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DONALD TRUMP, CONSTITUTIONAL FAILURE, AND THE GUARDRAILS OF DEMOCRACY

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The theme of this year's Schmooze Issue is constitutional revolution. This piece considers the end of Donald Trump's presidency, asking both how close the United States came to what would have been for many a highly undesirable constitutional revolution, and what guardrails prevented this revolution from occurring. The tradition of a peaceful transfer of power from administration to administration following established constitutional procedures, even in contentious moments or periods of crisis, has been a constant for more than 150 years. The events occurring between summer 2020 and January 2021 stand in contrast to this history, but we should not dismiss them as a bizarre outlier. Rather, they reveal significant gaps in our constitutional structure and open opportunities for manipulation, highlighting the possibility for successful revolution if political actors can exploit them. The fact that the nation seems to have achieved a peaceful transfer of power should not blind us to the risks that continue to exist.

January 6, 2021, in retrospect, was an important inflection point. After the Trump Administration engaged in increasingly aggressive direct efforts to overturn the results of the November 2020 election, a lie-fueled mob temporarily blocked the congressional counting of electoral votes, threatening an outright insurrection.¹ President Trump declined to respond to the crisis, opting not to authorize a state response immediately, and required significant encouragement to quell the mob directly.² His response appalled Americans who saw the mob as an illegitimate attempt to launch an insurrection, but also failed to satisfy and further mobilize his supporters, some of whom appeared to be hoping for a direct call to resist the election results by any means necessary.³

This moment seemed to turn public opinion finally and definitively against Trump and Trumpism, leading to acrimonious finger-pointing and a

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1. Gary C. Jacobson, *Donald Trump's Big Lie and the Future of the Republican Party*, 51 *PRESIDENTIAL STUD. Q.* 273, 273–74 (2021).

2. *Mob Attack, Incited by Trump, Delays Election Certification*, N.Y. TIMES (July 25, 2021), <https://www.nytimes.com/live/2021/01/06/us/electoral-vote>.

3. *Id.*

rapid and cascading deplatforming of conspiracy theorists and Trump deadenders, and, of course, of Trump himself. He departed from the presidency on schedule on January 20, 2021, and Joseph Biden was duly sworn in. While concerns remained and National Guard members activated to provide security in Washington, D.C., remained there until March, the crisis appeared to pass. Nonetheless, it left a long and ugly postmortem period of impeachment and a second trial, criminal charges for more than 400 of the insurrectionists, and a stalled congressional investigation into the insurrection.⁴

Now that the dust has settled, those who were alarmed by these events and saw them as an existential threat to American democracy have relaxed somewhat. With the immediate threat of Trump now significantly reduced with his vexed departure from the presidency, the final wave of lawsuits having been denied certiorari by the Supreme Court,⁵ and the prospect of state-level investigations and prosecutions on the horizon,⁶ we can indeed issue at least two cheers. While the period between November 3, 2020, and January 20, 2021, provided a stringent stress test, the United States passed. The guardrails held, and many observers would argue that the courts were critically important in ensuring this outcome.

This Essay asks more specifically what guardrails did indeed hold and what we might learn from this. The answer is somewhat surprising: American democracy was rescued from the brink by the rule of law, but not through the mechanisms one would expect, those securing an orderly transition of power through democratic institutions. Law functioned as a guardrail, rather, by enabling social media behemoths to act together to deplatform the powerful false narrative of the stolen election, and then by rendering available the space for private actors—the companies associated with voting machines accused of engineering the steal—to hold individuals and other media corporations accountable for purveying untruths.

This is not good.

4. Alanna Durkin Richer & Colleen Long, *Charged in Jan. Riot? Yes, but Prison May Be Another Story*, AP NEWS (May 1, 2021), <https://apnews.com/article/politics-prisons-capitol-siege-government-and-politics-6a8c5849a733bb20d02633d2a74636c5>.

5. Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020), *cert. denied sub nom. Republican Party Pennsylvania v. DeGraffenreid*, 141 S. Ct. 732 (2021); Corman v. Pa. Democratic Party, docket no. 20-574, *cert. denied sub nom. Republican Party Pennsylvania v. DeGraffenreid*, 141 S. Ct. 732 (2021).

6. Madison Hall et al., *668 People Have Been Charged in the Capitol Insurrection So Far. This Searchable Table Shows Them All*, BUS. INSIDER (Sept. 24, 2021), <https://www.insider.com/all-the-us-capitol-pro-trump-riot-arrests-charges-names-2021-1>.

I. THE ELECTION AND LITIGATING THE FALSE CLAIMS OF THEFT

First, we must consider how the stolen election narrative was generated. As both the Trump and Biden campaigns understood, some swing states like Michigan and Pennsylvania had provided that mail-in ballots, heavily preferred by Democratic voters, could not be legally counted until either election day or afterward.⁷ Since in-person voting on election day heavily favored Trump, the initial reporting generated the impression that Trump had a heavy lead in these states on election night.⁸ But as counting proceeded in a year featuring both record-breaking turnout overall and unprecedented early voting and mail-in voting, Trump's leads dwindled, and state by state, the counts shifted in favor of Biden. Before the sun rose on the east coast on Wednesday, the former Vice President was leading in Wisconsin. Michigan soon followed. In Pennsylvania on election night, Trump held a staggering 700,000 ballot margin over Biden; by Friday, Biden's strong performance among early and absentee voters enabled him to take the lead.⁹

Two narratives describe what happened next. It became increasingly clear that Biden had defeated Trump heavily in the popular vote and had won Michigan, Wisconsin, Pennsylvania, Nevada, Arizona, and Georgia.¹⁰ These outcomes led various media outlets, including Fox News, to call the election for Biden. Narrative #1 proceeds as follows: The Trump campaign's increasingly frantic and absurd legal efforts to overturn the election's results were alarming, but honest state and local officials from both parties followed the existing rules to certify election results and state and federal judges closed down the Trump team's legal gambits. By the time the election reached the crucial deadlines of state certification on December 8, 2020, and the Electoral College's meeting on December 14, the die was cast, and many national Republican legislators and officials abandoned Trump, though few were willing to defy him openly.

An isolated and out-of-touch inner circle nonetheless reinforced Trump's belief that he had won the election. In concert with these officials,

7. See Laura Bronner, Anna Wiederkehr & Nathaniel Rakich, *What Blue and Red 'Shifts' Looked Like in Every State*, FIFETHIRTYEIGHT (Nov. 12, 2020), <https://fivethirtyeight.com/features/where-we-saw-red-and-blue-mirages-on-election-night/>; Eliza Griswold, *Pennsylvania's Blue Shift*, New Yorker (November 6, 2020) <https://www.newyorker.com/news/campaign-chronicles/pennsylvanias-blue-shift>.

8. Chris Kahn & Jason Lange, *Explainer: Red Mirage, Blue Mirage - Beware of Early U.S. Election Wins*, REUTERS (Oct. 22, 2020, 6:09 AM) <https://www.reuters.com/article/us-usa-election-mirage-explainer/explainer-red-mirage-blue-mirage-beware-of-early-u-s-election-wins-idUSKBN2771CL>.

9. See Bronner et al., *supra* note 7, discussing Pennsylvania.

10. *Presidential Results*, CNN, <https://www.cnn.com/election/2020/results/president> (last visited Oct. 4, 2021).

Trump attempted to achieve through executive posturing what he could not win by law. He encouraged Republican state legislators to intervene by invalidating the election results,¹¹ personally calling Georgia's Republican Secretary of State to demand that he find enough votes to change the state result.¹² Moreover, Trump supported and encouraged the January 6 insurrectionist mob that, by invading the Capitol, briefly delayed Congress's counting of the electoral votes.¹³ Despite these outrageous breaches of norms and laws, state and national political actors performed their constitutional duties. Biden's electoral votes were counted properly on January 6 (and into the wee hours of January 7); he was inaugurated on January 20; and the constitutional process of impeachment and a Senate trial served to highlight and condemn the egregious conduct by the outgoing administration—albeit without a definitive repudiation of Trump and Trumpism.

This story is one of a tested but functional system. Judges applied the law, rejecting Trump's challenges. State and local officials did not bow to direct pressure from the President himself. Congress, under personal physical threat, continued to count the electoral votes as cast and certified. The Vice President performed his limited ceremonial role. Biden's ascension to the presidency on this reading marks a return to normalcy, with impeachment and the Senate trial, even though conviction failed, as the appropriate sanction. Trump's legal maneuvers and the actions of his legal team appear nonsensical and incompetent; throughout the process, left-wing social media mocked the President, Rudy Giuliani, Jenna Ellis, and Sidney Powell.¹⁴ Trump's extralegal actions seemed finally to strip away his veneer of unconventionality, revealing him as a dangerous demagogue.

However, reading Trump's actions through a conventional political lens is likely a mistake.¹⁵ The alternative narrative, which takes Trump and Trumpism at face value as extra-institutional and illiberal, proceeds as follows. The lawsuits, rather than being legal arguments, are political

11. Heidi Przybyla, Dareh Gregorian & Adam Edelman, *After Meeting with Trump, Michigan Lawmakers Say They See Nothing to Overturn Biden's Win*, NBC NEWS (Nov. 20, 2020, 7:58 PM), <https://www.nbcnews.com/politics/white-house/michigan-gop-lawmakers-heckled-arrival-white-house-meeting-n1248396>.

12. Stephen Fowler, *'This Was a Scam': In Recorded Call, Trump Pushed Official to Overturn Georgia Vote*, NPR (Jan. 3, 2021, 9:15 PM), <https://www.npr.org/2021/01/03/953012128/this-was-a-scam-in-recorded-call-trump-pushed-official-to-overturn-georgia-vote>.

13. Dan Barry & Sheera Frenkel, *'Be There. Will Be Wild!': Trump All But Circled the Date*, N.Y. TIMES (July 27, 2021), <https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html>.

14. See discussion *infra* Part II.

15. Julie Novkov, *How Do We Solve a Problem Like the Donald? The Democratic Challenge of Trump Supporters and the Politics of Presidential Removal*, 40 NEW POL. SCI. 439, 453, 457 (2018).

arguments and non-democratic ones at that. The sloppiness of the suits and their failure to present any colorable claims give away their true purpose—to serve as a signaling device to Trump’s dedicated supporters, nurturing the toxic relationship between the President and his followers. This relationship does not rest upon democratic politics, and the events of the last year illustrate that our constitutional system allows room for non-democratic, potentially authoritarian forms of political engagement and political development. Upon review of these claims and their purpose, it appears that, rather than being a ham-handed adjunct to the extralegal campaign that culminated in the insurrection, Trump’s legal campaign was a key component of an overall effort to overturn the election results. The lawsuits, widely covered in a variety of media outlets as the Trump campaign knew they would be, communicated and amplified the stolen election narrative. They ensured that when the election was challenged, the challenges would collapse into support for Trump in the funhouse mirror frames of fake news and deep state anti-Trump coordination.¹⁶ Because the stolen election strategy ignored democratic public sphere argumentation, it proved impermeable to the institutional shoals that would ordinarily destroy such efforts.

The Trump campaign long laid groundwork for claims (not reasoned arguments) that the election was illegitimate. This groundwork took two different forms. One piece involved a conventional, if aggressively used, legal-political strategy: the filing of lawsuits to challenge voting methods that Republicans presumed would favor Democratic candidates, Biden in particular. The second was a demagogic political strategy: claiming in advance that the electoral systems in place would solicit and count illegal votes for Democrats. These two strategies converged around the unified claim that only legal votes as defined by the Trump campaign should be counted. I assert that the strategies also shared a primary audience and set of interlocutors: Republican supporters of Mr. Trump. The legal losses, therefore, had little impact on the lawsuits’ function as mobilizing devices. What finally turned the tide was the short-circuiting of Trump’s and his amplifiers’ capacity to mobilize. These bulwarks, while creative and effective for this moment, should worry us because of their fragility, their lack of alignment with institutional and democratic values at their core, and their function in allowing us to believe—wrongly—that “the system” worked.

16. See *id.* at 452–54 (describing this phenomenon earlier in Trump’s presidency).

II. LAWSUITS AS MOBILIZATION

Before the election began, both Democrats and Republicans were spoiling for a post-electoral battle in state and federal court. Marc Elias, the experienced and visible partner and chair of Perkins Coie's Political Law Group, coordinated Democratic efforts.¹⁷ Before the election, Elias and his associates brought suits to challenge laws restricting voting assistance, prohibiting transportation assistance to voters, enforcing election day deadlines for the receipt of mail ballots, subjecting college students to problematic identification requirements, and other issues.¹⁸ As the election approached, Elias and his team intervened in or defended against efforts to restrict early voting and mail-in balloting,¹⁹ and they challenged shifts in ballot drop-off and signature-matching rules adopted by elections officials to address coronavirus ("COVID-19") issues.²⁰

The lawyers supporting Trump also litigated prior to the election, filing suits primarily targeting Democratic turnout efforts. As Trump encouraged his supporters to vote in person on Election Day, Democratic mobilization focused heavily on early voting, mail-in balloting, and ballot drop-offs. Because state boards of elections or secretaries of state had put some of these systems into place in response to the rising COVID-19 threat, Republican strategists attacked these accommodations with little success, arguing that state legislatures alone can alter the conduct of elections and that voters have a reliance interest in stable electoral rules.²¹ Yet even as these conventional, if extreme, efforts proceeded, the Trump campaign was building a narrative of unfairness and election theft.

17. Marc Elias has since left Perkins Coie to start his own firm, the Elias Law Group, in order to "engag[e] more directly in the political and electoral process." Press Release, Perkins Coie, Perkins Coie and Its Political Law Group Announce the Formation of the Independent Firm Elias Law Group LLP (Aug. 22, 2021), <https://www.perkinscoie.com/en/news-insights/perkins-coie-and-its-political-law-group-announce-the-formation-of-the-independent-firm-elias-law-group-llp.html>.

18. Marc Elias, *A Bad Law Is a Bad Law*, DEMOCRACY DOCKET (Mar. 9, 2020), <https://www.democracydocket.com/2020/03/a-bad-law-is-a-bad-law/>; Marc Elias, *Vote by Mail Isn't Fair for Everyone*, DEMOCRACY DOCKET (May 24, 2020), <https://www.democracydocket.com/2020/05/vbm-for-young-and-minority-voters/>; Marc Elias, *Five Steps Colleges Must Take to Protect Student Voting*, DEMOCRACY DOCKET (Aug. 1, 2020), <https://www.democracydocket.com/2020/08/student-voting/>.

19. *E.g.*, *Crossey v. Boockvar*, 239 A.3d 14 (Pa. 2020) (per curiam); *League of Women Voters of New Hampshire v. Gardner*, No. 226-2017-CV-00433 (N.H. Super. Ct. Apr. 9, 2020), *aff'd sub nom.* *New Hampshire Democratic Party v. Sec. of State*, No. 2020-0252 (N.H. July 2, 2021).

20. *E.g.*, *Gilby v. Hughs*, 471 F. Supp. 3d 763 (W.D. Tex. 2020); *see also Election Litigation*, SCOTUSBLOG, <https://www.scotusblog.com/election-litigation/> (last visited Sept. 6, 2021) (the 2020 Election Litigation Tracker is a collaboration between SCOTUSblog and the Election Law at Ohio State).

21. *See, e.g., In re Hotze*, 627 S.W.3d 642 (Tex. 2020); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 364 (Pa. 2020) (per curiam).

After the election, Trump's legal team shifted to outright aggression, not only filing a blizzard of lawsuits but also trumpeting their claims across conservative news media and a wide range of social media platforms. They filed suits in Pennsylvania challenging the extension of vote-by-mail deadlines and rules restricting the positioning of election observers.²² In Michigan, the team claimed that the vote-counting process lacked transparency and demanded that certification be delayed; they also claimed that election officials committed crimes.²³ In Arizona, the team jumped on board a rumor that Republican ballots completed with Sharpie markers had been rejected.²⁴ They alleged in Georgia that late-arriving ballots had been illegally counted, enraging Republican Secretary of State Brad Raffensperger.²⁵ They also sought to delay vote counting in Nevada by challenging "irregularities" in Clark County, home to the Democratic stronghold of Las Vegas.²⁶

These efforts collapsed quickly in court. Trump's legal team, earlier populated by the high-powered litigation professionals one would expect for a public legal campaign of this magnitude, experienced defections, and Trump's long-time friend and supporter, Rudy Giuliani, took over the campaign. Flanked by Jenna Ellis and Sydney Powell, Giuliani sallied forth, but Powell was pulled in by the gravitational forces of the wildest conspiracy theories and Trump's team disassociated publicly from her.²⁷ Giuliani's one appearance in federal court on behalf of the Trump campaign was disastrous; he fumbled basic questions about the nature of the suit he was arguing and the standard of review.²⁸ The Trump legal team persisted in the face of defeat up through and including in the U.S. Supreme Court, which finally denied certiorari on February 22, 2021, for the Pennsylvania cases.²⁹

22. Miles Parks, *Trump Election Lawsuits Have Mostly Failed*, NPR (Nov. 10, 2020), <https://www.npr.org/2020/11/10/933112418/the-trump-campaign-has-had-almost-no-legal-success-this-month-heres-what-they-ve>.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Aaron C. Davis et al., *For Trump Advocate Sidney Powell, a Playbook Steeped in Conspiracy Theories*, WASH. POST (Nov. 28, 2020, 5:32 PM), https://www.washingtonpost.com/investigations/sidney-powell-trump-kraken-lawsuit/2020/11/28/344d0b12-2e78-11eb-96c2-aac3f162215d_story.html.

28. Jon Swaine & Aaron Schaffer, *Here's What Happened When Rudolph Giuliani Made His First Appearance in Federal Court in Nearly Three Decades*, WASH. POST (Nov. 18, 2020, 11:05 AM), https://www.washingtonpost.com/politics/giuliani-pennsylvania-court-appearance/2020/11/18/ad7288dc-2941-11eb-92b7-6ef17b3fe3b4_story.html.

29. Ariane de Vogue & Devan Cole, *Supreme Court Denies Election Appeal from Pennsylvania Republicans*, CNN (Feb. 22, 2021, 12:38 PM), <https://www.cnn.com/2021/02/22/politics/election-pennsylvania-republicans-supreme-court/index.html>.

The post-election filings promoted an obviously false narrative of a stolen election. The accusations of fraud and theft rested on two pillars: first, that voting machines had covertly changed votes cast for Trump into votes for Biden, and second, that illegal voters in urban areas of the contested states had illegitimately tilted the numbers for Biden. These claims fueled the pressure to do something to fight the election's certification, and even as the losses piled up in court, rallies were organized across the country. Trump tweeted public support and pressured state election officials and Republican legislative members in private to reverse outcomes in the selected states.³⁰ The rallies and Trump's advocacy all relied on the false narratives that the lawsuits universally rejected, but media coverage of the lawsuits maintained the Trump team's frame visibly in the presence of the public eye. Trump and his supporters independently amplified the message through direct traditional media appearances and rallies and through various social media platforms, particularly Facebook and Twitter.

III. CONSTITUTIONAL FAILURE

We begin from the premise that modern American democracy is mostly legitimate and has been mostly legitimate since the landmark legislation in the mid-1960s that dismantled the structural apparatus of Jim Crow. Since then, the nation has experienced political turmoil and challenge, and not all individuals seeking to contribute to the national political discourse have endorsed the fundamental principles of liberal democracy. Nevertheless, for the most part, the boundaries around elite public national political discourse have been liberal ones, and even when some individuals have advocated for non-liberal political transformations, they have done so within an overarching liberal framework. The story is one of increasing access to democratic processes: the elimination of property qualifications for suffrage in the antebellum era, Reconstruction's brief moment of inclusion for African American men, Progressive-Era democratizing constitutional changes of the Seventeenth and Nineteenth Amendments, the 1960s transformations eliminating poll taxes and enforcing the Fifteenth Amendment, and the extension of the right to vote nationally to 18-year-olds during the Vietnam War. This progressive narrative has its fits and starts, particularly recently with the rise of unregulated campaign spending and the major retrenchment in the Voting Rights Act in the wake of *Shelby County v. Holder*.³¹ Nevertheless, we generally believe voting and elections matter and expect

30. See *supra* notes 11–12 and accompanying text.

31. 570 U.S. 529 (2013).

these processes to produce outcomes that might be depressing or infuriating, but legitimate.

Nonetheless, scholars and political observers have warned for years that the Constitution's structure and process for federal elections incorporate institutional relics designed to thwart democracy, intended originally to balance elite interests against each other and quell popular passions.³² The original Constitution's design insulated slavery against threat from a national popular movement, and the design features that accomplished this—most notably the Electoral College and equal state representation in the Senate and the Senate's institutional role—continued despite other democratizing reforms.

The Framers designed for a population where access to the ballot was limited and could be controlled on the state and local level. The states' relationships with each other gave them the incentives to manage their electoral processes and to guard this power from federal encroachment. As political scientist Alec Ewald has shown, the local nature of elections was hardwired into the system from the beginning and served as one of the foundational elements of American federalism.³³

In such a system, what would constitute systemic or constitutional failure? Law professor Mark Brandon provides a helpful typology.³⁴ He identifies (1) failures of constitutionalism; (2) failures of a constitution itself; (3) failures of constitutional order; and finally (4) failures of constitutional discourse.³⁵ These failures capture different domains, and failure within one domain may not pose an existential threat to a constitutional project, but any failure will likely instigate dynamism in the system. Yet, they illuminate the constitutive part of constitutionalism: the voluntary and principled limits a constitution imposes around which people can construct and consolidate a political identity.³⁶

This taxonomy of failure encourages practical consideration of what constitutions are expected to accomplish and whether they are achieving their goals. In Brandon's terms, this requires a constitutional regime to follow its own procedures, that the establishing procedures should “represent the

32. See, e.g., Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 61–66 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

33. See generally ALEC C. EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE* (2009).

34. See Mark E. Brandon, *Constitutionalism and Constitutional Failure*, GOOD SOC'Y, No. 2 1999, at 61, 63.

35. *Id.*

36. MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* 12 (1998).

fundamental aim of the regime,” that the normal operational procedures should be matters of reflective choice, that regime policies should meet a minimal threshold of rationality, and finally, that a regime should respect any other regime claiming authority secured through the same standards and practices.³⁷ He identifies two examples of constitutional failure: the founding (which violates the reflective choice condition by excluding major classes of denizen) and the Civil War (which incorporated systemic collapse).³⁸

Some protections against electoral and constitutional failures are legal and institutional. The safeguards that prevent constitutional failure from starting in one dimension and spreading are within the system, activated by checks and balances and, as the Constitution grew to incorporate more of the people who owed allegiance to it, through the democratic process itself. The two failures Brandon identifies prompted constitutive processes that knit together a constitution and a constitutional order that could survive for a time. Each constitutional order and its respective re-legitimation process depended upon not only the mechanisms in the Constitution itself, but also on the actions of the national state to promulgate and activate constitutional discourse, and to enforce constitutional norms. By this reading, Reconstruction might be more properly understood as reconstitution, with the Thirteenth through Fifteenth Amendments serving as the constitutive process and empowering the national state to do the work.

The reconstitution of Reconstruction was incomplete. It achieved a new order and created the groundwork for a new constitutional discourse. It was followed by a second, and less recognized-as-such constitutional failure spanning the years from 1877 to 1896. Political scientist Pamela Brandwein explains how the Fuller Court demolished the foundations of the new constitutional enterprise that the Waite Court, Congress, and President Grant had initiated.³⁹ The new order arising from the second post-war reconstitution failed on Brandon’s first metric spectacularly, but through white agreement to accept a federal system incorporating white supremacist state-building, the order itself succeeded and began to establish its own constitutional discourse.⁴⁰ The success of a constitutional project can only be seen in retrospect, and after success, it can be difficult to look back and perceive uncertainty about the outcome or to judge the scope of the threat.

37. Brandon, *supra* note 34, at 64.

38. *Id.* at 64–65.

39. PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 184–92 (Maeva Marcus et al. eds., 2011).

40. See JULIE NOVKOV, *RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA 1865–1954*, at 29–67 (2008).

IV. COLLAPSE OF AN ORDER

The current crisis arises from structure, law, and politics. The dead hand of slavery remains in the Constitution in the Senate—a body so anti-democratic and antithetical to American democratic values that the Supreme Court prohibited its structure to the states in the 1960s—and in the Electoral College. Recent Supreme Court decisions have allowed nearly unlimited spending in American elections by corporations and individuals.⁴¹ The foundations of the Voting Rights Act have been shaken, with many states exercising the new latitude that the Supreme Court granted to make access to voting more difficult, particularly for people of color.⁴² Partisan division in the United States has sharpened as median party positions have increased in separation and individual party members have shifted away from the center, particularly among Republican Party members.⁴³ Brandon's criteria raise cause for great concern.

Threats of crisis and failure abound. One might argue that the rise of voting restrictions and the active framing by the left of these restrictions as anti-democratic raises the prospect of failure of constitutionalism. The election of 2020 both bared and amplified a fundamental divide over who should be eligible to vote, what limitations and checks are appropriate, and what votes are legitimate. The electoral vote and popular vote for President have diverged twice in the past twenty years, and the balance of power in the Senate often does not reflect the partisan orientation of the nation on the whole. Voices on both sides of the political spectrum have claimed recently that these conditions violate constitutionalism either by misallocating the weight of representation or by insufficiently monitoring and controlling democratic participation.⁴⁴

41. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329–66 (2010) (striking down limits on campaign spending for corporations and outside groups); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218–20 (2014) (striking down aggregate limits on individual contributions to political campaigns).

42. *Shelby Cnty. v. Holder*, 570 U.S. 539 (2013). See, e.g., Catalina Feder & Michael G. Miller, *Voting Purges After Shelby: Part of Special Symposium on Election Sciences*, 48 AM. POL. RSCH. 687, 687–88 (2020).

43. Daniel Diermeier & Christopher Li, *Partisan Affect and Elite Polarization*, 113 AM. POL. SCI. REV. 277, 279–81 (2019); *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions*, PEW RSCH. CTR. (Dec. 17, 2019), <https://www.pewresearch.org/politics/2019/12/17/in-a-politically-polarized-era-sharp-divides-in-both-partisan-coalitions/>.

44. See, e.g., Ian Millhiser, *America's Democracy is Failing. Here's Why*, VOX (Jan. 13, 2021, 3:36 PM), <https://www.vox.com/policy-and-politics/2020/1/30/20997046/constitution-electoral-college-senate-popular-vote-trump> (arguing that the Senate is catastrophically undemocratic); Hans A. von Spakovsky, *How to Make Sure the 2020 Election Never Happens Again*, HERITAGE FOUND. (Dec. 8, 2020), <https://www.heritage.org/election-integrity/commentary/how-make-sure-the-2020-election-never-happens-again> (expressing alarm and concern about election security issues).

This debate and its ugly and violent iteration in connection with the 2020 election reveal a breakdown of constitutional discourse relating to disagreement about maintaining the foundations of American constitutionalism as a liberal order. I argued previously that one hallmark of the Trump presidency has been his capacity to mobilize his supporters around white identity and a rejection of some democratic norms.⁴⁵ The discourse around Trump and the Trump presidency from his supporters frames America by hearkening back to a pre-civil rights greatness in which the settled order largely excluded people of color and immigrants from the possession and exercise of political authority and democratic participation, and in some cases, from the country itself. Further, the Trump presidency illustrated that polarization has become a dual phenomenon, with both elites and the mass public separating on parallel tracks, as the mass public increasingly embraced alternatives to the American liberal tradition.⁴⁶

These factors overdetermined that the 2020 election would be not just controversial, but a potential constitutional stress test. It was easy to see this coming. Scholars began running surveys to assess the health of American democracy in 2017,⁴⁷ warned of the dangers of Trump and Trumpism,⁴⁸ showed how the Trump presidency constituted significant and dangerous changes in American political development,⁴⁹ and even advised that hardcore Trump supporters would not accept Trump's departure from office without turning to violence.⁵⁰

The assault on constitutionalism and democracy was coordinated and executed systematically, beginning before the election and culminating on January 6. The Constitution's structural protections for elections and the peaceful transfer of power presume state management and control of elections, potentially under federal oversight, but without the capacity of individual states to interfere in other states' electoral processes. The structure presumes further that the Electoral College will function and not experience its rare failures—a presumption that ignores the mechanical and ceremonial

45. Novkov, *supra* note 15, at 447–52, 457.

46. See generally Paul Nolette, *Trumpism and the Dual Tracks of American Polarization*, in *AMERICAN POLITICAL DEVELOPMENT AND THE TRUMP PRESIDENCY* 68 (Zachary Callen & Philip Rocco eds., 2020).

47. *American Democracy at the Start of the Biden Presidency*, BRIGHT LINE WATCH <http://brightlinewatch.org/american-democracy-at-the-start-of-the-biden-presidency/> (last visited Sept. 7, 2021).

48. See generally JEFFREY C. ISAAC, #AGAINST TRUMP: NOTES FROM YEAR ONE (2018); Lillian Mason, Julie Wronski & John V. Kane, *Letter: Activating Animus: The Uniquely Social Roots of Trump Support*, 115 AM. POL. SCI. REV. 1508 (2021).

49. See generally *AMERICAN POLITICAL DEVELOPMENT AND THE TRUMP PRESIDENCY*, *supra* note 46.

50. Novkov, *supra* note 15, at 455–56.

process of the congressional vote count, either in constitutional or statutory terms.

The threat of a constitutional failure is thus the failure of these mechanisms to function properly. Asserting that the Constitution passed the stress test simply points to the courts' unwillingness to allow states to call other states' voting processes into question, and to Congress's accomplishment of its constitutionally delegated task of counting electoral votes. But while these developments staved off the immediate threat that Trump would remain in office, they did nothing to resolve the underlying failure: that of constitutional discourse, and of the order itself.

These failures trace to Trump and Trumpism, which themselves are culminations of longer processes. Constitutional discourse depends upon a shared vision of constitutionalism and a shared framework for constitutional choice. Increased partisan polarization, the near collapse of an accessible middle in national legislative politics, and the sharp rightward turn of invested Republican partisans have followed and been reinforced by increasing incompatibility between competing visions of the American state. Accelerating drastically during the Trump years, we see a conundrum in American politics. The Trump wing of the Republican Party understands itself to be authentically American in an identity-based sense, but it simultaneously rejects the liberal democratic foundations of the American state while portraying its political engagements and activities as the representation of the true will of the people. This self-understanding makes sense of this wing's continued support of Trump, of the insistence on legal versus illegal votes, and of the fixation on the narrative of a stolen election. In this internalized logic, any electoral result that does not favor Trump is illegitimate, not because of a factual evaluation of the circumstances that reveals fraud, but because the will of the people, rightfully understood, is to make America great. Those who eschew this agenda are to be disincorporated.

As political scientist Paul Nolette notes, the mass public support for Trump during the campaign rested upon non-liberal frames, but party elites followed for the opportunity to advance neoliberal economic agendas.⁵¹ Throughout the Trump presidency, the mass public supporting Trump cohered around what Gwendoline Alphonso describes as "race-based identity nationalism."⁵² In this light, we can see why the failure of the lawsuits, while salient within the normal boundaries of political developments, had no

51. Nolette, *supra* note 46, at 70.

52. Gwendoline Alphonso, "One People, Under One God, Saluting One American Flag": Trump, the Republican Party, and the Construction of American Nationalism, in AMERICAN POLITICAL DEVELOPMENT AND THE TRUMP PRESIDENCY, *supra* note 46, at 55.

impact on beliefs about the stolen election narrative. The failure of the lawsuits, rather than undermining the narrative, fueled a wave of Republican-initiated state legislative proposals to limit or claw back broader ballot access initiatives undertaken during the 2020 election.

Table 1. Polling on the legitimacy/fairness of the 2020 election

DATE	Percent of voters believing election was legitimate/fair	Percent of Republicans believing election was legitimate/fair	Source
11/09/20	60% registered voters	30% registered Republicans	https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488
12/10/20	60% registered voters	23% registered Republicans	https://poll.qu.edu/national/release-detail?ReleaseID=3685
1/11/21	58% registered voters	21% registered Republicans	https://poll.qu.edu/images/polling/us/us01112021_usmk38.pdf
1/18/21	64% registered voters	28% registered Republicans	https://poll.qu.edu/national/release-detail?ReleaseID=3687
4/02/21	57% respondents	27% Republican respondents	https://www.ipsos.com/sites/default/files/ct/news/documents/2021-04/topline_write_up_reuters_ipsos_trump_coattails_poll_-_april_02_2021.pdf
5/26/21	64% registered voters	25% registered Republicans	https://poll.qu.edu/images/polling/us/us05262021_uslf38.pdf

The stolen election narrative was established by the time the election was called and actually grew among Republican voters as the fruitless

lawsuits saw defeat after defeat in court, as states completed their certification process, and as the Electoral College met. Even in the immediate wake of the attack on the Capitol, the stolen election narrative retained its power despite a wave of media coverage, even on Fox News, denying the lies about illegal voters and voting machine manipulation. While the narrative weakened a bit in subsequent months, it has not collapsed, and substantial numbers of Americans still believe that Donald Trump was cheated out of a second term.

The narrow miss was not really a narrow miss at all. Even as Congress completed its duty in the wee hours of January 7, the threat had not ended and much irremediable damage had been done. The structural bulwarks were shaken to their core. The courts had behaved in conventionally legalistic ways in denying the suits, but their nearly universal rejection of the stolen and fraudulent election claims did not substantially shift hardened perceptions on the right. The longstanding trust in the courts as institutions proved insufficient to legitimate the election's integrity. Institutions, structure, norms, and rule of law, even together, could not provide the full measure of security needed to protect against the threat.

V. THE OTHER GUARDRAILS

Given this extreme crisis of confidence and the failure of state-based structures to reconcile Trumpers to the legitimacy of Trump's electoral loss, why do so many Americans think the crisis has passed? A hint may be found in the slight shift in polling numbers in the above table on the legitimacy of Biden's electoral victory between January 11 and January 18. During that time, a shift that had previously been occurring quietly and alongside other initiatives moved forward aggressively and visibly into the public. Several new limits were imposed on the stolen election narrative and Team Trump's capacity to promulgate it broadly. These limits were not the result of any state action. Rather, they were actions taken by private companies that either portrayed their interests as taking a stand for democracy or actions that limited their own potential liability in light of the threat of legal actions against them.

Table 2. Timeline of private actions imposing limits

Date	Platform/ Actor	Action	Source
1/6/21	Twitter	Banner warning on Trump tweets; blocking of retweets	https://techcrunch.com/2021/01/09/the-deplatforming-of-a-president/

1/6/21	Twitter	12-hour account lock	https://techcrunch.com/2021/01/09/the-deplatforming-of-a-president/
1/6/21	Facebook and Instagram	24-hour suspension of Trump's account and related accounts	https://www.washingtonpost.com/technology/2021/01/11/trump-banned-social-media/
1/7/21	Facebook and Instagram	Indefinite suspension of Trump's account and related accounts	https://www.washingtonpost.com/technology/2021/01/21/facebook-oversight-board-trump-ban/
1/8/21	Twitter	Permanent ban on Trump and his use of affiliated Twitter handles	https://techcrunch.com/2021/01/09/the-deplatforming-of-a-president/
1/8/21	Twitter	Permanent ban on Michael Flynn, Sidney Powell, and Ron Watkins	https://techcrunch.com/2021/01/09/the-deplatforming-of-a-president/
1/8/21	Dominion Voting Systems	Election tech company filed \$1.3 billion defamation lawsuit against Sidney Powell for her claims about machine-based fraud	https://www.cnn.com/2021/01/08/politics/dominion-voting-defamation-lawsuit/index.html
1/10/21	Amazon Web Services	Removed support for Parler (conservative social media site)	https://www.washingtonpost.com/technology/2021/01/11/trump-banned-social-media/
1/12/21	YouTube	Suspension of Trump's channel "for a minimum of seven days"	https://www.washingtonpost.com/technology/2021/01/11/trump-banned-social-media/
1/14/21	Snapchat	Permanently disabled Trump's account	https://www.washingtonpost.com/technology/2021/01/11/tr

			ump-banned-social-media/
1/20/21	Facebook	Patriot Party (attempted new political party organized around Trump and his supporters) group deactivated after issuing threats of violence in response to Trump's ouster from social media	https://www.cnn.com/2021/01/18/tech/facebook-posts-promoting-violence/index.html
1/25/21	Dominion Voting Systems	Election tech company filed \$1.3 billion defamation lawsuit against Rudolph Giuliani for his claims about machine-based voter fraud	https://www.cnn.com/2021/01/25/politics/dominion-lawsuit-giuliani/index.html
2/4/21	Smartmatic	Election tech company filed \$2.7 billion defamation lawsuit against Fox Corporation, Fox News, anchors Maria Bartiromo, Lou Dobbs, and Jeanine Pirro, and Trump attorneys Rudolph Giuliani and Sidney Powell	https://www.nytimes.com/2021/02/04/business/media/smartmatic-fox-news-lawsuit.html
2/22/21	Dominion Voting Systems	Election tech company filed \$1.3 billion defamation lawsuit against Michael Lindell, MyPillow CEO	https://www.cbsnews.com/news/mypillow-ceo-mike-lindell-sued-dominion-voting-systems-1-3-billion/

Within a very short period of time, several of the key vehicles for reinforcing the stolen election narrative were drastically slowed or stopped.

As observers pointed out that much of the organizing for the January 6 attack had happened in plain view through Stop the Steal and other pro-Trump groups on Facebook, Facebook also began to rein in many of these groups (though by no means all of them or all Trump allies).⁵³ Parler, the right-oriented social media alternative to Twitter, was unable to secure a web host and was offline for a month.⁵⁴ When the app returned to Apple's App Store in May, uptake by new users was down drastically from its peak in January of 2021.⁵⁵

The lawsuits brought by Smartmatic and Dominion were important as well. The companies signaled in December that both Fox News and Newsmax were engaging in dangerous behavior, sending letters to the media outlets threatening litigation and demanding document preservation. Both networks issued intermittent disclaimers and caveats in their on-air coverage of the election, but their failure to repudiate the narrative comprehensively and consistently led the election tech companies to sue.⁵⁶

Trump supporters may be known for their eagerness to believe conspiracy theories about attacks on their heroes, but in some regards, they may in fact be correct. Molly Ball of *Time* points to "a terse, little-noticed joint statement of the U.S. Chamber of Commerce and AFL-CIO published on Election Day."⁵⁷ She argues that American leaders of labor and capital worked together for more than a year prior to November 2020 "to shore up America's institutions as they came under simultaneous attack from a remorseless pandemic and an autocratically inclined President."⁵⁸ Their effort, which helped Biden, but was neither linked to his campaign nor

53. Will Oremus, *The Battle Over Facebook's Top 10 List*, ONEZERO (Nov. 14, 2020), <https://onezero.medium.com/the-battle-over-facebooks-top-10-list-dc3fca3d799>. On the list for February 23, 2021, the top-performing link posts by this methodology included Franklin Graham (1), USA Patriots for Donald Trump (5), Ben Shapiro (6 and 7), Fox News (9), and Dinesh D'Souza (10). See Facebook's Top 10 (@FacebooksTop10), TWITTER (Feb. 23, 2021, 11:31 AM), <https://twitter.com/FacebooksTop10/status/1364251509806952448>.

54. Queenie Wong & Andrew Morse, *Parler Returns Online After Monthlong Absence: Here's What You Need to Know*, CNET (Feb. 16, 2021), <https://www.cnet.com/news/parler-returns-online-after-month-long-absence-heres-what-you-need-to-know/>.

55. Robert Hart, *Parler's Popularity Plummets as Data Reveals Little Appetite for Returning 'Free Speech' App Favored by Conservatives*, FORBES (June 2, 2021, 11:07 AM), <https://www.forbes.com/sites/roberthart/2021/06/02/parlers-popularity-plummets-as-data-reveals-little-appetite-for-returning-free-speech-app-favored-by-conservatives/?sh=794aa12c5e13>.

56. Dominic Patten, *Fox News, Rudy Giuliani & Newsmax Face "Imminent" Defamation Lawsuit Over Election Change Claims*, DEADLINE (Dec. 23, 2020), <https://deadline.com/2020/12/donald-trump-rudy-giuliani-fox-news-newsmax-lawsuit-election-fraud-dominion-voting-systems-joe-biden-1234661231/>.

57. Molly Ball, *The Secret History of the Shadow Campaign That Saved the 2020 Election*, TIME (Feb. 4, 2021, 5:40 AM), <https://time.com/5936036/secret-2020-election-campaign/>.

58. *Id.*

overtly in favor of his election, involved collaboration with state actors responsible for securing the vote and managing it effectively and employed public-facing strategies to strengthen narratives about the election's fairness.⁵⁹

Ball credits Mike Podhorzer, senior advisor to the AFL-CIO's president with a background in election data analysis, with recognizing the threat in late 2019. By Ball's account, he built a wide-ranging bipartisan outreach effort to address two dangerous but highly possible outcomes: a successful Trump effort to manipulate the vote illegitimately in enough states to win an Electoral College victory, and a Trump Electoral College loss that he would refuse to accept.⁶⁰ The COVID-19 outbreak and ensuing confusion and complications inserted into late primary processes heightened the risks, encouraging more players to come on board with the broad election security project.⁶¹

While activists successfully secured funding from Congress to ramp up processes to accommodate COVID-19 restrictions, private philanthropy filled the massive gap, and a nonpartisan organization, the National Vote at Home Institute, provided critical advice to state and local election officials on how to transition to a voting system that would, in many places for the first time, be primarily absentee and early.⁶² Other organizations did outreach work to convince voters that the new modes were secure and reliable.⁶³

Activists and researchers became increasingly alarmed by the rapid proliferation of disinformation and highlighted how engagement algorithms had the unintended effect of boosting toxic content when well-meaning individuals pushed back against it. Drawing on research by data analyst Laura Quinn, they pressed social media platforms to do more to choke off false and misleading content before it spread widely by tagging and taking down the most egregious examples.⁶⁴ Early in the electoral cycle, worries mounted that the Trump campaign was laying the groundwork to claim a victory regardless of the outcome by pressing false narratives about voting security and the potential for voter fraud and illegal voting, and that these narratives were spreading via these platforms.⁶⁵

The Chamber of Commerce reached out to Podhorzer shortly before the election, seeking to collaborate on a broad endorsement of a fair and peaceful

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

election. On election day, a joint statement came out from Chamber CEO Thomas Donahue, AFL-CIO President Richard Trumka, the National Association of Evangelicals, and the National African American Clergy Network.⁶⁶ The statement praised the record levels of turnout, but cautioned about dangers in the post-election period, asking that election officials “be given the space and time to count every vote” properly.⁶⁷ The statement called for patience and encouraged trust in the system, noting that “challenges are a normal part of every election.”⁶⁸ While the statement’s participants underlined their disagreements about the best electoral outcomes, they called for the process “to proceed without violence, intimidation, or any other tactic that makes us weaker as a nation.”⁶⁹ The statement closed by defining “[a] free and fair election” as “one in which everyone eligible to cast a ballot can, all ballots are counted consistent with the law, and the American people, through their votes, determine the outcome.”⁷⁰

This statement captured the coordinated message that the coalition pressed aggressively in the post-electoral period in a variety of venues. While Ball did not identify direct links between the coalitions’ activities and the news media, television anchors on election night were cautious about calling states. They explained that early vote counts should not be taken as representative of final outcomes and warned about the possibility of “red” or “blue shifts” in vote tallies based on when absentee versus in person ballots were being added to the count.⁷¹ Indeed, Fox called Arizona for Biden at 11:20 PM on election night based on their decision desk’s modeling strategies, doing so days before Edison Media and enraging Trump to the point of his directing Jason Miller to call Fox to demand a retraction.⁷²

Throughout the post-election period, Ball details the comprehensively organized work of activists who presented a confident stance of having won the election while countering GOP efforts to gin up theft narratives. When GOP observers menaced election workers counting ballots, activists were there to document proper procedures and to ensure that GOP observers would not overwhelm counting sites. Activists showed up at election board

66. *Id.*

67. Press Release, U.S. Chamber of Com., Business, Labor and Faith Leaders Call for Patience and Trust in Election Process (Nov. 3, 2020), <https://www.uschamber.com/press-release/business-labor-and-faith-leaders-call-patience-and-trust-election-process>.

68. *Id.*

69. *Id.*

70. *Id.*

71. Ball, *supra* note 57; Bronner et al., *supra* note 7.

72. Annie Karni & Maggie Haberman, *Fox’s Arizona Call for Biden Flipped the Mood at Trump Headquarters*, N.Y. TIMES (Nov. 16, 2020), <https://www.nytimes.com/2020/11/04/us/politics/trump-fox-news-arizona.html>.

meetings to counter GOP efforts to pressure investigations and challenges. When Trump haled Republican legislators to Washington, D.C., to discuss the election, activists immediately launched an all-out media campaign and conducted broad outreach to shore up support of Michigan's electoral results. Former governor and head of Michigan's Business Roundtable John Engler called key state GOP players.⁷³ A similarly detailed and multifaceted strategy was activated when the Trump campaign targeted the GOP canvassing board.⁷⁴

We know that Trump's serious bid to remain in the White House collapsed with the failure of the January 6 insurrection to prevent the counting of the electoral votes. Ball's analysis raises a darker interpretation—the possibility that Trump's call to his followers to gather in D.C. was a deliberate effort to provoke a violent and chaotic street conflict between them and leftwing activists—thereby justifying a suspension of the count and a heavily militarized intervention to keep the peace. The left did not take the bait, and the rest is uneasy history.

VI. DEMOCRATIC FRAGILITY

In short, the protective power of structure and institutions in this moment of crisis was limited. Faced with an unconventional political actor issuing unconventional political threats, a massive coordinated countermobilization barely preserved the outcome. It could not rescue constitutional discourse or restore constitutional order. To the extent that constitutional discourse is recovering, it is doing so because of actions undertaken by private corporations acting in their own interests.

What is the avenue forward? It is not easy to see. Deplatforming has reduced the public noise level of the Trumpist wing of the Republican Party, but as we are seeing, many elected officials and Republican elites are still reluctant to abandon the stolen election narrative. The Republicans who voted to impeach and convict Trump faced condemnation, some even from their own party chapters. If there's any doubt that the steal narrative is fundamentally regressive, one need only look at a wave of new attempts to restrict voting initiated in 2021. Illegal votes and illegal voters have clear meanings to those purveying the narrative, and their call for electoral reform is not a call for democracy.

Perhaps, though, it's too much to expect constitutional norms to stand as an effective bulwark against a non-liberal, non-democratic movement. We will remain perched unsteadily on democratic ground only as long as the

73. Ball, *supra* note 57.

74. *Id.*

incentives remain for targeted private resistance, sanctioning, and control of these elements. While this isn't a very hopeful projection, it is, I suppose, better than a civil war.