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(Re)Constructing Democracy in Crisis

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ABSTRACT

Contemporary concerns about democratic backsliding in the United States and elsewhere have produced an important new literature on democratic crisis and the ways in which political actors can undermine institutions and norms of constitutional democracy. This Article complements the democratic backsliding discourse by focusing on another set of questions: In what ways has democracy been chronically or systemically weakened and prevented, and what kinds of new institutional and organizational forms do we need to realize democratic aspirations in the twenty-first century? To develop this argument, this Article advances three main points. First, while the backsliding literature has thus far tended to focus on the sociological and institutional factors shaping the collapse of democratic regimes, this Article begins from the inverse premise: the sociological and institutional factors that affirmatively facilitate democratic equality, inclusion, and political action (Part I). This exploration of the affirmative drivers of democracy helps cast into sharper relief the more systemic and chronic ways in which current political and institutional dynamics make genuine democratic equality and participation impossible for many constituencies. In particular, democracy is undermined not only by more chronic crises of unequal power but also by systemic exclusion (Part II). This critique in turn helps inform an affirmative account of democracy-building reforms and movements (Part III).

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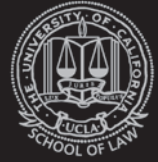
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INTRODUCTION

On January 20, 2017, Donald Trump was sworn in as President of the United States, giving voice to an apparent resurgence of right-wing, exclusionary populism premised on distrust of immigrants and minorities and in coalition with elite business interests. The very next day, a coalition of organizers launched the Women's March, one of the largest single days of protest action in American history, with millions of protestors marching in cities and towns all over the country.[1] Since then, concern about the potential crisis of American democracy has grown, with scholars exploring the potential that American constitutional democracy might erode or collapse.[2] Much of this literature emphasizes the problem of institutional "gaps that can be exploited to unravel" a democratic system[3] or the erosion of norms of behavior that restrain political actors from pushing constitutional and institutional structures too far.[4] As authoritarian or merely self-interested political actors push more and more strongly against norms and institutions, they can drive "democratic backsliding"[5] or "constitutional retrogression"[6] to authoritarianism.

This emerging literature offers an important diagnosis and analysis of the current crisis of democracy. But this approach understates the severity of

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1.   Erica Chenoweth & Jeremy Pressman, *This Is What We Learned by Counting the Women's Marches*, WASH. POST (Feb. 7, 2017), http://www.washingtonpost.com/news/ monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches [https://perma.cc/ EA7U-JF3B]; Sarah Frostenson, *The Women's Marches May Have Been the Largest Demonstration in US History*, VOX (Jan. 31, 2017, 11:11 AM), http://www.vox.com/ 2017/1/22/14350808/womens-marches-largest-demonstration-us-history-map [https://perma.cc/ XYE4-LNK2].

2.   *See, e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) (developing an account of how democratic systems around the world—including the United States—can collapse into authoritarianism); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 117–62 (2018) (developing a typology of forms of democratic collapse and assessing the potential of such a collapse in the United States).

3.   Huq & Ginsburg, *supra* note 2, at 85.

4.   *See, e.g.*, Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 153 (2017) ("[U]ndermining or destroying norms of political fair play and using hardball tactics to preempt political competition may produce a gradual descent into authoritarian or autocratic politics.").

5.   David Waldner & Ellen Lust, *Unwelcome Change: Coming to Terms With Democratic Backsliding*, 21 ANN. REV. POL. SCI. 93, 95 (2018) ("[W]e understand backsliding as potentially occurring through a discontinuous series of incremental actions, not a one-time *coup de grâce*.").

6.   Huq & Ginsburg, *supra* note 2, at 94 ("A constitutional liberal democracy can degrade without collapsing.").

contemporary America's democracy deficit, in two related ways. First, this focus on backsliding foregrounds the disjunctures of the current moment, emphasizing the uniqueness of contemporary pressures (such as those raised by the Trump administration, for example). But while current concerns about democratic crisis may be distinctive, American democracy has historically been deeply undemocratic, from the history of slavery, Jim Crow, and persisting economic and racial segregation, to the slow expansions of the voting franchise to women, minorities, and younger citizens, and other systemic inequities. By overstating the exceptionalism of the current moment, we risk obscuring the ways in which democracy has been a distant, unrealized ideal for too many communities, for too long.

Second, the focus on backsliding can at times risk implicitly valorizing the status quo ante. If the crisis of democracy is a product of new threats to norms and institutions, a ready response would be to restore conventional political practices and behaviors. But what if instead we need not return to older approaches, but rather develop radically new democratic institutions, organizations, and practices? To the extent that a focus on backsliding suggests the need for institutional fixes to prevent de-democratization, the backsliding discourse needs to be complemented with a more affirmative project focused on what it would take to proactively create a more democratic politics.

This Article complements the democratic backsliding discourse by focusing on this other set of questions. What does a broadly inclusive democracy look like? What new governmental institutions or civil society organizations do we need to respond to the chronic legacies of exclusion and inequality, on one hand, and the more proximate pressures of democratic backsliding by quasi-authoritarian political forces, on the other? To develop this argument, this Article advances three main points. First, where the backsliding literature has thus far tended to focus on the sociological and institutional factors shaping the collapse of democratic regimes, this Article begins from the inverse premise: the sociological and institutional factors that affirmatively facilitate democratic equality, inclusion, and political action (Part I). This exploration of the affirmative drivers of democracy helps cast into sharper relief the more systemic and chronic ways in which current political and institutional dynamics make genuine democratic equality and participation impossible for many constituencies and how these contemporary dynamics represent a continuation of longstanding historical exclusions from political equality (Part II). This critique in turn helps inform an affirmative account of democracy building (Part III).

I.   FROM DEMOCRATIC BACKSLIDING TO AFFIRMATIVE DEMOCRATIC FUNCTIONING

How we theorize democratic failure necessarily informs the kinds of democratic institutional solutions or responses we might pursue. The emerging literature on democratic backsliding has tended to focus on the political, institutional, and sociological factors that conduce to the collapse of democratic regimes. But by itself, these approaches imply that democratic functioning is best secured by preserving traditional norms and institutions. To complement this gap, we need to shift focus to the conditions that affirmatively enable democratic politics. This Part begins with the backsliding literature and then provides a complementary but broader theorization of democratic functioning. This broader conception of democracy and its foundations in turn illuminates a broader map of the kinds of institutions needed for democracy to thrive and the kinds of threats that can undermine democratic ideals.

A.   Democratic Backsliding

The emerging literature on democratic backsliding is built in reference to political, sociological, and institutional accounts of how democratic regimes collapse into authoritarianism. These accounts revolve around a few common themes. First, the problem emerges in the context of autocratic leaders, who are dispositionally hostile to democratic institutions, question the legitimacy of political opposition, and undermine civil liberties.[7] Second, these autocrats often gain political power through conventional and legitimate means, building coalitions with existing parties and gatekeepers, who side with them rather than screening them out of political power. Third, these coalitions then gradually subvert existing checks and balances to consolidate power.[8] Such backsliding can also arise in a less direct form, through the increasingly polarized and scorched-earth political conflict for power between rival parties.[9] As political scientists Steve Levitsky and Daniel Ziblatt suggest, a central factor in democratic survival

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7.   *See, e.g.*, LEVITSKY & ZIBLATT, *supra* note 2, at 65–68 (describing the views and dispositions of authoritarian leaders as revolving around a shared rejection of democratic institutions, legitimate opposition, and civil liberties).

8.   *See, e.g.*, *id.* at 78–96 (describing how autocrats once in power erode opposition through attacks on media and use of patronage relationships); Huq & Ginsburg, *supra* note 2, at 92–99 (defining the problem of "retrogression" where seemingly legal and innocuous policy changes accumulate to erode democratic functioning).

9.   *See, e.g.*, Balkin, *supra* note 4, at 153 (noting that constitutional hardball can exacerbate the erosion of democratic institutions); *see also* LEVITSKY & ZIBLATT, *supra* note 2, at 217 (describing links between polarization and democratic collapse).

is the maintaining of norms of "mutual toleration,"[10] the idea that all political actors tolerate one another's existence, and "forbearance,"[11] the idea that political actors once in power will hold themselves back from deploying the full range of their coercive powers out of a desire to preserve the larger democratic institutional system.

A related concern in the backsliding literature is the role of political norms. While much of law and democratic institutional analysis focuses on formal institutional structures like elections or the separation of powers, this literature highlights how much of democratic politics depends on unwritten norms of political behavior, like the norms of mutual toleration and forbearance. Other norms, too, have over time accumulated to structure, contain, and legitimize the exercise of political power, particularly in the context of executive power. These are the norms, including norms against conflicts of interest and norms promoting internal deliberation, that prevent the executive from overreaching under normal circumstances.[12] The problem with norms, though, is that they are hard to protect through conventional means of judicial review.[13] And it is these norms that have been most blatantly violated by the current Administration, contributing to some of the concerns about presidential overreach and arbitrariness.[14]

These accounts help diagnose threats to democratic politics and the pathways through which democracy can erode or even collapse. But these accounts tell us relatively little about what conditions will facilitate a robust democratic politics. Certainly the backsliding literature suggests that a frontline defense of existing institutions and norms that promote checks and balances,

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10. LEVITSKY & ZIBLATT, *supra* note 2, at 102.

11. *Id.* at 106.

12. *See, e.g.,* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2206–42 (2018) (mapping out different norms that structure the exercise of executive power).

13. *Id.* at 2193 ("Courts, however, remain inescapably limited players in a norm-based presidency.").

14. *See, e.g.,* Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Oct. 2017), http://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921 [https://perma.cc/6HCQ-K9H2]. Goldsmith writes:

> Trump has been less constrained by norms, the nonlegal principles of appropriate behavior that presidents and other officials tacitly accept and that typically structure their actions. Norms, not laws, create the expectation that a president will take regular intelligence briefings, pay public respect to our allies, and not fire the FBI director for declining to pledge his loyalty. There is no canonical list of presidential norms. They are rarely noticed until they are violated.

Id.

legitimate opposition, and deliberative or good faith policymaking is important. But the project of democratic renewal extends beyond a simple return to the status quo ante. What would it take, by contrast, to affirmatively rebuild—or to build for the first time—robust democratic institutions and practices? To answer this question we need to turn to a related but distinct social science literature not on democratic collapse but rather on democratic formation.

B.   An Affirmative Conception of Democratic Functioning

Sociologist Charles Tilly argues that we can conceptualize democracy not as a specific institutional form (of, say, elections or party systems, or the separation of powers) but rather as a particular type of relationship between state and citizen, characterized by "broad, equal, protected and mutually binding consultation."[15] Each of these aspects of the definition represents a dimension along which regimes can be more or less democratic. "Breadth" captures the problem of exclusion and unequal citizenship: Democracy is not real if only some constituencies are fully included in the political dialogue while other groups (racial minorities, women, or non-property holders) are not.[16] "Equality" similarly captures the importance of dismantling systematic hierarchies and inequities.[17] "Protection" refers to the kinds of concerns that appear in conventional accounts of constitutionalism and in much of the backsliding literature: the protection against arbitrary state power.[18] Finally, "mutually binding consultation" is meant to highlight the difference between a political system where interest groups "must bribe, cajole, threaten, or use third-party influence to get anything at all" in contrast to a more democratic reality where "state agents have clear, enforceable obligations to deliver benefits" as demanded by constituencies.[19]

To achieve this conception of democracy, regimes depend on three underlying sets of institutions and structures. First, this definition of democracy requires institutionalized state capacity. As Tilly suggests, "[w]ithout significant state capacity, citizens' expressed collective demands cannot translate into transformations of social life."[20] Without enforcement capacity, for example, states cannot ensure equality and civil rights or pursue substantive

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15.   CHARLES TILLY, DEMOCRACY 13–14 (2007).
16.   *Id.* at 14.
17.   *See id.*
18.   *Id.* at 15.
19.   *Id.*
20.   *Id.* at 58.

socioeconomic policies that might arise through democratic politics.[21]   The ability of a state to find solutions to public problems and actually implement them (what political scientist Juan Linz terms as "efficacy" and "effectiveness," respectively)[22] depends on sufficient state capacities and powers. This in turn informs the legitimacy, durability, and stability of a democratic regime.

Second, securing broad, equal, protected, and mutually consultative democratic politics requires not just state capacity but also what we might call "civic capacity," or the ability of citizens to mobilize and make political claims in the first place.[23] As Tilly notes, high capacity states create a risk of state overreach in ways that might undermine goals of protection and mutually binding consultation.[24] Thus, democratic polities also need robust forms of independent civil society organizing in order to exercise political influence that can both direct and check the exercise of state power. A key aspect of democratic politics is the ability of citizens to contest state action, forcing state actors to give an account of their policies through the imposition of sanctions, procedural requirements, and constraints.[25] But this exercise of civil society and constituent power is not driven by raw public opinion alone. Rather, it depends on the formation of civil society organizations through which constituencies can exercise political influence. Democratic politics, then, is not just a matter of formal institutions; it is also shaped by the contests between organized political interests fighting over policy outcomes.[26]

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21.   *See id.* at 15–16.

22.   JUAN J. LINZ, THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN, & REEQUILIBRATION 20, 22 (Juan J. Linz & Alfred Stepan eds., 1978) ("Efficacy . . . refers to the capacity of a regime to find solutions to the basic problems facing any political system . . . . Effectiveness is the capacity to actually implement the policies formulated, with the desired results.").

23.   *See* Hollie Russon Gilman & K. Sabeel Rahman, *Building Civic Capacity in an Era of Democratic Crisis*, NEW AMERICA 6–7, 16–17 (Oct. 10, 2017), http://www.newamerica.org/ political-reform/policy-papers/building-civic-capacity-era-democratic-crisis [https://perma.cc/ QZ23-UMWP].

24.   TILLY, *supra* note 15, at 15–16.

25.   *See* Mark Philp, *Delimiting Democratic Accountability*, 57 POL. STUD. 28, 32–35 (2009) (defining accountability as involving the demand for an explanation). *See generally* Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214 (2009) (outlining different dimensions of responsiveness and accountability for various types of state officials exercising delegated power, including elected and administrative officials).

26.   *See, e.g.*, Jacob S. Hacker & Paul Pierson, *After the "Master Theory": Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis*, 12 PERSP. ON POL. 643 (2014) (describing the shift in political science from a focus on public opinion and elections to the contests between organized interest groups who seek to secure preferred policy outcomes).

Third, this interaction between state and society itself depends on the existence of viable interfaces that enable dialogue and contestation between civil society and state actors. Conventionally, we think of voting and elections as critical interfaces that enable this kind of interaction between state authority and civil society actors. But this interaction also takes place in and depends on a variety of other institutional spaces and forms. In particular, it requires a public sphere, a media and informational context, through which political claims can be made and arguments developed. It also requires other processes and spaces through which civil society groups can engage with the policymaking process, whether through notice and comment or other informal consultative procedures in bureaucracies or through lobbying and advocacy activities. If there is no viable public sphere, or if constituencies do not trust the political process enough to bring their claims into it, then a democracy cannot thrive.[27]

II. DIAGNOSING THE BROADER CRISES OF AMERICAN DEMOCRACY

This account of democracy, defined as broad, equal, protected, mutually binding consultation, suggests that democracies require state institutions, civil society organizations, and interfaces to work well. This is very much a functional rather than formalistic account of democracy. Conventional institutional structures like elections, party systems, or the separation of powers are vital to meeting these functions, but they do not exhaust the range of institutional forms that could be employed or that might be necessary. At the same time, the formal existence of elections, parties, or the separation of powers does not ensure that democracies work well. This functionalist approach thus provides a broader framework through which we can not only diagnose democratic failures, but also imagine democratic revival.

First, note that backsliding theorists' concerns about erosion of checks and balances are consistent with this broader formulation. The concerns about erosion of norms and institutional restraints on potentially autocratic power are captured in Charles Tilly's focus on "protection" as a part of the definition of a democratic regime. Backsliding means a reduction of protection, a shift away from mutually binding consultation, and the creation of more unequal forms of political power and influence. But this functional view of democracy also highlights a number of other ways in which the core institutions and processes of democracy could fail. State capacity, civic capacity, and interfaces between civil

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27.   Thus, Charles Tilly notes that democratic consultation between state and society is not possible unless the state can centralize control over "autonomous power centers" and tap into "trust networks." TILLY, *supra* note 15, at 23.

society and government can all be undermined in a variety of ways, contributing to more chronic and perhaps more hidden erosions of democracy. In particular, this focus on the broader conditions for democratic functioning helps us diagnose two deeper, chronic crises of democracy that extend beyond the immediate headline focus of the backsliding discussion today: (1) the problem of systemic inequalities in political power and influence, and (2) the problem of systemic political exclusion, particularly along lines of race and ethnicity.

A.   Inequality and the Problem of Power

One of the major long-term threats to democracy stems from the problem of economic inequality and the ways in which it can enable durable and often hidden forms of political inequality. The democratic threat posed by concentrated wealth has most often been explored in the context of campaign finance reform and the concern that wealthy donors can skew elected officials to favor their interests.[28] But the problem of economic inequality skewing democratic politics extends beyond the campaign finance context, representing a deeper, chronic threat to the ideal of a broad, equal, protected, and mutually consultative democracy. As a result, a growing body of legal scholarship has explored the ways in which concentrated wealth itself might represent a threat to the values and institutions of constitutional democracy.[29] Indeed, economic inequality and the power disparities it generates corrode the state capacities, civic capacities, and interfaces that allow democracy to work.

As public law scholars have noted, the existing institutional structure of checks and balances and democratic politics in the American system depends on

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28. The literature on campaign finance reform and the links between economic and political inequality is vast. *See generally* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011) (describing how the campaign financing system makes political officials dependent on the wealthy rather than on the people more broadly); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED (2014) (tracing the evolution of ideas of corruption in constitutional law and public politics and arguing for more robust campaign finance reform).

29. *See, e.g.*, Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, and the Constitution of Opportunity*, *in* NOMOS LVIII: WEALTH 45 (Jack Knight & Melissa Schwartzberg eds., 2017) (tracing the centrality of concerns about economic inequality as a threat to democracy in American constitutional thought and political history); GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC (2017) (arguing that inequality is a threat to constitutional democracy); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015) (describing how income inequality disrupts established constitutional structures for checks and balances and the separation of powers); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014) (same).

an interaction between institutions and the political powers and interests that occupy those institutions at any given point in time; as this configuration of background interest groups change, the ways in which the institutions themselves operate can be affected.[30] The Madisonian system of checks and balances requires self-interested political factions to leverage existing institutions to check rival factions, Congress checking the executive, or states competing with one another. But when political interests and factions control multiple branches or operate to deliberately block some of these forms of accountability, the Madisonian system breaks down.[31] Furthermore, asymmetric use of these forms of political blockage and hardball by one party or some factions over others threatens long-term damage to institutions of responsiveness.[32] A similar dynamic manifests throughout our political system, as more wealthy interests are able to systematically skew policymaking to their favor, while other constituencies lack equivalent and countervailing political power. Through a variety of mechanisms, wealthier constituencies and business interests are able to skew policymaking to favor their interests over others. In the process, they also undermine the ability of other constituencies to advocate for themselves on fair and equal terms.

Social science studies have increasingly highlighted the ways in which policymaking institutions are more responsive to wealthier constituencies.[33] This differential responsiveness can arise not just through donor influence but also through other mechanisms. Some studies suggest that the decline in the share of elected officials with a blue collar background explains much of the policy skew toward wealthier interests, as more elite policymakers subconsciously respond

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30. *See generally* Daryl J. Levinson, *Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016) (describing how interest groups and institutions alike shape the balance of power in democratic politics). Levinson suggests that we need to view both interests and institutions in relationship to one another by "passing through" the power of governmental institutions to unpack the configuration of interest group powers that might lie behind them. *Id.* at 40, 84–90.

31. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006) (arguing that constitutional checks and balances are more often driven by the conflict between parties, leveraging whichever branches they control, rather than following a pure tripartite process of legislative, executive, and judicial checks on one another).

32. Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018) (arguing that the problem of constitutional hardball, where political actors push technically constitutional laws and strategies that nevertheless place greater pressure on the constitutional system of checks and balances, arises more from one set of partisan actors, rather than being a universal or symmetrical problem).

33. *See, e.g.*, MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 1 (2012) ("The American government does respond to the public's preferences, but that responsiveness is strongly tilted toward the most affluent citizens.").

more favorably to elite interests and tend to underestimate the popularity of more redistributive policies.[34] A similar form of "cultural capture" takes place in the context of regulatory policymaking, when regulators share a social background with the leaders of regulated industries, and thus tend to treat those constituencies more favorably.[35]

If shared social class represents one mechanism through which democratic politics systematically skews toward elite interests, a different source of this disparity in influence stems from the increased power of business interests to lobby for their preferred policies. We can define power generally as the ability to change the outcome or probability of outcomes in favor of one's own preferences or values.[36] In recent decades, business interests have accumulated more political power, while they have also managed to undermine the political power of countervailing interests, particularly workers.[37] Recent political science scholarship has documented the ways in which business groups shifted their organizing strategy and advocacy goals, starting in the 1970s and again in the 1990s.[38] The result has been a concerted effort to build a well-resourced and sophisticated system for lobbying, advocacy, and influence on state and federal policymakers.[39] Organized business advocacy groups outweigh labor, public interest, and other marginalized constituencies in their lobbying presence.[40] This

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34.   *See* NICHOLAS CARNES, WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING 12 (2013) ("[T]he shortage of people from the working class in American legislatures skews the policy-making process toward outcomes that are more in line with the upper class's economic interests.").

35.   *See, e.g.*, James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 79–80 (Daniel Carpenter & David A. Moss eds., 2014) (defining the term "cultural capture").

36.   *See* Jane Mansbridge et al., *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 J. POL. PHIL. 64, 80 (2010).

37.   *See* Jacob S. Hacker & Paul Pierson, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010) (arguing that much of the inequality crisis can be explained by the rise of business lobbying power and the decline of organized labor); Alexander Hertel-Fernandez, *How the Right Trounced Liberals in the States*, 39 DEMOCRACY J. (2016), http://democracyjournal.org/magazine/39/how-the-right-trounced-liberals-in-the-states [https://perma.cc/5Q6E-SY9W] (describing how business lobbying groups have developed mechanisms for influence on state governments).

38.   *See, e.g.*, JACOB S. HACKER & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER 204–06 (2016) (describing an example of the shift within the business lobby from a focus on industrial interests that became dominant politically in the 1970s to a focus on financial interests starting in the 1990s).

39.   *Id.*

40.   KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 442 (2012) ("[T]he weight of advocacy by organizations representing business interests . . . in no case is . . . outweighed by the activity of either organizations representing the less privileged or

influence is also increased through the close alignment between business interests and the Republican Party.[41]

This increase in political power on the part of business has in turn led to the pursuit of policies that further concentrate economic wealth and therefore political influence, for example through the promotion of tax cuts, "right to work" laws that fragment the ability of labor unions to exercise oppositional political power, and other similar shifts.[42] Meanwhile, the countervailing power of workers and other constituencies has been further undermined by the gradual shift away from mass-member organizations to professionalized nonprofit advocacy groups. While these professionalized advocates can be more sophisticated in their lobbying campaigns, this shift has weakened the popular foundations that historically drove the political power of membership-based groups, from consumer leagues to labor unions.[43]

Viewed from the standpoint of democratic functioning, this systemic disparity of power corrodes democracy in three ways. First, wealth and business dominance skew the operation of interfaces, from elections to regulatory policymaking, weakening values of breadth, equality, and mutual consultation. Second, this influence is often leveraged to push policies that further concentrate economic and political power, for example by dismantling regulatory regimes on big business or imposing higher barriers to labor organizing. The result is a reduction in both state capacity and civic capacity, particularly among countervailing constituencies like labor. These effects are not as blatant or immediate as the potential threats of an autocrat or backsliding, but they nevertheless represent a deep problem for democracy.

B.   Systemic Exclusion

A second form of democratic crisis lies not in the outsized political influence of some factions or constituencies but in a more extreme and localized exclusion of some constituencies from political agency altogether.

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public interest groups."); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 575 (2014) ("[B]usiness groups are far more numerous and active; they spend much more money; and they tend to get their way.").

41.   HACKER & PIERSON, *supra* note 38, at 166, 251–52, 254–55 (describing the linking of these business interests with the Republican Party and the resulting rightward shift of the Republicans).

42.   *See supra* note 37 and accompanying text.

43.   *See generally* THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE (2003) (describing this shift from mass-member to professionalized advocacy groups and the resulting decline of countervailing power).

Historically, this has been a central feature of American democracy in the form of legalized exclusion of enslaved persons and the system of Jim Crow. But even after the passage of the Thirteenth and Fourteenth Amendments abolishing slavery and constitutionalizing the guarantee of equal protection, and even after the civil rights movement of the 1960s, an often hidden system of exclusion from equal political power and participation remains.

Consider the extensive critiques of the institutionalized and systemic domination that communities of color face under the criminal justice system. The problems of mass incarceration and overpolicing produce a modern system of racial subordination akin to the Jim Crow era of racial terror and inequality.[44] Overpoliced and overincarcerated communities of color do not, in any meaningful sense, live in the kind of democratic polity marked by broad, equal, protected, mutually binding consultation. But similar patterns of structural exclusion appear in other contexts as well. Consider the ways in which precarious and insecure work is often racialized, leaving workers of color particularly vulnerable, or how the housing and zoning systems of many urban regions concentrate racial minorities and poverty in particular neighborhoods. These are all ways of constructing second-class citizenship for racial minorities, magnifying their economic and political inequality.[45]

This form of systematic racial exclusion is echoed in other contexts and with other constituencies as well. The legal and political assertion of a separate private realm has similarly operated at times as a way to keep out of public politics claims aimed at addressing disparities of power and opportunity in the workplace, the market, or the family.[46] Similarly, legal regimes that immunize the inner workings of the firm from legal liability or political critique construct the workplace as a

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44. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (describing the modern system of mass incarceration and policing as a form of Jim Crow racial inequality).

45. *See generally* ANDREA FLYNN ET AL., THE HIDDEN RULES OF RACE: BARRIERS TO AN INCLUSIVE ECONOMY (2017) (mapping the ways in which different legal and policy systems—from labor law to welfare bureaucracies to criminal justice to housing—construct racial hierarchy today).

46. For a classic statement of the ways in which appeals to a "private realm" have worked to immunize gender roles from political critique and reform, see Susan Moller Okin, *Justice and Gender*, 16 PHIL. & PUB. AFF. 42 (1987) (arguing that the private realm institutions of the family ought to be subjected to egalitarian critique and transformation). *Cf.* Susan Moller Okin, *'Forty Acres and a Mule' for Women: Rawls and Feminism*, 4 POL. PHIL. & ECON. 233, 234 (2005) ("Just as the freedom and equality proclaimed by the Declaration of Independence and the US Constitution's Bill of Rights did not take account of the fact that the economy of half the country was based on slave labor, so the freedom and equality of most liberal political thought does not take account of the unpaid labor of women in the home."); Amanda Werner, *Corporations Are (White) People: How Corporate Privilege Reifies Whiteness as Property*, 31 HARV. J. RACIAL & ETHNIC JUST. 129 (2015).

form of "private government" where workers are subject to the will of private managers and owners in ways that make them deeply unfree.[47]

These various issues, including racial and gender justice and labor law, involve what we usually think of as "substantive" questions, the substantive policy disputes that take place within ordinary democratic politics. But the common thread here is how these policies in the aggregate construct implicit and explicit boundaries that limit who can make claims in public politics and what issues can be engaged in the first place. This problem of exclusion represents a different type of democratic crisis. Here the problem is not so much the potential corrosion or collapse of democratic institutions in the face of an autocrat or even of concentrated power of wealthy interests. Rather, the problem here is that a democratic regime may already have some form of mutually binding consultation and robust interaction between civil society and state actors on some issues and for some constituencies, while at the same time denying this responsiveness to others. People of color are nominally democratic citizens, yet for them, the most pressing exercises of state power, such as in the policing context, are relatively immunized from democratic contestation and control. Similar immunities from contestation arise in the context of workers and the firm, or gender inequities within families, firms, and other spaces.

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Science fiction novelist William Gibson is often quoted (perhaps apocryphally) as having stated "the future is here, it is just unevenly distributed." For scholars and commentators this has been a useful way to articulate the reality that spaces of high technological sophistication can coexist with other spaces that are left behind from these technological advances. In many ways the same can be said of our current concerns about democracy. For all the concern raised in recent months about the potential slide into authoritarianism, or at least, diminished democracy in the United States, the reality is that both democracy and authoritarianism are already present in America, they are just unevenly distributed. Both of the crises mapped in this Part—the systematic inequalities in political power as evidenced by the power of business interests and the systematic exclusions of communities and particular issues from the larger political and legal debate—represent two important ways in which the ideal of a broad, equal, protected, mutually consultative democracy is a reality for some and a lie for

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47.   Elizabeth Anderson, Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It) 39–42 (2017).

others. These more chronic and systemic crises of democracy extend beyond the kinds of threats arising from the empowered autocrat that is the focus of the backsliding literature. Furthermore, the threat of a potential autocrat can coexist with and even exacerbate ongoing forms of inequality and exclusion. Democratization, and de-democratization, then, are "asynchronic"; that is, democracy as a form of mutually binding consultation between constituents and the state can thrive for some groups and in some spaces, while it fails for others.[48] Understanding these deeper crises of American democracy is critical for informing our understanding of how democracy can be revived and, in some cases, built for the first time.

III. (RE)BUILDING AMERICAN DEMOCRACY

Viewing democracy not just as a formal set of electoral or constitutional structures but as a broader set of institutions and practices that combine to ensure broad, equal, protected, and mutually binding consultation (as described in Subpart I.B above) helps highlight a wider range of crises undermining democratic ideals in contemporary American law and politics, particularly the crises of unequal power and systemic exclusion. Certainly the threat of democratic backsliding remains a real one, and the immediate defenses of checks and balances and norms shaping the exercise of executive power and political conflict are important. But beyond those defensive efforts, this fuller appreciation of the multiple crises of American democracy, crises not just of backsliding but also of systemic disparities of power and exclusion, suggests the need for a more far-reaching program of democratic reform, renewal, and rebuilding. These chronic crises of democracy suggest the need for radically different institutions and organizational forms to reshape American democracy, responding to the disparities of power and systemic exclusions that prevent many constituencies from participating in a broad, equal, protected, and mutually consultative politics.

First, ensuring democratic functioning requires a defense of state capacity and state institutions. Without robust regulatory and policymaking capacity, states cannot implement responses to problems of economic, racial, or gender justice, nor can they effectively enforce civil rights and public policies. Democracy requires a functioning government that retains significant policymaking authority.

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48. Daniel Ziblatt, *How Did Europe Democratize?*, 58 WORLD POL. 311, 333 (2006) (suggesting that, rather than evolving in lockstep, some institutional forms necessary for democracy might advance while others do not).

Second, civic capacity needs to be rebuilt, expanding the power of social movements, grassroots organizations, and marginalized constituencies to engage in political action. As Kate Andrias rightly notes, if we are to actually redress disparities of power, we need to go a step further and develop "a range of structural, power-shifting reforms to our law, our economy, and our democracy."[49] In particular, we should examine how current and historical social movements like labor or the Movement for Black Lives have worked to build their core capacity to contest and exercise power in the political arena.[50] Such countervailing power depends on more than just the ability to mobilize mass numbers of supporters, though that is of course a precondition. The political power of organizations depends on their ability to build what organizer and political scientist Marshall Ganz calls "strategic capacity," the ability to mobilize a wide range of human, financial, discursive, political and other resources and translate them into influence on decisionmakers.[51] Building organizational power thus requires something more than simply transactional mobilizing of one-off petition drives or protests; it also requires durable long-term organizing that can build the relationships, skills, and capacities of individual members themselves. By building genuine relationships and shared identities, organizations can create new forms of commitment, activism, and resources from among their members, which in turn fuels long-term, durable organizational power and influence.[52] As political scientist Hahrie Han explains, "[o]rganizers invest in developing the capacities of people to engage with others in activism and become leaders," while "[m]obilizers focus on maximizing the number of people involved without developing their capacity for civic action."[53]

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49. Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. FORUM 1, 6 (2016).

50. *See, e.g.*, Amna A. Akbar, *Toward a Radical Reimagining of Law*, 93 NYU L. REV. 405, 421–60 (2018) (describing the transformative and radical vision of law and institutions arising from the Movement for Black Lives); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 46–51 (2016) (describing the rise of the Fight for Fifteen movement and how new worker organizing is attempting to build bottom-up power).

51. *See* Marshall Ganz, *Resources and Resourcefulness: Strategic Capacity in the Unionization of California Agriculture, 1959–1966*, 105 AM. J. SOC. 1003, 1005 (2000) (defining strategic capacity).

52. *See generally* MARSHALL GANZ, WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT (2009); Marshall Ganz, *Leading Change: Leadership, Organization, and Social Movements, in* HANDBOOK OF LEADERSHIP THEORY AND PRACTICE 527 (Nitin Nohria & Rakesh Khurana eds., 2010) (describing how social movements build power in part by building authentic relationships and deep ties among members).

53. HAHRIE HAN, HOW ORGANIZATIONS DEVELOP ACTIVISTS: CIVIC ASSOCIATIONS AND LEADERSHIP IN THE 21ST CENTURY 8 (2014).

Third, we need to defend and redesign the interfaces that link such civil society action with state policymaking responses. This includes a defense of conventional levers for accountability, like voting and elections. But it also requires the creation of other participatory and representative institutions in day-to-day policymaking decisions, such as greater stakeholder involvement in regulatory policymaking. As sociologists Sidney Tarrow, Charles Tilly, and others have argued, the success of movements in exercising long-term political power and winning campaigns depends on a variety of conditions, including the presence of mobilizing narratives to frame their values and demands, organizational resources and capacity, and "political opportunity structure," the ways in which existing policymaking institutions create opportunities for movements to make effective claims on policymakers.[54] Political opportunity structure in turn can inform the strategies and organizational capacities of movements, as movements tend to build a "repertoire" of expertise and skills specialized around the most effective methods of exercising real power and influence.[55]

This broader agenda for democratic reform must necessarily complement and coexist with more proximate efforts to mobilize in defense against democratic backsliding. The mobilization evidenced by protests like the Women's March or the concerns about executive branch overreach should also direct energies toward these longer-term concerns.

Indeed, it is precisely out of these moments of conflict and contestation between organized interest groups that affirmative democracy-enabling institutions are forged. As suggested in Subpart I.A above, the threat of democratic backsliding emerges partly out of a dangerous coalition between autocratic leaders and allies among established power centers, from political parties to business leaders, or in some cases even the military.[56] Studies of democratic consolidation and emergence, on the other hand, suggest a similar dynamic in the affirmative: Institutions of democracy and the balancing of rival power centers and constituencies often emerge out of an extended period of political conflict and negotiation. Democratic institutions (and even constitutions) are shaped by how political elites respond to new constituencies

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54. For an elaboration of the concept of political opportunity structures, see generally Sidney Tarrow & Charles Tilly, *Contentious Politics and Social Movements*, *in* THE OXFORD HANDBOOK OF COMPARATIVE POLITICS 435 (Carles Boix & Susan C. Stokes eds., 2007); SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS (1994).

55. *See, e.g.*, HAN, *supra* note 53, at 68–69 (describing how repertoires of protest emerge); *see also* TILLY, *supra* note 15, at 148–49 (describing the phenomenon of repertoires and how social movements design advocacy strategies in light of existing institutional contexts).

56. *See supra* Subpart I.A; *see also* Waldner & Lust, *supra* note 5, at 17.

and pressures.[57] Where the costs to elites of allying with prodemocracy forces, or acquiescing to demands for redistribution of different forms, are too high, political elites will likely support repression against prodemocracy protests and constituencies. Where the costs of such accommodation are low enough to be outweighed by the pressure from below, elites will support democratizing reforms.[58]

As they build greater power and influence, the constituencies and movements focused on the crisis of democracy today must push a policy agenda designed not just to shore up checks and balances and norms against backsliding but also to affirmatively transform the systemic disparities of power and patterns of exclusion noted above. Here, three particular focal points emerge.

First, movements must foreground as part of their campaigning the need to defend and expand existing democratic institutions. This focus on democratic institutions includes issues like expanding access to the ballot and preventing further efforts at vote suppression through mechanisms like draconian voter ID policies or felon disenfranchisement. It also includes familiar issues such as campaign finance reform and redistricting reform. But it also must include new challenges like the emerging battles over free speech and equal access to the online public sphere, and the governance of media conglomerates. These institutions that foster democratic responsiveness are necessary to address other substantive inequities.

Second, these movements must focus not just on mobilizing but on building long-term power. As scholars of social movements have suggested, this means building mass-member, federated, civil society organizations driven by organic leaders developed from within the movement. It means converting people from newly mobilized supporters into long-term, committed members of the movement who deepen their knowledge, skills, and commitment over time.[59]

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57.   *See* Waldner & Lust, *supra* note 5, at 16.

58.   *See id.* For classic accounts of democratic consolidation developing this argument, see, for example, DARON ACEMOGLU & JAMES A. ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY (2d ed. 2009) (developing a macro theory of democratic consolidation premised on the bargaining between social classes), CARLES BOIX, DEMOCRACY AND REDISTRIBUTION (2003) (showing how bargains between social classes under conditions of inequality explain different trajectories of democratization or nondemocratization), and GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES (1986) (arguing that democratic transitions depend on the coalitions formed between existing power centers and democratic reformers).

59.   *See, e.g.,* HAN, *supra* note 53 (describing how civil society organizations can cultivate membership and leadership internally to build durable movements); SKOCPOL, *supra* note 43 (describing how social movements and civil society organizations lost power when they moved away from a focus on mass member organizations to a thinner model of

Part of what makes advocacy groups like labor in its heyday or gun rights proponents today so effective is that they build durable organizations that can exercise influence in a variety of ways and exist beyond momentary flashpoints of controversy. Similarly, these movements will at some point have to embed their members and values within larger organizations and institutions that can exercise political power more effectively. Thus, where movements have "anchored" within mainstream political parties, they have exercised wider influence on public policy and institutional change.[60]

Third, these movements must interrogate the relationships between democratic crisis and longer-term questions about economic inequality, racial or gender justice, or other related issues that contribute to the structural exclusions and power disparities described above. Fourth, and perhaps more controversially, these movements must look at advocating for policies that would help fragment the power and influence of dominant political factions that have pressed for the dismantling of democratic responsiveness as discussed in Part I above. In the industrial era, for example, Progressives advocated for regulations on monopolies and big finance in part to preclude these wealthy and powerful interests from dominating the political process, quite apart from their influence on the economy. Similarly, today's debates about inequality and economic policy have a political and institutional charge as well: A key reason why we ought to pursue tougher policies on finance or concentrated firms is to prevent concentrations of political power.

CONCLUSION

The crisis of democracy encompasses more than the threat of backsliding; by extension, the remedies for the crisis need to go beyond the push to restore a status quo ante of norms and institutional checks and balances. Just as the backsliding literature has emerged rapidly out of a generative dialogue between sociological and comparative political studies of democratic collapse, on one hand, and scholars of public law and American politics, on the other, this Article draws on a similar dialogue between sociological accounts of the drivers of democratic consolidation and current debates in public law, law and social

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professionalized advocacy groups); *see also* ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 211–12 (2017) (arguing that online social movements that focus on mobilizing through internet platforms are not as politically impactful as physical and mass-member-based organizing).

60. DANIEL SCHLOZMAN, WHEN MOVEMENTS ANCHOR PARTIES: ELECTORAL ALIGNMENTS IN AMERICAN HISTORY (2015).

movements, racial justice, and contemporary American politics. This account suggests that the broader crises of American democracy today include more chronic and systemic problems, especially the links between inequality and disparities of power, on one hand, and systemic forms of exclusion, on the other. Realizing a broad, equal, protected, and mutually consultative democratic politics requires addressing these chronic crises as well as the more immediate threats of backsliding.

These are broad aspirations and will require significant organizing and advocacy work on the part of civil society actors. But this is not the first time America has faced a crossroads where the survival of its democracy is at stake. Reconstruction after the Civil War, the Populist and Progressive movements culminating in the New Deal response to the upheavals of industrial capitalism, and the civil rights and inclusionary movements of the 1960s and 1970s represent major transformative moments when American democracy created new institutions that expanded democratic responsiveness and staved off the pathologies of corruption, systemic exclusion, and deliberate de-democratization. Whether we can do so again today to restore and even deepen American democracy in the twenty-first century remains to be seen.