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Princeton University

# Destroying Democracy by Law

AALS, Washington, DC – January 2024

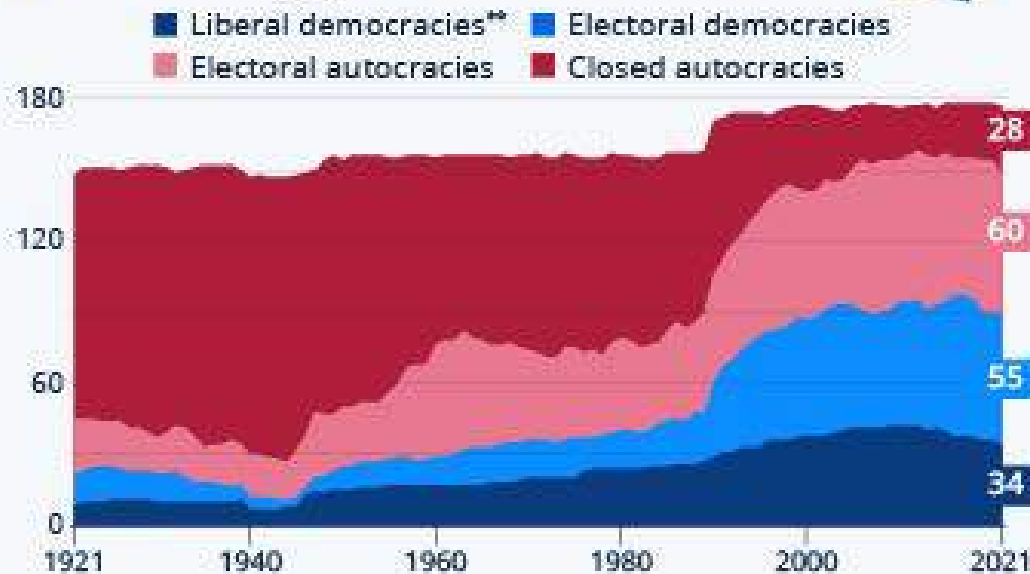
NOTE: The actual presentation was going to be much shorter, but because illness prevents me from attending, I'm therefore not subject to the panel time limits.

As a result, this is the original full-length lecture, excerpted from my forthcoming book *Destroying Democracy by Law* (to be published by Harvard University Press).

# The state of global democracy

## Is Democracy in Decline?

Evolution of the number of political regimes in the world by type\*



\* Political regimes based on the classification by Lührmann et al. (2018) and the assessment by V-Dem's project.

\*\* Free elections and equitable laws/processes

Sources: Our World In Data, Lührmann et al. (2018), V-Dem



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Compared with a century ago, democracy has triumphed.

Compared with 20 years ago, democracy has declined.

Instead, “electoral autocracies” (regimes with competitive elections but no real chance of changing leaders) have become the most common political regime type.

In 2023, V-Dem said that the world was back to the same democracy levels as in 1989.

**FIGURE 4: COUNTRIES WITH SIGNIFICANT CHANGES IN LIBERAL DEMOCRACY, 2009–2019**

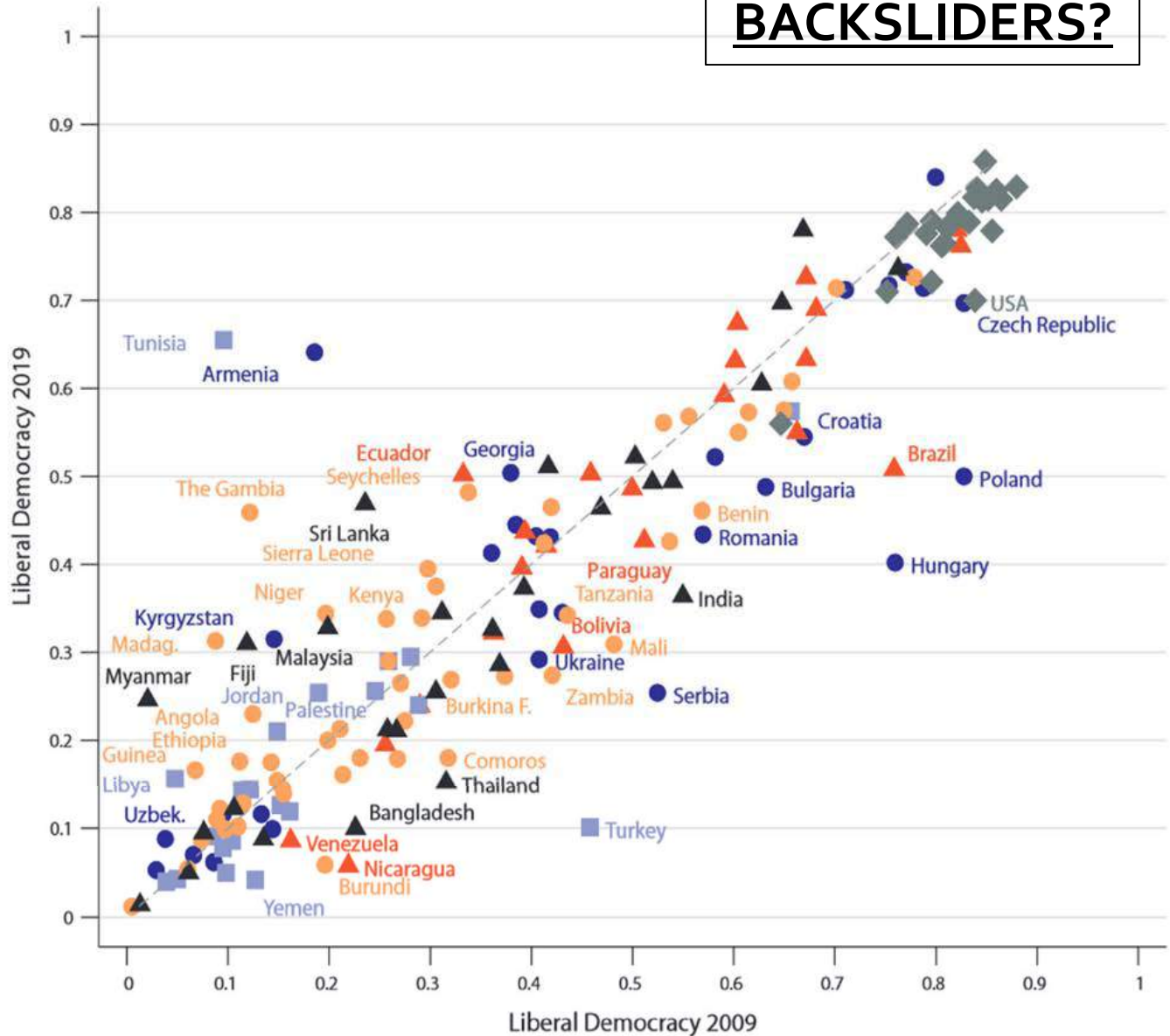
**WHO ARE THE BACKSLIDERS?**

**From the Varieties of Democracy 2020 Report**

- Eastern Europe and Central Asia
- MENA
- ◆ Western Europe and North America
- ▲ Latin America and the Caribbean
- Sub-Saharan Africa
- ▲ Asia-Pacific

**Countries above the line are democratic improvers.**

**Countries below the line are the democratic backsliders.**

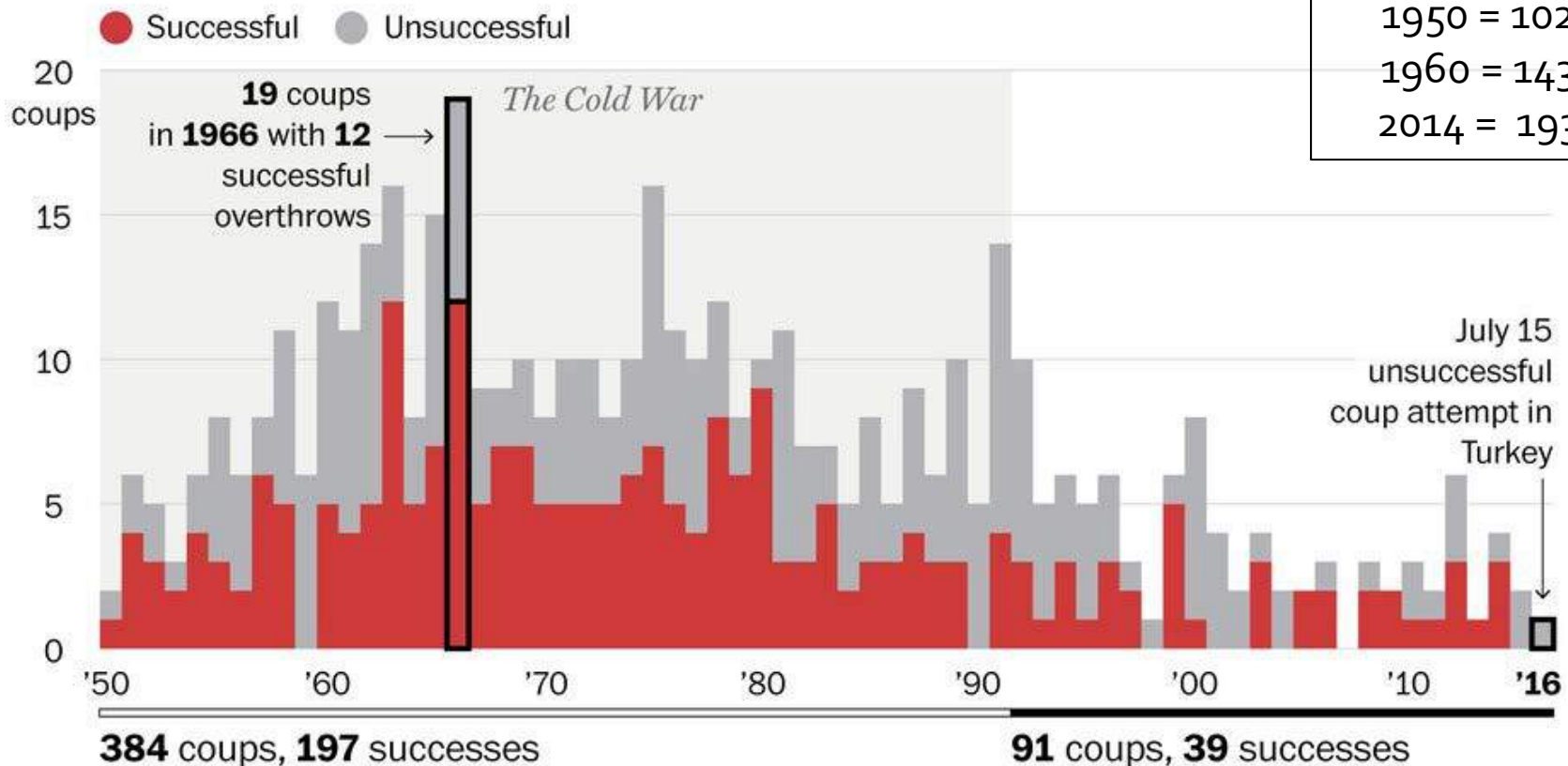


From V-Dem 2020 Democracy Report: [https://www.v-dem.net/media/filer\\_public/de/39/de39af54-obc5-4421-89ae-fb20dcc53dba/democracy\\_report.pdf](https://www.v-dem.net/media/filer_public/de/39/de39af54-obc5-4421-89ae-fb20dcc53dba/democracy_report.pdf)

# How do democracies collapse?

## Until recently, most democracies died by coup

### Comparing coup attempts and successes



# of countries:  
 1950 = 102  
 1960 = 143  
 2014 = 193

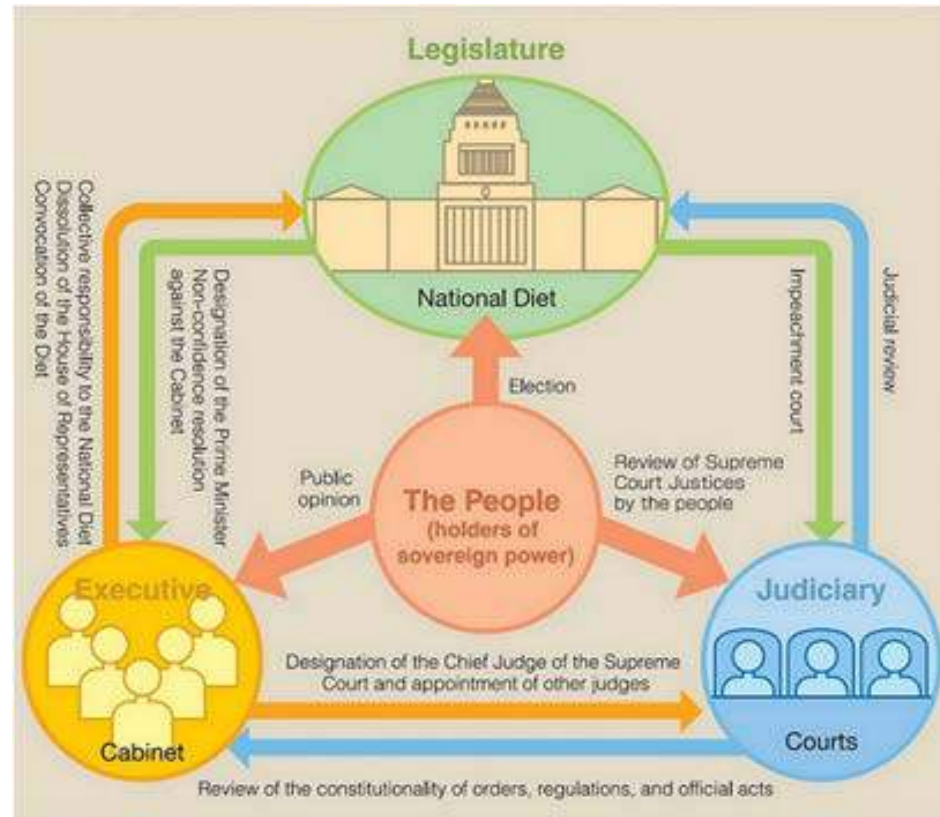
The Yemen Arab Republic and the People's Democratic Republic of Yemen are counted as one entry.

Source: Jonathan Powell and Clayton Thyne

JEREMY C.F. LIN/THE WASHINGTON POST

# Now there is a new script: Democracies die when autocrats are elected and crash their democratic constitutions through legal means.

How checks and balances are supposed to work (e.g. Japan's parliamentary system) →



Democracies die as checks on the executive branch are dismantled and the executive is given more power by law.

Since 1990, **70% of all major extensions of executive power** have been permitted by law. Fully half of those were accomplished through **reinterpretation** of existing law rather than creating new law.

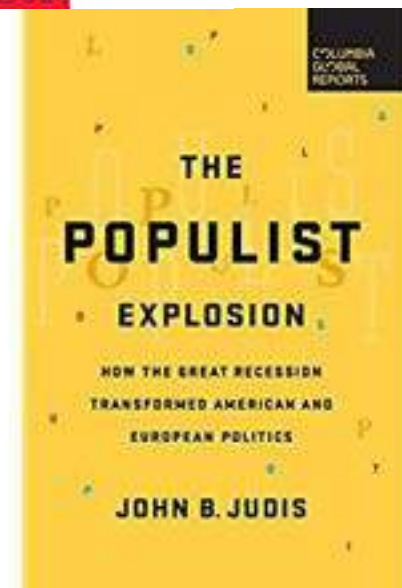
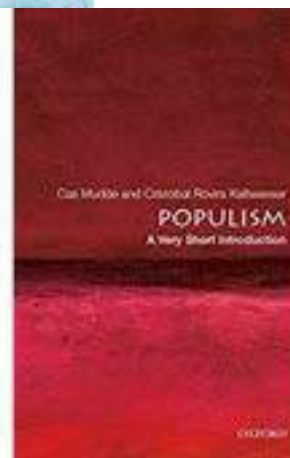
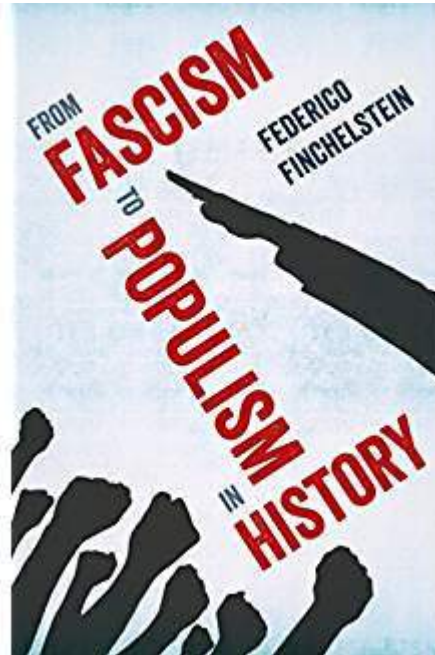
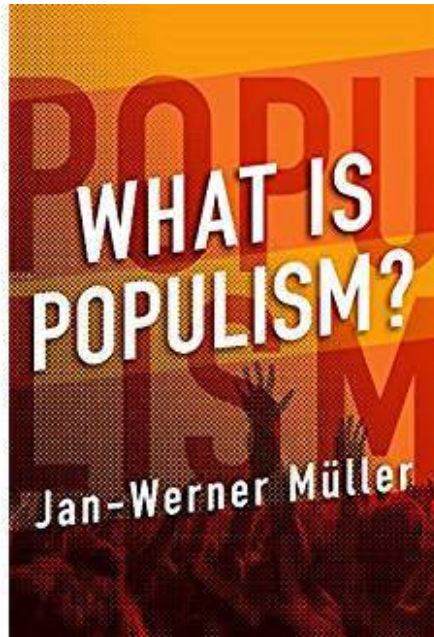
# In the new world of declining democracies, lawyers are the new footsoldiers of autocracy



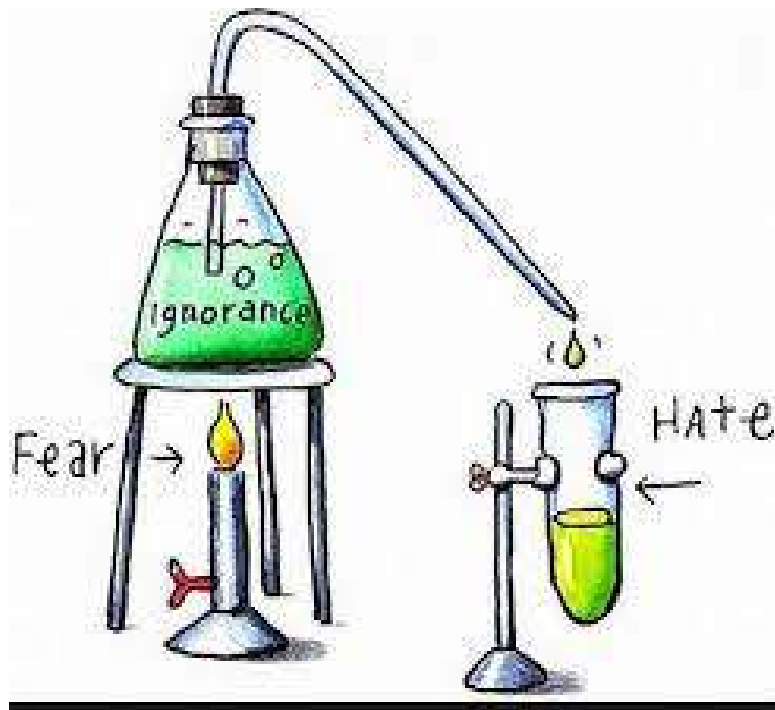
Now, the typical pattern is that autocratic leaders come to power  
NOT with phalanxes of **soldiers**, but with phalanxes of **lawyers**.

When democracy dies, it dies a **legal death**.

What does "the literature" say about why this is happening? Because the people have turned populist.



# And why have the people become populists?



People have turned populist because:

- **Deprivation:** Economic dislocation caused by increasing globalization that leaves certain classes behind.
- **Ignorance:** Fake news and the manipulation of truth.
- **Fear:** Of immigrants or terrorism or threats to identity. Of the “other.”
- **Anger:** At old elites and previous politicians-in-charge.
- **Racism:** Denigration of those who are different, especially when they seem to be beneficiaries of special treatment.



# But is populism really driving the “democratic decline”?

- “**Populism**” focuses on what the **new autocrats say and their appeals to publics.**
- **Constitutional destruction** focuses on what **the new autocrats do and the effects.**

Although they are often connected in the same person, they are **not the same in the world.**

And **while there is substantial public support for populism,** there is little public support for constitutional destruction.



**Blaming “democratic decline” on populist ideology presumes that voters intend to damage constitutional government.**

**But public opinion polls show that voters separate the two.**

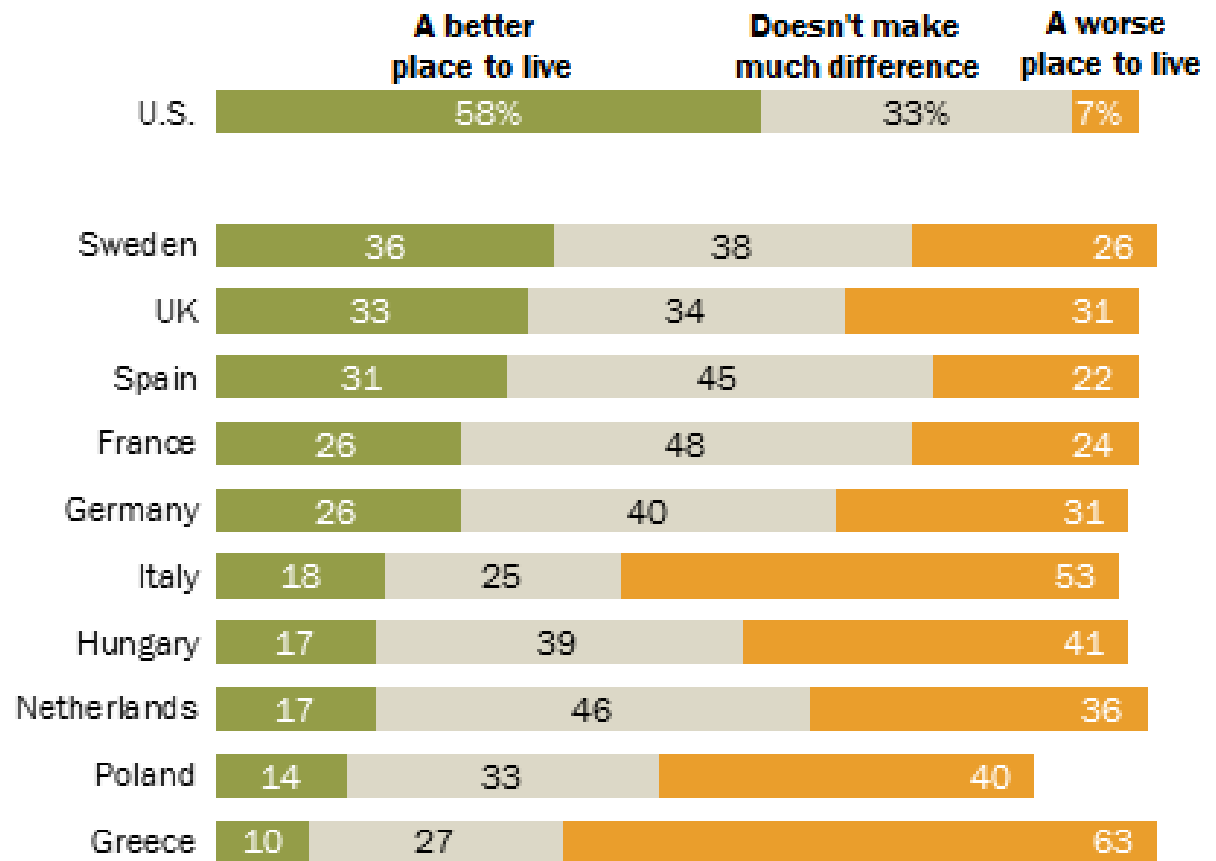
# Populist ideology

Orange = percent “right-populist” who oppose DIVERSITY, saying that including different races, ethnic groups, nationalities makes a country a WORSE place to live.

(NOTE: Data from 2016 = the year Trump won the US presidency)

## Americans more likely to say growing diversity makes their country a better place to live

*Do you think having an increasing number of people of many different races, ethnic groups and nationalities in our country makes it a better place to live, a worse place to live or doesn't make much difference either way?*



Source: Spring 2016 Global Attitudes Survey. U.S. survey conducted March 17-27, 2016.

PEW RESEARCH CENTER

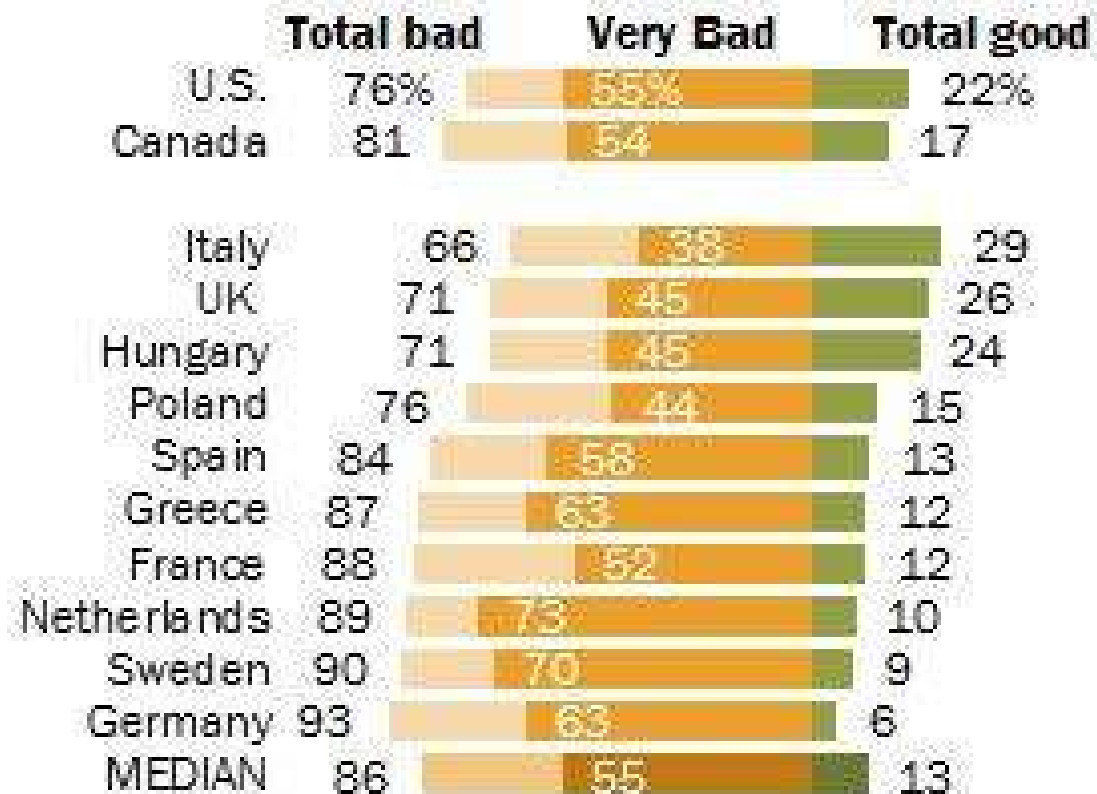
## Constitutional Destruction

Green = support for autocracy (2017 – while Trump was president).

In general, **autocracy is disfavored by supermajorities**, even in places like Italy, Hungary, Greece and Poland which had the highest rates of ideologically “right”-populism.

## Support for autocracy generally low

*Would a system in which a strong leader can make decisions without interference from parliament or the courts be a good or bad way of governing this country?*



Source: <https://www.pewresearch.org/global/2017/10/16/democracy-widely-supported-little-backing-for-rule-by-strong-leader-or-military/>.

**Instead of focusing on what populist leaders say, then, we should focus on what they DO.**

**Democracy** = being able to change leaders through free and fair elections and peaceful transfers of power.

**Autocracy** = when this is no longer possible – particularly when peaceful transfer of power is closed by law.



**Why do autocrats capture the law? Because law is the way that the state talks to itself . . .**

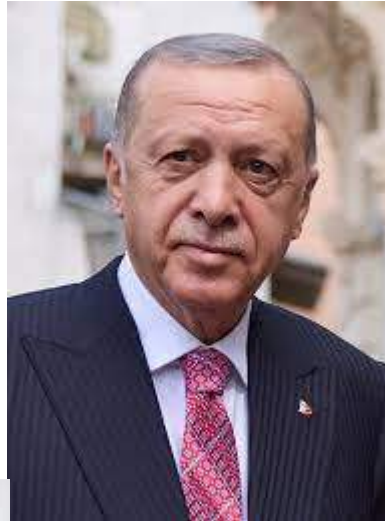
**To the bureaucrats. To the judges.  
To the military. And more. Law commands obedience.**

# Today, I will show how democracy is being dismantled step-by-step by law around the world



Russian president Vladimir Putin (illustration by TPOXA, ILLUSTRATION/shutterstock)

**Vladimir Putin, Russia**



**Recep Tayyip Erdogan, Turkey**



**Hugo Chavez, Venezuela**



**Donald Trump and Viktor Orbán**



**Jair Bolsonaro, Brazil**

# How do they do it? The autocratic script

1. Win elections that are “free and fair” (at least the first time).
2. Systematically dismantle checks on executive power.
3. Capture the parliament or make it irrelevant.
4. Capture the courts through “reform” limiting powers or new judicial appointments.
5. Ensure loyalists are in key “independent” offices (prosecutor, tax enforcement, judicial selection authority, election administration, military, intelligence services).



*Today, three variants: Hungary = fast;  
Turkey = slow; US = on the fence*

6. Harness the media as an echo chamber.
7. Harass opposition parties and the civil sector to discourage and distract them.
6. Rewrite the election laws to win the next time – and never have to leave office.

# Today, we can see three different ways that this script is being deployed

- **Fast autocracy** – Hungary under Orbán— rapid attacks on all independent institutions at once. (Also, Venezuela under Chávez.)
- **Slow autocracy** – Turkey under Erdogan — step by step over years to an autocratic endpoint. (Also, Russia under Putin.)
- **Autocracy on the fence** – the US under Trump (and Republicans) – leaders try to stay in power but they mobilize the law incompletely or opposition pushback works before autocracy succeeds. But the opposition is not strong enough to eliminate the danger completely – so autocracy stays on the fence. (Also, Brazil under Bolsonaro and India under Modi.)

# Fast autocracy: Hungary



# Viktor Orbán, Prime Minister of Hungary since 2010 (also 1998-2002)

**Viktor Orbán**  
turning  
Hungary into  
an  
**illiberal** state



# Orbán came to power in 2010 through a constitutional design flaw



Achilles – and his heel  
(and the ballot box)

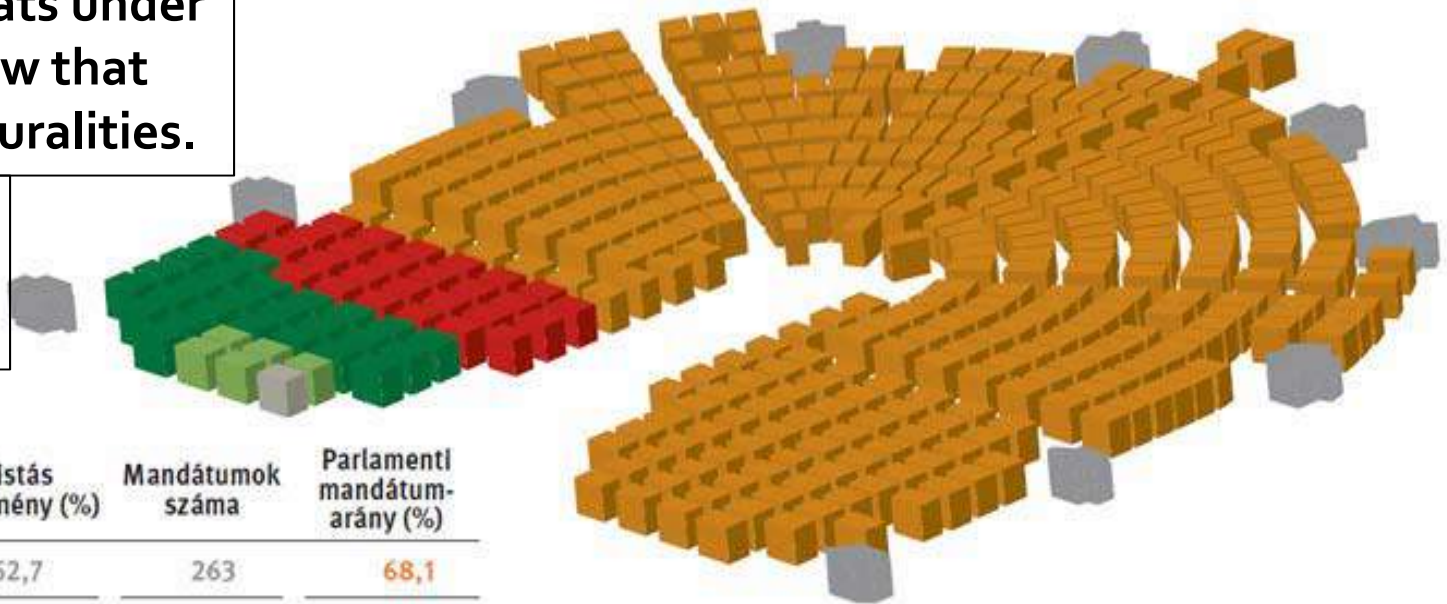
- **Hungary has a disproportionate election law** that makes constitutional supermajorities very likely, especially after the initially large number of parties declined.
- **Hungary has an easy constitutional amendment process** – a single two-thirds vote of the unicameral parliament could amend anything in the constitution.
- In 2010, all parties were discredited or completely new, except for **Fidesz, Orbán's party**. No one was surprised when he won a big victory – and gained a constitutional supermajority, allowing him to change the constitution at will.

# 2010: A constitution-making majority

In 2010, Fidesz obtained two-thirds of the Parliament's seats under an election law that supplements pluralities.

And did so with only 53% of the vote.

Az új Országgyűlés összetétele



Pártok	Listás eredmény (%)	Mandátumok száma	Parlamentari mandátumarány (%)
<b>Fidesz-KDNP</b>	52,7	263	<b>68,1</b>
<b>MSZP</b>	19,3	59	<b>15,3</b>
<b>Jobbik</b>	16,6	47	<b>12,2</b>
<b>LMP</b>	7,7	16	<b>4,1</b>
Független Molnár Oszkár		1	0,2

Prime Minister Viktor Orbán called this a "revolution of the ballot box."

# Hungary's political system



Above: A bicameral parliament building with a **unicameral parliament**. The president is elected by the parliament. And so is the prime minister.

**In Hungary, the primary check on power in the unicameral parliamentary system was the Constitutional Court.**

# In 2010, Orbán immediately set out to capture the Constitutional Court

- **Changed the system for appointing judges in 2010** so that the votes of only his party in Parliament would be enough.
- **Increased the size of the bench from 11 to 15** (in anticipation of giving the Court more cases to decide – following Turkey).
- **Changed the jurisdiction** of the Court so that it could not rule on budget matters or receive abstract review cases from anyone outside Orbán's circle, giving Orbán a free hand.
- **Nullified adverse decisions** by adding unconstitutional laws directly to the Constitution and then (in 2013) preventing the Court from ruling on the constitutionality of constitutional amendments.
- **By 2013, the Court was captured.** And the Court has obediently followed political direction ever since.



**"We are constitutional judges."**

# In 2011, Orbán rewrote the constitution



**The new “Alaptörvény” (Fundamental Law)  
in the halls of the Parliament**

With its reliable 2/3rds majority, Fidesz pushed through a new constitution in March 2011.

The draft had been written behind closed doors with no public or opposition participation.

It was passed on a party-line vote in the Parliament, as a private member’s bill in an expedited procedure.

# From 2011-2013: Passing “cardinal laws”



←  
Press  
freedom dies  
in Hungary  
2011 with  
new media  
laws.

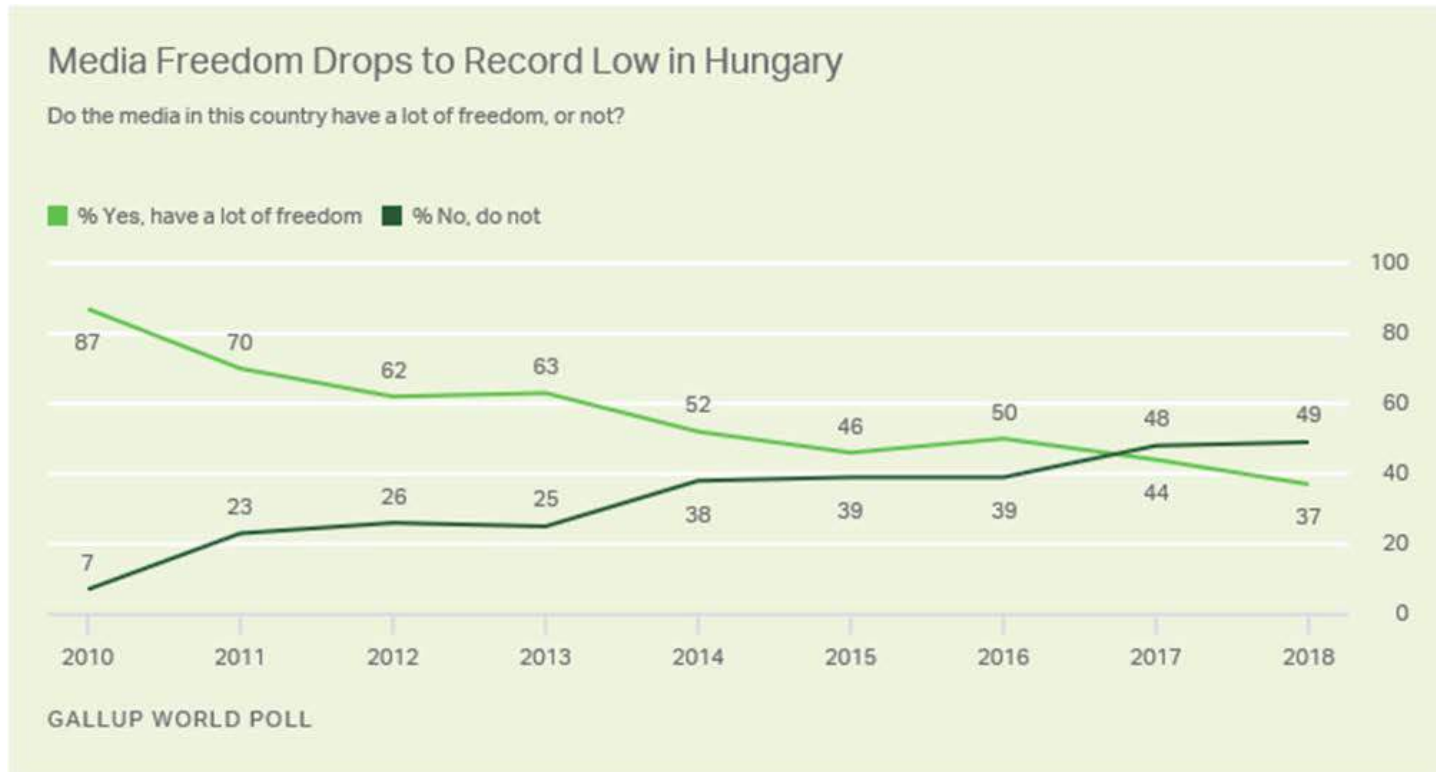
- The new constitution itself didn't look terrible on its face – by design, because the world was paying attention.
- But the constitution required **50+ “cardinal laws”** (laws of constitutional status) to fill in the details of the constitutional text. The **devil was in the detail** of the cardinal laws – which locked in Orbán's power.
- The cardinal laws required a **relative 2/3rds majority** of the Parliament, entrenching details of the new constitutional order and making it virtually impossible for any future government to change the system back. Orbán maintains status quo with only 1/3.

## Some topics of the cardinal laws – all of which were rewritten between 2011-2013 to lock in Orbán's power, people and policies

- On the regulation of political parties.
- On the regulation of churches
- On the freedom of the press and media services
- On voting and elections
- On rights of minorities in Hungary
- On the military and defense
- On the Parliament
- On the Presidency of the Republic
- On the operation of regulatory agencies
- On the police and national security services
- On the Constitutional Court
- On the judiciary
- On the public prosecutor
- On the local municipalities
- On the national bank
- On the state audit office
- On the pension system
- On the budget council
- On the establishment of public interest trusts (privatized universities)
- On states of emergency
- And more . . .



# For example: The cardinal law creating the Media Council



A new Media Council was introduced by law in 2011 with the power to regulate all media. All members were elected by Orbán's parliamentary 2/3rds majority for 9-year terms.

The Council started to fine all media outlets that were not "fair and balanced" and to deny broadcast frequencies to dissident radio and TV. Within a few years, the media had become an Orbán echo chamber with little viewpoint diversity.

## Another example: A new cardinal law creating the National Judicial Office & restructuring the judiciary

- **Created the National Judicial Office, empowering a single political official** to hire, fire, promote, demote and reassign all judges.
- **Lowered judicial retirement age** to remove the most senior judges (one quarter of the Supreme Court and 50% of appeals court presidents) so that there were new posts to fill.
- **Marginalized the National Council of the Judiciary** in vetting their peers by making their consent to judicial appointments optional and easily bypassed.
- Then (in 2021) the government changed the law again to replace the Supreme Court president with an unqualified loyalist with **the power to appoint new judges to his own court and assign any case to any judge.**



For eight years, Tünde Handó was held all judges' careers in her hands.

# Throughout the political system, checks and balances were removed

## Reduced Parliament to a rubber stamp

- A constitutional amendment cut the size in half and then redrew all of the districts with extreme gerrymanders.
- Routinely used private member's bills to bypass full parliamentary process and enact laws overnight.
- Governing party members were fined for not voting with the party and opposition MPs were fined for disrupting the proceedings.

## Removed independence of "independent authorities" by appointing loyalists for extended terms of office into:

- Prosecutor's office
- Election commission
- Audit office
- Ombudsman's office
- Central bank
- And more (competition office, public procurement office, etc.).



**Who has the power?  
Prime Minister Viktor Orbán  
and his close circle of Fidesz  
leaders  
(which he periodically purges  
to retain full control).**

# In the end, governing without constraint



“The Constitution is not a Toy”

7 March 2013

Protests against the Fourth Amendment

Because he has maintained his 2/3rds majority in parliament since 2010, Orbán can simply **amend the constitution** whenever he wants to do something unconstitutional.

Since March 2020, Hungary has been in a **state of emergency** (due to pandemic then Ukraine) and the Parliament gave Orbán the power to **override any law** (including the budget) **by decree**.

The ability to change the law when he wants to puts him **above the law**. But the law applies to everyone else and he uses it to wrongfoot the opposition.

# All democracy raters & the European Parliament agree . . .



The European Parliament overwhelmingly adopted a resolution with this conclusion in September 2022.

# Other examples of fast autocracy



Benjamin Netanyahu in Israel attempted a blitz constitutional takeover in spring 2023 – but Israelis were fighting back before 7 October changed the world.



Hugo Chavez began the Venezuelan constitutional revolution in 1998 by rapidly enacting a new constitution.

# Slow-motion autocracy: Turkey

# Recep Tayyip Erdoğan

## Leader of Turkey since 2002





# The system Erdoğan inherited: Constitutionally mandated secularism



**Mustafa Kemal (a.k.a. Atatürk)** (1881-1938), the founder and the first president of Republic of Turkey, **insisted on the complete separation of state and religion.**

- The “Kemalist” constitution of 1921 (amended 1924 and 1937) barred all display of religious symbols and practice in public life. **Mandatory secularism.**
- **Secularism was enforced by the Constitutional Court and by the military**, which together repressed all signs of public religious expression.
- The Constitutional Court was given the power to **ban religious political parties**, which it had done repeatedly.
- The military launched **coups** whenever secularism was in danger.

# How the Erdoğan and his AKP political party avoided a party ban

- Recep Tayyip Erdoğan heads the **Justice and Development Party (AKP)**, a “moderate Islamist” party with a great deal of public support.
- At first, this party advocated “American style” separation of church and state (tolerating public visibility of religion but not endorsing any religion).
- Prior religious political parties, including those of Erdoğan and his colleagues, had been banned for being too religious.
- **But the AKP’s program was liberal enough to escape a party ban (at first).** They advocated only the right to express their religion but not to impose it on anyone.
- This was a popular sentiment in Turkey . . . And so the AKP was swept into power as soon as it was allowed to stand for election.



# Erdoğan's rise to power

## Total clearout

Vote share (%) of the parties in the 2002 general election

jamesinturkey.com



The 2002 election that brought the AKP and Erdoğan to power.

Note that, under a rule that preceded Erdoğan parties that received less than 10% of the vote got NO seats in the Parliament.

- Erdoğan was elected mayor of Istanbul in 1995. Governed as a pragmatist.
- In 2002 national elections, his party won 34% of the vote and 66% of the seats in Parliament.
- Note that majorities voted for others!
- So Erdoğan became PM in Turkey's parliamentary system.

# At first, Erdoğan was a good guy . . .

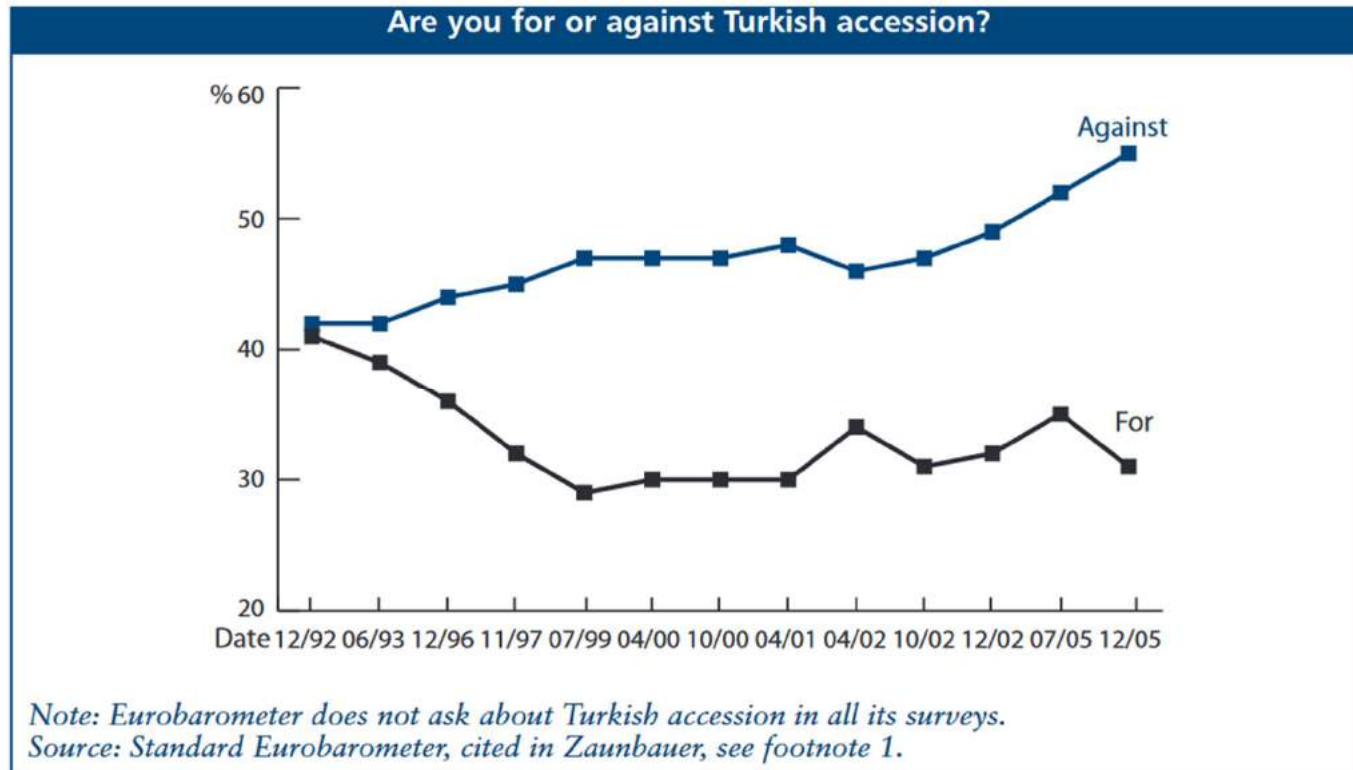


The EU recognized Turkey's candidacy for membership in 1999, pending reforms.

Erdoğan became PM in 2002 and eliminated the death penalty, entrenched gender equality, strengthened civilian control over the military, cracked down on torture.

Formal EU accession talks launched in 2005 after Turkey had made sufficient progress.

## But in 2006, the EU froze accession negotiations



**European public opinion had always been against.**

**Eventually European politicians followed suit.**

**Plus Cyprus joined the EU in 2004** without resolving its Turkish problem and it then voted to block Turkey's membership in the EU.

# With the EU out of reach, Erdoğan pivoted to autocracy

Under the constitution at the time, the **parliament elected the president (and also the prime minister)**.

Erdoğan promoted his political ally, the more overtly religious **Abdullah Gül**, as president of Turkey.

The **military threatened to intervene** and the **Constitutional Court refused to certify** the parliamentary election of the president.

Erdoğan called a **snap election in 2007**, won 47% of the vote, and his overwhelming parliamentary majority elected Gül again.

Erdoğan then pushed through a constitutional amendment in 2007 that **changed the system for choosing the president – by popular election rather than by parliament**.



Abdullah Gül as  
Turkish President  
with  
Recep Tayyip Erdoğan  
as Prime Minister.

(At this time, the Prime Minister held the real power; the President was a figurehead.)

# Consolidating power through constitutional amendments in 2010



- **The constitutional provision exempting the military from trial for their actions was removed** – so they were now accountable under law.

The package of amendments **brought the military and the Constitutional Court under Erdoğan's thumb** – with popular approval because they had stood in the way of popular support for moderate Islam.

But removing those two checks gave Erdoğan a free hand.

**2010 – huge package of constitutional amendments, something for everyone to love (and hate).**

- Individual citizens could go to the Constitutional Court to enforce their rights.
- **The number of judges on the Constitutional Court was increased** to deal with the increased case load (but provided a chance for Erdoğan to pack the Court).
- The system of appointing judges was changed (to allow for court-packing).

# The military trials of 2010-2016

**Two giant trials, each with hundreds of defendants – known as the Ergenekon and Sledgehammer cases – Charged military officers with plotting coups.**

Based on forged evidence, these were clearly **show trials**.

In 2012, 330 military officers convicted in the Sledgehammer trial.

In 2013, 247 top military officials were convicted in the Ergenekon trials, dozens sentenced to life imprisonment.

In 2014, an appeals court cleared all Sledgehammer convictions due to procedural irregularities in the trial

In 2016, all verdicts in Ergenekon were annulled by the appeals court.

**But the end result was the decapitation of the military and its reconstitution under Erdoğan's control.**

**The trials didn't have to have real evidence.**



**Former Chief of Staff  
Gen. İlker Başbuğ testifies.**



# Preparing for a change of system: From Prime Minister to President

From **2002-2014**, Erdoğan had been **prime minister** since his party held a large majority in the Parliament.

But long-term success of his party was not guaranteed.

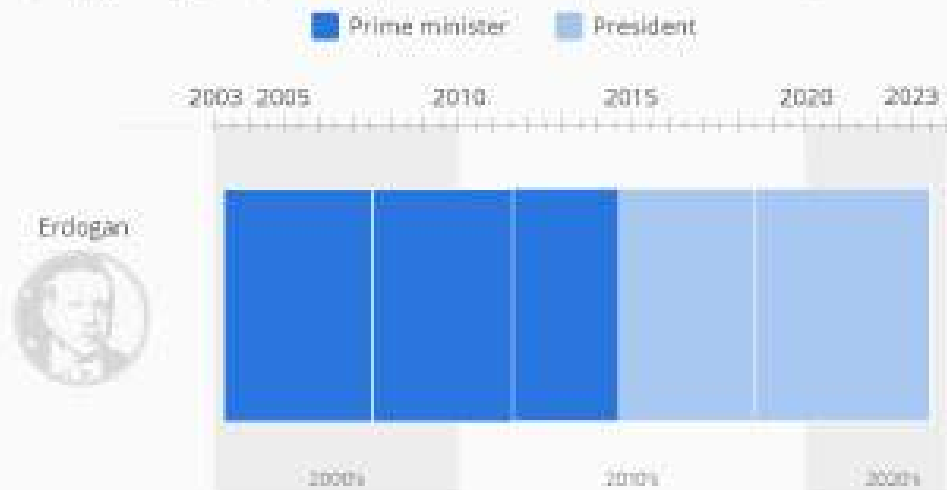
**In 2014, he ran for president and won,** taking advantage of the new constitutional **amendment that allowed for direct election of the president.**

Briefly, in 2015, his party lost its majority in Parliament. He called snap elections and won it back.

He then **began the process of legally transferring most powers to the presidency.**

## Erdoğan Goes it Alone

Recep Tayyip Erdoğan in power as prime minister or president of Turkey



Erdoğan was the first Turkish President to be elected directly by popular vote in 2014 for a 5-year term. He won a snap presidential election on June 24, 2018 and now is head of state and government.



© Statista.com Sources: Wikipedia, media reports

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# The 15 July 2016 coup attempt



Still shrouded in mystery.

Was it an attempt by Erdoğan's long-time-ally-turned-enemy Fethullah Gülen to overthrow Erdoğan, as the government says?

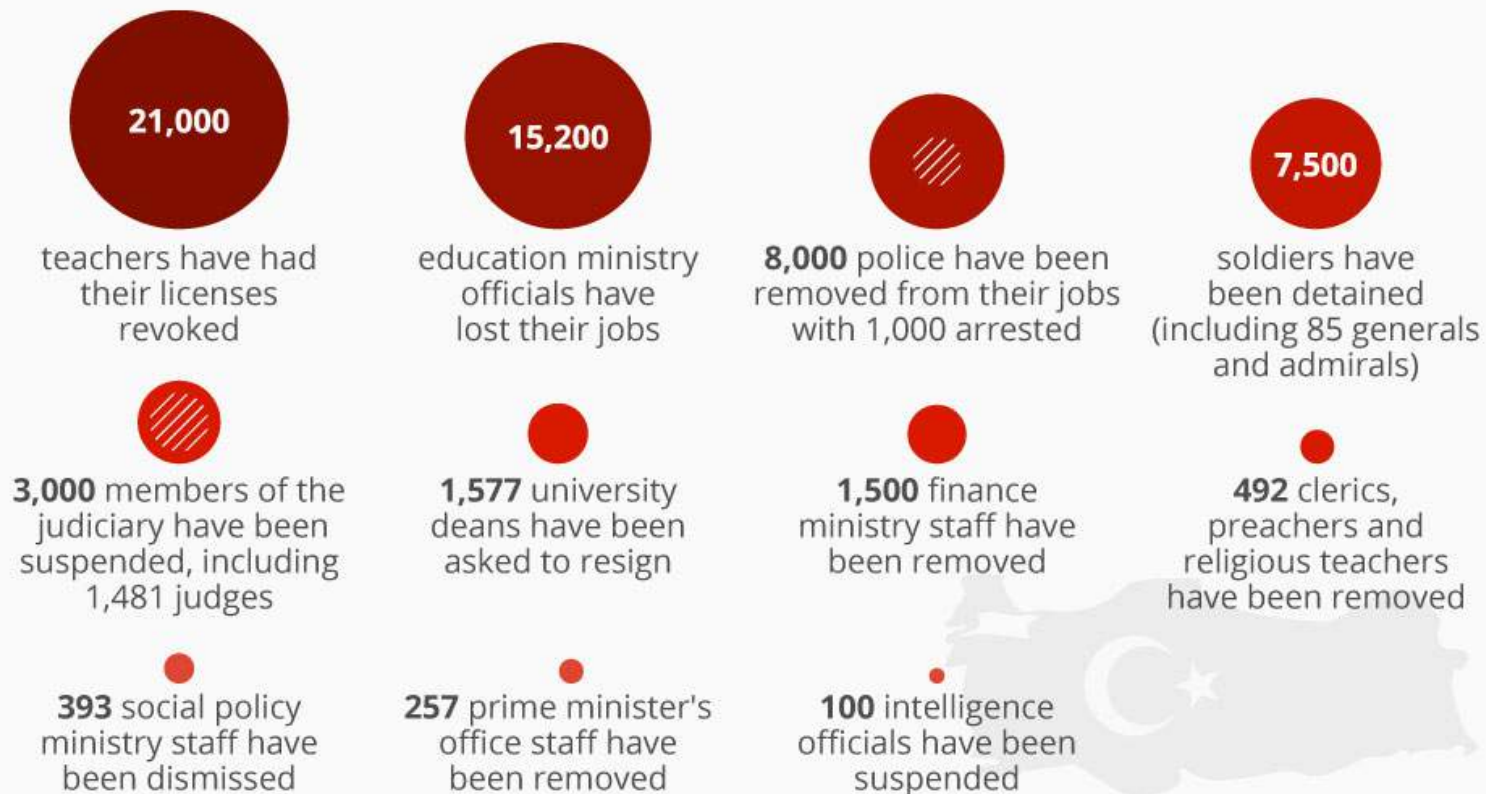
Or was it engineered by Erdoğan as an excuse for a crackdown, as critics suspect?

Either way, armed forces were involved along with civilians – and were crushed.

# The crackdown after the purge was brutal and far-reaching

## The Targets Of Erdogan's Purge

Estimated number of people purged after Turkish coup attempt



## Turkey votes on stronger presidency

A referendum on constitutional amendments could transform Turkey from a parliamentary democracy into a presidential system, and make Recep Tayyip Erdogan the most powerful president in Turkish history



*Under new system, Erdogan could stand in 2019 and 2024 elections, meaning he could potentially stay on as head of state until 2029*

### KEY PROPOSED CHANGES TO CONSTITUTION



Post of prime minister scrapped – position of vice president, possibly two or three, created



President will become head of executive as well as head of state, and be able to retain affiliation to his political party



President given sweeping new powers to draw up budgets, appoint and dismiss government ministers and judges, and enact certain laws by decree



President alone can announce state of emergency and dismiss parliament



Parliament loses right to scrutinise ministers but it can impeach president via majority vote of MPs.

Two-thirds majority required to put president on trial



Presidential and parliamentary elections held on same day every five years.

President limited to two terms

Sources: Wire agencies

Picture: Getty Images

**In 2017, Erdoğan's proposed the final consolidating constitutional amendment.**

- Converted Turkey from **parliamentary to presidential system.**
- Gave the president huge powers, including to **make law by decree** without the Parliament.
- Limited the president to **two 5-year terms**, but with exceptions built into the system.
- Gave presidential appointees **control over judicial careers.**

The referendum was held during a state of emergency and just barely passed.

# Presidential and parliamentary elections on 14 May 2023 in Turkey

## Erdoğan Wins Five More Years in Power

Turkey 2023 Parliamentary/Presidential Election final Results



As of May 29, 2023

Source: Turkish Election Commission (YSK)



statista

But Erdoğan had rigged the election rules in the run-up to the election so that it was not a fair contest:

- He lowered the parliamentary election threshold to 7% to discourage coalitions against him.
- He changed the composition of the local election boards to favor him.
- He established new voter registration rules to disenfranchise voters with new addresses (not his voters).

# And now . . . Erdogan the autocrat



# Other examples of slow autocracy



Putin in Russia – tacked toward democratic reform for a few years before turning sharply toward autocracy.



Modi in India – never really a democrat, but not quite an autocrat – making increasingly autocratic moves the longer he is in office.

# Autocracy on the fence: The United States



... which brings us to the United States and President Donald J. Trump



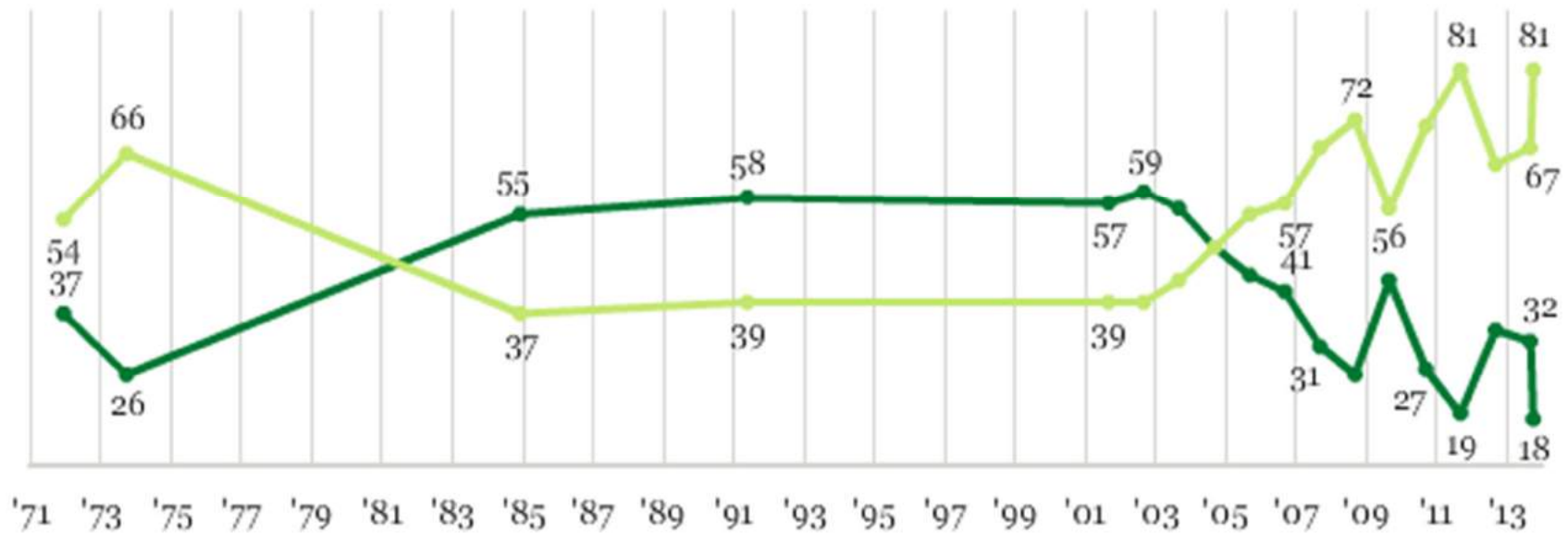
There was a certain shock in the world when he was elected.

# The signs of dissatisfaction with government were there for years

## Americans' Satisfaction With the Way the Nation Is Being Governed

On the whole, would you say you are satisfied or dissatisfied with the way the nation is being governed?

■ % Satisfied    ■ % Dissatisfied



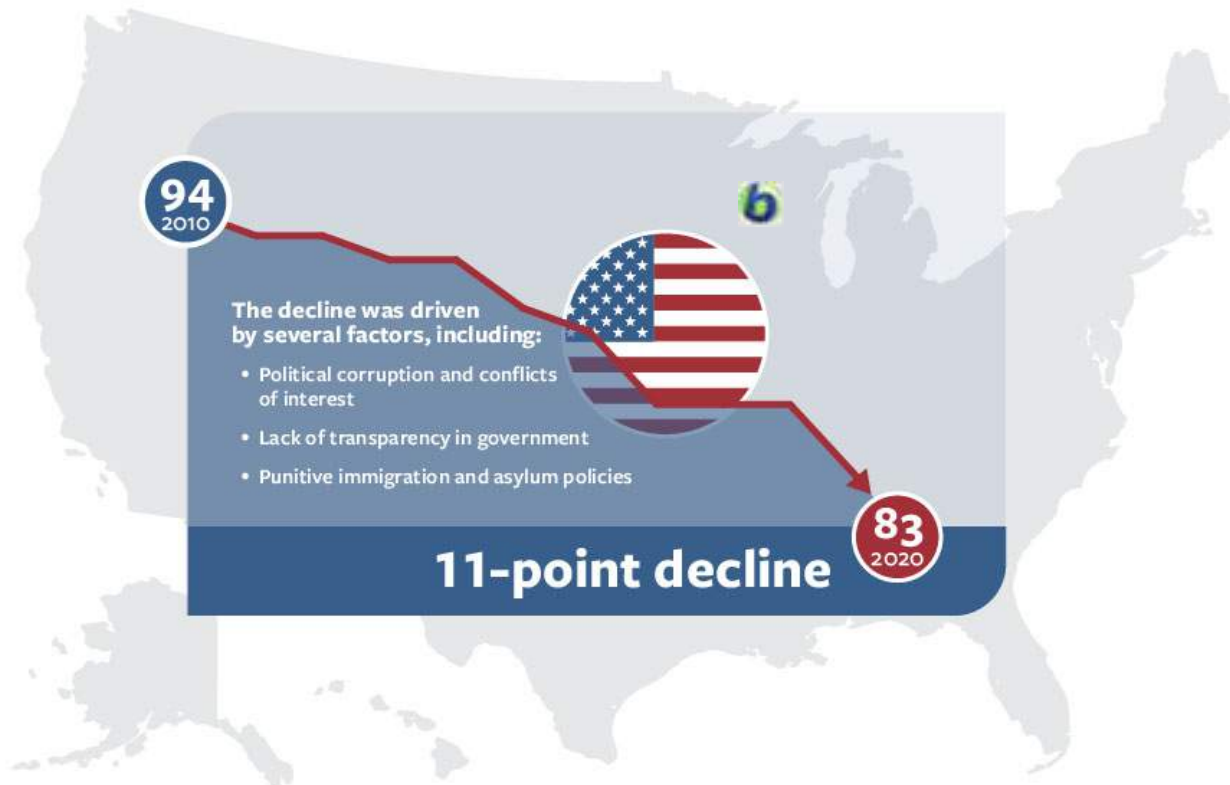
GALLUP

Note that dissatisfaction persisted no matter which party was in power in Washington. It was systemic with a general sense that politics were broken.

# The state of democracy in the US had also been declining before Trump

## United States in Decline

Over the past 10 years, the United States' aggregate *Freedom in the World* score has declined by 11 points, placing it among the 25 countries that have suffered the largest declines in this period.



According to Freedom House, the US was one of the **“top 25” decliners** in democracy scores between 2010 and 2020.

The decline was much faster after 2016 but it did not start then.

# The Election of Donald Trump 2016



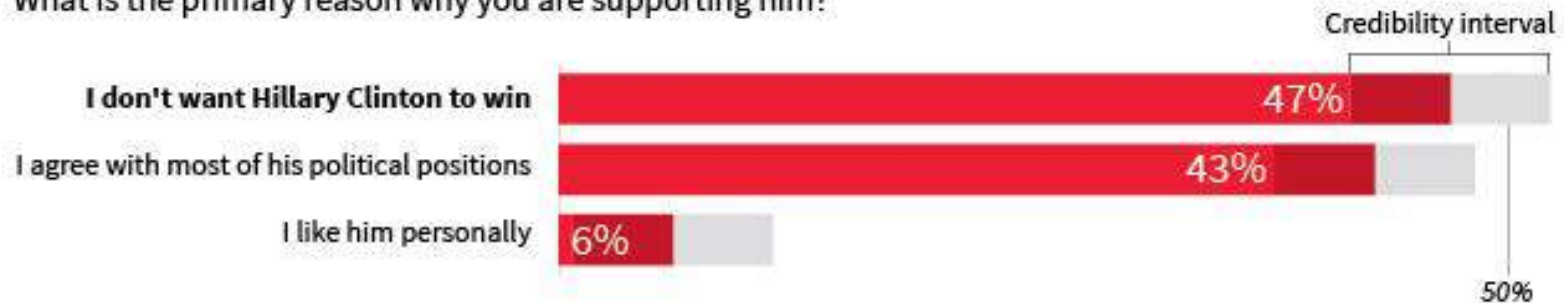
While the **populism** in his campaign was totally evident, many people said that he would become more “**presidential**” if he were actually elected.

So many of his 2016 voters were **not** convinced he would be **dangerous**.

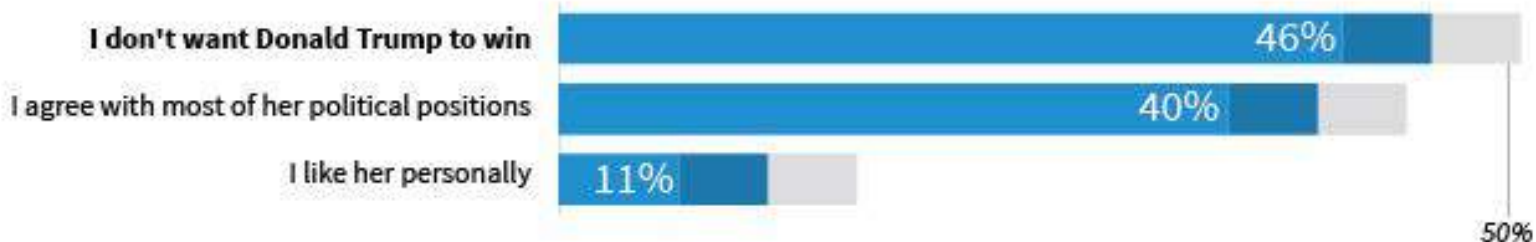
# The Perfect Storm 2016: Voters voted against the other candidate more than they voted for their own.

## Reuters/Ipsos poll | The anti-vote

You said that you would support Donald Trump in the general election if he ran against Hillary Clinton. What is the primary reason why you are supporting him?

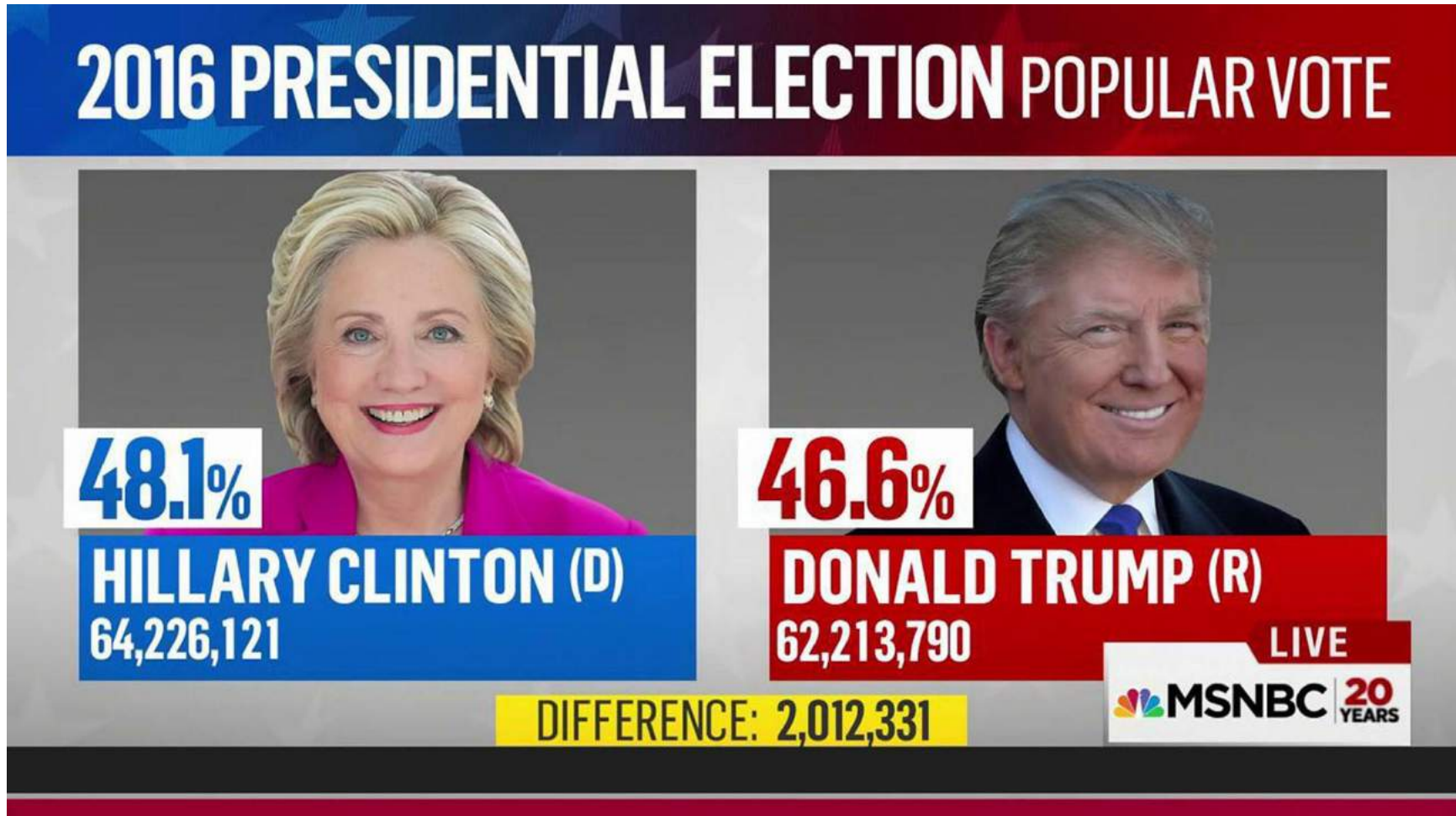


You said that you would support Hillary Clinton in the general election if she ran against Donald Trump. What is the primary reason why you are supporting her?



NOTES: Likely voters interviewed online April 29 – May 5. Credibility intervals – Trump supporters (n=469): ± 5.3 percentage points; Clinton supporters (n=599): ± 4.7 percentage points  
Source: Reuters/Ipsos

# 2016 "popular vote" elected Clinton

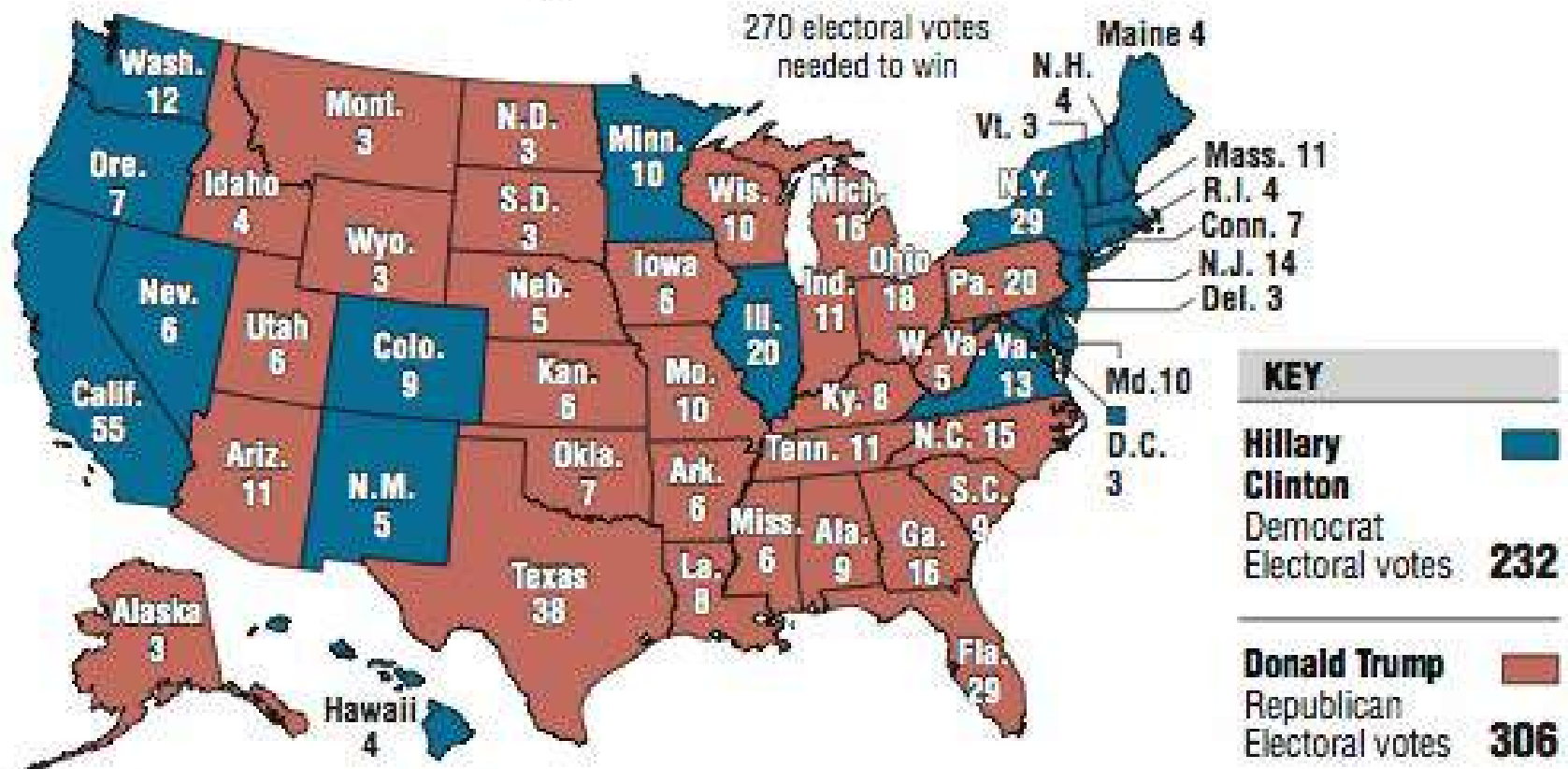


Above – the results on election night.

In the end, Clinton got about **3 MILLION MORE VOTES** than Trump.

# But the winner was . . . Trump

## Electoral College votes, state by state



SOURCE: National Archives and Records Administration, New York Times

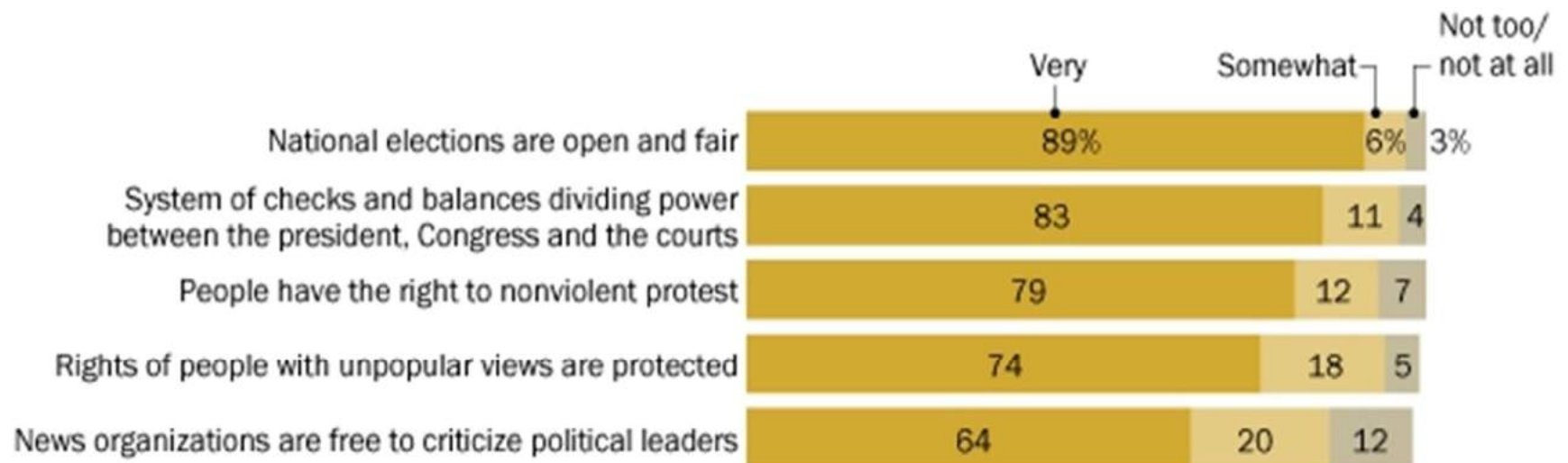
Arkansas Democrat-Gazette

# But what actually won in 2016?

American public opinion during the Trump years strongly favored democracy and robust constitutional government (2017)

## Broad public agreement on what is important to a strong democracy

% saying each is \_\_\_ important to maintaining a strong democracy in the United States



Note: Don't know responses not shown.

Source: Survey conducted Feb. 7-12, 2017.

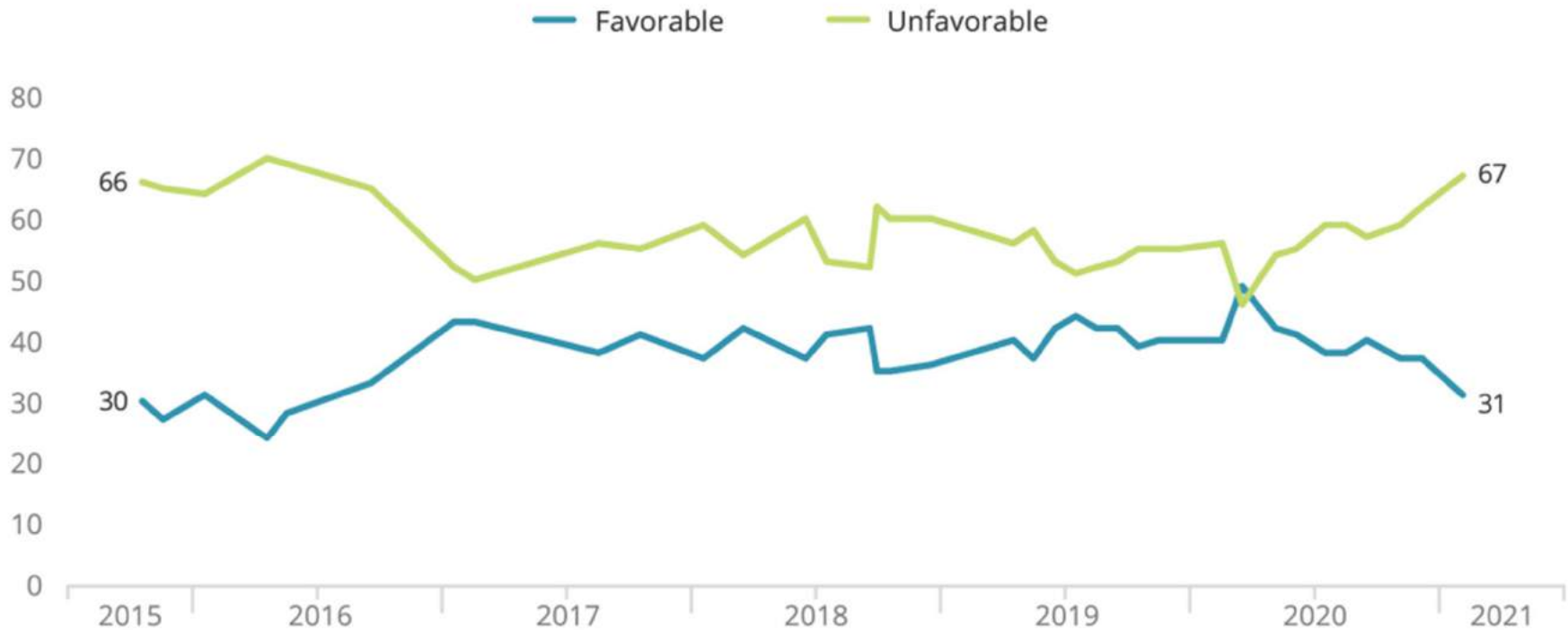
PEW RESEARCH CENTER



# Trump never had majority support – not even close

**FIGURE 1. Trump Favorability, 2015-2021**

Would you say your overall opinion of Donald Trump is:



Sources: PRRI 2015-2021 Surveys.

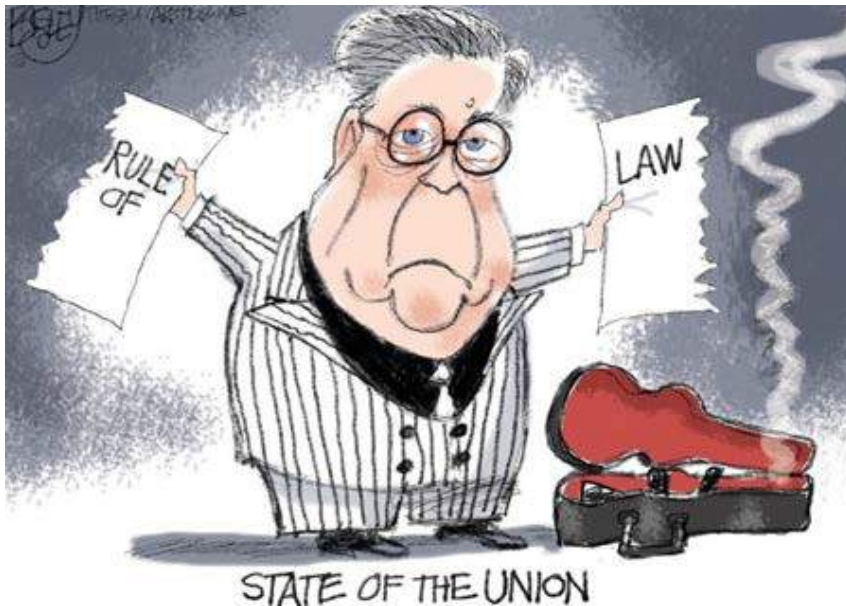
# But is the US constitution strong enough to resist an anti-democratic assault?

- Each institution is supposed to check the others:
  - Congress checks the president with funding, oversight and impeachment.
  - The president can veto laws passed by congress.
  - The courts check both.
- **But what if the US no longer has “separation of powers” but instead “separation of parties”?**
- If Republicans in Congress inevitably back the president, no matter what – and the courts support whatever Republicans do, there is no check on power.



And separation of parties extends to the state legislatures which have been busily rewriting the election laws for 2024.

# The US constitutional system relies on unwritten “conventions” and norms



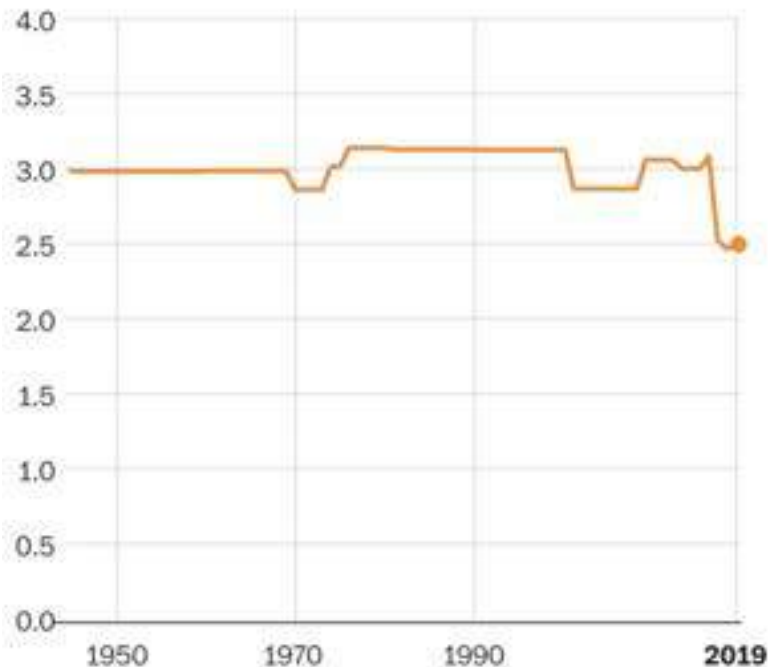
If the Attorney General or White House Counsel do not honor past precedents – which are not enforceable in a court of law anyway – then what?

- The law of the executive branch consists of confidential memos from the White House Counsel and the Justice Department.
- What if the president just ignores this whole body of law?
- Given how hard it is to sue the president, it is nearly impossible to enforce this law through courts.
- So President Trump often felt free to simply ignore it.

# The state of constitutionalism

## Executive respect for the Constitution falls

Do members of the executive branch respect the Constitution?  
Scale ranges from 0 (members of the executive violate the Constitution whenever they want to, without legal consequences) to 4 (members never violate the Constitution)



Source: Varieties of Democracy

THE WASHINGTON POST

- Under Trump, “executive respect for the Constitution” fell to the lowest level in the post-war period.
- Prior dips had been during Watergate and at the height of the War on Terror.
- Trump’s term was worse than both.
- But he didn’t completely break the constitutional order. It limped along.

# Populism: Trump said hateful things



“  
When Mexico is sending its people, they're not sending their best... They're bringing drugs. They're bringing crime. They're rapists. And some, I assume are good people.”

**Donald Trump**

June 16, 2015

Laura Buckner/Getty Images



“Why don't they go back and help fix the totally broken and crime infested places from which they came.”

PRESIDENT  
DONALD TRUMP



“  
He's not a war hero — He's a war hero because he was captured. I like people that weren't captured.”

**Donald Trump**

July 18, 2015

Mark Wilson/Getty Images

# And he openly celebrated violence

**July 2017:** Talking to police about how to arrest people, per [ABC News](#). "Please don't be too nice."

**August 2017:** In the aftermath of the white nationalist rally in Charlottesville, Virginia, Trump said "[many sides](#)" were to blame.

**October 2018:** [Trump publicly praised](#) Montana's then-Rep. Greg Gianforte (R) for previously assaulting a reporter. "Any guy that can do a body slam, he is my type!"

**October 2019:** The [New York Times](#) outlined Trump's proposal for border control, including a [water-filled trench with snakes or alligators and shooting migrants in the legs to slow them down](#).

**May 2020:** [Trump tweeted](#) during BLM protests, "[when the looting starts, the shooting starts](#)."

**August 2020:** [Trump wanted to send](#) the National Guard to Portland, Oregon, to confront protesters: "[We could fix Portland in, I would say, 45 minutes](#)."

**September 2020:** [Trump praised](#) law enforcement officers for killing Antifa member Michael Forest Reinoehl. "[That's the way it has to be. There has to be retribution](#)."

**September 2020:** [Trump told](#) the far-right Proud Boys that they should "[stand back and stand by](#)."

**January 2021:** At a rally preceding the Jan. 6 Capitol insurrection, Trump [told supporters](#) that "[we're going to walk down to the Capitol](#)," and "[you'll never take back our country with weakness](#)."

<https://www.axios.com/2022/05/02/trump-call-violence-presidency>

# But Trump changed very little law

Trump as president:

- **Improvised** policy, often disastrously.
- Put **unqualified people** into administrative positions.
- **Refused to fill many key jobs** – and had “acting” officials in place for extended periods of time.
- **Refused expert advice.**
- **Shut down the government** for 22 days.
- **Played fast and loose** with classified information.
- In general, **stopped government from functioning effectively.**

**“Executive underreach”**  
(Pozen and Scheppele)

But he was too undisciplined and impatient to change the law – except for his “Muslim ban” and his border wall “emergency.”



Trump was divisive, disruptive and undermined democratic values in his speeches.

Encouraged his supporters to use violence.

**But didn't use the law to the full extent to lock in his power.**

# Trump's relationship to law

- Trump pushed few laws through Congress, even when he had a Republican majority in both houses. Huge tax cut in his first year. And then almost nothing.
- He issued 220 executive orders – 55/year on average. By contrast Obama issued 35/year and Bush issued 36/year. Biden is issuing 50/year so far.
- And many more proclamations, statements and other signed documents with no legal force. The White House website had a section for “presidential actions” to include all of these statements.



Trump eventually rolled back 100+ environmental regulations.

He was more aggressive at rollbacks than at making new rules.  
(But he did push through a flurry of rules at the end.)



# Trump's biggest effect was on judicial appointments (but he outsourced this work to others)

- Trump **nominated:**
  - 1/4 of the overall federal bench
  - 1/3 of the Supreme Court
- And those **judges have been distinctive:**
  - The Supreme Court has **radically changed doctrine** on abortion, religion, gun rights, the administrative state and more.
  - Early studies show that Trump judges are **"significantly more conservative"** than other judges appointed by Republican presidents.
- Trump himself used the courts in new ways – through **leapfrogged appeals** to SCOTUS and aggressive use of the **"Shadow Docket."**



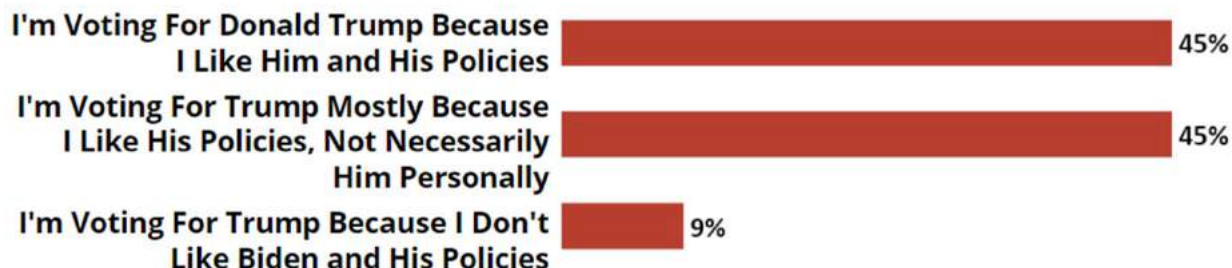
Trump was able to make three Supreme Court appointments, two under contested circumstances.

# The 2020 election – Trump’s base swung to support him, but the anti-Trump pushback was stronger

Republicans are more likely to vote *for* Trump than they are to vote *against* Biden.

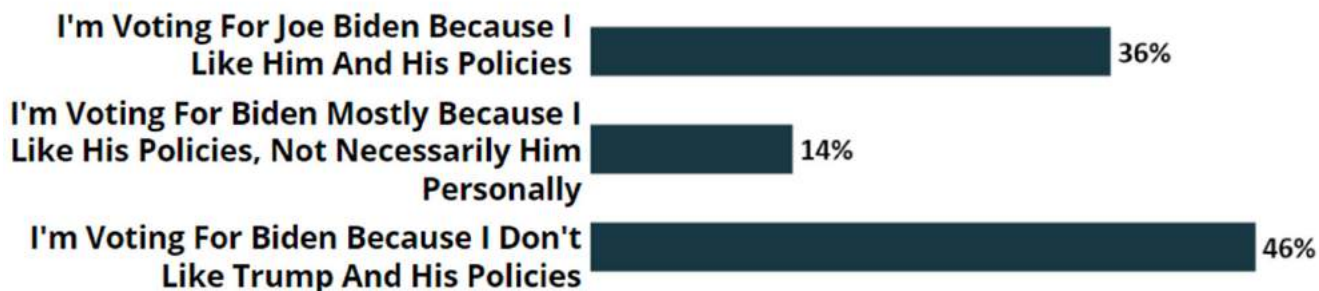
Pew Data,  
Summer  
2020

“Which of the following statements describes your vote?” Among Donald Trump Voters



Democrats are about as likely to vote *against* Trump as they are to vote *for* Biden.

“Which of the following statements describes your vote?” Among Joe Biden Voters



# The 2020 election, solid rejection of Trump

## WAS 2020 A CLOSE ELECTION?



51.3%



46.8%

POPULAR VOTE **+7M**

DATA\_  
DOWNLOAD

306

Joseph R. Biden Jr. ✓

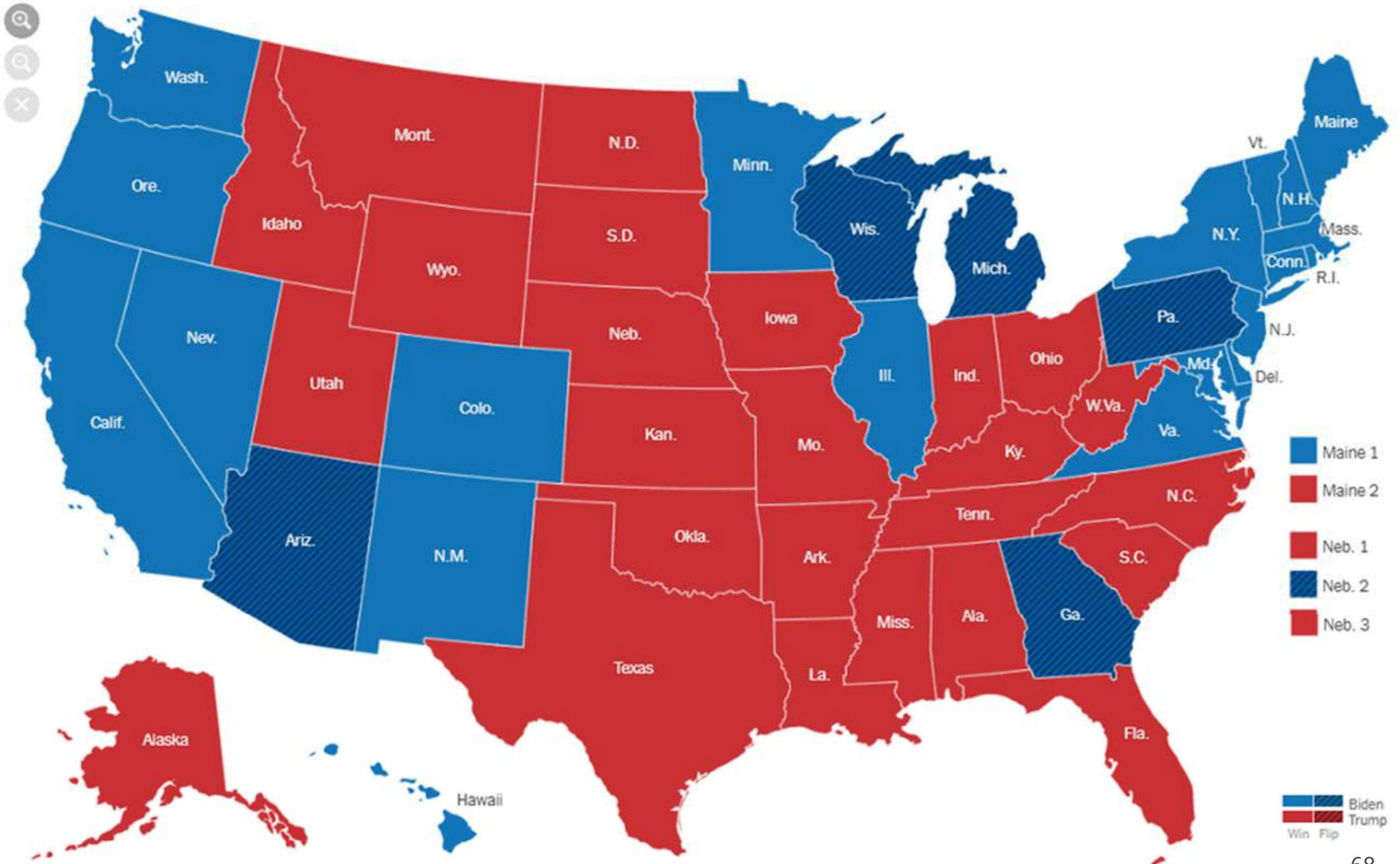
# The Electoral College wasn't close

232  
Donald J. Trump

79,554,222 votes (51.0%)

270  
TO WIN

73,611,220 votes (47.2%)



**But Trump repeatedly cast doubt on the integrity of the election – before and after**



And of course, we know what happened



6 January 2021 – Trump's supporters attacked the Capitol.

# The aftermath . . .



- There was much more behind the insurrection than an attack on the Capitol.
- Trump mobilized a legal plot to use the ambiguities in the Electoral Count Act to get Congress to accept fake electors and throw the election to the House and to Trump.
- But note that most of those under investigation and indictment – besides Trump himself – are the lawyers.
- Trump has been indicted in DC and Georgia for the plot to overthrow the election, in Florida for mishandling classified documents and in NYC for business records offenses. Plus civil trials for defamation, business fraud and more.
- And most of his indicted and unindicted conspirators are lawyers.

## The Republican Party has long been trying to lock in power by law – through efforts that are independent of Trump

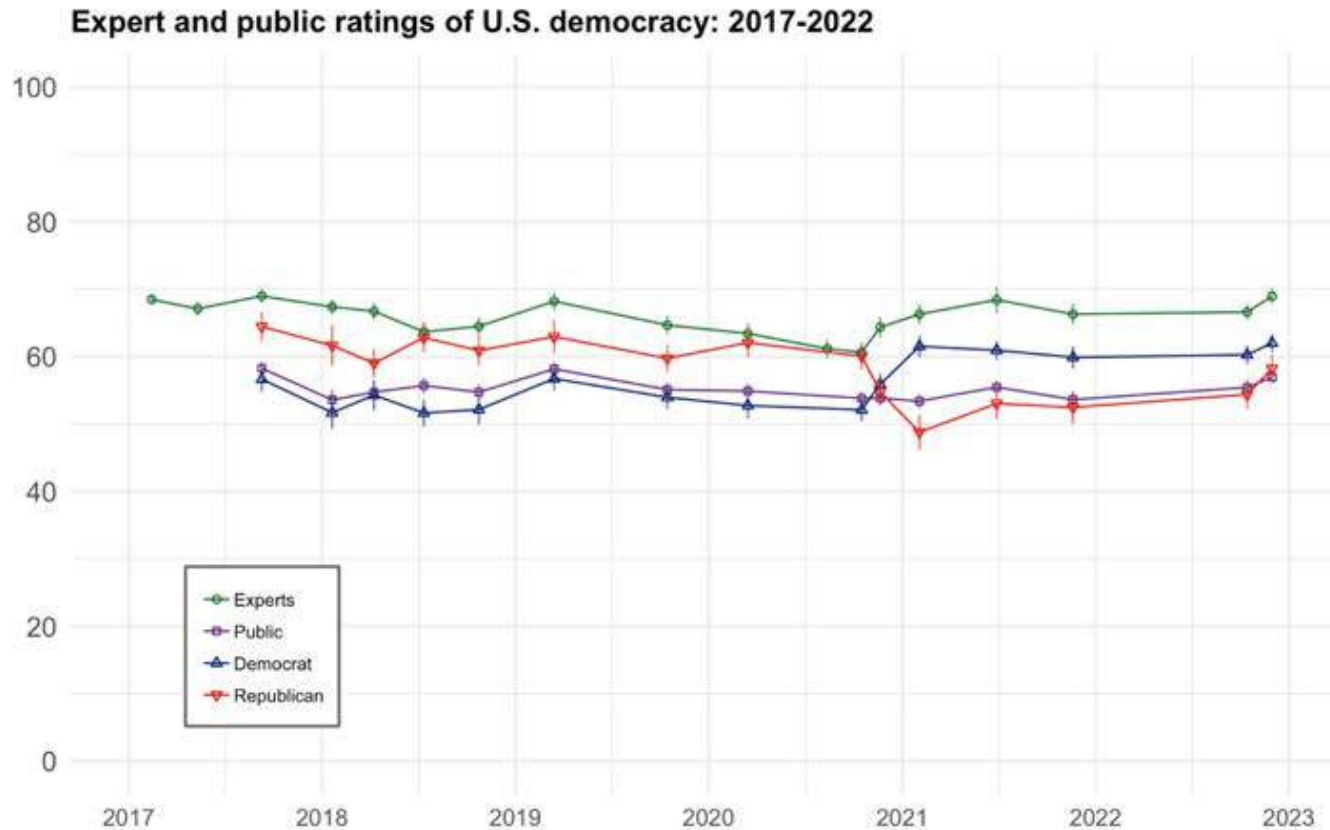
- Multiple battleground states are **changing their election laws** before the 2024 election.
- The US Supreme Court was poised to adopt the **“independent state legislature”** theory (near miss).
- If a Republican is elected president, there is a plan to use **“Schedule F”** to undermine the independent civil service.
- And there’s also a plan to get the Supreme Court to adopt the **“unitary executive theory”** which would be a vast concentration of new powers in the president’s hands.



The “theories” forwarded by the Republican Party would expand executive power, so the next time the US elects a Republican president, the US may experience a **democratic collapse, by law.** This is not dependent solely on Trump.



# Is the US a democracy in 2024? The jury is still out.



Ratings of U.S. democracy by the public and experts on a 0-100 scale. Figure shows mean values across eighteen survey waves. Vertical error bars are 95% confidence intervals. Source: @BrightLineWatch - November 2022

Perhaps surprisingly, there is little change in domestic assessments of threats to democracy over the last eight years.

Except that the 2020 election was met with a polarized response in which Ds and Rs cancelled out.

In short, Biden's election didn't change much.

# In summary: Pathways to autocracy

Fast:

- Hungary
- Venezuela
- Israel?

Slow:

- Turkey
- Russia
- India?

On the fence

- United States
- Brazil
- The UK?

And they learn from each other.



**What is to be done?**

# Preventing the entrenchment of autocracy



**Political scientists agree that only early mass public pushback is effective.**

**Complacency is fatal.**

In spring 2023, Israelis went to the streets every weekend in massive numbers – so did Romanians and Poles when their democracies were threatened; Ecuadorians rejected constitutional amendment removing term limits. These things worked to stall and even reverse autocratic capture.

# But lawyers have a special role



Lawyers can collude with autocratic power (as at right – Hungarian lawyers carrying sections of the new autocratic laws) . . .

Or lawyers can defend constitutionalism and the rule of law in a crisis –

- By challenging anti-constitutional legal arguments,
- By educating the public about the dangers of autocratic legalism and
- By holding power to account.

# The essential role of law in strengthening constitutional democracy . . .

Just as democracy can be destroyed by law, so too it can be rebuilt by law.

Law is not necessarily blind to the uses that are made of it.

This is where lawyers need to mobilize to push back autocratic capture using whatever legal resources they have to hand.



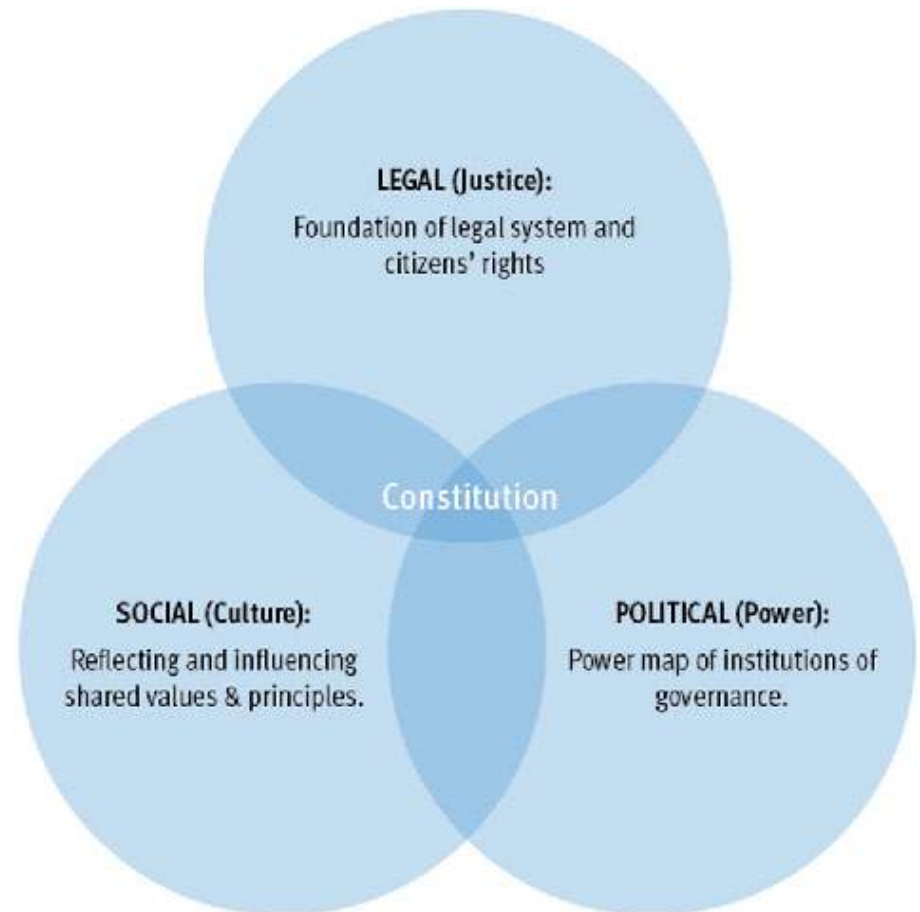
# The case for “asymmetric rupture”

## Asymmetric rupture:

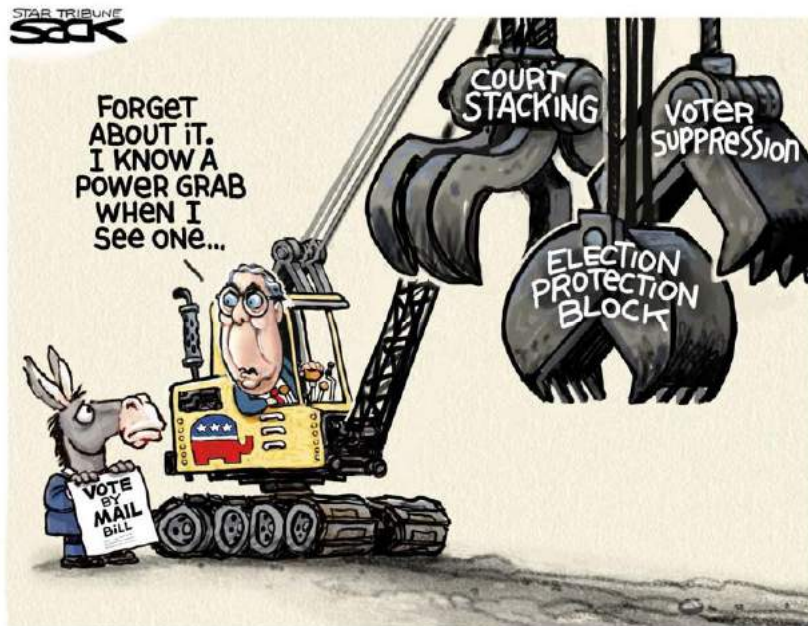
The principle that what may be justified to restore democracy may be different than what may be permitted to break democracy.

Therefore:

- Democrats can therefore run the autocratic playbook in reverse, justifying it with an appeal to constitutional standards.
- Bringing a country into line with its constitutional aspirations isn't mere tit for tat.



# How does this work?



Running the autocratic playbook in reverse can restore democracy.

- **Packing a court to make it independent of political branches** is different from packing it to make it dependent on the political branches.
- **Changing election rules to make voting more universal and more equal** is different from changing election rules to enable voter suppression.
- **Changing the law to increase protection of human rights, media freedom, fair trials, impartial prosecution and evidence-based regulation** is different from changing the law to undermine the rule of law along each of these dimensions.



## So lawyers have a lot of work to do in order to defend constitutional democracy



- . . . Because the threat is coming from inside the house and inside our own democracy.
- And, in particular, we can't be afraid to use our strongest weapon – which is law in defense of constitutional democracy.

**Not the end . . .**