

The Paper-Thin Constitutions: Paths to Authoritarianism in the United States and Venezuela

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“I swear before God, before the fatherland, and before my people, that upon this moribund constitution, I will enforce and propel the necessary democratic transformations so that the new republic may have a magna carta appropriate to a new age.”

–Hugo Chávez¹

In his inaugural address, President Joe Biden praised the “resilience of our Constitution” for defeating a riotous mob that attempted to overrun the Capitol and stop the certification of Electoral College votes that declared him the victor in the 2020 election. But constitutionalism itself can be a path to authoritarianism, and old constitutions are just as ripe for tyrannical exploitation as new ones. This Note is the first to compare U.S. and Venezuelan constitutional design to demonstrate how liberal-democratic constitutions can facilitate partisan institutional capture and allow authoritarianism to take root. In the United States, constitutional reverence alone will not prevent another crisis in 2024, and dismissing these efforts to undermine the rule of law as the thing of “banana republics,” as public officials and scholars have done, wastes an opportunity to identify the path that pulled American democracy to the brink.

Instead of dismissing the Venezuelan case as too dissimilar from the American one, I argue that both constitutional architectures allowed an elected president to capture the legislature, pack the judiciary, and delegitimize the credibility of elections under the guise of popular sovereignty through distinct paths. Necessary U.S. federal reforms can prevent another crisis in 2024, but because of the Electoral College and other minoritarian work-arounds, state reforms may be more effective in guaranteeing adequate democratic

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1. TeleSur tv, *Venezuela recuerda hoy la primera juramentación de Chávez*, YOUTUBE, at 0:51–1:19 (Feb. 2, 2013), <https://www.youtube.com/watch?v=cnSIJrhzeJc>.

representation. Legal safeguards to ward off constitutional exploitation have to be cemented in place—as the election of 2020 showed, relying on abstract norms and shared ideals is insufficient.

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INTRODUCTION

Jenna Ryan is a fifty-one-year-old real estate agent from Frisco, Texas, and a person of interest in a wide-ranging federal investigation. On January 6, 2021, Ryan took a private plane from Texas to Washington, D.C., to participate in a seditious insurrection against the U.S. government. She filmed herself packed into a crowd of supporters of President Donald Trump pushing into the Capitol building, and posted those videos online. Her stated goal, as well as that of her thousands of compatriots gathered there, was to have Congress overturn the results of the 2020 election, from which President Joe Biden had emerged victorious. Many of them threatened violence against members of Congress, who had to be cloistered together in an undisclosed location because of grave threats to their safety. The insurrection left the Capitol damaged, five dead, and many more injured, as well as a deep gash in U.S. democracy as the process to certify the winner of the election was interrupted. Ryan faced a prison sentence for federal criminal charges related to disorderly conduct at the Capitol and knowingly entering

or remaining in a restricted building without lawful authority.² She asked Trump to pardon her, justifying her actions as patriotic. “He asked us to be there,” she said of the President; “I was doing what he asked us to do.”³ Ryan believed, like many of her fellow travelers, that Biden would usher in a socialist utopia and turn the United States into Venezuela.⁴ After striking a plea deal with prosecutors, she was sentenced to sixty days in jail in November 2021.⁵

Ironically, it was Ryan herself who was mimicking the actions of Venezuelan government supporters. On July 5, 2017, hundreds of supporters of the late dictator Hugo Chávez stormed the National Assembly in Caracas with explosives and nine-millimeter guns ready to attack legislators marking Venezuelan Independence Day.⁶ The fact pattern is stunningly similar. Five members of the Venezuelan National Assembly from opposition parties were injured, including one whose blood stained the walls.⁷ The protesters were provoked by another high-ranking official, Vice President Tareck El Aissami, and many accused the law enforcement forces—which included members of the National Guard—of simply standing back and allowing the attack to take place.⁸ The U.S. State Department condemned the violence as “an assault on the democratic principles cherished by the men and women who struggled for Venezuela’s independence.”⁹

2. See *North Texan Jenna Ryan Tells CBS 11 She Deserves Pardon After Arrest for Alleged Role in Capitol Riot*, CBS News DFW (Jan. 15, 2021, 10:15 PM), <https://dfw.cbslocal.com/2021/01/15/txan-jenna-ryan-cbs-11-hoping-pardon-arrest-riot-capitol/> [<https://perma.cc/CV3D-EBKK>]; Joshua Baethge, *Frisco Broker Jenna Ryan Posts Photos While Crashing Capitol Hill During March for Trump*, CANDYSDIRT.COM (Jan. 7, 2021), <https://candysdirt.com/2021/01/07/frisco-broker-jenna-ryan-posts-photos-of-crashing-capitol-hill-during-march-for-trump/> [<https://perma.cc/433F-Q8ZB>]; Hannah Rabinowitz, *Real Estate Agent Who Asked Trump for a Pardon Pleads Guilty in Capitol Riot*, CNN (Aug. 19, 2021, 12:04 PM), <https://www.cnn.com/2021/08/19/politics/jenna-ryan-misdemeanor-capitol-riot/index.html> [<https://perma.cc/8VRL-L369>].

3. *North Texan Jenna Ryan Tells CBS 11 She Deserves Pardon After Arrest for Alleged Role in Capitol Riot*, *supra* note 2.

4. Baethge, *supra* note 2.

5. See Rabinowitz, *supra* note 2; Jordan Fischer, Eric Flack & Stephanie Wilson, *Jenna Ryan, Texas Realtor Who Tweeted She Was ‘Definitely Not Going to Jail,’ Gets 60 Days in Jail*, WUSA9 (Nov. 5, 2021, 2:45 PM), <https://www.wusa9.com/article/news/national/capitol-riots/jenna-ryan-texas-realtor-who-tweeted-she-was-definitely-not-going-to-jail-gets-60-days-in-jail-white-skin-blonde-hair-donald-trump-guy-womack/65-fb717bf2-3a07-4581-9486-bb9d8e144abd> [<https://perma.cc/MH6H-8Y3C>].

6. Pedro Pablo Peñaloza, *Un violento asalto de grupos chavistas al Parlamento de Venezuela deja varios diputados opositores heridos*, UNIVISION NOTICIAS (July 5, 2017, 12:38 PM), <https://www.univision.com/noticias/americas-latina/colectivos-chavistas-asaltan-el-parlamento-de-venezuela-de-mayoria-opositora> [<https://perma.cc/2UN9-NHY3>].

7. *Id.*

8. *Id.*

9. Joshua Goodman, *Govt Supporters Storm Venezuela Congress, Injuring Lawmakers*, ASSOCIATED PRESS (July 5, 2017), <https://apnews.com/article/caribbean-ap-top-news-venezuela-latin-america-international-news-e5e1605164214a9db1636534dc5c1ad4> [<https://perma.cc/98G7-7HML>].

In the wake of this country's own attack, politicians condemned the violence in Washington as the thing of a "banana republic,"¹⁰ as if the United States were impervious to authoritarian violence unlike *those* democratically underdeveloped societies. Biden, upon finally taking the oath of office, praised "the resilience of our Constitution" for pulling the nation back from the abyss.¹¹

But constitutionalism itself can be one path to authoritarianism—precisely what the idea of constitutionalism is supposed to ward off. In one study of global authoritarianism published in 2020, an interdisciplinary cadre of scholars from the University of Virginia School of Law argued that contemporary strongmen, from Russia's Vladimir Putin to Peru's Alberto Fujimori, have overstayed their welcome as heads of state not by flouting the constitution but by showing "nominal respect for the constitution by using constitutional rules and procedures to circumvent term limits."¹² Although the expansive study of term limit evasion acknowledged the example set by Hugo Chávez, it did not examine his erosion of democracy through legal means. Likewise, it dismissed the possibility that Trump could stay in power beyond his first term as a far-fetched joke.¹³ This Note seeks to expand our understanding of the tactics strongmen use to consolidate authority through legal and constitutional means.

In the intervening years after his election, Chávez consolidated authority in an unprecedented way in Venezuela by bending majoritarian state institutions to bolster his own authority while still adhering to the legal trappings of democracy. Through a referendum that took place shortly after his election, in 2000, Chávez created a new constitution that radically reorganized the state and its politics, from changing the country's official name to abolishing its bicameral Congress.¹⁴ Notably, Chávez siloed all elections into a centralized federal branch (or "power") of the state that allowed him to place party loyalists who were willing to manipulate the electoral process in his favor atop the chain of command.¹⁵ While many lauded this reorganization as a forward-thinking project of governance, the shuffle also enabled Chávez to stay in power for fifteen years, a term clipped only by his death.

10. *E.g.*, *Statement by President George W. Bush on Insurrection at the Capitol*, GEORGE W. BUSH PRESIDENTIAL CTR. (Jan. 6, 2021), <https://www.bushcenter.org/about-the-center/newsroom/press-releases/2021/statement-by-president-george-w-bush-on-insurrection-at-the-capitol.html> [<https://perma.cc/Y4P5-PVJ2>]; A. J. Bayatpour, *'This Is Banana Republic Crap': WI Congressmen React to Capitol Insurrection*, WKOW (Jan. 6, 2021), https://www.wkow.com/news/this-is-banana-republic-crap-wi-congressmen-react-to-capitol-insurrection/article_84782d2b-ef44-5b5d-a996-454449936b42.html.

11. Joseph R. Biden, Jr., U.S. President, Inaugural Address (Jan. 20, 2021) (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-biden-jr/> [<https://perma.cc/3EAM-M766>]).

12. Mila Versteeg, Timothy Horley, Anne Meng, Mauricio Guim & Marilyn Guirguis, Essay, *The Law and Politics of Presidential Term Limit Evasion*, 120 COLUM. L. REV. 173, 175–77 (2020).

13. *Id.* at 208 (citing the United States' "particularly rigid constitution" as a reason why Trump likely could not evade his term limits); *see id.* at 226 & n.321.

14. Allan R. Brewer-Carías, *The Venezuelan 1999 Constitution-Making Process as an Instrument for Framing the Development of an Authoritarian Political Regime*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 505, 512–14 (Laurel E. Miller ed., 2010).

15. *See id.* at 512; *see also infra* note 40 and accompanying text.

Twenty years later, to the north, another crisis of democracy took place: Donald Trump, a right-wing populist, attempted to use every arrow in his quiver to consummate a hostile takeover of American democracy through its minoritarian institutions. From appointing his own party loyalists to subvert the electoral system to urging the Supreme Court to intervene in his favor, Trump has exposed the frailties of the as yet resilient system of checks and balances enshrined in the U.S. Constitution by its Framers more than 200 years ago. A survey of U.S. electoral law and constitutional provisions meant to preserve democracy reveals a highly partisan system that can easily favor the incumbent party, moneyed interests, or a minoritarian propertied class, even when those factions do not represent the majority of the popular vote and even when that party loses the popular vote.

In this Note, I use Chávez's consolidation of authoritarian power through constitutional majoritarian means to explain the similar blueprint used by Trump and the Republican Party in their ongoing attempt to subvert the 2020 election. Comparisons between the United States and other dictatorial regimes often serve to divert attention from uniquely American forms of authoritarianism¹⁶ with often-repeated refrains such as, "This is not who we are," and "It cannot happen here." However, examining the provisions in both constitutions as documents of equal weight reveals how two leaders can take different paths to the same goal. The United States and Venezuela are dissimilar in almost every metric, but the two countries have now undergone constitutional crises and transformations at the behest of sitting presidents. They are two points in a constellation of nations in every continent sliding back from democracy in recent years. I argue that although in 2020 the United States pulled back from the brink of tyranny, the new President, the Congress, and state legislatures should speedily enact democratic reform to head off the possibility of future partisan exploitation of the Constitution. Finally, I argue that if comprehensive reform is impossible, state officials of good will should invite more international election observers to supervise U.S. elections, identify the shortcomings of its electoral architecture, and collaborate with state and local officials to implement their recommendations on expanding the franchise and lifting barriers to the ballot.

In Part I, I chronicle Chávez's rise to and consolidation of power through majoritarian constitutional reforms, the proliferation of partisanship in purportedly nonpartisan state institutions, and the long-lasting cloak of legitimacy that elections—fraudulent or not—provide. In Part II, I identify how under certain pressures, the system of minoritarian checks and balances fashioned by the Framers of the U.S. Constitution can succumb to partisan exploitation, explore the conditions that led to the installation of Trump—a President elected without a majority of the popular vote—in the White House, and examine the insurrection

16. See, e.g., MATTHEW C. MACWILLIAMS, ON FASCISM: 12 LESSONS FROM AMERICAN HISTORY (2020) (citing U.S. historical examples of lynching, Indigenous removal, Japanese-American internment, among other authoritarian features).

that overtook the Capitol in Washington, D.C., as members of Congress attempted to certify the states' electoral results.

Legal safeguards to ward off constitutional exploitation have to be automatic and cemented in place—as the election of 2020 showed, a reliance on abstract norms and shared ideals is insufficient. In Part III, I argue that Congress and state legislatures should, with all haste, enact proposed democratic process reforms such as the federal For the People Act and John Lewis Voting Rights Advancement Act and the state-level National Popular Vote Compact to protect the foundations of American democracy and prevent the kind of constitutional brinkmanship that endangered U.S. national security in 2020 and early 2021.

I. VENEZUELAN CONSTITUTIONAL DESIGN AND MANIPULATION

A. A NEW CONSTITUTIONAL PROJECT

Hugo Chávez won the 1998 election in a landslide, capturing approximately 56.4% of the vote.¹⁷ A sixteen-point victory¹⁸ margin in an election that saw 64% turnout¹⁹ was widely perceived to give Chávez a mandate to govern. But his plans went farther than just governing—indeed, the forty-four-year-old former lieutenant colonel was catapulted to national prominence after leading an attempted coup in 1992, and, lionized by his subsequent imprisonment, sought to transform the Venezuelan state.²⁰ While many scholars and high-ranking government officials had been working on a constitutional reform project since 1992, it was Chávez's "stunning victory . . . [that] cleared the way" for a new constitution, a priority issue of his campaign.²¹ One empirical study shows that, indeed, Chávez's promise of "a profound transformation of the political system" was a significant factor in voters' logical conclusion "that Chávez had undergone a political conversion, transforming him from a violent militant in 1992 to a democratic reformer in 1998."²² This Part argues that Chávez, in reforming the Venezuelan Constitution, advanced a theory of constitutional law through which the executive could use majoritarian institutions and the popular will to achieve his party's capture of power, although he later turned to minoritarian institutions to ensure his permanence as chief of state.

17. Serge F. Kovaleski, *Populist Elected in Venezuela*, WASH. POST (Dec. 7, 1998), <https://www.washingtonpost.com/wp-srv/inatl/daily/dec98/07/venezuela120798.htm>.

18. *See id.*

19. INT'L REPUBLICAN INST., VENEZUELA'S 1998 PRESIDENTIAL, LEGISLATIVE, AND GUBERNATORIAL ELECTIONS: ELECTION OBSERVATION REPORT 1 (1999).

20. Kovaleski, *supra* note 17; Latin Am. Digit. Beat, *President Caldera Pardons Officers Who Led 1992 Coup Attempts in Venezuela*, U.N.M. 1 (Apr. 29, 1994), <https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=12459&context=notisur> [<https://perma.cc/EZB3-J8VD>]; Brewer-Carías, *supra* note 14, at 510–11.

21. Ricardo Combellas, *El Proceso Constituyente y la Constitución de 1999*, 30 REVISTA POLITEIA 183, 188 (2003).

22. Damaris Canache, *From Bullets to Ballots: The Emergence of Popular Support for Hugo Chávez*, 44 LATIN AM. POL. & SOC'Y 69, 84 (2002).

Chávez's electoral promise was a precursor to Donald Trump's 2020 antiestablishment campaign. For the latter half of the twentieth century, as Venezuela emerged from the fascist dictatorship of Marcos Pérez Jiménez, it came to be considered a "model democratic society" in Latin American history.²³ Owing to an agreement known as the Pact of Punto Fijo, the three significant political parties bound themselves to share power and wealth from the country's massive oil reserves, regardless of which one of them won the elections.²⁴ The pact created a stable period of peaceful transfers of power and allowed Venezuela to withstand "the pressures of a guerrilla war, military rule in its southern neighbors, and the booms and busts of the oil industry."²⁵ But, as one of those parties decayed, this system generated a neoliberal party duopoly, "which created hierarchical national organizations and relied on oil revenues to satisfy the needs of their major constituencies," spawning wealth inequality.²⁶ As Presidents failed to turn the economy around,²⁷ Chávez united fourteen leftist parties in an antiestablishment front named Polo Patriótico.²⁸ Its mission became the Venezuelan equivalent of "draining the swamp."

Even before taking office, President-Elect Chávez called for the activation of a little-used mechanism, the National Constituent Assembly (ANC), to transform the country's political order and redraft the Constitution.²⁹ The legal authority for such a move was dubious and "found nowhere in the 1961 constitution" that was in force at the time.³⁰ In fact, the 1999 Constitution was the first to enshrine the ANC framework—which previously existed only in the abstract in constitutional theory circles—as a legitimate means of reorganizing the state's political order.³¹ But Venezuela's 1997 Organic Law on Suffrage

23. Mario J. Garcia-Serra, Comment, *The "Enabling Law": The Demise of the Separation of Powers in Hugo Chavez's Venezuela*, 32 U. MIA. INTER-AM. L. REV. 265, 266 (2001).

24. See Document #22: "Pact of Punto Fijo," *Acción Democrática, COPEI and Unión Republicana Democrática* (1958), MOD. LATIN AM., <https://library.brown.edu/create/modernlatinamerica/chapters/chapter-8-venezuela/primary-documents-with-accompanying-discussion-questions/document-22-pact-of-punto-fijo-accion-democratica-copei-and-union-republicana-democratica-1958/> [<https://perma.cc/WW9T-ZQPC>] (last visited Apr. 20, 2022); see also Jennifer L. McCoy, *Latin America's Imperiled Progress: Chavez and the End of "Partyarchy" in Venezuela*, J. DEMOCRACY, July 1999, at 64, 64 (describing the Venezuelan party duopoly as a "partyarchy," and examining the conditions of its downfall).

25. McCoy, *supra* note 24.

26. *Id.* at 64–65.

27. Harold A. Trinkunas, *The Crisis in Venezuelan Civil-Military Relations: From Punto Fijo to the Fifth Republic*, 37 LATIN AM. RSCH. REV., no. 1, 2002, at 41, 50, 61–63.

28. Canache, *supra* note 22, at 74; INT'L REPUBLICAN INST., *supra* note 19.

29. The ANC was the representative body charged with drafting a new Constitution. See Combellas, *supra* note 21.

30. Diego A. Zambrano, *The Constitutional Path to Dictatorship in Venezuela*, LAWFARE (Mar. 18, 2019, 8:00 AM), <https://www.lawfareblog.com/constitutional-path-dictatorship-venezuela?linkd=64968229> [<https://perma.cc/T6GE-3B6Q>] (examining the constitutionality of ANC).

31. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA DE 1999 Dec. 15, 1999, art. 347. For an English version of the 1999 Venezuelan Constitution, see CONSTITUTE, VENEZUELA (BOLIVARIAN REPUBLIC OF)'S CONSTITUTION OF 1999 WITH AMENDMENTS THROUGH 2009 art. 347, at 94 (2021), https://www.constituteproject.org/constitution/Venezuela_2009.pdf?lang=en [<https://perma.cc/CR2P->

and Political Participation established a process through which the President and the Congress or a petition signed by ten percent of the electorate could initiate a national referendum to consult voters on “decisions of special national importance.”³² Chávez believed in a populist theory of constitutional law that would allow the people to overthrow a constitution through this national referendum process, even though statutes typically cannot supersede constitutions.³³ Voters approved, with an astounding 87.75% of the vote, to authorize a supraconstitutional legislative body to work on, and eventually present to the people, the text of a new constitution.³⁴

The ANC—comprised of 131 elected members, only four of whom opposed Chávez’s government³⁵—worked during five months and sixty-three sessions to put forth a wide-ranging constitutional proposal.³⁶ It notably included the abolition of the bicameral legislature into a unicameral National Assembly,³⁷ the new enfranchisement of Indigenous peoples and members of the military,³⁸ and the elimination of criminal immunity for legislators.³⁹ Importantly, it also elevated the National Electoral Council (CNE), the governmental agency responsible for running elections, to the status of a branch of government, turning it into a centralized Electoral Power.⁴⁰ Its five members were forbidden from having any “ties to organizations for political purposes.”⁴¹ While these reforms were laudable and appeared to advance the goals of democracy, the normalization of the ANC as a constitutional drafting mechanism cleared an important supraconstitutional route to power for Chávez.

QDN2] (“The original constituent power rests with the people of Venezuela. This power may be exercised by calling a National Constituent Assembly for the purpose of transforming the State . . .”).

32. Ley Orgánica del Sufragio y Participación Política Publicada, 1997 (Gaceta Oficial N° 5200) (Venez.).

33. *Id.* at art. 181. This or a similar national referendum process is unlikely to be found in U.S. laws, although states frequently implement legislative and policy changes—and even constitutional reforms—through ballot initiatives. See *Initiative Process 101*, NAT’L CONF. ST. LEGISLATURES (last visited Apr. 20, 2022), <https://www.ncsl.org/research/elections-and-campaigns/initiative-process-101.aspx> [https://perma.cc/62WM-FJ4R].

34. *Referendos Nacionales Efectuados en Venezuela (1999 – 2000)*, CONSEJO NACIONAL ELECTORAL, <https://web.archive.org/web/20100718035314/http://www.cne.gov.ve/estadisticas/e010.pdf> [https://perma.cc/T6AM-346U] (last visited Apr. 20, 2022).

35. Allan R. Brewer-Carías, *The Collapse of the Rule of Law in Venezuela 1999–2019*, 52 N.Y.U. J. INT’L L. & POL. 741, 749 (2020). Some scholars have also criticized the proportional system the government chose to run these elections, arguing that it resulted in the official party obtaining 98% of the seats despite earning only 56% of the votes. See Javier Corrales, *Electoral Irregularities: A Typology Based on Venezuela Under Chavismo* 7 (Feb. 6, 2018) (unpublished draft document), <https://perma.cc/7YJZ-83VP>. It is equally worth noting that the opposition parties did not run under a consolidated ticket but were rather in competition with one another.

36. Combellas, *supra* note 21, at 194.

37. *See id.* at 200.

38. *Id.* at 200, 202.

39. *Id.* at 202.

40. CONSTITUTE, *supra* note 31, art. 292, at 79; *accord* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA DE 1999 Dec. 15, 1999, art. 292.

41. CONSTITUTE, *supra* note 31, art. 296, at 80; *accord* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA DE 1999 Dec. 15, 1999, art. 296.

The new Constitution also enshrined the enabling law, a mechanism that delegated powers to the President to rule by decree “with the rank and force of a law.”⁴² This mechanism was not unprecedented, but Chávez normalized this kind of rule by decree given his electoral success; he began requesting such laws from Congress soon after the July 1999 elections in which the ANC’s constitutional drafters were elected—including his wife, brother, and chief of staff.⁴³ Even if this type of law is ripe for a kind of exploitation that undercuts the separation of powers,⁴⁴ the mechanism itself is constitutional and at least nominally does not seem to run afoul of that doctrine: enabling laws must be approved by three-fifths of legislators.⁴⁵ Chávez would go on to become the President who secured the most enabling laws in the country’s history, with his successor, President Nicolás Maduro, obtaining the second most.⁴⁶

Chávez’s early ballot power secured both a popular mandate and political legitimacy, propelled by the antiestablishment sentiment coursing through the populace. Chávez’s use of the ANC and enabling laws, two supraconstitutional mechanisms, made him both the maker of the Constitution in the eyes of the people and positioned him above it.

B. INSTITUTIONAL CAPTURE IN SERVICE OF THE PARTY

“The court simply committed suicide to avoid being assassinated. But the result is the same. It is dead[]’ . . .”⁴⁷ With these words, the presiding magistrate of Venezuela’s highest court, Cecilia Sosa Gómez, resigned from her position in August 1999, just three weeks after the ANC took power.⁴⁸ The supraconstitutional ANC stripped the court of all judicial review competencies and passed an emergency judicial powers act, giving itself the authority to dissolve both the legislature and the judiciary.⁴⁹ The remaining magistrates of the Supreme Tribunal of Justice, who said they were threatened with violence by members of Chávez’s inner circle,⁵⁰ acquiesced to the ANC’s power grab.⁵¹ The death of the independent judiciary in 1999 was the first step in a long march of cooperation between the National Assembly and the Supreme Tribunal of Justice.⁵² These

42. CONSTITUTE, *supra* note 31, art. 203, at 57; *accord* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA DE 1999 Dec. 15, 1999, art. 203.

43. Garcia-Serra, *supra* note 23, at 273–74.

44. *See id.* at 277.

45. *See* CONSTITUTE, *supra* note 31, art. 203, at 57; *accord* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA DE 1999 Dec. 15, 1999, art. 203.

46. *Cf.* Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, J. DEMOCRACY, Apr. 2015, at 37, 38–39 (“The *chavista*-dominated legislature passed enabling laws four times under Chávez—in 1999, 2000, 2007, and 2010. . .”).

47. *Top Venezuelan Judge Resigns*, BBC (Aug. 25, 1999, 4:58 AM), <http://news.bbc.co.uk/2/hi/americas/429304.stm> [<https://perma.cc/H6FU-85LB>].

48. Combellas, *supra* note 21, at 194–96.

49. *See id.* at 196.

50. Zambrano, *supra* note 30.

51. Combellas, *supra* note 21, at 196.

52. *See* HUM. RTS. WATCH, RIGGING THE RULE OF LAW: JUDICIAL INDEPENDENCE UNDER SIEGE IN VENEZUELA 1 (2004) (describing politicization of Venezuela’s judiciary under Chávez).

two branches of government came to act as vassals of Chávez's government and his party, deepening a kind of "institutional capture" that facilitated his reelection.

Institutional capture, scholars contend, can occur when populists presiding over a still-capitalist market economy confront the bust cycle of the social policies they tend to promulgate at the beginning of their term, with greater efforts to seize institutions and avoid losing power.⁵³ Because populists who seek to consolidate power often "den[y] the existence of divisions of interests and opinions within 'the people' and reject[] the legitimacy of political opponents," as the populism theorist Cas Mudde puts it, these leaders try "to circumvent or undermine the power of countervailing forces, including independent judges and the political opposition."⁵⁴ Chávez, availing himself of the awesome powers his Constitution granted him, achieved this by putting loyalists in charge of nonmajoritarian institutions.

The erosion of Venezuela's independent judiciary began with the 1999 ANC, not with the formal appointment of loyal justices by Chávez but with the acquiescence of existing magistrates. An October 1999 decision from the Supreme Tribunal of Justice recognized the ANC's judicial emergency committee as superior, holding that "through the National Constituent Assembly, popular sovereignty becomes constitutional sovereignty . . . as the juridical mechanism to originate the Republic's new constitutional regime."⁵⁵ Simply put, this decision represented the court's full embrace of Chávez's own theory of constitutional interpretation, under which a national referendum imbued the ANC with maximum authority to create and dictate law. The ANC subsequently dismissed almost all of the country's judges and replaced them with temporary and provisional judges.⁵⁶ This decision paved the way for institutional capture.

But even after the adoption of the new Constitution, which outlined transparent, nonpartisan processes for the naming and removal of judges,⁵⁷ the judiciary remained stacked with partisan judges willing to help Chávez.⁵⁸ In the "mega-elections" of 2000, Chávez's party won a clear majority of National Assembly

53. See Nicholas Chesterley & Paolo Roberti, *Populism and Institutional Capture*, EUR. J. POL. ECON., July 2018, at 1, 2. Special and moneyed interests can also capture institutions, not just populists.

54. Cas Mudde, Opinion, *The Problem with Populism*, GUARDIAN (Feb. 17, 2015, 4:14 PM), <https://www.theguardian.com/commentisfree/2015/feb/17/problem-populism-syryza-podemos-dark-side-europe> [<https://perma.cc/BVU6-7YHC>].

55. Mary Ramos Fernández & Marianella Villegas Salazar, Información Jurisprudencial, Jurisprudencia Administrativa y Constitucional (Corte Suprema de Justicia y Corte Primera de lo Contencioso-Administrativo): Año 1999, REVISTA DE DERECHO PÚBLICO, Jan.–Dec. 1999, at 55, 111, 120; see Combellas, *supra* note 21, at 196.

56. Brewer-Carías, *supra* note 35, at 751.

57. See CONSTITUTE, *supra* note 31, arts. 264–65, at 71; accord CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA DE 1999 Dec. 15, 1999, arts. 264–65.

58. Brewer-Carías, *supra* note 14, at 518. Brewer-Carías is himself a controversial actor in Venezuela's history, as he is alleged to have provided legal justifications for a coup against Chávez in April 2002. See Allan R. Brewer Carías v. Venezuela, Case 12.724, Inter-Am. Comm'n H.R., Report No. 171/11, ¶¶ 8–12 (2011).

seats—92 of 165—which allowed it to reshape the judiciary into a more partisan body.⁵⁹ “Instead of forming the constitutionally required nominating committees, integrating representatives of the various sectors of civil society, the new national assembly established as vehicles for making appointments parliamentary commissions. . . .”⁶⁰ After a failed coup attempt against Chávez in 2002, the Supreme Tribunal of Justice was divided evenly between Chávez supporters and adversaries, and the pro-Chávez National Assembly passed a court-packing law that increased the court’s size to thirty-two from twenty magistrates.⁶¹ The new justices could be selected with a simple majority vote of the National Assembly if two-thirds of the legislature failed to elect them after three votes.⁶² Additionally, the law allowed the Assembly to suspend judges from their posts pending an impeachment investigation (which the President of the Assembly could simply refuse to bring up) or to nullify a judge’s initial appointment.⁶³

The application of this 2004 law was swift and merciless. One month after the law’s passage, the National Assembly removed the Vice President of the Supreme Tribunal of Justice, Franklin Arrieche, with a simple majority vote.⁶⁴ The Assembly could now use the law to do what it had been unable to do when Arrieche penned the court’s opinion in a decision shielding alleged coup leaders from prosecution two years earlier.⁶⁵ By 2006, more than 300 judges had been removed via legislative fiat for reasons as picayune as processing claims too slowly.⁶⁶ In their place, provisional judges who could be removed at will were appointed, making the judiciary particularly vulnerable to partisan pressures.⁶⁷

59. *Elecciones 30 de Julio de 2000: Total de Representantes Por Agrupacion Politica y por Entidad*, CONSEJO NACIONAL ELECTORAL, https://repositories.lib.utexas.edu/bitstream/handle/2152/17162/lh_seats_bydistrict_byparty_2000.pdf?sequence=2&isAllowed=y [https://perma.cc/6VA9-KLL7] (last visited Apr. 21, 2022). Chávez also won sixty percent of the vote in the presidential race. Brianna Lee, Kevin Lizarazo & Jeremy Sherlick, *Venezuela’s Chavez Era: 1958–2013*, COUNCIL ON FOREIGN RELS. (May 1, 2017), <https://www.cfr.org/timeline/venezuelas-chavez-era> [https://perma.cc/45B5-SYKW]. By choosing to run for reelection before his term had ended, and under the pretext that the new Constitution demanded new tabula rasa-like elections, Chávez extended his first term by a year.

60. Brewer-Carías, *supra* note 14, at 518.

61. See *Ley Orgánica del Tribunal Supremo de Justicia de la República Bolivariana de Venezuela*, 2004, art. 2 (Gaceta Oficial N° 37.942) (Venez.); HUM. RTS. WATCH, *A DECADE UNDER CHÁVEZ: POLITICAL INTOLERANCE AND LOST OPPORTUNITIES FOR ADVANCING HUMAN RIGHTS IN VENEZUELA* 45 & n.118 (2008).

62. HUM. RTS. WATCH, *supra* note 61, at 45–46.

63. *Id.* at 47–48.

64. *Id.* at 49. The constitution requires a two-thirds majority. CONSTITUTE, *supra* note 31, art. 265, at 71; accord CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA DE 1999 Dec. 15, 1999, art. 265.

65. HUM. RTS. WATCH, *supra* note 61, at 49–50.

66. Lauren Castaldi, Note, *Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform*, 37 GEO. J. INT’L L. 477, 479 (2006).

67. See *id.* at 495–96, 505–06.

A country's highest court is typically intended to serve as a countermajoritarian institution meant to protect the rights of minorities.⁶⁸ But Chávez, under the guise of popular sovereignty and using the ANC, subverted Venezuela's judiciary by stacking the Supreme Tribunal with loyalists who would "undermine the power of countervailing forces."⁶⁹ Thus, giving judicial power to allies can provide yet another means of bolstering the legitimacy of an antidemocratic leader by blessing the leader's actions as legal at every opportunity. This early constitutional chaos paved the way for partisan control of elections.

C. ELECTORAL CONTROL AND ITS AFTERSHOCK

When a president views executive authority as derived not from the constitution but from the people's votes, a country can have no shortage of elections. The constitution derives its meaning not from the courts but from the ballot box, translated as a simple percentage figure at the end of a long campaign season supercharged with all manner of political ambition and mudslinging. Chávez's partisan control of the CNE made Venezuelan elections unfair and unfree and thus valuable permission slips for his actions.

Michael Penfold, a Venezuela scholar at the Wilson Center, has described the political system ushered in by Chávez by drawing on an existing term popular among comparative law scholars: "[h]yperpresidentialism."⁷⁰ Hyperpresidentialism characterizes the unfettered expansion of presidential powers under Chávez, which Penfold argues was caused by the "progressive weakening of separation of powers," "[w]eaknesses in the constitutional design of Venezuelan presidentialism," and the "hegemonic position of officialism in the legislative power."⁷¹ Chief among these fatal flaws (or advantages, from the chavista⁷² point of view) in the Venezuelan Constitution is the centralization of the Electoral Power as the source of presidential power (and at its service).

Interestingly, Chávez's reliance on electoral supremacy meant that consolidating power was paved with required an expansion of the franchise—a majoritarian mechanism—and not, as occurs in many authoritarian regimes, the systematic disenfranchisement of vast swaths of the population. This development contrasts

68. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale Univ. Press 2d ed. 1986) (identifying and discussing the U.S. Supreme Court's countermajoritarian difficulty).

69. Mudde, *supra* note 54; see HUM. RTS. WATCH, *supra* note 61, at 37.

70. Michael Penfold, *La democracia subyugada: El hiperpresidencialismo venezolano*, 30 *REVISTA DE CIENCIA POLÍTICA* 21, 21 (2010). Hyperpresidentialism is a political system that features a concentration of power in the executive and its agencies and where the electorate only weakly controls the president. See Susan Rose-Ackerman, Diane A. Desierto & Natalia Volosin, *Hyper-Presidentialism: Separation of Powers Without Checks and Balances in Argentina and the Philippines*, 29 *BERKELEY J. INT'L. L.* 246, 249 (2011).

71. Penfold, *supra* note 70, at 25. "Officialism" is a catchall term encompassing the political forces, parties, and candidates aligned with the United Socialist Party of Venezuela currently in office. Venezuelan politicians and voters subsequently aligned themselves with one of two camps: officialism or opposition.

72. Chavismo is the political ideology associated with Hugo Chávez.

with the politics of the modern Republican Party, which has opposed full participation of the U.S. electorate in recent years.⁷³ Chávez sought to gain legitimacy by inducing his supporters (traditionally disengaged groups such as those living in poverty) to turn out to the polls for him,⁷⁴ a completely harmless move that, for all the criticism of Chávez's politics, improved democratic representation. It is the exact kind of policy that leaders are encouraged—if not expected—to undertake.

Between 2003 and 2004, and in anticipation of a recall referendum,⁷⁵ Chávez directed his government to undertake massive voter registration and identification card issuance drives to bolster the number of Venezuelan citizens who were eligible to vote.⁷⁶ Although the proportion of registered voters between April and August 2004 increased by only 11.7%, an unexceptional uptick according to an independent review by the Carter Center,⁷⁷ many opposition leaders voiced concerns that this enfranchisement operation was only meant to entrench Chávez in power.⁷⁸ Part of that campaign would go on to include, over the next two years, the naturalization of (and subsequent grant of voting rights to) 420,000 undocumented immigrants in Venezuela.⁷⁹ This strategy decidedly cannot be labeled antidemocratic, and it represents a marked distinction from efforts by the U.S. Republican Party in 2020 to disenfranchise voters in predominantly Black areas in the South, for example.⁸⁰

In August 2004, Chávez survived the referendum that sought to expel him from office, famously declaring that “Venezuela has changed forever,” and that he would fight for his supporters “for the rest of [his] life.”⁸¹ In the eyes of the opposition, this victory was only the first sign that Chávez had begun manipulating the electoral system in service of his electoral ambition: His triumph came on the heels of the CNE having thrown out several thousand signatures from the recall petition earlier that year.⁸² On election day, international observers found

73. See Amy Gardner, Kate Rabinowitz & Harry Stevens, *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Millions of Voters*, WASH. POST (Mar. 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/>.

74. See Lee et al., *supra* note 59; Penfold, *supra* note 70, at 23.

75. The Venezuelan Constitution establishes a recall referendum mechanism by which twenty percent of registered voters may petition for the head of state to be removed. CONSTITUTE, *supra* note 31, art. 72, at 21; *accord* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA DE 1999 Dec. 15, 1999, art. 72.

76. See Penfold, *supra* note 70, at 23.

77. *Id.*

78. Tobias Schwarz, ‘I Won’t Naturalize Foreigners Like Crazy’: *The Naturalization Campaign in Venezuela, 2004–2006*, EUR. REV. LATIN AM. & CARIBBEAN STUD., Apr. 2016, at 33, 43.

79. *Id.* at 33–34.

80. See Gardner et al., *supra* note 73; *infra* Part III.

81. *Victoria del pueblo: ¿Por qué Chávez ganó el referendo de 2004?*, TELESUR (Aug. 15, 2020), <https://www.telesurtv.net/telesuragenda/refrendo-revocatorio-2004-por-que-gano-chavez-consecuencias-20180815-0013.html> [<https://perma.cc/NQ2F-DEUY>].

82. See *El Consejo Electoral anula un millón de firmas necesarias para convocar la consulta contra Chávez*, EL PAÍS (Mar. 2, 2004, 5:31 PM), https://elpais.com/internacional/2004/03/02/actualidad/1078182003_850215.html [<https://perma.cc/4EA3-QKZU>].

other irregularities. An exit poll supervised by an American polling firm claimed that the opposition had won the recall referendum by eighteen points,⁸³ only to be trounced 58% to 42% in official results.⁸⁴ Observers also noted “a pattern of polling stations where several electronic voting machines returned an identical result, in what looked like a pre-programmed ‘cap’ on the number of opposition votes.”⁸⁵ That night, two opposition members of the Electoral Council were barred from accessing return information and from supervising the tabulation process.⁸⁶

Citing the high risk of fraud and lack of procedural transparency, opposition parties boycotted the parliamentary elections of 2005.⁸⁷ (“What fraud?” Chávez crowed.⁸⁸) With literally no opposition at the ballot box and an abstention rate of up to seventy-five percent,⁸⁹ candidates aligned with Chávez’s socialist coalition took control of all 167 seats of the National Assembly.⁹⁰ This overwhelming control of the legislative body opened the door for Chávez to establish a hyperpresidentialist system with (perceived) broad popular support. This National Assembly oversaw the purging of more than 190 judges on “corruption” charges, the subjugation of independent news media, the weakening of regional governments, and a tremendous backsliding in human rights.⁹¹ Soon after his 2007 inauguration, Chávez nationalized Venezuela’s telecommunications and electricity industries, as well as the Central Bank; he also cancelled the broadcast license of Radio Caracas Televisión, one of the largest and most enduring fonts of independent journalism that remained untethered from state control.⁹²

Few moves, however, were as consequential as Chávez packing the CNE with loyalists. In the ten years that followed, Venezuelans were asked to cast their

83. Press Release, Penn, Schoen & Berland Associates, Exit Poll Results Show Major Defeat for Chavez (Aug. 15, 2004, 7:49 PM), https://cepr.net/documents/publications/penn_schoen_berland_release.pdf [<https://perma.cc/69SQ-XZ9G>].

84. David Rosnick, *Polling and the Ballot: The Venezuelan Referendum*, CTR. ECON. & POL’Y RSCH. (Aug. 19, 2004), https://cepr.net/documents/publications/venezuela_2004_08.htm [<https://perma.cc/FC3Q-Y3PM>].

85. Jennifer McCoy, *What Really Happened in Venezuela?*, ECONOMIST (Sept. 2, 2004), <https://www.economist.com/the-americas/2004/09/02/what-really-happened-in-venezuela>.

86. See Jimmy Carter, *President Carter’s Trip Report on Venezuela, May 29–June 1, 2004*, CARTER CTR. (June 3, 2004), <https://www.cartercenter.org/news/documents/doc1700.html> [<https://perma.cc/2AVS-3K6U>].

87. See Gary Marx & Tribune Foreign Correspondent, *4 Parties Boycott Venezuela Vote*, CHI. TRIB. (Dec. 1, 2005), <https://www.chicagotribune.com/news/ct-xpm-2005-12-01-0512010146-story.html>. A more cynical explanation of the opposition’s strategy is that the parties thought a boycott could steal legitimacy away from the regime, which at the time still had relatively strong popular support.

88. *Id.*

89. Juan Forero, *Chávez’s Grip Tightens as Rivals Boycott Vote*, N.Y. TIMES (Dec. 5, 2005), <https://www.nytimes.com/2005/12/05/world/americas/chavez-s-grip-tightens-as-rivals-boycott-vote.html>.

90. See *Venezuela ‘Landslide’ for Chavez*, BBC (Dec. 5, 2005, 11:52 AM), <http://news.bbc.co.uk/2/hi/americas/4496586.stm> [<https://perma.cc/YH2M-H4QB>].

91. INT’L CRISIS GRP., VENEZUELA: HUGO CHÁVEZ’S REVOLUTION 11–16 (2007), <https://d2071andvip0wj.cloudfront.net/19-venezuela-hugo-chavez-s-revolution.pdf> [<https://perma.cc/7VRA-F2CW>].

92. Lee et al., *supra* note 59.

votes in eleven elections for issues ranging from municipal positions, to Chávez's reelection, to a new "socialist" constitution.⁹³ All of these elections were overseen (and their results announced) by the same woman, Tibisay Lucena, a defender of the President.⁹⁴ Although the Constitution is silent on term limits for the CNE's President, Article 296 states that members "shall hold office for seven years."⁹⁵ Lucena overstayed her first term under tacit acquiescence from the National Assembly until October 2014, after it officially ended in April 2013.⁹⁶ Her appointment to a second term occurred not through the constitutionally mandated civil society committee but through the Supreme Tribunal of Justice.⁹⁷ She has become a household name in Venezuela and has overseen—most notably—a constitutional reform referendum (Chávez's first loss at the polls since his first election), a referendum removing presidential term limits (which Chávez won), parliamentary elections, Chávez's last electoral victory in 2012 by his thinnest margin, and the election of President Nicolás Maduro the following year by just 1.6%.⁹⁸ Meanwhile, in 2012, former U.S. President Jimmy Carter called Venezuela's elections "the best in the world."⁹⁹

93. See Jaime L. García, *Venezuela votará la 'Constitución socialista' impulsada por Hugo Chávez el 2 de diciembre*, EL MUNDO (Mar. 11, 2007, 6:39 AM), <https://www.elmundo.es/elmundo/2007/11/03/internacional/1194067923.html> [<https://perma.cc/GUG7-ZR8C>]; Daniel Pardo, *Presidenta del CNE de Venezuela, Tibisay Lucena: "Yo no diría campaña sucia. Ha habido violaciones a la ley,"* BBC MUNDO (Dec. 4, 2015), https://www.bbc.com/mundo/noticias/2015/12/151203_venezuela_elecciones_cne_tibisay_lucena_ab [<https://perma.cc/RK7M-UNF6>].

94. See Pardo, *supra* note 93. When asked to respond to concerns that some electoral precincts were named after Hugo Chávez, Lucena said, "I laugh." *Id.*

95. CONSTITUTE, *supra* note 31, art. 296, at 80; accord CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA DE 1999 Dec. 15, 1999, art. 296.

96. See *La eternidad de Tibisay Lucena en el CNE*, LA PATILLA (Dec. 27, 2014, 8:00 AM), <https://www.lapatilla.com/2014/12/27/la-eternidad-de-tibisay-lucena-en-el-cne/>.

97. *Id.*

98. See Ronny Rodríguez Rosas, *Tibisay Lucena es la nueva ministra de Educación Universitaria de Maduro*, EFECTO COCUYO (Oct. 19, 2021, 5:53 PM), <https://efectococuyo.com/politica/tibisay-lucena-ministra-de-educacion-universitaria/> [<https://perma.cc/HTW2-QFVN>] (noting that everyone in Venezuela knew of Lucena partially because she served as head of the CNE from 2006 to 2020); see also Simon Romero, *Venezuela Hands Narrow Defeat to Chávez Plan*, N.Y. TIMES (Dec. 3, 2007), <https://www.nytimes.com/2007/12/03/world/americas/03venezuela.html> (constitutional reform referendum); Rory Carroll, *Hugo Chávez Wins Referendum Allowing Indefinite Re-Election*, GUARDIAN (Feb. 16, 2009, 3:04 AM), <https://www.theguardian.com/world/2009/feb/16/hugo-chavez-indefinite-rule> (term limit referendum); Simon Romero, *Shift in Venezuelan Politics as Chávez's Opposition Reclaims Seats in Legislature*, N.Y. TIMES (Sept. 27, 2010), <https://www.nytimes.com/2010/09/28/world/americas/28venez.html> (parliamentary elections); Juan Forero, *Hugo Chavez Beats Henrique Capriles in Venezuela's Presidential Election*, WASH. POST (Oct. 7, 2012), https://www.washingtonpost.com/world/venezuelans-flood-polls-for-historic-election-to-decide-if-hugo-chavez-remains-in-power/2012/10/07/d77c461c-10c8-11e2-9a39-1f5a7f6fe945_story.html (Chávez's 2012 electoral victory); Virginia Lopez & Jonathan Watts, *Nicolás Maduro Narrowly Wins Venezuelan Presidential Election*, GUARDIAN (Apr. 15, 2013, 6:31 PM), <https://www.theguardian.com/world/2013/apr/15/nicolas-maduro-wins-venezuelan-election> (Maduro's election).

99. José R. Cárdenas, *Jimmy Carter Blesses Venezuelan Election as Fear of Violence Grows*, FOREIGN POL'Y (Sept. 28, 2012, 3:51 PM), <https://foreignpolicy.com/2012/09/28/jimmy-carter-blesses-venezuelan-election-as-fear-of-violence-grows/>.

As a point of political theory, Venezuela's socialist revolution continues to be successful because of its ability to draw legitimacy from the ballot box, however contested those elections may be. The ballot box, in other words, breathes new life into the revolution almost every year and gives its revolutionaries the power to reform the political system. Long before Chávez came to power, the German jurist Carl Schmitt, a later influence of Hannah Arendt, articulated this phenomenon by noting how the "constituent power" of a nation's laws changes in the midst of revolution.¹⁰⁰ Schmitt claimed that "the people not only had the right to elect a constituent assembly to write a new constitution, but also that the assembly would have the right to overthrow the existing institutions and directly rule the country."¹⁰¹ With each election, Chávez overthrew the country's institutions anew—this was the legal genius of his constitutional revolution.

In this Part, I have shown how Chávez used constitutional majoritarian mechanisms to first seize power and then minoritarian mechanisms to prolong his stay. His successor's government, while continuing to emerge victorious in elections, has been capturing a shrinking proportion of the total electorate: Chávez received 7.4 million votes in his last election in 2012, but Maduro received about 5.8 million votes in 2018's last presidential contest¹⁰²—a sign of how strongmen, including Trump, can lean on nominal majorities to legitimate their claims to power.

II. AMERICAN CONSTITUTIONAL DESIGN AND MANIPULATION

Nothing requires that a constitution be either democratic or liberal. Although legal thinkers have usually identified constitutionalist governments by the presence of legal limits on power or a robust independent judiciary,¹⁰³ one could imagine people who bind themselves to be governed by a dictator. Harvard Law School's Mark Tushnet has posited that hybrid regimes¹⁰⁴ need not be mere transitional points on the road to democracy; instead, the stability that some authoritarian-adjacent regimes have enjoyed in places such as Singapore, Malaysia, Mexico before 2000, and Egypt is better understood as a separate form of constitutionalism.¹⁰⁵

100. Lars Vinx, *Carl Schmitt*, STAN. ENCYC. PHIL. ARCHIVE (Aug. 29, 2019), <https://plato.stanford.edu/archives/fall2019/entries/schmitt/> [<https://perma.cc/4HNK-LG4A>].

101. Joshua Braver, *Hannah Arendt in Venezuela: The Supreme Court Battles Hugo Chávez over the Creation of the 1999 Constitution*, 14 INT'L J. CONST. L. 555, 566 (2016).

102. *Chavez Re-Elected as Venezuelan President, Defeating Capriles*, CNN (Oct. 9, 2012, 7:54 AM), <https://www.cnn.com/2012/10/08/world/americas/venezuela-elections/index.html> [<https://perma.cc/NDV8-NJCD>]; *Venezuela Election: Maduro Wins Second Term Amid Claims of Vote Rigging*, BBC (May 21, 2018), <https://www.bbc.com/news/world-latin-america-44187838> [<https://perma.cc/LH4H-QZVB>].

103. See CHARLES HOWARD McILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 20–21 (rev. ed. 1947).

104. A hybrid regime exhibits both democratic and authoritarian features simultaneously, such as the juxtaposition of competitive elections and the erosion of checks and balances. For a discussion of autocratic legalism in Venezuela and the three key elements of autocratic legalism—"the *use, abuse, and non-use* . . . of the law in service of the executive branch"—see Corrales, *supra* note 46, at 38.

105. Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 393 n.6 (2015).

Scholars of the U.S. Constitution should understand this Founding document in a similar way: not as a self-assuring, democratic social contract but as a structure with antidemocratic features that would allow an authoritarian to bend the system in service of executive power. In this Part, I first highlight the quasi-authoritarian elements of the U.S. Constitution to argue that U.S. elections both enable and hamper appropriate democratic representation. Then, I argue that the 2020 election exposed faults in the U.S. electoral system that brought the country to a constitutional crisis. Lastly, I chronicle the first violent transfer of power in modern American democracy.

A. MINORITARIAN CHECKS AND BALANCES

Political theory is rich with scholars who contend that constitutions create a single, unitary “state” that holds a monopoly on the legitimate use of force.¹⁰⁶ This conception of government-as-Leviathan reigned supreme in countries whose legal systems greatly influenced the U.S. constitutional architecture, including England and France. But when surveying the loosely confederated Thirteen Colonies, some of the Framers found little appetite for an omnipotent state. The Constitution’s author, James Madison,¹⁰⁷ sought instead to turn the colossus on its head and create a government that discouraged powerful factions using multiple checks and balances, including fragmentation of the electoral base. Centuries later, however, those Madisonian ideals have not mitigated the intense grip of the Democratic–Republican party duopoly. Another closely related faction has also emerged: the white majority seeking to remain entrenched in power through antidemocratic mechanisms that subjugate the representation of people of color.¹⁰⁸

Self-interest, Madison understood, will always predominate in a republic; therefore, “it cannot and must not be conquered.”¹⁰⁹ But Madison and his fellow Framers also wanted to preserve the differences in opinion that, in their view, would make the republic so vibrant.¹¹⁰ Mitigation of faction, rather than its complete elimination, was the objective.¹¹¹ In *The Federalist No. 10* and *No. 51*, Madison engineered an intentionally fragmented electoral base that achieves this purpose:

106. See THOMAS HOBBS, *LEVIATHAN* 142 (Bobbs-Merrill Co., Inc. 1958) (1651).

107. *Who’s the Father of the Constitution?*, LIBR. CONG., <https://www.loc.gov/wiseguide/may05/constitution.html> [<https://perma.cc/Z6EG-RJUV>] (last visited Apr. 21, 2022).

108. Accounting for class, a minoritarian group has also entrenched itself in power: white, wealthy property owners. See Girardeau A. Spann, *Race Ipsa Loquitur*, 2018 MICH. ST. L. REV. 1025, 1026; Joshua P. Zoffer & David Singh Grewal, Essay, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437, 438 (2020) (asking and answering in the negative whether judges “reflect even an indirect democratic mandate”).

109. Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1330 (1994).

110. See *id.* at 1331.

111. *Id.*

“different state qualifications for voting; different districts for officials to represent (portions of states . . . [in] the House, whole states for senators, the entire [country] for the President); different electors ([direct electors] for members of the House, state legislatures for senators [pre-Seventeenth Amendment], the electoral college for the President); and [staggered] tenures. . . .”¹¹²

These aspects of the Constitution, Madison wrote, would “make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison.”¹¹³ This decentralization is the main distinguishing factor between the U.S. and Venezuelan constitutional models, and in many ways, it prevents a strongman from claiming that any one election represents the voice of the people.

But this Madisonian model, some scholars argue, “has existed only in a few passages of *Federalist 51* and the imagination of courts and constitutional theorists.”¹¹⁴ Instead of establishing an environment of interbranch competition driven by officials who act in the best interest of their respective departments, the U.S. political system created an incentive for officials to harmonize behavior to benefit their respective *parties*. The cross-party coalitions that admitted Hawaii and Alaska into the Union and enacted sweeping civil rights legislation are no more. In their place is an intensely polarized version of politics: Since 1990, all significant laws during periods of unified Democratic or Republican control have passed by narrow, party-line votes.¹¹⁵ This system additionally diffuses political accountability, leaving voters with no clear target for retribution or reward.¹¹⁶ Thus, in unified government, interbranch competition dissipates and smaller partisan majorities—factions—are able to effect significant policy change without the full range of checks and balances that Madison envisioned.¹¹⁷

All the while, a constitutional regime has emerged that empowers a white faction to subjugate Black Americans and Americans of color. Madison, for all his alleged genius, wrote a constitution that excluded vast swaths of American society from the franchise and enshrined the horrendous institution of slavery. Partisan gerrymandering,¹¹⁸ voter roll purges,¹¹⁹ and rigid requirements on out-

112. *Id.* at 1332–33 (footnote omitted).

113. THE FEDERALIST NO. 10, at 83 (James Madison).

114. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2329–30 (2006).

115. *See, e.g.*, DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at 221–22 (2d ed. 2005).

116. Levinson & Pildes, *supra* note 114, at 2342.

117. *Id.* at 2338.

118. *See* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (holding that partisan gerrymandering is a nonjusticiable political question); *see also* Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 983 (2020) (arguing that “the Court’s justiciability rules typically produce judicial deference to the efforts of whites to maintain or accumulate electoral power”).

119. *See* *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (striking down Section 4(b) of the Voting Rights Act, allowing states to enact more aggressive policies, such as voter roll purges).

of-precinct voting and absentee ballots¹²⁰—all mechanisms that have disparately and historically suppressed Black Americans’ votes—have continually enjoyed the Supreme Court’s imprimatur in recent years.¹²¹ This phenomenon has forced some Americans to contend with a “hard fact” that Martin Luther King Jr. identified in 1967: “many Americans would like to have a nation which is a democracy for white Americans but simultaneously a dictatorship over black Americans.”¹²² The *Atlantic*’s Adam Serwer has posited that “true democracy in America is only 55 years old, dating to 1965, the year the Voting Rights Act guaranteed suffrage—at least on paper—to all American citizens, regardless of race.”¹²³

Nothing cast the possibility of an autocratic American republic quite into stark relief like the election of 2016. Aziz Huq and Tom Ginsburg coined a term to explain the democratic backsliding that the United States had been experiencing even before the election of Donald Trump: “constitutional retrogression.”¹²⁴ They observed authoritarian trends that presaged democratic collapse in the United States, including public support for military rule, economic inequality, and absence of democratic progress in the world.¹²⁵ While Trump displayed overt autocratic tendencies throughout the campaign and during the first half of his term, including a naked undermining of the news media and a thirst for an armed forces loyal to him, he also quietly succeeded at reshaping the judiciary by stacking it with conservative ideologues. Chief Justice John Roberts attempted to defend the perceived independence of the federal judiciary, famously declaring, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. . . .”¹²⁶ However, by the end of his first term, Trump had appointed a quarter of all federal judges and one-third of the Supreme Court, drastically outpacing previous Presidents.¹²⁷

120. See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021) (upholding Arizona’s restrictions on out-of-precinct voting and mail-in ballots).

121. See generally Alex Cohen & Wilfred U. Codrington III, *The Promise and Pitfalls of the 15th Amendment over 150 Years*, BRENNAN CTR. FOR JUST. (Feb. 3, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/promise-and-pitfalls-15th-amendment-over-150-years> [<https://perma.cc/6RRL-7K39>] (discussing failures related to the Fifteenth Amendment that prevent a “robust democracy”); Ian Millhiser, *How America Lost Its Commitment to the Right to Vote*, VOX (July 21, 2021, 8:00 AM), <https://www.vox.com/22575435/voting-rights-supreme-court-john-roberts-shelby-county-constitution-brnovich-elena-kagan> [<https://perma.cc/SE9D-RGBJ>] (commenting that the Supreme Court “drained nearly all of the life” out of the Voting Rights Act).

122. Martin Luther King Jr., *America’s Chief Moral Dilemma* (May 10, 1967).

123. Adam Serwer, *The Capitol Riot Was an Attack on Multiracial Democracy*, ATLANTIC (Jan. 7, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/multiracial-democracy-55-years-old-will-it-survive/617585/>.

124. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 83 (2018).

125. See *id.* at 80–82.

126. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

127. See Sahil Kapur, *With a Final Push on Judges, McConnell Will Cement a Lasting Legacy for Trump*, NBC NEWS (Dec. 14, 2020, 4:30 AM), <https://www.nbcnews.com/politics/congress/final-push-judges-mcconnell-will-cement-lasting-legacy-trump-n1250950> [<https://perma.cc/PG6J-KPKH>].

Republicans had long criticized the courts and legal outcomes that did not benefit their platform,¹²⁸ but this rise of hyperpartisanship in the judiciary is only achievable with intraparty, interbranch collaboration—the exact kind that Madison opposed and Chavez secured.¹²⁹

B. CONSTITUTIONAL EXPLOITATION AND THE 2020 ELECTION

History will not look kindly on those who forget just how close the presidential election of 2020 came to throwing the country into a full-blown constitutional crisis that could have easily ended with a Republican-friendly Supreme Court appointing the nation's President. If the election of 2016 foreboded the possibility of U.S. authoritarianism, the 2020 election demonstrated just how apparent and constitutional the threat was. Constitutional and legal mechanisms existed for Trump to declare victory in the case of a razor-thin election, setting in motion a meltdown “much worse than 2000's *Bush v. Gore* case.”¹³⁰ This Section explores the circumstances under which Trump could have subverted the U.S. electoral process for his own gain, and attempts to answer how U.S. democracy escaped the grip of tyranny.

It should surprise no one that Trump questioned the legitimacy of the U.S. electoral process long before it became clear that he would soon be forced to adopt a label—one that is often necessary to a functioning democracy—that he had always eschewed: the loser. Already in 2016, after Trump lost to Ted Cruz in the Colorado primary, he excoriated the “rigged and boss controlled Republican primaries!”¹³¹ After losing the popular vote in the 2016 election, he alleged that voter fraud was rampant and established a commission to study his claim, which he disbanded after it found little evidence of such transgressions.¹³² This did not deter Trump from continuing to make such claims even until the last days of his presidency.¹³³

As the COVID-19 pandemic struck the United States, states began expanding their early and mail-in voting capabilities during their primary elections¹³⁴ to help voters avoid huddling together in long lines and mitigate the likelihood of

128. See Bruce G. Peabody, *The Curious Incident of Trump and the Courts: Interbranch Deference in an Age of Populism*, 7 BRIT. J. AM. LEGAL STUD. 237, 239–41 (2018).

129. See *supra* notes 109–13 and accompanying text.

130. Barton Gellman, *The Election That Could Break America*, ATLANTIC (Sept. 23, 2020), <https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424/>.

131. Tom Liddy, *Donald Trump: The Things He Said Are 'Rigged' and 'Not Rigged,'* ABC NEWS (Oct. 12, 2016, 2:02 PM), <https://abcnews.go.com/Politics/donald-trump-things-rigged-rigged/story?id=42738506> [<https://perma.cc/C33R-M7ZC>].

132. See Jill Colvin & John Hanna, *Trump Signs Order Disbanding Voter Fraud Commission*, ASSOCIATED PRESS (Jan. 3, 2018), <https://apnews.com/article/b3d4e5974aba421b81763c153541ea06> [<https://perma.cc/UFP3-RNCM>].

133. See Donald Trump, U.S. President, Remarks at Save America Rally (Jan. 6, 2021) (transcript available at <https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6> [<https://perma.cc/9VK8-WGN6>]).

134. See *Absentee and Mail Voting Policies in Effect for the 2020 Election*, NAT'L CONF. STATE LEGISLATURES (Nov. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx> [<https://perma.cc/8HSX-ZWW8>].

contracting an airborne infection. Some states, such as Indiana, did not expand absentee or mail ballot eligibility but did extend the deadline for receipt of such ballots.¹³⁵ According to Pew Research Center, approximately forty-six percent of voters cast their ballots this way, placing great reliance on the U.S. Postal Service.¹³⁶ While the U.S. Constitution designed elections to be administered among the different states,¹³⁷ voters' dependence on a federal agency briefly made the 2020 electoral contest much more centralized—akin to the processes of other nations, including Venezuela, though outside official constitutional sanction. In August, about 700 mailboxes were removed and decommissioned, a process Postmaster General Louis DeJoy testified he had “no idea” about, even as he refused to reinstall the boxes.¹³⁸ Outrage grew as the public learned that DeJoy, who was appointed by Trump just months earlier, donated more than \$1.2 million to the Trump Victory Fund.¹³⁹ In the cast of characters of the 2020 election, DeJoy almost became the metaphorical American counterpart to Tibisay Lucena—both purportedly apolitical officials who wielded great power over voting ballots and managed to position bureaucracies in highly partisan ways.

“Get rid of the ballots and you’ll have a very peaceful—there won’t be a transfer, frankly. There will be a continuation,” Trump said at a news conference on September 23, 2020.¹⁴⁰ With this statement, Trump sent shock waves through the country, signaling his intention to cling to power until the end—which turned out to be noon on Inauguration Day. But few understand just how little protection the exalted Constitution provided against the possibility that Trump’s presidency

135. *See id.*

136. *See* PEW RSCH. CTR., SHARP DIVISIONS ON VOTE COUNTS, AS BIDEN GETS HIGH MARKS FOR HIS POST-ELECTION CONDUCT 19 (2020), <https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020/> [<https://perma.cc/2BNC-NVKC>].

137. *See* U.S. CONST. art. I, § 4, cl. 1.

138. Meg Wagner, Melissa Macaya & Veronica Rocha, *Trump’s Postmaster General Testifies: DeJoy Says He Was Unaware 700 Collection Boxes Had Been Removed*, CNN (Aug. 21, 2020, 10:44 AM), https://www.cnn.com/politics/live-news/postmaster-general-dejoy-senate-testimony/h_91ccfcaa21cc24decc04c6b184c21e27 [<https://perma.cc/5ZMF-GYRE>]. Rank-and-file postal workers were so overwhelmed by the volume of ballots cast by mail that they sent letters to forty-six states warning that their voters could be disenfranchised by delayed mail-in ballots amid cuts in service. *See* Erin Cox, Elise Viebeck, Jacob Bogage & Christopher Ingraham, *Postal Service Warns 46 States Their Voters Could Be Disenfranchised by Delayed Mail-in Ballots*, WASH. POST (Aug. 14, 2020), https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381_story.html.

139. Brian Naylor, *New Postmaster General Is Top GOP Fundraiser*, NPR (May 7, 2020, 1:28 PM), <https://www.npr.org/2020/05/07/851976464/new-postmaster-general-is-top-gop-fundraiser> [<https://perma.cc/GQK6-WY97>]. Still, Trump continued to claim without evidence that mail ballots were susceptible to widespread manipulation. *See* Nicholas Riccardi, *Here’s the Reality Behind Trump’s Claims About Mail Voting*, ASSOCIATED PRESS (Sept. 30, 2020), <https://apnews.com/article/virus-outbreak-joe-biden-election-2020-donald-trump-elections-3e8170c3348ce3719d4bc7182146b582> [<https://perma.cc/6MV3-2NM8>].

140. Michael Crowley, *Trump Won’t Commit to ‘Peaceful’ Post-Election Transfer of Power*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/us/politics/trump-power-transfer-2020-election.html>.

would extend beyond that moment and how close the United States came to the brink of constitutional chaos.¹⁴¹

The sacred ritual that tends to begin a transition of power is the loser's concession. Established by William Jennings Bryan in the election of 1896 against Republican opponent William McKinley,¹⁴² this tradition has been the constitutionally absent glue that has held democracy together. Even the 2000 election, whose results were in legitimate legal dispute, featured a concession that itself was recanted but nevertheless accepted in the end.¹⁴³ At the heart of Trump's refusal to concede is a phenomenon that professor Edward Foley has termed the "blue shift,"¹⁴⁴ first predicted in 2014.¹⁴⁵ Because early results from in-person voting (which leaned heavily Republican) would show Trump ahead, many public intellectuals correctly predicted the President would claim victory early on even as predominantly Democratic mail ballots cut down on that lead after being processed.¹⁴⁶ And he did, because neither the Constitution nor the laws require him to concede—or at least wait until the final count to claim rhetorical victory in an effort to undermine democratic continuity.

Surprisingly for a constitutional democracy, earning the majority of votes is immaterial before concession because the state legislatures hold outsized sway over the appointment of electors at this juncture. Voters can thank Madison's constitutional design for this seeming democratic foible. The U.S. Constitution undeniably grants the power to appoint all electors of a state to that state's legislature.¹⁴⁷ This clause has served as a bulwark against tyranny because decentralized elections shield the electorate from federally centralized manipulation of vote counts.¹⁴⁸ But where state legislators may only have the best interests of their parties at heart, they can work in harmony to install a member of their own party. Republican legislatures in decisive states such as Arizona, Georgia, Michigan, or Pennsylvania could have voted to send slates of Trump electors to

141. As Gellman put it, "If we emerge without trauma, it will not be an unbreakable ship that has saved us." Gellman, *supra* note 130.

142. *See id.*

143. *See* Ellen Gamerman, *Gore's Regret Is Evident in Speech*, BALTIMORE SUN (Dec. 14, 2000, 03:00 AM), <https://www.baltimoresun.com/bal-00election35-story.html>.

144. Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309, 309–12 (2019).

145. *See id.* at 312–13. In 2020, top Democratic data and analytics firm Hawkfish also predicted a "red mirage"—the illusion that Trump had won on Election Night. Margaret Talev, *Exclusive: Dem Group Warns of Apparent Trump Election Day Landslide*, AXIOS (Sept. 1, 2020), <https://www.axios.com/bloomberg-group-trump-election-night-scenarios-a554e8f5-9702-437e-ae75-d2be478d42bb.html> [<https://perma.cc/4JYL-5WAF>].

146. *See* Talev, *supra* note 145.

147. *See* U.S. CONST. art. II, § 1, cl. 2.

148. Trump himself attempted to convince Georgia Secretary of State Brad Raffensperger to "find 11,780 votes" and say he "recalculated." Amy Gardner, *'I Just Want to Find 11,780 Votes': In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor*, WASH. POST (Jan. 3, 2021, 9:59 PM), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html.

Congress, bypassing even a gubernatorial veto.¹⁴⁹ Those rival slates would have then cast their dueling votes and transmitted their ballots to the President of the Senate, Vice President Mike Pence.¹⁵⁰

Although no competing slates of electors existed in this election, Republicans nevertheless made broad claims about the power of the Vice President and leaned on the courts to give their constitutional arguments some air. This marked a dramatic shift from the usual norms governing transitions of power, establishing a playbook for 2022 or 2024.¹⁵¹ As Foley predicted in 2019, Republicans took the “especially aggressive position that Mike Pence, as President of the Senate, has the unilateral authority under the Twelfth Amendment to decide which certificate of electoral votes . . . is the authoritative one entitled to be counted in Congress. . . .”¹⁵² In so doing, Republicans tested their legislative options for future elections while also deploying an ultimately unsuccessful strategy in the judiciary. In the lower courts, Trump and his campaign filed sixty-two lawsuits attempting to overturn—or at least challenge—the results of the election, all but one of which failed.¹⁵³ Trump and his legal team openly voiced that they expected the conservative Supreme Court to side with him because he had appointed three Justices during his term: “[H]opefully,” one Trump surrogate and lawyer said, “Amy Coney Barrett will come through and pick it up.”¹⁵⁴ Absent a case or controversy, the Supreme Court could not unilaterally step in and reverse the results,¹⁵⁵ but it also declined to hear three lawsuits involving Trump’s election claims by exercising its discretion through the certiorari process, which is rooted not in the Constitution but instead in ancient English common law.¹⁵⁶ While the Justices ultimately declined to meddle in the mess, Trump’s insistence on Supreme Court intervention—and, more broadly, his push for a hyperpartisan judiciary—was squarely in the mold of Chávez’s authoritarianism. One could

149. See Foley, *supra* note 144, at 315–16 (describing a hypothetical vote in Pennsylvania in which the legislature directs electoral votes to Trump).

150. See Gellman, *supra* note 130; U.S. CONST. art. II, § 1, cl. 2. *But see, e.g.*, Chiafalo v. Washington, 140 S. Ct. 2316, 2323 (2020) (holding that states may penalize and replace “faithless elector[s]” who do not vote for the nominee of their party).

151. See Barton Gellman, *Trump’s Next Coup Has Already Begun*, ATLANTIC (Dec. 6, 2021), <https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/>.

152. Foley, *supra* note 144, at 321.

153. William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>. A judge sided with Trump only once, ruling that voters could not “cure” their ballots if they failed to provide proper identification three days after the election.” *Id.*

154. Celine Castronuovo & John Krugel, *Trump Surrogate on Election Legal Challenges: ‘Hopefully Amy Coney Barrett Will Come Through,’* HILL (Nov. 5, 2020, 7:29 PM), <https://thehill.com/homenews/campaign/524727-trump-surrogate-on-election-legal-challenges-hopefully-amy-coney-barrett> [<https://perma.cc/SRU7-DSBN>].

155. See U.S. CONST. art. III, § 2, cl. 1.

156. Lawrence Hurley, *U.S. Supreme Court Dumps Last of Trump’s Election Appeals*, REUTERS (Mar. 8, 2021, 9:49 AM), <https://www.reuters.com/article/us-usa-court-election/u-s-supreme-court-dumps-last-of-trumps-election-appeals-idUSKBN2B01LE> [<https://perma.cc/V2H6-ZMY2>].

easily imagine a scenario in which Chief Justice John Roberts succumbs to partisan pressure and pens a public statement explaining that he would rather resign than become an accessory to democratic subversion.

Building an authoritarian architecture that can be used to manipulate state institutions and overturn a legitimate electoral victory requires the kind of popular support and longevity in power that Chávez had. But Republican domination of crucial state legislatures, the Senate, and the judiciary made this power grab structurally feasible in 2020.

C. THE FIRST VIOLENT TRANSFER OF POWER

The coda to this democratic nightmare is a scenario few average Americans foresaw, despite warnings from scholars and intelligence analysts alike. On January 6, 2021, thousands of the President's supporters marched to the Capitol, breaching security protocols and ransacking congressional offices inside. The insurrectionists "were frank about their intentions: undoing not just the 2020 Presidential outcome but also any form of representative government that allows Democrats to obtain and exercise power."¹⁵⁷ Trump openly instigated this attack, telling his supporters in a speech that he would walk with them to the Capitol and that they had to "show strength."¹⁵⁸ "All Vice-President Pence has to do," Trump told the crowd, "is send it back to the States to recertify, and we become president, and you are the happiest people."¹⁵⁹

It deserves special attention that the decision to keep democracy on life support (at least for now) fell to a single man. Because the U.S. Constitution is silent on who counts the votes but appoints the President of the Senate as the presiding officer,¹⁶⁰ few barriers prevented Mike Pence from unilaterally derailing the electoral count. The labyrinthine Electoral Count Act fills some of the Constitution's gaps, but the convoluted process is also ripe for manipulation: When two conflicting slates of electors have been appointed (say, one by the state legislature and one by the governor), and the two chambers of Congress disagree on which one has been "lawfully certified" and which one to accept, then "the votes of the electors whose appointment shall have been certified by the [governor] . . . shall be counted."¹⁶¹ The Republican governors of Georgia and Arizona, then, with a combined twenty-seven electors, could have tilted the election for Trump if they chose to certify a Republican slate of electors and Pence accepted those slates. Subsequent investigative reporting showed that John Eastman, a conservative

157. Luke Mogelson, *Among the Insurrectionists*, NEW YORKER (Jan. 15, 2021), <https://www.newyorker.com/magazine/2021/01/25/among-the-insurrectionists>.

158. Trump, *supra* note 133.

159. *Id.*

160. *See* U.S. CONST. art. II, § 1, cl. 3.

161. 3 U.S.C. § 15; *see also* ELIZABETH RYBICKI & L. PAIGE WHITAKER, CONG. RSCH. SERV., RL32717, COUNTING ELECTORAL VOTES: AN OVERVIEW OF PROCEDURES AT THE JOINT SESSION, INCLUDING OBJECTIONS BY MEMBERS OF CONGRESS 9 (2020) ("When the two houses disagree, then the statute states that the votes of the electors whose appointment was certified by the governor of the state shall be counted.").

lawyer and ally of the Trump campaign, prepared a two-page, six-point memo outlining the procedural steps Pence had to follow to accomplish this constitutional takeover.¹⁶² “The main thing here,” Eastman wrote as his final point, “is that Pence should do this without asking for permission — either from a vote of the joint session or from the Court. Let the other side challenge his actions. . . .”¹⁶³ Pence seemed willing to go along with this plan until former Vice President Dan Quayle told him he had “no flexibility” to execute the Eastman plan.¹⁶⁴

In a letter made publicly available soon after Trump’s fiery speech, Pence stated that the Constitution constrained him from claiming “unilateral authority to determine which electoral votes should be counted and which should not.”¹⁶⁵ This action alone made him a momentary and nominal guardian of democracy, but the more important lesson is that a well-functioning democracy should never depend on individual heroes. Pence could have allowed the objections to come to the floor and unilaterally claimed authority to count only Trump electors; in such a scenario, Trump would have had a majority of the votes *counted*. After Pence’s letter circulated, Trump tweeted that “Mike Pence didn’t have the courage to do what should have been done,” and chants of “Hang Mike Pence” broke out among the riotous mob.¹⁶⁶ It was only after hours of violence in the Capitol building, and several injured or dead, that law enforcement managed to clear the crowds and Joe Biden was certified as the election’s winner.¹⁶⁷

Some Republicans, incensed at Trump, denounced his incitement and even voted against him in subsequent impeachment procedures in the House.¹⁶⁸ Although he survived his Senate impeachment trial, the reality remains that a plurality of Republican voters believe that Trump should continue to play a “major role” in the party,¹⁶⁹ and the President himself excited his followers by pleading, upon departing the White House, that “we will be back in some

162. Memorandum from John Eastman to Mike Pence, U.S. Vice President, <https://s3.documentcloud.org/documents/21066248/eastman-memo.pdf> [<https://perma.cc/3YZY-STU7>]; see *READ: Trump Lawyer’s Memo on Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 8:20 AM), <https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html> [<https://perma.cc/Y65Q-D6M5>].

163. Memorandum from John Eastman to Mike Pence, *supra* note 162.

164. BOB WOODWARD & ROBERT COSTA, PERIL 199 (2021); see Jamie Gangel & Jeremy Herb, *Memo Shows Trump Lawyer’s Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 5:39 PM), <https://www.cnn.com/2021/09/20/politics/trump-pence-election-memo/index.html> [<https://perma.cc/28DF-C5YH>].

165. Letter from Michael R. Pence, U.S. Vice President (Jan. 6, 2021), <https://int.nyt.com/data/documenttools/pence-letter-on-vp-and-counting-electoral-votes/9d6f117b6b98d66f/full.pdf> [<https://perma.cc/7JKJ-SCBL>]; see *Read: Vice President Mike Pence’s Statement Breaking with Trump on Electoral College Vote Count*, CNN (Jan. 6, 2021, 1:25 PM), <https://www.cnn.com/2021/01/06/politics/pence-trump-electoral-college-letter/index.html> [<https://perma.cc/2PSX-KUWJ>].

166. Mogelson, *supra* note 157.

167. *See id.*

168. See Tim Alberta, *What the GOP Does to Its Own Dissenters*, ATLANTIC (Dec. 7, 2021), <https://www.theatlantic.com/magazine/archive/2022/01/peter-meijer-freshman-republican-impeach/620844/>.

169. Eli Yokley, *Half of Voters Call for Cabinet to Remove Trump as Bulk of Republicans Say He Should Retain ‘Major Role’ in Party*, MORNING CONSULT (Jan. 7, 2021, 2:00 PM), <https://morningconsult.com/2021/01/07/capitol-riots-trump-blame-polling/> [<https://perma.cc/L55Z-UKM6>].

form.”¹⁷⁰ The defeated President continued to pursue unilateral, partisan audits of state electoral processes, and he insisted at one of his signature rallies, in June 2021, that he is “the one that’s trying to save American democracy.”¹⁷¹ Should nothing change, the United States will find itself careening toward authoritarianism again in 2024.

III. THE URGENCY OF DEMOCRATIC REFORM

Since 1995, the Organization for Security and Co-operation in Europe (OSCE) has conducted election observations in countries that belong to this international organization.¹⁷² These actions aim “to assess the extent to which elections respect fundamental freedoms and are characterized by equality, universality, political pluralism, confidence, transparency and accountability.”¹⁷³ The OSCE has observed every midterm and presidential election in the United States since 2002, and it did so again in 2020, flying in an expert team from September 27, 2020, to November 12, 2020.¹⁷⁴ After its trip, the team published a scathing report on the state of U.S. democracy.¹⁷⁵ This Part urges the quick enactment of comprehensive democratic reforms at the federal level and, in the meantime, the implementation of state-level solutions, including increased collaboration with international observers and the adoption of the National Popular Vote Compact.

In paragraph after paragraph, the OSCE report reads like a press statement from the U.S. State Department decrying election irregularities that politicians associate with faraway, unstable regimes. It noted that eighteen states restricted the presence of international observers, running afoul of OSCE commitments.¹⁷⁶ It called the judiciary “highly politicized.”¹⁷⁷ It expressed concern over the reduction of polling stations and its effect on “Native Americans and some African American communities.”¹⁷⁸ It decried other antidemocratic features of the

170. Quint Forgey, ‘We Will Be Back in Some Form’: Trump Pledges Political Comeback at Farewell Event, POLITICO (Jan. 20, 2021, 9:48 AM), <https://www.politico.com/news/2021/01/20/trump-pledges-we-will-be-back-farewell-event-460675> [<https://perma.cc/QB5Q-SL2V>].

171. Michael Collins, *Donald Trump Tells Ohio Rally He’s ‘Trying to Save American Democracy,’* USA TODAY (June 27, 2021, 7:40 PM), <https://www.usatoday.com/story/news/politics/2021/06/26/donald-trump-rally-ohio-saturday-return-campaign-style-events/5310482001/> [<https://perma.cc/2GM5-BV75>].

172. *See Elections*, ORG. FOR SEC. & COOP. EUR., <https://www.osce.org/odihr/elections> [<https://perma.cc/47LN-NHMG>] (last visited Apr. 22, 2022).

173. *Id.*

174. *See General Elections, 3 November 2020*, ORG. FOR SEC. & COOP. EUR., <https://www.osce.org/odihr/elections/usa/456787> [<https://perma.cc/AD7S-ST3T>] (last visited Apr. 22, 2022); *Elections in the United States of America*, ORG. FOR SEC. & COOP. EUR., <https://www.osce.org/odihr/elections/usa?page=1> [<https://perma.cc/WKL2-THQR>] (last visited Apr. 22, 2022).

175. *See* ORG. FOR SEC. & COOP. EUR., INTERNATIONAL ELECTION OBSERVATION MISSION: UNITED STATES OF AMERICA — GENERAL ELECTIONS, 3 NOVEMBER 2020, STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS (2020), <https://www.osce.org/files/f/documents/9/6/469437.pdf> [<https://perma.cc/R45W-F76Q>].

176. *See id.* at 3.

177. *Id.* at 5.

178. *Id.* at 7–8 (footnote omitted).

electoral process, as well: “Restrictions on voting rights of felons and ex-felons contravene principles of universal suffrage. . . .”¹⁷⁹ It emphasized that Trump “repeatedly used his official capacity for political advantage,”¹⁸⁰ and that his refusal to commit to a peaceful transfer of power “risk[s] eroding public confidence in democratic institutions and delegitimizing the outcome of the election.”¹⁸¹ The document is an indictment of our system, but also a mirror of the view from abroad.

The Trump Era has rightly prompted scholars, activists, and the public at large to press for election protection measures. Even though autocrats often bypass elections, some—such as Chávez and Maduro, Russia’s Vladimir Putin, and Turkey’s Recep Tayyip Erdoğan—also use them to bolster their own legitimacy; that legitimacy feeds off elections that somehow declare the same candidate victorious every time. The suggestions on how to reform democracy have been legion, from instituting a federal Election Day holiday¹⁸² to abolishing the Electoral College.¹⁸³ Unlike in Venezuela, where the capture of majoritarian institutions led to authoritarianism, the antidote for a minoritarian autocrat in the United States must be to strengthen majoritarian institutions.

Soon after taking back the House majority in 2019, Democrats passed H.R. 1, a sweeping elections and ethics bill that establishes public financing for congressional elections, ends partisan gerrymandering, and bars states from disenfranchising Americans on condition of prior incarceration.¹⁸⁴ Importantly, it restores the Voting Rights Act, gutted by the Supreme Court’s decision in *Shelby County v. Holder*.¹⁸⁵ In 2018, election officials executed large-scale voter purges in minority neighborhoods, imposed burdensome identification requirements on minority communities,¹⁸⁶ and put overwhelmingly Black, Latinx, and Asian voter

179. *Id.* at 8.

180. *Id.* at 3.

181. *Id.* at 12.

182. See Holly Jackson, *It’s Time to Make Election Day a Holiday — In Law and Spirit*, WASH. POST (Oct. 22, 2018), <https://www.washingtonpost.com/outlook/2018/10/22/its-time-make-election-day-holiday-law-spirit/>.

183. See Josh Chafetz, *Why We Should Abolish the Electoral College*, N.Y. TIMES (Oct. 4, 2020), <https://www.nytimes.com/2020/03/17/books/review/let-the-people-pick-the-president-jesse-wegman.html> (reviewing JESSE WEGMAN, *LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE* (2020)).

184. For the People Act of 2019, H.R. 1, 116th Cong. (2019); see Mike DeBonis & John Wagner, *House Democrats Pass H.R. 1, Their Answer to Draining the Swamp*, WASH. POST (Mar. 8, 2019), https://www.washingtonpost.com/powerpost/house-democrats-prepare-to-pass-hr-1-their-answer-to-draining-the-swamp/2019/03/08/740f6b48-415b-11e9-9361-301ffb5bd5e6_story.html.

185. See Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, ATLANTIC (July 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/>.

186. See, e.g., Ida Adibi, Note, *Voting While Trans: How to Combat Voter ID Laws & Disenfranchisement of the Transgender Community*, GEO. J. GENDER & L. ONLINE (2020), https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2020/11/Final_Ida-Adibi_Voter-ID-Laws_Issue-1.pdf [<https://perma.cc/UJ7F-CTZU>] (criticizing voter identification laws for their role in limiting voter participation, and focusing on the “particular threat to the transgender community”).

registrations on hold.¹⁸⁷ Passing H.R. 1—now known as the For the People Act of 2019—would just be the beginning of the road to equal voting rights and to protecting the elected branches from authoritarian domination. After Mitch McConnell refused to bring the bill up for a vote,¹⁸⁸ Democrats should use their Senate and House majorities to garner bipartisan support for this bill, even if that means doing away with the filibuster rules that require a sixty-vote majority.

Other important federal legislation may allay the uncertainty that accompanies attempted government takeovers. For instance, Republican leaders have expressed a willingness to explore a reform of the Electoral Count Act, the law that outlines the procedures for certifying elections.¹⁸⁹ Such a compromise, which would explicitly constrain the Vice President's ability to reject electoral results that members object to, has received support from some of the most centrist members of the Democratic caucus, but it would not ameliorate voter disenfranchisement or attempts by state legislators to exert control over electoral results.¹⁹⁰ If Democrats are willing to abolish or reform the filibuster, Congress could also pass narrower measures making it a crime not to count, in the absence of a factual adjudication of determinative fraud, the votes of a state or affirmatively precluding federal executive departments from ever taking possession of state ballots.¹⁹¹

Given the unlikelihood of such broad-ranging reform, state legislatures will have the most important role to play. Because it is difficult to amend the

187. Wendy R. Weiser, Daniel I. Weiner & Dominique Erney, *Congress Must Pass the 'For the People Act,'* BRENNAN CTR. FOR JUST. (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/case-hr-1> [https://perma.cc/5Y87-T8UT]. For all it would do to improve the political representation of minorities, the liberal American Civil Liberties Union notably urged members of Congress to vote against it. See Letter from Ronald Newman, Nat'l Pol. Dir., ACLU, Kate Ruane, Senior Legis. Couns., ACLU, & Sonia Gill, Senior Legis. Couns., ACLU (Mar. 6, 2019), https://www.aclu.org/sites/default/files/field_document/aclu_h_r_1_vote_recommendation_letter.pdf [https://perma.cc/M64H-FZGG] (contending that H.R. 1 would “burden the speech and associational rights” of Americans).

188. Mitch McConnell, Opinion, *Mitch McConnell: Behold the Democrat Politician Protection Act*, WASH. POST (Jan. 17, 2019), https://www.washingtonpost.com/opinions/call-hr-1-what-it-is-the-democrat-politician-protection-act/2019/01/17/dcc957be-19cb-11e9-9ebf-c5fed1b7a081_story.html (describing the Act as an “outlandish Democrat proposal”).

189. See Burgess Everett, *McConnell Cracks Door to Electoral Count Act Reform*, POLITICO (Jan. 5, 2022, 5:36 PM), <https://www.politico.com/news/2022/01/05/mcconnell-electoral-count-act-reform-526542> [https://perma.cc/5F8C-KCSJ]; Susan Collins, Opinion, *Susan Collins: Our Democracy Shouldn't Rest on a Rickety Law*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/opinion/politics/susan-collins-eca-reform.html>.

190. See Li Zhou, *What Congress's New Election Reform Idea Leaves Out*, VOX (Jan. 22, 2022, 7:30 AM), <https://www.vox.com/22891901/electoral-count-act-subversion-voting-rights-congress> [https://perma.cc/AY62-SX7M].

191. A draft executive order never signed by Trump would have directed the Secretary of Defense to seize election voting machines and have designated a special counsel within the Department of Justice to probe the election. Trump himself was involved in the proposal. See Betsy Woodruff Swan, *Read the Never-Issued Trump Order that Would Have Seized Voting Machines*, POLITICO (Jan. 25, 2022, 11:34 AM), <https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572> [https://perma.cc/6TXC-JEAY]; Alan Feuer, Maggie Haberman, Michael S. Schmidt & Luke Broadwater, *Trump Had Role in Weighing Proposals to Seize Voting Machines*, N.Y. TIMES (Jan. 31, 2022), <https://www.nytimes.com/2022/01/31/us/politics/donald-trump-election-results-fraud-voting-machines.html>.

Constitution to abolish the Electoral College, states—especially swing states that Biden won in 2020—may choose instead to bind their legislatures to the results of the popular vote because the Constitution does not prescribe how states must certify their slates of electors. State legislatures could legally bind themselves to certifying only one slate of electors: the one chosen by the people of that state. Already an effort to make this nationwide popular vote a reality is underway. The National Popular Vote Interstate Compact is a model agreement among the states to elect the President by popular vote, and sixteen states possessing 195 electoral votes have already joined it by enacting a bill to that effect.¹⁹² The bill has passed at least one chamber in nine additional states with eighty-eight more electors.¹⁹³ While some commentators have suggested the compact may be an unconstitutional agreement among states¹⁹⁴ or may violate the guarantee of a republican form of government,¹⁹⁵ the appointment of electors is within the plenary power of the states,¹⁹⁶ and it is at least an open question as to how the courts would react to the compact if, for instance, the change was enacted through state-level ballot initiatives with grassroots popular support.

Lastly, state legislatures should pass laws to cooperate with international organizations in their electoral observation missions. Currently, only seven states and the District of Columbia have explicit guidance in their statutes to allow for international nonpartisan observers.¹⁹⁷ More reports like the OSCE's would hold American officials accountable for potential election abuses or misconduct, as well as send a message that the United States is willing to scrutinize its own systems of governance in the name of democracy. While such monitoring delegations have no enforcement mechanisms (neither in the United States nor anywhere else in the world), they can begin to unsettle the notion that the text of the Constitution is enough to guarantee a fully participatory democracy. Such international accountability mechanisms, if taken seriously, can guard against autocratic manipulation.

CONCLUSION

To remind us of what *we are not*, democratic leaders tend to tactfully place appeals to the specter of authoritarianism in their high-minded speeches.¹⁹⁸ One

192. *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE!, <https://www.nationalpopularvote.com/written-explanation> [<https://perma.cc/FM26-RFXD>] (last visited Apr. 23, 2022).

193. *Id.*

194. *See, e.g.*, Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 373–76 (2007).

195. *See, e.g.*, Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427, 1429 (2009).

196. *See* Jamie B. Raskin, *Neither the Red States nor the Blue States but the United States: The National Popular Vote and American Political Democracy*, 7 ELECTION L.J. 188, 193 (2008).

197. *See* Policies for Election Observers, NAT'L CONF. STATE LEGISLATURES (Oct. 13, 2020), <https://www.ncsl.org/research/elections-and-campaigns/policies-for-election-observers.aspx#international> [<https://perma.cc/P8Y9-TLFA>].

198. *See* Mark Jia, *Illiberal Law in American Courts*, 168 U. PENN. L. REV. 1685, 1686–87 (2020).

year after a deadly insurrection at the Capitol, President Joe Biden stood in the iconic Statuary Hall in a solemn moment of remembrance, attempting to convince the public that what had happened there was an aberration—that unlike in places such as China and Russia, the transfer of power could only happen peacefully in America, “never at the tip of a spear or the barrel of a gun.”¹⁹⁹ Five days later, in an Atlanta speech on voting rights, Biden said that voter suppression and election subversion are “the kind of power you see in totalitarian states, not in democracies.”²⁰⁰ But taken together, the demise of democracy in Venezuela and the United States offer overriding lessons on what we *have* become, and what may still lay ahead.

Chief among these lessons is that reliance on constitutions—new or old—is insufficient. History is filled with authoritarian figures who rose and clung to power by subverting or rewriting the constitution. Their new constitutions often removed term limits, undermined judicial independence, and gave the executive excessive control over federal elections.²⁰¹ In 1999, Chávez used majoritarian tools to rewrite the Venezuelan Constitution with broad popular support but later manipulated it. Since 2020, Trump and his allies have also been tacitly rewriting the U.S. Constitution—in silence, through its minoritarian institutions, wagering that no one in Washington will have the courage to enforce the document’s oft-praised checks and balances.

Venezuela offers the example of how strongmen can exert excessive control over federal elections when they are centralized. Contrary to the Madisonian decentralized system that buttresses U.S. elections, Venezuelan elections are wide open to fraud, as has been documented throughout *chavismo*’s tenure in government.²⁰² For many strongmen, including Chávez, elections are their only source of legitimacy. They seek to manipulate elections and change results to

199. Joseph R. Biden, Jr., U.S. President, Remarks by President Biden to Mark One Year Since the January 6th Deadly Assault on the U.S. Capitol (Jan. 6, 2022) (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/06/remarks-by-president-biden-to-mark-one-year-since-the-january-6th-deadly-assault-on-the-u-s-capitol/> [<https://perma.cc/KD2T-LC2Q>]).

200. Joseph R. Biden, Jr., U.S. President, Remarks by President Biden on Protecting the Right to Vote at the Atlanta University Center Consortium (Jan. 11, 2022) (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/11/remarks-by-president-biden-on-protecting-the-right-to-vote/> [<https://perma.cc/SLL2-D4CU>]).

201. Not every constitutional reform project signals a necessary turn to autocracy. In Chile, for example, an ongoing constitutional reform project aims to explicitly reject the authoritarian constitution enacted during the military dictatorship of Augusto Pinochet. See *Jubilation as Chile Votes to Rewrite Constitution*, BBC (Oct. 26, 2020), <https://www.bbc.com/news/world-latin-america-54687090> [<https://perma.cc/EC9F-V3G8>]. The new leftist president, Gabriel Boric, will face the task of bolstering public support ahead of a 2022 referendum to approve the final text. See Cristian Farias, Opinion, *This Is a Do-or-Die Moment for Chile’s Incoming President*, N.Y. TIMES (Dec. 24, 2021), <https://www.nytimes.com/2021/12/24/opinion/chile-president-boric.html>.

202. See Antonio Maria Delgado, *Maduro Claims Election Victory, Leaving Venezuela with Three Congresses amid Fraud Claims*, MIA. HERALD (Dec. 7, 2020), <https://www.miamiherald.com/news/nation-world/world/americas/venezuela/article247677735.html>; see also Javier Corrales, *Democratic Backsliding Through Electoral Irregularities: The Case of Venezuela*, EUR. REV. LATIN AM. & CARIBBEAN STUD., Jan.–June 2020, at 41, 41 (discussing how “electoral irregularities contributed to democratic backsliding in Venezuela under *chavista* rule”).

bolster their claim that they are following the will of the people. By consistently claiming that he alone represented that will, and that the people could choose to overthrow the Constitution and enact a new one, Chávez brought about a political transformation over many years that guaranteed his party would remain unchallenged.

While Venezuela would likely benefit from establishing minoritarian mechanisms such as decentralized elections, the American example demonstrates that such counterweights are not panaceas because parties can dominate politics. By legislating a system that protects their permanence in power, Republicans have been able to gradually tighten their grip on certain branches of governments. Partisans played a significant role this election: a significant Republican donor oversaw the postal logistics of ensuring that Democratic votes would arrive in time to be counted, and Vice President Mike Pence could have claimed unilateral authority to decertify Biden's electoral votes. The only body that could have stopped him at that point would have been the conservative Supreme Court. If antidemocratic elements continue to pervade the Republican Party, and the party takes both houses of Congress in 2024, it is difficult to imagine why they would not feel emboldened to defend a stronger (and far smarter) authoritarian. Thus, legislation that fossilizes majoritarian democratic triggers where the Constitution is silent is necessary to guard against new mayhem.

Democracies, if they are to survive, require individuals who are willing to protect institutions more than they are willing to pursue their own political gains. Just weeks after the insurrection, the second Senate trial of former President Trump presented yet another test that political officials failed. Underenforced, constitutional provisions for holding officials accountable in the event of "Treason, Bribery, or other high Crimes and Misdemeanors,"²⁰³ amount to nothing more than mere suggestions.

Meanwhile, many Americans and the world²⁰⁴ will remember January 6, 2021, as an incredibly undemocratic date. Jenna Ryan, hours after storming the Capitol, tweeted: "It was one of the best days of my life."²⁰⁵

203. U.S. CONST. art II, § 4.

204. See Eli Yokley, *Capitol Riot Reverses Positive Trend in America's Global Reputation That Followed Biden's Victory*, MORNING CONSULT (Jan. 20, 2021, 12:01 AM), <https://morningconsult.com/2021/01/20/us-global-reputation-capitol-riot-polling/> [<https://perma.cc/E4FG-6BEE>].

205. Meryl Kornfield, *She Flew in a Private Plane to the Capitol to Support Trump. Now She Wants Donations to Cover Her Legal Fees*, WASH. POST (Jan. 22, 2021, 2:39 PM), <https://www.washingtonpost.com/dc-md-va/2021/01/22/jenna-ryan-private-jet-legal-fees/>.