Uribe's party, approved a constitutional amendment to authorize President Uribe to run for a second term.²⁵¹ The court allowed this earlier amendment, as it believed that people would still freely decide whom to choose as president, institutions with powers of control and review would still have full

Authoritarian Rule, 41 *Comp. Pol. Stud.* 715, 722–24 (2008) (arguing that party autocracies produce a stable solution for authoritarians to maintain control through power sharing because parties incentivize members to commit to autocratic institutions rather than rebel).

248. See Magaloni, *Voting for Autocracy*, *supra* note 96, at 257–59 (“The rule of non-re-election for all elective offices, including the presidency, allowed the [Mexican Institutional Revolutionary Party (PRI)] to offer ample opportunities to elites, who remained loyal to the official party hoping to obtain a nomination in the future and thereby to reap the benefits of office.”).

249. See Landau, *Presidential Term Limits*, *supra* note 25, at 225–27 (arguing that while “courts around the world have increasingly been willing to declare [term limit] amendments to the constitution unconstitutional,” judicial doctrines limiting constitutional change have not been effective at preventing their spread in Latin America); David Landau, Yaniv Roznai & Rosalind Dixon, *Term Limits and the Unconstitutional Constitutional Amendment Doctrine*, in *Politics of Presidential Term Limits* 53–54 (Alexander Baturo & Robert Elgie eds., 2019) (“One thing that is distinctive about the recent wave of term limits battles globally is also the increasing involvement of courts and constitutional jurisprudence.”).

250. See, e.g., Dixon & Landau, *Transnational Constitutionalism*, *supra* note 191, at 636 (reconciling the fact that “[c]onstitutional amendment procedures . . . are often used to advance distinctly anti-democratic constitutional ends” with the reality that the unconstitutional constitutional amendment doctrine “seem[s] to interfere with legitimate democratic values and uses of amendment”); Landau et al., *From an Unconstitutional Constitutional Amendment*, *supra* note 33, at 41–42 (expanding the unconstitutional constitutional amendment doctrine to a theory of an unconstitutional constitution as a whole following the Honduran Supreme Court’s finding that the constitution’s term limit was itself unconstitutional).

251. Sentencia [S.] No. C-1040/05, 26 febrero 2010, Corte Constitucional [C.C.], *Gaceta de la Corte Constitucional* [G.C.C.], [Constitutional Court] (Colom.). The 1991 constitution initially allowed only one term. *Constitución Política de Colombia* July 1991, art. 190 (Colo.).

authority, checks and balances would still be in place, the executive would not be bestowed with new powers, and the acts to be adopted would still be subject to judicial review.²⁵² Before his second term was up, President Uribe tried to hold a referendum to ask the people of Colombia if they wanted him to run for a third term.²⁵³ Congress approved the referendum, but on February 26, 2010, the constitutional court held the referendum to be unconstitutional for procedural defects (by a 7-2 vote) and because it constituted a “substitution” of the Constitution (by a 5-4 vote).²⁵⁴ While the procedural defects could perhaps be remedied, the substitution argument posed a more serious barrier to term limit removal. In positing this argument, the court reasoned that the amendments altered the character of the constitution in such a way that they effectively substituted the old constitution with a new one, and that such a change could only be accomplished by calling a constitutional assembly.²⁵⁵ The proposed referendum, by contrast, did not represent an exercise of “primary constituent power.”²⁵⁶ Thus, in order to pass the amendment, the government would have to call a constituent assembly and draft a brand-new constitution, a major hurdle to clear. President Uribe was highly popular when the constitutional court held the referendum unconstitutional, with some reports putting his approval rating at ninety percent.²⁵⁷ Despite that, Uribe stepped down.²⁵⁸

The only other court that attempted to declare a constitutional term limit amendment to be unconstitutional was Niger’s constitutional court. The attempt to overstay was made by Mamadou Tandja, who had come to power via election in 1999, the same year that Niger implemented a new constitution.²⁵⁹ The 1999 Constitution allowed for a maximum of two five-year terms.²⁶⁰ Tandja won reelection in 2004, and thus his term was scheduled to expire in 2009.²⁶¹ In May 2009, Tandja announced that he

252. Manuel José Cepeda Espinosa & David Landau, *Colombian Constitutional Law: Leading Cases* 343, 345–46 (2017) (reproducing the Colombian Constitutional Court’s 2005 opinion, which held that the 2004 term limit amendment didn’t replace the constitutional text sufficient to undermine “respect for the social state of law”).

253. See *id.* at 351.

254. S. No. C-1040/05, 26 febrero 2010, C.C..

255. *Id.*

256. *Id.*

257. See Jorge Eduardo Arellano, *Álvaro Uribe Busca Segunda Reección* [Álvaro Uribe Seeks Second Reelection], *El Nuevo Diario* (Aug. 12, 2008), <https://www.elnuevodiario.com.ni/internacionales/23942-alvaro-uribe-busca-segunda-reeleccion/> [<https://perma.cc/GXN6-B9H5>].

258. Espinosa & Landau, *supra* note 252, at 360.

259. Niger Profile, BBC News (Feb. 19, 2018), <https://www.bbc.com/news/world-africa-13944995> [<https://perma.cc/Q4TF-WTYN>].

260. Constitution de la Véme République Aug. 9, 1999, art. 36 (Niger).

261. Freedom in the World 2010: Niger, Freedom House, <https://freedomhouse.org/report/freedom-world/2010/niger> [<https://perma.cc/9DNE-HXVG>] (last visited Sept. 4, 2019).

intended to seek a longer stay in office through a popular referendum.²⁶² But rather than permanently amending the constitution, the referendum was designed instead simply to grant Tandja another three years in office.²⁶³ Thus, he would not stand for reelection for a full term but simply extend his time in office with the blessing of the referendum. The idea was then to draft and implement a new constitution during that three-year period, with the new constitution allowing for an unlimited number of five-year terms.²⁶⁴ Though this plan could have allowed Tandja to remain in office indefinitely, the stated goal of the three-year extension was to reward the President for his success in growing the economy and allow him to continue to oversee ongoing development projects for another few years.²⁶⁵

In a May 2009 advisory ruling, Niger's Constitutional Court said that the referendum was unconstitutional because the 1999 charter made term limits unamendable.²⁶⁶ (Indeed, it is probable that this elaborate plan was an attempt to work around the unamendability of term limits.) Sensing a growing opposition, Tandja dissolved parliament that same month.²⁶⁷ Then, in June, the court formally ruled that the referendum proposal was invalid.²⁶⁸ Tandja responded to this obstacle by disbanding the court and appointing a new slate of justices.²⁶⁹ At the same time, Tandja announced that, in order to "continue to safeguard the essential foundation of the nation and to preserve the interests of the people," he would henceforth rule by decree.²⁷⁰ Tandja thereby assumed emergency powers, invoking Article 53 of the Nigerien Constitution (but in the absence of parliamentary approval, which is required).²⁷¹ In August of that year, Tandja's three-

262. See *id.*

263. *Id.*

264. Constitution de la VIème République Aug. 18, 2009, art. 39 (Niger) (decreeing that the five-year presidential terms are "renewable").

265. See Abdoulaye Massalatchi, Niger Court Annuls Constitutional Referendum Plan, Reuters (June 12, 2009), <https://af.reuters.com/article/commoditiesNews/idAFLC35950720090612> [<https://perma.cc/R6NY-BERK>] [hereinafter Massalatchi, Niger Court Annuls Referendum] (describing Tandja's argument that the extension would enable him to "end current blockages in government" and allow him to "complete large infrastructure projects").

266. See *id.*; see also Constitution de la Vème République Aug. 9, 1999, art. 136 (Niger) (decreeing that the constitutional provision on presidential term limits shall not be subject to any revision).

267. See Niger Leader Dissolves Parliament, BBC News (May 26, 2009), <http://news.bbc.co.uk/2/hi/africa/8067831.stm> [<https://perma.cc/9E44-YT36>].

268. See Massalatchi, Niger Court Annuls Referendum, *supra* note 265.

269. Niger Anger at Court Appointment, BBC News (July 3, 2009), <http://news.bbc.co.uk/2/hi/africa/8132581.stm> [<https://perma.cc/CM5F-Z78Y>].

270. Abdoulaye Massalatchi, Niger President Rules by Decree After Court Snub, Reuters (June 26, 2009), <https://www.reuters.com/article/niger-politics/update-2-niger-president-rules-by-decree-after-court-snub-idUSLQ2439220090626> [<https://perma.cc/54WD-LVDR>].

271. Freedom in the World 2010: Niger, *supra* note 261; see also Constitution de la Sixième République Aug. 18, 2009, art. 53 (Niger) (stating the National Assembly must approve by an absolute majority the duration of the exercise of the exceptional powers).

year extension referendum was held amid an opposition boycott, passing with a reported ninety percent voter approval.²⁷² Tandja was also empowered under this referendum to disband the current government and form a new one, which he did.²⁷³ As planned, a new constitution that did not limit the number of five-year terms the president could serve was enacted.²⁷⁴ Tandja then terminated the use of emergency powers and oversaw parliamentary elections, which his party dominated, under the new constitution.²⁷⁵

The new constitutional order was never securely established, however, as Tandja faced down serious opposition at home and abroad. Opposing politicians called for protests, and discussed ousting Tandja through a coup as early as June 2009.²⁷⁶ Ordinary citizens took to the streets, joined by powerful labor unions and civil society groups.²⁷⁷ The Economic Community of West Africa States criticized Tandja and eventually suspended Niger from membership.²⁷⁸ The French government verbally chastised Tandja as well,²⁷⁹ and in late 2009 the United States and the European Union froze all aid to the country.²⁸⁰ This tense situation culminated in a February 18, 2010 coup that forced Tandja from power.²⁸¹ Over the course of 2010, the military oversaw the drafting and implementation of a new constitution, under which presidential elections were held in 2011 (Tandja did not participate).²⁸² The new constitution retains the maximum of two five-year terms, and continues to make that provision unamendable.²⁸³

The role of the military in Niger points at a final cause of failure: military intervention. The idea of a military overthrowing an autocratic regime to restore democracy may run contrary to the popular image of the

272. See *Timeline: Niger's Tandja Ousted in Coup*, Reuters (Feb. 19, 2010), <https://www.reuters.com/article/us-niger-events/timeline-nigers-tandja-ousted-in-coup-idUSTRE61I2OT20100219> [<https://perma.cc/NVF5-Y8UD>].

273. See *id.*

274. *Freedom in the World 2010: Niger*, *supra* note 261.

275. See *id.*

276. See *On Alert for a Constitutional Coup in Niger?*, *New Humanitarian* (June 25, 2009), <http://www.irinnews.org/report/84991/niger-alert-constitutional-coup-analysis> [<https://perma.cc/9LVS-93MV>].

277. See *Lawyers Challenge Niger President*, *BBC News* (July 13, 2009), <http://news.bbc.co.uk/2/hi/africa/8147371.stm> [<https://perma.cc/H6WP-FSFF>]; *Unions Call for General Strike to Protest Referendum*, *France 24* (July 22, 2009), <https://www.france24.com/en/20090722-unions-call-general-strike-protest-referendum-> [<https://perma.cc/M6XD-T2MP>].

278. Scott Stearns, *Regional Mediator Proposes Power-Sharing Deal for Niger*, *Voice of Am.* (Jan. 19, 2010), <https://www.voanews.com/a/regional-mediator-proposes-power-sharing-deal-for-niger-82188532/152922.html> [<https://perma.cc/YC25-X23E>].

279. *Niger 'Must Return to Democracy'*, *BBC News* (Aug. 10, 2009), <http://news.bbc.co.uk/2/hi/africa/8193976.stm> [<https://perma.cc/XLC7-DUFR>].

280. *Freedom in the World 2010: Niger*, *supra* note 261.

281. *Timeline: Niger's Tandja Ousted in Coup*, *supra* note 272.

282. *Freedom in the World 2010: Niger*, *supra* note 261.

283. *Constitution de la VIIème République Nov. 25, 2010*, arts. 46, 175 (Niger).

military as a coup maker. Yet, in a recent book, Professor Ozan Varol demonstrates that the military has often taken it upon itself to intervene to restore democracy.²⁸⁴ The highest profile example is Honduras. In 2009, Honduras's military ousted then-President Manuel Zelaya on the suspicion that he was seeking to extend his term through a planned constitutional referendum, which, for good measure, had also been blocked by Congress and the court.²⁸⁵ The episode took place against the backdrop of particularly strict term limits: The Honduran Constitution allows only a single four-year term and further bars anybody who advocates for the change or removal of term limits from public office.²⁸⁶ The 2009 episode can be seen as a potent, consolidated invocation of Honduras's harsh prohibition on changing presidential term limits: The legislature, the judiciary, and the military united to deprive Zelaya of his office, as is envisioned by the constitution. (The aftermath of the story, however, is striking: Less than six years later, those same forces would coalesce to reexamine the issue, with the court not only allowing the case to proceed but also ruling to eliminate term limits altogether.)²⁸⁷

IV. EVASION WITHOUT CONSTITUTIONAL AMENDMENT

Amendment is likely to be the preferred strategy for incumbents powerful enough to accomplish constitutional change. But for those who are less powerful, or those unsure of their chances, there are other options. This Part documents four common strategies encountered in our survey that do not involve amending the constitution but that are still arguably constitutional in nature.

A. *The Blank Slate Theory*

Among the authoritarian leaders to bear the title of “president,” Omar al-Bashir, former president of Sudan, ranks among the most notorious. Before becoming president, al-Bashir made his career in the military, and it was through military means that he came to power, leading a bloodless coup in 1989.²⁸⁸ Over the course of the 1990s, Sudan underwent a number of political changes: In 1993, al-Bashir disbanded the government

284. See Ozan O. Varol, *The Democratic Coup d'État* 1–3 (2017) (“[A]n event as undemocratic as a military coup can, in some cases, lead to democracy.”).

285. Elisabeth Malkin, *Honduran President Is Ousted in Coup*, N.Y. Times (June 28, 2009), <https://www.nytimes.com/2009/06/29/world/americas/29honduras.html> [<https://perma.cc/E3WZ-KNQL>].

286. *Constitución Política* 1982, art. 239 (Hond.). Honduras's Constitution further allows for the stripping of the citizenship of anyone who advocates for term limit removal or presidential reelection. *Id.* art. 42.

287. *The President of Honduras Starts His Second Term Under a Cloud*, Economist (Jan. 27, 2018), <https://www.economist.com/the-americas/2018/01/27/the-president-of-honduras-starts-his-second-term-under-a-cloud> [<https://perma.cc/6EDJ-DZ8U>].

288. Omar al-Bashir: Sudan's Ousted President, BBC News (Aug. 14, 2019), <https://www.bbc.com/news/world-africa-16010445> [<https://perma.cc/JGG5-UZTM>].

and named himself president.²⁸⁹ In 1996, he ran, unopposed, for his first popular election.²⁹⁰ In 1998, he oversaw the implementation of a new constitution.²⁹¹ This constitution instituted presidential term limits: a maximum of two five-year terms.²⁹² Elections under the 1998 Constitution were not held until 2000,²⁹³ and thus his first five-year term began then, though he had already been at the helm for eleven years by that point. But, even under this generous reading of term limits, al-Bashir's term should have expired in 2010, and yet he remained president until his forcible deposition in 2019.²⁹⁴ At all relevant times, Sudan retained a maximum presidential tenure of two five-year terms, but no amendment was pursued. What happened?

First, elections were never held in 2005. At that time, Sudan was in the process of resolving its decades-long conflict in the south. A peace agreement was signed,²⁹⁵ under whose terms South Sudan became the world's newest nation in a 2011 referendum.²⁹⁶ Also around this time, conflict in the Darfur region of western Sudan was raging intensely.²⁹⁷ And in 2005, an entirely new constitution was implemented,²⁹⁸ renewing the maximum tenure of two five-year terms for the president.²⁹⁹ But, given the instability wracking the country at that time, no one seems to have been much concerned about holding presidential elections, and there was little doubt that al-Bashir would remain in charge as the resolution of the South Sudan issue and the war in Darfur proceeded ahead.³⁰⁰ Thus, the first elections under the 2005 constitution did not occur until 2010, which al-

289. Simon Tisdall, Profile: Sudan's President Omar al-Bashir, *Guardian* (Apr. 20, 2011), <https://www.theguardian.com/world/2011/apr/20/profile-sudan-president-omar-al-bashir> [<https://perma.cc/6JWL-WJWE>].

290. *Id.*

291. *Id.*

292. Constitution of the Republic of the Sudan 1998, art. 41.

293. Profile: Omar al-Bashir, *Al Jazeera* (Dec. 18, 2010), <https://www.aljazeera.com/focus/2010/03/201031013131107402.html> [<https://perma.cc/8XLJ-JUST>].

294. Declan Walsh & Joseph Goldstein, Sudan's President Omar Hassan al-Bashir Is Ousted, but Not His Regime, *N.Y. Times* (Apr. 11, 2019), <https://www.nytimes.com/2019/04/11/world/africa/sudan-omar-hassan-al-bashir.html> [<https://perma.cc/4VBZ-D35T>].

295. Press Release, United Nations, Sudan Peace Agreement Signed 9 January: Historic Opportunity, Security Council Told (Feb. 8, 2005), <https://www.un.org/press/en/2005/sc8306.doc.htm> [<https://perma.cc/AHA5-BU7A>].

296. South Sudan Referendum: 99% Vote for Independence, *BBC News* (Jan. 30, 2011), <https://www.bbc.co.uk/news/world-africa-12317927> [<https://perma.cc/64BJ-82AF>].

297. Sudan: Events of 2005, Human Rights Watch, <https://www.hrw.org/world-report/2006/country-chapters/sudan> [<https://perma.cc/G2ND-8JYN>] (last visited Sept. 3, 2019).

298. Int'l Inst. for Democracy & Electoral Assistance, Constitutional History of Sudan, ConstitutionNet (2016), <http://www.constitutionnet.org/country/constitutional-history-sudan> [<https://perma.cc/8H8A-CE3G>].

299. Interim National Constitution of the Republic of the Sudan 2005, art. 57.

300. See *supra* notes 297–298.

Bashir won,³⁰¹ thus beginning his first five-year term as the elected president of the new Sudan. His second term, on this reading, began in 2015, after winning reelection.³⁰² And so his term of office was set to legally conclude in 2020. Up until he was forced from power, it appeared overwhelmingly likely that al-Bashir and his supporters were going to use their considerable power to pass a constitutional amendment that would allow Bashir to contest the 2020 elections and perhaps beyond, though al-Bashir's ruinous policy agenda caught up with him before this became possible.³⁰³

The story of al-Bashir and Sudan has no shortage of constitutional malfeasance: Al-Bashir took over via coup, dissolved his own government, unilaterally declared himself president, held fraudulent elections, and cited (not without accuracy) severe instability as grounds for delaying elections between the years 2005 and 2010. Even until just before his ouster, he appeared poised to amend the constitution to remain in office even longer. But amid all this activity, another, less noticeable evasion strategy was pursued. When new constitutions were implemented in 1998 and 2005, both of which included a maximum presidential duration of ten years, al-Bashir's prior years of service, which began as early as 1989, were not considered. Even if one accepts this maneuver as unavoidable with respect to the 2000 elections, as Sudan transitioned from military dictatorship to something more like a modern presidential state, the "reset" that occurred between 2005 and 2010 requires some explanation. Whether a new constitution was passed with the goal of extending al-Bashir's tenure, or if that result was simply taken for granted, the fact is this action did allow al-Bashir constitutionally to remain in office for a further ten years (of which he served nine).³⁰⁴

1. *The Basic Strategy.* — What al-Bashir accomplished in this instance is what we term the "blank slate" strategy. The idea is simple: When a new constitution with term limits is passed, those limits do not apply retrospectively, but only prospectively. The tolling period begins anew—even a leader like Bashir, who by 2005 had occupied the position of highest authority in Sudanese politics for sixteen years, would not be subject to the limits until the first elections were held under the new charter. We code eight total attempts at using this strategy since 2000. In five countries—

301. David Smith, Omar Hassan al-Bashir Declared Winner of Sudan Election, *Guardian* (Apr. 26, 2010), <https://www.theguardian.com/world/2010/apr/26/bashir-sudan-elections-kiir-secession> [<https://perma.cc/C6FJ-FS7K>].

302. Adela Suliman, 'More of the Same': Bashir Sweeps Sudan Election, *Al Jazeera* (Apr. 27, 2015), <https://www.aljazeera.com/news/2015/04/bashir-sweeps-sudan-election-150427111551251.html> [<https://perma.cc/5K8F-8PUZ>].

303. See Mohammed Amin & Fred Oluoch, Party Clears Hurdle for Bashir to Stand Again in 2020 Elections, *E. African* (Aug. 11, 2018), <http://www.theeastafrican.co.ke/news/africa/Sudan-Omar-al-Bashir-party-scraps-term-limits/4552902-4706592-o97wfy/index.html> [<https://perma.cc/YBA9-48KV>]; Walsh & Goldstein, *supra* note 294.

304. Tull & Simons, *supra* note 31, at 84–85.

Bolivia, Kyrgyzstan, Peru, Senegal, and Sudan—the blank slate approach was the primary strategy used. In three countries—Angola, Burkina Faso, and Kazakhstan—it was a secondary strategy (in Angola in addition to delaying elections; in Kazakhstan and Burkina Faso in addition to an amendment).³⁰⁵ In all cases, the strategy was successful.

While the strategy has an excellent success rate, it is not as common since, in most cases, it requires the adoption of a brand-new constitution, which is not always easy or desirable. What is more, on its own, the strategy risks being challenged by the political opposition. After all, unlike for a constitutional amendment, the new constitution itself does not clearly authorize another term for the president. All that the incumbent has is a plausible argument that his prior term should not count under the new constitution. But since others may contest this claim, we often see the courts get involved. Indeed, in five of the eight cases of the blank slate theory, constitutional courts were called upon to validate the theory. Though sometimes the strategy unfolds by default—like in Sudan or Peru, where the Peruvian Congress issued an “authentic interpretation” holding that President Fujimori’s 1990–1995 term should not be counted for the purposes of constitutional term limits³⁰⁶—in other cases, presidents and their supporters have to make an affirmative case before the courts that the time period they served before the institution of term limits should not count for tolling purposes.

Consider the example of Bolivia. The Bolivian presidency endured a tumultuous beginning to the twenty-first century, with a number of leaders forced to end their terms early because of illness and popular protests.³⁰⁷ Out of this difficult political situation emerged Evo Morales, who won the presidency in the elections of 2005.³⁰⁸ Morales was and is a committed reformer³⁰⁹ and oversaw the drafting and implementation of a new constitution that came into effect in 2009.³¹⁰ Before then, the Bolivian Constitution allowed presidents to serve a single five-year term, plus a second term

305. These eight instances do not include the cases in which presidents previously served without term limits.

306. Coletta Youngers, *Fujimori’s Rentless Pursuit of Re-Election*, NACLA (Sept. 25, 2007), <https://nacla.org/article/fujimoris-rentless-pursuit-re-election> [<https://perma.cc/YBA9-48KV>].

307. *Bolivia Profile-Timeline*, BBC News (Jan. 10, 2018), <https://www.bbc.co.uk/news/world-latin-america-18727510> [<https://perma.cc/U8RZ-GVXR>].

308. Juan Forero, *Coca Advocate Wins Election for President in Bolivia*, N.Y. Times (Dec. 19, 2005), <https://www.nytimes.com/2005/12/19/world/americas/coca-advocate-wins-election-for-president-in-bolivia.html> (on file with the *Columbia Law Review*).

309. *Bolivia Country Profile*, BBC News (Jan. 10, 2018), <https://www.bbc.com/news/world-latin-america-18727507> [<https://perma.cc/5FTF-PVVC>].

310. See EU Election Observation Mission, *Bolivia—Final Report—Constitutional Referendum 25 January 2009 at 6–8* (2009), http://eas.europa.eu/archives/eucom/missions/2009/bolivia/pdf/eucom_bolivia_2009_final_report_en.pdf [<https://perma.cc/7B5Q-UULV>] (“One of the campaign promises of Evo Morales in 2005 was to propose a new Constitución Política del Estado (CPE) which would reflect the cultures and traditions

provided they take a five-year break from the office before serving again.³¹¹ Under the 2009 Constitution, the president was allowed to serve two *consecutive* five-year terms, allowing the president to run for reelection without taking a break.³¹² Under the new constitution, Morales won reelection in December 2009.³¹³ Though this was four years after he first came into office, under the blank slate theory, it was the beginning of his first five-year term. This interpretation was formally endorsed when, in 2013, Bolivia's Constitutional Court ruled that Morales's term from 2005 to 2009 would not count for term limits purposes, coming as it did prior to the 2009 Constitution.³¹⁴ Congress would later pass a law reiterating this holding.³¹⁵ Members of the opposition criticized the maneuver in large part because Morales had reportedly promised during the constitutional drafting process that he would not seek another term in 2014; its legal status, however, was never seriously in doubt.³¹⁶ Indeed, Morales would go on to win a "second" term in 2014 as he continued to enjoy high levels of popularity.³¹⁷ More recently, Morales has pursued less conventional

of Bolivia and equally important contribute to a more equal, just and prosperous country." (emphasis in original)).

311. Constitución Política del Estado Feb. 2, 1967, art. 87 (Bol.).

312. Constitución Política del Estado Feb. 7, 2009, art. 168 (Bol.).

313. Rory Carroll & Andreas Schipani, Evo Morales Wins Landslide Victory in Bolivian Presidential Elections, *Guardian* (Dec. 7, 2009), <https://www.theguardian.com/world/2009/dec/07/morales-presidential-victory> [<https://perma.cc/YK8W-AXBS>].

314. Bolivia's President Evo Morales Can Seek Third Term, *BBC News* (Apr. 30, 2013), <https://www.bbc.com/news/world-latin-america-22351190> [<https://perma.cc/QQ5F-S4LF>].

315. Bolivia: New Law Backs President Evo Morales Third Term, *BBC News* (May 21, 2013), <https://www.bbc.com/news/world-latin-america-22605030> [<https://perma.cc/8EN5-LELC>].

316. Mariano Castillo & Gloria Carrasco, Court Clears Path for Bolivia's Morales to Run for 3rd Term, *CNN* (Apr. 30, 2013), <https://www.cnn.com/2013/04/30/world/americas/bolivia-morales-re-election/index.html> [<https://perma.cc/9QF8-8SNX>]; see also George Philip & Francisco Panizza, *The Triumph of Politics: The Return of the Left in Venezuela, Bolivia and Ecuador* 119 (2011) ("Morales's promise made in late 2008 to stand down in 2014 if re-elected in 2009 . . . permitted the vote on the new constitution to go ahead."); Solange Márquez, Evo Morales, la Reelección y una Promesa Incumplida [Evo Morales, Reelection and an Unfulfilled Promise], *Universal* (Mar. 8, 2019), <https://www.eluniversal.com.mx/solange-marquez/evo-morales-la-reeleccion-y-una-promesa-incumplida> [<https://perma.cc/MBN4-DWX8>] (criticizing Morales for breaking his promise not to run again in 2014, but noting that the opposition has exhausted all possible legal remedies); Observador Internacional Crítica Intención de Reelección Indefinida [International Observer Criticizes Intention of Indefinite Reelection], *Diario (Bol.)* (Oct. 8, 2017), https://www.eldiario.net/noticias/2017/2017_10/nt171008/principal.php?n=58&observador-internacional-critica-intencion-de-reeleccion-indefinida [<https://perma.cc/6DDQ-FG3H>] (reporting the recollections of an international observer who was present at the 2008 constitutional negotiations that Morales explicitly agreed that he would not run for reelection in 2014).

317. William Neuman, President of Bolivia Claims Victory in Election, *N.Y. Times* (Oct. 12, 2014), <https://www.nytimes.com/2014/10/13/world/americas/bolivia-seen-likely-to-re-elect-morales-as-president.html> [<https://perma.cc/RED6-7UVU>]; Bolivia Electoral Court Confirms Evo Morales's Poll Win, *BBC News* (Oct. 20, 2014), <https://www.bbc.com/news/world-latin-america-29689049> [<https://perma.cc/VF46-77EB>].

constitutional arguments—with surprising success—to secure potential third and fourth terms, but this development will be discussed in section IV.B.2 below.

2. *Ingredients for Success.* — The factors necessary for a president to achieve overstay through the blank slate approach are distinct from those needed to pass a constitutional amendment, which requires the president to be sufficiently powerful to meet the amendment threshold. The blank slate strategy, by contrast, mainly requires an opportunity to come along: the writing of a new constitution. If a president comes into office before a new constitution is drafted, this offers an opportunity to assert the blank slate theory.

Of course, the president has an important role to play in calling a constitutional assembly. Indeed, since constitutions often lack the procedures for their own replacement, calling a constitutional assembly can, in some cases, be easier than amending the constitution.³¹⁸ An example from Ecuador illustrates this fact. When the highly popular President Rafael Correa realized that he did not have the congressional supermajority required to amend the constitution,³¹⁹ he simply appealed to the people and called a constitutional referendum to establish a constituent assembly to write a new constitution.³²⁰ The result was a constitution that passed with more than eighty percent of the vote.³²¹ As the prior constitution did not stipulate procedures for its own replacement,³²² it was effectively easier for President Correa to write a brand-new constitution than to amend the previous one. More generally, the literature has found that constitutions that are harder to amend are more likely to be replaced, suggesting that these mechanisms for change are to some extent substitutes.³²³

318. See Landau, *supra* note 26, at 242.

319. Constitución de la República del Ecuador Aug. 11, 1998, art. 282 (Ecuador).

320. Simon Romero, Ecuador: Congress Approves Referendum on Constitutional Assembly, N.Y. Times (Feb. 14, 2007), <https://www.nytimes.com/2007/02/14/world/americas/14briefs-ecuadorassembly.html> [<https://perma.cc/WB2B-S5RF>].

321. Allan R. Brewer-Carías, El inicio del proceso constituyente en Ecuador en 2007 y las lecciones de la experiencia venezolana de 1999 [The Beginning of the Constituent Process in Ecuador in 2007 and Lessons from the Venezuelan Experience of 1999], 12 *Iuris Dictio* 109, 127 (2011).

322. Constitución de la República del Ecuador Aug. 11, 1998, arts. 282–283 (Ecuador) (providing amendment mechanisms but no procedure for wholesale constitutional replacement); Brewer-Carías, *supra* note 321, at 114; see also Gabriel L. Negretto, Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America, 46 *Law & Soc’y Rev.* 749, 757 (2012) (arguing that amendments and replacements “cannot . . . be used as interchangeable means of constitutional transformation[,] [because] [n]ew constitutions are required to change the basic structure of the state and the political regime”).

323. See Zachary Elkins, Tom Ginsburg & James Melton, The Endurance of National Constitutions 99 (2009) (suggesting that “constitutions with lower thresholds for amendment will be more flexible and likely to survive in the face of constitutional crisis”); Michael D. Gilbert, Entrenchment, Incrementalism and Constitutional Collapse, 103 *Va. L. Rev.* 631, 665 (2017) (“Constitutions fail when they are too easy or too hard to amend.”).

On the other hand, we believe that it is rare for a president to call a constitutional assembly and draft a new constitution *solely* for the purpose of circumventing term limits. The reason is that it is more difficult to control a constituent assembly than the legislature. When the entire system is up for grabs, a president and his party risk losing as much as they gain, especially when a constitution is generally favorable to an executive and his party. What is more, constituent assemblies tend to represent broad cross-sections of society and may aspire to deliberate based not on narrow self-interest but the broader common good.³²⁴ As a result, as Professor Jon Elster has argued, they are characterized by “strong passions,” which are much harder to control than economic or political interests.³²⁵

Calling a constitutional assembly, then, can be a bit of a gamble. Indeed, it is telling that when the Colombian Constitutional Court told President Uribe that he could only run for a third term if he were to call a constitutional assembly and draft a new constitution, he opted to exit instead.³²⁶ Likewise, when President Mugabe called for a constitutional assembly in Zimbabwe, he ended up with a constitution that, for the first time, included term limits (and he only narrowly avoided the inclusion of age limits which would have ousted him).³²⁷ In Bolivia, President Morales has shown a strong desire to remain in office, but it is improbable that, when he oversaw the new constitution-making process in 2009, Morales was motivated *primarily* by a longer time in office; true, that was the result he got, but were that the extent of his ambition—and not the wholesale reformation of the political system—he could have saved himself a lot of trouble by recourse to a different strategy such as amendment or the courts.³²⁸

As a general matter, then, the blank slate strategy should probably be regarded as a narrow tactic that only arises when the right factual circumstances are met. Because those factual circumstances involve many factors outside of the president’s direct control, it is unlikely indeed that many

324. There is a debate, however, about whether constitutional assemblies deliberate for the public good. Compare Bruce Ackerman, *We the People 1: Foundations* 6–7 (1991) (discussing the necessary steps involved in decisions made by the people versus the government, and highlighting how the former involve citizen engagement in “higher lawmaking”), with Sujit Choudhry, Ackerman’s Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?, 6 *Int’l J. Const. L.* 193, 197 (2008) (“Ackerman has failed to adduce sufficient evidence to demonstrate that political actors were self-consciously engaged in a process of higher lawmaking . . .”).

325. See Jon Elster, *The Political Psychology of Constitution Making*, in *Constituent Assemblies* 207, 216 (Jon Elster, Roberto Gargarella, Vatsal Naresh & Bjørn Erik Rasch eds., 2018) (observing that “strong passions”—which tend to coincide with constitutional framing—“tend to undermine rational belief formation,” and accordingly, diminish actors’ receptivity to rational appeals to their interests).

326. See *supra* notes 251–258 and accompanying text.

327. See *Democrats* (Upfront Films 2014) (following Zimbabwe’s process of writing a new constitution after the disputed results of the 2008 presidential election).

328. See *supra* Part III.

incumbents would attempt to orchestrate overstay *ex ante* through reliance on the blank slate strategy. In light of these observations, it is perhaps unsurprising that the blank slate theory is not as common an evasion strategy as constitutional amendment. As noted, in a mere five cases it was the primary strategy.³²⁹

While the blank slate theory requires an opportunity to come along, when it does, the strategy tends to succeed. Indeed, we do not find any failed attempts to apply the blank slate strategy. The only possible case of failure is Senegal—but with a twist. Then-President Abdoulaye Wade won the legal argument for a blank slate before the Constitutional Court, allowing him to stand for reelection in 2012, but he *lost* that election, in part because many Senegalese were tired of having him in office and angry over what they perceived to be a circumvention of term limits.³³⁰ Indeed, the court's decision sparked riots almost immediately.³³¹ Disparate opponents of Wade coalesced around a single candidate in the election, Macky Sall,³³² who campaigned on the platform of reducing presidential power and respecting term limits.³³³ It was a tense election season, leading to some deaths.³³⁴ Sall would go on to win, and, somewhat surprisingly, Wade would amicably concede defeat, leading to a peaceful transfer of power.³³⁵ Thus, while Wade succeeded in securing a chance to run in the 2012 elections, he did *not* succeed in overstaying.

B. *Using the Courts to Reinterpret Term Limits*

In 2009, the Supreme Court of Nicaragua issued a remarkable judgment that would essentially take term limits out of the constitution.³³⁶ Prior to the ruling, Nicaragua's Constitution limited the number of terms a president could serve in the following manner: A president could serve a single five-year term, and potentially one additional nonconsecutive

329. See *supra* section IV.A.1.

330. See Senegal's President Concedes Defeat in Runoff Election, CNN (Mar. 25, 2012), <https://www.cnn.com/2012/03/25/world/africa/senegal-elections/index.html> [<https://perma.cc/Y8LX-Z6GA>].

331. Senegal Clashes Erupt as Court Clears Wade Poll Bid, BBC News (Jan. 28, 2012), <https://www.bbc.co.uk/news/world-africa-16770305> [<https://perma.cc/58AU-9J4U>].

332. Senegal's President Concedes Defeat in Runoff Election, *supra* note 330.

333. Senegal Presidential Poll Results Confirm Run-Off, BBC News (Mar. 1, 2012), <https://www.bbc.com/news/world-africa-17215803> [<https://perma.cc/9JPV-QN2S>] (“Mr. Sall promised that if elected, he would shorten the presidential term to five years from the current seven, and enforce a two-term limit.”).

334. Thomas Fessy, Senegal Proud of Peaceful Election After Macky Sall Win, BBC News (Mar. 26, 2012), <https://www.bbc.com/news/world-africa-17514530> [<https://perma.cc/JX89-PASJ>] (noting that tension prior to the election had led to at least six deaths).

335. Adam Nossiter, A Turbulence-Free Election in Senegal, N.Y. Times (Mar. 25, 2012), <https://www.nytimes.com/2012/03/26/world/africa/president-concedes-race-in-senegal.html> [<https://perma.cc/D58B-Z5DY>].

336. Sentencia [S.] No. 504, de las 5:00 p.m., 19 octubre 2009, Sala Constitucional, Boletín Judicial [B.J.] [Supreme Court of Justice] p. 1, 24 Const. I (Nicar.).

term, but only after being out of office for at least five years.³³⁷ President Daniel Ortega, who came into office in 2007 after once serving as president in the 1980s before a string of electoral defeats thereafter, challenged this rule before the nation's supreme court.³³⁸ Ortega claimed that the constitution's term limits clashed with other rights and principles enshrined in the same document: the right to equality, the principles of sovereignty and self-government, the right to vote, the principle of the supreme interest of the nation, and the right to personality and capability.³³⁹

In a landmark ruling on this petition, the court introduced two new canons of interpretation: first, that constitutional *values* take precedence over constitutional *rules*;³⁴⁰ and second, that the intentions of the *original* constituent power prevail over those of the *derivative* constituent power—that is, that the original drafters' intentions in framing the constitution take precedence over the intentions of those who later amend the constitution.³⁴¹ With respect to the first principle (values over rules), the court pointed to the Nicaraguan Constitution's right to participate in politics on equal terms.³⁴² Because term limits only applied to some political offices only (for example, to the president but not legislators), they violated the right to equal participation.³⁴³ As to the second principle, that of preferring the vision of the original drafters of the constitution over subsequently added amendments, the court noted that the original constitution of 1987 did *not* include term limits.³⁴⁴ Those provisions were added only in 1995, and thus, according to the court, they were the result of the exercise of *derivative*, rather than *original* constituent power, and derivative provisions must always respect the limits established by original constituent power.³⁴⁵

337. Constitución Política de la República de Nicaragua 1987, as amended by Law No. 192 (July 4, 1995) art. 147 (Nicar.).

338. Profile: Nicaraguan President Daniel Ortega, from Revolutionary Leader to Opposition Hate Figure, BBC News (July 19, 2018), <https://www.bbc.com/news/world-latin-america-15544315> [<https://perma.cc/4Y3B-D76M>]. Ortega was one among a class of named plaintiffs that also included more than 100 mayors, whose offices were also subject to term limits. See Constitución Política de la República de Nicaragua 1987, as amended by Law No. 192 (July 4, 1995), art. 178 (Nicar.). The case came before the Supreme Court on appeal from the National Electoral Council, which had denied Ortega petition to contest the 2011 elections.

339. S. No. 504, 19 octubre 2009, B.J., p. 24 Const. I.

340. Id. at 16.

341. Id. at 18–19, 21.

342. Constitución Política de la República de Nicaragua 1987, as amended by Law No. 192 (July 4, 1995), arts. 48, 50 (Nicar.).

343. S. No. 504, 19 octubre 2009, B.J., p. 24 Const. I. Specifically, the court held that there were insufficient grounds to justify treating presidents, vice presidents, and mayors differently than other government officials; the circumstances were too similar to justify different restrictions on their offices. Id.

344. Id. at 19.

345. Id. at 18–22.

Having concluded that term limits violated the equality values enshrined in the constitution and the original constituent power's grant of free choice in voting as a form of sovereignty, the court added one additional reason for finding that term limits were unconstitutional: Barring reelection via term limits would cause President Ortega's "political death."³⁴⁶ This, the court said, was prohibited by the constitution and also a number of human rights treaties that the government of Nicaragua had ratified.³⁴⁷ This ruling cleared the way for Ortega to run for reelection in the 2011 elections. Ortega won reelection then, and, in 2014, he oversaw the passage of a constitutional amendment that scrapped term limits entirely.³⁴⁸ This allowed him to run in, and win, the 2016 elections, at which point his wife Rosario Murillo became his vice president.³⁴⁹ During and after the court proceedings and the subsequent amendment, Ortega has faced harsh criticism from the opposition, but he remains powerful and has become increasingly authoritarian.³⁵⁰

1. *The Basic Strategy.* — The Nicaraguan Court's decision represents a distinct evasion strategy that is increasingly common: the use of courts to interpret away term limits in the constitution. Indeed, since 2000, there have been four cases where presidents successfully extended their terms in this way: Nicaragua in 2009, Burundi in 2013, Honduras in 2015, and Bolivia in 2017. The strategy was also used successfully in Costa Rica in 2003, but with the important difference that it allowed a *former* president to run for another term.³⁵¹ Finally, it was unsuccessful in Guyana; however,

346. *Id.* at 22.

347. *Id.*

348. Nicaragua Scraps Presidential Term Limits, Al Jazeera (Jan. 29, 2014), <https://www.aljazeera.com/news/americas/2014/01/nicaragua-scraps-presidential-term-limits-201412951043190534.html> [<https://perma.cc/B3TU-GWKA>].

349. Joshua Partlow, Nicaragua's Daniel Ortega Wins Third Consecutive Term amid Questions About Democracy, Wash. Post (Nov. 7, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/11/05/nicaraguas-daniel-ortega-headed-for-third-consecutive-term-amid-questions-about-democracy/?utm_term=.8d5bd278a91b (on file with the *Columbia Law Review*).

350. Charles Lane, Ortega Is Becoming the Type of Autocrat He Once Despised, Wash. Post (July 16, 2018), https://www.washingtonpost.com/opinions/nicaragua-is-rapidly-heading-for-a-new-nightmare/2018/07/16/049dabd4-890b-11e8-a345-a1bf7847b375_story.html (on file with the *Columbia Law Review*).

351. There was an attempt in 2000, brought by former President Arias and his supporters, to challenge the constitutionality of the 1969 amendment prohibiting any presidential reelection. See Sentencia [S.] No. 07818, a las 4:45 p.m., 5 septiembre 2000, Sala Constitucional de la Corte Suprema de Justicia, Poder Judicial [Constitutional Chamber of the Supreme Court of Justice] p. 1, Const. I (Costa Rica). However, Costa Rica's top court (*Sala IV*) rejected the claim, holding that it lacked the judicial power to review the substantive issues within the challenge due to separation of powers concerns. *Id.* Despite this first failure, the same plaintiffs, former President Arias and his supporters, later succeeded on grounds largely similar to those brought before the court in 2000. In 2003, *Sala IV* invalidated the single-term limit on substantive and procedural grounds, restoring the pre-1969 version of the provision, which allowed for two consecutive four-year terms. See Sentencia [S.] 02771, a las 11:40 a.m., 4 abril 2003, Sala Constitucional de la Corte

this was a case brought by a private citizen similarly attempting to use the courts to allow a *former* president to run for another term.³⁵²

In each of these cases, presidents have been able to control the courts and use them to advance some legal theory that would extend term limits (Burundi) or remove them entirely (Honduras, Nicaragua, and Bolivia). We believe that this finding is important and has largely gone unnoticed in the literature. Indeed, when it comes to courts and term limits, the literature is most familiar with the Colombian Constitutional Court's decision that prevented President Uribe from running another term.³⁵³ But most of the time, courts do not play that role; they do not halt overstaying incumbents but instead help them to secure another term. In our survey, the Colombian Constitutional Court is the only court that has successfully prevented a president from running for another term, making it the exception, not the rule. The cases discussed in this Part are extraordinary in that they represent instances in which courts removed term limits based on constitutional interpretation alone. But they do not exhaust the various ways in which courts have aided incumbents in staying past their terms. As described in section IV.A.1, in five of the eight cases in which the blank slate theory was pursued, courts validated this theory. Indeed, if we include all cases in which courts were involved somehow, we find that thirty percent of the incumbents that successfully overstayed were aided by the courts in some way. Overall, then, courts appear to largely legitimize overstaying, not to halt evasion attempts.

A recurring theme in these cases is the use of international human rights law as an argument to scrap term limits. In each of the Latin American cases, an argument was made that the existence of term limits restricted the incumbent's right to political participation as enshrined in international human rights law, most notably in the Inter-American Convention on Human Rights.³⁵⁴ This argument featured in the decision by the Nicaraguan Supreme Court and was even more prominent in the decisions from Bolivia and Honduras.

In Honduras, the Inter-American Convention on Human Rights was the main basis for removal of term limits. The Honduran Constitution allowed the president to serve for only a single four-year term.³⁵⁵ In late 2014,

Suprema de Justicia, Poder Judicial, [Constitutional Chamber of the Supreme Court of Justice], p.1, Const. I (Costa Rica); see also Michael B. Wise, *Judicial Review and Its Politicization in Central America: Guatemala, Costa Rica, and Constitutional Limits on Presidential Candidates*, 7 *Santa Clara J. Int'l L.* 145, 173–75 (2010).

352. See *infra* section IV.B.3.

353. See *supra* notes 251–258 and accompanying text.

354. This is codified specifically in article 23 of the Inter-American Convention on Human Rights, which guarantees the right to political participation. See *American Convention on Human Rights art. 23*, Nov. 22, 1969, 1144 U.N.T.S. 123.

355. Moreover, the constitution enshrines additional measures to protect terms limits by (a) barring anybody who advocates for the change or removal of term limits from public office for ten years, and (b) potentially stripping the citizenship of anyone who advocates

this provision was challenged before the supreme court on the grounds that it violated free speech and the right to propose, discuss, and vote on matters of public interest,³⁵⁶ as well as the rights to political participation and equality before the law, since presidential candidates who had served before were not treated in a manner equal to other citizens who had not yet served as president.³⁵⁷ The court validated these arguments by relying chiefly on international human rights law.³⁵⁸ It noted that a number of human rights treaties, including the Inter-American Convention on Human Rights, had been ratified *before* the establishment of the 1982 Constitution, and that the drafters of the 1982 Constitution had a binding legal obligation to respect and protect the rights contained therein.³⁵⁹ Applying a standard that to an American lawyer might resemble strict scrutiny, the court noted that the requirements of international human rights law could be abrogated in cases of “imperious social need” or “imperative public interest,” *if* the restrictions were *proportional* to the goal sought.³⁶⁰ Regarding the first prong of the test, the court found no evidence in the history of the relevant provisions to support a conclusion that the harsh limitation on presidential terms was justified by an imperious social need or imperative public interest.³⁶¹ As to the second prong, the court held that the provisions were not proportional; even if they had been reasonably tailored to achieve some important goal in the past, they were not proportional in the present day.³⁶² To bolster its holding, the court developed one further argument. It noted that, even if there really were an intractable conflict between the constitutional provisions and international human rights, the jurisprudence of the latter requires judges to apply the *pro homine* principle—that is, to choose the norm most favorable to the human person.³⁶³ On this ground, the court found that freedom of expression, freedom of thought, and access to political rights must prevail over whatever interests are protected by the prohibition against presidential reelection, thereby effectively scrapping term limits.

2. *Ingredients for Success.* — To successfully evade term limits through judicial interpretation requires one main ingredient: control of the courts. By contrast, the president does not have to be particularly powerful or

for term limit removal or presidential reelection. Constitución Política Jan. 11, 1982, arts. 42, 239 (Hond.).

356. Supreme Court of Justice, Constitutional Chamber Apr. 22, 2015 (Hond.). There were two different actions brought by former President Callejas Romero and fifteen members of Congress, respectively, advocating distinct legal grounds for removing term limits.

357. *Id.* at 2–3.

358. *Id.* at 12.

359. *Id.*

360. *Id.* at 17.

361. *Id.* at 20.

362. Specifically, the court observed that since writing the constitution, ten successful elections had taken place, and political rights had thus been strengthened. *Id.* at 18.

363. *Id.* at 16.

popular, nor does he need to enact a brand-new constitution. By using this strategy, the president can avoid the up-front political costs associated with the more common strategy of amendment. The president need not wage a lengthy political campaign to persuade legislators or ordinary voters to support his cause—he need merely persuade a small group of lawyers. What is more, he does not even need a sound legal argument, since, in the hands of these judges, constitutional rules become nothing but “pretty play-things” (to use Karl Llewellyn’s famous phrase).³⁶⁴ As long as the courts are willing to go along, incumbents can evade term limits without too much trouble while maintaining a veneer of legitimacy and constitutionality.

Consider recent events in Bolivia, where all these factors came together when President Evo Morales and his associates turned to the courts after other evasion attempts had failed. Morales, not content with the two five-year terms he was allowed in the 2009 constitution he helped to implement, or the extra four years he picked up as a result of his successful use of the blank slate strategy,³⁶⁵ first pushed for a national referendum, but that failed.³⁶⁶ Running out of options, Morales turned to Bolivia’s Plurinational Constitutional Tribunal, whose judges are appointed by popular vote.³⁶⁷ In an eighty-page decision announced in 2017, the Tribunal scrapped term limits.³⁶⁸ Like in Honduras, part of the reasoning was based on international human rights law; the Tribunal held that term limits violated the right to participation and equality as enshrined in international human rights documents, which are superior to the constitution.³⁶⁹

364. See Karl Llewellyn, *The Bramble Bush* 14 (1977).

365. See *supra* notes 307–317 and accompanying text.

366. This referendum narrowly failed in early 2016, and yet his party insisted that he would remain their candidate for the 2019 elections. See Bolivia’s President Evo Morales to Run Again Despite Referendum Ruling It Out, *Guardian* (Dec. 17, 2016), <https://www.theguardian.com/world/2016/dec/18/bolivas-president-evo-morales-to-run-again-despite-referendum-ruling-it-out> [<https://perma.cc/A9GQ-3KRJ>].

367. Bolivia’s Plurinational Constitutional Tribunal is the only constitutional court in Latin America whose judges are appointed by popular vote. See Gabriel Elizondo, *Bolivians Vote to ‘Decolonise Courts,’ Al Jazeera: Opinion* (Oct. 16, 2011), <https://www.aljazeera.com/indepth/opinion/2011/10/201110169924243497.html> [<https://perma.cc/Y2V3-NWET>] (noting that the election held in 2011 was “the first time judges in a Latin American country [were] selected by popular vote”). Although the goal of this policy was to make the judiciary more accountable, it has had the unfortunate side effect of making the court largely accountable to President Morales. See Sergio Verdugo, *The Fall of the Constitution’s Political Insurance: How the Morales Regime Eliminated the Insurance of the 2009 Bolivian Constitution*, 17 *Int’l J. Const. L.* 1098, 1111–12, 1115 (on file with the *Columbia Law Review*). This is in part because, in addition to the popular vote, each candidate must be approved by a two-thirds vote of the Plurinational Legislative Assembly, which has been dominated by Morales’s party, *Movimiento al Socialismo (MAS)*, since the establishment of this body in the 2009 constitution. *Id.* (manuscript at 19–20).

368. Sentencia [S.] No. 0084, 28 noviembre 2017, Tribunal Constitucional Plurinacional [Multinational Constitutional Court], p. 1, 5 (Bol.).

369. Bolivia’s Constitution, in fact, specifically provides for the superiority of international human rights treaties that were ratified prior to the adoption of the 2009

In addition, the court pushed another, rather astonishing argument: The drafters actually did not intend to include term limits in the constitution, in spite of having included them in four separate articles. Though this reading seems odd, it was based on a constitutional provision that requires that the Plurinational Tribunal, in interpreting the constitution, “give preference to the intent of the constituent assembly as demonstrated in its documents, acts and resolutions, as well as the literal tenor of the text.”³⁷⁰ The Tribunal thus reviewed the legislative history of the term limits articles and found that the original plan of the Constituent Assembly had been to allow officials to remain in office for an unlimited number of terms, and had only agreed to term limits as part of a political compromise in order to get the constitution approved.³⁷¹ As the Tribunal put it,

[T]he real intention of the framers, with respect to the reelection of Presidents and Vice Presidents, was to opt for indefinite consecutive reelections according to the will of the people. In other words, the original constitutional drafters considered that there should not be limits to the possibility that authorities could run again for office, because the continuity or not of incumbents must depend on the popular will.³⁷²

By this line of reasoning, the Plurinational Tribunal overturned term limits.

That recourse to the courts has been effective in these cases does not mean that the strategy is entirely without risk. Although it might appear to be a relatively costless way to evade term limits, such decisions risk harming the legitimacy of the courts and may generate political backlash. First, when courts are so openly seen as an instrument to advance the president’s political agenda, their reputation and legitimacy may be diminished. This can be a problem because a long line of research has shown that judicial decisions are complied with because of the courts’ legitimacy.³⁷³ That is,

constitution. See Constitución del Estado Plurinacional de Bolivia Feb. 7, 2009, art. 256 (Bol.).

370. See *id.*

371. S. No. 0084, 28 noviembre 2017, Tribunal Constitucional Plurinacional, p. 1, 5.

372. *Id.* at 60.

373. See, e.g., David Easton, A Systems Analysis of Political Life 267–68 (1965) [hereinafter Easton, Systems Analysis] (“[S]upport for any of the political objects will, in the long run, depend upon the members being persuaded that outputs are in fact meeting their demands or that they can be expected to do so within some reasonable time.”); Nuno Garoupa & Tom Ginsburg, Judicial Reputation: A Comparative Theory 14–23 (2015) (describing the importance of judicial reputation in conveying the quality of the judiciary and fostering public esteem); David Easton, A Re-Assessment of the Concept of Political Support, 5 *Brit. J. Pol. Sci.* 435, 450–53 (1975) (describing how belief in legitimacy reflects people’s perception of authorities to be morally proper or right); Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 *Harv. L. Rev.* 1787, 1794–96 (2005) (“[C]ritics who denounced *Bush v. Gore* as legally illegitimate did not necessarily imply that it should not be followed.”); James L. Gibson & Gregory A. Caldeira, The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice, 39 *Am. J. Pol. Sci.* 459, 461 (1995) (explaining that few people are willing to accept a decision by the European

when the court lacks support as an institution, different constituencies are less likely to respect judicial rulings and may challenge and defy them.³⁷⁴ And while it might appear that authoritarian leaders are better off without courts, a number of studies have shown that authoritarian leaders can benefit from having somewhat independent courts for a host of reasons.³⁷⁵

Second, court decisions are not immune to popular backlash. While judicial decisions may be less visible than constitutional amendment, opposition may mobilize against a court ruling and dismiss it as illegitimate or a “constitutional coup.”³⁷⁶ Burundi offers an example. After years of civil war related to the Hutu–Tutsi ethnic conflict, a peace agreement was finally signed in 2003.³⁷⁷ One party to the agreement was Pierre Nkurunziza, a military commander of one of the Hutu rebel groups—Forces for Defence of Democracy (FDD).³⁷⁸ In 2005, as Burundi emerged into a period of greater stability, a voter referendum established a new constitution.³⁷⁹ Article 302 established a special procedure for the selection of the first president: Instead of having a popular vote, as would happen in the future, the first president would be chosen by a two-thirds vote in the legislature.³⁸⁰ This is how Nkurunziza became the first president

Court of Justice that they find objectionable and noting the strong relationship between legitimacy and acceptance of decisions); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 *Am. Pol. Sci. Rev.* 343, 344–46 (1998) (“[S]upport for the U.S. Supreme Court is fairly widespread . . . [M]ost Americans judge their Supreme Court to be a largely legitimate institution.”).

374. See Easton, *Systems Analysis*, *supra* note 373, at 264–65 (noting the importance of the judiciary in implementing regularity, thus maintaining sentiments of justice and equity and minimizing discontent).

375. For example, courts are necessary to resolve disputes among different branches of government. See Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits* 58–61 (2015) (describing obedience with judicial decisions as a product of the need for coordination so that “the orders of . . . judges are obeyed merely because everyone expects everyone else to obey them”). Independent courts can further help attract foreign investment. See Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* 5–6 (2007) (examining how the legitimizing of the Egyptian Supreme Constitutional Court helped attract foreign private investment); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 *J. Econ. Hist.* 803, 816–23 (1989) (“[T]he creation of a politically independent judiciary greatly expanded the government’s ability credibly to promise to honor its agreements, that is, to bond itself. By limiting the ability of the government to renege on its agreements, the courts played a central role in assuring a commitment to secure rights.”).

376. See, e.g., Dexter Boniface, *Constitutional Coup in Nicaragua*, *Democracy in Latin Am. Blog* (Oct. 27, 2009), <https://demlab.wordpress.com/2009/10/27/a-constitutional-coup-in-nicaragua/> [<https://perma.cc/L2UE-LQDD>].

377. Burundi Profile—Timeline, BBC News (May 21, 2018), <https://www.bbc.co.uk/news/world-africa-13087604> [<https://perma.cc/AHB9-DKHR>].

378. *Id.*

379. Burundi: Missteps at a Crucial Moment: Context, Human Rights Watch, <https://www.hrw.org/legacy/backgrounder/africa/burundi1105/2.htm> [<https://perma.cc/N3BF-7ZUG>] (last visited Oct. 3, 2019).

380. *Constitution de la République du Burundi* Mar. 18, 2005, art. 302 (Burundi).

of Burundi under the new constitution.³⁸¹ That constitution provided for a maximum of two five-year terms, meaning that Nkurunziza's term would elapse in 2015 after winning the 2010 election.³⁸²

And yet Nkurunziza remains in office in 2019. He managed this overstay by taking a legal interpretation before Burundi's Constitutional Court and winning.³⁸³ His theory was as follows. Because his first term came through the special procedures of Article 302, and he was selected by the legislature rather than the popular vote, his first term did not count for the purposes of the general term limits provision, Article 96, which read in its entirety: "The President of the Republic is elected by universal direct suffrage for a term of five years renewable one time."³⁸⁴ Thus, because his first term was not by "universal direct suffrage," but by legislative supermajority, the argument went, the first five years did not count toward his total ten-year term.³⁸⁵ There is a certain literal logic to this argument, in that his first term didn't meet the precise specifications of the term limits provision. But as one Burundian legal scholar, Professor Pacifique Manirakiza, argues, this reading was incorrect, because historical context including electoral legislation passed at the same time as the constitution strongly suggests that the special selection procedure was meant only as a one-time exception to the general method of election as the country emerged from civil war, and the first term was not meant to be excepted from limits on that basis.³⁸⁶ Indeed, it is likely that the judges on Burundi's Constitutional Court did not support Nkurunziza's reading as a matter of law, but rather felt pressured into ruling in his favor.³⁸⁷ The court's vice president, for instance, fled the country not long before the decision was announced, citing "death threats."³⁸⁸ Nonetheless, the favorable ruling cleared the way for Nkurunziza to run again successfully in 2015.³⁸⁹

Though this maneuver allowed Nkurunziza to remain in office, it came at a high cost. Opponents reacted swiftly with protests—some of which

381. See Burundi Profile—Timeline, *supra* note 377.

382. Constitution de la République du Burundi Mar. 18, 2005, art. 96 (Burundi).

383. Kelsey Lilley, Burundi's Flawed Constitutional Referendum, Atl. Council (May 16, 2018), <https://www.atlanticcouncil.org/blogs/africasource/burundi-s-flawed-constitutional-referendum/> [<https://perma.cc/D59X-D5DV>].

384. Constitution de la République du Burundi Mar. 18, 2005, art. 96 (Burundi).

385. See Pacifique Manirakiza, The 2005 Constitution of Burundi 18–20 (2006), http://www.icla.up.ac.za/images/country_reports/burundi_country_report.pdf [<https://perma.cc/5SHQ-XXGQ>].

386. *Id.*

387. Burundi Court Backs President Nkurunziza on Third-Term, BBC News (May 5, 2015), <https://www.bbc.com/news/world-africa-32588658> [<https://perma.cc/SME5-P3QP>].

388. *Id.*

389. See Jessica Hatcher, Burundi's President Pierre Nkurunziza Wins Third Term in Disputed Election, *Guardian* (July 24, 2015), <https://www.theguardian.com/world/2015/jul/24/burundi-pierre-nkurunziza-wins-third-term-disputed-election> [<https://perma.cc/V2ED-K2T7>].

turned deadly—as the nation returned to a state of chaos not seen since the pre-2005 civil war days.³⁹⁰ Before the election of 2015 even took place, there was a short-lived coup d'état³⁹¹ that looked like it might succeed for a few days before Nkurunziza's government crushed it.³⁹² Protests and riots continued, and the international community urged Nkurunziza to step down,³⁹³ but in the end Nkurunziza remained to oversee a country that continues to be divided by deep ethnic tensions and political disagreements.³⁹⁴

3. *Possible Failure?* — All the cases we surveyed succeeded in their countries' highest courts, making the strategy quite successful. An interesting exception occurred in Guyana, where in 2018 a private citizen, on behalf of *former* President Bharrat Jagdeo, challenged Guyana's 2000 adoption of term limits.³⁹⁵ He prevailed in Guyana's appellate court, which held that the 2000 amendment imposing term limits restricted the rights of the electorate to elect Jagdeo as their president and therefore altered the basic structure of the constitution.³⁹⁶ Such amendments, the appellate court held, could only be passed through a constitutional referendum, and not through Parliament, as had been the case here.³⁹⁷ The same argument failed, however, in the Caribbean Court of Justice. The Caribbean Court of Justice is the highest court of appeal for Guyana and functions effectively as an international constitutional court for the countries formerly

390. See *id.*; Moses Havyarimana, Gun Clashes Rage on in Burundi as Radio Station Attacked, *Daily Nation* (May 14, 2015), <https://www.nation.co.ke/news/africa/Burundi-president-in-secret-location-in-Dar-es-Salaam/-/1066/2716134/-/6b6o8uz/-/index.html> [<https://perma.cc/PFA8-LEK9>].

391. See Abigail Higgins & David Smith, Burundi Coup Figure Admits Defeat After Day of Fighting in Capital, *Guardian* (May 15, 2015), <https://www.theguardian.com/world/2015/may/14/burundi-violence-coup-protests-bujumbura-president-pierre-nkurunziza> [<https://perma.cc/3AGK-3U3R>].

392. See Failed Burundi Coup Plotters Arrested as President Returns from Tanzania, *Guardian* (May 15, 2015), <https://www.theguardian.com/world/2015/may/15/burundi-army-dead-radio-station-battle-coup-leaders-arrested> [<https://perma.cc/LU8A-R6HR>].

393. See Clement Manirabarusha, Burundi's Nkurunziza Wins Presidential Vote Boycotted by Rivals, *Reuters* (July 24, 2015), <https://www.reuters.com/article/us-burundi-election-results/burundis-nkurunziza-wins-presidential-vote-boycotted-by-rivals-idUSKCN0PY1TN20150724> [<https://perma.cc/4E7B-2Y3M>] (“Washington and Brussels both . . . admonish[ed] Nkurunziza for breaking the two-term limit agreed in a key peace deal that ended the 12-year civil war and kept ethnic tensions in check.”).

394. See Freedom in the World 2018: Burundi, Freedom House, <https://freedomhouse.org/report/freedom-world/2018/burundi> [<https://perma.cc/Q9YH-9EXC>] (last visited Sept. 4, 2019) (“The current political environment . . . reduc[es] meaningful openings for effective political representation of ethnic and religious minorities and other distinct groups.”).

395. The Case of Presidential Term Limits, *Kaieteur News* (Apr. 11, 2018), <https://www.kaieteurnews.com/2018/04/11/the-case-of-presidential-term-limits/> [<https://perma.cc/KN99-H9XQ>].

396. *Attorney Gen. of Guy. v. Richardson*, CCJ Appeal No. GYCV2017/008, Caribbean Court of Justice, ¶¶ 136–138 (June 26, 2018).

397. *Id.*

subject to the jurisdiction of the Privy Council.³⁹⁸ The court noted that the amendment that included term limits did not emerge “from the desire of any political party to manipulate the candidacy for the Presidency according to its agenda,” and instead followed “extensive national consultation of the national view on what was required to enhance democracy in Guyana.”³⁹⁹ As the highest court of Guyana, it reversed the interpretation by the domestic court. This rather idiosyncratic case represents so far the only time a president failed to overstay through the strategy of constitutional litigation.

The fact that the strategy failed in a regional court highlights a potentially important role for regional courts, which are more independent and harder to control than domestic courts. Specifically, it raises the possibility that the Inter-American Court of Human Rights could reverse the interpretations by the courts in Bolivia, Honduras, and Nicaragua. After all, an important part of the basis for erasing term limits in each of these cases is the right to vote enshrined in international human rights law, especially the Inter-American Convention on Human Rights.⁴⁰⁰ Since the Inter-American Court is the final arbiter on the meaning of the Inter-American Convention, it is in a good position to clarify the scope of this right and its relationship to term limits, as it is likely that the right to vote was never intended to overturn term limits.⁴⁰¹ Thus far, the Inter-American Court has not addressed the question—likely it is currently treading carefully in light of recent backlash it has received for some of its decisions.⁴⁰² What is more, it is not entirely clear how the Inter-American Court would get jurisdiction over such a case, since it requires someone to allege a violation of their rights, and in this case, the rights violations have been claimed by presidents alone.⁴⁰³ Yet, it is not inconceivable that voters could

398. For an account on how the Caribbean Court of Justice came to replace the Privy Council, see Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 *Colum. L. Rev.* 1832, 1882–84 (2002).

399. *Richardson*, CCJ Appeal No. GYCV2017/008, ¶¶ 41–42, 78, 122.

400. See American Convention on Human Rights, *supra* note 354, art. 48.

401. Unlike the Inter-American Court, which does not hear appeals of domestic courts' decisions, the Caribbean Court of Justice hears appeals in both civil and criminal matters from those states that have ceased to allow appeals to the Judicial Committee of the Privy Council. See Leonard Birdsong, *The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean*, 36 *U. Miami Inter-Am. L. Rev.* 197, 217–18 (2005). For an overview of the jurisdiction and powers of the Inter-American Court on Human Rights, see Thomas Buergenthal, *The Evolving International Human Rights System*, 100 *Am. J. Int'l L.* 783, 794–97 (2006).

402. See Alexandra Huneeus, *Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights*, in *Cultures of Legality: Judicialization and Political Activism in Latin America* 112, 119–31 (Javier Couso, Alexandra Huneeus & Rachel Sieder eds., 2010) (discussing “the recent rejection of Inter-American Court rulings by three national high courts, those of Chile, Argentina, and Venezuela”).

403. See American Convention on Human Rights, *supra* note 354, art. 48.

allege a violation, for example based on the right to participate in “genuine periodic elections.”⁴⁰⁴ Alternatively, a member state could request an advisory opinion from the court.⁴⁰⁵ Indeed, in March 2018, the Venice Commission, the legal advisory body of the Council of Europe, released a report purporting to do exactly that, clarifying the scope of the right to vote under international law in light of term limits.⁴⁰⁶ Yet unlike the opinion by the Venice Commission, a decision from the Inter-American Court would have real legal implications in Latin America. Of course, a cynical take on what these domestic courts are doing is that, if the international law argument is not available, they would find some other interpretative canon. Regardless, a contrary opinion from the Inter-American Court would make it harder to maintain a human rights law-based decision, and therefore delegitimize the evasion strategy and make it easier for the opposition to challenge it.

C. *The Faithful Agent Approach*

In 2002, Kenya’s President Daniel Arap Moi faced a difficult situation. He was up against constitutional term limits that came into effect in 1992, but he had served as Kenya’s chief executive since 1978. He wanted to remain in power a bit longer,⁴⁰⁷ so he pushed for the drafting of a new constitution, claiming that elections should not be held until a new constitution was in place.⁴⁰⁸ His opponents, including leaders within his own Kenya African National Union (KANU) party, did not support this idea, and he was forced to abandon it.⁴⁰⁹ By this point, Moi was unpopular, making a

404. *Id.* art. 23.

405. *Id.* art. 64.2. There is a current debate regarding whether these opinions are binding for all states. Compare Eugenio D. Matibag, Inter-American Commission on Human Rights, *in* 2 *Encyclopedia of U.S.–Latin American Relations* 479, 479 (Thomas M. Leonard, Jürgen Buchenau, Kyle Longley & Graeme S. Mount eds., 2012) (stating that a decision by the Inter-American Court of Human Rights is only binding “if (and only if) the accused state party has accepted the court’s jurisdiction”), with Julie Calidonio Schmid, *Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory*, 16 *Duke J. Comp. & Int’l L.* 415, 415–16, 444–55 (2006) (arguing that while these opinions are nonbinding in theory, the opinions may “impose binding obligations on states through their development of international custom and treaty norms”), and Ana Aliverti, *The Promise of Human Rights? The Inter-American Court’s Advisory Opinion on the Rights of Migrant Children*, *Univ. of Oxford: Border Criminologies* (Oct. 27, 2014), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2014/10/promise-human> [<https://perma.cc/UQ95-65X8>] (“Advisory opinions aren’t binding for member states.”).

406. European Comm’n for Democracy Through Law (Venice Comm’n), *Report on Term-Limits Part I—Presidents*, CDL-AD(2018)010 (Mar. 20, 2018).

407. *Campaign to Keep Moi in Power*, BBC News (July 10, 2000), <http://news.bbc.co.uk/2/hi/africa/827186.stm> [<https://perma.cc/FCU2-39S9>].

408. *Kenya’s Moi Seeks to Prolong Rule*, CNN (June 29, 2002), <http://edition.cnn.com/2002/WORLD/africa/06/29/kenya.moi/> [<https://perma.cc/D9QX-9AER>].

409. See *Campaign to Keep Moi in Power*, *supra* note 407.

constitutional amendment a political nonstarter.⁴¹⁰ It was time for him to retire, but he wanted to continue to command Kenya's political development, if he could. So he did what many other leaders have tried: He carefully chose a successor he believed he could control.⁴¹¹ Thus, Moi could facially respect the constitutional term, while retaining substantive power over the government.

Unfortunately for Moi, this maneuver totally backfired. He chose Uhuru Kenyatta, the son of former leader Jomo Kenyatta. Uhuru Kenyatta was in his early forties at the time and inexperienced in politics.⁴¹² Moi explicitly pushed for Kenyatta as KANU's candidate because he thought Kenyatta could "be guided."⁴¹³ In so doing, Moi passed over many more senior KANU members, who were angered both at Moi's rather transparent attempt to hold onto power and at being denied the chance to seek the presidency themselves.⁴¹⁴ In response, they defected from KANU, formed a new party, and eventually joined forces with opposition parties, forming the "Rainbow Coalition," united behind a single candidate, Mwai Kibaki.⁴¹⁵ The result was that KANU and Kenyatta were defeated in the elections, with the Rainbow Coalition winning both the presidency and a majority in parliament.⁴¹⁶ Kenyatta would go on to win the presidency in 2013 and 2017, but by then he was no longer allied to Moi and certainly not his puppet.⁴¹⁷

1. *The Basic Strategy.* — The case of President Moi illustrates what we call the faithful agent approach. The core of the strategy is to appoint a

410. Davan Maharaj, *Kenya's Big Man Is Being Belittled*, L.A. Times (Aug. 18, 2002), <http://articles.latimes.com/2002/aug/18/world/fg-moi18> [hereinafter Maharaj, *Kenya's Big Man*] (on file with the *Columbia Law Review*).

411. Marc Lacey, *Kenya's Retiring Leader Fires Vice President over Succession*, N.Y. Times (Aug. 31, 2002), <https://www.nytimes.com/2002/08/31/world/kenya-s-retiring-leader-fires-vice-president-over-succession.html> [<https://perma.cc/8WRC-GZ3G>].

412. See *id.*

413. Davan Maharaj, *Kenyan Opposition Rallies Against Moi*, L.A. Times (Oct. 15, 2002), <http://articles.latimes.com/2002/oct/15/world/fg-uhuru15> (on file with the *Columbia Law Review*).

414. See Maharaj, *Kenya's Big Man*, *supra* note 410.

415. See European Union Election Observation Mission, *Kenya General Elections 27 December 2002: Final Report 8–9* (2002), <http://aceproject.org/regions-en/countries-and-territories/KE/reports/Kenya%20-%20EU%20rep02.pdf> [<https://perma.cc/TM6S-SREQ>]; see also Kamau Ngotho, *The Deal and Deal Makers in Kibaki's 2002 Victory*, Daily Nation (Aug. 30, 2008), <https://www.nation.co.ke/News/-/1056/465904/-/tkag72/-/index.html> [<https://perma.cc/VJ34-T9QE>].

416. European Union Election Observation Mission, *supra* note 415, at 35.

417. See Jason Patinkin, *Uhuru Kenyatta Wins Kenyan Election by a Narrow Margin*, Guardian (Mar. 9, 2013), <https://www.theguardian.com/world/2013/mar/09/kenyatta-declared-victor-in-kenyan-elections> [<https://perma.cc/4635-BA85>]; see also Kimiko de Freytas-Tamura, *President Uhuru Kenyatta Is Declared Victor of Kenyan Election*, N.Y. Times (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/world/africa/kenya-uhuru-kenyatta-president-election.html?module=inline> [<https://perma.cc/S6PQ-X56R>].

successor that can be controlled. Of course, not all cases in which a president attempts to appoint a successor rise to the level of evasion. We only count it as such when there is a widespread sense in the country that the successor is particularly easy to control and not independent—for example, because the successor is particularly inexperienced or a close relative. Using this criterion, we find that since 2000 the strategy has been attempted five times but has been successful only twice. The appeal of the strategy for outgoing leaders is apparent: They can obey the constitution, while still pulling the strings. But it is difficult to implement in practice, as it is hard to find a successor who will remain faithful once he is in power.

The most notorious example of how this strategy was used successfully is Russia. Under Article 81.3 of the Russian Constitution, a president cannot be elected for more than two consecutive terms.⁴¹⁸ After two terms, there must be a gap where power turns over to another candidate.⁴¹⁹ After Putin's second term was up in 2008, he chose Dmitry Medvedev as his successor and slid into the prime minister's seat, where he served from 2008 to 2012.⁴²⁰ Medvedev, who had no electoral experience, would not have had a chance to win but for an endorsement from Putin, a highly popular president at the time.⁴²¹ And even while he was no longer president, Putin continued to pull all the strings. Indeed, observers note that as prime minister, Putin was in fact more influential than President Medvedev.⁴²² Then, in 2012, Putin returned as president (after the presidential term of office had been extended to six years⁴²³) and Putin was again re-elected in

418. Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] Dec. 12, 1993, art. 81.3 (Russ.). Each term was initially for four years until a constitutional amendment was adopted in 2008 that changed the limit to six years. See Elena A. Kremyanskaya, Tamara O. Kuznetsova & Inna A. Rakitskaya, *Russian Constitutional Law* 104 (2014); see also Philip P. Pan, *Russia's Medvedev Signs Constitutional Amendment to Lengthen Presidential Terms*, Wash. Post. (Dec. 31, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/30/AR2008123000839.html> (on file with the *Columbia Law Review*).

419. It is only after at least a one-term gap that a former president may participate in future elections. See Kremyanskaya et al., *supra* note 418, at 104.

420. See Neil MacFarquhar, *Putin Confirms He Is Running for President*, N.Y. Times (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/world/europe/russia-vladimir-putin-president.html> (on file with the *Columbia Law Review*); see also List of Prime Ministers of Russia, World Atlas, <https://www.worldatlas.com/articles/prime-ministers-of-russia-since-the-fall-of-the-soviet-union.html> [<https://perma.cc/F57U-3N6E>] (last visited Sept. 4, 2019).

421. Seth McLaughlin, *Medvedev vs. Putin: Who's Ruling Russia?*, Wash. Diplomat (Nov. 18, 2010), http://www.washdiplomat.com/index.php?option=com_content&view=article&id=6194:medvedev-vs-putin-whos-ruling-russia-&catid=979:july-2009&Itemid=254 [<https://perma.cc/Z4DV-BFRA>].

422. As examples, the responses to the 2008 war in Georgia and the financial crisis demonstrated that Medvedev was controlled by Putin to advance the latter's goals. On Putin's Terms, *Economist* (Nov. 14, 2008), <https://www.economist.com/node/12622987> [<https://perma.cc/R4YL-YN9Q>].

423. MacFarquhar, *supra* note 420.

2018.⁴²⁴ With a twenty-four year tenure—including his time as prime minister—Putin is the longest-serving Russian head of state since Josef Stalin.⁴²⁵

Putin had two things going for him, neither of which can be easily emulated. First, the Russian Constitution allowed him to return after sitting out a term.⁴²⁶ Many presidents do not have constitutions that allow them to return in the future.⁴²⁷ Second, he was able to find a faithful agent who remained loyal even when Putin was out of office.⁴²⁸ Finding a faithful agent is often difficult. Once the agent is actually in office, there is no guarantee that he will remain faithful to the former president. That is, the strategy runs into a classic principal–agent problem, whereby it is hard for the principal to control the agent.⁴²⁹

One potential workaround to the second problem is to pick a successor that is a family member. A possible example of successful use of this strategy is Azerbaijan, where the aging then-President Heydar Aliyev groomed his son Ilham Aliyev to succeed him and saw Ilham installed as president after fraudulent elections in 2003.⁴³⁰ Heydar Aliyev, who had come to power through elections in 1993,⁴³¹ first gave his son a number of political posts, culminating in 2003 when Ilham became prime minister.⁴³² At the time, President Aliyev was already quite ill, and his son was effectively governing the country.⁴³³ In addition, in 2002 the President had succeeded in pushing through a set of constitutional amendments, which included a provision that, in the event of the president's death in office,

424. Russia Election: Vladimir Putin Wins by Big Margin, BBC News (Mar. 19, 2018), <http://www.bbc.com/news/world-europe-43452449> [<https://perma.cc/683X-KHA5>].

425. MacFarquhar, *supra* note 420.

426. See *supra* notes 418–419 and accompanying text.

427. See, e.g., U.S. Const. amend. XXII, § 1 (“No person shall be elected to the office of the President more than twice . . .”).

428. See *supra* note 422 and accompanying text.

429. For principal–agent problems in politics and bureaucracies, see Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 *J.L. Econ. & Org.* 243, 246–53 (1987); Barry M. Mitnick, The Theory of Agency: The Policy “Paradox” and Regulatory Behavior, 24 *Pub. Choice* 27, 28–29 (1975); Barry R. Weingast, The Congressional–Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC), 44 *Pub. Choice* 147, 151–58 (1984).

430. See Azeri Leader’s Son Chosen as PM, BBC News, <http://news.bbc.co.uk/2/hi/europe/3121915.stm> [<https://perma.cc/YSY5-6Q5Q>] (last updated Aug. 4, 2003); Eastern European Observers Call Azerbaijan Election a Sham, *Inst. for Democracy in E. Eur.* (Oct. 21, 2003), <https://idee.org/azerbaijanelections.html> [<https://perma.cc/BKQ9-YDSD>].

431. Paul Lewis, H.A. Aiyev, K.G.B. Officer and Azeri Leader, 80, *Dies*, *N.Y. Times* (Dec. 13, 2003), <https://www.nytimes.com/2003/12/13/world/ha-aliyev-kgb-officer-and-azeri-leader-80-dies.html> [<https://perma.cc/26K7-5KDK>].

432. Susan B. Glasser, Rise of Leader’s Son Sharpens Azerbaijan’s Identity Crisis, *Wash. Post* (Aug. 9, 2003), https://www.washingtonpost.com/archive/politics/2003/08/09/rise-of-leaders-son-sharpens-azerbaijans-identity-crisis/27907137-47f9-40a1-a322-b44b3b46751d/?noredirect=on&utm_term=.86a511e5d7e1 (on file with the *Columbia Law Review*).

433. See *id.*

the prime minister would succeed him.⁴³⁴ Thus, had the President died before the 2003 election, his son would have become president automatically. As it happened, the President lived until mid-December 2003, while elections were held in October.⁴³⁵ The result of those fraudulent elections was a victory for Ilham,⁴³⁶ and he took over as president on October 31, 2003. He has remained in office ever since, after ridding the constitution of term limits in 2009 via constitutional amendment.⁴³⁷ Indeed, his wife currently serves as vice president, meaning that if he dies in office, she will succeed him.⁴³⁸ The case of the transfer of power from Aliyev Heydar to Ilham lies on the thin line between circumvention of term limits and simply passing power from one generation to the next. By ensuring succession to his son, Aliyev Heydar assured his family's continued dominance of Azerbaijani politics, but he was ill at the time and died less than two months after his son took office. Thus, we code it as a successful use of this strategy, but the duration in which Heydar could have pulled the strings of government was very short.⁴³⁹

But relying on a family member is not without risks either. Specifically, our case studies suggest that this approach might generate political backlash, either from the president's party or the public at large. Consider Zimbabwe, where Robert Mugabe's decision to select his wife Grace as his successor turned his party against him and ultimately produced his ouster.⁴⁴⁰ Or consider Guatemala, where President Alvaro Colom tried to circumvent term limits by putting forward his wife as his successor.⁴⁴¹

434. See *id.*

435. Lewis, *supra* note 431.

436. Azerbaijan, Freedom House, <https://freedomhouse.org/report/freedom-world/2004/azerbaijan> [<https://perma.cc/NVK4-KNFB>] (last visited Sept. 4, 2019).

437. Freedom in the World 2019: Azerbaijan, Freedom House, <https://freedomhouse.org/report/freedom-world/2019/azerbaijan> [<https://perma.cc/W2LS-SN7Z>] (last visited Oct. 4, 2019); Freedom in the World 2010: Azerbaijan, Freedom House, <https://freedomhouse.org/report/freedom-world/2010/azerbaijan> [<https://perma.cc/MS49-4S9D>] (last visited Oct. 4, 2019).

438. Azerbaijan's President Wins Yet Another Term, *Economist* (Apr. 12, 2018), <https://www.economist.com/europe/2018/04/12/azerbaijans-president-wins-yet-another-term> [<https://perma.cc/A94W-9KL9>].

439. Indeed, it is likely *not* the case that he himself was exercising control over the government even for the six weeks of his son's presidency when he was still alive, as Aliyev Heydar at that point was undergoing treatment in the United States. See Lewis, *supra* note 431.

440. See Charles Capel, Zimbabwe's Ousted President Robert Mugabe Says He Won't Vote for His Old Party, *National* (July 29, 2018), <https://www.thenational.ae/world/africa/zimbabwe-s-ousted-president-robert-mugabe-says-he-won-t-vote-for-his-old-party-1.755122> [<https://perma.cc/9NAB-VYF8>]; Norimitsu Onishi & Jeffrey Moyo, Robert Mugabe Resigns as Zimbabwe's President, Ending 37-Year Rule, *N.Y. Times* (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/world/africa/zimbabwe-mugabe-mnangagwa.html> [<https://perma.cc/VD7E-EZ27>].

441. See Guatemala's Alvaro Colom to Divorce Wife Sandra Torres, *BBC News* (Mar. 21, 2011), <https://www.bbc.com/news/world-latin-america-12813999> [<https://perma.cc/>].

Guatemala's Constitution provides for only a single four-year term, so Colom, who came to power in 2008 was scheduled to step down in 2012, with elections to take place in late 2011.⁴⁴² In March of that year, his wife, Sandra Torres, announced that she intended to run to replace him and, at the same time, that she and her husband were getting a divorce.⁴⁴³ It was not that the couple had a falling out, but that Guatemala's Constitution explicitly prohibited "relatives to the fourth degree of consanguinity and second of affinity" of the incumbent from running for president.⁴⁴⁴ Though Torres was divorced from her husband, the Electoral Tribunal ruled that she was nonetheless barred from running.⁴⁴⁵ An appellate court later enjoined the elections authorities to allow her to run, but eventually the Supreme Court reversed that decision, and barred Torres from running, because it was clear that the divorce had only been undertaken to bypass the constitutional prohibition.⁴⁴⁶ Torres, still divorced from Colom and now legally allowed to run, bid for the presidency in 2015 but ultimately lost the election.⁴⁴⁷ Along these same lines, consider Hillary Clinton, who was hurt by her connection to former President Bill Clinton.⁴⁴⁸ While the Clintons cannot be reasonably considered a case of evasion through a faithful agent approach—particularly because Bill Clinton left office and Hillary ran many years later—the example reveals how "keeping it in the family" is often not well received by the electorate.

94U2-6YUA] (discussing Sandra Torres's announced plan to divorce her husband, Colom, in order to run for president to succeed him).

442. Constitución Política de la República de Guatemala 1985, arts. 184, 187 (amended 1993) (Guat.); Alex Renderos, Guatemala Presidential Election Campaign Heats Up, L.A. Times (July 28, 2011), <https://www.latimes.com/world/la-xpm-2011-jul-28-la-fgw-guatemala-election-20110728-story.html> (on file with the *Columbia Law Review*); Patzy Vasquez, Guatemala's Colom Takes Office, CNN (Jan. 15, 2008), <http://www.cnn.com/2008/WORLD/americas/01/15/guatemala.president/index.html> [<https://perma.cc/A3ED-545E>].

443. Guatemala's Alvaro Colom to Divorce Wife Sandra Torres, *supra* note 441.

444. Constitución Política de la República de Guatemala 1985, art. 186.c. (Guat.); see also Guatemala's Alvaro Colom to Divorce Wife Sandra Torres, *supra* note 441 (suggesting that political aspirations may have motivated the planned divorce).

445. Pablo Ordaz, Sin marido y sin presidencia [Without a Spouse and Without the Presidency], El País (July 1, 2011), https://elpais.com/diario/2011/07/01/internacional/1309471208_850215.html [<https://perma.cc/5TSP-6T4K>].

446. See Guatemala Ex-First Lady Sandra Torres in Presidential Run-Off, BBC News (Sept. 16, 2015), <https://www.bbc.com/news/world-latin-america-34264218> [<https://perma.cc/N4B4-9A7P>]; Rory Carroll, Guatemala's First Lady Sandra Torres to Divorce 'for Her Country,' Guardian (May 19, 2011), <https://www.theguardian.com/world/2011/may/19/guatemala-sandra-torres-divorce> [<https://perma.cc/B6JK-DTRZ>].

447. Guatemala Election: Jimmy Morales Elected President, BBC News (Oct. 26, 2015), <https://www.bbc.com/news/world-latin-america-34632485> [<https://perma.cc/Q6JV-LDRN>].

448. See Tamara Keith, Is Bill Clinton Helping or Hurting His Wife's Campaign?, NPR (Oct. 5, 2016), <https://www.npr.org/2016/10/05/496670378/is-bill-clinton-helping-or-hurting-his-wifes-campaign> [<https://perma.cc/5F59-UJR6>].

D. *Delaying Elections*

Among all the strategies we find in our study, election delay is probably closest to the popular image of authoritarian overstay. The leader does not change the law or follow some kind of procedure to legitimize his continued time in office but simply stays in power until elections take place. Even in such cases, it is generally inaccurate to suggest that the president simply *ignores* the constitution—often specific reasons are advanced for the delay of elections, and the court may validate the delay as warranted. Since 2000, we find four cases of election delay: Angola in 2002 to 2012, Cote d’Ivoire in 2010, the Democratic Republic of Congo in 2016, and in Sudan, from 2005 to 2010 (as a secondary strategy, combining with President al-Bashir’s use of the blank slate approach as discussed in section IV.A.1).

For the would-be overstayer, the strategy is unlikely to be particularly appealing, as it requires genuine instability for the delays to be credible, and such instability is generally undesirable for numerous reasons.⁴⁴⁹ Further, it is hard to justify delaying the elections for more than a couple of years at most, as incumbents will eventually run out of reasons to explain the delay. As a result, it will likely buy them a couple of years at most, not a whole other term.

One notable exception, and perhaps the most successful use of this strategy, is Angola, where President Jose Eduardo dos Santos was able to delay elections by about a decade. The country experienced a civil war that lasted from 1975 and did not formally end until 2002.⁴⁵⁰ By coincidence, under Angola’s 1992 Constitution, that was also the year that then-President Jose Eduardo dos Santos was due to end his term.⁴⁵¹ But instead of ending his term then, dos Santos would remain, with new elections not being held until 2012, after a new constitution had been passed in 2010.⁴⁵² Delays occurred repeatedly between 2002 and 2012, always on the basis

449. In rare cases, there are delays for reasons that seem legitimate and the overstay that results is minimal, as in Kenya between 2012 and 2013, when the court ordered a one-year delay in order for elections to align with the term of the legislature. See James Macharia, Update 3: Kenya High Court Delays Elections to March 2013, Reuters (Jan. 13, 2012), <https://www.reuters.com/article/kenya-elections-idUSL6E8CD1E720120113> [<https://perma.cc/FG4R-ZCMC>].

450. See Angola Votes for Parliament and President, BBC News (Aug. 31, 2012), <https://www.bbc.com/news/world-africa-19432246> [<https://perma.cc/SQ9X-KVTD>].

451. See Claudia Generoso de Almeida, Angola: The MPLA and the Fall of dos Santos’ Dynasty, Presidential Power (Mar. 15, 2019), <https://presidential-power.com/?cat=110> [<https://perma.cc/6VMM-KTBF>].

452. See Henrique Almeida, Angolan President Signals 3-Year Election Delay, Reuters (Dec. 10, 2009), <https://www.reuters.com/article/ozatp-angola-elections-idAFJ0E5B90J20091210> [<https://perma.cc/6W2H-VDNT>]; Celia W. Dugger, Angola Moves to Make President Stronger, N.Y. Times (Jan. 21, 2010), <https://www.nytimes.com/2010/01/22/world/africa/22angola.html> [<https://perma.cc/A7ZS-KT4Z>].

that more time was needed to properly prepare the country for a new election.⁴⁵³ Once the new constitution was implemented in 2010, the blank slate theory was applied such that dos Santos was eligible to serve another two terms.⁴⁵⁴ He only served one, however, retiring after 2017.⁴⁵⁵

CONCLUSION

This Essay has documented the considerable array of evasion strategies incumbents have used to get around their term limits, along with how frequently they are employed, the considerations in pursuing them, and why they might fail.

One important question raised by our analysis is whether constitutional term limit provisions truly constrain those in power. The general topic of whether and how constitutions actually constrain has received a great deal of scholarly attention in recent years, with analyses on the impact of different kinds of rights,⁴⁵⁶ judicial review,⁴⁵⁷ and electoral systems,⁴⁵⁸ among others. Yet thus far, no studies have attempted to estimate the causal effect of term limits on the likelihood of timely exit.⁴⁵⁹ Doing so would be fraught with methodological difficulties. The key challenge is to isolate the impact of constitutional term limits provisions from other factors that can cause incumbents to exit (such as norms of rotating power, a desire to enjoy retirement, or to receive awards and recognition for their leadership,⁴⁶⁰ among many possible others).

453. See, e.g., *New Delay for Angolan Elections*, BBC News, <http://news.bbc.co.uk/2/hi/africa/6201093.stm> [<https://perma.cc/JF2Z-W43W>] (last updated Dec. 21, 2006).

454. See Dugger, *supra* note 452.

455. See Rafael Marques de Morais, *Angola: A New Angolan President*, *Maka Angola* (Sept. 9, 2017), <https://www.makaangola.org/2017/09/a-new-angolan-president/> [<https://perma.cc/9DU6-QBHU>].

456. Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 *Am. J. Pol. Sci.* 575 (2016); Adam S. Chilton & Mila Versteeg, *The Failure of Constitutional Torture Prohibitions*, 44 *J. Legal Stud.* 417 (2015); Adam Chilton & Mila Versteeg, *Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending*, 60 *J.L. & Econ.* 713 (2017).

457. M. Rodwan Abouharb, Laura P. Moyer & Megan Schmidt, *De Facto Judicial Independence and Physical Integrity Rights*, 12 *J. Hum. Rts.* 367, 383 (2013); Adam S. Chilton & Mila Versteeg, *Courts' Limited Ability to Protect Constitutional Rights*, 85 *U. Chi. L. Rev.* 293 (2018); Charles Crabtree & Michael J. Nelson, *New Evidence for a Positive Relationship Between De Facto Judicial Independence and State Respect for Empowerment Rights*, 61 *Int'l Stud. Q.* 210, 217 (2017).

458. See generally Torsten Persson & Guido Tabellini, *The Economic Effects of Constitutions* (2003) (examining the impact of electoral design on policy outcomes).

459. Ginsburg, Melton, and Elkins make some observations on this question, noting that the fact that many incumbents exit means that term limits are "surprisingly effective." See Ginsburg et al., *On the Evasion*, *supra* note 13, at 1814, 1866.

460. See, for example, the Ibrahim Prize for Achievement in African Leadership, which goes to African leaders with admirable leadership records. One of the requirements to be eligible for the prize is that the president serves only for his or her constitutionally mandated

We do not believe that this Essay is the right forum to take up this question, but we conclude with some observations on the topic. On the one hand, some of our findings point to the possibility that term limits do actually force some incumbents out of office. A substantial portion of leaders (about two-thirds) who reach the end of their term do make a timely exit, and this fact should not be overlooked. This statistic is reassuring, although we cannot be sure whether it is the constitution that causes them to exit or whether there are other forces at work. For example, some leaders exit because of strong democratic norms or because they want to establish such norms. We need look no further than the history of the United States, where George Washington established a norm of stepping down after two terms that went substantially unchallenged until the presidency of Franklin Delano Roosevelt, despite the lack of a constitutional provision providing for term limits.⁴⁶¹ The endurance of this norm—despite any constitutional prohibition—demonstrates that even when presidents timely step down, the reasons for their doing so may not exclusively be related to respect for the constitution. Yet, it is possible that there are incumbents who would have liked to overstay, realized that doing so was going to be near-impossible, and therefore did not try. Perhaps more noteworthy is the number of incumbents that tried to overstay but failed. In many of these cases, the constitution played a direct role in the failure, with popular movements relying on the document to declare the attempt to be illegal and illegitimate and demanding incumbents to leave. Thus, it is likely that the constitution can and does work to prevent executive overstay at least some of the time.

The observation that those incumbents who do overstay never ignore the constitution, but rather use constitutional rules and processes to evade it is more complicated. One can take it as evidence that the constitution matters in some way, in that leaders respect it enough not to ignore it. But it also suggests that the constitution is not as much of an obstacle as we might wish to believe. And the fact that incumbents are increasingly savvy in pursuing different and novel evasion methods deepens this conclusion: Even where a constitutional rule is clear, and violation carries with it political risks, leaders can and will seek varied means to remain in office while ostensibly showing respect for the document and the rule of law. Thus, our findings present an ongoing tension between the efficacy and manipulability of term limits. This Essay does not purport to answer the question of how to reconcile this tension, but rather, it seeks to raise it as an issue for

term. Ibrahim Prize for Achievement in African Leadership, Mo Ibrahim Found., <http://mo.ibrahim.foundation/prize/> [<https://perma.cc/JQT4-FZRD>] (last visited Sept. 4, 2019).

461. But see Bruce G. Peabody, George Washington, Presidential Term Limits, and the Problem of Reluctant Political Leadership, 31 *Presidential Stud. Q.* 439, 440 (2001) (“[T]he two-term tradition was actually born out of deep-seated American anxieties about centralized governing power Washington’s particular understanding of presidential service may be of relatively little importance in analyzing the two-term tradition that emerged from his (seemingly inadvertent) example.”).

further research grounded in a new understanding of how, and how often, term limits are evaded.