

THE SPECTER OF DICTATORSHIP: AN INTRODUCTION TO THE SPECIAL ISSUE

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INTRODUCTION

In November of 2021, the *Syracuse Law Review* hosted a symposium on *The Specter of Dictatorship: Judicial Enabling of Presidential Power*, which Stanford University Press published in the summer of that year.¹ This special issue features the participants' thoughts on that book's themes. I am very grateful to *Syracuse Law Review* for hosting this symposium and for their hard work in soliciting, editing, and publishing the participants' thoughtful contributions to this special issue. I also would like to express my gratitude to the participants for sharing and developing their important insights.

This introduction will first provide a brief synopsis of the book to orient readers of the special issue. I will then introduce the contributions that comprise this issue and explain how they interact with the book's argument. Finally, I will offer a few closing thoughts on where we stand in the battle to retain American democracy, which remains under threat. The courageous battle of the Ukrainian people to preserve their freedom from an authoritarian regime's onslaught should remind us that democracy is a precious gift that we must not take for granted. Yet, *The Specter of Dictatorship* reminds us that we can lose democracy in slower and less dramatic ways than through foreign invasion or a military coup, so that preserving democracy requires not only courage, but also foresight and a deep appreciation of how democracies decline.²

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1. DAVID M. DRIESEN, *THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER* (2021) [hereinafter DRIESEN, *THE SPECTER OF DICTATORSHIP*].

2. *Id.* at 3.

The book and this special issue provide important resources for understanding how democracies can virtually disappear over time and what we must do to preserve it.

I. A BRIEF SYNOPSIS OF THE SPECTER OF DICTATORSHIP

In *The Specter of Dictatorship: Judicial Enabling of Presidential Power*, I draw lessons about how to improve America's separation of powers jurisprudence from the experience of democratic decline in other countries. In the cases I study (and in many others), democracy gradually fades over a decade or more, sometimes in ways that are difficult to detect.³ While some democracies have vanished in a sudden coup, it is more common than many suppose to lose it through a gradual process of erosion.

The book relies heavily on case studies of Turkey, Hungary, and Poland, all of whom elected autocratic leaders who over time impaired or largely destroyed the democracies they inherited.⁴ My goal involves understanding the role of the chief executive in democracy loss.

I argue that in all of these cases, and many more, the chief executive of the country (*de facto* or *de jure*) drove the democratic decay.⁵ Autocrats, I argue, create autocracies.⁶ But this argument requires significant qualifications. No autocrat defeats democratic government on his own.⁷ Rather, the heads of state rely heavily on a political party that supports his democracy impairing measures with lock step party line votes.⁸ Thus, I do not take issue with the large literature suggesting that politics and political parties play a huge role in maintaining or destroying democracies.⁹ I endorse the claim that partisan polarization drives democratic decline. I just argue that the

3. See Kim Lane Scheppele, *The Limits of Constitutionalism: Autocratic Legalism*, 85 U. CHI. L. REV. 545, 555 (2018) ("It seems to take a bit more than a decade after these sorts of reforms begin before the pretense of democratic and constitutional government disappears entirely").

4. See DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 1, at 95–120 (analyzing democratic decline in Hungary, Poland, and Turkey).

5. See *id.* at 95–96 (noting that my case studies show that the head of state drove democratic decline in Hungary, Poland, and Turkey, but that other scholars' work suggests this is a general pattern).

6. *Id.* at 4.

7. *Id.*

8. *Id.* at 120.

9. See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 7 (2018) (arguing that tolerance of autocratic behavior by a major political party hastens democratic decline); DANIEL ZIBLATT, *CONSERVATIVE PARTIES AND THE BIRTH OF DEMOCRACY* 22 (2017) (arguing the attitudes of conservative parties play a crucial role in allowing establishment and maintenance of democracies).

chief executive leads the institutional charge to undermine democracy and that therefore appropriate limits on executive power can help preserve democracy.¹⁰

In all these cases (and likely in almost all cases), constitutional “reforms” that strengthened the chief executive’s power played a large role in destroying or weakening democratic government. Constitutional amendments enacted by Parliament or through a referendum and legislation shifted the balance of power toward the chief executive.¹¹

A major type of reform one sees in all of these countries (and all others losing democracy that I am aware of) involves creating more centralized head-of-state control of the executive branch of government, a system resembling that called for by American advocates of the unitary executive theory.¹² All of these countries when they were fully democratic relied on civil servants protected from political manipulations. They also made key executive branch institutions—such as prosecution services, electoral commissions, and media authorities—either independent or multiparty.¹³ In all of these cases, the head of state secured “reforms” giving him effective control over these entities.¹⁴ These countries also attacked the political independence of the civil service more broadly.¹⁵ Once the chief executive has the power to remove political opponents and neutral experts, he and the political party supporting the chief executive people key bureaucracies with their supporters. The chief executive then uses these politically aligned officials to protect his friends and persecute political opponents, shutdown opposition media, and tilt the electoral playing field in their favor, thereby undermining democracy and the rule of law.¹⁶

10. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 119 (“the head of state drives conversion from democracy to autocracy”).

11. *Id.* at 96 (noting that elected autocrats dismantle checks and balances through “legislative and constitutional processes”).

12. *See id.* at 95 (explaining that the chief executive and his party bring administration under their control to “pave the way to autocracy”).

13. David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L. J. 1, 29 (2020) [hereinafter Driesen, *The Unitary Executive Theory*].

14. *See id.* at 33–39 (discussing the measures adopted in these countries to largely destroy the independence of these institutions).

15. *See id.* at 30–32 (discussing the legal changes in Hungary, Poland, and Turkey that impaired the civil service’s independence); *see, e.g.*, Scheppele, *supra* note 3, at 575 n.105 (discussing mass firings of civil servants in Hungary).

16. *See* Driesen, *The Unitary Executive Theory*, *supra* note 13, at 34–41 (discussing how Hungary, Poland, and Turkey used compromised prosecution services, electoral commissions, and media authorities toward these ends).

In Turkey and Hungary, the two countries who have largely lost democracy, abuse of emergency powers has hastened democracy's disintegration.¹⁷ The democracy-destroying potential of emergency powers will not surprise anybody who has studied the history of Nazi Germany.¹⁸

Unfortunately, the United States Supreme Court in recent years has been enacting the kinds of separation of powers reforms that other countries' autocrats used to undermine their democracies. The Supreme Court has adopted the unitary executive theory, although not completely implemented it as of this writing, as explained in Heidi Kitrosser's contribution to this issue.¹⁹ The Court has also taken an extraordinarily deferential approach to presidential claims that national security considerations justify his actions and to the construction of emergency powers (excepting real health emergencies and, in some respects, the Guantanamo Bay cases).

Based on this experience I make a number of proposals for improving the Supreme Court's treatment of presidential power. Most basically, I argue that the Court, like the Founders, should consider the possibility of a bad faith President in constructing its jurisprudence. It should take into account the possibility of democratic decline and the potential for a President to play a substantial role in undermining democracy. Too often, the Court considers the benefits of implying fresh presidential power without considering its potential costs if it fell into the wrong hands.

In particular, I recommend abandoning efforts to establish a unitary executive, which would concentrate all of the substantial legislative, executive, and judicial authority delegated to the executive branch over decades in the hands of one person. The Court has recently suggested that giving the President a political removal authority enables a President to faithfully execute the law.²⁰ But for-cause removal authority likely suffices to empower a President to check

17. See DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 102–04 (discussing the abuse of emergency powers in Hungary and Turkey).

18. See *id.* at 48–49 (discussing the role of emergency power in subjugating the German state to Hitler).

19. See *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198–99 (2020) (assuming that the President has “unrestricted removal authority” with two limited exceptions—one for multimember commissions and another for “inferior officers”).

20. See *id.* at 2204 (discussing the problem of a President being unable to remove a Director of the Consumer Financial Protection Board who opposes consumer protection).

bureaucrats who evade rather than implement the law.²¹ Political removal empowers an autocratic President to dismantle the rule of law, as illustrated by President Trump’s abuse of removal authority and actions by Presidents Andrew Jackson,²² Andrew Johnson,²³ and Richard Nixon,²⁴ all of whom sought to undermine the law or fair elections.

I also advocate conceptualizing national security (which the Court often invokes but never defines) as a defense of the people’s sovereignty over the United States.²⁵ That approach helps, for example, in understanding why terrorism constitutes a threat to national security, instead of just a species of especially horrific crime. Terrorism can threaten the nation’s security because it can lead to a collapse of our freedoms, as President Bush suggested. But that suggests that terrorism can destroy democracies not through physical violence but by causing the government to combat the terrorist threat through measures that limit freedom and democracy.²⁶ This, in turn, suggests that courts need to better balance the need to afford the President sufficient power to protect the nation against real threats against the potential for excessive deference to allow Presidents seeking to use real or imagined emergencies to grab powers undermining democracy.

In short, understanding the role of the head of state in dying democracies teaches us that the Supreme Court needs to rethink a jurisprudence aimed at empowering the President, rather than checking him. The main goal of the Founders—to create a Republic that would remain democratic even in the faces of forces pushing toward despotism—supports these sorts of reforms.

21. See Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 7–8 (2021) (the right to remove officers for “neglect of duty” or “malfeasance” traditionally connotes a right to remove officers not faithfully executing the law).

22. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 32–33.

23. *Id.* at 34 (discussing the impeachment of Andrew Johnson for removing the Secretary of War to undermine the law of reconstruction); David M. Driesen, *Appointment and Removal*, 14 ADMIN. L. REV. 421, 438 (2022) (documenting Johnson’s pervasive use of removal of many other officials to undermine the law of reconstruction) [hereinafter Driesen, *Appointment and Removal*].

24. Driesen, *Appointment and Removal*, *supra* note 23, at 440–41.

25. See DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 151–56.

26. See *id.* at 153–55.

II. INTRODUCTION TO THE CONTRIBUTIONS TO FOLLOW

The issue begins with Noah Rosenblum's piece on the role of doctrine in democratic deconsolidation, which provides a fairly comprehensive recapitulation of the book's treatment of the rise of Presidential power and capturing the core of its approach.²⁷ *The Specter of Dictatorship*, consistent with its limited aim of seeking to motivate and inform improvements in separation of powers jurisprudence, focuses heavily on legal doctrine's role in aiding or constraining presidential power, even as it mentioned other more fundamental causes. Professor Rosenblum's article provides a "friendly critique" of the book's emphasis on doctrine, explaining that more emphasis on other elements of democratic decline reveals the root causes of democratic erosion.²⁸ He draws a distinction between legal doctrine and institutional developments, arguing that the latter more strongly influence "presidential power and democratic decline."²⁹ He documents the book's emphasis on doctrine and usefully supplements its account with added information about institutional factors shaping the growth of presidential power over time, while usually agreeing with the book's historical account. He then argues in Part Two that "doctrinal changes, while potentially significant, have not been strongly causal."³⁰ In particular, he treats the "breakdown of democratic culture," not doctrinal development, as the disease that leads to democratic decline.³¹ But in the end, he agrees with the book's conclusion that doctrine may indeed play a role in checking presidential power.³² Congruent with the book's argument that law plays a role in legitimizing or delegitimizing drives to autocracy, he argues that legal reforms can play a role in helping to preserve or undermine democratic culture.³³

Heidi Kitrosser bolsters the book's case against the unitary executive theory as anti-democratic and advocates some limitations on the theory's advance that even the current Supreme Court might

27. See generally Noah A. Rosenblum, *Doctrine and Democratic Deconsolidation*, 72 SYRACUSE L. REV. 1433 (2022) [hereinafter Rosenblum, *Democratic Deconsolidation*].

28. *Id.* at 1435.

29. *Id.*

30. *Id.* at 1435, 1453–64.

31. *Id.* at 1436.

32. Rosenblum, *Democratic Deconsolidation*, *supra* note 27, at 1471.

33. *Id.*

adopt.³⁴ She focuses on the way unity can undermine democracy by enhancing the “President’s ability to hide or manipulate information.”³⁵ She begins with a probing analysis of the doctrine’s origins and premises, showing (among other things) that the Roberts Court treats “political accountability as an essential protective force in the case of the presidency,” but as a “dangerous temptation” for members of Congress.³⁶

Building on the theory developed in her fine book, *Reclaiming Accountability*, Professor Kitrosser explains how a flow of information from the executive branch to Congress and the general public helps make some degree of presidential political accountability possible.³⁷ But a President armed with the power to fire subordinates for no reason at all can force subordinates to keep information about what the President is doing secret or even publish distorted and false information, thereby eviscerating meaningful political accountability and distorting public debate. Calling the book’s concerns with the unitary executive theory’s tension with concept of an independent civil service “well-placed,” she focuses on the role of Inspectors General and other civil servants in reporting information.³⁸ She shows that the authority to fire civil servants can impede the information flow, discussing as examples President Trump’s firing of Inspectors General and of a Homeland Security expert who debunked “Trump’s false claims that the 2020 election involved massive cyber-fraud.”³⁹

She then argues that the Court “can and should recognize the special risks to accountability posed by unfettered presidential control over . . . information.”⁴⁰ It should therefore uphold legislation that reasonably limits such control. She endorses the book’s call to overturn or more thoroughly limit the unitary executive theory.⁴¹ But she shows that the Court can protect officials tasked with an informational role “without overruling precedent.”⁴² She then links

34. See generally Heidi Kitrosser, “A Government That Benefits from Expertise”: *Unitary Executive Theory and the Government’s Knowledge Producers*, 72 SYRACUSE L. REV. 1473 (2022) [hereinafter Kitrosser, *Unitary Executive Theory*].

35. *Id.* at 1475.

36. *Id.* at 1485.

37. HEIDI KITROSSER, *RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION* 1–4 (2018).

38. Kitrosser, *Unitary Executive Theory*, *supra* note 34, at 1490.

39. *Id.* at 1489.

40. *Id.* at 1491.

41. *Id.* at 1491–95.

42. *Id.* at 1493.

these recommendations to the book's goal of preventing slides into autocracy.⁴³

Andrea Katz's essay endorses the book's and Professor Kitrosser's conclusion that bureaucrats, if given sufficient independence, act as protectors of democracy.⁴⁴ While agreeing with the book's call for judicial reform to protect rule of law values within bureaucracies from potentially authoritarian politicization, she advocates more use of bureaucratic reforms—seeding the bureaucracy with independent actors like election monitors, ombudsmen, and inspectors general.⁴⁵ She makes an extremely important point to support these reforms: “*bureaucratic independence plays a structural role in democratic maintenance by counterbalancing the powers of political actors to turn government's levers toward illegal ends.*”⁴⁶ She illustrates the point by discussing the role of independent officials in resisting President Trump's effort to create an American autocracy.⁴⁷ But, she argues, we have done less than many countries in establishing and protecting bureaucratic independence and we should do more.⁴⁸

Jed Shugerman reads *The Spector of Dictatorship* as assuming that the anti-unitary position is the pro-liberty position and questions that assumption.⁴⁹ While the book acknowledges that delegation of authority to the executive branch has contributed to the rise of presidential power, it does not advocate judicial enforcement of a robust nondelegation doctrine. Shugerman writes that perhaps the book's anti-tyranny principle should have led to a critique of excessive delegation.⁵⁰ Shugerman endorses recent scholarship that doubts an original intent to prohibit broad delegations of authority from Congress, relying partly on his then forthcoming article in Stanford

43. Kitrosser, *Unitary Executive Theory*, *supra* note 34, at 1495–96.

44. See generally Andrea Scoseria Katz, *Defending the Defenders: Why Bureaucratic Independence is a Necessary Supplement to Judicial Defense of Democracy*, 72 SYRACUSE L. REV. 1497 (2022).

45. *Id.* at 1497–98.

46. *Id.* at 1509.

47. *Id.* at 1513–17.

48. *Id.* at 1517–19.

49. See generally Jed Handelsman Shugerman, *The Bi-Partisan Enabling of Presidential Power: A Review of David Driesen's The Spector of Dictatorship: Judicial Enabling of Presidential Power*, 72 SYRACUSE L. REV. 1521 (2022) [hereinafter Shugerman, *Bi-Partisan Enabling of Presidential Power*].

50. *Id.* at 1522–23.

Law Review to bolster the point.⁵¹ But he suggests that the lack of an originalist case does not necessarily preclude giving the doctrine life.⁵²

The *Specter of Dictatorship* points out that the Supreme Court often bends the law when national security concerns arise but has never defined national security. In seeking to solve the problem of understanding what exactly national security is, it points out that the deadliness of incidents does not explain how we define national security. We regard the killing of thousands on 9/11 as manifesting a threat to national security, but not the killing of tens of thousands annually by air pollution and automobiles. Professor Shugerman reads that argument for my national security definition (which does include terrorism as a national security issue) as being dismissive of terrorist violence and worries that the book thereby “confirms conservatives’ fears.”⁵³

He also points out that the tendency of Presidents to appoint executive branch lawyers to the Supreme Court helps explain the pro-presidential tilt of the Supreme Court.⁵⁴ The information in *The Specter of Dictatorship* shows that other countries have systems that avoid this flaw, by not allowing so much head-of-state control over judicial appointments.⁵⁵ In the end, Shugerman endorses the book’s “insightful warnings” but would like better treatment conservative’s concerns about bureaucracy as a threat to liberty.⁵⁶

Robert L. Tsai expresses more skepticism toward the book’s suggestion that courts can make “a modest contribution to the effort to preserve democracy” than Noah Rosenblum does.⁵⁷ He argues that “judges alone can’t save democracy” a point congruent with the book’s suggestion that appropriate judicial decisions on presidential power are more likely to contribute to political resistance to autocracy than to stop it outright on their own.⁵⁸ But Professor Tsai’s essay on

51. Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022).

52. Shugerman, *Bi-Partisan Enabling of Presidential Power*, *supra* note 49, at 1522.

53. *Id.* at 1536–37.

54. *Id.* at 1528.

55. *See, e.g.*, DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 118–119 (discussing the Turkish system in which judges and other non-presidential actors have played a significant role in selecting the member of Turkey’s constitutional Court).

56. Shugerman, *Bi-Partisan Enabling of Presidential Power*, *supra* note 49, at 1541.

57. Robert L. Tsai, *Why Judges Can’t Save Democracy*, 72 SYRACUSE L. REV. 1543, 1546 (2022) [hereinafter Tsai, *Why Judges Can’t Save Democracy*].

58. *Id.* at 1544.

“Why Judges Can’t Save Democracy,” unlike Rosenblum’s article, seems to doubt that they can play any constructive role at all.⁵⁹ While he makes a wide variety of arguments, many of them hinge on recognizing that an autocratic President can only obtain power with a national movement behind him and that movement “can sharply limit the effectiveness of judges as a check on democratic erosion.”⁶⁰ This is partly because the judiciary will over time reflect the partisan polarization that led to democratic decline (something we are certainly seeing in the U.S. Supreme Court today). It is also very hard for judges to recognize measures that lead to democratic decline. He advocates spending “more energy” on “structural changes.”⁶¹ He advocates overhauling election administration to make elections fairer and reducing impediments to “effective policymaking in Congress” among other things.⁶² But he characterizes the “judicial mindset” as “perhaps the biggest obstacle” to making judges into democracy defenders.⁶³ My view is that the only way to change the judicial mindset is through the arguments like those this book makes. But it is hard to argue that the current federal judiciary offers an especially receptive audience for this book’s arguments, as *The Specter of Dictatorship* acknowledges.⁶⁴ Professor Tsai’s argument, however, seems to view the judicial mindset as a permanent obstacle to hearing what this book has to say, perhaps even before the onset of polarization and movement toward autocracy influence the judiciary.

Cem Tecimer discusses the book’s advocacy of an anti-autocracy canon of constitutional construction—favoring constructions of the Constitution that tend to preserve democracy.⁶⁵ He focuses in particular on the book’s argument that judges should consider democratic decline abroad in order to understand how to properly apply the anti-autocracy canon.⁶⁶ He explores the issue of whether judges should consider experience abroad in adjudicating constitutional cases. He explains that the book advances arguments for consideration of foreign experience based on originalism—that the

59. *Id.* at 1546.

60. *Id.* at 1550.

61. *Id.* at 1557.

62. *Id.* 1562-66

63. *Id.* at 1558.

64. See DRIESEN, *supra* note 1, at 134 (acknowledging that if an American autocrat packs the federal courts with reliable loyalist judges “no federal judicial audience will exist for this book’s arguments.”)

65. See generally Cem Tecimer, *The Anti-Autocracy Canon and Foreign Law*, 72 SYRACUSE L. REV. 1561 (2022) [hereinafter Tecimer, *Anti-Autocracy Canon*].

66. *Id.* at 1563-64.

Founders considered foreign experience in writing the Constitution—and precedent—that the Court itself has done so in cases such as *Ex Parte Milligan*⁶⁷ and *Youngstown Sheet & Tube Co. v. Sawyer*.⁶⁸

Tecimer primarily focuses on practical concerns, mostly discussing judicial capacity to appropriately consider foreign experience. He explores the question of who decides which countries have undergone democratic decline to inform understanding of what constitutional changes place it in jeopardy. Even if judges (presumably aided by *The Specter of Dictatorship* and other books addressing democratic erosion) can identify reference countries, Tecimer asks whether judges have the capacity to adequately understand foreign law and practices.⁶⁹ He also worries that this kind of argument might prove counterproductive. Judges may respond to references to countries whose slide to autocracy is clearer and more advanced than our own may trigger “a false sense of confidence” that we need not worry about losing our democracy.⁷⁰ He also points out, citing Kim Lane Scheppele’s work, that the nature of democratic decline may make it hard for judges to understand how a single practice can contribute to democratic decline, since democratic decline typically occurs gradually through numerous measures, many of which do not by themselves seem alarming.⁷¹ He explains that the current Court seems unlikely to embrace such arguments, thereby implying that this book can only influence the deliberations of some future Supreme Court.⁷²

III. AMERICAN DEMOCRACY: AN UPDATE

Because autocrats drive autocracy, it may seem that our democracy remains safe, since Joe Biden does not exhibit autocratic tendencies. That thought would be an error. First of all, the Supreme Court has continued to pave the way for a future autocracy by championing the unitary executive theory in two cases issued just as *Specter of Dictatorship* went to press. In *Collins v. Yellen*, the Supreme Court reaffirmed its endorsement of the unitary executive

67. 71 U.S. 2, 125 (1866).

68. 343 U.S. 579, 593 (1952) (Frankfurter J., concurring); *id.* at 651–53 (Jackson, J., concurring).

69. Tecimer, *Anti-Autocracy Canon*, *supra* note 66, at 1571.

70. *Cf.* DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 1, at viii (discussing the problem of a “confidence trap” where experience in surviving prior threats to democracy may make American’s too confident in our ability to keep it in the future).

71. Tecimer, *Anti-Autocracy Canon*, *supra* note 66, at 1572.

72. *Id.* at 1574–75.

theory in *Seila Law LLC v. Consumer Financial Protection Board*.⁷³ The case dramatically illustrates the Court's activism in seeking autocracy enhancing constitutional reform, as the Court overcame substantial statutory and constitutional barriers to hear that case.⁷⁴ In *United States v. Arthrex*, the Court used the unitary executive theory to challenge the independence of the Patent Trial and Appeal Board, an adjudicative body within the executive branch in a 5-4 decision, with Justice Thomas joining the liberals in dissent.⁷⁵

On the other hand, the Court has limited executive branch assertions of emergency power to combat COVID-19 (as Noah Rosenblum notes in his paper),⁷⁶ but not in a way that suggests the Court is reigning in presidential abuse of emergency power. The Court rejected requirements that large employers implement requirements for vaccination or testing and masking of their employees and that landlords refrain, under some circumstances, from evicting tenants during the pandemic.⁷⁷ But Congress had clearly authorized these measures through statutory language requiring the protection of the health of workers (in the employers' case) and the general public (in the eviction moratorium case).⁷⁸ The *Specter of Dictatorship* had urged the courts to check fake emergencies to protect democracies from destruction.⁷⁹ But the Court in the COVID cases did not deny that the pandemic constituted a real emergency.⁸⁰ The book also urged the courts to require that powers used have the capacity to address the emergency, but the Court did not and could not dispute that COVID spreads in workplaces and newly homeless tenants can travel and

73. *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021) (holding unconstitutional for cause removal restrictions on the President's authority to fire the head of the Federal Housing and Finance Agency).

74. The Housing and Economic Recovery Act of 2008 (Recovery Act) barred jurisdiction over actions challenging any action affecting the FHFA's role as a conservator. *Id.* at 1770. The Court creatively read the Recovery Act as not barring a constitutional claim aimed at attacking actions of the FHFA as conservator. *See id.* at 1780. The Court also applied an uncharacteristically liberal approach to standing and mootness in this case. *See id.*

75. *United States v. Arthrex*, 141 S. Ct. 1970 (2021).

76. Rosenblum, *Democratic Deconsolidation*, *supra* note 27, at 1458.

77. *Alabama Ass'n of Realtors v. Dep't of Health & Human Serv's*, 141 S. Ct. 2485, 2486 (2021); *Nat'l Fed. Of Indep. Bus. (NFIB) v. Occupational Safety and Health Admin. (OSHA)*, 142 S. Ct. 661, 662-63 (2022).

78. *See Alabama Realtors*, 141 S. Ct. at 2491-92 (Breyer, J., dissenting); *NFIB*, 142 S. Ct. at 670 (Breyer, J. dissenting).

79. *See DRIESEN, THE SPECTER OF DICTATORSHIP*, *supra* note 1, at 165.

80. *See Alabama Realtors*, 141 S. Ct. at 2489; *NFIB*, 142 S. Ct. at 665.

infect others.⁸¹ While the *Specter of Dictatorship* advocated an arbitrary and capricious test for assertions of emergency power, it was careful to acknowledge the need for some deference to executive branch decisions addressing real emergencies.⁸² I have shown elsewhere that the Court's approach in the COVID cases reflects ideological opposition to federal health protection when viewed by some of the public as intrusive.⁸³ Its COVID case law hardly suggests dawning wisdom about the risk abuse of executive power poses to democracy's survival.

The Specter of Dictatorship's focus on the chief executive implies that democracy may unravel if the polity elects an autocratic chief executive. President Trump has suggested he plans to run again and this brings up a theme of the book, the tendency of autocrats and the party that supports him to tilt the electoral playing field. In this regard, President Trump seeks to displace officials who insisted on an honest vote count in 2020, such as Georgia's Secretary of State, Ben Raffensperger.⁸⁴ Furthermore, President Trump's supporters have secured passage of bills in Georgia and elsewhere that authorize wresting vote counting authority from bipartisan officials and elected secretaries of state under some circumstances—a state level variant on the politicization of election commissions that *Specter* decries.⁸⁵ This

81. See DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 166.

82. See *id.*

83. See David M. Driesen, *Major Questions and Juristocracy*, REGUL. REV. (Jan. 31, 2022), <https://www.theregreview.org/2022/01/31/driesen-major-questions-juristocracy/> (chastising the Court for usurping the President's role in addressing major questions); David M. Driesen, *The Death of Law and Equity: A Comment on Two COVID Cases*, VERFASSUNGSBLOG (Jan. 19, 2022), <https://verfassungsblog.de/the-death-of-law-and-equity/> (arguing that the Court's approach to COVID in the OSHA case reflects a return to judicial activism associated with the Lochner period).

84. Cameron McWhirter & Alexa Corse, *Georgia's Brad Raffensperger Again at Center of Election Fight*, WALL ST. J. (March 7, 2022), <https://www.wsj.com/articles/georgias-brad-raffensperger-again-at-center-of-election-fight-11646571602> (discussing President Trump's efforts to unseat incumbent Secretaries of State in Georgia, Michigan, and Arizona).

85. See Andrew Solender, *Trump Says New Georgia Election Law Would've Prevented His Loss In The State*, FORBES (Mar. 26, 2021), <https://www.forbes.com/sites/andrewsolender/2021/03/26/trump-says-new-georgia-election-law-wouldve-prevented-his-loss-in-the-state/?sh=6b499a2a1b59>; see also Mark Niese, *Georgia Election Bill Rooted in Trump Supporters Complaints about 2020*, ATLANTA J. CONST. (Mar. 24, 2022), <https://www.ajc.com/politics/georgia-election-bill-rooted-in-trump-supporters-complaints-about-2020/WVOWSQA2HRGZHOQJVRB6CE4XB4/>; Georgia's new election laws allow the State Election Board to remove local superintendents in charge of ballot counting and certifying election results. See GA. CODE ANN. § 21-

could pave the way for stealing elections, but has not garnered the degree of attention that more familiar election tilting measures, such as voting restrictions and partisan gerrymandering (both playing a role in some of the case studies) have received. This reinforces Robert Tsai's point that election reform, not just judicial treatment of presidential power, is important to preserving democracy.⁸⁶

The *Specter of Dictatorship* discussed Trump's attempts to tilt the electoral playing field while in office, such as seeking prosecution of political opponents, seeking to corrupt the 2020 census, and using the Post Office as a tool to limit mail-in balloting.⁸⁷ And it catalogued efforts to tilt electoral outcomes using techniques that my autocratic models have used, such as gerrymandering and voting restrictions.⁸⁸ But it opined that states' control over voting may make it harder to rig elections than it might be in a unitary state.⁸⁹ Trump's efforts to facilitate the theft of a future election suggest that he appreciates this problem and is doing his best to overcome it.

But the need for the Supreme Court to construct a separation of powers jurisprudence that impedes rather than facilitates autocracy will endure even if Trump does not become our next President. Unfortunately, an autocrat can become an elected head of state at any time in any place. And the Supreme Court's role as guardian of the Constitution requires it to take that possibility more seriously than it has in the recent past, even if the present threat abates.

2-31 (2021); *see also* GA. CODE ANN. § 21-2-70 (2021) (giving superintendents responsibility for election operations); GA. CODE ANN. § 21-2-76 (2021) (superintendents may not simultaneously serve as elected officials); GA. CODE ANN. § 21-2-33.1(g) (2021) (Secretary of State required to defer to State Election Board's decisions on enforcing election law, including removal of local officials). The state election board is a political body dominated by Republican politicians. *See* GA. CODE ANN. § 21-2-30 (2021).

86. Tsai, *Why Judges Can't Save Democracy*, *supra* note 57, at 1556 (acknowledging the crucial role of politics and political parties in preserving democracy and mentioning the Court's rulings authorizing unlimited campaign expenditures, undermining voting rights, and declining to police partisan gerrymanders as important obstacles to keeping our democracy intact).

87. *See* DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 126–28.

88. *See id.* at 109–10.

89. *See id.* at 129.