

DEMOCRACY WITHOUT DEMOCRATS

AZIZ Z. HUQ AND TOM GINSBURG

ABSTRACT

This paper examines a distinctive set of ethical and pragmatic dilemmas, which we label “democracy without democrats,” arising in the current moment of democratic backsliding.⁷ This seemingly oxymoronic condition arises under the following circumstances. On the one hand, elected officials actors who in fact have a democratic mandate lack the necessary incentives or disposition to maintain democratic competition. On the other hand, nonelected actors, such as judges and bureaucrats, have both the incentives and the capabilities to take actions that preserve the possibility of democratic endurance. This paradoxical confluence leads to a number of problems of constitutional theory that we identify and discuss here, focusing in particular on the matter of how to remove anti-system chief executives.

KEYWORDS: *Democratic failure, constitutional design, democratic ethics*

INTRODUCTION

Two general approaches to the study of the recent global decline in the quality of democratic institutions have dominated the recent resurgence of literature on the topic. Democratic erosion can be diagnosed in either gestalt or granular terms. A gestalt approach focuses on ambient socioeconomic conditions. These might include global financial aftershocks in the wake of the 2008–9 financial crisis; the accelerating globalization of industrial capitalism; perceived cultural and

Constitutional Studies, Volume 6

©2020 by the Board of Regents of the University of Wisconsin System

demographic shocks, particularly in the form of new migrants; and the belief that historically dominant social groups are losing their grip on the labor market or markers of high social status: All these can be understood as providing potent ecological preconditions for democratic backsliding (see, e.g., Eichengreen 2018; Waldner and Lust 2018).

A granular lens, in contrast, can focus instead on a specific country's narrative arc and aims to tease out specific institutional mechanisms through which that arc travels (see, e.g., Sadurski 2019). This second approach traces the specific etiology of political candidates or movements that come to power through reasonably fair elections, but then set about abolishing institutions and norms that provide necessary ballast to constitutional democracy as a going concern. Rather than highlighting ambient conditions, this granular approach draws attention to political contingencies and local institutional configurations. It explains, for example, the rise of anti-system parties in terms of the strength of a preexisting party system and measures their success in terms of the legal and institutional tools that are immediately available to entrench themselves from electoral loss. It is an exploration of contingency rather than determined structure.

Gestalt and granular approaches are not competitors but complementary. While the gestalt approach is useful for understanding the macro-level economic and social forces that enable democratic backsliding, the granular analysis can cast tightly focused light on the specific choices and tactics available to domestic and international actors wishing to preserve or recuperate democratic government.

Together, the two levels of explanation provide complementary means of understanding and responding to democratic decline. A gestalt approach, hence, might illuminate the constraining effect of increasing global trade flows on democratic choice (see, e.g., Rodrik 2011). But in the narrow time frame in which democratic decline operates, there may be little leverage for changing such ecological conditions. Here, a granular approach can have particular value. It may provide insight into immediate interventions that mitigate the proximate risk of further democratic collapse. But these interventions may provide only limited relief without the long-term fixes suggested by the gestalt approach. Instead, to some extent, short-term fixes can even be in tension with long-term remedies, with which they will inevitably interact. Explanations that ignore either approach entirely will not properly capture the complex weave of historical experience.

In this article, we use a granular approach to sketch a general account of a class of distinctive dilemmas observed in contemporary moments of democratic backsliding, and from that observation we draw a gestalt observation about conditions of democratic survival. We argue that these often can be characterized as moments of

democracy without democrats.¹ In this condition, the main elected actors, who will generally have a democratic mandate, lack the necessary incentives or disposition to maintain durable and ongoing democratic competition. To the contrary, they may be set on stifling that prospect. In contrast, nonelected actors, such as judges and bureaucrats, may have both sufficient incentives and the capabilities to take actions to preserve the possibility of democratic constitution. The resulting paradox of democracy without democrats is that it is precisely those who *lack* an electoral mandate who are best positioned, and indeed perhaps even necessary, to making sure that electoral mandates continue to matter. (We recognize that the phrase has been used in a different sense by Lukács [1955, 61] to describe the Weimar Republic.) Our account emphasizing the democracy-supporting role of unelected institutions is in superficial tension with the view that it is precisely the large footprint of bureaucratic power, squeezing out democratic choice, that drives backsliding (Mounk 2018). But as we will explain, the two arguments are, in fact, more compatible than first seems possible.

Democracy without democrats creates a set of distinctive hurdles—ethical, strategic, and practical—for those committed to democracy preservation. For instance, is their loyalty to present incumbents, or should the interest of future potential incumbents count? What strategies are effective in recreating space for democratic competition? How in practice can constitutions be designed to empower at critical moments the key defenders of democracy who themselves lack democratic legitimacy, without creating pathological conditions at other, nonemergency times? Indeed, is there any general strategic guidance that can be offered for democracy without democrats?

We think the answer to this last question is yes. Our aim in this article is to develop a theoretical framework for identifying and mapping the difficulties of, and at least some partial solutions for, the dilemmas of maintaining democracy without democrats. Starting with some examples of instances in which a democratic reversal has been resisted is our way of provoking analysis of how that goal might be strategically pursued. To this end, our analysis assumes that democracy as a system-wide quality is a desirable state, even if the results of democratic elections at times warrant condemnation. We rely on a tripartite definition of democracy offered in our earlier work (Ginsburg and Huq 2018b; Huq and Ginsburg 2018). This definition comprises three relatively elementary institutional elements. Without these, we think, democratic competition is infeasible: free and fair elections; effective rights of political speech and association that are necessary for democratic contestation; and

1. We borrow this phrase from Georg Lukács's *Die Zerstörung der Vernunft*: "Thus the Weimar Republic was basically a republic without republicans, a democracy without democrats" (Lukács 1955, 61). We use the phrase to a different purpose. Thanks to András Jakab for the translation.

an administrative rule of law in relation to election management and the criminal law, especially as applied to members of the political opposition. This is, as we have argued before, a relatively thin definition that focuses on the minimal institutional features to maintain the possibility of rotation in office.

Part I defines democracy without democrats. It then reviews the role of unelected actors in arresting the process of democratic backsliding. Extending our earlier work, we demonstrate the possibility that unelected actors can successfully brake, albeit not necessarily derail, a dynamic of democratic backsliding. Part II then turns to the possible roles that unelected (pro-democratic) actors can play in resisting (elected) anti-system actors. We specify two general functions that might be played, and where possible give recent examples of how constitutional design might enable them. These functions are protective or Hippocratic (Huq 2016), rather than restorative in quality.

DEMOCRACY WITHOUT DEMOCRATS

Definition

The situation we characterize as democracy without democrats emerges as a result of the electoral origins of contemporary democratic backsliding. Democratic backsliding often begins when a polity elects a leader or party with a weak or nonexistent commitment to the persistence of democracy as a going concern. Whereas in previous eras threats to democracy were from revolutions or coups, today's threat is what Svobik (2015) calls "incumbent takeover": an elected leader who never leaves. To pick just a few of the prominent examples, Viktor Orbán and the Fidesz party in Hungary, Recep Tayyip Erdoğan and the AK party in (Turkey), and Hugo Chávez of the United Socialist Party of Venezuela (PSUV) all came to political power initially through reasonably fair elections. Once in power, however, they used legal and extralegal measures—ranging from electoral reform to constitutional reform to regulatory changes to overt violence—as a means to tighten their control of the state and to insulate themselves from the loss of political power through elections (for a complete taxonomy, see Ginsburg and Huq 2018b).

There is nothing necessary or inevitable about this pattern of decline. To the contrary, divergent patterns of backsliding in otherwise similar jurisdictions such as Hungary and Poland, or in Venezuela and Bolivia, suggest that specific national trajectories can have different velocities and end points.² There is no universal

2. For this reason alone, a gestalt approach training on macro-level economic or geopolitical conditions provides only partial explanation.

covering law of democratic decline circa 2019. But whatever the end point reached, it is a common feature of these cases that the parties or officials who are empowered by the democratic process are opposed, whether by ideology or disposition, to the persistence of a legally structured electoral competition for political power that “institutionalizes uncertainty” (Przeworski 1991, 10–14). They can be loosely called “anti-system.” This is a concededly baggy and capacious term that we use in a specific sense here to mean that they have a “delegitimizing” ambition regarding the democratic arrangements that brought them to power, and so their exercise of political power has a destabilizing effect on the overall democratic “regime” (Capoccia 2002, 14). They are thus the first element of democracy without democrats: a group of elected actors who are prepared to sacrifice norms, conventions, or rules functionally necessary to democratic persistence, usually in order to remain in power in spite of democratic opposition.

The second element of democracy without democrats is more subtle. As we have demonstrated in earlier work that profiled Colombia, Finland, and Sri Lanka as case studies (Ginsburg and Huq 2018a), it is often unelected actors and institutions, such as high court judges, election commissions, prosecutors, and military leaders, who have both the incentives and the ability to stand in the way of democratic backsliding. But if those brought to power with electoral mandates are not properly called democratic because of their anti-systemic agendas, then those capable of defending the democratic project also cannot be ranked as “democratic” for the distinct and different reason that they do not derive their authority directly from an electoral or representative process. Hence, with this combination in view, we can see the emergence of *democracy without democrats*: the actors with electoral legitimacy are not committed to democracy, while those in a position to defend democracy lack electoral legitimacy.

One reason that unelected actors play an important role is the relative disempowerment of the political faction that loses in the electoral process. The idea of electoral rotation implies that most political power is reassigned (if necessitated by a vote count) from a loser at the polls to the winner. But there is no necessary rule that *all* power be shifted or that a political opposition be utterly disempowered. A handful of political systems assign opposition parties a measure of countervailing control precisely as a means of preventing dominant-party entrenchment (Fontana 2009). In Germany, for instance, the rules of parliamentary procedure apportion committee chairmanships in the two legislative houses according to the percentage of seats each party has in each chamber. This kind of “government in opposition” mechanism is valuable because it may incentivize and sustain norms of reciprocity across parties (Fontana 2009). But Germany is the exception rather than rule, and

empowering the opposition remains a relatively rare design choice. Hence there is a need to think about nonelected actors' incentives and powers.

Some commentators have blamed democratic backsliding on the public's perception that bureaucracies and interest groups have seized control of political power, squeezing out space for broadly held and mutable public preferences (Mounk 2018). Technocracy begets populist backlash, in this view. At least insofar as this complaint is made about unelected elements of a national governments—as opposed to, say, about the power of unelected supranational actors (see, e.g., Mair 2013)—we think this concern is distinctly overwrought. Bureaucracies have played important and necessary functions of every single post–World War II government that has succeeded, even in part, in addressing the distributional and welfare challenges of their populations. The existence of an extensive bureaucracy is hence consistent, as a historical matter, with a robust domestic democracy, and with higher levels of confidence in government and the democratic process than are presently observed. What requires explanation, there, is *why* the public suddenly starts to perceive the bureaucracy as a problem for democracy (rather than as one necessary element for its functioning). The role of political entrepreneurs who can exploit the limited knowledge of citizens in a modern democracy should not be overlooked. To blame the unelected elements of the state for decay of democratic confidence, as Mounk and others do, is to miss the deliberately cultivated character of the anti-bureaucratic animus, and of the economic and sociocultural roots of democratic emasculation more generally.

Examples

To motivate further analysis, we offer two brief case studies of Colombia and South Africa to show how democracy without democrats can play out in practice. We pick these examples because they show how unelected actors can be at the vanguard of democracy's protection. Among the principal actors in both cases are judges. But we stress up front that judicial empowerment is a contingent and not a necessary feature of democracy without democrats.

The Colombian example originates with the 2002 electoral victory of Álvaro Uribe. This was the first time Uribe had been elected to the Colombian presidency. Quickly, he became extraordinarily popular by virtue of his aggressive approach to prosecuting a long-standing war against leftist rebels. (He indeed remains quite popular today.) But while serving as president, on two occasions he tried to change a term-limit provision in the Colombian constitution. The first time (in 2004) he succeeded, extending his one-term limit to a two-term rule, a decision blessed by

the country's Constitutional Court (Kline 2015). On the second occasion, though, he was stymied by the very same court. The justices reasoned that a second extension of the presidential term would work a "substitution" of the constitution, fundamentally undermining its original design, because it would allow the president to "name members of the central bank, the attorney general, the ombudsman, the chief prosecutor, and many members of the Constitutional Court" (Landau 2013). Twelve consecutive years in power would in effect have vested the president with tremendous power over virtually all the institutions of state, including those institutions charged with checking him. It is striking to note that the Colombian Constitutional Court resisted Uribe even though he had appointed four of its nine members at the time of the second reelection decision.

The judicial decision to rebuff Uribe's second effort at term-limit extension is an important instance of a nonelected institution's defense of democracy-eliciting rules. Term limits are not a necessary precondition of democracy, to be sure. But they can be a useful instrument in its preservation. As a result, they are often subject to attack by anti-system politicians intent on entrenching themselves in power (Ginsburg et al. 2010). Equally, the Constitutional Court's success in preserving term limits cannot be equated with an unequivocal and certain stability in democratic institutions. While judicial intervention foreclosed Uribe's effort to keep the presidency, his influence on Colombian politics did not disappear.

On June 17, 2018, a run-off presidential election ended in victory for Iván Duque, a protégé of former president Uribe. Moreover, until July 2018, Uribe himself remained in the Colombian Senate despite a number of ongoing investigations for bribery and human rights violations that also amounted to serious crimes (Cohen 2018). At the time of this writing, he is on trial for witness-tampering charges, charges that have provoked popular demonstrations in Uribe's favor. At a more systemic level, open questions remain about whether Duque will follow his mentor's example, and if so, whether he might be able to find a way to circumvent judicial checks. At this point, though, Colombia's democracy seems to have survived the immediate threat of incumbent takeover.

A second example of democracy without democrats can be found in recent South African experience. Unlike Colombia, South Africa has a parliamentary system rather than a presidential one. The president is elected by the parliament and remains in office so long as he or she has dominant party support. Under Section 89 of the 1996 Constitution, the president can be removed in the event of a serious violation of the constitution or law, serious misconduct, or an inability to perform the functions of the office. Indeed, Thabo Mbeki was forced from office in 2008 for supporting a corruption investigation against Jacob Zuma, his rival in

the African National Congress (ANC). In one of those nice ironies of history, it was Zuma's ascent to the presidency that accelerated systemic corruption of a kind that threatened the state's legitimacy and ability to deliver basic services—and it was an unelected actor who proved indispensable in resisting the wholesale infection of the state by that blight.

During the Zuma presidency, the state was captured by a group of businesses owned and operated by a trio of brothers from the Gupta family. Public contracts were steered to preferred businesses owned by the Guptas at exorbitant rates in exchange. In return, officials received kickbacks. Ministers who declined to cooperate with the Guptas were unceremoniously relieved of their duties and office (Huq 2019). The extent of “state capture” in South Africa under President Zuma, and its corrosive effect on public confidence in the state and on the efficacy of democratic accountability, makes it an apt case study for how democracy without democrats works in practice.

This second case study is especially interesting because it was not just the Constitutional Court that took the pro-democracy initiative. Rather, it was the Office of the Public Protector. This is an investigative body fashioned in Chapter IX of the 1996 South African Constitution. This chapter of the Constitution creates a whole suite of nonelected institutions designed to promote constitutional democracy under the rule of law. The Office of the Public Prosecutor has constitutional authority, among other things, to investigate “any conduct in state affairs, or in the conduct of public administration in any sphere of government” that is alleged to have been “improper, or to result in any impropriety or prejudice.” This kind of ombudsman office, an innovation first used in Sweden, has become an increasingly common constitutional design choice in recent years (Ginsburg and Huq 2018b). Its popularity is an indication of how constitutional designers at least believe that non-judicial bureaucrats can play important roles in the defense of democratic norms.

In the South African case, the public protector's role in maintaining democracy involved disclosure to the public of systemic corruption. Her disclosures ultimately had the effect of undermining Zuma's ability to maintain a grip on ANC leadership. The nation's Constitutional Court, in contrast, played a secondary, albeit also necessary, role in ensuring that the ombudsman's recommendations were taken seriously.

In 2013, Public Protector Thuli Madonsela released a report on President Zuma's second home in Nkandla, concluding that Zuma had substantially and improperly benefited from state-funded improvements to that property. She recommended that Zuma also be required to repay the state reasonable costs. Prior to the release of the public protector's final report, the parliamentary ANC party had also

initiated its own investigation of the Nkandla spending. Rather unsurprisingly, this inquiry cleared Zuma of any impropriety. Indeed, for a whole year after the public protector's report had been submitted, a stalemate ensued. Neither the president nor the parliament took any steps to implement her recommendations (Klug 2015; Huq 2019).

In the end, it fell to the Constitutional Court's judges to break the deadlock. The South African Constitutional Court has a long record of interventions on matters of institutional design aimed at promoting democracy under a stable rule of law (Dixon and Roux 2020). For instance, in 2011 the Court invalidated legislation dissolving the former anti-corruption investigative task force and creating a new, weaker one. (*Glenister v. President of the Republic of South Africa and Others* [2011] ZACC 6). The *Glenister* majority reasoned that the new investigative structure was insufficiently independent from the president, a situation that generated an excessive and improper risk of partisan capture. The decision was pathbreaking insofar as it signaled the Court's recognition of its structural role in maintaining institutions of accountability. In the later part of the Zuma presidency, this understanding was placed under great strain. Both President Zuma and parts of the parliamentary ANC party spent considerable political capital to stymie investigations into corruption and to derail sanctions and condemnations flowing from successful anti-corruption probes. It thus was not entirely surprising that when minority parties in parliament were rebuffed in their efforts to secure some action on the public protector's report, they would turn to the Court for redress.

Accepting the minority parties' challenge to that parliamentary rebuff of the protector's report on Nkandla, the Constitutional Court categorically rejected the ANC's implicit presupposition that recommendations of the public protector were merely advisory. A functional logic akin to that of the *Glenister* decision played a key role here. As Chief Justice Mogoeng explained, "[O]ne cannot talk about remedial action unless a remedy in the true sense is provided to address a complaint in a meaningful way." He instead underscored the "irrationality" of allowing alleged malefactors to decide whether they should comply with the public protector's recommendation. Such a posture, Mogoeng added, would be "at odds with the rule of law" (*Economic Freedom Fighters v. Speaker of the National Assembly and Others* [2016] ZACC 11). As the South African constitutional law scholar Stu Woolman has observed, the *Economic Freedom Fighters* decision is best understood as a "part of the Constitutional Court's ongoing efforts to keep the train on the tracks—by ensuring that the state, specific state actors, and 'well-connected' private actors abide by the rule of law and are held accountable both to the Constitution and the people they serve." (Woolman 2016, 174-75).

The public protector's investigations undermined ANC support for President Zuma and ultimately led to his removal from office by parliament and his replacement with Cyril Ramaphosa as the head of the party. At least in the medium term, therefore, a series of legalistic interventions by unelected bureaucrats and judges created political conditions under which a ruling, anti-system coalition could collapse (albeit not allowing interparty rotation in power). By altering the political payoffs from corruption through the disclosure of new information to the public, in other words, the Court and the Office of the Public Protector helped stymie a process of ongoing decay in constitutional institutions. Of course, just as in the Colombian case, there is no guarantee that this intervention will have durable effects. After all, at least from one angle, Zuma's initial ascent to power might have seemed a victory for democracy, as it marked the orderly intraparty replacement of the unpopular Mbeki. So his fall may one day be understood as the beginning of a darker chapter, not a better one. But it does indicate that vigilance by unelected institutions toward the functioning of democracy is warranted and can have a powerful impact.

Ethics

Democracy without democrats creates a distinctive ethical dilemma. Nonelected actors are put to the choice of honoring the preferences of current voters or enabling future voters to exercise a meaningful democratic choice. Assuming that public support for an anti-system party is sufficiently durable, some considerable time might elapse between the present and a circumstance in which an electoral majority is unable to vindicate its preferences at the polls because of anti-system entrenchment (although both Venezuela and Turkey arguably reached this predicament within a single generation of anti-system party rule and over the course of a small number of electoral cycles). A welfare economist might counsel "discounting" future generations' interests to their present value. One interpretation of this position might suggest that nonelected actors should not rush to conclude that democratic backsliding will induce subsequent regret among democratic subjects.

Yet it is far from clear that the political obligation of those officials should be characterized in welfarist terms in the first place. Constitutional design decisions are not simply about or easily reducible to the task of maximizing welfare (Huq 2016). Instead, it is useful to invoke instead the concept of democratic trusteeship, developed by Dennis Thompson (2010, 26), as a normative principle that might plausibly guide the actions of unelected officials in moments of democratic stress. According to Thompson's principle, an official must "make sure that citizens continue to have competent control over their collective decision-making" in the future.

Thompson applied this concept in a very general way. Subsequently, the model has been more specifically to assess the appropriate role of constitutional courts (Dyevre 2015), although whether courts have some distinctive role to play in terms of democracy protection is far from clear (Ginsburg and Huq 2018b). We think the trusteeship model has particular application to nonelected figures who exercise significant discretion over the manner in which governance occurs, such as the military and bureaucracies tasked with the fair administration of elections. Indeed, we think that the Colombian and South African cases showcase it in action. As of this writing, ongoing events in Bolivia triggered by an arguably flawed presidential election may be providing yet another instance of the trusteeship model in action (although whether the military role there will be limited to trusteeship remains unclear).

Generalizing?

The Colombian and the South African examples explored here are not unique. In other work, we have pointed to examples in Sri Lanka and interwar Finland as instances in which nonelected actors—militaries, electoral commissions, police officials—saved the day by refusing to defect on democracy (Ginsburg and Huq 2018a). Under some circumstances, international actors and institutions may play a valuable role; this is perhaps embodied in the recent efforts of the European Union to shore up the Polish judiciary in the face of attacks by the ruling Law and Justice Party (PiS). For present purposes, we offer the two cases above as evidence of the sheer *possibility* of the dynamic that we characterize here as democracy without democrats. This is the dynamic in which elected actors embark on a course of conduct that is inconsistent with the preservation of democratic competition and in which the strongest defense of the latter is mounted by unelected actors such as bureaucrats and judges. Any effort to generalize from these cases, however, must proceed with caution. A possibility is not a certainty, nor even necessarily a likelihood. Although we will describe strategies that unelected actors might take under these conditions, there are two reasons for thinking that their efforts will be fragile or unreliable. Absent thoughtful constitutional design, as well as a measure of luck, democracy without democrats can collapse into the absence of democracy.

First, there is no certainty that nonelected actors will succeed when they attempt to impede anti-system leaders and political coalitions. In Venezuela, for example, Hugo Chávez was successful in deploying against his foes a suite of tactics usefully labeled “discriminatory legalism” (Weyland 2013, 24–25). Chávez’s efforts included diverting funds from the state’s exploitation of natural resources to political ends, using regulatory authorities to close independent television stations, and

deploying the criminal law to jail and harass opponents. When Chávez had to purge the judiciary to make these steps effective, he also found enough support within the administrative and judicial ranks to get his “Bolivarian revolution” off the ground by overcoming whatever early resistance he encountered. Judges’ efforts to appeal to international institutions, such as the Inter-American Court of Human Rights, also did not lead to effective redress. To the extent nonelected actors resisted these initiatives, they failed. This shows that failure is perennially a possibility. Where a backsliding leader can divide and conquer an unelected bureaucracy, this possibility may loom even larger.

Second, as the Venezuelan case intimates, the prediction that unelected actors will favor democracy in the absence of elected actors committed to its persistence should not be confidently proffered. As we have noted elsewhere (Ginsburg and Huq 2018b), how security forces break in a context between pro- and anti-system forces will often be determinative of a polity’s trajectory. The failure of the “Egyptian spring” and the ultimate fate of the Venezuelan movement against President Nicholas Maduro’s regime—at the time of this writing still mired in stalemate—exemplify this. Rather than dwell on those familiar examples, we discuss here the United States, which between 2016 and 2019 has evinced an interestingly complex case of democracy without democrats.

Assume for a moment that the beginning of the Trump presidency marked a real threat of accelerated backsliding, given the peculiar temperament and ethical orientation of the electoral winner, in tandem with the willingness of a major American political party to tolerate violations of conventions against politicization of investigations and the use of formal governmental authority to oust or harass perceived political foes. Such a risk might obtain even if electoral competitiveness remains healthy. Consider, against this background, whether and how successfully nonelected actors in the United States have evinced a commitment to democracy under the rule of law.

A tally of that commitment reveals a decidedly mixed bag. On the positive side, the president’s need to peremptorily fire the director and deputy director of the Federal Bureau of Investigation, as well as the persistence of criminal investigations by both the US Office of Special Counsel and also the US attorney for the Southern District of New York, is evidence that many unelected officials believe that their commitment runs not to the transient holders of political office but to the larger institutional principles of legality and democracy. Furthermore, the whistleblower complaint that led the House of Representatives to open up an impeachment inquiry in relation to President Trump’s dealings with the Ukraine—which ultimately concluded in impeachment and then acquittal—was followed by a parade

of career officials risking career-related retaliation, presidential calumny, and even violent threats by testifying before Congress. The sheer breadth and consistency of these witnesses' testimony provides some support for our central thesis here—that often the best defenders of democracy will themselves have no democratic credential. Consistent with Jon Michaels's recent analysis of what some have called the American "deep state," the Washington bureaucracy proved in practice "demographically diverse, highly accountable, and lacking financial incentives or caste proclivities to subvert popular will" (Michaels 2017). As a matter of institutional demography, this nonelected body may well be more representative in one sense than those chosen through polls to sit in Congress or the White House.

Similarly, we have to date no reason to believe that the parts of the federal government responsible for the compilation of economic data on growth and employment have been influenced by the president's desire to buff his reputation.³ That the 2018 mid-term election led to the loss of several of the president's allies in Congress suggests that in most of the country, elections officials do not act in a partisan fashion. And while remaining decidedly committed to remaining in the barracks and to deference to the commander-in-chief, the military has slow-walked the most outrageous demands, for example his order to exclude soldiers from its ranks simply because of their status as gender-nonconforming.

However, the president did indeed fire James Comey from the Federal Bureau of Investigation in 2017, arguably for self-serving and even corrupt reasons—with no substantial political consequences. He also harassed from office an attorney general, Jeff Sessions, precisely because he was insufficiently vigorous in a Roy Cohnesque defense of the president's own person from Special Counsel Robert Mueller, and later ousted a number of inspectors general. If Deputy Attorney General Rod Rosenstein survived a parallel campaign, it is only because his boss's firing relieved him of the responsibility of supervising the Mueller investigation. Sessions's replacement, William Barr, has turned the force of his office toward the goal of investigating the president's enemies and pursuing his personal and partisan grievances. Moreover, other elements of the federal bureaucracy have been particularly vigorous in pursuing the nativist and persecutory elements of the president's populist agenda. For instance, the Department of Homeland Security has

3. To be clear, we do not subscribe to the rash of reckless talk of a "deep state," a term formerly used to describe the destabilizing effect of a powerful military's informal influence on domestic politics in Turkey, Pakistan, and other jurisdictions. There are important differences of valence and scale between those cases and that of the United States. It is either laziness or partisan bile that underlies the use of that term, which has migrated from the left to the right in recent terms. We see no reason to think it has analytic power on either side of the political ledger.

seemingly embraced with relish the pursuit of stepped up immigration enforcement, in particular against migrant families and children. This has led to a sharp uptick in family and juvenile detentions (Eagly et al. 2018). To be clear, changing the intensity of immigration law enforcement is not directly tied to any one predicate of constitutional democracy under the rule of law. Rather, the shift in enforcement priorities and the Trump administration’s rapid embrace of—and perhaps even an identification with—a nativist set of priorities may fairly be characterized as indexing the risk of democratic backsliding.

Perhaps of greater concern is the attitude of the federal courts. The Republican-dominated Senate’s stymying of nominations and confirmations of federal judges during the Obama administration, followed by a rush of appointments under President Trump, means that a growing share of the bench is politically aligned with the regnant political regime. These judges are more likely to accept claims to broad executive branch authority, unbounded by free speech or antidiscrimination constraints. A concrete example is the June 2018 decision by a majority of the Supreme Court that found no hindrance to the so-called travel ban, notwithstanding candidate and then-president Trump’s litany of disparaging and animus-laden comments made in its justification (Huq 2019). Another has been the willingness of the Supreme Court to intervene before lower-court adjudication had run its course—until now, a highly unusual move—in litigation over whether a citizenship question could lawfully be added to the 2020 national census and whether a presidential ban on transgender members of the armed services violated norms of equal protection. This embrace of populist policies must be set alongside the high probability that the Supreme Court will impose no barrier to more overtly antidemocratic moves by the executive branch, including *sotte voce* efforts to exclude racial minorities from the franchise, to threaten political foes, or to use state power for improperly entrenching ends.

The US case thus crisply illustrates that the unelected elements of a government should not be viewed as a whole. Instead, different elements of the government are pointed in different directions. The US case also suggests that there is no reason to believe that an institution’s constitutional status means the institution orients toward the defense of constitutional democracy. It is, after all, the federal courts that have done the least in that cause, and a federal bureaucracy unanticipated by the drafters of the Constitution in 1787 that has done the most. The divergence from familiar encomiums to the force of judicial independence and the importance of courts more generally should not go unrecognized.

More broadly, there has been a general, secular trend in constitutional design that recognizes a “fourth branch” of government beyond the scheme famously

laid out by Montesquieu and instantiated by the drafters of the US Constitution. Among the various accountability institutions that are now routinely constitutionalized are counter-corruption commissions, ombudsmen, and human rights institutions; but some countries also have public service commissions designed to maintain and defend a neutral civil service.⁴ Precisely because of its age and the difficulty of amending its formal text, the US Constitution lacks this genre of institutional safeguards. It is hard to see it being better off for that.

HOW TO SURVIVE DEMOCRACY WITHOUT DEMOCRATS: TWO GENERAL STRATEGIES

The Colombian and South African examples are suggestive of two general approaches that nonelected actors might adopt in defense of democracy under conditions of backsliding. This part explores these two general approaches, which we have labeled *protective* (or Hippocratic) on the one hand, and *restorative* on the other. These protective and restorative approaches, we stress at the outset, are not mutually exclusive: Some steps might, indeed, have both effects. But their ends are distinct, and they reflect different estimates of the likely future equilibrium. We conclude by pointing out the critical constitutional design choices implicated in these two approaches.

A first possibility is for unelected actors to take a protective, or Hippocratic, approach under conditions of democratic backsliding. This would entail their taking actions that limit the damage to, say, human rights or economic stability without challenging the entrenchment of the newly ascendant anti-systemic candidate or party. The effect of such actions would be to limit the extent of spillover damage from democratic backsliding without actually checking the process itself and to at least leave open the possibility of a return to democracy at another date. The public protector's investigation of Nkandla, for example, might be characterized as an effort to identify and stanch a particularly pernicious form of corruption by the South African president. The investigation might have been pursued, not with any hope of ending Zuma's term of office, but with the far more modest goal of reining in an especially potent public example of corruption, with a particularly large "demonstration effect" on the behavior of hierarchically subordinate actors (Khondker 2006). The Office of Public Protector's efforts might thus have been

4. See, e.g., Constitution of Colombia (1991), Art. 130; Constitution of Fiji (2013), Arts. 125–26; Constitution of India (1949), Art. 315. By our count, forty-one constitutions in force have provisions for a public service commission.

aimed at curbing, without entirely foreclosing, the transactional basis of Zuma's grip on power. A possible result was his remaining in office for the duration of his term, but better restrained by norms and institutions of accountability. Although greater accountability was not assured, it at least remained on the table as a political option.

A second possibility is that a nonelected actor intervenes more aggressively to restore democratic competition. The idea is to reboot the political system by allowing electoral competition to work anew, potentially leading to the rotation of power. That is likely to happen only through the ouster of the individual or party responsible for backsliding. The Colombian Court's refusal to countenance a third term for President Uribe hence had no protective effect. Rather, it aimed directly at a change in senior leadership. Preserving rotation in office was itself the goal, without concern for the quality of whoever ascended to leadership in the future. From this angle, the ultimate effect of the Office of Public Protector's actions in South Africa, in tandem with the Constitutional Court, might from the start have been motivated by a hope that revelations of Zuma's corruption would make it too politically costly for the ANC to keep Zuma in a leadership position. Of course, such a strategy is both uncertain *ex ante* and potentially risky. Failure to oust Zuma might have allowed not just his consolidation of power. It might have also discredited allegations of corruption as grounds for repudiating a leader. That dynamic is arguably discernable in the US context, in which the ability of candidate and President Trump to ride out allegations of sexual harassment and an invidious toleration of violent white supremacists might have made both sexual harassment and also white supremacy less stigmatized as political tropes (cf. Rosa and Bonilla 2017). A failed attempt at restoration, that is, risks inducing new collateral damage to important human interests.

Both the Colombian and the South African cases can plainly be interpreted as examples of restorative strategies at work. Both are ambiguous in one important regard. In both, it may have been unclear *ex ante* whether what was required for the effectual defense of democracy was the defenestration of a particular chief executive or the more general reform of a whole political movement. In some instances of "charismatic populism" (see Ginsburg and Huq 2018b), a particular political leader may be particularly important. The coherence of a political movement may depend on that leader's ability to tap into public belief in the illegitimacy of the political system precisely through his or her "flagrant" and repeated violations of public conventions of civility, truth telling, and toleration (Hahl et al. 2018, 1–2). Consistent with this theory, in the US context, some evidence suggests the openly racist and rabidly nativist elements of candidate Donald Trump in fact contributed to his ultimate success at the polls (Morgan and Lee 2016, 2018). If public support

for an anti-system formation is closely tied to the appeal of what Hahl et al. (2018) call a specific “lying demagogue,” then targeting that one leader might be a means to start rebuilding democratic institutions.

Yet, the death of Hugo Chávez and the persistence in office of the far less charismatic Nicholas Maduro suggest that even where the political appeal of an anti-systemic formation is tightly bound up with a particular politician’s charismatic appeal, a sufficiently entrenched party can survive the (literal) passing of its charismatic leader if it can appeal to the material interests of the security services. Hence, to the extent that an unelected defender of democracy seeks to pursue a restorative strategy, it seems necessary to know whether a specific leader is pivotal in the production and reproduction of backsliding or whether the regime’s legitimation strategy is not organized around a single charismatic figure (cf. Mazepus et al. 2016, for a demonstration of heterogeneity across regimes in this regard). Of course, whether this is so will often only be clear in hindsight.

The relationship of protective and restorative strategies is complex. Plainly, an unelected defender of democracy can take a step in the hope that it has both kinds of effects. The Office of Public Protector’s move against Zuma in relation to the Nkandla corruption scandal can be characterized as both protective and restorative. A strategy might begin as protective and over time morph into the restorative as its effect on public opinion becomes clear. Yet, the Colombian Constitutional Court’s term limit decision had no protective effect. It was instead entirely restorative. There is therefore in a subset of cases in which democracy’s bureaucratic champion need not choose: He or she can safeguard the people and their right to select their leaders simultaneously. But there are also instances in which a strategic choice must be made between the protection of democracy as an institution and the mitigation of the harmful effects of defecting from democracy.

Under these conditions, the choice between protective and restorative approaches can plausibly be understood to depend on expectations of near-term political dynamics. A preventive strategy may be premised on the belief that an anti-system regime has considerable public support, such that it is unlikely to be displaced in the near future but would if displaced quickly reassert itself by seizing power once more. For instance, in April 2018, the Fidesz party won yet another two-thirds supermajority of seats in Hungary’s parliamentary elections. Relative to the 2014 poll, Fidesz managed to increase its vote share by 4 percent (from 45 percent to 49 percent) and to attract some half-million new voters, in large part through its bellicose anti-immigrant positions (Krekó and Enyedi 2018). Although Fidesz’s success at consolidating power flows from many sources, including its success in co-opting the state apparatus and controlling the flow of news and information into the

country, Krekó and Enyedi observe that “the post-2010 regime draws its legitimacy from the personal authority of Viktor Orbán.” So long as he heads the government, perhaps little can be done to restore the quality of Hungarian democracy (at least assuming his charisma does not fade or become tarnished for other reasons).

In contrast, a restorative approach must aim—whether implicitly or explicitly—at the repudiation of a leader or a party; hence, it must assume that once this repudiation occurs, the voting public will not simply return that person or organization to political power. For instance, the strenuous domestic and international efforts in late 2018 and early 2019 to remove Maduro from the Venezuelan leadership appear to rest on the assumption that once his immediate grip on power is loosened, the people will not simply return him to power at another poll. In effect, the restorative approach rests on the assumption that a hard reset of the democratic process will have a rejuvenating effect. It also rests on the assumption that a charismatic populist has not so altered the ideological terms of his or her own party such that the party will pivot back from an anti-system orientation to play by democracy’s basic ground rules once again. As the Venezuelan transition from Chávez to Maduro demonstrates, this is hardly a secure assumption.

In a rather similar vein, in the United States, some commentators have observed that the troubling nativist, racist, and antidemocratic elements of the Trump presidency are likely to persist after he has left office. On this account, Trump has successfully reorganized the primary base of the Republican party, creating a core group of partisans with preferences quite different from that party’s primary base during the 1990s and 2000s (Novkov 2018). More generally, there is some evidence that American liberals and conservatives now have asymmetrical attitudes to their political opponents when they are in national leadership positions: Democrats seem to be more willing to accept Republican leadership as legitimate than the reverse (Morisi et al. 2018). Indeed, hysterical rhetoric about the existential peril of a Clinton presidency—encapsulated in the phrase the “Flight 93 election”—invoking the September 11 hijacking to argue that Hillary Clinton represented a “civilization that wants to die”—may well have helped Republicans to capture the presidency in 2016.⁵ On this quite plausible account of shifting partisan psychology, talk of impeachment or the Twenty-Fifth Amendment as means

5. Flight 93 refers to the hijacked airliner whose passengers overwhelmed the hijackers on September 11, 2001. It was invoked as an analogy for a Clinton victory in 2016 in an anonymous but influential, article. See, e.g., Publius Decius Mus, *The Flight 93 Election*, available at <https://www.claremont.org/crb/basicpage/the-flight-93-election/>. We know of no firm evidence of the causal impact this rhetoric had on the election. But the appeal’s hysterical quality is self-evident from the article’s irresponsible and irreparably slanted treatment of facts.

of changing the White House's leadership is beside the point: The problem is the underlying transformation in partisan orientation and a deeper, albeit asymmetrical, unwillingness of one side of the political spectrum to accept as legitimate the possibility of alteration of power. The problem, on this view, is no longer the specific person in the Oval Office. It is, rather, that a crucial, politically significant slice of the voting public has defected from one of democracy's basic assumptions.⁶ By way of important caveat, however, we do not assert that the Democrats are immune from this phenomenon, only that the Republicans seem to have adopted it first. The decision of certain Democrat activists to run false or misleading electioneering schemes on social media in the 2018 election is evidence of the bilateral potential of this dynamic.

Another important distinction between the two approaches is that the restorative strategy requires some theory to guide determinations of which certain actions among many possibilities will bring about the end of a specific presidency or government. It has to have a theory, that is, of the hard constitutional reset. This suggests that the mechanism supplied in a constitutional text for removing a chief executive or for changing the partisan character of a ruling coalition will be crucial in practice. Generally, such mechanisms come in two forms. First, a presidential system will have a device such as impeachment or criminal prosecution to oust a leader. This leads to several questions (Huq 2018): Will a political mechanism such as impeachment be exclusive or complementary to a legalistic mechanism such as prosecution? And more important, how is the inevitable entanglement of legal and political considerations and processes best managed? Presidential term limits provide only a partial solution to the problem, since backsliding may occur within the frame of a single term, and term limits themselves may also be subject to evasion and corrosive attack (Ginsburg et al. 2010). Conversely, the recent Bolivian case provides some grounds to think such attacks can in turn backfire.

Second, in a parliamentary system, leadership change will generally occur through a legislative vote of no confidence. An important subspecies of the latter are constructive votes of no confidence, which allow for removal of a prime minister only if an alternative government can be formed. The constructive and the nonconstructive modes of no-confidence mechanisms can also be combined. The Fixed Parliament Act of 2011 in the United Kingdom, for instance,

6. The intractability of the resulting problem is suggested, albeit from a different perspective and under different conditions, by Brecht's famous poem *Die Lösung*. ("Wäre es da/ Nicht doch einfacher, die Regierung/ Löste das Volk auf und/ Wählte ein anderes.").

mandates a period of delay after a no-confidence vote, during which efforts to find a substitute ruling coalition must be made, after which a new election must occur. That this measure has had complex and arguably destabilizing anticipatory effects in the absence of any no-confidence vote, including decreasing party discipline and increasing the risk of hung parliaments, suggests that the design of such mechanisms presents thorny and complex problems (which are discussed in illuminating detail in Craig 2018 from a legal perspective, and Schleiter and Issar 2016 from a political science lens).

More generally, we think the design of these hard reset mechanisms is one of the most difficult and insufficiently studied problems of constitutional design. On the one hand, such mechanisms in both parliamentary and presidential systems have to cope with the inevitable risk of opportunistic exploitation by a particular government's partisan foes. They should therefore not be too easy to effectuate. On the other hand, the mechanism cannot be so hard to deploy that under conditions of real backsliding it is unavailable. Yet it is devilishly difficult to write a constitutional rule that distinguishes cleanly between these two classes of likely cases, both of which must be encompassed and accounted for in the hard reset rule.

CONCLUSION

Our aim in this article has been to introduce a new way of characterizing the dilemma facing officials committed to democracy within a context of active backsliding from democratic norms and institutions. We have called this situation “democracy without democrats” because it is characterized by the lack of an actor who both (a) has a democratic mandate, and (b) is committed to the persistence of the democratic enterprise.

Under these conditions, two general strategies can be pursued. One is protective, insofar as it aims to limit the damaging spillovers to human well-being and the economy from democratic erosion. The other is the restorative approach, which strikes instead at the core of the backsliding problem itself: It aims to achieve a hard reset of the balance of political power to bring back a stable democratic equilibrium. Which of these is feasible and appropriate depends on contingent elements of the political landscape, as well as on the range of constitutional tools available. We have identified the specific instrument whereby the hard reset is achieved as particularly important. In future work, we intend to investigate further the relationship between different kinds of removal devices in the presidential context in particular, and the kinds of strategic analyses that we have only begun to explore here. The topic, in short, is a rich one that is far from being exhausted.

REFERENCES

- Capoccia, Giovanni. 2002. "Anti-system Parties: A Conceptual Reassessment." *Journal of Theoretical Politics* 14 (1): 9–35.
- Cohen, Steven. 2018. "Why Colombia Keeps Electing Presidents Tied to Murderers." *The New Republic*, May 18, 2018.
- Craig, Robert. 2018. "Restoring Confidence: Replacing the Fixed-Term Parliaments Act 2011." *Modern Law Review* 81 (3): 480–508.
- Dixon, Rosalind, and Theunis Roux. 2020. "Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa." In, *From Parchment to Practice: Implementing New Constitutions*, ed. Tom Ginsburg and Aziz Z. Huq, 53–75. New York: Cambridge University Press.
- Dyevre, Arthur. 2015. "Technocracy and Distrust: Revisiting the Rationale for Constitutional Review." *International Journal of Constitutional Law* 13 (1): 30–60.
- Eagly, Ingrid, Steven Shafer, and Jana Whalley. 2018. "Detaining Families: A Study of Asylum Adjudication in Family Detention." *California Law Review* 106:785.
- Eichengreen, Barry. 2018. *The Populist Temptation: Economic Grievance and Political Reaction in the Modern Era*. New York: Oxford University Press.
- Fontana, David. 2009. "Government in Opposition." *Yale Law Journal* 119 (3): 548–623.
- Ginsburg, Tom, and Aziz Z. Huq. 2018a. "Democracy's Near Misses." *Journal of Democracy* 29 (4): 16–30.
- . 2018b. *How to Save a Constitutional Democracy*. Chicago: University of Chicago Press.
- Ginsburg, Tom, James Melton, and Zachary Elkins. 2010. "On the Evasion of Executive Term Limits." *William and Mary Law Review* 52:1807.
- Hahl, Oliver, Minjae Kim, and Ezra W. Zuckerman Sivan. 2018. "The Authentic Appeal of the Lying Demagogue: Proclaiming the Deeper Truth about Political Illegitimacy." *American Sociological Review* 83 (1): 1–33.
- Huq, Aziz. 2016. "Hippocratic Constitutional Design." In *Assessing Constitutional Performance*, ed. Tom Ginsburg and Aziz Z. Huq, 39–70. New York: Cambridge University Press.
- . 2018. "Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design." *UCLA Law Review*, vol. 65, no. 6.
- . 2019. "Article II and Anti-discrimination Norms." *Michigan Law Review* 118:47–115.
- . 2019. "A Tactical Separation of Powers." *Constitutional Court Review* (forthcoming).
- Huq, Aziz, and Tom Ginsburg. 2018. "How to Lose a Constitutional Democracy." *UCLA Law Review* 65 (1): 78.
- Khondker, Habibul Haque. 2006. "Sociology of Corruption and 'Corruption of Sociology': Evaluating the Contributions of Syed Hussein Alatas." *Current Sociology* 54 (1): 25–39.
- Kline, Harvey F. 2015. *Fighting Monsters in the Abyss: The Second Administration of Colombian President Álvaro Uribe Vélez, 2006–2010*. Birmingham: University of Alabama Press.

- Klug, Heinz. 2015. "Accountability and the Role of Independent Constitutional Institutions in South Africa's Post-apartheid Constitutions." *New York Law School Law Review* 60 (1): 153–80.
- Krekó, Péter, and Zsolt Enyedi. 2018. "Orbán's Laboratory of Illiberalism." *Journal of Democracy* 29 (3): 39–51.
- Landau, David. 2013. "Abusive Constitutionalism." *University of California at Davis Law Review* 47:189–260.
- Lukács, Georg. 1955. *Die Zerstörung der Vernunft*. Berlin: Aufbau Verlag.
- Mair, Peter. 2013. *Ruling the Void: The Hollowing Out of Western Democracy*. New York: Verso.
- Mazepus, Honorata, Wouter Veenendaal, Anthea McCarthy-Jones, and Juan Manuel Trak Vásquez. 2016. "A Comparative Study of Legitimation Strategies in Hybrid Regimes." *Policy Studies* 37 (4): 350–69.
- Michaels, Jon D. 2017. "The American Deep State." *Notre Dame Law Review* 93 (4): 1653–70.
- Morgan, Stephen L., and Jiwon Lee. 2016. "The White Working Class and Voter Turnout in US Presidential Elections, 2004 to 2016." *Sociological Science* 4:656–85.
- . 2018. "Trump Voters and the White Working Class." *Sociological Science* 5:234–45.
- Morisi, Davide, John T. Jost, and Vishal Singh. 2018. "An Asymmetrical 'President-in-Power' Effect." *American Political Science Review* 113 (2): 614–20.
- Mounk, Yasha. 2018. "The Undemocratic Dilemma." *Journal of Democracy* 29 (2): 98–112.
- Novkov, Julie. 2018. "How Do We Solve a Problem like the Donald? The Democratic Challenge of Trump Supporters and the Politics of Presidential Removal." *New Political Science* 40 (3): 439–58.
- Przeworski, Adam. 1991. *Democracy and the Market*. Cambridge: Cambridge University Press.
- Rodrik, Dani. 2011. *The Globalization Paradox: Democracy and the Future of the World Economy*. New York: W. W. Norton.
- Rosa, Jonathan, and Yarimar Bonilla. 2017. "Deprovincializing Trump, Decolonizing Diversity, and Unsettling Anthropology." *American Ethnologist* 44 (2): 201–8.
- Sadurski, Wojciech. 2019. *Poland's Constitutional Breakdown*. New York: Oxford University Press.
- Schleiter, Petra, and Sukriti Issar. 2016. "Constitutional Rules and Patterns of Government Termination: The Case of the UK Fixed-Term Parliaments Act." *Government and Opposition* 51 (4): 605–31.
- Svolik, Milan. 2015. "Which Democracies Will Last? Coups, Incumbent Takeovers, and the Dynamic of Democratic Consolidation." *British Journal of Political Science* 45 (4): 715–38.
- Thompson, Dennis F. 2010. "Representing Future Generations: Political Presentism and Democratic Trusteeship." *Critical Review of International Social and Political Philosophy* 13 (1): 17–37.
- Waldner, David, and Ellen Lust. 2018. "Unwelcome Change: Coming to Terms with Democratic Backsliding." *Annual Review of Political Science* 21 (1): 93–113.
- Weyland, Kurt. 2013. "The Threat from the Populist Left." *Journal of Democracy* 24 (3): 18–32.

Woolman, Stu. 2016. “A Politics of Accountability: How South Africa’s Judicial Recognition of the Binding Legal Effect of the Public Protector’s Recommendations Had a Catalyzing Effect That Brought Down a President.” *Constitutional Court Review* 8 (1): 155–92.

CASES CITED

Economic Freedom Fighters v. Speaker of the National Assembly and Others [2016] ZACC 11

Glenister v. President of the Republic of South Africa and Others [2011] ZACC 6

