

A DEFENSE OF MECHANICAL DEMOCRACY

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Democracy is often conceptualized expansively, encompassing not only procedural mechanisms but also on the left and, increasingly, the right substantive values. Taken for granted, or viewed as meager and unsatisfying, is the concept of mechanical democracy—defined minimally as the right to vote, the right to have votes counted, and the assumption of office by the election winner. Yet mechanical democracy serves as a foundational mechanism for conflict conciliation and leadership succession, transforming intense social conflicts into manageable electoral processes rather than violent confrontations. And in recent years, these procedural elements have come under increasing threat in the United States, through voter suppression tactics, legal challenges to the Voting Rights Act, efforts to manipulate vote certification, and direct assaults on the peaceful transfer of power. The expansion of democracy’s definition to include substantive values risks conflating essential electoral procedures with politically contested policies, thereby undermining the clarity and defense of core democratic functions. This Article defends a conception of mechanical democracy, emphasizing its indispensable role in preserving political stability and preventing civil conflict. If democracy is to be extended beyond these procedural essentials, the priority should be ensuring a political environment free from affirmative state interference, rather than expanding democracy to encompass broader policy goals.

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INTRODUCTION

The term *democracy* is both ill-defined and potent. It carries many possible meanings yet also retains significant persuasive force. In this sense, it is not unlike many other commitments we take as foundational to our social and political systems: liberty, equality, freedom. It is indeed likely that the very centrality of these commitments invites elasticity in concept. To fit within the concept is to find a measure of protection against the assault of opposing views, leading to an ever-wider umbrella concept.

Yet democracy is unlike other social commitments in at least two ways. Democracy maps directly to concrete administrative institutions that serve vital roles in a political system: the identification of those who govern us, the setting of terms upon which they retain that position, and a recognized system of leadership succession that forestalls civil war. Liberty and equality, by comparison, bear associations with our institutions—say, the criminal justice system and the welfare system—but the mapping is hazy, contested, and merely suggestive. The institutions connected to democracy, moreover, are under threat, in the United States and in other places. There are of course the bald attempts to undermine democracy by converting ministerial legal tasks into discretionary, electorally determinative tasks: the president jawboning electoral officials to “find” votes in pivotal jurisdictions;¹ or pressuring the vice president to not certify election results.² Then there are the more sophisticated legal threats: the so-called independent state legislature theory,³ which posits that state legislatures have plenary authority over election rules and administration; a variety of techniques to suppress the ability to vote;⁴ the sidelining of Section 5 of the Voting Rights Act;⁵ the emerging idea, recently supported in the Eighth Circuit, that Section 2 of the Voting Rights Act does not provide a private right of action.⁶

These threats target *mechanical democracy*: the simple right to vote, to have one’s vote counted, and to have the vote-winner take office.⁷ Particularly in the years since Congress passed the Voting Rights Act, mechanical democracy has been taken for granted. And observers came to embrace ever-fuller concepts of democracy. That concept required not just

¹ See *infra* Part III.A.

² See *infra* Part III.A.

³ See *infra* Part III.A.

⁴ See *infra* Part III.A.

⁵ See *infra* Part II.

⁶ See *infra* Part II.

⁷ This notion of mechanical democracy is closely related to Schumpeter’s concept of democracy in its minimalist form, and as an appealing alternative to Hobbesian anarchy. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1942). The effort to shore up mechanical democracy in this entry may be seen as Shklar-like and motivated by concern about adverse realities. Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* (Nancy L. Rosenblum ed., 1989).

procedural equality, but also substantive equality in the time and resources required to be an active participant in political life.⁸ Among other criteria, to take an example, Dahl also thought democracy required “enlightened understanding,” so that voters can appreciate the stakes of the election.⁹ Democracy required not just a lean apparatus to ensure procedural equality and execution, then, but a far more elaborate and politically contested set of policies and institutions to ensure substantive equality among citizens. Without that substantive equality, in this conception, there was no democracy. Not in the meaningful sense.

I do not contest the normative value of that fuller concept of democracy. Yet no concept of democracy can exist without mechanical democracy. And mechanical democracy can no longer be taken for granted. Our operative concept of democracy ought to be pared down to a mechanical notion. Other values, such as substantive equality, ought to be defended, but on their own terms rather than as a necessary feature of democracy. Those values must do their own work, rather than find shelter under the concept of democracy.

The move is important as it isolates the core vulnerability of our democratic system. A kind of democracy can survive even in the face of substantive inequality or a fractured information environment. Much of America’s democratic history can be characterized in this way—a measure (at least) short of Olympic ideals. But it was still a democracy. However, the reverse is not true: the substantively full idea of democracy cannot survive without its mechanical foundations. We should lay bare those foundations to realize their value.

I. MECHANICAL DEMOCRACY

What is mechanical democracy and what is its function in our political system? This is a bare concept of democracy characterized by a few simple features: (1) the right to vote; (2) the right to have votes counted; and (3) that the person winning the vote assumes public office. Democracy is thus mechanical in nature: it endows citizens and candidates with rights, but only procedural rights, and not many of those. Notably absent from this understanding is any notion of substantive equality among voters or requirements regarding their participatory capabilities or epistemic states and opportunities.

Yet if it functions, this impoverished understanding of democracy performs a remarkable task. It allows large, diverse groups of people to live together in an incomplete but workable harmony. Any complex society possesses many different interests: agricultural interests prefer one set of

⁸ See *infra* Part II.

⁹ See ROBERT A. DAHL, ON DEMOCRACY 38 (1998).

policies, bankers another, labor unions another, the professional class another, justice-oriented non-profits another, religious adherents another, and so on. A group's preferred set of policies generally redound to the benefit of that group, directing economic resources, social recognition, or other scarce resources to their group to the relative exclusion of other groups. The critical policies may for example relate to the distribution of financial rewards, as through grants, public contracts, subsidies, or to trade policy, or to language or religious rights.

Every political system must derive some technology for managing conflicting interests within the polity. In some cases, regimes use policing systems to suppress conflict; in others, they use political ideology or theocratic commitments to induce conformity and reduce conflict; in others, they use natural resource wealth to make citizens compliant; in other regimes, they decentralize political authority so that policies can be tailored to the locally dominant groups. Many regimes combine one or more of these strategies.¹⁰

Civil violence is the alternative to a workable strategy of conflict management. Where conflict between interests cannot be channeled or contained, people tend to turn to political violence as a conflict resolution strategy. The group that can inflict the most harm on the other groups is likely to prevail, winning its preferred set of policies to the relative exclusion of the other groups. The list of historical and recent civil wars is not short. A partial list: the Russian civil war (1916-26),¹¹ the Chinese civil war (1927-49),¹² the Spanish civil war (1936-39),¹³ the Guatemalan civil war (1960-96),¹⁴ the Salvadoran civil war (1979-92),¹⁵ the Sudanese civil war (1983-2005),¹⁶ the Nigerian Biafran war (1967-70),¹⁷ and the Sierra Leone civil war (1991-2002).¹⁸ Each of these wars reflects a breakdown in conflict management, resulting in violence over scarce resources: land distribution and property rights (Russian civil war, Chinese civil war, Spanish civil war, Guatemalan civil war, Salvadoran civil war), natural resource wealth (Nigerian civil war, Sierra Leone civil war), or social and religious recognition (Sudanese civil war, Spanish civil war).

¹⁰ One could imagine other possibilities, too. For instance, leadership selection through a lottery over citizens may satisfy many of the requirements—though it would not be a democracy.

¹¹ EVAN MAWDSLEY, *THE RUSSIAN CIVIL WAR* (2011); JON SMELE, *THE 'RUSSIAN' CIVIL WARS, 1916-1926: TEN YEARS THAT SHOOK THE WORLD* (2015).

¹² ODD ARNE WESTAD, *DECISIVE ENCOUNTERS: THE CHINESE CIVIL WAR, 1946-1950* (2003); SUZANNE PEPPER, *CIVIL WAR IN CHINA: THE POLITICAL STRUGGLE, 1945-1949* (1978).

¹³ HUGH THOMAS, *THE SPANISH CIVIL WAR* (2001).

¹⁴ SUSANNE JONAS, *THE BATTLE FOR GUATEMALA: REBELS, DEATH SQUADS, AND U.S. POWER* (1991).

¹⁵ TOMMIE SUE MONTGOMERY, *REVOLUTION IN EL SALVADOR: FROM CIVIL STRIFE TO CIVIL PEACE* (1995).

¹⁶ DOUGLAS H. JOHNSON, *THE ROOT CAUSES OF SUDAN'S CIVIL WARS* (2003).

¹⁷ JOHN DE ST. JORRE, *THE BROTHERS' WAR: BIAFRA AND NIGERIA* 18 (1972).

¹⁸ DAVID KEEN, *CONFLICT AND COLLUSION IN SIERRA LEONE* 1-7 (2005).

Since World War II, indeed, and until very recently, the dominant form of war has been civil conflict rather than inter-state conflict.¹⁹

Every political system must also derive some technology for leadership succession. All leaders experience short lives relative to the potential life of the polity. So who takes office when the current leader dies or is incapacitated? Genetic lineage is probably the most common method of succession historically. Monarchies rely on formal, hide-bound rules of lineage to determine who takes office once the leader dies.²⁰ Or similarly, for a period, the Roman empire relied on adoptive succession, whereby the current leader would anoint his successor via adoption.²¹ Other regimes rely on conclave-based approaches: the politburo might select the next leader,²² or in a theocracy a small group of senior clerics might do so.²³ Others might turn to rankings in non-political domains to assign new leadership, most notably military rank.²⁴ Others, such as the Mongol Khanates, were forced to build a rough consensus among lower-level leaders, a process that that often led to conflict between rivals.²⁵

Even in systems that typically manage conflict well, leadership succession is fraught. Some of the most noted historical civil wars resulted from contested successions: England's fifteenth century War of the Roses between the Yorkists and Lancastrians;²⁶ the Ottoman Interregnum in the fifteenth century, fought between Sultan Bayezid's sons;²⁷ the Mexican conflict following the ouster of Porfirio Diaz in the 1910s;²⁸ the collapse of the Ethiopian empire in 1974 and the ensuing conflict between ethnic groups;²⁹ and, more recently, the post-Gaddafi conflict in Libya.³⁰ These systems had been largely successful in managing conflict while the leader was alive and in office. But once the leader was dead or incapacitated, the polity found itself without consensus about who should next take office.

¹⁹ James D. Fearon & David D. Laitin, *Ethnicity, Insurgency, and Civil War*, 97 AM. POL. SCI. REV. 75 (2003).

²⁰ See SAMUEL E. FINER, *THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES* 1–3 (Oxford Univ. Press 1997).

²¹ See *THE CAMBRIDGE ANCIENT HISTORY, VOLUME XI: THE HIGH EMPIRE, A.D. 70-192* 1–3 (Alan K. Bowman, Peter Garnsey, & Dominic Rathbone eds., 2000).

²² See ARCHIE BROWN, *THE RISE AND FALL OF COMMUNISM* 445–46 (2009).

²³ See SAÏD AMIR ARJOMAND, *THE TURBAN FOR THE CROWN: THE ISLAMIC REVOLUTION IN IRAN* 152–53 (1988).

²⁴ See ALFRED STEPAN, *RETHINKING MILITARY POLITICS: BRAZIL AND THE SOUTHERN CONE* 22–26 (1988).

²⁵ See TIMOTHY MAY, *THE MONGOL CONQUESTS IN WORLD HISTORY* (2012).

²⁶ See MICHAEL HICKS, *THE WARS OF THE ROSES* 15–21 (2010).

²⁷ See HALIL İNALCIK, *THE OTTOMAN EMPIRE: THE CLASSICAL AGE, 1300-1600* (1973).

²⁸ ALAN KNIGHT, *THE MEXICAN REVOLUTION, VOLUME 2: COUNTER-REVOLUTION AND RECONSTRUCTION*: 25 (1986).

²⁹ EDMOND J. KELLER, *REVOLUTIONARY ETHIOPIA: FROM EMPIRE TO PEOPLE'S REPUBLIC* (1989).

³⁰ FREDERIC WEHREY, *THE BURNING SHORES: INSIDE THE BATTLE FOR THE NEW LIBYA* (2018).

This led to a high-stakes conflict between candidates and civil war or rebellions.

Democracy serves many functions. For instance, it increases the responsiveness of public actions.³¹ Because leaders fear elections, that is, they will be more likely to produce policies popular among voters. As part of that popular-demand function, democracy may induce policies that promote economic equality.³² Democracy conveys dignity to citizens, placing them formally on the same level when it comes to voting—one person, one vote.³³ It may encourage communitarian values, asking us to engage with our fellow citizens on matters of shared concern.³⁴ Political theorists insightfully defend these and other benefits of democracy.

But the core and indispensable function of democracy is that it manages conflict and provides clear rules of leadership succession. Prior to an election, disagreements among different components of society are channeled into electoral competition. Instead of violence between rural and urban interests, as during the Chinese civil war, or between labor and landowners, as in the Spanish civil war, or between different religious factions, as during the English civil war (1642-51), there is debate, electioneering, marching, and ultimately, voting.³⁵ That is an enormously beneficial trade. The trade is possible because interests see that they have some chance of winning the election, or of influencing the person who wins the election, and the expected value of that electoral outcome exceeds the value of engaging in armed conflict.³⁶

Even more to the point, leadership succession is integrated into the machinery of elections. It is not too much to say that an election *is* leadership succession. An election reduces the question of succession to a simple mathematical one: did candidate A or candidate B receive more votes? All that needs to happen is for clerks to perform the ministerial job of collecting the votes and tallying them, and we have an answer to the question beguiling polities for thousands of years—who next? That, too, is incredibly valuable.

³¹ See e.g., PUTNAM ET AL., *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993); DAHL, *supra* note 9.

³² See e.g., CARLES BOIX, *DEMOCRACY AND REDISTRIBUTION* (2003); DARON ACEMOGLU & JAMES A. ROBINSON, *ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY* (2006).

³³ See e.g., DAHL, *supra* note 9.

³⁴ See CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

³⁵ S.P. Harish & Andrew T. Little, *The Political Violence Cycle*, 111 AM. POL. SCI. REV. 237 (2017).

³⁶ ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET: POLITICAL REFORMS IN EASTERN EUROPE AND LATIN AMERICA* (1991); ADAM PRZEWORSKI, *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950-1990* (2000).

Undergirding these functions of democracy is that elections reduce the stakes of conflict.³⁷ Social interests must feel that they have some chance of winning the election. And if lost, they must feel that they have some chance of winning the next election. It is this prospect of future victory that turns what might be an existential crisis into a matter of biding one's time and organizing a coalition for the next election.³⁸ Whereas violence might feel worth it if leadership were to switch to the opposition indefinitely, it becomes a distinct second-choice if leadership holds office for only a few years, and parties feel they have a chance of winning the next election.³⁹ It reduces the stakes of politics,⁴⁰ and makes the non-violent option preferred, by temporally expanding the question of choice of leadership.⁴¹

A simple formalization following Przeworski helps clarify the role of elections and other institutions in maintaining a peaceful order.⁴² Suppose the payoff from winning an election is W , and the payoff from losing an election is L . Naturally, $W > L$, because when one loses an election the opposing party advantages their aligned groups at the expense of you and your aligned groups. The question is whether a party is better off with violence, or instead enduring a lost election and waiting for the next election. Let V be the payoff from engaging in violence. Further let p be your belief about probability you win the next election. In this case, biding your time and waiting for the next election is preferred if $V < pW + (1-p)L$.⁴³ Notice, of course, that $pW + (1-p)L > L$, because you put some weight on a future world in which you win an election, making violence less attractive. This is what Przeworski means when he argues that elections reduce the stakes of politics by spreading out control of the state temporally. As a corollary, notice that violence is less attractive the more likely to think you are to win the next election. This means that subjective beliefs about the fairness

³⁷ PRZEWORSKI, DEMOCRACY AND THE MARKET, *supra* note 36; Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997); Douglas C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 806–20 (1989); Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. INST. & THEORETICAL ECON. 286 (1993).

³⁸ It is possible to see other mechanisms as underlying democracy's potent force. For example, another idea is that democracy is regarded as a "legitimate" method of choosing a leader, and that legitimacy breeds civil peace. SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* (1960).

³⁹ See PATEMAN, *supra* note 34.

⁴⁰ As noted below, the stakes of politics may be reduced in other ways, too. For instance, federalism reduces the stakes of politics, as do constitutional provisions such as the Establishment Clause, which seeks to take the issue of religion off the political table. Weingast, *The Political Foundations of Democracy and the Rule of Law*, *supra* note 37.

⁴¹ PRZEWORSKI, DEMOCRACY AND THE MARKET, *supra* note 36.

⁴² *Id.* at 29.

⁴³ This simple formalization is for conceptual purposes and can be complicated in many ways.

of electoral administration are important to maintaining peace—if a group believes the elections to be rigged, so they have no chance of winning, violence will become more attractive.

It is also clear that from this simple but helpful conceptualization that elections are but part of what make for a peaceful order. In fact, if L and W are not too different, elections may not matter much—your life is approximately the same, regardless of whether you or the opponent wins an election, so violence is unattractive even absent elections. For the mid-century period of American politics in which the parties were criticized for being “tweedle-dee tweedle-dum,” two parties without a difference, for example, L and W may have substantially converged.⁴⁴ Successful orders, moreover, invest heavily in institutional devices that blunt the consequences of losing an election. We can think about many of our constitutional protections as devices that move W and L closer together. The Establishment Clause prevents, or tries to prevent, state religion from being part of what is at stake in an election.⁴⁵ Win or lose, there will be no state religion. The Constitution further ensures, or aims to ensure, that win or lose, you can engage in your preferred expressive activity. The Fourteenth Amendment ensures, or aims to ensure, that win or lose, your racial group will not be subject to laws that target you on that basis. The structural features of the Constitution, likewise, fit in this conception. The separation of powers and bicameralism slow down lawmaking, in theory, making it unlikely that the loss of a single election will refashion the nation’s policies wholesale. And federalism limits the reach of the central government, fragments the consequences of any electoral loss, and gives you an exit option in the event you dislike the policies that develop in your local jurisdiction.⁴⁶ All these features reduce the stakes of politics, making L relatively close to W.

So democracy should be seen a part of a suite of policies and institutions that serve to reduce the stakes of politics. Though central, it is not a full account of what makes for a peaceful order. Also relevant are individual rights, structural limits on what a regime can accomplish, and fragmentation of sovereign authority. Part of the story of the current moment of peril—not told in this Article—is of the degradation of the legal and institutional devices that historically kept L and W close together. But in part because of that degradation, the conciliatory role of elections all the more deserves attention.

⁴⁴ This of course led to dissent. A young Bernie Sanders wrote in a New York Times op-ed that “If there was one profound message from the Presidential election, it’s that the old Democratic-Republican, tweedle-dee tweedle-dum, two-party system needs to be challenged.” Bernard Sanders, *This Country Needs a Third Political Party*, N.Y. TIMES (Jan. 3, 1989), <https://www.nytimes.com/1989/01/03/opinion/this-country-needs-a-third-political-party.html> [https://perma.cc/59BZ-C772].

⁴⁵ Weingast, *The Political Foundations of Democracy and the Rule of Law*, *supra* note 37.

⁴⁶ *Id.*

In sum, mechanical democracy entails a simple set of procedural rights—the right to vote, the right to have one’s vote counted, and the right for the person with the most votes to be the next leader—that elegantly solves deep, recalcitrant problems faced by polities for thousands of years. How can complex polities manage conflict among constituents? And how will the next leader be selected? Democracy is a large part of an answer to both.

II. SUBSTANTIVE DEMOCRACY, AND CRITIC

For all the work mechanical democracy does, it is limited. A distinguished line of political theorists, economists, and legal scholars advance the central point that democracy entails not just formal procedural rights, but also a substantive component.⁴⁷ Though there are many conceptions of substantive democracy, the core insight of this strand of the literature is that the right to vote, by itself, is insufficient: citizens must, in addition, have sufficient capacities as individuals to participate meaningfully in the democratic process. For democracy to be realized, citizens must have the time, health, resources, and informational capability to make their case during and between elections, to engage with other citizens, and to be democratic activists.

Substantive equality is the key to achieving these requirements. Ensuring that citizens have adequate housing, health, time, education, and informational resources—and moreover that all those resources bear a measure of equality—is of course a large commitment. Reaching that goal itself requires an elaborate set of policies and institutions.⁴⁸ Whereas election administration, in theory requires only a sparse set of clerical vote-administration and counting institutions, the institutions that deliver substantive equality will be sprawling, complex, and deeply substantive and distributional in nature. Their tasks will not be clerical or ministerial. They will instead render difficult choices with tradeoffs that leave some parties better off and others worse off. Which schools receive public money and which do not? Should we provide public assistance or loan forgiveness for higher education? For whom? Which hospitals should

⁴⁷ CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001); CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION—AND WHY WE NEED IT MORE THAN EVER* (2006); WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* (2022); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); AMARTYA SEN, *THE IDEA OF JUSTICE* (2009); BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984); ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989). As Shapiro argued in a noted piece, “there are as many theories of substantive democracy as there are substantive democratic theorists, and it seems unlikely that any one will win the philosophical high ground.” Ian Shapiro, *The State of Democratic Theory*, in *POLITICAL SCIENCE: STATE OF THE DISCIPLINE* (Ira Katznelson & Helen V. Milner eds., 2003).

⁴⁸ For an excellent assessment of the connections between administrative institutions and a fuller conception of democracy, see NOVAK, *supra* note 47.

receive public money? Who receives public health insurance and who does not? Which procedures do they cover? What level of public support should there be for housing? Who receives that housing support? What of food insecurity payments? Or general income assistance? To what extent should we subsidize internet and communications infrastructure for rural communities? Should we subsidize the production of agricultural goods? Which criminal offenses should warrant incarceration? Answers to these questions go to the extent to which we satisfy the condition of substantive equality and capability to meaningfully participate in the democratic process.

Yet these questions represent standard, politically contested topics in democracies. They represent, in other words, the conflicts in interests that democracy is meant to reconcile, or at least to quiesce. They represent the work of democracy. It is odd, therefore, to position specific responses to those questions as necessary conditions for democracy. To assume that the questions resolve in a specific way is to dissolve away the mine run of pressing policy questions meant to be addressed by democracy.⁴⁹

The temptation to usher these substantive questions under the umbrella of *democracy* is understandable. Virtually all participants value democracy. As a concept, it is inviolable. In this sense, it is not unlike other socially esteemed concepts: liberty, equality, or freedom. Because they are so valued, advocates on all sides of debates struggle to articulate their positions as exemplars of those concepts. Take *freedom* for example. Republicans have long argued that their policies promote individual freedom. A partial list: Barry Goldwater wrote, “I do not undertake to promote welfare, for I propose to extend freedom,” justifying the reduction of welfare payments;⁵⁰ Reagan defended his policy agenda, saying, “Freedom is never more than one generation away from extinction”; the Heritage Foundation titled its budget report as “A Budget Blueprint for Freedom, Opportunity, and Prosperity.”⁵¹ Democrats, too, find the concept appealing. As the Democratic candidate for president in 2024 put it, “[W]hen we Democrats talk about freedom, we mean the freedom to make a better life for yourself and the people that you love. Freedom to make your own health care decisions. And yeah, your kids’ freedom to go to school without worrying about being shot dead in the hall.”⁵² Both Democrats and Republicans invoke freedom to

⁴⁹ Others recognize the peril of this question. See DAHL, *supra* note 9, at 163.

⁵⁰ BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 15 (1960).

⁵¹ Matthew D. Dickerson, *A Budget Blueprint for Freedom, Opportunity, and Prosperity*, HERITAGE FOUND. (Feb. 23, 2022), <https://www.heritage.org/budget-and-spending/commentary/budget-blueprint-freedom-opportunity-and-prosperity> [<https://perma.cc/6LZZ-9SU9>].

⁵² Elaine Kamarck & William A. Galston, *Freedom—Harris’s Message to America*, BROOKINGS INST. (Aug. 23, 2024), <https://www.brookings.edu/articles/freedom-harriss-message-to-america/> [<https://perma.cc/3TXK-PPSQ>].

advance their favored policy positions. They do so because the concept of freedom resonates with the American public, and policies that can be understood to advance the concept may thereby be more easily embraced. Much the same occurs with the concepts of liberty and equality.

And it is true of democracy, too. Many of the calls for substantive democracy can be understood as calls for the effectuation of specific policy programs, characterized as part of a socially valued but poorly-defined concept. Rather than saying that reducing welfare payments helps families become free, however, the claim is that a suite of policies helps or may be necessary to the realization of democracy. This is true on the left—calling for substantive equality—and especially recently on the right. Populist leaders resist the rule of law on the “democratic” grounds that judicial oversight threatens the will of the people;⁵³ argue that democracy runs against efforts to control election interference;⁵⁴ connect democracy with the imperative of heritage or civilizational values;⁵⁵ or contend the dismantling of the administrative state is necessary to protect democracy.⁵⁶ Along these same lines, the current Vice President argued that the votes of those with children ought to count more than the votes of the childless, thus embedding substantive values into a concept of what democracy requires.⁵⁷ Legally, conservative jurists use the concept of democracy to erode campaign finance restrictions,⁵⁸ or to pull down structures of agency independence.⁵⁹ Everyone supports democracy, just to different ends.

There is a key difference, however, between contestation over the concept of freedom (or liberty or equality) and over the concept of democracy. The difference is that democracy, at its foundation, entails a

⁵³ Ashifa Kassam, *Marine Le Pen ruling is fuel for the global right's attacks on court authority*, *GUARDIAN* (Apr. 7, 2025), <https://www.theguardian.com/world/2025/apr/07/marine-le-pen-ruling-is-fuel-for-the-global-rights-attacks-on-court-authority> [<https://perma.cc/65FS-QA43>].

⁵⁴ *JD Vance's Full Speech on the Fall of Europe*, *SPECTATOR* (Feb. 14, 2025), <https://www.spectator.co.uk/article/jd-vance-what-i-worry-about-is-the-threat-from-within/> [<https://perma.cc/Q2CF-JPNE>].

⁵⁵ Marion Dupont, *How the Far Right Envisions Europe*, *LE MONDE* (June 8, 2024), https://www.lemonde.fr/en/opinion/article/2024/06/08/how-the-far-right-envisions-europe_6674195_23.html [<https://perma.cc/9L3A-5UBA>].

⁵⁶ CNN, *Trump: 'Deep state' Is a Threat to Democracy* (Sept. 7, 2018), <https://www.cnn.com/videos/politics/2018/09/07/donald-trump-deep-state-montana-rally-sot-vpx.cnn> [<https://perma.cc/54JD-9CQH>].

⁵⁷ Margaret Talbot, *JD Vance and the Right's Call to Have More Babies*, *NEW YORKER* (Aug. 5, 2024) <https://www.newyorker.com/news/daily-comment/j-d-vance-and-the-rights-call-to-have-more-babies> [<https://perma.cc/44XD-YYTR>].

⁵⁸ *Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . [P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.”)

⁵⁹ *Free Ent. Fund v. Public Co. Acctg. Oversight Bd.*, 561 U.S. 477, 499 (2010) (cutting back on agency independence, arguing that “Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”)

set of concrete institutions: the administration of voting and the counting of ballots. Proponents of substantive democracy add to that foundation. But there is no foundational analogue for freedom. It is simply a concept. It does not, at foundation, entail any specific set of concrete institutions that perform a critical social function.

Attending substantive policies to democracy may undermine support for the foundation itself. If it is taken that for democracy to exist meaningfully, a large suite of contested policies must come too, democracy may itself come to hold less appeal. This is especially true in highly polarized times, as we live in today. That would be a grievous loss—the foundations of democracy address the enduring problems of conflict conciliation and leadership succession. A second consequence is that, even if they do not reduce support for the foundations of democracy, they distract attention from the monitoring and analysis of those foundations. We give thought to the substantive components of democracy, sidelining the foundations of the right to vote, the counting of votes, and the peaceful transfer of power to the person with the most votes.

It is telling that many of the most prominent accounts of substantive democracy emerged after the Voting Rights Act of 1965. Barber published his account in 1984; Dahl his in 1989; Sen his in 1999; Gutman and Thomas theirs in 2004. One reading of this pattern is that substantive democracy became possible, or more possible,⁶⁰ to contemplate once it was felt that the foundations of mechanical democracy were secure. And the Voting Rights Act (VRA) did perhaps more than any other single public act to ensure the integrity of mechanical democracy. If we regard the pillars of mechanical democracy as the right to vote, the right to have one's voted counted, and the right of the person with the most votes to take office, it was the first of these that had the most tenuous grasp for much of American history. Votes, once cast, were generally counted.⁶¹ And the person with the most votes almost always took office without controversy.⁶² Far from assured, however, was the right to vote in the first instance.

The Voting Rights Act of 1965 sought to eliminate practices or procedures that discriminated on the basis of race. Since Reconstruction,

⁶⁰ *But see* earlier scholars: e.g., JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1861); JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927); HANNAH ARENDT, *THE HUMAN CONDITION* (1958).

⁶¹ Prominent exceptions include allegations of ballot stuffing in the Nixon-Kennedy presidential race. *See* IRWIN F. GELLMAN, *CAMPAIGN OF THE CENTURY: KENNEDY, NIXON, AND THE ELECTION OF 1960* (2021). Or Johnson's "Box 13" scandal from his senate primary. *See* ROBERT DAVID JOHNSON, *ALL THE WAY WITH LBJ: THE 1964 PRESIDENTIAL ELECTION* (2009). Or the 1876 presidential election, which saw Tilden lose electoral votes to Hayes due to allegations of fraud in several southern states. *See* ROY MORRIS, JR. *FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876* (2004). However, these are exceptions historically.

⁶² The American context is complicated by the electoral college.

Black voters in the south especially were subject to a variety of devices that discouraged them from exercising the right to vote: poll taxes,⁶³ literacy tests,⁶⁴ grandfather clauses,⁶⁵ white primaries,⁶⁶ and manifold methods of intimidation and violence.⁶⁷ The VRA made those devices illegal through provisions such as Section 2 of the Act, which was understood to create a right of action to challenge discriminatory voting practices or procedures, and Section 5 of the Act, which imposed a pre-clearance regime for certain covered jurisdictions, mostly in the south, so that they could not change their procedures without approval from the Department of Justice.⁶⁸ Widely regarded as highly effective,⁶⁹ the VRA largely resolved the third pillar necessary for mechanical democracy—the right to vote.

That at least was the environment that the prominent proponents of substantive democracy encountered. With the foundations secure, it followed that our attention should rest with a fuller, more complete conception of democracy. Yet the foundations of democracy can no longer be taken for granted, and neither can democracy's elemental role of conflict conciliation and leadership succession. This calls for a renewed effort to understand the functions of procedural democracy—to appreciate and focus on the foundations of democracy.

III. IMPERILED MECHANICS

A. *Democratic Foundations*

Over the last ten years, the basic mechanics of American democracy have become imperiled. Consider a partial list of events undermining the foundations of the right to vote, the counting of votes, and the transfer of power to the vote-winner.

Shelby County. In 2013, the Supreme Court invalidated the “coverage” formula under Section 4 of the Voting Rights Act.⁷⁰ That in turn effectively disabled Section 5 of the Act, which required pre-clearance for covered jurisdictions before they could change their voting procedures or practices. This set the legal stage for innovation and experimentation in methods that would discourage voters from participating in elections. Evidence suggests

⁶³ Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DEV. U. L. REV. 1023 (2009).

⁶⁴ *Id.* at 1024.

⁶⁵ *Id.* at 1041.

⁶⁶ *Id.* at 1031.

⁶⁷ *Id.*

⁶⁸ Voting Rights Act of 1965, Pub. L. No. 89-100, 79 Stat. 445.

⁶⁹ See e.g., Abhay Aneja & Carlos Fernando Avenancio-Leon, *The Effect of Political Power on Labor Market Inequality: Evidence from the 1965 Voting Rights Act* (U.C. Berkeley, Working Paper, 2019).

⁷⁰ See *Shelby County v. Holder*, 570 U.S. 529 (2013).

that innovations following *Shelby County* relatively reduced turnout for Black and Hispanic populations.⁷¹

Section 2 and a Private Right of Action. Historically, Section 2 of the VRA has been understood to convey a private right of action, such that private individuals and organizations could sue to enforce its provisions. In the 2021 case of *Brnovich v. Democratic National Committee*, Justice Gorsuch invited contestation on this point, saying it was “an open question.”⁷² Following this invitation, the Eighth Circuit held in late 2023 that Section 2 did not create a private right of action.⁷³ If followed by other circuits or the Supreme Court, this holding threatens to undermine the primary surviving provisions of the VRA.

Independent legislature theory. The Constitution refers to “the legislature” when speaking of the state’s power to regulate elections, leading some academics and jurists to the view that state legislatures have exclusive authority over elections. This view, known as the independent legislature theory, would undermine the role of courts in monitoring elections and open the possibility of partisan state legislatures—themselves often gerrymandered—determining election outcomes even as against popular vote counts. The Court recently ruled out a strong version of the independent legislature theory,⁷⁴ though it limited state judicial supervision to “ordinary judicial review,”⁷⁵ a term without clear definition.

Consolidated Polling Places. Reflecting weakened legal constraints under the VRA, the number of mailing places in many locations dropped dramatically over the last decade. Between 2012 and 2016, for instance, the number of primary election polling places in Maricopa County, Arizona fell from two-hundred to sixty, a reduction of seventy percent.⁷⁶ These reductions led to longer wait times and appear to concentrate in jurisdictions with more minority voters.⁷⁷ Consolidating polling places discourages democratic participation by increasing the costs of voting—polling places will be, on average, more distant, and wait times will be longer—and one study found that polling place consolidation “contributes

⁷¹ Stephen B. Billings, Noah Braun, Daniel B. Jones, & Ying Shi, *Disparate Racial Impacts of Shelby County v. Holder on Voter Turnout*, 230 J. PUB. ECON. 105047 (2024); Aneja & Avenancio-Leon, *supra* note 69.

⁷² 594 U.S. 647, 690 (2021) (Gorsuch, J., concurring).

⁷³ *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023).

⁷⁴ *Moore v. Harper*, 600 U.S. 1, 3 (2023).

⁷⁵ *Id.* at 36.

⁷⁶ Ari Berman, *There Are 868 Fewer Places to Vote in 2016 Because the Supreme Court Gutted the Voting Rights Act*, NATION (Nov. 4, 2016), <https://www.thenation.com/article/archive/there-are-868-fewer-places-to-vote-in-2016-because-the-supreme-court-gutted-the-voting-rights-act/> [<https://perma.cc/3UK7-M5A5>].

⁷⁷ Hannah Klain et al., *Waiting to Vote: Racial Disparities in Election Day Experiences*, BRENNAN CTR. FOR JUST. (June 3, 2020), <https://www.brennancenter.org/our-work/research-reports/waiting-vote> [<https://perma.cc/BN3M-UQX8>].

to between 11 and 13 percent of the participation gap between low- and high-minority areas during non-presidential elections.”⁷⁸

Non-Ministerial Vote Counting. During the 2020 election, officials in several jurisdictions did not certify election results or otherwise undermined the vote-counting process. Normally, this would be a ministerial role. For instance, Republicans in Wayne County, which includes Detroit, initially declined to certify the election results, changing their position only after intense scrutiny.⁷⁹ The Michigan State Board of Canvassers then waived, with a Republican member suggesting they would not certify the results⁸⁰—this again would normally be a ministerial action. He ended up abstaining.⁸¹ The Republicans won the 2024 election, so it was not necessary to manipulate election results, but they had prepared the groundwork to systematically do so had they lost the election, investing in control of election boards in critical states.⁸²

Purging of Voter Rolls. In recent years, Republican officials have tried to purge voters from the rolls based on the supposition that they were ineligible voters. For the most part, these efforts took place before the vote occurred, and the purged voters would have an opportunity to correct the record or challenge the purge.⁸³ However, the most recent effort to purge voters took place after Republicans had lost the vote, potentially reversing the initial results in North Carolina judicial elections via the removal of 60,000 votes.⁸⁴

Harassment of Voting Officials. Even where elected officials ultimately carried out their responsibilities, they increasingly face calls by elected officials or partisans to undermine the regular-order electoral machinery. For instance, in the 2020 election, election officials in the

⁷⁸ Enrico Cantoni, *A Precinct Too Far: Turnout and Voting Costs*, 12 AM. ECON. J.: APP. ECON. 61, 64 (2020).

⁷⁹ Colin Dwyer, *Michigan’s Wayne County Certifies Election Results After Brief GOP Refusal*, NAT’L PUB. RADIO (Nov. 18, 2020), <https://www.npr.org/sections/live-updates-2020-election-results/2020/11/18/936120411/michigans-wayne-county-certifies-election-results-after-brief-gop-refusal> [<https://perma.cc/Z8EX-KQNM>].

⁸⁰ Dartunorro Clark, *Michigan Election Board Votes to Certify Biden Win, Dealing Blow to Trump Effort*, NBC NEWS (Nov. 23, 2020), <https://www.nbcnews.com/politics/2020-election/michigan-election-board-votes-certify-biden-win-dealing-blow-trump-n1248685> [<https://perma.cc/ZB49-JESX>].

⁸¹ *Id.*

⁸² The Daily, *The Army of Election Officials Ready to Reject the Vote*, N.Y. TIMES (Nov. 1, 2024), <https://www.nytimes.com/2024/11/01/podcasts/the-daily/election-officials.html> (on file with the Cornell Journal of Law and Public Policy).

⁸³ E.g., Jalen Maki, *Nearly 900 Lincoln County Voters Affected*, TOMAHAWK LEADER (Dec. 27, 2019) (describing Republican efforts to purge over 200,000 voters in Wisconsin), <https://tomahawkleader.com/stories/purge-of-234000-wisconsin-voter-registrations-challenged-in-federal-state-court,82235> [<https://perma.cc/8SXR-4C8H>].

⁸⁴ See Sam Levine, *North Carolina Judges Back Republican Colleague in Bid to Toss Votes and Overturn Election*, GUARDIAN (Apr. 4, 2025), <https://www.theguardian.com/us-news/2025/apr/04/north-carolina-court-ballots-republicans> [<https://perma.cc/2KJG-8YBS>].

battleground states of Arizona,⁸⁵ Pennsylvania,⁸⁶ and Georgia⁸⁷ were pressured to alter election results or to deny certifying election results. President Trump himself privately jawboned the Georgia Secretary of State, the state official responsible for election administration, to “find 11,780 votes . . . because we won the state.”⁸⁸

January 6. Most alarmingly, President Trump attempted to overturn the 2020 election on January 6, 2021, inciting a mob to attack the Capitol as Congress was preparing to certify the election results.⁸⁹ Under federal law, Congress formally counts electoral votes and certifies results, typically a dry, ministerial affair. However, President Trump pressured Vice President Pence, who presided over the proceeding, to refuse to certify battleground electoral votes. At a nearby political rally, President Trump amplified the “stop the steal” slogan, telling the crowd, “[W]e’re going to walk down, and I’ll be there with you, we’re going to walk down, we’re going to walk down. Anyone you want, but I think right here, we’re going to walk down to the Capitol. . . . [Y]ou’ll never take back our country with weakness. You have to show strength and you have to be strong,” and “We will not let them silence your voices. We’re not going to let it happen, I’m not going to let it happen.”⁹⁰ The ensuing attack on the capitol delayed the certification of election results and resulted in the deaths of at least seven people.⁹¹

These actions represent threats to the minimal mechanics of a democracy: the right to vote, the right to have one’s vote counted, and the right for the winner to take office. Those basics can no longer be taken for granted. Yet they are the indispensable foundation for virtually any defensible theory of democracy. Scholars often regard theories of procedural or mechanical democracy as meager, unsatisfying, and incomplete. That may be right. It may not be nice to live in a house that consists only of a foundation and timber framing. But living in a house without a foundation or framing is virtually impossible.

⁸⁵ See Rachel Leingang, *Arizona Republican Who Resisted Pro-Trump Pressure in 2020 to Stand Down*, GUARDIAN (Feb. 15, 2024), <https://www.theguardian.com/us-news/2024/feb/15/arizona-maricopa-clint-hickman-reelection-republican-trump> [<https://perma.cc/FRX4-PVDB>].

⁸⁶ See BRENNAN CENTER FOR JUSTICE, ELECTION OFFICIALS UNDER ATTACK: HOW TO PROTECT ADMINISTRATORS AND SAFEGUARD DEMOCRACY 3 (2021).

⁸⁷ See *id.* at 4.

⁸⁸ *Id.*

⁸⁹ See H.R. Rep. No. 117-000 (2022) (“Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol”).

⁹⁰ Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NAT’L PUB. RADIO (Feb. 10, 2021), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [<https://perma.cc/RR4X-FPLL>].

⁹¹ See Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> [<https://perma.cc/AQC7-T4AY>].

B. *Democratic Curtilage*

To extend this metaphor, if a theory of democracy is to be telescoped beyond these basics, the first place it ought to reach is the curtilage of mechanical democracy. The curtilage of democracy is a space that allows political candidates, advocates, and citizens to engage in political activity without fear of retribution or the withholding of benefits by state actors. Unlike most notions of substantive democracy, this is not about creating democratic capabilities. The objective is more modest: to create a negative space in which political activity might take place without material affirmative interference by the state.

In terms of the simple model discussed earlier, it is possible to see democratic curtilage as speaking to the p parameter, reflecting beliefs that one will win the election. If the state is used against political opponents, it diminishes the value of p and increases the appeal of violence. Likewise, if one expects the other party to use the state against political opponents, it increases the gap between winning and losing an election, similarly increasing the appeal of violence over democratic commitment. Though outside the basics of mechanical democracy, therefore, democratic curtilage ties analytically to the social function of democracy.

The threats to this negative space derive primarily from the offensive deployment of the bureaucracy against political enemies. Consider a partial list of prominent examples of activity that violates this space from recent decades in the United States.

COINTELPRO. Under Director Hoover, the Federal Bureau of Investigation (FBI) investigated and surveilled “subversive” political movements and individuals, including civil rights leaders such as Martin Luther King Jr.⁹² These investigations examined the lawful activity of leaders on the political left, weaponizing the bureaucracy against dissenting voices for roughly two decades, from the mid-1950s to the mid-1970s.⁹³

Nixon Enemies. President Nixon kept a list of political enemies,⁹⁴ the purpose of which, according to his White House counsel, John Dean, was to “maximize the fact of our incumbency in dealing with persons known to be active in their opposition to our Administration. Stated a bit more bluntly—how we can use the available federal machinery to screw

⁹² WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI’S SECRET WARS AGAINST DOMESTIC DISSENT* 1, 36, 95 (1990); Mark Mazzetti, *Burglars Who Took on F.B.I. Abandon Shadows*, N.Y. TIMES (Jan. 7, 2014) <https://www.nytimes.com/2014/01/07/us/burglars-who-took-on-fbi-abandon-shadows.html> [<https://perma.cc/DE2W-4VGU>].

⁹³ CHURCHILL & WALL, *supra* note 92; Mazzetti, *supra* note 92.

⁹⁴ Christopher Lydon, *Ex-Counsel Says White House Kept ‘Enemy List’ That It Used for Harassment*, N.Y. TIMES (June 27, 1973), <https://www.nytimes.com/1973/06/27/archives/excounsel-says-white-house-kept-enemy-list-that-it-used-for.html?searchResultPosition=16> [<https://perma.cc/TF47-UASD>].

our political enemies.”⁹⁵ Under this scheme, he continued, a “project coordinator” would determine how enemies interacted with the federal government, and “how we can best screw them (e.g., grant availability, federal contracts, litigation, prosecution, etc.).”⁹⁶

IRS Enforcement Discretion. Under President Obama, non-profits associated with the Tea Party—an early strand of right-populism—were disproportionately targeted for scrutiny of their tax-exempt status by the IRS during the 2010 and 2012 elections, according to the Treasury Inspector General for Tax Administration.⁹⁷ Though progressive groups were also scrutinized, the IRS apologized to Tea Party groups, the official in charge of the effort resigned,⁹⁸ and the IRS reformed its process for reviewing tax-exempt status.⁹⁹

Weaponization of the DOJ. In his first term, President Trump sought to use the DOJ to attack political enemies.¹⁰⁰ For example, he pressured Attorney General Barr and Ukraine officials to find evidence of corruption in the Biden family,¹⁰¹ and later demanded of Barr “where are all the arrests?”¹⁰²

These instances should be distinguished from the more routine handing out of favors, in some degree, to political allies.¹⁰³ Though in the limit, granting favors to friends and punishing enemies may be isomorphic—e.g., if there is a single life-or-death action, with only friends or enemies the beneficiary—the favors granted tend to be modest rather than existential, and to only obliquely affect underlying political activity. By comparison, the offensive use of the bureaucracy is intended

⁹⁵ Memorandum from John Dean, White House Counsel, to H.R. Halderman (Aug. 16, 1971) (“Dealing with Our Political Enemies”) (Aug. 16, 1971), <https://exhibits.lib.unc.edu/items/show/7896> [https://perma.cc/5PDW-B8GX].

⁹⁶ *Id.*

⁹⁷ Philip Bump, *Treasury Report: The IRS Owes Apologies to More Than Just Tea Party Groups*, ATLANTIC (May 14, 2013), <https://www.theatlantic.com/politics/archive/2013/05/treasury-report-irs-owes-apologies-more-just-tea-party-groups/315257/> [https://perma.cc/M4VL-D3TR]; Caitlin Oprysko, *Trump Pressed Ukraine’s President to Work with Barr for Dirt on Biden*, POLITICO (Sept. 25, 2019), <https://www.politico.com/story/2019/09/25/white-house-releases-transcript-of-trumps-call-with-ukraines-president-1510767> [https://perma.cc/W68X-K4WY].

⁹⁸ John Hicks, *Central Figure in IRS Tea Party Controversy Resigns*, WASH. POST (Sept. 23, 2013), https://www.washingtonpost.com/politics/federal_government/central-figure-in-irs-tea-party-controversy-resigns/2013/09/23/db0d3d28-248a-11e3-b75d-5b7f66349852_story.html [https://perma.cc/7LTF-HYF4].

⁹⁹ Stephen Ohlemacher, *IG: IRS Takes Significant Steps to Stop Tea Party Targeting*, ASSOCIATED PRESS (Apr. 30, 2015), <https://apnews.com/small-business-united-states-congress-united-states-government-ac567c387f9044ad8c3e2bd81fbf243d> [https://perma.cc/JEE6-MS85].

¹⁰⁰ Kyle Cheney, *‘Where Are All of the Arrests?’: Trump Demands Barr Lock Up His Foes*, POLITICO (Oct. 7, 2020), <https://www.politico.com/news/2020/10/07/trump-demands-barr-arrest-foes-427389> [https://perma.cc/2STX-UXLA].

¹⁰¹ Oprysko, *supra* note 97.

¹⁰² Cheney, *supra* note 100.

¹⁰³ JOHN H. ALDRICH, *WHY PARTIES? A SECOND LOOK* (2011) (arguing that parties allow for the transmission of selective benefits).

to be maximally efficacious, as close to existential as possible in threat or actuality, and to directly affect underlying political activity. Of course, these examples of offensive bureaucracies differ in the degree to which they were successful, the extent to which they were systematic or opportunistic, and in the measure of high-level or presidential involvement. The more successful, the more systematic, and the more presidential, the more troubling.

The most concerning aspect of the second Trump administration thus is, not just that it appears to be preparing for the offensive use of the bureaucracy, but instead that the effort appears to be high-level and systematic. This is a high-level effort, like President Nixon's, though more open.¹⁰⁴ In the lead-up to the election, President Trump broadcast that he would prosecute and punish enemies.¹⁰⁵ It is also systematic and high-dimensional, rather than opportunistic. President Trump has appointed, for example, loyalists to critical law enforcement agencies. Likewise, the Administration is targeting a diverse range of power centers, including universities.¹⁰⁶ And there is an effort to undermine the capacity of the bureaucracy's immune system—its civil service protections¹⁰⁷—which normally discourages the most egregious partisan uses of agency authority. It is to be seen whether this high-level, systematic effort will be successful.

CONCLUSION: RENEWED FOUNDATIONS

The most important functions performed by democracy are conflict conciliation and solving the problem of leadership succession. Those

¹⁰⁴ As White House Counsel John Dean put it in his memo proposing the offensive use of the bureaucracy against political enemies, "I have learned that there have been many efforts in the past to take such actions, but they have ultimately failed—in most cases—because of lack of support at the top." Dean, *supra* note 95.

¹⁰⁵ Tom Dreisbach, *Trump Has Made More Than 100 Threats to Prosecute or Punish Perceived Enemies*, NAT'L PUB. RADIO (Oct. 22, 2024), <https://www.npr.org/2024/10/21/nx-s1-5134924/trump-election-2024-kamala-harris-elizabeth-cheney-threat-civil-liberties> [<https://perma.cc/Q5QZ-FJBQ>].

¹⁰⁶ For example, the National Institutes of Health, a major funder of academic research, is attempting to revise its grant formula in ways that would collectively reduce university funding by billions of dollars per year. Nat'l Insts. of Health, Supplemental Guidance to the 2024 NIH Grants Policy Statement: Indirect Cost Rates (Feb. 7, 2025), <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-25-068.html> [<https://perma.cc/A22H-LTN3>]; Ailia Zehra, NIH Cuts Overhead Funding for Research, THE HILL (Feb. 8, 2025), <https://thehill.com/policy/healthcare/5134501-nih-cuts-billions-from-research-overhead-funding/> [<https://perma.cc/5MBJ-7MAA>].

¹⁰⁷ Exec. Order No. 14171, 90 Fed. Reg. 8625 (Jan. 31, 2025) ("Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce"). The so-called Department of Government Efficiency (DOGE) likewise represents a chaotic but effective method of diminishing the administrative state, which can be seen as an opposed power center. See, e.g., Yamini Aiyar & Dan Honig, *Efficiency Isn't Everything: Successful Delivery of State Services Requires Judgment, Not Chainsaws*, FOREIGN POL'Y (Apr. 7, 2025), <https://foreignpolicy.com/2025/04/07/doge-efficiency-administrative-state-government/> [<https://perma.cc/Y5B4-2G2F>] (noting that "efficiency . . . becomes the ruse for a much deeper centralization and personalization of politics").

functions require a workable system of mechanical democracy: the right to vote, the counting of votes, and the transfer of power to the person with the most votes. When it works, mechanical democracy remarkably converts what would otherwise be a messy, often bloody set of problems into an elegant mathematical question—who received the most votes?

Especially since the Voting Rights Act, theorists have increasingly turned to fuller conceptions of democracy that require, not just procedural equality, but also substantive capabilities and equality. They ask that citizens have adequate levels of health, time, and resources, and for those to be provisioned to citizens equitably. This turn reflects both a faith in the soundness of democracy's procedural foundations—viewed as basically secure since the Voting Rights Act—and the natural tendency to integrate preferred policy positions into socially inviolable concepts, such as democracy.

Yet the mechanical foundations of democracy can no longer be taken for granted, and substantive theories of democracy carry risks. They risk confusing the essential mechanics of democracy with politically contested, substantive policy choices, and they risk obscuring our vision of those mechanical essentials. I do not deny the normative value of substantive equality—it is a compelling value—but that is a value that must make its own way, rather than as a rider to democracy. And so must right-leaning values regarding community or shared civilizational heritage. If focus is due outside the mechanics, it ought to rest in the curtilage of mechanical democracy, a negative space that allows actors to engage in political activity without affirmative interference by the state. The political function of mechanical democracy is too important, its foundations now too fragile, for attention to be elsewhere.