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Democracy as Failure

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Aziz Z. Huq*

“I can't go on. I'll go on.”

Samuel Beckett, The Unnamable (1953)

The theory and the practice of democracy alike are entangled with the prospect of failure. This is so in the sense that a failure of one kind or another is almost always to be found at democracy's inception. Further, different kinds of shortfalls dog its implementation. No escape is found in theory, which precipitates internal contradictions that can only be resolved by compromising important democratic values. Out of localized failure, indeed, comes wholesale breakdown. A stable democratic equilibrium proves elusive because of the tendency of discrete lapses to catalyze wider, systemically disruption. Worse, the very pervasiveness of local failure also obscures the tipping point at which systemic change occurs. Social coordination in defense of democracy is therefore very difficult, and its failure correspondingly more likely.

This thicket of intimate entanglements has implications for both the proper description and normative analysis of democracy. At a minimum, the nexus of democracy and failure elucidates the difficulty of dichotomizing democracies into the healthy and the ailing. It illuminates the sound design of democratic institutions by gesturing toward resources usefully deployed to mitigate the costs of inevitable failure. Finally, it casts light on the public psychology best adapted to persisting democracy. These epistemic, psychological, and institutional projects have not been identified, or extensively discussed, in recent political philosophy. That latter tends to focus on social choice questions, deliberative democracy, or accommodations with Rawlsian political liberalism.¹ But to grasp the proximity of democracy's entanglements with failure is to temper the aspiration for popular self-government as a steady-state equilibrium, to open new questions about the appropriate political psychology for a sound democracy, and to limn new questions about democracy's optimal institutional specification. It is, for these reason, a worthwhile enterprise for political philosophy.

In developing these claims, I use the terms 'democracy' and 'failure' in the following capacious senses. By failure, I mean simply a falling short of an aspiration or goal that is inherent in a specific enterprise. Consider, by way of example, what it means to fail as a parent. I also fail if I expose my child to avoidable, yet disabling injury. I also fail her, though, if I needlessly lose my temper at her trivial mischief. This second sort of failure is not in isolation fatal, but can have grave effects over time. This is a capacious understanding of failure: It takes as a counter-factual an idealized well-functioning and inclusive democracy, one that enfolds

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the best of the manifold flawed polities we can observe in the world. I adopt this definition in part because of the possibility that small dysfunctions can, over time, aggregate to systemic threats. Hence, in the parenting context, a broken leg may heal, but the cumulative effect of my repeated failures to maintain my composure may, in the fullness of time, inflict great harm on my daughter's psyche and well-being. Big things, that is, can have small beginnings.

I define a democracy for present purposes as a set of institutions through which all the adult citizenry of a nation routinely and effectively shapes how political power is exercised.² Although relatively thin, this definition still embodies a certain number of normative commitments: It entails a certain kind of inclusion of all the polity; a linkage between that whole people and political power (i.e., not control by a minority); and a commitment to maintaining the system of popular control. My definition is, however, mechanistically catholic. It allows for elections, direct democracy, and sortition. Deliberation is not required.³ And no one mechanism has a monopoly on the democracy label.⁴ More important than any procedural entailment is the system-level possibility of public views materially influencing how state power is deployed. A litmus test for democracy is hence the presence of substantial uncertainty, before new leaders or new policies are selected, about who those leaders or what those policies will be.⁵ Alternatively, one might ask whether the modal adult citizen has the possibility of participating in the choice of who exercises political power.⁶

These institutional preconditions pertain directly to a democracy's claim to legitimacy *qua* democracy. In the absence of uncertainty over elective choice, and in the absence of some relationship between electors and those elected, there is no plausible argument that a government has a moral argument for compliance on the ground that it is a democracy. Although the actual sociological predicates of state legitimacy and legal compliance likely vary across polities, I think it is fair to say that in observable democratic systems, participants generally believe, to some degree, that citizens have an obligation of compliance with law, even some law with which they disagree, simply because they are participants in a democracy. Moreover, the rule of law necessary to democratic endurance requires officials and judges to have a specific disposition of respect and acceptance toward the law. Continued electoral competition requires incumbents to hold a certain attitude of restraint toward their opponents. Being a member of the loyal opposition remains its own ethics of patience and restraint. Mere "legalism"—the position that ethical obligations are exhausted by rule-following alone⁷—is singular unpropitious as a psychology of democracy. Unlike chess or Go, therefore, democracy is a game that rests on normative choices and that requires normative commitments from its participants. The plausibility of these normative demands turns on how well basic democratic institutions work. Hence, the manner in which democracy's necessary mechanisms are vulnerable to failure has implications for the strength of a state's moral claim to legitimacy, and perhaps the strength of its sociological legitimacy.

The argument of this article has two strands. One aims to tightly hitch the idea of democracy—which typically has a positive valence—with the prospect of failure—usually glossed as negative. Despite incompatible evaluative tilts, I will suggest that democracy cannot be understood except in light of its likely and certain failures, both theoretical and practical. A second strand of the argument then links failure writ small to failure writ large.

The thought that democracy itself is a kind of failure is not new. A long tradition of political thought, starting in Book VIII of Plato's Republic, condemns democracy as flawed in

its inception and practice.⁸ The republican thought of the Florentine republics, as John Pocock argued, also recognized an especially rich array of “theoretical reasons” for self-government’s failure.⁹ One can thus imagine an ‘anatomy of anti-democracy,’ akin to the genealogies of anti-liberalism carved by Isaiah Berlin and Stephen Holmes, one that carries Plato’s theme forward to Hobbes and Schmitt, and thence to anarchists, contemporary libertarians, and critical theorists.¹⁰ That’s not my project here, although the republican intuition that self-government coexists with its incipient failure chimes with my analysis. Equally, I am not concerned with limning an alternative to democracy. I accept Churchill’s familiar dictum that democracy is the least bad option available.¹¹

Further, I concede that ‘democracy’ as an ideal type does not exist. There are only actual, existing democracies that are congeries of imperfectly formed, variably managed institutions and political formations. None are as good as they could be, but only some are fairly denominated as failing. Indeed, it is useful to think about democracy in terms of those actual, existing institutions as a means to develop from the ground up an understanding of how democracy is constrained by its own normative and pragmatic commitments. It is a way of surfacing what a Marxian would call democracy’s ‘internal contradictions,’ the seeds of its inevitable crises. This inductive approach is different from the posture adopted by other prominent theorists who offer instead “a model for institutions to mirror.”¹² My approach thus stands in a revived tradition of non-ideal theory, or political realism, although I hope to avoid having the gravitational pull of brute facts push me into any “uncritical defense” of the status quo.¹³ Although not all of tensions I highlight can be avoided, almost all can be managed to some extent though institutional design, legal checks, or shared normative commitments among political elites.

Four Species of Democratic Failure

There are four margins along which democracy, in very different senses, fails. Mapping these four salients, each of which stretches out into a no-man’s land of ambiguously justified government arrangements, is a way to grasp the complex intimacy of democracy and failure.

Democracy as Failure 1: Democracy’s Violent Midwife

Democracy began among Greek city-states, in the sixth century B.C.E., and was in rude health until at least the fourth century B.C.E. More than two thousand years later, in the late eighteenth century, it was taken up on both sides of the Atlantic after monarchy had, in different ways, been repudiated.¹⁴ Only in the late twentieth century did it become globally hegemonic—not coincidentally as one of the two early Atlantic adopters assumed a mantle of global stewardship. Both the first and the second historical eras of democracy, therefore, punctuated a very different status quo with its own entitlements and beneficiaries. The fact of violence (and what would under other circumstances be denominated a crime), and the attendant unsettling of an institutional status quo, generates a first set of constraints and contradictions. These limit democracy and in some measure orient it toward failure.

The origin of Athenian democracy is conventionally located in Cleisthenes’s reforms of 508-07 B.C.E. Herodotus portrayed these as a ploy to consolidate power against aristocratic rivals in the wake of a Spartan occupation.¹⁵ But democratic reforms were only feasible “in the aftermath of two oligarchic coups d’états and a devastating military defeat,”¹⁶ that is, as one

equilibrium in a longer series of nonlinear avulsions in governmental form. Without crisis and defeat, it is not clear Athenian democracy would have emerged. Moreover, Athenians themselves “chose” to look back on a distinct “founding, authorizing moment”: the public murder of Hipparchus by Harmodius and Aristogeiton some six years earlier.¹⁷ So even if Paul Cartledge is correct that the murderers did not act on any political passion, and even if the Peisistratid tyranny with which Hipparchus was associated did not come to an end until Sparta invaded, it is still quite telling that the self-perception of the world’s first democracy hinged on the commission of a crime. It was a widely shared recognition that an act of violence was needed to separate democracy from a prior epoch.¹⁸

Two millennia later, both American and the French revolutions also pivoted on violent acts. In one, the thrum of Jefferson’s distinctive cadences could not hide the bloody and martial quality of America’s entrance on the world stage.¹⁹ In the other, a no-less eloquent guillotine blade bisected the monarch’s sublunary body, setting in motion both international and domestic paroxysms.²⁰ Even if revolutionary events were initially set into motion on the belief that a revised *ancien régime* could be restored, purged of the despotic tendencies or fiscal depredations,²¹ the fact of violence demarcated two regimes. It thereby raised stakes for reluctant revolutionaries, closing off doors to retreat or reconciliation. Even seemingly incrementalist pathways to democracy, such as Britain’s, were entwined with violence. The enactment of the Great Reform Act of 1832 in the United Kingdom, a landmark of democratic reform, was prompted by the so-called Swing riots of 1830-31.²² Democratic reform would be taken up again in 1867 in part largely because of the continued, sometimes violent, militancy of the Chartist movement, which in turn had emerged from the perceived betrayal of the working classes in the 1832 legislation.²³

The connection between violence and democratic origin is not universal. Not every democracy’s birth is marked by violence; in other cases, the violence that does occur is not a repudiation of the former dispensation. Decolonization in South Asia and Africa, for example, was often characterized by violence directed at other members of a nascent polity rather than at a former regime. India’s partition is an example of a democratic origin where violence occurred, but was not aimed at repudiating the former colonial regime. and, indeed, ended up inscribing religious and regional distinctions that were in some measure a function of the imperial imagination.

When democracy is demarcated with extralegal violence—as is often, if not inevitably, the case—it generates distinctive theoretical and practical difficulties. Democracy as a going concern depends on a stable set of institutions constituted by and operating under law. Shorn of a commitment to the rule of law, democratic institutions cannot operate in an orderly and effective fashion. When democracy has violent origins, by contrast, it will have encoded in its historical DNA the legitimacy of extra-legal appeals against established institutions. The possibility of ultra vires force in service of a better state hence becomes salient and unavoidably available as a destabilizing rhetorical move and practical possibility. Violence invites more, potentially unravelling violence. At the very least, it creates the rhetorical platform to justify and legitimate a repudiation of the state’s putative monopoly on force.

In the French case, the initial criminal act could not be contained, but spilled over into iterative violent purges of the body politic. And in the newly independent United States, too, violence persisted to a degree that embarrasses the dominant, hagiographic historiography of

the Founding. The roughly one in five former colonists who supported the Crown were harassed by their neighbors—sometimes tarred and feathered—dispossessed of their lands, and in some cases formally banished; some 60,000 ultimately left the new nation.²⁴ Aligned, although not identical to, violence is the possibility of extra-legal constitutional change. The first American constitution (the Articles of Confederation) was then unlawfully abandoned for a second (now canonical) version. “Illegality,” as Bruce Ackerman has written, “was a leitmotif at the Convention from first to last.”²⁵ That did not breed violence (although it entrenched and enabled the violence of slavery). But the subsequent success of American democracy, such as it is, rests on an impressive historical erasure of its own origins. That erasure in turn might be one cause of the nearly pathological reverence for the Constitution’s drafters today.

The violent origins of democracy, more generally, signal to supporters of the old regime that their presence in the new polity is at the sufferance of newly enfranchised majorities. The split marked by extralegal violence can lead to profoundly anti-democratic civil violence and demographic purges. Democracy established by violence thus in practice proximately depends often not just on persuasion, but also on violent purgatives, for its endurance. The same problem, it should not be noted, arises even in the absence of a founding crime. After the collapse of the Soviet Union, several of its former satellite states across Eastern Europe enacted lustration measures targeting tens of thousands of former state officials and employees.

Yet at the same time, democracy as a going concern depends on the apolitical rule of law in which losers are not hounded from home, ordinary lives, or country. A democracy must be able to manage public disagreements about policy and governmental performance through a predictable and stable set of institutional arrangements. Democracy won’t persist unless honest politicians know that they won’t be locked up for imagined offenses[†]; unless they know that in opposition they will be able to campaign and criticize; and unless they know that the subsequent round of elections will not be engineered to ensure a repeat performance of their defeat.²⁶ That is, they depend on the state’s legitimate monopoly on force. A democracy that begins in crime has already betrayed its fragile commitment to the rule of law. It has thus created conditions in which it is more than reasonable for those out of power to legitimately wonder whether the legal commitments upon which a democracy rests will be kept in subsequent periods.

Democracy as Failure 2: Democracy as Compromise

Whether constructed on a crime or not, a new democratic order will of practical necessity be designed to limit the power of duly formulated majorities to achieve what would otherwise be legitimate policy ends. Constraints on the exercise of democratic choice, which are often baked into a new constitutional text and enforced by an unelected judiciary, do not bite on all possible democratic coalitions uniformly. Rather, it is more likely than not that a democratic constitution—understood either in terms of a formal text or a set of unwritten but consolidated arrangements such as Britain’s or Israel’s—will constrain asymmetrically some

[†] The adjectival caveat is intentional; dishonest politicians who abuse state power—the South African former president Jacob Zuma being a useful recent example—should not have any insulation from criminal prosecution. While the prospect of criminal liability in some instances can motivate a leader’s decision to stay in power, in my view the more important effect is to incentivize law-breaking while in office.

of those who wanted for political authority under a prior regime. Where those compromises undermine the essential institutional elements of a democracy, the latter's plausible claim to legitimacy starts to corrode.

As I have already noted, democracies are normally fashioned in conditions that do not favor the sort of ideal constitutional design envisaged by deliberative democracy's advocates. Commonly accompanied by violence, the end of an *ancien régime* will likely be characterized by political turmoil as new factions jockey for pivotal powers within the new institutional dispensation. Even if violence against former rulers does not erupt, violence as a byproduct of contestation over civil power often proves endemic. Civil strife undermines the possibility that new institutions of state will either be designed through democratic processes or will instantiate democratic ideals in operation. Not only are the ordinary processes of democracy consultation and debate hindered. Civil strife also intensifies internal schisms that ordinarily could be navigated through legislatures, constituent assemblies, and like collective bodies.²⁷ Where bargains are struck, they are as likely to reflect exhaustion as political principle. An ethics of institutional creation under such conditions is best framed as *Hippocratic* in quality—striving, as physicians do, to avoid the creation of any new harms rather than the creation of the best the best imaginable form of government.²⁸

Even if a democracy is not crafted under conditions of crisis, it is likely to be circumscribed by endogenous constraints. Incremental processes of democratization through legislation are often best understood as concessions by powerful groups (such as a monarchy or a land-holding class) to cede just enough authority in the form of a permanent democratic institution so as to dissipate the threat of more serious violent uprisings.²⁹ The leading political economy of this dynamic, offered by Daron Acemoglu and James Robinson, underscores the redistributive character of new democratic arrangements. But their formal model does not imply that incremental democratization will lead to a level playing field. To the contrary, a subsequent extension of their model suggests that once democratic arrangements are in place, political elites will renege and use their material resources as a way to capture a disproportionate share of de jure political power—thus curtailing the inevitable redistributive implications of a broader franchise.³⁰ Recent empirical work, moreover, suggests that powerful elites tend to succeed in entrenching their preferences in new constitutional beyond revanchist democratic tides.³¹

Under the modal conditions of its creation, therefore, democratic arrangements will be negotiated with some factions or social groups exercising disproportionate influence as a consequence of their ability to threaten new civil strife. It has historically tended to be propertied factions that have this upper hand. This fact has escaped no-one. During the Putney debates of 1647, Cromwell's son-in-law Henry Ireton cautioned the Levellers that universal male suffrage would “come to destroy property thus. You may have such men chosen or at least the major part of them, as have no local or permanent interest. Why might these men not vote against all property?” To Ireton, this seemed an obvious and dangerous fallacy since by definition, the aim of “government is to preserve property.”³² Many since Ireton have concurred. James Madison, for example, defined the iniquity of faction in distributional terms. He warned in Federalist 10 that democracies “have ever been found incompatible with personal security or the rights of property.”³³ The U.S. Constitution was designed to avoid this incompatibility, and not necessary to promote a democracy in which, as Sir Thomas

Rainsborough said at Putney, elective institutions acknowledge that “the poorest he hath a life to live ... as the greatest he.”³⁴

The history of democratic institutional design, accordingly, has been a history of partial blockages and countermeasures intended to stymie *sub silencio* the inevitable redistributive effects of an enlarged franchise. This is just as true when a democratic order emerges through a series of incremental reforms as when it arises through a single, convulsive change: The constraints I identify attend efforts at constitutional amendment as much as those aimed at constitutional creation.³⁵ A range of measures can achieve this end without evincing any obvious infidelity to democratic principles. These range from limitations on eligibility for elected office, voter qualifications, or—Madison’s solution—the use of a large geographic unit to dilute the power of redistribution-minded majority.³⁶ Indeed, it is striking that the prospect of asymmetrically constrained democratic power has become so embedded and accepted that two of its principal instruments—representation and judicial review—have come to be seen as natural, even inevitable, elements of a well-run democracy.³⁷ As Bernard Manin reminds us, in the late eighteenth century a “government organized along representative lines was seen as differing radically from democracy, whereas today it passes for a form thereof.”³⁸ In its original, parliamentary form—prior to the emergence of mass-based parties—representation would ensure that only those “who inspired the trust of their constituents as a result of their local connections, their social prominence, or by the deference their provoked” obtained elective office.³⁹ By selecting for social rank, representation would defuse redistributive sentiment. The depth of democracy’s defeat by the political practicalities of its origin is nowhere better exemplified than in the bare fact that so many assume that representation is integral—rather than anathema—to democracy.

The second device commonly used to constrain democracy, and yet often painted as “representation reinforcement,” is a high court tasked with the resolution of constitutional questions.⁴⁰ As described by Ran Hirschl, the role of a judiciary in a new democracy is instead one of “hegemonic preservation.” This means giving judges the constitutionally defined role of protecting rights to property, as well as other market-preserving entitlements, as a way to forestall democratic majorities’ ability to redistribute resources.⁴¹ This “insurance” against too much democracy provides a hard constraint to democratic rule, at the same time as it generates a patina of legality for a new state.⁴² The posture of the early U.S. Supreme Court in respect to slavery, and the Indian Supreme Court in respect to land redistribution provide striking examples of this thesis.

Particularly in the United States, but also elsewhere, there is a persistent notion that courts not only should but indeed will be a mechanism for protecting democracy in practice. This is a serious error. The independence of the judicial power is not correlated to the judicial commitment to democratic consolidation or expansion. In the United States, the Supreme Court under Chief Justice Earl Warren is commonly celebrated for decisions on race, electoral reform, and criminal justice. The Warren Court is taken as proof of the connection between judicial independence and an expansive, substantive commitment to democratic rule. But the Warren Court’s role in the American polity is aberrational rather than representative.

For much of American history, the most important effect of judicial review on democratic norms was the maintenance of racial exclusions via decisions upholding fugitive slave laws, the right to move slaves across jurisdictional lines, and the legal subordination of

'free' blacks in the form of separate but equal. After the Civil War, it enabled the dismantling of Reconstruction, and embraced only lightly disguised racial circumscription of the franchise.⁴³ Until the mid-twentieth century, civil society formations such as unions and minority religious groups obtained little or no shelter from the courts. The Court today has declined to limit partisan gerrymandering or rein in dark campaign money, at the same time that it has embraced racially disproportionate restraints on the franchise, such as voter identification requirements and election roll purges. As the twenty-first century unfolds, it seems likely that once again the Court's approaches to campaign finance, redistricting, commercial speech, the right to unionize, and the discrimination against disfavored racial minorities will in the aggregate narrow, rather than expand, democratic space. Outside the United States, courts have generally fared ill as defenders of electoral choice in the recent wave of democratic backsliding.⁴⁴ In short, judicial independence has in practice worked better as a hedge against property dispossession than democratic dispossession.

There is nothing structural about the manner in which the American Supreme Court is selected, or the array of canonical textual and precedential sources at its ready disposal, that conduces to a pro-democracy role. Judges are appointed by dominant political coalitions. These have an incentive to use appointments as a device to entrench themselves against electoral competition. The context in which the vast majority of the constitutional text was first adopted was not properly democratic. And, as noted, the commitment of key drafters to democratic practice was in fact quite precarious. It should thus be no surprise that the Court has in the long run done more to damage than to aid democracy.

A different argument to the effect that the structural conditions of democratic origins impede democracy would start not from the power of domestic interest groups, but would instead look at the supranational and international institutions such as the (now defunct) Bretton Woods system, the World Trading Organization, the European Union, and the web of bilateral and multilateral treaties as a network designed to encase and constrain domestic (usually democratic) governments' freedom of policy choice. According to an illuminating recent history of neoliberal thought, these comprised "an extra-economic enforcer for the world economy in the twentieth century" that has emerged as wealth's conventional safeguards of representation and franchise restrictions have withered in efficacy.⁴⁵ More generally, international competition fosters conditions that thwart certain democratic impulses. Hence, analysts working in a Marxian tradition observe that the mobility of industrial and financial capital creates a "reservation profit" that works as a floor below which capital flight occurs.⁴⁶

Materials indications of the success of democracy-limiting strategies abound. Among the most important are the persistence of slavery or its functional analogs as a feature of societies commonly denominated as democratic, and the enduring of various ideological justifications for the systematic marginalization and subordination of women. Consider the first of these as an example (although a parallel narrative could be offered about gender-based exclusions). One estimate suggests that between twenty and thirty percent of the Athenian population in the late fourth century B.C.E. were enslaved.⁴⁷ Of the eighty-four clauses of the 1787 U.S. Constitution, six directly concern slavery, and another four had substantial implications for the peculiar institution that were recognized and debated at the Philadelphia Convention.⁴⁸ Provisions tying the presence of slavery to the size of a state's congressional delegation, and thence to its influence in the Electoral College, shaped the early Republic's

politics, ensuring that slaveholders dominated both the antebellum White House and Supreme Court.⁴⁹

Until the late twentieth century, moreover, the southeast of the United States subsisted in a state of “subnational authoritarianism,” in which one-party rule was ensured through the electoral abnegation of the African-American population. That population, in turn, was again the lynchpin of a profitable agrarian economy that faltered only with the introduction of mechanization at the beginning of the twentieth century. A similar point could be made about the exclusion of women from the franchise until 1919, a measure that reflected widely accepted social norms of domestic authoritarianism. As in the Athenian case, these facts are strikingly neglected in conventional talk of American democratic history. The failure in common parlance to recognize that racial and gender exclusions are fatal to the very label ‘democracy’—as I think they are—is telling evidence that we—as a society—still fail to take seriously the experience and interests of excluded groups, primarily African-American, who labored under the authoritarian hand of Jim Crow. It is an epistemic failure that continues to catch our common tongue in culpable neglect.

The failures of democracy that flow from the initial demand for compromise, in short, are a dominant feature of the landscape even in putative paragons of democracy, such as the United States. A plausible prediction based on the common circumstances of democratic creation is that democracy’s advent will be typically accompanied by the persistent subordination and exclusion of subaltern populations. At the same time, devices such as representation and judicial review will work to curb the most ambitious redistributive within the demos. To be clear, it is not that democracy as a social form is somehow to *blame* for social stratification or economic inequality. It is rather that the conditions under which democracy is likely to emerge are conditions that tend to wed democracy to stratification and inequality as the price of initial adoption, and thus constrain the scope for the operation of democratic principles. The resulting absence of procedural equality might not be a problem in and of itself,⁵⁰ but in extremis it may have implications for the felt legitimacy of democratic orders.

There is one final way in which what happens at a democracy’s inception is necessarily insufficient to ensure its sound working. It is easy to conceptualize democracy as being adopted, or rejected, as a package, at a single moment of time. This is commonly how the U.S. Founding is imagined, for instance. But there are necessary elements of a democracy that cannot be adopted or embraced at a Founding moment. In particular, any choice of democratic form requires the possibility of rotation out of office. Even on the minimalist account I have stipulated, democracy is not compatible with an absence of uncertainty as to who will occupy key public offices moving forward. But the possibility of rotation in public office requires trust among office holders at the crucial moment when power is transferred. And trust is commonly not created *ex nihilo*, or overnight. Trust must instead be learned; it is a habit, and as much can be acquired only through repetition and experience.⁵¹ But at least the first (and perhaps the second) time power must change hands, an immense amount of trust is needed—a trust that cannot be predicated on past precedent, but that must often be spun from the gossamer of a constitution’s paper promises. In at least one regard, therefore, a democracy will necessarily be wanting at the moment of its creation—and thus susceptible to failure of one sort or another—because it will want for the crucial element of trust that can be constructed only over time.

The possibility that these failures will overwhelm the operation of democracy's three essential institutional elements, and hence vitiate its claim to legitimate authority, is unavoidable and pervasive. There is also a potential interaction here with the first democracy/failure nexus: The perception that democratic procedures are stacked in favor of elites may itself provoke a belief that extralegal violence is warranted as a means to alter unjust distributions. The first and the second species of democratic failure limned here, in short, can mutually reinforce each other in damaging ways.

Democracy as Failure 3: Democracy in Theory

The practice of democracy cannot be disentangled from certain theoretical commitments. Democracy, that is, is not a game such as chess or Go, which is defined by a closed set of rules enabling and inviting complex, strategic choices. Rather, from the basic conceptual building blocks of popular choice, ex ante uncertainty, and institutional continuity a wide range of different institutional arrangements can be imagined. There is no guarantee that choices can be made between various potential arrangements without difficult sacrifices. It is also possible that a normative question implicit in the design of democracy will have no stable or satisfying answer. In these cases, it is plausible to talk of "failure" as a necessary, and not merely contingent, feature of its instantiation.

This point requires some elaboration. We can usefully start with a canonical formulation of democratic institutions in political thought supplied by Rousseau. The social contract that Rousseau specifies is intended to reconcile two aims. It "defends and protects" the "person and goods" of each member, even as it ensures that each "obeys only himself and remains as free as before."⁵² This tension between individual rationality and the collective good, Rousseau suggests (rightly, I think), is implicit in democracy. It must be confronted because democracy is among those forms of governments subject to a "basic legitimation demand," whereby "something must be said ... in the mode of justifying explanation or legitimation."⁵³ Rousseau's solution is to place all persons and powers "under the supreme direction of the general will," with "each member as an indivisible part of the whole."⁵⁴ The relation of private to general wills in Rousseau's account is the crux of his mediation between the two aims of the social contract. As such, it has generated considerable interpretive division, including debate on whether Rousseau was indeed "drawn to democracy."⁵⁵

What is relevant here is less whether it is accurate to characterize Rousseau's solution as democratic, and more whether he was able to identify any convincing justification for the potential member of a polity concerned that about the private/general will trade-off. A broad array of sensitive and careful scholars of Rousseau suggest not only that he failed to identify such a justifying reconciliation, but that his work can be glossed as an ironic repudiation of the very possibility of such a settlement. Hence, Bernard Williams denied the possibility of "theoretical" resolutions to the competing moral demands of democracy, and instead suggested that "Rousseau was right to impose impossible conditions."⁵⁶ Judith Shklar suggests that his analyses are utopian, and as such "stand as reproaches to actuality."⁵⁷ In a rather less charitable register, Sir Isaiah Berlin complains that "Rousseau mysteriously passes from the notion of a group of individuals in voluntary free relations with each other ... to the notion of submission of something which is myself, and yet greater than myself."⁵⁸ That is, the twin normative impulses that animate a seminal account of legitimate democratic rule are standardly viewed as irreconcilable. Worse, Rousseau's effort at rapprochement arguably catalyzed a new

and volatile ideological amalgam in the shape of the general will. Even if some duller, sublunary justification for democratic rule can be offered, as Bernard Williams intimated, it will fail to navigate the theoretical impasse. It will leave a normative shortfall, or failure, as its residue.

Rousseau's account of the social contract points toward a second obdurate theoretical tension at the democratic project's heart. He observes that a social contract must bind a defined group of members, and as such requires some account of demographic boundaries. On his account, the people are defined as such because they are "already bound by some union of origin, interest, or convention," even if they have not yet "borne the true yoke of laws."⁵⁹ Setting aside the question whether these prerequisites are ever plausibly satisfied—Rousseau says they are, in Corsica—it is instead worth underscoring that no decisional procedure, electoral, sortition-based, or representational, can get off the ground without an account of boundaries. A tension arises between theoretical predicates of democracy in practice because there is no good answer to the boundary problem, and the ways in which it is in practice solved generally lack a sound footing in theory or empirical fact, even if its psychological pull is almost irresistible. So Frederick Whelan's complaint in these pages that democracy's boundary problem is "insoluble within the framework of democratic theory" still resounds today.⁶⁰

Whelan's conclusion resonates because the boundary problem's theoretical settlements are impractical, while the solutions observed in practice are hard to justify on any normatively attractive basis. To begin with, it is a familiar observation that democratic procedures cannot resolve the initial scope of a democratic policy, leaving what some call a "paradox internal to democracies."⁶¹ But if Rousseau's intuition about the moral directives animating the scope and formation of a democracy are to guide, a democratic polity should at a minimum encompass all those whose "person" or "goods" materially affected by a polity's decisions. This raises both practical and theoretical difficulties. Many democratic decisions are characterized by negative externalities, although their vector and scale will vary tremendously from case to case.⁶² It is hard in practice to see how the demographic scope of a democracy can be recalibrated for every decision a polity must take, depending on whether there are large or small spillover costs. At the same time, a polity defined to account for all negative spillovers would plainly exceed the criteria of "origin, interest, or convention" that Rousseau imposed. Rather, embracing the logical entailment of Rousseau's commitment would seem to require that all those affected, and perhaps even all those potentially affected, by a polity's decisions should by rights have a share in that polity's decision. The resulting "all affected interests" principle, as Robert Goodin has demonstrated, conduces quickly to a global definition of the polity.⁶³ But such a definition raises serious questions of "performative" feasibility as to whether procedures exist, or can be imagined, for the aggregation, weighing, and enactment of preferences within the polity.⁶⁴ Corsica and the globe, that is, present implementation problems of such different magnitudes that it is reasonable to think that the design of democracy for the latter is simply a distinct problem from the design of democracy for the former.

Resisting the impulse toward globalism, David Miller has suggested ways to "radically weaken the force" of an "all affected interests" principle. Miller's strategy in part is to show that the principle can be implemented only at the cost of compromising other morally relevant considerations, since as the equality of individual interests. In part, it is to contend that the principle simply lacks force. On this latter score, he makes three points. First, he has suggested that the range of issues a democracy can address be constrained by ruling out *ex ante* decisions

with large negative spillovers. Second, he suggests that a polity's spillovers will vary in magnitude, such that only some need be counted (although this point is pressed into service of a different argument). Third, he suggests that the "all affected interests" principle only applies to *government* decisions, and then only if someone has "no escape" from their negative effects.⁶⁵ If these points are correct, the "all affected interests" principle can be honored without serious damage to other normative compulsions.

I am not convinced, however, that Miller has identified ways in which the boundary problem can be plausibly mitigated; rather, I think he shows why its resolution necessitates trade-offs between the various moral predicates of democracy. Start with his first point. Although Miller is correct that democratic procedures might place out of bounds decision with large negative spillovers, the suggestion faces high practical hurdles. Contra Miller's recommendation, I am aware of no democratic constitution that creates zones of autonomy for noncitizens instead of citizens. To the contrary, it is more common for citizens to benefit from immunities from state action than noncitizens, even when the latter are resident permanently within the polity. It is, moreover, hard to imagine a plausible set of democratic preferences that would conduce to the arrangement Miller suggests—at least without some substantial constraint of what democratic preferences can be realized.

Miller's second basis for weakening the "all affected interests" principle—that some effects are trivial—seems to me again practically difficult to implement. Many state policies affect discrete tranches of nonresidents in predictable yet trenchant ways: Consider a state's decision to extend a domestic subsidy for a valued local crop or good (which is the economic equivalent of imposing a tariff); its decision to bar some kind of family-based migration; or its decision to support (or not to support) the development of a new pharmaceutical that will mitigate a globally prevalent disease. All these decisions seem comfortably within the range of plausible democratic discretion, yet all bear heavily on discrete yet distinct groups dispersed variously around the world, perhaps in *ex ante* unpredictable ways. As these examples suggest, his "no escape" limitation is of more theoretical than practical interest. To see this more concretely, consider his suggestion that migrants are not "coerced" by border controls because they can opt to settle in other countries.⁶⁶ This might once have fitted the European context, where (at least until recently) multiple options for migrants existed. But it ill describes the plight of asylum seekers at the southern border of the United States. In any case, Miller does not attend to the dynamic effect of his proposal—which again can now be glimpsed in the growing pan-European resistance to accepting migrants—of interlocking barriers to entry for migrants that leave then, in the aggregate, no humane, bearable option. Even accepting Miller's points, therefore, I think that considerable charge remains in the moral dilemmas of the boundary problem.

The insolubility of the boundary problem means that there is always an open question as to composition of the polity, and the nature of the bonds uniting its members—and this openness increases the risk of democratic failure. In practice, the boundary problem is putatively solved by an appeal to "some union of origin, interest, or convention." But as Joseph Schumpeter observed, this imposes no tractable constraint on the definition of democratic boundaries, such that a "race-conscious" or an "anti-feminist" nation present no concerns of democratic legitimacy.⁶⁷ Indeed, the many nations that define citizenships partially in terms of the *jus sanguinis* principle—including putatively liberal states such as France and Germany—and the long persistence of gender-discriminatory rules for derivative citizenship

in U.S. law, suggest that Schumpeter's solution is not outlandish, even as an account of practice in supposedly liberal polities. The Schumpeterian solution to the boundary problem is also consistent with practices of subnational authoritarianism—whereby racial or religious groups within the geographic scope of the polity are excluded from the franchise, and thereby subject to some form of permanent and deep social stratification—that otherwise would seem inconsistent with democratic commitments. That is, an answer to the boundary problem that sounds in “origin, interest, or convention” almost necessarily conduces to certain local failures of democratic practice.

At the same time, as an empirical matter, biological or cultural grounds for democratic self-definition, found with dismaying regularity in contemporary political discourse, are unfaithful to historical fact and sociological realities. Race or ethnicity, to the extent they are even stable, coherent categories,⁶⁸ are not reliable proxies for criminality or expected economic contribution.[‡] As Samuel Scheffler has observed, efforts to define the polity in terms of culture necessarily ignore or deny the fact that “culture and cultures are always in flux, and that individuals normally relate to cultures through the acknowledgement of multiple affiliations and activities.”⁶⁹ With the possible exception of polities that rely on skill-based criteria for immigration, such as Canada, the use of “origin, interest, or convention” in contemporary national self-definition, current practice yields no morally compelling answer to democracy's boundary problem.

I will sketch quickly a third theoretical concern, although as an empirical matter, I think its force is substantially less than the two I have aired already. Pace Rousseau's image of the general will as “always right” and as a justification for the extinguishing of all “partial society,”⁷⁰ there is always be disagreement, always a dose of Madisonian faction, in a democratic society.⁷¹ The theoretical challenge that this creates is the familiar difficulty of aggregating a collective's interests in the face of Arrowian cycling. I am not sure this is a great challenge, despite the hand-wringing it generates among public choice scholars. For one thing, in practice democratic bodies prove remarkably adept at managing instability and reaching durable social choices.⁷² For another, the identification of a decision protocol wholly immune from potential cycling may not be critical to democratic decision-making. Collective decisions can be legitimate provided they are “accompanied by a justification for its choice in terms of the other alternatives that could have been chosen and the principle that guided the choice.”⁷³ The social choice challenge to democracy, in short, is less substantial than first appears.

To summarize, I have focused on the way that questions implicit in the *theory* of democracy—Rousseau's challenge, the boundary problem, and Arrowian cycling—create insuperable problems for the *practice* of democracy. In my view, it is the first two—and not the cycling problem—that present the most intractable challenges because they tend to generate local failures of democracy, such as subnational authoritarianism or illiberal or even racist migration regimes. Their potential dissolving effect on democratic orders, however, go beyond these local lapses: As the following section details, the intractability of these problems also opens a space for political leaders and movements who oppose democracy as a going concern. These deficiencies of theory, that is, can spawn practical failure in ways that I take up now.

‡ There are many arguments for why race, ethnicity, and religion provide questionable grounds for resolving the boundary problem, and I do not presume to exhaustively consider them here. Suffice to say that I view all such resolutions as unavoidably suspect even if omnipresent.

Democracy as Failure 4: Democracy as its own gravedigger

I have so far delineated a series of practical and theoretical challenges that a democratic polity cannot wholly avoid. I have suggested that these difficulties are irresolvable without slighting valuable democratic goals. This implies that democracy falls short—it has retail failures—at its origin and in its operation, and in its translation from theory to practice. All of the limitations on democracy adumbrated thus far, however, have a local character: They impugn one discrete dimension or feature of democracy’s operation. My final argument about the entanglement of democracy and failure builds on these local failures, but goes beyond them to posit a causal connection between local failures of democracy and its global, systemic breakdown. Democracy, through its local failings, generates the psychological, institutional, and political conditions in which the whole system of popular choice breaks down. Democracy’s failures, as a result, are not importantly only because of their immediate effects (although those can certainly be significant), but also because of their dynamic consequences for systemic stability. Democracy, I thus contend, can become its own gravedigger.

To motivate this possibility, it is useful to start by reflecting on the ordinary operation of an elective democracy. In most elections for national leaders, voters must choose between one or more candidates. Outside a handful of exceptional cases, just less than fifty percent of them will be immediately disappointed by the result. (In the 2018 Turkish elections, for example, Recep Tayyip Erdoğan won just under 53 percent of the national vote, despite having declared a state of emergency, purged the military and civilian bureaucracies, and inveigled overwhelmingly positive coverage from state and private media). Once in office, moreover, a leader is very likely to disappoint some, perhaps even all, of her supporters. Not all their interests will be pursued with equal vigor; some of their hopes will inevitably be dashed. Few of those who voted against her may be inclined to see her performance as a success. All this means that in the ordinary case, many of the participants of an electoral democracy—perhaps most—will experience an acute sense of disappointment, even dismay. Yet those participants are expected, again and again, to find time in their hectic work and family lives to inform themselves of the substance of a democratic choice, and then to take the time and effort—some say irrationally—to express that choice.⁷⁴ As a social practice with material costs at the individual level, that is, democracy is not obviously self-sustaining.

It is not just the pure act of democratic selection that demands effort while supplying scant psychological payoff. It is not at all clear that the policies or candidates chosen by a democracy will be successful. As contemporary experience with climate change, pandemic illness, and economic inequality show, democracies are not always good at recognizing serious threats; they are often tardy in responding to them. And having worked up a response, a democracy may infer that it has leeway to respond haphazardly to a crisis—inviting an even more acute crisis down the road. In David Runciman’s account, “failure leads to success, success leads to failure,” and all “moments of truth for democracy are an illusion.”⁷⁵ The difficulty of institutionalized learning on the part of elected bodies (as opposed to civil services) seems to me of greater practical importance than the sempiternal debate as to whether a democratic collective will make a wiser decision than an individual acting alone.⁷⁶ At the level of policy, therefore, members of the voting public will often have good reason for dissatisfaction with the democratic system.

Discontent and dismay at both the personnel and the practical effects of democracy can take different forms. One possibility is that participants will engage in what Pierre Rosanvallon calls “counter-democratic” measures of surveillance, denunciation, and oversight.⁷⁷ Alternatively, and perhaps more likely, they can lapse into a general apathy and disengagement from democratic processes from a sense that not only are their views and actions causally irrelevant, but that ensconced leaders will typically home in on unjustified, and even immoral, policies. When a democracy maintains authoritarian enclaves—the American south until the 1960s; the female gender until the 1920s on both sides of the Atlantic—emotional commitments to democracy are also likely to be overall thinner; to the extent that enfranchised members of the system have a commitment in that system, it may be inextricably connected to the maintenance of their own dominance. And obviously, those subject to authoritarian practices are unlikely to have much faith in their polity’s democratic claims.

But this sort of general malaise in the face of democratic choice, and the concomitant absence of any deep commitment to democracy as a going concern, presents a systemic threat to democratic endurance. Since the 1930s, it has been abundantly clear that both political elites and voting publics can bring to power candidates and movements that are systemically opposed to the maintenance of democratic practice.⁷⁸ Although local discontents with democratic performance are not the only cause of a more general democratic failure, it seems very likely that the growth of such discontent makes it easier for an anti-system candidate or party to seize power, and then dismantle democratic competition from within. In the 1990s, Peter Mair offered precisely this diagnosis to explain the initial rise of anti-systemic populist parties and candidates in Europe.⁷⁹ Twenty years later, the patterns that Mair identified of low voter turnout, high voter turnover, declining political party membership, and public disengagement from politics have engendered a wave of populist chancers across Europe, including Silvio Berlusconi, Marine Le Pen, Geert Wilders, Beppe Grillo, and Norbert Hofer.⁸⁰

A different kind of dysfunction can unfold in the legislative policy domain. Consider in this regard an argument associated with the public choice theorist Mancur Olsen:⁸¹ Democracy operates in time. Legislation produced at one point in time will persist, unless a sunset clause has been included. Policies and institutions created by democratic processes, moreover, often prove to be harder to dissolve than to create: Once created, policies create pools of beneficiaries that will fight to maintain a legislative status quo. Separation of powers systems, and even bicameralism in the absence of separated powers, creates multiple veto gates, hence favoring a politics of such resistance.⁸² Over time, a sort of legislative calcification occurs: As more and more law is added to the statute books—with each law being difficult to undo—the burden of successive exercises of democratic choice drains surplus state capacity to address new needs or previously excluded populations. Weighed down by the accumulating baggage of electoral promises, a democracy over time becomes increasingly incapable of responding to new challenges, or indeed, of even adapting to slowly shifting circumstances. The arrow of legislative time, in this fashion, generates a congealing of policy commitments that ultimately proves disabling.

A final dynamic operates through the causal channel of political structures, rather than policies or voting practices. The nineteenth century English constitutional commentator Walter Bagehot offered a justification for Victorian monarchy that has a bearing on the stability of democratic rule today. According to Bagehot, a democracy will of necessity have complex institutional arrangements as a means of accounting for the plurality of interests to

be represented. (He might have added here that complexity flows in important part from the hegemonic preservation strategies of existing elites and property holders documented above). The opacity of the ensuing arrangements, however, undermines public understanding and confidence in government. In Bagehot's view, therefore, a simpler and less democratic governmental form such as monarchy was necessarily more stable—and more publicly satisfying—than a more complex one, such as democracy. Looking to the U.S. Constitution, Bagehot condemned its want of any “ready, deciding power,” a dearth that left it incapable of effectual response to the problems of post-Civil War Reconstruction.⁸³ In this way, Bagehot thought, the very institutional design decisions intended to ensure the Constitution's ratification and survival paradoxically led to its downfall.

Not all of these arguments about the dynamic effect of retail democratic failure on the risk of system failure should be given equal weight. Their force is an empirical, not a theoretical, matter. At least as applied to the United States, I think Olsen's and Bagehot's arguments have only limited force. I am not sure, though, whether those arguments would have a more potent charge in different national contexts. Moreover, exogenous social and economic forces—in particular the perception of rapid cultural change or economic transformations that undermine the possibility of individual betterment—also contribute to systemic crises of democracy.⁸⁴ With all those caveats, I nonetheless think there is some reason for concern that democracy's various failures, even if initially local in scope, can over time have destabilizing systemic implications. In a sense, this is simply a modern proof of Plato's dictum that democracy has inherent to it the tendency to degrade into tyranny (although refashioned on empirical rather than metaphysical grounds).⁸⁵ All show in different ways the possibility that democracy can be its own gravedigger.

These three dynamics, moreover, interact with the theoretical failures that I have sketched in the previous part. Recall that we have no satisfying account of how private wills are fully identified with the general will, and we lack a solution to the boundary problem. This means that democracy abides alongside a persisting uncertainty on matters key to its core claims to legitimacy. As a result, the average participant in a democracy will never receive a robust or even a clear statement of some basic terms of legitimation. However dimly aware they are of the ensuing theoretical gap, they are vulnerable to appeals that exploit their regime's want of robust normative foundations. As a result, they may well be vulnerable to political appeals that hinge on what Isaiah Berlin once called the “evil ... mythology of the real self.”⁸⁶ Appeals to ethnic or religious templates of nationhood can be invoked as justifications for suppressing political opposition or disallowing the associational life that leads in time to political opposition. Rousseau's deeply misleading idea of a general will can be conjured to justify measures that suppress channels for contesting and revising democratic judgments.

That this theoretical concern has some practical force is suggested by the fact that the very fallacy Berlin decried turns out to be characteristic of the contemporary anti-democratic populist wave. In an influential recent treatment, Jan-Werner Müller has defined populism as a political strategy based on a “moralistic imagination of politics” as a Manichean confrontation between a morally purified “people” and a corrupt and irremediable “elite.”⁸⁷ Populism so defined can be observed as a hegemonic political formation in Latin American (on the left), Europe, the United States, Israel, and India (on the right). A central conceptual element of populism across these cases is the rhetorical elision of pluralism, which flows seamlessly rather often into a dismantling of institutional checks on state power and a

suppression of divergent opinions and associations.⁸⁸ Populism as such need not always prove an antechamber to autocracy.⁸⁹ But it is a species of hegemony that easily and quickly bleeds into a domination inconsistent with democratic persistence.⁹⁰

Living With Democratic Failure

I have tried up to this point simply to capture a loosely affiliated array of connections between the project of democracy and the prospect of its failure. To an extent that is not recognized in the political philosophy work on democracy, I have argued, failure is not a risk for the democracy project. It is a certainty. Both at its inception and in operation, as well as in theory, democracy predictably and unavoidably falls short in many discrete ways. Given its origins and the circumstances of its ongoing operation, several distinct kinds of failure will be observed in a democratic system. The difficulty of avoiding these failures, at a bare minimum, suggests a need to consider democracy through the lens of realist rather than ideal theory: The latter runs the risk of specifying criteria of success that simply cannot be reached under any plausible set of circumstances. An ideal theory lens, moreover, misses an important dynamic: Retail disappointments can generate both a public psychology and a set of policy outcomes that set the stage for more systemic breakdowns of democratic order. Theoretical failures open the door to the political appeals of populists lacking a firm commitment to democracy. This is not to say that the ordinary operation of democracy *alone* conduces to failure; it is rather to suggest that this risk abides even in its otherwise mundane daily functioning.

All this should not be taken, however, as grounds for abandoning the ambition to maintain democracy as a going concern. Rather, cognizance of the pervasiveness of failure can provide a stimulus to fresh lines of theoretical inquiry and practical activity. I set forth below practical lessons and theoretical entailments that might be drawn from the observation of pervasive and at times concatenating democratic failure. These conclusions fall into three loose categories. First, there is a relatively simple descriptive point about the identification problem raised by the risk of systemic democratic failure. Second, a suite of lessons can be drawn about particular elements of a public psychology well fitted to democracy given the predictable frailties of democracy's theoretical justifications. Finally, I consider implications of the pervasiveness of democratic failure for key elements of constitutional design in a democracy.

The Identification Problem of Systemic Democratic Failure

If failure is embedded right at the origin of democracy, and if the project of implementing democracy immediately confronts hard theoretical and practical limits, and if those hard limits can cascade over time into a more systemic kind of failure, then it is far from clear that any simple, crisp line can be drawn identifying 'the' point at which at which democracy as a going concern has been compromised beyond repair. It is always possible to point to some way in which democracy has failed. Many of those failures are, moreover, absolute so far as the affected group is concerned. Subnational authoritarianism is an obvious example. Moreover, there are no clear guidelines for predicting when a given cluster of democratic failures will snowball into a more systemic breakdown. As a result, even as it will almost always be possible to identify *some* failure, it will also be difficult to know whether there is *enough* failure to imperil the structural persistence of democratic competition.

This theoretical concern, which is immanent in the analysis so far, resonates with recent empirical work on how democracies founder. In the past half century, the modality of democracy failure has changed. Whereas once the modal form of democratic failure was the military coup or the emergency declaration, now democracies fail by inches. They are corroded from within by anti-systemic incumbents who employ constitutional and legal authorities to undermine the institutional, legal, and social predicates for meaningful forms of democratic contestation.⁹¹ Democratic failures latter now occur as incremental processes, sliced into small pieces each of which may be superficially legal, with system-level effects emerging only gradually over time.

The theoretical analysis of democracy as failure worked through here suggests that this epistemic problem is even more acute than previously suggested. It also suggests that the problem generalizes beyond those cases in which an anti-systemic candidate or party tries to unravel democratic competition. In the absence of a complete and sudden caesura in democracy's functioning, taking the temperature of democratic health will *always* present a considerable challenge. Consider again the crude litmus tests for democratic health that I proffered at this essay's outset: the existence of ex ante uncertainty about a selection procedure's outcome. The analysis so far suggests why various efforts to delineate 'bright lines' beyond which a democracy cannot tread without inviting a systemic collapse confront such difficulties.⁹² In a context of pervasive democratic failure, discerning the critical step change will often be well-nigh impossible.

Although the limited scope of my project here does not permit an extended an inquiry into a substitute for bright lines, two potential alternatives merit notice here. First, it is possible that rather than looking for discrete step changes to the quality of democracy, it is more worthwhile to look for the direction of change. Democracy should be imagined as a system-level characteristic, akin perhaps to individual health, and gauged as such. We should focus on whether its general state is improving or declining. Second, efforts to classify leaders and parties in terms of their commitment to democracy as a system may be a better investment than the search for an elusive bright line marking democratic failure. Although such classifications are likely contentious, I suspect they are no less controversial than judgments about the quality of democracy at large.

Democratic Failure and Errors of Political Psychology

Other distinctive lessons can be drawn from the mapping of democracy's failures about how democracy can be misconceived. I label these errors of 'public psychology' because they are ways in which public, political discourse—rather than academic debate—goes awry. Of course, there is no reason to anticipate that scholars would be immune from such mistakes; indeed, to the extent scholars become Gramscian organic intellectuals for anti-systemic populist movements, there is every reason to think that will indulge and even revel in misapprehensions.

To begin with, the relation of democracy's theoretical difficulties to the risk of populist and anti-systemic destabilization explain the peril of what William Galston calls 'anti-pluralism.'⁹³ Democracy's persistence is at risk, that is, when its leaders substitute what Arendt called "the factual plurality of a nation or a people" with "the image of one supernatural body driven by one superhuman, irresistible 'general will.'"⁹⁴ Arendt here is repudiating Rousseau's

account of the social contract. I think she is also repudiating the Hobbesian account of a contract between individuals that gives rise to the delegation of sovereign power to a singular levitation unbound by residual contractual bounds to a people. Further, I take her thought to be inconsistent with the premise, common to both Rousseau and Hobbes—and recently emphasized by Richard Tuck in his revisionist account of Hobbes as a proto-democrat in *De Cive*—that “the people have no existence separate from the sovereign” and that the sovereign relates to its constituent members solely as “individuals.”⁹⁵ All these positions, Arendt suggests, are ersatz substitutes for “the lost sanction of religion” that once legitimated state-building projects.⁹⁶ Of course, the appeal of such legitimating bromides runs deep. And it may well be, at the end of the day, that the force of these corrosive denials of pluralism can be extirpated from the public vocabulary of politics only by a thoroughgoing attack upon, and repudiation of, the standard account of sovereignty.

Second, it follows from a pluralist orientation that the outputs of a democratic process ought to be viewed with some caution. The project of democracy, that is, also requires that one hold in mind constantly the contingency and partiality of any claim of representation or judgment. Whatever the epistemic merits of democracy as a theoretical matter, there is practical hazard in the presupposition that a democracy’s output are *eo ipso* correct as a factual or moral matter. Perhaps they are more likely to be correct in some sense than say, decisions by a single ruler or a narrow clique,⁹⁷ but that comparative advantage does not entitle democratic outputs to any conclusive moral weight. Indeed, it ought to be a truism by now that democratic decisions are often wrong on the facts and flawed on normative grounds. Even if their finality must be conceded on pragmatic grounds, therefore, their moral heft should be strictly construed.

Third, a related cognitive error concerns the possibility of a final, definitive response to democracy’s boundary problem. For if it is a mistake to conjure some unitary popular sovereignty, it is also problematic, and equally inconsistent with democracy as a political project, to assume that the polity has crisp and clear boundaries. That claim is not just empirically unsound—although one should not underestimate the profound and tendentious fallaciousness tendered by way of sovereignty talk—it is also a theoretical error. The boundaries of the polity are not settled once and for all, but are always up for renegotiation. The denial of such fluidity is another sort of betrayal of the idea of democracy.

The history of repudiated franchise boundaries is a warning against confidence that the final outer perimeter of enfranchisement has been reached. Many generations’ sturdy beliefs in the good sense of excluding the poor, women, or racial minorities from the voting booth now seem errant and apparent follies. The so-called “Great” Reform Act of 1832, for example, excluded the working classes, who took to the streets as the Chartist movement to demand a democratic voice. America’s Constitution, of course, endorsed and enabled the exclusion of women and African-Americans—lacunae corrected only in 1919 and the 1960s respectively. For the great part of American history, those exclusions seemed both obvious and necessary. There is no reason to think that we are not making kindred errors today. Indeed, the earlier noted tendency to gloss linguistically over the moral failings of the past by talking of democracy as an American trait dating back to the eighteenth century suggests that we remain prone to such errors. Our own beliefs about the mandatory reach of the franchise—as well as our beliefs about the necessity and strength of migration controls—should be more contingently, more modestly calibrated in light of that history, and in light of the constant

possibility that our own secure normative coordinates will be disproved by fresh moral insight, or by technological and social transformation.

Institutional Responses to Democratic Failure

An agenda for democracy-minded reform of constitutional and legal institutions would be both expansive and necessarily tailored to the particular facts of the polity in question.⁹⁸ The prevalence of local democratic failure, and its dynamic interaction with systemic collapses, suggests a need for general prescriptions, though, that apply across heterogeneous national contexts. Without being exhaustive—a task that would require consideration, *inter alia*, of whether representative elections should be abandoned in favor of sortition; whether migration policy requires first-order rethinking; and whether democratic capitalism is truly an oxymoron at a moment of neoliberal triumph—I draw two generally applicable institutional responses to democratic failure both from the above analysis and also my own prior work on the constitutional design of democratic orders.

First, a sound democracy ought to have a way of identifying and learning from its mistakes, and of correcting its shortfalls. Especially where a democratic failure leads to excision or exclusion from collective decision-making, mechanism design presents serious challenges. The population designated as salient for democratic ends always has an interest in patrolling entry to the polity because new members necessarily dilute and diminish the voice of some extant faction. Franchise expansion is therefore most likely when common cause can be fashioned between democratic ‘insiders’ and those excluded from the polity. These alliances will almost always face opposition. One way to anticipate and facilitate inclusionary alliances is through the careful design of a constitutional amendment rule. In contemporary constitutional practice, a wide variety of such rules can be observed, ranging from the exceedingly obdurate to a near identity between legislative and constitutional changes.⁹⁹ Moreover, amendment rules can be *de facto* or *de jure* variegated, such that different kinds of amendments must overcome varying procedural hurdles.¹⁰⁰ An amendment regime could usefully accommodate the need for corrective expansions to the franchise by allowing them to be passed by a less onerous rule than the mine rule of constitutional changes. It would thus anticipate, and discount, inevitable endogenous opposition to such alternations motivated by a fear of diluted voice.

Second, I have suggested that theoretical weaknesses pertaining to the basic terms of democratic legitimacy open the door to populist and anti-systemic leaders. These leaders will, as Ginsburg and I show elsewhere, endeavor to shut down the possibility conditions for further democratic contestation. As a result, any democratic constitution should address precisely and clearly the question of whether and how misconduct by elected leaders can be sanctioned. (This sounds self-evident, but notice that the U.S. Constitution fails this simple test). Different jurisdictions rely on a range of procedures, including votes of no confidence, impeachment, anti-corruption commissions, and criminal prosecutions. I have argued that illegality is often threaded into democracy’s origin, and also that the stable operation of a democracy depends on compliance with the rule of law. There is often the template of original legal defiance, as a result, to tempt a Jefferson into the Louisiana Purchase, a Lincoln into the suspension of habeas corpus, or a Truman into the seizure of the nation’s steel mills. There is always the possibility, that is, that illegality will succeed, and thereafter be embraced as the law of the land. Indeed, this may well be a good characterization of how historical practice in the

United States is folded into constitutional law.¹⁰¹ The allure of illegality—which is a species of moral hazard—set aside the necessity of legality for durable democratic persistence, creates an obvious tension that ought to be recognized and managed. At a minimum, such recognition implies the wisdom of institutions that mitigate the moral hazard of redemptive illegalities. It seems singularly unwise to relegate that task to democratic majorities. After all, those majorities have already by assumption made an erroneous choice of leaders already. Instead, a fulsome recognition of democratic failure presses toward the need for politically independent institutions, rooted in bureaucratic norms, for the investigation of high-level criminality and malfeasance—institutions that even supposedly advanced democracies such as the United States singularly lack.¹⁰²

Conclusion

The central claim of this essay is that democratic practice involves plural failures of different but concatenated kinds. Recognition of that fact, and a better understanding of the specific manifestations of local failure as well as their causal relation to systemic breakdowns, is missing from political philosophy writing on democracy. It is also, perhaps to more substantial consequence, absent from the practice of institutional design and public understandings within democracy. It is, I think, an unpleasant thing to acknowledge that the lodestar of modern political life is doomed to fall short, time and again, for varying and inevitable causes. Yet that recognition can profitably be integrated into an ethics of democracy, one that is considerably more humble, cautious, and provisional than the triumphalism that has characterized recent writing on the matter.

¹ See, for example, the coverage of David Estlund, “Democratic theory,” in Frank Jackson and Michael Smith, eds., *Oxford Handbook of Contemporary Philosophy* (Oxford: Oxford University Press, 2005), 208-30.

² For a minimalist definition of democracy, see Thomas Christiano, “Freedom, Consensus, and Equality in Collective Decision-Making” *Ethics* 101 (1990), 151.

³ The absence of deliberation in ancient Athens is argued by Daniela Cammack, “Deliberation in Ancient Greek Assemblies,” *Classical Philology* (forthcoming 2019).

⁴ Philippe C. Schmitter and Terry Lynn Karl, “What Democracy Is ... and Is Not,” *Journal of Democracy*, 23 (1991), 75-88.

⁵ Mike Alvarez, José Antonio Cheibub, Fernando Limongi, and Adam Przeworski, “Classifying political regimes,” *Studies in Comparative International Development* 31 (1996), 3-36.

⁶ Tom Ginsburg and Aziz Huq, *How to Lose a Constitutional Democracy* (Chicago: University of Chicago Press, 2018).

⁷ Judith Shklar, *Legalisms: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1986), 2.

⁸ Plato, *The Republic* (London: Penguin Books, 2003), 290-94.

⁹ J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 2016), 75-76.

¹⁰ For examples, see Jason Brennan, *Against Democracy* (Princeton: Princeton University Press, 2016); Slavaj Žižek, *The Year of Dreaming Dangerously* (New York: Verso Books 2012).

¹¹ I have heard often from academic colleagues an argument to the effect that one should prefer to be born and raised in contemporary China rather than contemporary India fiving their respective growth rates. The claim is offered as proof of democracy’s dispensability. Setting aside the irony of academics advocating the destruction of the very institutions of free exchange that enable them, the comparison seems to be so obviously an example of selecting on the desiring outcome—ignoring the many periods of Chinese history and contemporary examples of autocracy that lacked economic growth—that it borders on the frivolous.

¹² Joshua Cohen, “Deliberation and Democratic Legitimacy,” in Alan Hamlin and Philip Petit, eds., *The Good Polity* (New York: Blackwell, 1989), 17, 22.

¹³ Laura Valentini, “Ideal v. Non-ideal Theory: A Conceptual Map,” *Philosophical Compass* 7 (2012), 654-664, 659.

¹⁴ John Dunn, *Setting the People Free: The Story of Democracy* (London: Atlantic Books, 2005), 13-21.

¹⁵ *Ibid.* 34; Herodotus, *The Histories* (trans. Robin Waterfield) (Oxford: Oxford University Press, 2008), V: 66-67, 69.

¹⁶ Josiah Ober, *Demopolis: Democracy Before Liberalism in Theory and Practice* (Cambridge: Cambridge University Press, 2017), 31.

¹⁷ Paul Cartledge, *Democracy* (Oxford: Oxford University Press, 2016), 58-59.

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- ¹⁸ In similar terms, David Armitage underscores the Roman perception of a “right relationship between civil war and civilization.” David Armitage, *Civil Wars: A History in Ideas* (New York: Vintage, 2017), 35.
- ¹⁹ David Armitage, *The Declaration of Independence: A Global History* (Cambridge: Harvard University Press, 2007), 28.
- ²⁰ R.R. Palmer, *Twelve who ruled: The year of terror in the French Revolution* (Princeton: Princeton University Press, 2013), 23-25.
- ²¹ Hannah Arendt, *On Revolution* (London: Penguin Books, 2006), 34.
- ²² Rioting occurred in or near constituencies that elected crucial pro-reform politicians in 1831. Toke S. Aidt and Raphaël Franck, “Democratization under the threat of revolution: Evidence from the Great Reform Act of 1832,” *Econometrica* 83:2 (2015), 505-547.
- ²³ Malcolm Chase, *Chartism: A New History* (Manchester: University of Manchester Press, 2007).
- ²⁴ Maya Jasanoff, *Liberty’s Exiles: American Loyalists in the Revolutionary World* (New York: Knopf, 2011).
- ²⁵ Bruce Ackerman, *We the People 2: Transformations* (Cambridge: Belknap Press, 1998), 49.
- ²⁶ For an argument to this effect in refutation of Hobbes’s argument for a single sovereign, see Jean Hampton, “Democracy and the Rule of Law,” *Nomos* 36 (1994), 13-44. For an argument based on observed practices, see Aziz Huq and Tom Ginsburg, “How to Lose Your Constitutional Democracy,” *UCLA Law Review* 65:1 (2018): 78-169.
- ²⁷ Jon Elster has made a similar argument about constitution making more generally. Jon Elster, “Constitution-making and violence,” *Journal of Legal Analysis*, 4:1 (2012), 7-39.
- ²⁸ Aziz Z. Huq, “Hippocratic Constitutional Design,” in Tom Ginsburg and Aziz Z. Huq, eds., *Assessing Constitutional Performance* (New York: Cambridge University Press, 2016).
- ²⁹ Daron Acemoglu and James A. Robinson, “Why did the West extend the franchise? Democracy, inequality, and growth in historical perspective,” *Quarterly Journal of Economics* 115:4 (2000): 1167-1199.
- ³⁰ Daron Acemoglu and James A. Robinson, “Persistence of Power, Elites, and Institutions,” *American Economic Review* 98:1 (2008): 267-93.
- ³¹ Michael Albertus and Victor Menaldo, “Gaming democracy: elite dominance during transition and the prospects for redistribution,” *British Journal of Political Science* 44 (2014): 575-603.
- ³² Andrew Sharp ed. *The English Levellers* (Cambridge: Cambridge University Press, 1998). 113-14.
- ³³ James Madison, “Federalist No. 10,” in Isaac Kramnick, ed., *The Federalist Papers*, (New York: Penguin Books, 1987).
- ³⁴ Quoted in Keith Thomas, “The Levellers and the franchise,” in *The Interregnum*, (Palgrave: London, 1972), 55-72.
- ³⁵ Aziz Z. Huq, “The Function of Article V,” *University of Pennsylvania Law Review* 162 (2013), 1165-1236.
- ³⁶ Adam Przeworski, *Why bother with elections?* (London: Polity 2018), 30-39.
- ³⁷ In contrast, the model of the mixed constitution first described by Polybius hinges on the existence of a harmonious balance. Polybius, *The Rise of the Roman Empire* (London: Penguin Books, 1979), 317.
- ³⁸ Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997), 4.
- ³⁹ *Ibid.* 202.
- ⁴⁰ This was offered as a normative claim in John Hart Ely, *Democracy and distrust: A theory of judicial review* (Cambridge: Harvard University Press, 1980).
- ⁴¹ Ran Hirschl, *Towards juristocracy: the origins and consequences of the new constitutionalism* (Cambridge: Harvard University Press, 2009).
- ⁴² The idea of judicial review as insurance is developed in Tom Ginsburg, *Judicial review in new democracies: Constitutional courts in Asian cases* (Cambridge: Cambridge University Press, 2003).
- ⁴³ See *Williams v. Mississippi*, 170 U.S. 213 (1898).
- ⁴⁴ Aziz Z. Huq, “Democratic Erosion and the Courts: Comparative Perspectives,” *NYU Law Review Online* 92 (2018), 21-31.
- ⁴⁵ Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge: Harvard University Press, 2018), 23.
- ⁴⁶ Wolfgang Streek, *Buying Time: The Delayed Crisis of Democratic Capitalism* (New York: Verso Books, 2014), 74-75.
- ⁴⁷ Ellen Meiksins Wood, *Democracy against Capitalism: Renewing Historical Materialism* (New York: Verso Books, 2016), 185.
- ⁴⁸ David Waldstreicher, *Slavery’s Constitution: From Revolution to Ratification* (New York, Hill and Wang, 2009), 3.
- ⁴⁹ Shlomo Slonim, “The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President,” *Journal of American History* 73:1 (1986), 35-58.
- ⁵⁰ Charles R. Beitz, “Procedural Equality in Democratic Theory: A Preliminary Examination,” *Nomos* 25 (1983): 69-91.
- ⁵¹ Adam Przeworski, “Acquiring the habit of changing governments through elections,” *Comparative Political Studies* 48:1 (2015), 101-129.
- ⁵² Jean-Jacques Rousseau, “On the Social Contract,” in John T. Scott, ed., *The Major Political Writings of Jean-Jacques Rousseau* (Chicago: University of Chicago Press, 2012), 172.
- ⁵³ This idea is developed in Bernard Williams, *In the Beginning was the Deed* (Princeton: Princeton University Press, 2005), 4-5.
- ⁵⁴ Rousseau, “On the Social Contract,” 176.
- ⁵⁵ Robert Wokler, *Rousseau* (Oxford: Oxford University Press, 1995), 71. For a less positive view, see Richard Falin, *Rousseau and Representation* (New York: Columbia University Press, 1978).
- ⁵⁶ Williams, *In the Beginning was the Deed*, 16-17.
- ⁵⁷ Judith Shklar, *Men and Citizens: A Study in Rousseau’s Social Theory* (Cambridge: Cambridge University Press, 1986), xiii.
- ⁵⁸ Isaiah Berlin, *Freedom and its Betrayal* (Princeton: Princeton University Press, 2014): 48
- ⁵⁹ Rousseau, “On the Social Contract,” 199.
- ⁶⁰ Frederick G. Whelan, “Prologue: Democratic theory and the boundary problem,” *Nomos* 25 (1983), 13, 16.
- ⁶¹ Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006). 35.

- ⁶² Arash Abizadeh, "On the demos and its kin: Nationalism, democracy, and the boundary problem," *American Political Science Review* 106:4 (2012), 867-882.
- ⁶³ Robert E. Goodin, "Enfranchising all affected interests, and its alternatives," *Philosophy & public affairs* 35:1 (2007), 40-68.
- ⁶⁴ Compare Christian List and Mathias Koenig-Archibugi, "Can There Be a Global Demos? An Agency-Based Approach." *Philosophy & Public Affairs* 38:1 (2010), 76-110.
- ⁶⁵ David Miller, "Democracy's domain," *Philosophy & public affairs* 37:3 (2009), 201, 214-18.
- ⁶⁶ *Ibid.* 218-22; David Miller, "Why immigration controls are not coercive: A reply to Arash Abizadeh," *Political theory* 38: 1 (2010), 111-120.
- ⁶⁷ Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper, 1950), 244-45,
- ⁶⁸ Both race and gender have become increasingly fluid, albeit in expected ways. Rogers Brubaker, *Trans: Race and Gender in an Age of Unsettled Identities* (Princeton: Princeton University Press, 2016).
- ⁶⁹ Samuel Scheffler, "Immigration and the Significance of Culture," *Philosophy & public affairs* 35, no. 2 (2007), 93, 105-06.
- ⁷⁰ Rousseau, "On the Social Contract," 182-83.
- ⁷¹ Madison, *Federalist* 10.
- ⁷² This empirical point is developed at length in Gerry Mackie, *Democracy defended* (Cambridge: Cambridge University Press, 2003).
- ⁷³ John W. Patty and Elizabeth Maggie Penn, *Social choice and legitimacy: The possibilities of impossibility* (Cambridge: Cambridge University Press, 2014), 194.
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- ⁷⁵ David Runciman, *The Confidence Trap: A History of Democracy in Crisis from World War I to the Present* (Princeton: Princeton University Press, 2013), 33-35.
- ⁷⁶ Indeed, improving the epistemic competence and rationing of voters can have both good and bad effects on institutional performance in a democracy. Scott Ashworth and Ethan Bueno De Mesquita, "Is voter competence good for voters?: Information, rationality, and democratic performance," *American Political Science Review* 108:3 (2014), 565-587.
- ⁷⁷ Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge: Cambridge University Press, 2008), 33-74.
- ⁷⁸ Ginsburg and Huq, *How to Save a Constitutional Democracy*.
- ⁷⁹ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (London: Verso, 2013), 2-7, 22-44.
- ⁸⁰ David Van Reybrouck, *Against Elections* (New York: Seven Stories Press, 2016): 15-18.
- ⁸¹ Mancur Olson, *The rise and fall of nations: Economic growth, stagflation and social rigidities* (New Haven: Yale University Press, 1982).
- ⁸² Paul Pierson, "When effect becomes cause: Policy feedback and political change," *World politics* 45, no. 4 (1993), 595-628.
- ⁸³ Walter Bagehot, *The English Constitution* (Oxford: Oxford University Press, 2001), 38, 159. The problem is developed in these terms in Margaret Canovan, "Populism for Political Theorists?," *Journal of Political Ideologies* 9:3 (2004). 241-52.
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- ⁸⁵ Plato, *The Republic*, 290.
- ⁸⁶ Berlin, *Freedom and its Betrayal*, 51.
- ⁸⁷ Jan-Werner Müller, *What is Populism?* (Philadelphia: University of Pennsylvania Press, 2016): 19-20.
- ⁸⁸ Aziz Z. Huq, "The People against the Constitution," *Michigan Law Review* 116 (2018), 1123-44.
- ⁸⁹ For an acute analysis of the resurgence of the U.K.'s Conservative Party in these terms, see Stuart Hall, "The great moving right show," *Marxism Today* 23:1 (1979), 14-20.
- ⁹⁰ Ranajit Guha, *Domination without hegemony* (Cambridge: Harvard, 1977).
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- ⁹² An example is the Bright Line Watch Project, which is housed at Dartmouth and Yale Universities, and can be reviewed at <http://brightlinewatch.org/>.
- ⁹³ William A. Galston, *Anti-Pluralism: The Populist Threat to Liberal Democracy* (New Haven: Yale University Press, 2018).
- ⁹⁴ Arendt, *On Revolution*, 50.
- ⁹⁵ Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2015), 104-05.
- ⁹⁶ Arendt, *On Revolution*, 152.
- ⁹⁷ The best recent defense of democracy's epistemic merits is explicitly comparative in character. Hélène Landemore, *Democratic reason: Politics, collective intelligence, and the rule of the many* (Princeton: Princeton University Press, 2012).
- ⁹⁸ For an attempt to provide general prescriptions for both new and established democracies, see Ginsburg and Huq, *How to Save a Constitutional Democracy*.
- ⁹⁹ There are different ways to measure constitutional rigidity. Astrid Lorenz, "How to measure constitutional rigidity: four concepts and two alternatives," *Journal of Theoretical Politics* 17:3 (2005), 339-361.
- ¹⁰⁰ Huq, "The Function of Article V."
- ¹⁰¹ Frederick Schauer, "The Political Risks (If Any) of Breaking the Law," *Journal of Legal Analysis* 4: 1 (2012), 83-101.
- ¹⁰² For an extended analysis of the trade-offs entailed by the design of such institutions, see Aziz Z. Huq, "Legal and Political Checks on Apex Criminality," *UCLA Law Review* 68 (2018).