COUPS AND PUNISHMENT IN THE CONSTITUTIONAL ORDER

ANTHONY MICHAEL KREIS*

This Essay examines the historical and constitutional foundations of an anti-coup principle in the United States, emphasizing how state-level prosecutions deter and can appropriately punish election subversion. Tracing its roots to English constitutional history and the Glorious Revolution, the anti-coup principle rejects arbitrary executive power. It underscores the need for accountability to sustain democratic norms against presidential self-coup conspiracies. Highlighting how presidential systems are vulnerable to autocoups, the Essay argues that the decentralized nature of American presidential elections and constitutional provisions, such as the Guarantee Clause, empower states to act as guardians against authoritarian threats. It further explores the historical evolution of voting rights through state constitutions. The Essay illustrates states' foundational role in protecting free and fair elections alongside the federal government, which supports using state prosecutorial power to punish wrongdoers who conspire to overturn lawful presidential elections. The Essay concludes that preserving democratic institutions requires cultural safeguards and the active enforcement of accountability mechanisms at the state level, ensuring that no individual or group undermines the rule of law and citizens' right to vote with impunity.

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INTRODUCTION

When the rough beast of authoritarianism comes around, faith is democracy's first defense. Democratic institutions are susceptible to failure when the public is indifferent to their worth. In 1838, Abraham Lincoln imparted this lesson to the Young Men's Lyceum of Springfield,

* Assistant Professor of Law, Georgia State University College of Law. This Essay was prepared for the *Wisconsin Law Review*'s 2024 Symposium on State Law and Federal Elections. The Essay was measurably improved by engagement with symposium participants, especially Vik Amar, Josh Douglas, Ned Foley, Sandy Levinson, Miriam Seifter, Carolyn Shapiro, and Quinn Yeargain.

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Illinois.[1] And for good reason. Misfortune and angst befell the United States as destabilized banking policies, unreliable agricultural markets, and a real estate crash plunged the young nation into an economic recession.[2] Meanwhile, the American moral fabric showed worsening wear. Abolitionists labored to become a national movement, and pro-enslavement constituents of the Jacksonian regime fought back.[3] The murder of abolitionist Elijah Lovejoy by a pro-slavery horde in late 1837 punctuated the despair.[4] Reflecting on the mob violence and political unrest, Lincoln observed that an unhappy republic requires heightened vigilance against the threat of despotism and the attacks on constitutional values that precede it. Warding off democratic rot requires the public to cherish some transcendent norms. Lincoln warned that ignoring the rule of law's deterioration could create an opening for an American Caesar—a "[t]owering genius" that "thirsts and burns for distinction" outside established tradition.[5]

The election of 2020 revealed a hard truth: Even in advanced democracies, things fall apart. Like Lincoln's survey, discontent ran deep throughout the United States as Donald Trump's first term in office waned. Change and decay brooded over a fractured public. A global pandemic precipitated mass death, quarantine protocols, and an economic downturn.[6] Shocking, unjustified deaths of Black citizens at the hands of white police officers moved thousands of Americans to protest in the streets against systemic racism.[7] Trump Administration officials relished

1. Abraham Lincoln, Address Before the Young Men's Lyceum of Springfield, Illinois, on the Perpetuation of Our Political Institutions (Jan. 27, 1838), *in* 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 108, 112–13 (Roy P. Basler, Marion Dolores Pratt & Lloyd A. Dunlap eds., Rutgers University Press 1953).

2. Sara T. Damiano, Book Review, 36 J. EARLY REPUBLIC 420, 420–21 (2016) (reviewing JESSICA M. LEPLER, THE MANY PANICS OF 1837: PEOPLE, POLITICS, AND THE CREATION OF A TRANSATLANTIC FINANCIAL CRISIS (2013)).

3. *See* ANTHONY MICHAEL KREIS, ROT AND REVIVAL: THE HISTORY OF CONSTITUTIONAL LAW IN AMERICAN POLITICAL DEVELOPMENT 23–24 (2024) (detailing the nationalization of abolitionists' work in the 1835 mail campaign).

4. ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 23–24 (2010).

5. Lincoln, *supra* note 1, at 22.

6. *See* Karen Schwartz, *Driving and Travel Restrictions Across the United States*, N.Y. TIMES, https://www.nytimes.com/2020/04/10/travel/coronavirus-us-travel-driving-restrictions.html (May 5, 2020); Ben Casselman, *A Collapse that Wiped Out 5 Years of Growth, with No Bounce in Sight*, N.Y. TIMES, https://www.nytimes.com/2020/07/30/business/economy/q2-gdp-coronavirus-economy.html (Feb. 22, 2021); Lucy Tompkins, Mitch Smith, Julie Bosman & Bryan Pietsch, *Entering Uncharted Territory, the U.S. Counts 500,000 Covid-Related Deaths.*, N.Y. TIMES, https://www.nytimes.com/2021/02/22/us/us-covid-deaths-half-a-million.html (Oct. 1, 2021).

7. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

in the opportunity to crack down on mobilized dissent while the nation reeled, even floating the idea of invoking the Insurrection Act to suppress protesters.[8] All the while, white supremacist groups started to get in on the act, stoking unrest among demonstrators.[9] Trump was asked to repudiate militant groups' violent tactics at a presidential debate. He did not categorically condemn the provocateurs. Instead, the President suggested they "stand back and stand by."[10]

The nation reeled further toward chaos when Donald Trump doubted the security and fairness of the upcoming election. Trump, assisted by Department of Justice officials, fueled baseless conspiracy theories of rampant election fraud. The President and his allies claimed the explosion of mail-in ballot usage (because of the public health emergency) was crooked.[11] Conservative media outlets repeated the Administration's lies.[12] Trump encouraged Americans to descend on polling places to keep watch.[13] And bad actors heeded the call. Armed groups schemed to interfere with the election, including one plot to kidnap Michigan's Governor, Gretchen Whitmer.[14] While antidemocratic toxicity continued to spread, the President would not commit to the peaceful transfer of power if Joseph Biden defeated him.[15] *O tempora! O mores!*

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8. Michael S. Schmidt & Maggie Haberman, *Trump Aides Prepared Insurrection Act Order During Debate over Protests*, N.Y. TIMES (June 25, 2021), https://www.nytimes.com/2021/06/25/us/politics/trump-insurrection-act-protests.html.

9. Gianluca Mezzofiore & Katie Polglase, *White Supremacists Openly Organize Racist Violence on Telegram, Report Finds*, CNN, https://www.cnn.com/2020/06/26/tech/white-supremacists-telegram-racism-intl/index.html [https://perma.cc/Z9RD-97CY] (June 30, 2020, 11:18 AM).

10. Sheera Frenkel & Annie Karni, *Proud Boys Celebrate Trump's 'Stand by' Remark About Them at the Debate*, N.Y. TIMES, https://www.nytimes.com/2020/09/29/us/trump-proud-boys-biden.html (Jan. 20, 2021).

11. Michael S. Schmidt & Nick Corasaniti, *Justice Dept. Aids Trump's False Narrative on Voting*, N.Y. TIMES (Sept. 25, 2020), https://www.nytimes.com/2020/09/25/us/politics/mail-ballots-pennsylvania-justice-department.html.

12. Tiffany Hsu, *Conservative News Sites Fuel Voter Fraud Misinformation*, N.Y. TIMES, https://www.nytimes.com/2020/10/25/business/media/voter-fraud-misinformation.html (Nov. 6, 2020).

13. Amy Gardner, Joshua Partlow, Isaac Stanley-Becker & Josh Dawsey, *Trump's Call for Poll-Watching Volunteers Sparks Fear of Chaos and Violence on Election Day*, WASH. POST (Sept. 30, 2020), https://www.washingtonpost.com/politics/trumps-call-for-poll-watching-volunteers-sparks-fear-of-chaos-and-violence-on-election-day/2020/09/30/76ce0674-0346-11eb-b7ed-141dd88560ea_story.html.

14. Mitch Smith, *Two Men Convicted in Plot To Kidnap Michigan's Governor*, N.Y. TIMES (Aug. 23, 2022), https://www.nytimes.com/2022/08/23/us/verdict-trial-gretchen-whitmer-kidnap.html; Joshua Partlow, *Shouting Matches, Partisan Rallies, Guns at Polling Places: Tensions High at Early-Voting Sites*, WASH. POST. (Oct. 21, 2020), https://www.washingtonpost.com/politics/voter-intimidation-allegations/2020/10/20/6722d0ae-123e-11eb-82af-864652063d61_story.html.

15. 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.

Despite decisively losing to his challenger, Donald Trump bombarded the public with claims he won.[16] Election fraud, he falsely decried, was everywhere. Emergency rules to make voting safer in a pandemic were unlawful, he puled.[17] Stewing in defeat, Trump and his allies machinated against the public's will to keep Republicans in power. The plan included browbeating state election officials and gathering state and federal lawmakers to overturn the election.[18] The President and his surrogates ruthlessly defamed election workers, accusing them of wrongdoing.[19] The President criticized governors who refused to do his bidding.[20] Courts rejected the Trump campaign's unsubstantiated allegations of invalidly cast ballots.[21] But then there were some members of Congress who, in eager rivalry to ingratiate themselves to their defeated leader, proposed preposterous motions.[22] These legislators stood ready to invalidate the democratic process for the presidency without casting doubt on their electoral success. The betrayal peaked after the President whipped a mob into a frenzy on January 6, 2021, which descended on and attacked the U.S. Capitol to prevent legislators from

16. Jonathan Martin & Alexander Burns, *Biden Wins Presidency, Ending Four Tumultuous Years Under Trump*, N.Y. TIMES, https://www.nytimes.com/2020/11/07/us/politics/biden-election.html (Apr. 26, 2021).

17. Philip Ricker, Amy Gardner & Annie Linskey, *Trump's Escalating Attacks on Election Prompt Fears of a Constitutional Crisis*, WASH. POST (Sept. 24, 2020), https://www.washingtonpost.com/politics/trump-election-transition-crisis/2020/09/24/068d2286-fe79-11ea-8d05-9beaaa91c71f_story.html.

18. Maggie Haberman, Charlie Savage & Luke Broadwater, *Previously Secret Memo Laid Out Strategy for Trump To Overturn Biden's Win*, N.Y. TIMES (Aug. 8, 2023), https://www.nytimes.com/2023/08/08/us/politics/trump-indictment-fake-electors-memo.html.

19. Richard Fausset & Danny Hakim, *Inquiry Scrutinizes Trump Allies' False Claims About Election Worker*, N.Y. TIMES (Nov. 1, 2022), https://www.nytimes.com/2022/11/01/us/trump-georgia-election-ruby-freeman.html; Eileen Sullivan, *Jury Orders Giuliani To Pay $148 Million to Election Workers He Defamed*, N.Y. TIMES (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/us/politics/rudy-giuliani-defamation-trial-damages.html.

20. Lisa Lerer, Richard Fausset & Maggie Haberman, *As Trump Attacks Georgia Republicans, Party Worries About Senate Races*, N.Y. TIMES, https://www.nytimes.com/2020/11/30/us/politics/georgia-republicans-trump-kemp.html (Dec. 3, 2020).

21. David A. Fahrenthold, Elise Viebeck, Emma Brown & Rosalind S. Helderman, *Here Are the GOP and Trump Campaign's Allegations of Election Irregularities. So Far, None Has Been Proved.*, WASH. POST (Nov. 10, 2020), https://www.washingtonpost.com/politics/trump-election-irregularities-claims/2020/11/08/8f704e6c-2141-11eb-ba21-f2f001f0554b_story.html.

22. Nicholas Fandos & Emily Cochrane, *After Pro-Trump Mob Storms Capitol, Congress Confirms Biden's Win*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/congress-gop-subvert-election.html.

formally ratifying the election results.[23] There was no peaceful transfer of power.

The 2020 presidential election results were honored despite the violence and jawbone tactics. Joseph Robinette Biden Jr. took the oath of office on January 20, 2021, as the forty-sixth President of the United States.[24] People in power stood athwart autocracy's drumbeat and obeyed the voters' will. Not institutions alone, but also the Lincoln-like constitutional faith of those occupying them mattered. Many Americans, stunned by the brazen disregard for American democracy, naturally inquired about what justice for crimes against democracy might look like. Does faith in institutional norms and traditional practices not erode if failed autocoup participants walk away with impunity? What kind of justice is required in the wake of a failed presidential autocoup? Is there a danger in letting conspirators, who may continue to work on undermining trust in democratic institutions and norms, continue to participate in the electoral process? On whose shoulders does this responsibility all rest? Prosecutors in Arizona, Georgia, Michigan, and Wisconsin stepped into the breach for their state's interests alongside a case brought by the U.S. Department of Justice.[25]

Beyond the blood-soaked pages of civil war and rebellion, tiny coups dot the annals of America's nineteenth-century history.[26] Careful students of history understand that the perpetrators either relished in their success or enjoyed relative impunity, free to create false mythology about their lost cause and warp the nation's understanding of the past. Legal accountability for crimes against democracy is essential to maintaining faith in the rule of law. This principle should be constitutional in presidential systems. Presidentialism is acutely susceptible to autocoups because, unlike parliamentary democracies, executive power is likelier

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23. Peter Baker, *A Mob and the Breach of Democracy: The Violent End of the Trump Era*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/trump-congress.html.

24. Peter Baker, *Biden Inaugurated as the 46th President Amid a Cascade of Crises*, N.Y. TIMES, https://www.nytimes.com/2021/01/20/us/politics/biden-president.html (Jan. 26, 2021).

25. Glenn Thrush & Danny Hakim, *Georgia Case Lays the Ground for Parallel Prosecutions of Trump*, N.Y. TIMES (Aug. 15, 2023), https://www.nytimes.com/2023/08/15/us/elections/trump-indictments-willis-smith.html; Danny Hakim & Maggie Haberman, *Arizona Charges Giuliani and Other Trump Allies in Election Interference Case*, N.Y. TIMES (Apr. 24, 2024), https://www.nytimes.com/2024/04/24/us/arizona-fake-electors-trump.html; Danny Hakim, *Trump Named as Unindicted Conspirator in Michigan Election Interference Case*, N.Y. TIMES (Apr. 24, 2024), https://www.nytimes.com/2024/04/24/us/trump-michigan-election-interference.html; Alan Feurer & Charlie Savage, *Special Counsel Revises Trump Election Indictment To Address Immunity Ruling*, N.Y. TIMES, https://www.nytimes.com/2024/08/27/us/politics/trump-indictment-election-jan-6.html (Nov. 6, 2024).

26. *See* Anthony Michael Kreis, *The New Redeemers*, 55 GA. L. REV. 1483, 1487–88 (2021).

to lie at the margins of constitutional norms for want of direct majoritarian legislative constraints.[27] And but for federalism, presidentialism in American law could mean that participants in failed autocoup conspiracies might never have to answer for their attempt to dismantle democracy. State-level prosecutions for failed federal coups are vital for punishment and deterrence. These accountability mechanisms are lawful, justified by states' historical place in developing the right to vote and rejecting arbitrary rule as an original matter, as well as structural considerations. This Essay explores the *sine qua non* of state prosecutions to safeguard democracy against presidential self-coups as a historical principle and structural matter foundational to American constitutionalism.[28]

I. THE INHERITED ORIGINS OF THE ANTI-COUP PRINCIPLE IN AMERICA

The annals of democratic change in English constitutionalism span centuries. The Magna Carta laid down the principle that the king could not arbitrarily alienate free subjects of land, liberties, or legal remedies outside the "law of the land."[29] Royal power had a narrow set of formalized limitations that the king pledged to honor or suffer significant personal costs.[30] Nearly half a millennia later, England was thrown into a state of civil war after eleven years of Personal Rule under Charles I,[31] who later challenged the authority of Parliament to question his divine right to rule by initiating an autocoup by force against recalcitrant parliamentarians.[32]

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27. *See* Alfred Stepan & Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarianism Versus Presidentialism*, 46 WORLD POL. 1, 22 (1993).

28. This Essay does not address the doctrinal or evidentiary limits on any prosecution of a former President because of presidential immunity, which would apply to both state and federal indictments. *See Trump v. United States*, 144 S. Ct. 2312 (2024). This piece explores the normative legitimacy of state prosecutions related to a nationalized presidential election conspiracy, which can sweep well beyond any presidential candidate alone, through the lens of history and tradition.

29. *See generally* Roscoe Pound, *The Law of the Land*, 6 TENN. L. REV. 206 (1928).

30. A. E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 20–21 (rev. ed. 1998).

31. KEVIN SHARPE, THE PERSONAL RULE OF CHARLES I, at xv (1992).

32. A DECLARATION OF THE HOUSE OF COMMONS TOUCHING A LATE BREACH OF THEIR PRIVILEGES (1642), *reprinted in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1628–1660, at 159, 159–60 (Samuel Rawson Gardiner ed., Oxford, Clarendon Press 1889) (describing the events of Charles I seeking to arrest five recalcitrant parliamentarians with an armed guard).

Charles's great dilemma was a persistent lack of funds to support the Crown's endeavors.[33] But in exchange for Parliament's acquiescence to raise revenue, Parliament had demands. Quite a predicament for Charles, as the King neither believed in the art of negotiation nor democratically imposed limitations on the monarchy's power.[34] Charles called Parliament to convene in November 1640, known as the Long Parliament, to appropriate monies to quell sectarian strife in Scotland.[35] The Long Parliament was overshadowed by a dominant faction called the Junto.[36] John Pym led the Junto and was committed to reforming the monarchy and stamping out Catholicism in England.[37]

After a protracted and bitter political struggle with the Junto and in the wake of rising tensions in London, where the city's agitated residents took to the streets to protest English popery,[38] Charles decided to lash out against his political enemies. In January 1642, the Attorney General was dispatched to Parliament by Charles with charges of treason against one member of the House of Lords and five members of the House of Commons, including John Pym, who had led opposition efforts to constrain royal power, such as Parliament's adoption of the Grand Remonstrance, which articulated a wide array of grievances against the Crown.[39] The following day, Charles went to Westminster with armed soldiers and breached the hallowed chamber where the House of Commons sat. In an aggressive transgression against parliamentary privilege, Charles entered the House. He demanded the surrender of his political enemies and the submission of the members of Parliament from the Speaker's chair:

> Gentlemen, I am sorry for this occasion of coming unto you. Yesterday, I sent a Sergeant-at-Arms upon a very important

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33. PAULINE GREGG, KING CHARLES I, at 138 (1981).

34. Corinne Comstock Weston, *English Constitutional Doctrines from the Fifteenth Century to the Seventeenth: II. The Theory of Mixed Monarchy Under Charles I and After*, 75 ENG. HIST. REV. 426, 429–30 (1960).

35. *See* 2 WILLIAM COBBETT, COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 590–91 (London, R. Bagshaw 1807).

36. *See generally* ANTHONY FLETCHER, THE OUTBREAK OF THE ENGLISH CIVIL WAR (1981).

37. *Id.*

38. 3 CHARLES KNIGHT, THE POPULAR HISTORY OF ENGLAND: AN ILLUSTRATED HISTORY OF SOCIETY AND GOVERNMENT FROM THE EARLIEST PERIOD TO OUR OWN TIMES 470–73 (London, Bradbury & Evans1857).

39. Among others, the group was charged with high treason for trying "[t]o deprive the King of his Regall Power, and to place in Subjects an Arbitrary and Tyrannicall power" and "alienate the Affections of His people, and to make His Majestie odious unto them." ARTICLES OF HIGH TREASON, AND OTHER HIGH MISDEMEANORS, AGAINST THE LORD KYMBOLION. MR DENZILL HOLLIS. SIR ARUTHUR HASLERIG. MR JOHN PYM. MR IOHN HAMPDEN. MR WILLIAM STRODE. 1–2 (London, Robert Barker 1641).

> occasion to apprehend some that by my command were accused of high treason, whereunto I did expect obedience, and not a message.[40]

Charles threw down the gauntlet by laying siege to Parliament. A highly antagonistic relationship careened toward civil war, symbolically breaking out in August 1642.[41] After the English Civil War, Charles stood trial in defeat for levying war against English lawmakers and trammeling parliamentary privilege. In refusing to concede an earthly court might have jurisdiction over a sovereign,[42] Charles explained, "no learned Lawyer will affirm that an Impeachment can lie against the King . . . one of their Maximes is, That the King can do no wrong."[43] The monarch's jurisdictional plea was rejected. Charles Stuart, King of England, was convicted of high treason and beheaded in 1649.[44]

In the years that followed, England suffered years of authoritarian misrule under parliamentarian Oliver Cromwell, endured the restoration of the Stuarts under Charles II and James II, and settled the chaos of James II's reign after he fled the country and Parliament invited William and Mary to rule as joint sovereigns.[45] That 1689 settlement with William and Mary, the Glorious Revolution, definitively embraced the principle that the sovereign was the head of a multi-membered body politic. Joined together, the constrained crown and its subjects formed the state as a corporate whole where the constituent parts of government worked together, but representative lawmaking was supreme as Crown-in-Parliament.[46]

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40. 2 SAMUEL RAWSON GARDINER, THE FALL OF THE MONARCHY OF CHARLES I. 1637–1649, at 395 (London, Longmans, Green & Co. 1882).

41. DAVID CRESSY, ENGLAND ON EDGE: CRISIS AND REVOLUTION 1640–1642, at 420 (2006).

42. *See* Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 383–84 (2010).

43. JAMES HEATH, A CHRONICLE OF THE LATE INTESTINE WAR IN THE THREE KINGDOMS OF ENGLAND, SCOTLAND AND IRELAND WITH THE INTERVENING AFFAIRS OF TREATIES, AND OTHER OCCURRENCES RELATING THEREUNTO. AS ALSO THE SEVERAL USURPATIONS, FORREIGN WARS, DIFFERENCES AND INTERESTS DEPENDING UPON IT, TO THE HAPPY RESTITUTION OF OUR SACRED SOVERAIGN, K. CHARLES II. IN FOUR PARTS, VIZ. THE COMMONS WAR, DEMOCRACIE, PROTECTORATE, RESTITUTION 210 (2d ed., London, J.C. 1676).

44. Trial of Charles I (1649), *in* 4 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS 1045, 1141 (T. B. Howell ed., London, T.C. Hansard 1816).

45. BRUNO AGUILERA-BARCHET, A HISTORY OF WESTERN PUBLIC LAW: BETWEEN NATION AND STATE 297–99 (2015).

46. WILLIAM HENRY, A THIRD DECLARATION (1688) (William proclaimed that he invaded England to depose James II in order to convene "a Free Parliament to establish the Religion, the Laws and the Liberties of those Kingdoms upon such a sure and lasting

The American experience was not unaffected by seventeenth-century politics in England and the Glorious Revolution. As John Adams recalled in 1775: "It ought to be remembered, that there was a revolution here as well as in England, and that we made an original, express contract with king William, as well as the people of England."[47] Colonists on the opposite shores of the Atlantic from London attempted to solidify a unique position within the English constitutional universe through written instruments that established forms of self-governance for their respective colonies and delineated sets of rights and privileges, most notably in Massachusetts and New York.[48]

Colonists' work to firmly establish democratic norms and codify rights in America were snuffed out during the reign of James II. The Crown rescinded colonial charters covering territory from New Jersey to Maine and centralized power under the royally controlled Dominion of New England.[49] Under this regime, Governor Edmund Andros dispensed with democratic institutions and imposed imperial rule on the colonists.[50] Americans were not the only victims of royal reneging and suppression of self-governance. In a brazen obtrusion that further catalyzed opposition to his reign in England,[51] James withdrew parliamentary borough charters in 1688 to purge over 2,000 local officials from their positions, thereby enabling the King to limit the franchise to persons friendly to James's agenda ahead of parliamentary elections.[52] The King

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Foundation, that it shall not be in the Power of any Prince for the future to introduce Popery and Tyranny"); Bill of Rights (Act) 1688 1 W. & M. 2 c. 2 (Eng.).

47. Letter from John Adams to the Inhabitants of the Colony of Massachusetts-Bay (Mar. 6, 1775), *in* 2 THE ADAMS PAPERS, PAPERS OF JOHN ADAMS, DECEMBER 1773–APRIL 1775, at 307 (Harvard Univ. Press 1977).

48. THE BODY OF LIBERTIES OF 1641, *in* THE COLONIAL LAWS OF MASSACHUSETTS 29 (Boston, William H. Whitmore 1889); CHARTER OF LIBERTIES AND PRIVILEGES (1863), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 164 (William Finley Swindler ed., 1978).

49. 2 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 143 (1987) ("James II precipitated the constitutional crisis of the century when he revoked the charters of the seven most northern colonies and created the Dominion of New England. Edmund Andros was appointed governor to rule—even though the English attorney general gave his opinion that to do so was illegal—without an elected assembly, promulgating prerogative taxes as well as prerogative ordinances." (cleaned up)).

50. *Id.*

51. James II's purge not only offended those who were the target of his remodeling of borough councils but engendered "deep resentment" that "left him with the shakiest of political foundations in the towns" because James suspended requirements for office-holding, permitting Catholics to hold positions of power. PAUL D. HALLIDAY, DISMEMBERING THE BODY POLITIC: PARTISAN POLITICS IN ENGLAND'S TOWNS, 1650–1730, at 19 (1998).

52. SCOTT SOWERBY, MAKING TOLERATION: THE REPEALERS AND THE GLORIOUS REVOLUTION 117–18 (2013).

destroyed free and fair elections by rigging parliamentary constituencies in what was effectively a soft coup.[53]

Andros's usurpation of the local governance engendered opposition, culminating in a 1689 rebellion that toppled the Dominion government in response to James II's downfall.[54] Similar rejections of governance that fell outside the English constitutional settlement of 1688–89 erupted in New York and Maryland.[55] Colonial governance reverted to local control and the several charters governing the American colonies,[56] in what should be understood as a rejection of arbitrary aggrandizement of executive power and what makes colonial charters—the forerunners to state constitutions—the inheritors of the principle against self-coups in the English constitutional tradition. And while the actions of colonists resisted the abrogation of their charter rights and the values of self-governance attendant to those legal instruments, even members of the House of Commons acknowledged the reversion as a righting of a constitutional wrong: When James II "destroy[ed] the charters, rights, liberties and privileges of the several plantations and Colonies in New England," it was an act "in pursuance of a wicked design to subvert the constitution of the English Government and the Protestant religion established by law, and instead thereof to introduce arbitrary power and popery."[57]

Colonists, who before 1690 had little in common regarding a constitutional culture,[58] now had the beginnings of a shared Anglicized constitutionalism that "used the language of local autonomy to challenge arbitrary power" to reform colonial governance and entrench

53. *See* Robert H. George, *The Charters Granted to English Parliamentary Corporations in 1688*, 55 ENG. HIST. REV. 47, 53 (1940).

54. 1 REID, *supra* note 49, at 42 (noting that the 1689 New England revolution was in part a response to a lack of respect for property rights and representative taxation).

55. THE GLORIOUS REVOLUTION IN AMERICA: DOCUMENTS ON THE COLONIAL CRISIS OF 1689, at 167–91 (Michael G. Hall, Lawrence H. Leder & Michael G. Kammen eds., 1964).

56. *See id.*

57. THE MANUSCRIPTS OF THE HOUSE OF LORDS, 1689–90, at 422–23 (London, Eyre & Spottiswoode 1889).

58. John M. Murrin, *England and Colonial America: A Novel Theory of the American Revolution*, *in* ANGLICIZING AMERICA: EMPIRE, REVOLUTION, REPUBLIC 9, 11 (Ignacio Gallup-Diaz, Andrew Shankman & David J. Silverman eds., 2015) ("As the Glorious Revolution revealed, nothing resembling a coherent American society had taken shape in the wilderness before 1690. The Crown, not the settlers, tried to unite the colonies through the Dominion of New England. Multiple Americas had appeared in the English New World, and the passage of time threatened to drive them farther apart, not closer together, if only by intensifying the initial transformations by which each had become distinct.").

Protestantism.[59] Early American political development did not set the colonies off on a distinct path away from English constitutionalism. Instead, colonists began to "embrace a pan-British identity whose values were shaped by a shared narrative of Britain and the empire that celebrated liberty, property, Protestantism, King-in-Parliament, and the claim of a unique, superior post-1688 British constitution."[60] And it was in their colonial charters that these rights and values—including the right to democratic legislative representation and limited executive authority within the bounds of law—were memorialized.

Synthesizing the state of British law in the wake of a century of turmoil followed by decades of stability, the much-celebrated English jurist William Blackstone laid down the maxims governing royal power. Blackstone explained the duties of the king by reciting a thirteenth-century maxim: "The king ought not to be subject to man, but to God, and to the law; for the law maketh the king. . . . [H]e is not truly king, where will and pleasure rules, and not the law."[61] In expounding the scope of executive power, Blackstone said that "the law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong."[62] However, Blackstone explains that "the prerogative of the crown extends not to do any injury" but is faithfully deployed "for the benefit of the people."[63] This pretzel work of legal axioms can be synthesized into a plain rule: The executive is immune from wrongdoing while acting under the imprimatur of law, *but the king could do wrong* if power was used contrary to law. Acting extra-legally, the king ceases to be kingly. Thus, royal power was only as good as it was lawful and exercised with the consent of the governed.[64]

The American colonists embraced the Glorious Revolution and the democratic turn in British constitutionalism it reflected. As leading Bostonians declared in 1689 in opposition to dethroned James II's top-down colonial governance, it was repugnant for colonial officials to demand that colonists "must not think the Priviledges of English men

59. Owen Stanwood, *The Protestant Moment: Antipopery, the Revolution of 1688–1689, and the Making of an Anglo-American Empire*, 46 J. BRIT. STUD. 481, 503 (2007).

60. Andrew Shankman, *A Synthesis Useful and Compelling: Anglicization and the Achievement of John M. Murrin*, *in* ANGLICIZING AMERICA: EMPIRE, REVOLUTION, REPUBLIC, *supra* note 58, at 20, 39.

61. 1 WILLIAM BLACKSTONE, COMMENTARIES *226–27.

62. *Id.* at *238 (emphasis omitted).

63. *Id.* at *239.

64. Indeed, this is reflected by the Founders' understanding that executive power was not to reflect a monarchical vision but a more mundane "power to execute law." Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1274 (2020).

would follow us to the End of the World."[65] However, the problem for British subjects on the shores of America was a blossoming constitutional doctrine of dependency. Colonists were not "children" of the mother country but imperial dependents living in conquered territory whose "political contagion"[66] meant they were governed by royal disposition in a kind of pre–Glorious Revolution state of subjugation.[67]

The key to understanding the causes of the American Revolution is not that Americans drifted into an irretrievably broken relationship with England because revolutionaries detested English constitutionalism. Instead, the schism was a byproduct of colonists' belief they were owed an equal place in the imperial constitutional order—and the settlement of seventeenth-century political struggles in England—as a contractual matter through their colonial charters. In this vein, while the first state constitutions experimented with various institutional innovations in this new revolutionary era, these constitutions "were situated within an established constitutional tradition, and they took their place alongside existing practices and understandings, many of which remained viable."[68] Indeed, Connecticut and Rhode Island continued to govern by their colonial charters as state constitutions until 1818 and 1842, respectively.[69]

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65. THE BOSTON DECLARATION OF GRIEVANCES (1689), *reprinted in* THE GLORIOUS REVOLUTION IN AMERICA: DOCUMENTS ON THE COLONIAL CRISIS OF 1689, *supra* note 55, at 42, 43.

66. JOHN DICKINSON, A NEW ESSAY (BY THE PENNSYLVANIAN FARMER) ON THE CONSTITUTIONAL POWER OF GREAT BRITAIN OVER THE COLONIES IN AMERICA 97 (Phila. 1774).

67. 1 BLACKSTONE, *supra* note 61, at *105 ("But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives . . . . And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions. They are subject however to the control of the parliament; though (like Ireland, Man, and the rest) not bound by any acts of parliament, unless particularly named." (footnotes omitted)). Parliament also asserted its absolute right to rule over the colonies in 1766. *See* American Colonies Act 1766, 6 Geo. 3. c. 12 (Declaratory Act) (Eng.) ("[C]olonies and plantations in America have been, are, and of right ought to be, subordinate unto, and dependent upon the imperial crown and parliament of Great Britain; and that the King's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons of Great Britain, in parliament assembled, had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever.").

68. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 39–41 (2004).

69. Mark A. Graber, *State Constitutions as National Constitutions*, 69 ARK. L. REV. 371, 397–98 (2016); William F. Swindler, *Seedtime of an American Judiciary:*

The foundation of the United States' constitutional culture—inherited first by colonial charters, then subsumed by state constitutions, later embraced in parallel fashion by the U.S. Constitution—must be understood in this context. The origins of state constitutionalism in the United States can be directly traced back to the Anglicization of legal culture and the Glorious Revolution's final settlement's rejection of executive self-coups, arbitrary rule, and power without consent.[70] The first real fight over pretended authority and the usurpation of power concerned the recession of state charters—a principle affirmed through the revolution and the first state constitutions. In this sense, Jonathan Gienapp observed: "While the final arbiter might have changed, the logic undergirding it had not. In the shadow of independence, much was fluid, but the basic conception of constitutional authority that had long structured American constitutional thinking remained undisturbed."[71]

II. CONSTITUTIONAL ARCHITECTURE AND AUTOCOUP DETERRENCE

> *In their ambitious desire to root out tyranny once and for all, they went beyond what Englishmen of 1215 or 1688 had attempted: their new constitutions destroyed "the kingly office" outright. . . .*
>
> —Gordon S. Wood[72]

The American constitutional order's architecture provides important structural safeguards, buttressed by a foundational political principle of shared republican accountability, to deter, punish, and impede attempted presidential autocoups through cooperative federal and state governance. The Constitution's design and attendant legal doctrine also create a space where states are an important backstop against nationalized despotic

From Independence to the Constitution, 17 WM. & MARY L. REV. 503, 506 & n.12 (1976).

70. It should, of course, be noted that the Glorious Revolution was ironically made possible by William III toppling James II's reign through the threat of military force at the manufactured invitation of English luminaries and illiberal attitudes towards Catholicism, but the settlement ultimately relied on Parliament declaring James II abdicated the throne by fleeing to France after destroying the Great Seal of the Realm (lore often describes James as throwing it into the Thames) and William III accepting limitations on the royal prerogative. *See* F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 283 (1908) (chronicling James II's flight to France); W. A. SPECK, RELUCTANT REVOLUTIONARIES: ENGLISHMEN AND THE REVOLUTION OF 1688, 71–91 (1988) (describing the Dutch invasion of England).

71. JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 36 (2018).

72. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 136 (1998).

impulses. This shared democracy-reinforcing imprimatur necessarily must include the state prosecution power.

The "Bad Man" theory of law was familiar to the founding generation. Ideally, only reputable stewards would hold power, of course, but preemptive checks were needed to hedge against the specter of corrupt executive power. In Great Britain, if hereditary virtue skipped a generation, no lawful constitutional processes or remedies outside rebellion and regicide were available to remove the sovereign from power. In the American constitutional system, both those who supported the ratification of the U.S. Constitution and those who opposed its adoption recognized that there needed to be law-based mechanisms to protect against empowered menaces and encourage virtuous heads of government. Alexander Hamilton noted in *Federalist 69* that impeachment and criminal prosecutions for wrongdoing would constrain the President without bloodshed, unlike in Great Britain, where there was "no punishment to which [the King] can be subjected without involving the crisis of a national revolution."[73] In a similar vein, James Monroe argued that meaningful carrots and sticks are required for good executive governance because "[t]he prospect of reward and the fear of punishment . . . are the most powerful incentives to virtuous action."[74] The state prosecution power is part of the incentive structure to keep the nation's chief executives well-behaved and shield the presidency from becoming kingly.

As an initial observation, the decentralized makeup of American presidential elections entrusts states with administering the Electoral College, which not only places substantial authority in state legislatures to take charge of the business of running presidential elections but also is an important feature in preventing an incumbent President from rigging or influencing a unified, national electoral process under their authority.[75] Secondly, states have a mutual obligation to one another as part of the national union to maintain a republican government. The federal government makes this obligation enforceable under the Constitution's

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73. THE FEDERALIST NO. 69, at 446 (Alexander Hamilton) (Robert B. Luce, Inc. 1976).

74. James Monroe, *Some Observations on the Constitution* (May 25, 1788), *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 844, 864 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

75. The Electoral College has serious democratic deficiencies concerning how votes are weighted and counted under winner-take-all schemes. Calls for more democratic reforms are with merit; however, those matters are distinct from the value of a decentralized election administration that hinders federal authorities from commandeering the process in furtherance of an autocoup. This is also not to suggest that robust federal mechanisms to guarantee the uniform right to vote and fair ballot box procedures are neither good nor necessary. Instead, shared governance that can defend the franchise across the states and thwart nationalized self-dealing abuses of the electoral process is a positive example of cooperative federalism.

Guarantee Clause.[76] Alexander Hamilton underscored the imperative of forestalling autocracy in every part of the nation by asking: "Who can predict what effect a despotism, established in Massachusetts, would have upon the liberties of New Hampshire or Rhode Island, of Connecticut or New York?"[77]

Embedded implicitly in the Guarantee Clause is the understanding that democratic backsliding has spillover effects. Thus, while the federal government must defend democratic institutions in states, states also have a duty to one another in the first instance to protect democracy and guard other jurisdictions against the creep of authoritarian criminality and the contagion of democratic decay.[78] If, therefore, a person or group of people attempt to unlawfully overturn the result of a presidential election through corrupt means against state executives, judges, legislators, or administrators, not only do states have the prerogative to punish bad actors to protect the integrity of state government, but they also should do so as a form of mutual defense against antidemocratic spillover. The latter is consistent with the Guarantee Clause's philosophical underpinnings and the founding generation's understanding that corrupt leaders cannot rule arbitrarily with impunity.

Some critics may suggest that a matter as grave as a failed presidential autocoup may be too serious or complex for state prosecutors to pursue. Undoubtedly, the gravitas of a federal prosecution and the resources of the national government are generally superior to state and local law enforcement. But these smaller offices may be the only vehicle to obtain justice and are a serious disincentive to wannabe election meddlers and fraudulent conspirators contemplating overturning a lawful election. The presidential pardon power can be gifted to participants of a failed conspiracy or even the incumbent President themself, rendering them immune from a federal investigation or criminal prosecution related to plotting a self-coup. State prosecutors are a critical deterrent because participants in a national coup conspiracy, including subordinates in offices of public trust, cannot presume their loyalty will yield an ironclad failsafe from the criminal justice system, should their endeavor fail.

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76. U.S. CONST. art. IV, § 4.

77. THE FEDERALIST NO. 21, *supra* note 73, at 127 (Alexander Hamilton).

78. *See also* Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 196 (2020) ("The Clause incorporates an understanding that the political structures in one state could have significant deleterious, even if not immediate, effects on the others, and that federal intervention might be necessary to prevent the worst of those threats from coming to pass."). Professor Ryan Williams's gloss on the Guarantee Clause offers that it "was designed to protect the rights of states in their sovereign governmental capacities, not the individual rights of those states' respective citizens" as "a quasi-diplomatic commitment." Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 611 (2018).

III. STATE DEMOCRATIC CONSTITUTIONALISM AND THE RIGHT TO VOTE

The fundamental right to vote and nationalized understandings of voting rights originated in the states. The right to vote is an explicit protection embedded in state constitutions.[79] As equal guarantors of the right to vote alongside the federal government, states have a prerogative to protect electors' right to have their vote cast free from despotic influences that might engage in fraud or deceptive trickery.

The U.S. Constitution does not expressly guarantee the right to vote.[80] Indeed, despite the Supreme Court's articulation that casting a ballot is a fundamental right,[81] the Constitution's text does not affirmatively provide a right to cast a ballot. Instead, the Constitution constrains the federal and state governments from discriminating against citizens' access to the franchise as a negative right, guaranteeing that ballot access will not be denied because of a citizen's race, sex, or age.[82] To the extent that an affirmative right to vote is guaranteed, the Federal Constitution pegs voter eligibility for members of Congress to state voting rights.[83] These rights have long been recognized in states' foundational legal texts, though in deeply imperfect ways throughout American history, to be sure, as well as a basic right to vote and the critical need to protect the free and fair exercise of the franchise.

American colonial charters typically delineated the qualifications for electors in a tradition later replicated in state constitutions. But more than

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79. *See generally* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021).

80. *See generally* RICHARD L. HASEN, A REAL RIGHT TO VOTE (2024); Joshua A. Douglas, *Is the Right To Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143 (2008).

81. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless [voting] is regarded as a fundamental political right, because preservative of all rights."); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (describing the right to vote as "precious" and "fundamental").

82. U.S. CONST. amends. XV, XIX, XXVI.

83. U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *id.* amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

simply understanding electoral participation as a privilege, before independence from Great Britain, some American colonies enacted laws for compulsory voting regimes—establishing a democratic obligation for enfranchised members of the body politic—though it is not apparent to what extent the pre-Founding provisions were enforced.[84]

The Plymouth Colony fined individuals three shillings who failed to appear in an election without "due excuse" in 1636.[85] In Virginia, those colonists who did not exercise their right to vote in elections were penalized by a 1649 law requiring eligible nonvoters to turn over one hundred pounds of tobacco.[86] Maryland and Delaware embraced compulsory voting measures in the early eighteenth century. Maryland, like Virginia, adopted a tobacco forfeiture law for those who did not cast ballots at elections in which they were entitled to partake in 1715.[87] Delaware fined violators twenty shillings.[88] North Carolina promulgated a mandatory voting law in parish elections for vestrymen, excepting Quakers and individuals too infirm to cast votes, in 1764 with a penalty of, like Delaware, twenty shillings.[89] The Georgia Constitution of 1777, which was replaced in 1789, mandated "[e]very person absenting himself from an election, and shall neglect to give in his or their ballot at such election, shall be subject to a penalty not exceeding five pounds" unless the failure to participate was justified by a "reasonable excuse."[90]

While a tradition of compulsory voting laws or analog constitutional mandates did not become entrenched in state legal traditions, they are nevertheless a data point to contemplate when assessing how early legal tradition developed in America, at least as an initial theoretical matter. By some (albeit limited) measure, these laws reflect political elites' view about the tight relationship between the active exercise of the franchise by those who were entitled to it and the health of the polity. Crucially, however, the newly minted American states constitutionalized voting rights and fair election principles during the revolutionary era and early republic years.

State constitutions in the republic's infancy protected two broad categories of democracy rights—a right to vote articulated through

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84. Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2173–74, 2174 n.154 (1996).

85. Note, *Compulsory Voting's American History*, 137 HARV. L. REV. 1138, 1141 (2024).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. GA. CONST. of 1777, art. XII, *in* 2 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 777, 780 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE].

detailed qualifications for electors and more generalized process-related safeguards for voters to be free from state influence and have their votes counted. The latter protection varied in scope and verbiage. Still, it largely reflected the principle against executive autocoups articulated in the 1688 Bill of Rights: "That Election of Members of Parlyament ought to be free."[91] Today, thirty state constitutions contain a free elections clause.[92]

Before adopting the U.S. Constitution, state constitutions transposed the English Bill of Rights verbiage into state declarations of rights. Virginia's Declaration of Rights laid down a right to vote intertwined with the principle that the government should not have a thumb on the scale in the electoral process: "That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage."[93] Pennsylvania, New Hampshire, and Vermont enshrined a right to free elections tethered to a right to vote and run for public office.[94] Massachusetts' 1780 fair elections clause swept broadly to recognize that the Commonwealth's "inhabitants" possess "an equal right to elect officers, and to be elected, for public employments."[95] Maryland's Declaration of Rights added that "elections ought to be free and

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91. Bill of Rights (Act) 1688 1 W. & M. 2 c. 2 (Eng.).

92. ARIZ. CONST. art. II, § 21; ARK. CONST. art. III, § 2; CAL. CONST. art. II, § 3; COLO. CONST. art. II, § 5; CONN. CONST. art. VI, § 4; DEL. CONST. art. I, § 3; IDAHO CONST. art. I, § 19; ILL. CONST. art. III, § 3; IND. CONST. art. 2, § 1; KY. CONST. § 6; MD. CONST., Declaration of Rights, art. VII; MASS. CONST. pt. I, art. IX; MO. CONST. art. I, § 25; MONT. CONST. art. II, § 13; NEB. CONST. art. I, § 22; N.H. CONST. pt. 1, art. XI; N.M. CONST. art. II, § 8; N.C. CONST. art. I, § 10; OKLA. CONST. art. III, § 5; OR. CONST. art. II, § 1; PA. CONST. art. I, § 5; S.C. CONST. art. I, § 5; S.D. CONST. art. VII, § 1; TENN. CONST. art. I, § 5; TEX. CONST. art. VI, § 2(c); UTAH CONST. art. I, § 17; VT. CONST. ch. I, art. 8; VA. CONST. art. I, § 6; WASH. CONST. art. I, § 19; WYO. CONST. art. I, § 27.

93. VA. CONST. of 1776, Declaration of Rights, § 6, *in* 7 THORPE, *supra* note 90, at 3812, 3813.

94. N.H. CONST. of 1784, art. I, § 11, *in* 4 THORPE, *supra* note 90, at 2453, 2455 ("All elections ought to be free, and every inhabitant of the state having the proper qualifications, has equal right to elect, and be elected into office."); VT. CONST. of 1777 ch. I, § 8, *in* 6 THORPE, *supra* note 90, at 3737, 3741 ("That all elections ought to free; and that all freemen, having a sufficient, evident, common interest with, and attachment to, the community, have a right to elect officers, or be elected into office."); PA. CONST. of 1778, Declaration of Rights, § 7, *in* 5 THORPE, *supra* note 90, at 3081, 3083 ("That all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office.").

95. MASS. CONST. of 1780, pt. I, art. 9, *in* 3 THORPE, *supra* note 90, at 1888, 1891.

frequent."[96] North Carolina's 1776 constitution simply declared "[t]hat elections of members, to serve as Representatives in General Assembly, ought to be free,"[97] while Vermont added that elections must be "free and voluntary."[98] Later, in 1792, Delaware added a "free and equal" elections clause to a new state constitution, as did Kentucky and Tennessee in 1792 and 1796, respectively, in those states' first constitutions.[99]

Parallel to the broadly articulated right to free and fair elections, state constitutions have language that bars election interference by "civil or military" authorities. The framers of the first state constitutions included provisions to protect voters from those vested with government power from wielding that power to influence elections. In 1776, the Delaware Constitution provided that "[t]o prevent any violence or force being used at the said elections, no person shall come armed to any of them, and no muster of the militia shall be made on that day."[100] Fifteen states have continued this tradition with express prohibitions against military interference in elections embedded in a right to free and equal elections or suffrage.[101] In the 1790 Pennsylvania Constitution, the Commonwealth's electors were first provided with a textual guarantee that voters would be free from arrest to and from election except in cases of "treason, felony, and breach or surety of the peace."[102] Other states followed Pennsylvania in the twenty-five years after the ratification of the Federal Constitution, including Delaware, Tennessee, Ohio, and

96. MD. CONST. of 1776, Declaration of Rights, art. V, *in* 3 THORPE, *supra* note 90, at 1686, 1687.

97. N.C. CONST. of 1776, Declaration of Rights, § 6, *in* 5 THORPE, *supra* note 90, at 2787, 2787.

98. VT. CONST. of 1777, ch. II, § 29, *in* 6 THORPE, *supra* note 90, at 3737, 3746.

99. DEL. CONST. of 1792, art. I, § 3, *in* 1 THORPE, *supra* note 90, at 568, 568; KY. CONST. of 1792, art. XII, § 5, *in* 3 THORPE, *supra* note 90, at 1264, 1274; TENN. CONST. of 1796, art. XI, § 5, *in* 6 THORPE, *supra* note 90, at 3414, 3422.

100. DEL. CONST. of 1776, art. XXVIII, *in* 1 THORPE, *supra* note 90, at 562, 567. This provision was not carried over into the 1792 constitution, which added a broader free and equal elections clause.

101. ARIZ. CONST. art. II, § 21; ARK. CONST. art. III, § 2; COLO. CONST. art. II, § 5; IDAHO CONST. art. I, § 19; MO. CONST. art. I, § 25; MONT. CONST. art. II, § 13; N.M. CONST. art. II, § 8; OKLA. CONST. art. III, § 5; PA. CONST. art. I, § 5; S.D. CONST. art. VII, § 1; UTAH CONST. art. I, § 17; WASH. CONST. art. I, § 19; WYO. CONST. art. I, § 27.

102. PA. CONST. of 1790, art. III, § 3, *in* 5 THORPE, *supra* note 90, at 3092, 3096.

Louisiana,[103] and thirteen states since have retained this protective language in analog constitutional clauses.[104]

The fundamental right to vote emanates from state constitutions, which provide affirmative language extending the franchise. While many may assume that voter qualifications should be cemented into fundamental instruments of government as opposed to statutes, it was a deliberate choice to place a right to vote intertwined with voter qualifications in a higher-order position than a simple statute. Virginia constitutionalized the voting requirements as provided by law in 1776.[105] Early state constitutions provided granular details about voting qualifications when delineating a right to vote.[106]

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103. DEL. CONST. of 1792, art. IV, § 2, *in* 1 THORPE, *supra* note 90, at 568, 574; TENN. CONST., of 1796 art. III, § 2, *in* 6 THORPE, *supra* note 90, at 3414, 3418; OHIO CONST. of 1802, art. IV, § 3, *in* 5 THORPE, *supra* note 90, at 2901, 2907; LA. CONST. of 1812, art. II, § 8, *in* 3 THORPE, *supra* note 90, at 1380, 1382.

104. ARK. CONST. art. III, § 4; ARIZ. CONST. art. VII, § 4; CONN. CONST. art. VI, § 8; IND. CONST. art. II, § 12; KAN. CONST. art. V, § 7; ME. CONST. art. II, § 2; MISS. CONST. art. IV, § 102; NEB. CONST. art. VI, § 5; OKLA. CONST. art. III, § 5; OR. CONST. art. II, § 13; S.C. CONST. art. II, § 11; WASH. CONST. art. VI, § 5; WYO. CONST. art. VI, § 3.

105. VA. CONST. of 1776, *in* 7 THORPE, *supra* note 90, at 3812, 3816 ("The right of suffrage in the election of members for both Houses shall remain as exercised at present; and each House shall choose its own Speaker, appoint its own officers, settle its own rules of proceeding, and direct writs of election, for the supplying intermediate vacancies.").

106. DEL. CONST. of 1792, art. IV, § 1, *in* 1 THORPE, *supra* note 90, at 568, 574 ("All elections of governor, senators, and representatives shall be by ballot. And in such elections every white free man of the age of twenty-one years, having resided in the State two years next before the election, and within that time paid a State or county tax, which shall have been assessed at least six months before the election, shall enjoy the right of an elector; and the sons of persons so qualified shall, between the ages of twenty-one and twenty-two years, be entitled to vote, although they shall not have paid taxes."); PA. CONST. of 1790, art. III, § 1, *in* 5 THORPE, *supra* note 90, at 3092, 3096 ("In elections by the citizens, every freeman of the age of twenty-one years, having resided in the state two years next before the election, and within that time paid a State or county tax, which shall have been assessed at least six months before the election, shall enjoy the rights of an elector: *Provided*, That the sons of persons qualified as aforesaid, between the ages of twenty-one and twenty-two years, shall be entitled to vote, although they shall not have paid taxes."); MASS. CONST. of 1780, pt. 2, ch. I, § 2, art. II, *in* 3 THORPE, *supra* note 90, at 1888, 1896 ("[E]very male inhabitant of twenty-one years of age and upwards, having a freehold estate within the commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to give in his vote for the senators . . . ."); S.C. CONST. of 1778, art. XIII, *in* 6 THORPE, *supra* note 90, at 3248, 3251–52 (every non-atheist free white man who believes in heaven and hell with residency and property requirements); GA. CONST. of 1777, art. IX, *in* 2 THORPE, *supra* note 90, at 777, 779 ("All male white inhabitants, of the age of twenty-one years, and possessed in his own right of ten pounds value, and liable to pay tax in this State, or being of any mechanic trade, and shall have been resident six months in this State, shall have a right to vote at all elections . . . ."); N.Y. CONST. of 1777, art. VII, *in* 5 THORPE, *supra* note 90, at 2623, 2630 ("That every male inhabitant of full age, who shall have personally resided within one of the counties of this State for six months immediately

The early years of establishing the franchise in the United States, state by state, were important for cementing the right to vote as constitutionally fixed. During the republic's early years, states also grappled with the identity politics of elector rules. The most progressive rules that advanced the United States toward universal suffrage were states' steady efforts to remove or reject property ownership as a prerequisite so that by 1855, only three states maintained any property requirements for voting eligibility.[107] These constitutional values were later reflected in the Twenty-Fourth Amendment's prohibition of poll taxes in federal elections and the Supreme Court's decision in *Harper v. Virginia Board of Elections*[108] barring wealth-based eligibility requirements to participate in state elections.[109]

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preceding the day of election, shall, at such election, be entitled to vote for representatives of the said county in assembly; if, during the time aforesaid, he shall have been a freeholder, possessing a freehold of the value of twenty pounds, within the said county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to this State . . . ."); VT. CONST. of 1777, ch. II, § 6, *in* 6 THORPE, *supra* note 90, at 3737, 3742 ("Every man of the full age of twenty-one years, having resided in this State for the space of one whole year, next before the election of representatives, and who is of a quiet and peaceable behaviour . . . shall be entitled to all the privileges of a freeman of this State."); MD. CONST. of 1776, art. II, *in* 3 THORPE, *supra* note 90, at 1686, 1691 ("All freemen, above twenty-one years of age, having a freehold of fifty acres of land, in the county in which they offer to vote, and residing therein—and all freemen, having property in this State above the value of thirty pounds current money, and having resided in the county, in which they offer to vote, one whole year next preceding the election, shall have a right of suffrage . . . ."); N.J. CONST. of 1776, art. IV, *in* 5 THORPE, *supra* note 90, at 2594, 2595 ("That all inhabitants of this Colony, of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for Representatives in Council and Assembly; and also for all other public officers, that shall be elected by the people of the county at large."); N.C. CONST. of 1776, art. VII, *in* 5 THORPE, *supra* note 90, at 2787, 2790 ("That all freemen, of the age of twenty-one years, who have been inhabitants of any one county within the State twelve months immediately preceding the day of any election, and possessed of a freehold within the same county of fifty acres of land, for six months next before, and at the day of election, shall be entitled to vote for a member of the Senate."); *id.* ("That all freemen of the age of twenty-one years, who have been inhabitants of any one county within this State twelve months immediately preceding the day of any election, and shall have paid public taxes shall be entitled to vote for members of the House of Commons for the county in which he resides.").

107. The three states with property requirements were narrowly applied in practice. Rhode Island exempted natural born citizens, South Carolina law contained an exemption based on residency, and New York's requirement only applied to Black voters. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 351 tbl.A9 (rev. ed. 2009).

108. 383 U.S. 663 (1966).

109. *Id.* at 668 ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." (internal citations omitted)).

The steady movement toward universal suffrage and away from socioeconomic discrimination was different from how racial equality in voting was achieved. Most states limited the franchise to white citizens straight out of the gate. Several states revisited race-neutral elector clauses and excluded non-whites from voting eligibility through regressive constitutional revision.[110] At the same time, before the Civil War and the federal guarantees to vote without regard to race, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont had no categorical racial bars on voting, later reflected in the post-Civil War constitutional reformation and the Fifteenth Amendment's ratification.[111] Similarly, social movements to expand voting rights to include women and young Americans percolated in states before the U.S. Constitution expanded access to the franchise. Women first enjoyed the right to vote in Wyoming's 1889 constitution.[112] The Georgia Constitution established the franchise's extension to eighteen-year-olds in 1943.[113] These state measures were part of unfolding movements to expand voting rights for women and young Americans that ultimately manifested in Federal Constitution analogs in 1920 and 1971, respectively.

States and state constitutions have played a crucial role in developing voting rights in the United States. A constant throughline of the movement away from discrimination based on wealth, race, sex, and age in voting and toward the cherished national principles of universal suffrage is the bottom-up evolution of voting rights. Historically, there has been a valuable interplay between state-level mobilization to protect and advance democracy and the national interest to constitutionalize the principle of universal suffrage. Though voting rights took on a national character in the American consciousness during the mid-twentieth century in the wake of the civil rights movement, states nevertheless retained a vested interest in protecting the right to vote. State prosecutors are proper stakeholders to defend citizens' right to freely cast ballots and

110. These states were Connecticut, Delaware, Kentucky, Maryland, New Jersey, North Carolina, Pennsylvania, and Tennessee.

111. A Supreme Judicial Court of Massachusetts ruling in 1807 excluded many Native Americans from voting for Governor and Lieutenant Governor on land untaxed by the Commonwealth. *In re Op. of Justs.*, 3 Mass. (1 Tyng) 568, 572 (1807) ("That the Constitution of this Commonwealth doth not authorize the inhabitants of any of the unincorporated plantations in the State to give in their votes for Governor and Lieutenant Governor."). New York's 1821 constitution limited voting to citizens of the state but required nonwhite voters to establish residency for three years before becoming state citizens and pay a hefty tax. N.Y. CONST. of 1821, art. II, § 1, *in* 5 THORPE, *supra* note 90, at 2639, 2642. Georgia law did not have any race-based qualifications, but a de facto whites-only rule.

112. ROBERT B. KEITER, THE WYOMING CONSTITUTION 195 (2d ed. 2017).

113. ALBERT BERRY SAYE, A CONSTITUTIONAL HISTORY OF GEORGIA 1732–1945, at 388–89 (1948).

have them fairly counted even when an overlapping federal interest exists. Thus, if a person orchestrates or participates in a criminal scheme to unlawfully overturn a presidential election, states can appropriately exercise the prosecution power to vindicate constitutional rights consistent with American history and tradition.

CONCLUSION

The American constitutional tradition does not have a clear claim to standing athwart authoritarians seeking to create local enclaves of self-serving government and meting out criminal consequences to democracy's foes. The irony of this fact lies in the simple proposition that American constitutionalism was born out of the grievances of colonial generations against arbitrary rule in the seventeenth and eighteenth centuries. Despite the imperfect historical record, the democratic ideal of self-governance remains a bedrock, ever-aspirational component of American political identity. The enduring principle that democratic self-governance is central to American constitutionalism is not self-executing or self-perpetuating, as the United States' checkered history reveals. Rather, faith in institutions is an ongoing project where widely held republican virtues are necessary but insufficient to safeguard democracy. It also requires a constitutional design that deters and punishes attacks on free and fair elections. The anti-coup principle, backed by a longstanding legal culture and constitutional architecture deeply embedded in American tradition, requires states to step into the breach to fill that role against the dangers of despotism, both local and national.

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