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Joshua is Climenko Fellow at Harvard Law and received his Ph.D from Yale Political Science and a J.D. from Yale Law School. His research includes court-packing, conflicts over how to make constitutions, and international trade. Joshua's work has been published in the *International Journal of Constitutional Law* and the *Georgetown International Law Review* and his co-authored casebook, the *U.S. Constitution and Comparative Constitutional Law* was published by Foundation Press. He has also published shorter pieces in a variety of outlets, such as *Politico*, *Dissent* and *Talking Points Memo*.

### *Constituent Power as Extraordinary Adaptation*

Both radical proponents and legalist critics of popular constitution-making share Carl Schmitt's definition of the people as outside of, unconstrained by, and superior to all law. "Legalists" cite Venezuela and Bolivia as evidence that unleashing the people facilitates authoritarianism. I turn away from Carl Schmitt and towards Hannah Arendt to retell these countries' stories and recover an alternative vision of the people's relationship to law called "extraordinary adaptation." Even as many of the specific rules of the old institutions are bent, reinterpreted or broken, those institutions are still "extraordinarily adapted" to regulate and give shape to the creation of the new constitution. The process is illegal, but not lawless. The illegality must be principled in three ways: 1. The violator must exhaust all other legal channels; 2. openly acknowledge the violation in search of popular vindication, and 3. concede enough to the opposition so that it may begrudgingly acquiesce to the new constitution. This liminal legal space constructs a plural people that may realize their freedom to break with the past but still stave off the establishment of semi-authoritarian constitutions.

I illustrate my theory by comparing the creations of the 1999 Venezuelan and the 2008 Bolivian constitutions. In Venezuela, then president Hugo Chávez plunged the country into a legal abyss to exclude the opposition from the constitutional assembly and create a highly centralized constitution. In Bolivia, by contrast, the extraordinary adaptation of the old constitution led to compromises that garnered the opposition's begrudging acquiescence to a new constitution that checks presidential power.