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Democracy in Crisis

On a frigid January evening in 2008, Barack Obama, then merely a junior senator from Illinois, shocked the political establishment by winning the Iowa Caucus. At the boisterous celebration rally, Obama delivered what would become one of the signature speeches of his political career, defining many of the central themes of his campaign and his presidency. “[T]he time has come,” Obama declared, “to tell the lobbyists who think their money and their influence speak louder than our voices that they don’t own this government – we do. And we are here to take it back!”¹ If there was a central message in Obama’s 2008 campaign for the White House, it was this faith in a revival of American democracy – the belief “that in the face of impossible odds, people who love this country can change it.”²

Obama would go on to win the presidency, but within the next eight years, the aspirational hope of the early Obama era faded away, supplanted by something much darker. While the Obama administration achieved several significant policy changes, his term was also marked by the fallout from the Great Recession as well as increasingly vociferous opposition from conservatives in Congress. At its close, Donald Trump, a real estate mogul, shocked the country by winning the next presidential election, after rising to political prominence as the leader of the “birther” movement that questioned the very legitimacy of the nation’s first African American President.

In some ways, the Trump candidacy channeled a sharper frustration with the corrupt and rigged political and economic system than even that evoked by Obama in 2008. But Trump garnered his “populist” grassroots base by fusing this antiestablishment ire with virulent appeals to racism, misogyny, and

¹ “Barack Obama’s Caucus Speech,” *New York Times*, January 3, 2008, www.nytimes.com/2008/01/03/us/politics/03obama-transcript.html.

² *Ibid.*

xenophobia. As president, Trump has provoked widespread concerns about the threat he and his politics pose to democratic institutions.³ His public rhetoric has helped foster and encourage the resurgence of openly white supremacist and anti-feminist movements in American politics. The lack of transparency around his and his family's business interests – as well as proliferating conflicts of interest and opportunities for self-dealing connected to them – raise concerns about kleptocracy and corruption. His attacks on the free press, independent judges, independent law enforcement, and his calls for criminalization of his political opponents all raise the specter of democratic decline in the United States.

Yet fears about rising exclusionary populism, lack of accountability, and erosion of existing democratic checks and balances all speak to deeper, more chronic problems of American democracy. Although Trump poses some unique threats to American democracy, in many ways Trump is as much symptom as he a cause of the weakness of American democratic structures. In a polity where trust in and responsiveness of political institutions is already low, where racial and gender disparities lurk just beneath the surface, and where many constituencies struggle to make themselves heard even in settings of “politics as usual,” conventional political structures – even those of the pre-Trump era – already fall short of democratic aspirations and ideals. The Trump era has exacerbated chronic failures into a more virulent and urgent form of democratic crisis. Thus, the democratic threats posed by the rise of far-right populism raise a subsidiary danger: that efforts to reform American democracy will focus too narrowly on restoring an imagined pre-Trump era of civility and the accompanying “norms” of ordinary political behavior in a status quo ante.⁴ Even if such reform were possible, it would be unwise. Trumpism is reflective of the deeper and more chronic crisis of American democracy.

It is this deeper level of crisis that is the focus of this book. The threats to the ideal of democracy are widespread and arise from day-to-day failures of democratic governance: in how constituencies struggle to organize and exercise a share of political power; in the perpetual fracturing of communities along racial, gender, and class lines; and in how institutions of ordinary, daily governance – from cities to regulatory bodies – fail to operate inclusively and responsively. Rebuilding democracy – or rather building it anew so that it will

³ Jack Goldsmith, “Will Donald Trump Destroy the Presidency?” *Atlantic*, October 2017, www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/.

⁴ Jedediah Purdy, “Normcore,” *Dissent*, Summer 2018, www.dissentmagazine.org/article/norm-core-trump-resistance-books-crisis-of-democracy.

include many for the first time – requires addressing these deeper structural challenges. Yet conventional democracy reform discourses themselves pose obstacles to this process. As we argue in this book, often ideas of “good governance” reforms and the allure of “civic technology” platforms capture attention and resources, but such efforts frequently fall short in addressing deeper problems of inequality, exclusion, and disparate political power. What we need is a clear-eyed sense of these chronic crises of democracy – and an approach to democracy reform that is sufficiently transformative and bold to tackle these crises. This book represents an attempt to map out what such an alternative, transformative approach to democracy reform – that places power and inequality at its center – might look like. As we will argue below, building a truly inclusive democracy will require deep investments in building bottom-up, membership-driven civil society organizations, and radically more participatory and democratic policymaking institutions that these organizations can engage and influence.

But before we can explore these forward-looking directions, the rest of this chapter explores in more depth three key background arguments that serve as the foundation for this book: first, that the crisis of democracy is a structural and chronic one, based in deep patterns of inequality and exclusion that cut beyond the current debates over the Trump administration; second, that many conventional approaches to democracy reform fail to address these deep disparities in power and inequality; and third, that a democratic rebuilding agenda that does take these inequities seriously will have to look closely at both the building of grassroots civil society and social movement power on the one hand, and transformations to the day-to-day operation of policymaking institutions and processes on the other.

INEQUALITY, EXCLUSION, AND THE CHRONIC CRISIS OF DEMOCRACY

In the years since Trump’s electoral victory in 2016, there has been an explosion of scholarly concern for the dangers of “democratic backsliding,” much of which is devoted to unpacking the political, institutional, and sociological factors that tend to accompany or provoke the collapse of democratic regimes into authoritarianism.⁵ These accounts tend to share some common areas of focus, highlighting the threats posed by autocratic leaders, who by disposition

⁵ See for example, Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018), 5–6; and Aziz Huq and Tom Ginsburg, “How to Lose a Constitutional Democracy,” *UCLA Law Review* 65 (2018): 78–169.

are hostile to democratic institutions and civil liberties,⁶ warning that such autocrats can gain political power through conventional and legitimate means, particularly by building coalitions with existing parties and gatekeepers causing a gradual subversion of existing checks and balances and a consolidation of power.⁷ Some of these scholars warn that democratic backsliding can also arise in a less direct form, through increasingly polarized and scorched-earth forms of political conflict between rival parties for power.⁸

Given this fear of backsliding, much of this literature has tended to highlight the importance of defending existing institutional checks and balances, as well as restoring informal “norms” that govern political behavior – norms such as the “mutual toleration”⁹ of political opponents and “forbearance,”¹⁰ which require political actors, once in power, to hold themselves back from deploying the full range of their coercive powers to snuff out their rivals. In the American context, a variety of other norms have also been central to maintaining democracy, including norms against conflicts of interest for elected officials, and norms promoting internal deliberation (such as the expectation that the president will consult with legal and other internal experts before advancing policy proposals). It is these norms that prevent the executive branch from overreaching in normal circumstances.¹¹ And it is these norms that have been most blatantly violated by the current administration, contributing to concerns about presidential overreach and arbitrariness.¹²

Yet a narrow focus on norms as the primary site for the threat of autocracy risks glossing over a much-needed investigation into deeper, more chronic

⁶ Levitsky and Ziblatt describe the views and dispositions of authoritarian leaders as revolving around a shared rejection of democratic institutions, of legitimate opposition, and of civil liberties (*How Democracies Die*, 65–68).

⁷ Levitsky and Ziblatt describe how autocrats, once in power, erode opposition through attacks on media and use of patronage relationships (*How Democracies Die*, 78–96); and Huq and Ginsburg, “How to Lose a Constitutional Democracy.”

⁸ Jack M. Balkin, “Constitutional Hardball and Constitutional Crises,” *Quinnipiac Law Review* 26 (2008): 579–98; see also Levitsky and Ziblatt, *How Democracies Die*, 217.

⁹ Levitsky and Ziblatt, *How Democracies Die*, 102.

¹⁰ *Ibid.*, 106.

¹¹ Daphna Renan maps out different norms that structure the exercise of executive power in “Presidential Norms and Article II,” *Harvard Law Review* 131 (2018): 2187–2282.

¹² Goldsmith, “Will Donald Trump Destroy the Presidency?”

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

problems of contemporary American democracy. The election of 2016 did not so much produce a democratic crisis as reveal one. The reality is that American democracy had already been deeply broken for years prior to that campaign cycle. The deeper, more troubling, crisis of American democracy stems first from the growing problem of economic inequality and its magnifying of disparities of political power, and second from systemic patterns of social exclusion that have limited political agency along racial and gendered lines.

Inequality and the Problem of Power

One major long-term threat to democracy stems from economic inequality and the ways it can enable durable and often hidden forms of political inequality. Much of the scholarship on the democratic threat posed by concentrated wealth has explored the terrain of campaign finance reform and focused concerns on the ability of wealthy donors to influence elected officials to favor their interests.¹³ But economic inequality skews democratic politics beyond the campaign finance context. Indeed, this disparity in political influence extends even beyond the electoral arena to the day-to-day practice of politics and governance. Through a variety of mechanisms, wealthier constituencies and business interests are able to steer policymaking to favor their interests over others. In the process, they also undermine the ability of other constituencies to advocate for themselves on fair and equal terms. An extensive social science literature has in recent years documented more pervasive disparities in how public policy skews toward the preferences of wealthier and more elite constituencies.¹⁴

Democracy in practice is less about “the mass public” as it is about the contest between organized interests – but in practice some interests have been vastly more effective at exercising influence than others. Laypersons in the general public often have little information about, or low motivation to participate in, electoral politics.¹⁵ Political voice and influence have, by contrast, often been produced through organized political activity. It is through

¹³ Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – And a Plan to Stop It* (New York: Twelve, 2011); and Zephyr Teachout, *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United* (Cambridge, MA: Harvard University Press, 2014).

¹⁴ Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton, NJ: Princeton University Press, 2014); and Martin Gilens and Benjamin I. Page, *Democracy in America: What Has Gone Wrong and What We Can Do about It* (Chicago: University of Chicago Press, 2017), 38: “[e]conomic inequality begets political inequality, which, in turn, makes it harder to address economic inequality.”

¹⁵ Larry M. Bartels, “Uninformed Votes: Information Effects in Presidential Elections,” *American Journal of Political Science* 40 (1996): 194–230.

civic association that many individuals gain knowledge, experience, and political efficacy.¹⁶ Association not only increases the political efficacy of individuals and communities; associations themselves also can exercise direct influence on public policy through interest-group lobbying and politics. As a result, the changing balance between different civic associations has macro implications for the functioning of American democracy.

Recent political science scholarship has documented how business groups shifted their organizing strategies and advocacy goals in the 1970s and again in the 1990s.¹⁷ The result has been a concerted effort to build a well-resourced and sophisticated system for lobbying, advocacy, and exerting influence on state and federal policymakers. Organized business advocacy groups outweigh labor organizations, public interest groups, and marginalized constituencies in their lobbying presence.¹⁸ This influence is magnified by the close alignment between business interests and the Republican Party.¹⁹ Business interests have also vastly outweighed other actors through lobbying and influencing regulatory bodies.²⁰

This increase in political power on the part of business has in turn led to the pursuit of policies that further concentrate economic wealth and therefore political influence – for example through the promotion of tax cuts, “right to work” laws that fragment the ability of labor unions to exercise oppositional

¹⁶ Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000); Theda Skocpol and Morris P. Fiorina, eds., *Civic Engagement in American Democracy* (Washington, DC: Brookings Institution, 1999); David Easton, *A Framework for Political Analysis* (Englewood Cliffs, NJ: Prentice-Hall, 1965); David Easton, *A Systems Analysis of Political Life* (Hoboken, NJ: Wiley, 1975); and Arthur H. Miller, “Political Issues and Trust in Government: 1964–1970,” *American Political Science Review* 68 (1974): 951–72.

¹⁷ Hacker and Pierson describe the shift within the business lobby from a focus on industrial interests that became dominant politically after the 1970s to a focus on financial interests starting in the 1990s (Jacob S. Hacker and Paul Pierson, *American Amnesia: How the War on Government Led Us to Forget What Made America Prosper* (New York: Simon & Schuster, 2017), 206).

¹⁸ Martin Gilens and Benjamin Page, “Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens,” *Perspectives on Politics* 12 (2014): 564–81, 575: “business groups are far more numerous and active; they spend much more money; and they tend to get their way”; Kay Lehman Schlozman, Sidney Verba, and Henry E. Brady, *The Uneven Chorus: Unequal Political Voice and the Broken Promise of American Democracy* (Princeton, NJ: Princeton University Press, 2012), 442: “the weight of advocacy by organizations representing business interests . . . in no case is . . . outweighed by the activity of either organizations representing the less privileged or public interest groups.”

¹⁹ Hacker and Pierson describe links between these business interests and the Republican Party and the resulting rightward shift of the Republicans (*American Amnesia*, 166, 248–52).

²⁰ Jason Webb Yackee and Susan Webb Yackee, “A Bias towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy,” *Journal of Politics* 68 (2006): 128–39.

political power, and other similar shifts.²¹ Indeed, business interests have focused on policy changes that – like the busting of unions – undermine the countervailing power of labor and other rival interest groups.²² Meanwhile, the countervailing power of workers and other constituencies has been further undermined by the gradual shift away from mass-member organizations to professionalized nonprofit advocacy groups.²³ Scholars have documented the decline of organized labor and other mass-member civil society institutions in recent decades.²⁴ While these professionalized advocates can be more sophisticated in their lobbying campaigns, this shift has weakened the popular foundations that historically drove the political power of membership-based groups, from consumer leagues to labor unions.²⁵

This disparity in political influence is further exacerbated by a growing class divide in political leadership. Fewer and fewer political leaders come from working-class backgrounds, leading to demonstrable skewing of policy outcomes in favor of wealthier groups.²⁶ Similarly, shared social and cultural ties between economic elites and regulators help explain subtle forms of “cultural capture,” where regulators defer to industry interests and take a softer hand than they might otherwise.²⁷ As Nicholas Carnes puts it, the disparity of political influence is a product not just of who is doing the talking – with more (and more effective) advocacy coming from elite and business interests – but also of who is doing the listening: as the policy class becomes less representative themselves of the economic and social diversity of the country, these disparities in responsiveness become more pronounced.²⁸

²¹ See Brishen Rogers, “Libertarian Corporatism Is Not an Oxymoron,” *Texas Law Review* 94 (2016): 1623–46, 1629–30; Kate Andrias, “The New Labor Law,” *Yale Law Journal* 126 (2016): 2–100, 39–41.

²² Alexander Hertel-Fernandez, “How the Right Trounced Liberals in the States,” *Democracy: A Journal of Ideas* 39 (2016), <http://democracyjournal.org/magazine/39/how-the-right-trounced-liberals-in-the-states> [<https://perma.cc/5Q6E-SY9W>]. Hacker and Pierson also argue that much of the inequality crisis can be explained by the rise of business lobbying power, and the decline of organized labor. See Jacob S. Hacker and Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer – And Turned Its Back on the Middle Class* (New York: Simon & Schuster, 2010).

²³ Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Norman: University of Oklahoma Press, 2003).

²⁴ Hacker and Pierson, *American Amnesia*; and Hacker and Pierson, *Winner-Take-All Politics*.

²⁵ *Ibid.*

²⁶ Nicholas Carnes, *White Collar Government: The Hidden Role of Class in Economic Policy Making* (Chicago: University of Chicago Press, 2013).

²⁷ James Kwak, “Cultural Capture and the Financial Crisis,” in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, ed. Daniel Carpenter and David A. Moss (New York: Cambridge University Press, 2013), 71–98.

²⁸ Carnes, *White Collar Government*.

Additionally, a growing body of legal scholarship explores the ways in which concentrated wealth itself might represent a threat to the values and institutions of constitutional democracy.²⁹ The existing institutional structure of checks and balances in democratic politics in the American system depends on a dynamic interaction between institutions on the one hand and the political powers and interests that occupy those institutions at any given point in time on the other; changes in the configuration of these interest groups affect how the institutions themselves operate.³⁰ The Madisonian system of checks and balances requires self-interested political factions to leverage existing institutions to check rival factions – i.e., Congress checking the executive or states competing with one another. But when political interests and factions control multiple branches or operate to deliberately block some of these forms of accountability, the Madisonian system breaks down.³¹ Furthermore, when one party or some group of factions deploys these forms of political blockage and hardball asymmetrically over other factions, it threatens long-term damage to institutions of responsiveness.³² A similar dynamic manifests throughout our political system, as more wealthy interests are able to systematically skew policymaking to their favor, while other constituencies lack equivalent and countervailing political power.

²⁹ See Joseph Fishkin and William E. Forbath, “The Anti-Oligarchy Constitution,” *Boston University Law Review* 94 (2014): 671–98; Joseph Fishkin and William E. Forbath, “Wealth, Commonwealth, & the Constitution of Opportunity,” public law research paper no. UTPUB632 (Austin: University of Texas School of Law, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620920; Ganesh Sitaraman, *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic* (New York: Alfred A. Knopf, 2017); and Kate Andrias, “Separations of Wealth: Inequality and the Erosion of Checks and Balances,” *Michigan Journal of Constitutional Law* 18 (2016): 419–504.

³⁰ See Daryl Levinson, “Looking for Power in Public Law,” *Harvard Law Review* 130 (2016): 31–143. Levinson suggests that we need to view both interests and institutions in relationship to one another by looking past the intrinsic powers that governmental institutions might possess on paper, and look instead to the configuration of interest-group powers that might currently occupy, influence, or lie behind particular institutions (40, 83–84).

³¹ Daryl J. Levinson and Richard H. Piles argue that constitutional checks and balances are more often driven by the conflict between parties, leveraging whichever branches they control, rather than following a pure tripartite process of legislative, executive, and judicial checks on one another. See “Separation of Parties, Not Powers,” *Harvard Law Review* 119 (2006): 2311–86.

³² Joseph Fishkin and David Pozen argue that the problem of constitutional hardball is more a problem arising from one set of partisan actors than it is a universal or symmetrical problem. See “Asymmetric Constitutional Hardball,” *Columbia Law Review* 118 (2018): 915–82.

Systemic Exclusion

These trends are compounded by deep, persisting problems of structural exclusion along lines of race and gender. The failure of American democracy is simply not a new phenomenon; it is built on a chronic legacy of antidemocratic exclusion. This form of democratic crisis lies not in the outsized political influence of some factions or constituencies, but in a more extreme and localized *exclusion* of some constituencies from political agency altogether. Historically, this has been a central feature of American democracy in the forms of legalized exclusion of enslaved persons, the legal system of Jim Crow, and the exclusion and subordination of women at common law. But even after the passage of the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments, abolishing slavery, assuring equal protection, and nominally protecting voting rights, indeed even after the civil rights movement of the 1960s, there remain often-hidden systems of exclusion from equal political power and participation.

Consider the extensive critiques of the institutionalized and systemic domination that communities of color face under the criminal justice system. The problems of mass incarceration and over-policing represent a modern system of racial subordination akin to the Jim Crow era of racial terror and inequality.³³ Over-policed and over-incarcerated communities of color do not, in a meaningful sense, live in a democratic polity marked by broad, equal, protected, mutually binding consultation. But similar patterns of structural exclusion appear in other contexts as well. Consider how precarious and insecure work is often racialized, leaving workers of color particularly vulnerable, or how the welfare bureaucracy treats mostly minority recipients and applicants, or how housing and zoning systems of many cities concentrate racial minorities and poverty in particular neighborhoods. These are all ways of constructing second-class citizenship for racial minorities, magnifying their economic and political inequality.³⁴

This form of systemic racial exclusion is echoed in other contexts and with other constituencies as well. Legal and political assertions that certain spheres of life are apolitical “private realm[s]” have similarly operated at times to

³³ See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).

³⁴ Andrea Flynn et al. map the ways in which different legal and policy systems from labor law to welfare bureaucracies to criminal justice to housing construct racial hierarchy today in *The Hidden Rules of Race: Barriers to an Inclusive Economy* (New York: Cambridge University Press, 2017).

shield the workplace, the market, or the family from publicly political claims aimed at addressing disparities of power and opportunity therein.³⁵ Similarly, legal regimes that immunize the inner workings of the firm from legal liability or political critique construct the workplace as a form of “private government” where workers are subject to the will of private managers and owners in ways that make them deeply unfree.³⁶

These various issues, including racial and gender justice and labor law, involve “substantive” questions, that is, the substantive policy disputes that take place within ordinary democratic politics. Yet in the aggregate, these policies also construct implicit and explicit boundaries that limit who can make claims in public politics and what issues can be engaged in the first place.

Science fiction novelist William Gibson is often quoted (perhaps apocryphally) as having stated that, “The future is already here – it’s just not very evenly distributed.”³⁷ The aphorism is a useful articulation of the reality that places with high technological sophistication can coexist with others that are left behind by technological advances. The same observation applies to current concerns about democracy. Despite recent fears about a potential slide into authoritarianism, or at least, diminished democracy in the United States, the reality is that both democracy and authoritarianism are already present in America, they are just unevenly distributed. Both of the crises discussed here – the systematic inequalities in political power as fostered by the organized power of business interests as well as the systemic exclusions of communities and particular issues from the larger political and legal debate – represent important ways in which the ideal of a broad, equal, protected, mutually consultative democracy is violated. These more chronic and systemic crises of democracy persist beyond the depths of threats arising from the empowered

³⁵ For a classic statement of the ways in which appeals to a “private realm” have worked to immunize gender roles from political critique and reform, see Susan Moller Okin, “Justice and Gender,” *Philosophy and Public Affairs* 16 (1987): 42–72. See also her “Forty Acres and a Mule’ for Women: Rawls and Feminism,” *Politics, Philosophy and Economics* 4, no. 2 (2005): 233–48, 234: “Just as the freedom and equality proclaimed by the Declaration of Independence and the U.S. Constitution’s Bill of Rights did not take account of the fact that the economy of half the country was based on slave labor, so the freedom and equality of most liberal political thought does not take account of the unpaid labor of women in the home.”

³⁶ Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don’t Talk about It)* (Princeton, NJ: Princeton University Press, 2017), 39–42.

³⁷ Garson O’Toole, “The Future Has Arrived – It’s Just Not Evenly Distributed Yet: William Gibson? Anonymous? Apocryphal?” *Quote Investigator* (blog), January 24, 2012, <https://quoteinvestigator.com/2012/01/24/future-has-arrived/>.