Democracy's Deficits

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I. Introduction

History confounds certainty. Barely a quarter century after the collapse of the Soviet empire, it is democracy that has entered an intense period of public scrutiny. The election of President Trump and the Brexit vote are dramatic moments in a populist uprising against the postwar political consensus of liberal rule. But they are also signposts in a process long in the making, yet perhaps not fully appreciated until the intense electoral upheavals of recent years. A percentage or two change in the Brexit vote, or a few tens of thousands of votes cast differently in a few key states in the U.S., would certainly have postponed the confrontation but would not have altered the fundamental concerns. With the realignment of the Dutch and French elections, the emergence of a hard right populism in Hungary and Poland, and the mushrooming of anti-governance alliances in Italy and Spain, deeper questions must be asked about the state of democracy. Italy may have had 44 governments in a 50-year span, but power generally rotated among a familiar array of parties, personalities, and policies – until Berlusconi reoriented politics and the emergence of the current nihilist currents.

The current moment is defined by the distrust of two key features of democratic governance: the centrality of institutional order and the commitment to what in game theory would be termed “repeat play,” the idea that there is a tomorrow and that the losers of today may unseat the victors in a new round of electoral challenge. The central idea of contestation, of losers and winners engaged in common enterprise, is ceding to what Jan-Vincent Müller refers to as a “permanent campaign”2 aiming to “prepare the people for nothing less than what is conjured up as a kind of apocalyptic confrontation.”3 In rejection of any pluralist account of democracy, “[t]he https://example.com/research
can be no populism … without someone speaking in the name of the people as a whole.\textsuperscript{4}

At issue across the nuances of the national settings is a deep challenge to the core claim of democracy to be the superior form of political organization of civilized peoples. It is odd, and highly dispiriting, to have to engage this question so soon after democracy seemed ascendant as never before. With the collapse of the Soviet Union and its empire, the twentieth century concluded with democracy having defeated its two great authoritarian rivals, and the popular election of governments spread across a greater swath of the Earth than ever before. Francis Fukuyama’s embellished claim that the end of history was upon us\textsuperscript{5} accurately captured the sense that electoral democracy alone seemed to lay claim to political legitimacy.\textsuperscript{6} Further, the opening to democracy invited economic liberalization, and the resulting market exchanges were allowing huge masses to rise from poverty, even in hold-out autocratic states like China or Vietnam.

Clearly the era of democratic euphoria has ended. The rise of Islamic terrorism and the failure of the Arab Spring were certainly warning shots, but grave as these might be, they did not challenge the core of democratic government. The inevitable trade-off between security and liberty that accompanies external threats to democratic regimes is a serious challenge and can itself compromise core legitimacy. But democracies that withstood what Philip Bobbitt terms the long wars of the twentieth century\textsuperscript{7} were unlikely to come undone in the face of enemies who sought to target civilians, but were in no position to pose a sustained military threat of any kind. Even the problematic military engagements in Afghanistan or Iraq bitterly divided democratic societies but did not threaten an epochal confrontation with democracy itself.

Instead, the current moment of democratic uncertainty draws from four central institutional challenges, each one a compromise of how democracy was consolidated over the past few centuries. The four I wish to address are:

\begin{itemize}
  \item Id. at locs. 305-306.
  \item See Francis Fukuyama, \textit{The End of History?}, NAT’L. INT., Summer 1989 at 3, 4 (“What we may be witnessing is not just the end of the Cold War, . . . but the end of history as such: that is, the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government.”).
  \item PHILIP BOBBITT, \textit{THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY}, at xxi-xxii (First Anchor Books ed., 2003) (“This war . . . began in 1914 and only ended in 1990. The Long War, like previous epochal wars, brought into being a new form of the State—the market-state.”).
\end{itemize}
first, the accelerated decline of political parties and other institutional forms of popular engagement; second, the paralysis of the legislative branches; third, the loss of a sense of social cohesion; and fourth, the decline in state competence. While there are no doubt other candidates for inducing anxiety over the state of democracy, these four have a particular salience in theories of democratic superiority that make their decline or loss a matter of grave concern. Among the great defenses of democracy stand the claims that democracies offer the superior form of participation, of deliberation, of solidarity, and of the capacity to get the job done. We need not arbitrate among the theories of participatory democracy, deliberative democracy, solidaristic democracy, or epistemic democratic superiority. Rather, we should note with concern that each of these theories states a claim for the advantages of democracy, and each faces worrisome disrepair.

II. Participation: Failing Political Parties

Political parties created democracy and modern democracy is unthinkable save in terms of the parties.8

Parties [are] the distinctive, defining voluntary associations of representative democracy.9

One indicator of the age of the American constitution is the absence of any role for political parties, by contrast to Article 21 of the German Constitution, for example. The Framers of the Constitution equated parties with factions, and aimed for a form of democratic politics that would rise above sectional concerns, immediate gratification of wants, and the risk of succumbing to the passions of greed and envy. Until the 20th century, political parties were not granted constitutional recognition – indeed, the first 19th century constitution that addressed the status of political parties was that of Colombia in 1886, and there in order to ban parties. By contrast, the constitutions of the 20th century privilege political parties as the galvanizing force of democratic politics.10

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10 See Tom Ginsburg, Constitutions as Political Institutions, in Routledge Handbook of Comparative Political Institutions 101, 106 (Jennifer Gandhi & Ruben Ruiz-Rufino eds., 2015) (“In our work on the Comparative Constitutions Project, [Zachary] Elkins, [James] Melton, and I identify certain core provisions to written constitutions . . . . In the nineteenth century . . . . few constitutions mentioned political parties, while most written in the twentieth century do so.”).
As experience in electoral self-government grew, democrats throughout the world learned that parties provide a forum for the integration of the different interests that must coalesce for successful policymaking, more so in first-past-the-post elections than in proportional representation systems. Even in parliamentary systems, some aggregation is necessary to draw sufficient attention to the party platform and to make the party a desirable suitor in forming a governing coalition. But mostly parties were the institutional mechanism for translating interests and ideology into governance. Politics is the art of the possible, even if what is possible and necessary at any particular moment fails to inspire. Without parties, responsible and productive governance rested on the happenstance of enlightened leaders, rather than an institutionalized mechanism for taking hard decisions, cutting deals, accepting short-term costs for longer-term gain, and all the mechanisms that define wise stewardship.

In the United States, parties served as the political expression of the spirit of voluntary associations critical to the young Republic. As Alexis de Toqueville noted, “Americans of all ages, all conditions, and all dispositions, constantly form associations. . . . Wherever, at the head of some new undertaking, you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.” By the time Toqueville came to America, political parties were emerging as among the most salient of these associations. They provided the organizational resources for political campaigns, selected candidates, coordinated platforms, and disseminated information about politics. In exchange, parties dispensed patronage and access to power, the glue that held the activist wings of the party in check and that allowed a coordinating discipline to be imposed on the party’s elected representatives. As I have written elsewhere, the organizational fabric of parties came undone in the U.S. in the late 20th century, partially as a result of legal reforms that left significant aspects of party governance outside the control of party leaders, and partially through external factors such as the rise of low-cost social media and the mechanisms of direct access to funding and the party constituency.

Examined globally, the American experience of tottering political parties appears emblematic rather than exceptional. The result in country after country is the dissolution of the discipline of political parties in favor of a politics of free agency formed largely around the persona of individuals or momentary issues, devoid of a sustaining institutional presence. In the American context, Richard Pildes describes this central feature of

12 V.O. Key, Jr., Politics, Parties and Pressure Groups (1st ed. 1942).
contemporary politics as the process of political fragmentation: “the external diffusion of political power away from the political parties as a whole and the internal diffusion of power away from the party leadership to individual party members and officeholders.”

But the breaking-up of central institutions extends far beyond the domain of politics – the economic conglomerates of yesteryear such as ITT and Gulf & Western were long since dismantled in favor of independent specialized units. In the political domain, fragmentation is a fact of life in all democratic countries, meaning that attempts to find the causal roots at the national level will necessarily be incomplete. The process of what is termed “fissuring” in labor economics reflects the broad destabilization of large integrated organizations in the face of technological change, ease of communication, globalization, and other pressures on previous advantages of scale. Whether across supply markets or in the domain of politics, ease of communication and transportation puts pressure on broad horizontal organizations whose prime advantage was access to markets, economic or political.

As parties fragment, a spiral ensues. Targeting specific groups of voters, activists, and donors requires more focused and generally more extreme messages. Broad-tent parties become an impediment to a new form of politics that channels passion rather than rewarding the necessarily limited returns from governance. More broadly, the disengagement from the parties leads to what Emanuel Towfigh terms the “party paradox” in which parties, though necessary to democratic functioning, become a contributing source of disenchanted with the political process: “This paradox of representation may reduce the acceptance of political decisions by the electorate and contribute to the overall disillusion with democracy.”

Weakened political parties do not have the institutional fortitude to withstand hostile challenges from outsiders, as evident in the U.S. where Donald Trump and Bernie Sanders (the former a marginal affiliate of the Republicans; the latter not even a member of the Democratic Party) were able to displace established party figures, and in the case of President Trump, walk away with the party endorsement and ultimately the presidency. In place of programs and governance, candidacies are now centered on individuals and elections are framed as a referendum on the leadership of that individual. Even in Germany, the country that has best

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16 Emanuel V. Towfigh, Sebastian J. Goerg, Andreas Glöckner, Philip Leifeld, Aniol Llorente-Saguer, Sophie Bade, Carlos Kurschilgen, Do direct-democratic procedures lead to higher acceptance than political representation?: Experimental survey evidence from Germany, 167 PUBLIC CHOICE 47 (2016).
resisted the assault on democratic institutions, there is a noted increase in the personalization of the campaigns of Chancellor Angela Merkel.\textsuperscript{17} Candidate-driven elections are increasingly the norm in Europe as parties that emerged from the capacity to gain parliamentary representation are no longer needed as an electoral platform.\textsuperscript{18} Even the desultory elections for the European Parliament witnessed an effort to attract personalities to the candidate roster in a vain attempt to boost voter turnout.\textsuperscript{19} Direct candidate appeal to voters goes hand-in-hand with the documented fragmentation of political parties in, among other places, Bolivia, Bulgaria, Denmark, Ecuador, Finland, France, Guatemala, India, Israel, Italy, Netherlands and Thailand.\textsuperscript{20}

In this sense, the desperate gambit of Prime Minister David Cameron to seek to solidify his political base by appealing to plebiscitary alternatives to parliament emerges from the failure of political discipline in the legislative setting. It well follows the pattern in the Europe Union of seeking to alter its perceived democratic deficit through greater use of referenda and other tools of direct democracy.\textsuperscript{21} Put less delicately, Nigel Farage, the leader of the UK Independence Party (UKIP), touted the Brexit vote as the story of the British people telling the political elite to stick it. “It is, after all, rather extraordinary that over half the voting population defied a large majority of its own elected parliament, all of the traditional political parties, and virtually

\textsuperscript{17} Harald Schoen & Robert Greszki, Third Term for a Popular Chancellor: An Analysis of Voting Behaviour in the 2013 German Federal Election, German Politics. Dec 2014, Vol. 23 Issue 4, p251-267. 17p. (“In the 2013 German federal election, the trend towards increased electoral volatility and fragmentation continued. . . . [I]n the 2009 election the conservative CDU/CSU fought a personalised campaign in which it aimed successfully to capitalise on Merkel’s increased popularity. In the 2013 election, the CDU/CSU campaign was, once again, focused on Chancellor Merkel, who was now the unchallenged leader of her party.”).


\textsuperscript{19} See, e.g., Hermann Schmitt, Sara Hobolt & Sebastian A. Popa, Does Personalization Increase Turnout? Spitzenkandidaten in the 2014 European Parliament Elections, European Union Politics, 2015 Vol. 16(3) 347–368, 2015 (“The 2014 European Parliament elections were the first elections where the major political groups each nominated a lead candidate (Spitzenkandidat) for the Commission presidency in the hope that this would increase the visibility of the elections and mobilize more citizens to turn out . . . . ”).


\textsuperscript{21} Andreas Auer, European Citizens’ Initiatives: Article I-46.4 Draft Convention, 1 EUROPEAN CONSTIT. L. REV. 79 (2005).
every important institution in the country — from the Central Bank, to the leaders of industry, to the trade unions.”

Nor did the Brexit fiasco prevent embattled Italian Prime Minister Matteo Renzi from turning to a constitutional referendum to shore up his government in 2016, with the same disastrous results. Just as critical is the disenchantment with political parties and parliamentary weakness that gave rise to Brexit in the first place: “[T]ensions have grown in most Western nations between the existing processes of representative democracy and calls by reformists for a more participatory style of democratic government.”

If Brexit highlights the perceived weakness of political parties as coordinators of democratic politics, it begs the question of the root cause of that weakness. In substantial part, the weakness follows from the simple fact that the parties cannot claim to speak for much of a constituency. In other words, they have significantly lost their participatory quality. To give but one example, in the 1950s, 20 percent of Britons were members of political parties; today that figure is about one percent.

In the U.S., according to the yearly Pew Foundation studies of American political behavior, party identification is at an observed all-time low. Currently, 39 percent of Americans identify as independents, 32 percent as Democrats and 23 percent as Republicans; “This is the highest percentage of independents in more than 75 years of public opinion polling.”

Party failures are intrinsically connected to the demise of the institutional supports of those parties. Throughout the 20th century, parties relied heavily on other forms of organization to provide their active constituency. For the Democratic Party in the U.S., or for the Labour Party in Britain, or for the Social Democratic parties of western Europe, that organizational backing came heavily from the labor unions. For the Republicans in the U.S. or the Tories in Britain, or the Christian Democrats and conservative parties in Europe, the organizational ties were to the

22 Jeremy Shapiro, Brexit was a rejection of Britain’s governing elite. Too bad the elites were right. Vox. http://www.vox.com/2016/6/25/12023532/brexit-rejection-britains-governing-elite.

23 See Jason Horowitz, Italy’s Premier, Matteo Renzi, Says He’ll Resign After Reform is Rejected, N.Y. TIMES (Dec. 4, 2016), https://nyti.ms/2k5yVgh (“Prime Minister Matteo Renzi said he would resign after voters decisively rejected constitutional changes.”).


chambers of commerce or other locally-based representatives of small businesses and agricultural interests.\(^\text{27}\)

Taking the U.S. as an example, the decline of underlying institutions is as precipitous as the decline of parties. Union density today is at an all-time low since the New Deal created federally-mandated rights of collective bargaining. Union decline captures only a part of the picture. Significant as well is the shift in composition of the unionized workforce reflected in the domination of unionization in the public sector. While about 11 percent of the American workforce is unionized, the figure for the private sector has fallen below seven percent, while public sector unionization remains about 35 percent.\(^\text{28}\) Not only have unions declined outright but, perhaps more significantly, they cease to be an independent source of support for political parties outside the state realm. To the extent that unions centrally become the expression of public employees they no longer organize a constituency independent of the political realm. Instead labor unions are largely an expression of the political party to which they are affiliated, and become another political actor whose fortunes are tied to that party’s electoral capabilities.\(^\text{29}\) Not surprisingly, efforts to consolidate Republican political power at the state level, as exemplified by Governor Scott Walker in Wisconsin, seek to undermine the power of public sector unions as a proxy for the Democratic Party. These are not battles reflective of participatory engagement by diverse sectors of the society, but power struggles within the state itself.

On the other side of the ledger, we find a corresponding erosion of broad-scale institutional engagement. In the U.S. the best example comes from the evolution of the Chamber of Commerce from the organizational representative of local enterprise to the exponent of the interests of concentrated capital: “Mention the Chamber of Commerce, and most people think of a benign organization comprised mostly of small business owners who meet for networking and mutual support in local chapters across the U.S. But today's Chamber is anything but that….\(^\text{30}\) The Chamber’s interests

\(^{27}\) See Daniel Ziblatt, Conservative Parties and the Birth of Democracy (Cambridge, 2017) (chronicling organization rise of British and German conservative parties).


\(^{29}\) The concern over the legal implications of the distinct role of public sector unionism in the U.S. go back at least to Harry H. Wellington and Ralph K. Winter, Jr., The Limits of Collective Bargaining in Public Employment, 78 Yale L.J. 1107, 1116, 1124-25 (1969).

are now highly focused around a small number of industries and interests, including “tobacco, banking, and fossil fuels.” According to one article, 64 donors were responsible for 50 percent of all donations, while 94 percent of all donations came from a pool of just 1,500 top donors.

Across the political spectrum, parties become tied not to broad-based constituency organizations, but to much narrower sectional interests, already well-entrenched in the corridors of power. The claim of parties as a special arena of participatory engagement in the democratic project wanes accordingly. The parties emerge hollowed out, just as do their organizational bases of support.

III. Deliberation: The Weakness of Legislative Branches

[Deliberative] collective decision-making ought to be different from bargaining, contracting and other market-type interactions, both in its explicit attention to considerations of the common advantage and in the ways that that attention helps to form the aims of the participants.

The democratic method is that institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will.

Rarely would Joshua Cohen and Joseph Schumpeter be lumped together in theories of democratic legitimacy. Yet they both look to a discursive element to raise the capacity of democratic governance to reach the common good, and to reach beyond mere sectional claims on spoils. For Cohen and


31 Id. (“Founded in 1912, the U.S. Chamber of Commerce has been shaped by its CEO Tom Donohue into a powerful lobbying and campaigning machine that pursues a fairly narrow special-interest agenda. It's now the largest lobbying organization in the U.S. (ranked by budget). It mostly represents the interests of a handful of so-called "legacy industries" – industries like tobacco, banking and fossil fuels which have been around for generations and learned how to parley their earnings into political influence. The Chamber seeks favorable treatment for them, for example, through trade negotiations, tax treatment, regulations and judicial rulings.”).


the deliberativist tradition, the domain of discourse is in public participation and direct engagement. For Schumpeter and those in his tradition, myself included, elite competition in the electoral arena provides the foundations for citizen engagement and education, and the ensuing retrospective accountability for the exercise of governmental power.

For present purposes, however, we limit our discussion to the institutionalization of deliberation in the legislative arena. Democracies are conceived around legislative power, from the Magna Carta’s parliamentary check on the crown, to the expansive role of Congress as Article I of the Constitution, to the revolutionary emergence of parliamentary power throughout the 19th century. Colloquially, we used to speak of the Senate as the “world’s greatest deliberative body.” It is no overstatement to say that this is the world’s ennobling democratic inheritance. Or, put another way, the hallmark moments of 20th century authoritarian rule are intertwined with plebiscitary triumphs of a Hitler or Mussolini.

The legislative arena, at least in theory, is the clearest institutionalized setting for democratic deliberation. In its classic rendition, it is the arena in which “participants of deliberation, before counting votes, are open to transform their preferences in the light of well-articulated and persuasive arguments.” On this view, the process of deliberation transforms democratic politics because it “requires the participants to display the reasons why the support a particular stand. It comprehends an exercise of mutual justification that allows a thorough type of dialogue before a collective decision is taken.”

Yet, in the modern era, the words “Congress” and “dysfunction” seem to go together like a horse and carriage, with some apology to Frank Sinatra. Consider that the total enacted legislation annually by the U.S. Congress has declined considerably from the 1970s, in which as many as 804 bills were passed, to the most recent, in which only 296 bills were passed. But focusing on the U.S. misses much of the picture. Across a number of markers, the legislative branches of mature democracies have declined as centers of policy debate and formation. In their place, executives have adopted more muscular policymaking roles, checked primarily by courts.

This is a large topic to which I have devoted an entire monograph. But for the current presentation, consider just one partial indicator of the

35 Conrado Hübner Mendes, Constitutional Courts and Deliberative Democracy 14 (Oxford 2013).
36 Id. at 15.
37 Statistics and Historical Comparison, GovTrack, https://www.govtrack.us/congress/bills/statistics (last visited Mar. 31, 2017) (showing that the 95th Congress passed 804 bills while the 113th Congress passed 296).
trend over time in the U.S.. Since Franklin Roosevelt’s fabled first 100 days in office ushered in the transformative New Deal, presidents have routinely devoted themselves to hitting the ground running, using the initial period of pride among the partisans and disorganization among the vanquished to show muscular leadership. The effort to blaze through the first 100 days has not changed, but the form has. The number of legislative initiatives of the first 100 days has dropped steadily, from 76 new statutes under Roosevelt, to 7 and 11 under George W. Bush and Barack Obama, respectively. Even though, of course, presidents do not pass legislation, and even though they might often confront a congress or a chamber with an opposition majority, the drop off does not mean presidential inaction. While legislation has dropped, executive decrees have increased throughout the modern period. Consistent with this trend, President Trump had no significant legislative activity at all during his first 100 days of the Trump administration and the number of substantial legislative initiatives amounted to zero.

The result is rising executive unilateralism, the increased dependence on administrative law to set policy, and the central checking role of the courts as restraints on presidentialism – even in formally parliamentary systems. Doctrinally, the absence of congressional action not only removes the central democratic branch from the reins of government, but also makes more difficult judicial constraint. Following Justice Jackson’s famous Steel Seizure typology, the power of the executive is at lowest ebb when the President seeks to countermand the actions of Congress. The unstated flip side of Jackson’s observation is that the pathway for judicial repudiation of executive action is correspondingly easier when Congress has blazed the trail. When Congress fails to act, the mechanisms of democratic constraint are compromised.

For Justice Jackson, congressional inaction posed the most difficult issues for democratic governance and, by extension, for the judiciary. As Justice Jackson framed the problem,

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40 The major congressional actions took the form of an expedited procedure to withdraw regulatory decrees within a fast-track window. There were no new legislative initiatives of any substance.


42 Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.\textsuperscript{43}

In the absence of legislative initiative, executive power naturally rushes to fill the void, whether through governance by direct decree or by indirect administrative command. Without the legislative branchoffsetting the powers of the executive, the job of defining the boundaries of prerogative power and regulatory authority falls to the judiciary. As Justice Jackson cautions, the lines of judicial engagement are least clear – the “zone of twilight”—when there is institutional failure in the legislature, and the “least dangerous branch” finds itself at risk of open conflict with the executive.\textsuperscript{44}

There is nothing distinctly American about hypertrophic executive power in the modern era. Even before the UK Supreme Court had to engage the authority of the Prime Minister to implement Brexit, a topic to which I shall return in concluding, the British government confronted the military consequences of executive unilateralism in the disastrous Iraqi campaign. One proposal, from the House of Lords Select Committee on the Constitution, would have implemented limitations similar to those of the American War Powers Act, obligating parliamentary approval for any long-term military engagement.\textsuperscript{45} As Prime Minister Brown observed at the time, “Now that there has been a vote on these issues so clearly and in such

\textsuperscript{43} Id.

\textsuperscript{44} How this conflict plays out is the subject of Rosalind Dixon & Samuel Issacharoff, \textit{Living to Fight Another Day: Judicial Deferral in Defense of Democracy}, 2016 Wisc. L. Rev. 694.

\textsuperscript{45} Select Committee on the Constitution, \textit{Waging War: Parliament’s Role and Responsibility}, 2005-6, HL 236-I, ¶ 3 (UK) (“The purpose of our inquiry has been to consider what alternatives there are to the use of Royal prerogative power in the deployment of the armed force . . . and in particular whether Parliamentary approval should be required for any deployment of British forces outside the United Kingdom . . . .”). In the following years, the interplay between the Prime Minister and Parliament developed informally, until the point in 2014 “the prime minister acknowledged that a convention of Commons approval now existed.”), Philippe Lagassé, \textit{Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control}, 70 Parliamentary Aff. 280, 289 (2017).
controversial circumstances, I think it is unlikely that except in the most exceptional circumstances a government would choose not to have a vote in Parliament [before deploying troops].

The lack of accountability and the absence of parliamentary engagement was confirmed by the 2016 Chilcot Report, whose many condemnations of Prime Minister Blair included unilateral decisionmaking by the executive.

It is not possible in this one exposition to engage the extensive discussions at the level of national democracies on parliamentary failure to check the executive. A review of the literature shows a persistent theme among both academic commentators and pundits to be the collapse of responsible government at the parliamentary level. The causes for that collapse in the academic literature include concerns about thresholds of representation, party fragmentation, increasing presidentialism and semi-presidentialism, and the displacement of parliamentary authority by international accords or, in the case of Europe, the overreach of Brussels. Pundits are more inclined to point to the venality or corruption of

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47 REPORT OF A COMMITTEE OF PRIVY COUNSELLORS, THE REPORT OF THE IRAQ INQUIRY, 2016, HC 264, at 625 (UK) (critiquing Blair’s actions, the report noted that “there should have been a collective discussion by a Cabinet Committee or small group of Ministers on the basis of inter-departmental advice agreed at a senior level between officials at a number of decision points which had a major impact on the development of UK policy before the invasion of Iraq.”).

48 See, e.g., MICHAEL FOLEY, THE BRITISH PRESIDENCY 108 (2000) (noting “that Blair and his followers operated on the assumption that parliament was no longer a central force of political significance . . . .”); Zachary Karabell, How the GOP Made Obama One of America’s Most Powerful Presidents, POLITICO (Apr. 14, 2016), http://www.politico.com/magazine/story/2016/04/barack-obama-gop-most-powerful-213814 (positing that Republicans in Congress as “the so-called Party of No only provoked the Obama administration into finding innovative ways to exercise [greater unilateral] power . . . . Rather than containing the White House, congressional Republicans liberated it.”).

49 See, e.g., Anu Bradford, The Brussels Effect, 107 NW. U. L. REV. 1 (describing how regulations passed in Brussels can result in globalization of standards); Cynthia R. Farina, Congressional Polarization: Terminal Constitutional Dysfunction?, 115 COLUM. L. REV. 1689 (2015) (synthesizing political science literature about congressional polarization); Mattias Kumm, The Legitimacy of International Law: A Constitutional Framework of Analysis, 15 EUR. J. INT’L L. 907 (2004) (discussing conflicts between international law and national domestic self-government); Juan J. Linz, The Perils of Presidentialism, J. DEMOCRACY, Winter 1990, at 51 (arguing that presidentialism is less conducive to democracy than parliamentarism); Pildes, supra note 11 at 809 (positing that political fragmentation is the cause of recent government dysfunction, such as “the inability of party leaders to bring along recalcitrant minority factions of their parties”); Melanie Amann et al., Is Germany’s Parliamentary Hurdle Obsolete?, DER SPIEGEL (Oct. 4, 2013), http://www.spiegel.de/international/germany/experts-5-percent-parliamentary-hurdle-in-germany-should-be-lowered-a-925817.html (surveying political scientists’ critiques of the Bundestag’s five percent hurdle to seat parties).
parliamentary officials, though in some countries, such as Brazil, the two come together.\textsuperscript{50}

Parliamentary democracies are centered on the parties. Candidates run as part of a slate and the demand for a larger share of seats in parliament is what offers the prospect of national stewardship. The collapse of the parliaments compounds the effect of the collapse of parties and the two are both the cause and effect of each other. Invariably, the locus of political activity shifts to the executive and the defining feature of democratic politics turns to the triumphalist claims of the victorious head of state. Consider this account of contemporary politics:

What we are seeing in the presidential campaigns ... is that the more chance the candidates have of winning — or the more chance they think they have of winning — the more they are prepared to play the game that I call “national presidentialism”. They go in for speeches that amount to saying: “If I’m elected, then everything ... is going to be different because I’m the only one able to lead this country”.... All that matters is how the candidate is going to be able to restore [the nation’s] image once he or she has been given supreme power.

This account of contemporary politics would ring true in many democracies around the world, the U.S. clearly included. In my native Argentina, such “caudillo politics” have generally been the mark of the demise of democracy rather than its fulfillment. That this particular statement happens to be about

France and that the speaker is Daniel Cohn-Bendit, the leader of the 1968 student uprising, only makes it a bit more piquant. 51

IV. Solidarity: The Threats to Social Cohesion

A central theme of my work on Fragile Democracies 52 concerns the inherent difficulty in democratic governance in the absence of a democratic polity. Strikingly, and perhaps paradoxically, elections are seen in post-World War II state formation as the means toward the creation of a democratic state rather than a system of choice among those already committed to a common enterprise of collective governance. In countries emerging from colonial rule or despotic regimes, elections were the confirmation of a democratic transformation, even as they often served as the marker of who would hold state authority in a world of unfinished “us-versus-them” business. Our era of diversity may applaud the benefits of such broad democratic aspirations, but citizens of Burundi or Bosnia-Herzegovina or Iraq would well understand the frailties of democracy without a solidaristic commitment to a collective future.

The role of communitarian solidarity suffers from the traumas of the 20th century, from Nazism to the ethnic slaughter in the Balkans. One reads back with horror at Carl Schmitt proclaiming that, “Democracy requires … first homogeneity and second … elimination or eradication of heterogeneity.” The unmistakable message is that “[a] democracy demonstrates its political power by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity.” 53

Yet, a look back at our democratic inheritance shows how central earlier generations thought the sense of shared identity, and that the ties between social cohesion and self-government is not an invention of 20th century reaction. In the background of the founding documents of constitutionalism in the United States is the claim, no doubt jarring from a slave society, that the American blessings of liberty could be traced to the conception of homogeneity of the population, a claim that hauntingly echoes in Schmitt. In the words of John Jay, in Federalist 2:

[...] Providence has been pleased to give this one connected country to one united people – a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of

52 See note 38, supra.
government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.\textsuperscript{54}

Jay may today be the least celebrated of the Federalist authors, but the sentiment was widely shared, with John Stuart Mill later extending the argument to make this not simply an observation about America but a prerequisite for democracy:

Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government can not exist.\textsuperscript{55}

Liberal theorists into the 20\textsuperscript{th} century, including notably John Rawls, continued the tradition of making claims for just treatment of citizens turn, at least in part, on a shared sense of “political traditions, institutions of law, property, and class structure, with their sustaining religious and moral beliefs and underlying culture. It is these things that shape a society’s political will ….”\textsuperscript{56} The arguments do not sound in the need for consanguinity so much as the continued importance of a sense of collective identity in order to sustain citizen self-government. Democratic politics have long provided a critical forum in which solidarity could blossom. Across democratic societies, political parties provided the organizational framework for sports leagues, adult education projects, and newspapers – all of which served as intermediaries between citizens and the broader society. These agencies of civil society are weakened, and leave citizens increasingly disengaged from political life, as reflected in declining voter participation rates across the democratic world. The problem of lack of collective identity is more acute at the higher levels of efforts at European governance being compromised by trying to craft a “democracy without a demos.”

Among the contemporary challenges in advanced democratic societies are significant erosions in the sense of collective solidarity that provided the historic glue for the common project of democratic governance. For immediate purposes, I focus on two: the challenge of immigration and the

\textsuperscript{54} \textsc{The Federalist} No. 2 (John Jay), available at http://avalon.law.yale.edu/18th_century/fed02.asp.
\textsuperscript{55} \textsc{John Stuart Mill}, \textit{Considerations on Representative Government} 344-45 (The Floating Press ed. 2009) (1861).
\textsuperscript{56} \textsc{John Rawls}, \textit{The Law of Peoples} 106 (1921).
Democracy’s Deficits

The challenge of declining living standards of the broad mass of the population – the toilers and voters of democratic states. There are many manifestations of contemporary social dissolution. But the combination of economic insecurity and the presence of perceived outsiders seems invariably to lead to fear of the other as taking over and blame on the other for the corresponding loss in social standing and wealth. The point here is not the normative claim that this sense is or is not justified, or even the positive claim of a causal relation between immigration and economic malaise. Rather, the issue is the democratic challenge posed by widespread sentiments among the plebeian classes of being under siege. There is not a populist movement in a western democracy at present that does not play to both xenophobia and economic insecurity. The immediate question is why these strains have such force at present, and why they seem to operate in tandem.

While the answers are no doubt complex, they must begin with an assessment of the empirical realities of modern democratic societies, still reeling from the financial meltdown of 2008. The brute fact is that there is a loss of cohesion that accompanies high periods of immigration until the new immigrants are integrated into the national consensus. What Americans celebrate as the melting pot is undoubtedly a process of change and recreation of the national identity, but provides for mechanisms of integration of waves of immigrant populations. Even in the best of circumstances, the process of integration and the corresponding accommodation of prior governing values will take time. What hopefully ends up a richer cultural environment (oftentimes with side improvements from food to music) invariably begins as a project of social and linguistic strain.

Taking the U.S. as a the key example, there is no escaping the fact that immigration has risen dramatically in the U.S. in the past quarter century and that the level of foreign-born Americans is at the highest level in a century – precisely the time of the last great burst of nativist populism in the U.S.
What is striking here, apart from any concerns about the distribution of immigrant labor skill levels, or even the number of legal vs. illegal immigrants, is just the sheer number. The last immigration-fueled nativist turn transformed American politics for a generation, including closed-border constraints on immigration, isolationist politics, and even Prohibition directed at the drinking habits of recent immigrants.

The challenge of immigration emerges politically in tandem with the sense of loss in the economic sphere. In what is referred to as the “elephant curve” produced by the World Bank, there is a graphic depiction of a global redirection of wealth over the 20 year period leading into the financial meltdown, perhaps as significant as any ever recorded. The graph shows a stunning rise in the real incomes of the great majority of the world’s population, with huge numbers being lifted from poverty – primarily, though not exclusively, the result of the Chinese economic transformation.

Global income growth from 1988 to 2008

Source: Milanovic, B., Lead Economist, World Bank Research Department, Global income inequality by the numbers
With the exception of the very poorest of the poor, the past 30 years have witnessed a transformation of lives around the world from extreme poverty to levels of income, health, material possessions and life prospects that begin to challenge those of the advanced industrial democracies. The graph further reflects the rise of finance and the dominance of the top one percent, a subject of democratic challenge for some form of equitable redistribution. But the most important part of this chart is the downward curve where real levels of income did not increase and in fact decreased over the same 20-year period. This is the two deciles of the world’s population found at roughly the 65th to 85th percentiles of world income distribution. That group is roughly the working classes and lower middle classes of the advanced industrial countries that form the longest standing core of democratic societies.

As a normative matter, redistribution from wealthier nations to poorer ones in a period of rising wealth must be applauded. The economic dislocations in the advanced industrial countries translates on the ground into hundreds and hundreds of millions of people being lifted from truly destitute conditions. But the global processes that have done much to alleviate human suffering do not dampen the consequences of the inability of the advanced societies to cushion the domestic effects of international migration and global economic integration or to redistribute internally from the winners to the losers from globalization.

The democratic sense of solidarity comes under siege as the laboring backbones of the advanced industrial countries find themselves challenged by a lost sense of recognizing their country amid rapidly changing demographics. It also comes as the rest of the world is exerting downward pressures on their living standards and wealth shifts markedly to other parts of the world. As voters, these threatened groups in advanced societies were the backbone of the major parties of 20th century democracy, the labor and social democratic parties on the left, and the Christian Democratic and center parties on the right.

Both labor and the center-right parties were traditionally cautious to negative on immigration and cross-border trade. While their policies differed, each saw a central part of its political role as protecting the always vulnerable working class and small entrepreneurial class, including the highly subsidized agricultural classes in countries like France, from economic dislocation. Both immigrants and the entry of cheaper goods from abroad threatened the less dynamic sectors of the advanced world economies. This is especially true for the working classes. Private sector labor unions saw immigration as a source of downward pressure on wages, and resisted it as such. By contrast, public sector unions primarily attend to the level of government expenditures on employment and tend to be neither protectionist on trade nor cautious on immigration. When we look to the upper Midwest voting for Donald Trump or the decayed industrial north of England voting for Brexit or the frayed Northern industrial towns of France voting for the
National Front, the message of governmental failure to provide for basic social security rings loudly. And, when coupled with the sense of the traditional institutions being disengaged from working class concerns, the field is left open to populist anger, whether from the right or left.

Indeed, the message resonates in those communities feeling left behind. One simple measure in the United States is to break down the vote by county, the basic unit of local governance. Donald Trump won roughly five times as many counties as Hillary Clinton, but the counties that Clinton won included almost all the largest and most dynamic urban areas of the country – indeed, although a numerical minority, the counties won by Clinton generated 64 percent of the national gross domestic product.58 In Britain, the same pattern obtained in the Brexit vote. Leaving aside Scotland and the eastern precincts of Northern Ireland (where voters were probably more inclined to leave the United Kingdom than the European Union), the Brexit vote matched the economic prospects of the local populations. Brexit lost in London and the relatively prosperous South, and carried most of the rest of the country, save for a few areas of economic resurrection in Manchester and Liverpool.59 Put another way, Brexit was the dominant choice of those over 40, the generations that had felt declining wage prospects, but not the generation under 40.60 Comparable distributions could be found in the French presidential elections as well.

The groups threatened by declining economic prospects, a sense of isolation in their own countries, and the combined effects of foreign threat delivered Brexit and President Trump’s victories in the upper Midwest. Now feeling vulnerable, these voters are increasingly deserting their former political affiliations in favor of angry populist reactions, frequently led by demagogic appeals to isolation and the sense of lost horizons. From Brexit to Five Star to President Trump to the Front National to Podemos, the trends are dramatic. The historic array of postwar political parties offered neither economic security nor the sense of political protection from outsiders, and were displaced by those much closer to the sense of populist dismay.

In particular, the financial crisis of 2008 appears to have been the defining blow that exposed the frailty of democracies. The sudden economic

dislocation stressed the already weak political institutions of governance and the ability of traditional political parties to offer prospects of remediation. For the laboring classes of the advanced democracies, for whom the decades leading to 2008 had offered a steady decline in real wages, confidence in any remnant of the political status quo to cushion the further post-crisis economic decline was exceedingly low. Without functioning politics, democracies are ill-prepared to offer security, redistribution, or optimism about life prospects for their citizens. That huge numbers of the populations of the democratic countries no longer confided in the solidaristic commitment of the society or its capacity to protect them fueled the current populist backlash.

V. Getting it Done

*Democratically produced laws are legitimate and authoritative because they are produced by a procedure with a tendency to make correct decisions.*

Over the past two centuries, democracies have outfought, out-innovated, and out-produced their rivals. With singular capacity, democracies raised the living standards of the broad masses of their population, raised education levels to permit citizen engagement, and at the same time were able to trust powerful militaries to protect them from foreign assault without succumbing to military rule. History is obviously much more complicated and this is a somewhat tendentious reading, but it captures the ideological consensus that prevailed after the collapse of the Soviet empire and the brief era of presumed democratic universalism.

As the elephant curve chart on income distribution shows, however, the optimistic story is under serious challenge. The China/Singapore models of authoritarian rule coupled with high state competence challenge an emerging feature of democracies: the presence of multiple veto points blocking the creation of public goods and equitable policies. Mature democracies include mechanisms of transparency, “due process,” and participation that provide an entry point for private interests to block undesired governmental action. Under such circumstances, it is easier to block than to build and the result is to raise the costs of public endeavors dramatically. Fukuyama terms this the rise of “vetocracy,” defined as “a situation in which special interests can veto measures harmful to themselves, while collective action for the common good becomes exceedingly difficult to achieve. Vetocracy isn’t fatal to American democracy, but it does produce poor governance.”


confirmation can be found in the wobbly efforts of the Republicans in the U.S. Congress to pass from a party of opposition to a party of governance on their signature demand for the repeal of the Affordable Care Act. After seven years of campaigning on a promise to repeal Obamacare, a clear Republican majority in the House of Representatives had trouble even proposing legislation to be submitted to a congressional vote.

The central claim to superior competence of democracies is not the process of governance but the outputs that result; deliberation is necessarily slower and more complicated than decree. At some point, however, deliberation is not a process of citizen inputs but a public choice nightmare in which vested sectional interests can marshal resources to overwhelm the passive majority. The result is a failure of public policy leadership and a collapse into rewards for privileged access to the strongest forces in government, almost invariably the executive. As I have described the process elsewhere, "the ‘three C’s’ of consolidated power take hold: clientelism, cronyism, and corruption."\(^{63}\) The result is "weak democracies with autocratically minded leaders, who govern through informal, patronage networks .... [C]lientelism binds many citizens to ruling elites through cooptation and coercion."\(^{64}\) Such failing democracies have no necessary organizational superiority to more decisive regimes, and indeed, the presence of numerous veto points to action may actually make democracies less capable.

Consider an example from new airport construction, a massively complex undertaking that has not even been attempted in the U.S. since the opening of the Denver airport in 1995. An international traveler to Beijing cannot help but be awed by the majestic beauty of the Terminal 3 international arrivals. Built for the opening of the Beijing Olympics, and designed by English architect Norman Foster, its dramatic arches evoke both the red lacquer motifs of Imperial China and the bird’s nest design of the Olympic stadium. The new terminal was constructed, from design to completion, in four years, a massive effort that included three work crews a day, laboring on rotating eight-hour shifts.

By contrast, consider Terminal 3 with Heathrow’s Terminal 5 in London. Like Terminal 3 in Beijing, Heathrow’s Terminal 5 is designed by Norman Foster. Yet it is at best functional, a desperately needed additional space for an overcrowded airport. It has no grandeur, no inspiration, no sense of tribute to a rising power – and it took 20 years to complete.

\(^{63}\) FRAGILE DEMOCRACIES, at 158.

When pressed about this in a BBC interview, Foster acknowledged the gains in completion time in China from more efficient labor use, from lower regulatory demands, from ease of siting and a host of other factors. But even on Foster’s account, there were years of delay that could not be accounted for. Instead what emerges is the capacity of Chinese authorities to simply get the job done: “[Y]ou’ve taken out the democratic process, you’ve taken out the plan, so that comes down to decision making, it comes down to having a very, very clear idea of objectives and getting on with it.”

Of course, my home airport in New York is LaGuardia, which makes Terminal 5 look like paradise. Among New York’s signature contributions to democratic dysfunction is the much ballyhooed opening of the Second Avenue subway extension in 2017, a mere 88 years after it was initially proposed. Even more striking than the delay were the extravagant costs, themselves a self-imposed problem of poor governance. Digging a subway in a dense urban environment necessitates disrupting delivery of gas, water, telecommunications, etc. Doing so efficiently in turn requires coordination so that service disruptions and alternative sources can be adjusted. The builder of the subway found coordination among the various utilities and regulatory agencies that covered each service so daunting that they decided the only solution was to dig deep into the bedrock of Manhattan so as to avoid having any contact with any other utilities or administrators. The result is that more than 80 years after first proposed, the Second Avenue subway finally opened in 2017, encompassing a total of four subway stops, running a grand total of three kilometers, and pricing in at a whopping figure of over $1 billion per kilometer.

The capacity to cushion the dislocations of the modern global economy and the press of immigration is another measure of state competence. Germany’s capacity to integrate the former East Germany confirms the difficulty of the enterprise, even among people who already shared a language and a clear national identity. It is here that all the themes of democratic stress come together. The inability of institutional political actors to debate policy, to appeal to collective interest, and to assure through competent leadership all drain the vitality of the democratic project. Populist anger is stoked by state incompetence and increased clientelism for those

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with privileged access to the executive. Weakened forms of participation and deliberation, in turn, compound the sense of democratic failure.

VI. Conclusion

The picture of democracy presented here is certainly somber, but it need not be funereal. The identified deficits in democratic governance are serious, no doubt. But the advanced industrial democracies are sophisticated societies with great internal resources. Three are worth noting here because they are significant sources of resilience. Undoubtedly there are many more, but these three flow immediately from the discussion above, and the last points back to the role of law, a topic thus far not addressed.

First, waves of populist anger tend to be conjunctural. The immediate spark for the latest political tide appears to be the consequences of the financial crisis of 2008. Economic recovery is the likeliest source of any easing of enraged politics. But populist reaction translates poorly into governance, as the U.S. Republican Party has shown in its hesitating transition from opposition to ruling. The current populist wave began at least a decade earlier in Latin America than in Europe or the U.S., and it is now sputtering out amid corruption scandals and the inability to achieve deliverance.

Second, democratic states abound in civil society institutions that resist the anti-liberalism of caudillo politics. One of the main failings of the founding constitutional vision in the U.S. was the lack of any space for intermediating institutions that stood between the state and the citizenry. Toqueville’s observations about the notable abundance of association in the young Republic may be generalized to all democratic countries, even in the more state-oriented political orders of Europe. Even a strict Montesquieu-inspired division of government powers proved not to anticipate the manner in which democratic societies function. From the press to community associations to political parties to churches there is far more resilience than just a formal account of the separation of powers between the legislature and the executive.

Third, democratic societies develop thick legal institutions bounded by the rule of law. Moments of populist passion confront constitutional constraints and the restraining force of constitutional courts, as I addressed at length in *Fragile Democracies*. The Brexit vote provides a useful illustration. Although advocacy for popular initiatives in Britain has a long history, going back at least to A.V. Dicey more than a century ago, the process is relatively unutilized and the relation between the subjects of referendum and ensuing governmental action remains unclear. As the House

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68 A.V. DICEY, OUGHT THE REFERENDUM TO BE INTRODUCED INTO ENGLAND? (1890).
of Lords Select Committee concluded, “we regret the ad hoc manner in which referendums have been used, often as a tactical device, by the government of the day.”

In the aftermath of Brexit, Prime Minister Cameron departed the scene and a chastened Tory government formed under Prime Minister Theresa May, itself further weakened by a disastrous gamble on rapid-fire elections. The government allowed the Brexit vote to stand as the will of the people and took the first steps toward unwinding Britain’s participation in the European Union. This provoked a legal challenge leading to a remarkable discussion in the UK Supreme Court on the nature of British democratic governance. In an approach that hearkens back to Justice Jackson’s careful dissection of the delicate balance of powers between the executive and the legislature, the Court framed the inquiry:

[The] Act envisages domestic law, and therefore rights of UK citizens, changing as EU law varies, but it does not envisage those rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties.

That a weak government had appealed directly over the head of Parliament to enraged voters did not alter the institutional commitments to the democratic supremacy of Parliament. Nor could the Prime Minister invoke plebiscitary approval as a substitute for proper institutional process:

The question is whether that domestic starting point, introduced by Parliament, can be set aside, or could have been intended to be set aside, by a decision of the UK executive without express Parliamentary authorisation. We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue.

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69 HOUSE OF LORDS, SELECT COMMITTEE ON THE CONSTITUTION, 12TH REPORTS OF SESSION 2009-10, REFERENDUMS IN THE UNITED KINGDOM: REPORT WITH EVIDENCE, at p. 20.
71 Id.
Rule of law principles may serve to brake the more worrisome manifestations of populist anger. In some countries, as in Hungary and increasingly Poland, the institutions may be overwhelmed by the concerted forces of politics. But they can provide a necessary challenge and an avenue of repair. In the words of the U.S. court confronting the Trump Administration’s proposed travel bans, and the Administration’s claims to unaccountable executive discretion:

There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy…. [T]he Government's ‘authority and expertise in [such] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals,’ even in times of war . . . [O]ur cases make clear, courts can and do review constitutional challenges to the substance and implementation of immigration policy.\(^{72}\)