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### A Republic If [We] Can Keep It: A Prolegomenon on Righting the Ship of State in the Wake of the Trumpian Tempest Book Review

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#### Recommended Citation

Ronald J. Krotoszynski Jr., *A Republic If [We] Can Keep It: A Prolegomenon on Righting the Ship of State in the Wake of the Trumpian Tempest Book Review*, 98 *Tex. L. Rev.* 539 (2019).

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# “A Republic If [We] Can Keep It”: A Prolegomenon on Righting the Ship of State in the Wake of the Trumpian Tempest

DEMOCRACY AND DYSFUNCTION. By Sanford Levinson & Jack M. Balkin.  
The University of Chicago Press. 2019. 208 pages. \$25.00.

Ronald J. Krotoszynski, Jr.\*

*Democracy has to be born anew every generation,  
and education is its midwife.*<sup>1</sup>

## I. A Tempest in a Teapot? Or a Full-Bore Maelstrom?: Defining the Existence and Scope of the Problems Vexing Our National Governing Institutions

After the close of the Federal Convention in Philadelphia, Dr. Benjamin Franklin, when asked by a “Mrs. Powel[I]” exactly what sort of government the delegates had fashioned, quipped, “A republic . . . if you can keep it.”<sup>2</sup> That question—whether we can maintain the relevance, functionality, and structure of our national governing institutions—remains no less pressing today than in 1789, when the federal government became operational. And, moreover, it constitutes a question that Sandy Levinson and Jack Balkin, the authors of *Democracy and Dysfunction*,<sup>3</sup> are remarkably well-suited both to ask and to answer. Their verdict, alas, is not an altogether promising one.

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\* John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. This Review Essay reflects the benefit of the thoughtful and constructive comments and suggestions provided by the law faculty at the University of Oklahoma College of Law, incident to a faculty workshop. The University of Alabama Law School Foundation provided a generous summer research grant, which greatly facilitated my ability to work on this project. I should also express my thanks to the Seattle University School of Law for hosting me as a Visiting Scholar in Residence during the summer of 2019, when I was at work on this Review Essay. Kerry Fitz-Gerald, a research librarian at the Seattle University law library, provided invaluable research assistance, locating a wide variety of sources—of varying degrees of obscurity—at lightning speed and with good cheer. Finally, the usual disclaimer applies: Any errors or omissions are the sole responsibility of the author.

1. John Dewey, *The Need of an Industrial Education in an Industrial Democracy*, 17 MANUAL TRAINING & VOCATIONAL EDUC. 409 (1916), reprinted in 10 JOHN DEWEY: THE MIDDLE WORKS, 1899–1924: JOURNAL ARTICLES, ESSAYS, AND MISCELLANY PUBLISHED IN THE 1916–1917 PERIOD 137, 139 (Jo Ann Boydston ed., 1980).

2. *Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 AM. HIST. REV. 595, 618 (1906) (“A lady asked Dr. Franklin Well Doctor what have we got a republic or a monarchy. A republic replied the Doctor if you can keep it.”).

3. SANFORD LEVINSON & JACK M. BALKIN, *DEMOCRACY AND DYSFUNCTION* (2019). Most citations to this work will appear within the text itself as parentheticals.

Sandy Levinson and Jack Balkin are preeminent legal academics who have both regularly made major—indeed iconic—contributions to the field of public law.<sup>4</sup> In *Democracy and Dysfunction*, these two gifted constitutional theorists have set a remarkably difficult task for themselves: identifying and addressing the most pressing structural problems facing the national government and proposing solutions equal to the task of making our union a more perfect one.

We tend reflexively to presume the durability and legitimacy of both the Constitution and the governing institutions that it creates. Yet, the systematic breakdown of institutional norms and conventions<sup>5</sup> over the past fifty years, and with even greater frequency since January 20, 2017,<sup>6</sup> raises troubling questions about the underlying strength and durability of the federal government. As with the government created under the Articles of Confederation, serious people are starting to question if our national government's design remains workable.<sup>7</sup>

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4. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (arguing that originalism and living constitutionalism are compatible); J. M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998) (explaining ideology as the result of cultural evolution and the spread of cultural know-how); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006) (arguing that many constitutional provisions promote unjust, insufficiently democratic, or ineffective government); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988) (examining constitutional faith and its effect on American society through comparisons with religious faith).

5. See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1103–14 (2013) [hereinafter Bradley & Morrison, *Presidential Power*] (discussing how consistent practice over time generates constitutional conventions that, if not legally binding on future presidents, nevertheless impose meaningful constraints on them); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 410–11, 415–28 (2007) (arguing that subconstitutional sources of law, including statutes, regulations, and settled practices, effectively structure and constrain the federal government even if these legal rules are not entrenched against change going forward in the same way as the Constitution itself).

6. See Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 177–79, 190–203 (2018) (arguing that President Donald Trump has violated numerous constitutional practices and conventions). Professor Siegel posits that “[e]ven as judged by the lower standards of polarized times, President Trump stands alone” because “[n]o one else in recent memory has approached the degree of his disregard of political norms and constitutional conventions.” *Id.* at 190.

7. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 463–67 (1969) (describing the serious concerns and reservations that contemporary social and political leaders held regarding the Articles of Confederation prior to the drafting of the Constitution). It bears noting that serious misgivings about the national government under the Articles of Confederation arose well before popular confidence in that government more or less collapsed in the late 1780s. For example, George Washington, first president of the national government under the Constitution of 1787, wrote despairingly in May 1786 that “there are errors in our National Government which call for correction; loudly I will add.” Letter from George Washington to John Jay (May 18, 1786), in 4 *THE PAPERS OF GEORGE WASHINGTON, CONFEDERATION SERIES*, 2 APRIL 1786–31 JANUARY 1787, at 55–56 (W. W. Abbot ed., 1995), <https://founders.archives.gov/GEWN-04-04-02-0063> [<https://perma.cc/KS66-NWGE>]. He added that “something must be done, or the fabrick must fall. It certainly is tottering!” *Id.* Washington nevertheless questioned whether sufficient popular support existed for writing a new blueprint for the national government, observing

Even if our national governing institutions are in need of an update, however, an important condition precedent must be met before any serious reform effort, whether or not involving constitutional amendments, can get off the ground: An active, engaged, and well-informed citizenry focused on these fundamental questions of institutional design and function must exist. At present, however, one may charitably describe the overall level of political engagement in the United States as “rather low.” Most ordinary Americans know relatively little about their government or its institutions and are, to use retired Justice Sandra Day O’Connor’s turn of phrase, civically illiterate.<sup>8</sup>

What’s more, in the absence of serious social, economic, and political disruptions that materially affect the ordinary lives of average Americans, creating and sustaining the high level of political engagement that would be required to remodel the federal government’s institutions and their operation seems highly unlikely.<sup>9</sup> Professor Levinson may well “continue to ride [his] hobbyhorse of wanting us to pay attention to the Constitution itself and at least to think of serious constitutional reform” (p. 44), but will the body politic fall in line under his constitutional reform banner?

Another way of assessing the prospects for major constitutional reform would be to ask: Does the United States currently face a serious constitutional crisis? The answer to this question probably will depend upon whom you ask. Jack Balkin, for example, emphatically answers this question in the negative.

In Balkin’s view, a constitutional crisis exists only if problems arise that the existing institutions of government are incapable of addressing through ordinary politics. He explains that “[a] constitutional crisis occurs when there is a serious danger that the Constitution is about to fail at its central task,” which consists of “keep[ing] disagreement within the boundaries of ordinary politics rather than breaking down into anarchy, violence, or civil war” (pp. 91–92). Moreover, “[y]ou can tell if you are in a constitutional crisis when politicians stop saying that they will comply with the law, with judicial orders, or with the Constitution” (p. 95). Balkin argues that the United States is not (yet) in a constitutional crisis “and for that, at least, you can be thankful” (*id.*).

Levinson, by way of contrast, believes we already have reached a point of inflection; he points to “the breakdown of Congress as a truly functioning institution” (p. 48) and the rise of “a more Caesarist conception of the presidency” (p. 47) as compelling evidence of not merely a breakdown in, but rather the failure of, the Madisonian system of the separation of powers.<sup>10</sup>

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that “the people are not yet sufficiently misled to retract from error” and he warned that “[i]gnorance & design, are difficult to combat.” *Id.*

8. Sandra Day O’Connor, *The Rule of Law and Civic Education: Foreword*, 67 SMU L. REV. 693, 698 (2014).

9. See LEVINSON & BALKIN, *supra* note 3, at 11–12, 172, 174 (lamenting the lack of interest within the legal community in rethinking the federal government’s institutional arrangements).

10. See *id.* at 46–50 (arguing that institutional failures have been exacerbated by presidents who

He posits that the United States has reached the advent of a “constitutional dictatorship” by the President (p. 50). Given these unfortunate developments, “those who place their faith in the Madisonian system of checks and balances—or the virtues of attending America’s elite institutions—to save us from the ravages of a sociopathic narcissist are deluding themselves” (*id.*). In sum, “James Madison has truly, and irrevocably, left the building” (*id.*).

Even if we have not yet reached a full-bore constitutional crisis, as Levinson argues (pp. 43–50, 169–89), we have certainly seen in recent times a great many informal constitutional conventions go the way of the dodo bird. Indeed, a skeptical reader need not rely solely on Levinson and Balkin to establish the truth of this assertion. Even if our governing institutions have not failed—in the same way as those under the Articles of Confederation were widely believed to have failed<sup>11</sup>—it is clear that they are evolving in troubling ways that present a real and growing risk of widespread dysfunction (if not quite a complete collapse).

Several well-regarded public law scholars also have concluded that the Madisonian system of checks and balances is no longer functioning as the Framers intended—and endorse in part, if not in whole, Levinson’s thesis of a failed Madisonian system of the separation of legislative, executive, and judicial powers. Professor Bruce Ackerman, for example, has warned for over a decade about the potentially disastrous effects of unchecked growth in the President’s unilateral power to act—not only with respect to foreign and military affairs but also at home, through the organs of the administrative state.<sup>12</sup>

In making these arguments, Ackerman’s work harkens back to Arthur Schlesinger, Jr.’s earlier Cassandra-like warning, issued during the Nixon Administration, of a creeping “imperial Presidency.”<sup>13</sup> Tracing the growth over time in the scope of executive power, primarily in the areas of foreign and military affairs, Schlesinger credited President Nixon with expanding the

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have shamelessly flouted the Madisonian system of checks and balances coupled with Congress’s failure to challenge successfully broader and more frequent presidential assertions of unilateral governing authority); THE FEDERALIST NO. 51, at 320–22 (James Madison) (Clinton Rossiter ed., 1961) (arguing for the necessity of a system of checks and balances, reflected in the separation of powers, to ensure that “[t]he interest of the man [will] be connected with the constitutional rights of the place”).

11. For a relevant discussion of the myriad shortcomings of the federal government under the Articles of Confederation, see ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 84–90 (6th ed. 1983) and GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 13–20 (2009).

12. See BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 3–7 (2010) (arguing that an unchecked modern presidency will produce highly undesirable outcomes and do so on a regular basis).

13. See ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 418 (1973) (coining the phrase “the imperial Presidency,” thereby popularizing it within the broader socio-legal culture, and arguing that once firmly established, an “imperial presidency” will be impossible to check if We the People acquiesce in and ratify through the electoral process the presidency’s heightened, unilateral powers).

boundaries of presidential power in the domestic arena: “The imperial Presidency, created by wars abroad, was making a bold bid for power at home.”<sup>14</sup> He concludes that the Nixon Administration succeeded in “produc[ing] an unprecedented concentration of power in the White House and an unprecedented attempt to transform the Presidency of the Constitution into a plebiscitary Presidency.”<sup>15</sup>

Professors Eric Posner and Adrian Vermeule express similar concerns about the systematic failure of Congress to assert itself against an increasingly imperial President.<sup>16</sup> Unlike Levinson and Balkin, however, they are pessimistic about the ability of formal legal constraints to cabin the continued growth in the President’s authority: “[E]xecutive-centered government in the administrative state is inevitable” and courts applying the separation-of-powers doctrine “cannot hope to constrain the modern executive.”<sup>17</sup> Rather than law, they posit that “political substitutes” can provide a sufficient constraining force on the Executive Branch to avoid “executive tyranny.”<sup>18</sup> Thus, instead of resisting a *de facto* reallocation of power from Congress to the President, Posner and Vermeule argue that the trend toward an imperial presidency is inevitable, irreversible, and, all things considered, not really a big deal.<sup>19</sup>

More recently, Professor Neil Siegel has lamented the Trump Administration’s routine flouting of established institutional norms.<sup>20</sup> Siegel posits that “what is most troubling about President Trump is his disregard of political norms that had previously constrained presidential candidates and Presidents, and his flouting of nonlegal but obligatory ‘constitutional conventions’ that had previously guided and disciplined occupants of the White House.”<sup>21</sup> When political actors abide by well-established constitutional conventions, these conventions “help the U.S. government function at least tolerably well by keeping partisanship within reasonable bounds” because they “discourag[e] elected officials from pushing their legal

14. *Id.* at 377.

15. *Id.*

16. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 13–15 (2010) (arguing that checks and balances have atrophied in the face of executive power and that federal judges probably will not arrest, much less reverse, this trend through judicial enforcement of Madisonian separation-of-powers principles).

17. *Id.* at 14–15.

18. See *id.* at 14–17 (“[L]aw does little to constrain the modern executive . . . whereas politics and public opinion do constrain the modern executive . . .”).

19. See *id.* at 16–17 (“After . . . the decline of the separation of powers, executive government is not despotic, but it is or can be popular and broadly credible among the citizenry.”).

20. See generally Siegel, *supra* note 6 (discussing political norms, why they matter, and the ways in which President Trump has disrespected them).

21. *Id.* at 177–78.

powers to their respective maxima” (which can and does lead to gridlock and chaos).<sup>22</sup>

Siegel argues that the United States faces a serious problem with its national governing institutions, but frets that “[i]t is far easier to diagnose the problem than it is to offer promising solutions, because it is far easier to observe that respect for political norms and constitutional conventions is eroding in American politics than it is to identify all of the reasons why.”<sup>23</sup> He posits that “[i]t is essential that the President be called out for his disregard of political norms and constitutional conventions each and every time he disrespects them.”<sup>24</sup> It is not clear, however, how efficacious this approach would be in ensuring that the imperial-presidency-on-steroids genie goes back inside the bottle after Donald Trump vacates 1600 Pennsylvania Avenue.

Constitutional conventions are, to use Professor Keith Whittington’s apt description, “maxims, beliefs, and principles that guide officials in how they exercise political discretion.”<sup>25</sup> Violating a constitutional convention may not be, strictly speaking, unlawful or illegal, but doing so involves “violat[ing] the spirit of the constitution.”<sup>26</sup> He explains that constitutional conventions “serve a normative function within constitutional politics, leading political actors to better realize constitutional ends.”<sup>27</sup> Accordingly, their widespread die-off under the Trump Administration constitutes a serious problem that will significantly complicate the ability of our national government to function effectively going forward.

The U.S. system of national governance relies, to some extent, on political actors not exerting their constitutional authority in maximal ways routinely, but it also relies on constitutional actors exercising some powers to check unilateral assertions of authority by the other branches. Yet, today we face not only an “imperial” president but also a quiescent Congress.<sup>28</sup> Despite Madison’s assumption that ambition would check ambition,<sup>29</sup> today, as Professor Curtis Bradley and Dean Trevor Morrison observe, “the

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22. *Id.* at 188.

23. *Id.* at 203.

24. *Id.*

25. Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860 (2013).

26. *Id.* at 1852. For a useful and detailed discussion of both constitutional and extra-constitutional conventions, see Young, *supra* note 5, at 410–28, 455–61. Professor Young argues that “much—perhaps even *most*—of the ‘constitutional’ work in our legal system is in fact done by legal norms existing outside what we traditionally think of as ‘the Constitution.’” *Id.* at 411.

27. Whittington, *supra* note 25, at 1853.

28. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 436–47 (2012) [hereinafter Bradley & Morrison, *Historical Gloss*] (discussing the causes of gradual congressional acquiescence through delegation and warning that “legislative power is being transferred to the executive branch rather than jealously guarded”).

29. THE FEDERALIST NO. 51, *supra* note 10, at 322 (“Ambition must be made to counteract ambition.”).

existence and especially the extent of many other obstacles to effective congressional checks on executive power — including members’ tendency to think more in terms of party than branch, and the President’s greater ability to appeal to the national electorate”—constitute “defining elements of *modern* government” and “the Madisonian conception of separation of powers is not an accurate description of modern congressional-executive relations.”<sup>30</sup>

Our national government’s system of checks and balances relies, in almost equal measure, on both institutional self-restraint and institutional *action*; today, however, both are in short supply. Professor Siegel observes that, in the absence of responsible government, “troubling questions arise regarding how the federal government is to execute its basic responsibilities of filling executive and judicial offices, solving problems that the states are not well-situated to address on their own, and safeguarding rights through the passage and updating of civil rights legislation.”<sup>31</sup> And what is the core source of the problem? Bradley and Morrison explain that “Congress by itself often seems either unable or unwilling to provide adequate checks on executive power.”<sup>32</sup>

If these trends continue unabated, the effective locus of federal power will shift from Congress to the President—much as power shifted in ancient Rome from the Senate to the Emperor.<sup>33</sup> Prior to the Trump Administration, we already faced, to use Ackerman’s turn of phrase, a “runaway presidency.”<sup>34</sup> With its advent, and the recklessness with which President Trump has refused to honor long-standing conventions that limit the President’s freedom of action,<sup>35</sup> the erosion of the Framers’ carefully calibrated system of separated powers, in which “ambition would counteract ambition,” now rivals the melting of the Greenland glaciers. In sum, to

30. Bradley & Morrison, *Historical Gloss*, *supra* note 28, at 446–47; see Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 884 (2007) (arguing that “[w]hether or not this picture [of Madison’s ambition checking ambition] was ever realistic, it is no longer so today”).

31. Siegel, *supra* note 6, at 189.

32. Bradley & Morrison, *Presidential Power*, *supra* note 5, at 1112.

33. MICHAEL CRAWFORD, *THE ROMAN REPUBLIC* 187 (1978); ERICH S. GRUEN, *THE LAST GENERATION OF THE ROMAN REPUBLIC* 503 (1974). Crawford explains that this evolutionary process in the allocation of power from the Senate to the Emperor was deemed fundamentally “compatible with the Roman system of values” because “central to the Roman revolution was not the replacement of one oligarchy by another, but the creation of a despotism, supported by a very different consensus from that which had supported the collective rule of the Republican aristocracy.” CRAWFORD, *supra*, at 187; see GRUEN, *supra*, at 506–07 (noting that “[f]undamental change did not receive consideration” because “[r]eforms, when they came, were generally piecemeal and unconnected, prompted by ad hoc situations, often induced by considerations of politics”). Professor Ackerman appears to believe the analogy to the decline and fall of the Roman Republic to be an apt one. ACKERMAN, *supra* note 12, at 16.

34. ACKERMAN, *supra* note 12, at 6.

35. For some salient examples, see Siegel, *supra* note 6, at 190–203.



paraphrase the iconic Tom Hanks (playing astronaut Jim Lovell) line from the motion picture *Apollo 13*, “[Washington], we have a problem.”<sup>36</sup>

## II. Does the National Government Require Radical Reform, Conventional Reform, or Both?: An Overview of *Democracy and Dysfunction*

Some years ago, Professors Levinson and Balkin participated in a symposium on structural problems that arise from the Constitution and what could be done to fix them. They debated, at the symposium and later in print, whether the problems currently facing the national government can be fixed by operation of ordinary statutes and judicial decisions (conventional reform) or if they require the ultimate reform device, namely, a constitutional convention to write a new foundational document (radical reform). This initial engagement took place in 2015, and their interlocution was published in 2016.<sup>37</sup> Levinson and Balkin decided to build on this initial exchange, through a series of letters—which are really short essays—written between September 29, 2015, and January 1, 2018.

In these essays, Levinson and Balkin debate whether the Constitution itself is broken and needs to be replaced (Levinson) or whether the United States is simply going through a rough patch that could be addressed and redressed through more targeted statutory and judicial interventions (Balkin). This obviously reflects a fundamental disagreement about both the nature of the problems confronting the federal government and what will be required to solve them.

Professor Balkin posits that statutory and judicially driven reforms that would make our electoral processes more democratic could restore more than a modicum of normalcy to our national government. He acknowledges a problem with what he calls “constitutional rot” (pp. 105–15), but argues that “constitutional rot” need not be fatal to our existing constitutional arrangements (pp. 193–203). In his view, radical change is simply not necessary to arrest and correct our present institutional difficulties (pp. 21–23, 38–39, 105–15).

Balkin’s proposed reforms would include abolishing the districting requirement for seats in the House of Representatives (an 1842 federal statute currently requires districting),<sup>38</sup> as well as a broad campaign finance reform

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36. APOLLO 13 (Universal Pictures 1995).

37. Sanford Levinson & Jack M. Balkin, *Democracy and Dysfunction: An Exchange*, 50 IND. L. REV. 281 (2016).

38. See The Apportionment Act of 1842, ch. 47, 5 Stat. 491 (providing that members of the House “shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative”); see also Daniel A. Farber, *Legislative Constitutionalism in a System of Judicial Supremacy*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 431, 447 (Richard W. Bauman & Tsvi Kahana eds., 2006) (noting that the use of districts and first-past-the-post winners “exist[] only by congressional sufferance”). Professor Balkin observes, quite correctly, that “we can move from single-member districts in the House to

project, the use of nonpartisan districting commissions to end the practice of gerrymandering districted legislative seats, and other reforms in voting procedures (pp. 22, 31, 199–203). Moreover, Balkin squarely rejects the argument that the United States is in the midst of a constitutional crisis (pp. 91–95), emphasizing that “[t]he American Constitution has multiple veto points and checks and balances precisely to prevent the kind of calamity that you fear would occur if your political adversaries were able to work their will without restraint” (p. 36).

Levinson, by way of contrast, thinks that structural problems are themselves responsible, at least in part, for the federal government’s current dysfunctional state (pp. 11–14). Moreover, if this is so, then merely treating the symptoms will not prove sufficient to the task at hand (pp. 27–34). He concludes that the best way forward would involve drafting and adopting a new federal constitution that fundamentally reshapes the federal government (pp. 31–34, 169–89). As he explains his position, “[w]hatever the promise of the Constitution’s Preamble about the importance of ‘We the People,’ the reality is something else, and I, for one, would feel much better if the citizenry were not forced to continue living under a greatly defective Constitution because [the Framers] deprived us of an effective way of reasserting our own collective autonomy” (p. 34).

Levinson is quite obviously the more pessimistic of the two—and by a wide margin. In his view, the United States suffers under a constitutional structure that no longer functions adequately (and Levinson strongly implies that it has never functioned particularly well) (pp. 12–14, 170–81). Among the counts in his bill of indictment: the President has too much unilateral power (particularly in the areas of foreign and military affairs) and is insufficiently accountable for his actions more generally (pp. 170–75); Congress is hopelessly polarized and institutionally incapable of pushing back effectively against unilateral presidential power-grabs (pp. 12–14, 86, 145–47, 155, 170–76); the equal voting rights of each state in the Senate and Electoral College are radically, and unjustifiably, undemocratic (pp. 11, 175–

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other forms by ordinary statute[s].” LEVINSON & BALKIN, *supra* note 3, at 22. Of course, this elides the problem of getting members of the House of Representatives who contested and won election through single-member districts, with a first-past-the-post winner, to abolish the very system that produced their electoral victories—a prospect that seems, at best, highly unlikely. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) (stating that when it comes to identifying processes undeserving of trust in American representative democracy, “our elected representatives are the last persons we should trust”). Moreover, history is instructive regarding the altruism of incumbents: Incumbent state legislators would not address the gross malapportionment of seats. Instead, the Supreme Court’s intervention proved essential to fixing this structural problem. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that plans for seat apportionment in the Alabama Legislature were constitutionally invalid and “completely lacking in rationality”); *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding that state legislatures violated the Fourteenth Amendment Equal Protection Clause by drawing districts that were grossly unequal in population). The same political economy would appear to apply for abolishing districted, first-past-the-post elections for seats in the federal House.

81); and the Article V amendment process is far too cumbersome and has led to the ossification of our constitutional rules (pp. 175–76). Finally, and more broadly, Levinson laments that no serious conversations regularly take place in the nation’s law schools about these glaring constitutional deficiencies (pp. 11–12).

Both Levinson and Balkin do agree on one point: Congress as an institution has failed to perform its constitutional responsibility to serve as a meaningful check on the Executive Branch (pp. 141–66). In fact, Balkin believes that some means of removing an incompetent or corrupt President, short of impeachment, would be desirable, even though a constitutional amendment, a very difficult undertaking, would be necessary to secure such a reform (pp. 164–66). He also advocates a greater role for congressional oversight and posits that more competitive congressional elections might lead Congress more reliably to undertake its constitutional oversight duties (*id.*).

Despite greater overall agreement between Levinson and Balkin in this area than in others, Levinson, perhaps predictably, is considerably more pessimistic than Balkin regarding the immediate prospects of “reigning” in the imperial presidency. He balefully observes that even when Congress attempts to constrain unaccountable presidential authority over foreign and military affairs (for example, by adopting, over President Nixon’s veto, the War Powers Act of 1973), these efforts have more often than not failed—if not backfired (pp. 145–47).

Congress clearly intended the War Powers Act to serve as a *check* on unilateral presidential military authority. Today, however, the statute instead functions as something of a *blank check* to deploy U.S. military forces for up to sixty days without first consulting with Congress—much less seeking formal congressional approval in advance of deploying U.S. armed forces (p. 146). Levinson argues that the War Powers Act has morphed over time into “a permission slip for the president to initiate hostilities for sixty days without having to worry about receiving congressional permission” (*id.*). We have reached a point, he laments, where “[i]t is now regarded as simply naïve to point to the text of the Constitution and its assignment to Congress of the power to ‘declare war’” (p. 145). Indeed, the Executive Branch not only treats the War Powers Act as a blank check to engage in military operations for up to sixty days but also reads the statute down to avoid its application when offensive military operations abroad exceed the sixty-day “authorization.”<sup>39</sup>

In sum, both Levinson and Balkin posit creeping “Caesarism” or “presidential dictatorship,” not only in the context of diplomatic and military affairs but also with respect to the administrative state here at home (pp. 45,

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39. See Bradley & Morrison, *Presidential Power*, *supra* note 5, at 1099–100, 1140–41, 1145–47 (noting that, despite “widespread criticism” of the Obama Administration’s unilateral decision to go to war in Libya, “there was no serious effort in Congress to force the President to comply with the letter of the [War Powers Act]” after his Administration read the Act narrowly to justify continuing its offensive after sixty days).

58–61, 153–60). Moreover, they concur that this state of affairs has become the established status quo (even among academics at Harvard Law School (p. 174)). Levinson explains that “[a]s political polarization has crippled Congress, the president has become increasingly emboldened to act unilaterally, safe in the knowledge that a Congress that cannot pass legislation has few ways to stop him” (p. 155).<sup>40</sup> It bears noting that Levinson and Balkin are hardly alone in criticizing the creeping evolution of the office of the President into that of a Roman Emperor and Congress’s abject failure to do anything meaningful to arrest, much less reverse, this trend.<sup>41</sup>

Unfortunately, however, Levinson and Balkin fail to offer any concrete solutions, *capable of implementation in the current political situation*, that would restore the lost system of Madisonian checks and balances. The principal solution that they offer—a constitutional amendment creating a new presidential removal power for Congress that would be less onerous than impeachment under Articles I and II<sup>42</sup>—is capable of neither easy adoption nor implementation (pp. 148–50, 161–66, 202–03). Why would Congress seek to enhance its accountability when it routinely and predictably fails to assert itself using the oversight tools that it already possesses? What is more, even if congressional elections were more competitive, there is little reason to believe that Congress would necessarily assert itself more forcefully (even if one or both houses of Congress are controlled by the opposition party). The core problem lies with Congress shirking its constitutional duties (as the next Part will explain and explore).

### III. On the (Very) Poor Prospects for Securing Meaningful Institutional Reform: The Core Problems with the Federal Government’s Design and Operation Are Deep-Seated and Incapable of Easy-to-Implement Solutions

Times of fat and plenty do not often give rise to revolutionary changes in political arrangements. The Revolutionary War was the product of ten years of British taxation without representation, going back to the first Stamp Act of 1765, which imposed taxes on Great Britain’s North American colonies to offset the cost of frontier military operations against the French

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40. See also Bradley & Morrison, *Historical Gloss*, *supra* note 28, at 414–15, 438–47 (comparing the Madisonian model of interbranch competition to the modern reality). As Bradley and Morrison note, “[a]lthough Congress and the President may disagree about particular policies, Congress as a body does not systematically seek to protect its prerogatives against presidential encroachment.” *Id.* at 414–15. This is so because of “both collective action problems and veto limitations,” in addition to “the tendency of individual members to identify more strongly with their political party than with the legislative branch as an institution.” *Id.* at 415.

41. See *supra* notes 12–36 and accompanying text.

42. See U.S. CONST. art. I, § 2, cl. 5, § 3, cl. 6 (conferring on the House the sole power to impeach officers of the United States, including the President, and vesting with the Senate the sole power to try impeachments initiated by the House); *id.* art. II, § 4 (providing that the President may be removed from office through conviction under articles of impeachment).

and their allies, several of the indigenous populations of the eastern United States.<sup>43</sup> The Philadelphia Convention took place only after the government under the Articles of Confederation proved itself totally inept and a cheap-money financial crisis brought about if not a full depression, then a rather deep recession.<sup>44</sup> As Professor Gordon Wood explains, “[t]he ability of America to sustain any sort of republican government seemed to be at issue.”<sup>45</sup>

The Articles of Confederation came into force on March 1, 1781. It took six years of total gridlock, coupled with a national economic crisis, before Congress authorized a convention to consider proposing amendments to revamp the national government’s structure and powers.<sup>46</sup> The delegates in Philadelphia obviously took a page from Sarah Palin and “went rogue”<sup>47</sup>—they grossly exceeded the scope of their mandate by proposing an entirely new government and bypassing the ratification rules for changes to the

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43. See KELLY, HARBISON & BELZ, *supra* note 11, at 47–53 (detailing the taxes imposed on the colonies by the British Parliament and the colonists’ highly dyspeptic reaction to them).

44. See *id.* at 84–90 (discussing the multitude of shortcomings of the federal government under the Articles of Confederation). As Professor Wood explains, “The events of the 1780s seemed to point toward ‘some crisis, some revolution’ that could not be predicted.” WOOD, *supra* note 11, at 14. Many states adopted debt forgiveness and paper money schemes that threatened the stability of commercial credit markets and created a serious risk of hyperinflation. *Id.* at 19.

45. WOOD, *supra* note 7, at 466.

46. See KELLY, HARBISON & BELZ, *supra* note 11, at 86–88 (describing the “impotence” of Congress and the financial difficulties facing the country under the Articles of Confederation); see also WOOD, *supra* note 11, at 15 (“There were, of course, many defects in the Articles of Confederation that had become obvious by the 1780s.”).

47. Former Alaska Governor and 2008 GOP vice-presidential nominee Sarah Palin has embraced this characterization of her approach to the 2008 presidential campaign—despite its origin as part of a parody on the NBC satirical show *Saturday Night Live*. See generally SARAH PALIN, GOING ROGUE: AN AMERICAN LIFE (2009) (adopting the title of “going rogue” in Palin’s memoir); see also Maureen Dowd, *Come Back, Sarah Palin!*, N.Y. TIMES (Apr. 14, 2012), <https://www.nytimes.com/2012/04/15/opinion/sunday/dowd-come-back-sarah-palin.html?searchResultPosition=1> [<https://perma.cc/9KV5-BLYN>] (“Two of the most hallucinatory moments in ‘S.N.L.’ history came in 2008, when Tina Fey’s Sarah Palin and the real Palin sashayed past each other, and when John McCain roguishly appeared in a skit with Fey’s Palin going rogue.”). For a serious discussion of how Palin resolutely and consistently refused to be managed by the McCain campaign during the 2008 general election campaign (i.e., “went rogue”), see JOHN HEILEMANN & MARK HALPERIN, GAME CHANGE: OBAMA AND THE CLINTONS, MCCAIN AND PALIN, AND THE RACE OF A LIFETIME 396–401 (2010). Like Palin, the delegates at the Federal Convention in Philadelphia quickly determined that they would simply disregard their marching orders from the Congress under the Articles of Confederation. See KELLY, HARBISON & BELZ, *supra* note 11, at 93, 106 (recounting how the convention adopted a resolution to create a more powerful national government when the convention “had been commissioned merely to modify the Articles of Confederation,” and how the convention adopted a plan for ratification of the Constitution that “violated the method of amendment in the Articles of Confederation”); WOOD, *supra* note 7, at 463–67, 532–33 (“If the Federalists were to accomplish their revolution, they would necessarily have to circumvent the Articles of Confederation whose amendment legally required the unanimous consent of the state legislatures.”).

Articles of Confederation (which, like the EU today, required unanimity for any amendments to the existing constitutional rules).<sup>48</sup>

Until our republic “hits bottom”—or the equivalent for a nation’s governing institutions—and the federal government’s hopeless dysfunction causes obvious, serious, and unacceptable economic problems, most Americans simply do not care whether Congress and the Supreme Court are abjectly deferential to the President.<sup>49</sup> Or that the President continues to accumulate and exercise more and more unilateral power (not only with respect to diplomatic and military affairs, where the Congress and the federal courts have traditionally deferred to the President,<sup>50</sup> but also with respect to the regulatory state within the nation’s borders). Indeed, this trend significantly predates the Trump Administration and the practice of presidents seeking to expand the scope of their unilateral authority knows no ideological or partisan limits.<sup>51</sup>

It was, after all, President Obama who asserted the right to assassinate U.S. citizens living abroad by dropping Hellfire missiles on them.<sup>52</sup> When lawyers and law professors objected to the President unilaterally deciding to execute U.S. citizens abroad, the incumbent Attorney General, Eric Holder, gave a major speech at the Northwestern University School of Law, where

48. See RUSSELL L. CAPLAN, *CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* 141 (1988) (discussing how the delegates of the Philadelphia Convention overstepped their limited commission to revise the Articles of Confederation by creating a whole new system of government and also referencing the unanimity requirement for amendment to the Articles of Confederation); see also KELLY, HARBISON & BELZ, *supra* note 11, at 90–96, 106 (discussing the circumstances that led the Congress under the Articles of Confederation to call a convention for proposing amendments and the convention delegates’ subsequent decision simply to write an entirely new plan of government with a new and different ratification process).

49. See, e.g., Mickey Edwards, *We No Longer Have Three Branches of Government*, POLITICO (Feb. 27, 2017), <https://www.politico.com/magazine/story/2017/02/three-branches-government-separation-powers-executive-legislative-judicial-214812> [<https://perma.cc/J2GP-FA8Z>] (discussing the mounting evidence of systematic congressional and Supreme Court abdication of their constitutional checking functions in the face of growing unilateral presidential authority and also how many Americans appear to have become increasingly blasé about this trend).

50. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 132 (2d ed. 1996) (observing that the federal courts are less inclined to vigorously enforce constitutional norms in cases involving diplomatic or military affairs); see, e.g., Holder v. Humanitarian Law Project, 561 U.S. 1, 36 (2010) (“Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government’s interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups’ nonviolent ends.”).

51. See SCHLESINGER, *supra* note 13, at ix–x, 41–46.

52. SCOTT SHANE, *OBJECTIVE TROY: A TERRORIST, A PRESIDENT, AND THE RISE OF THE DRONE* 281–85 (2015); Editorial, *Justifying the Killing of an American*, N.Y. TIMES (Oct. 11, 2011), <https://www.nytimes.com/2011/10/12/opinion/justifying-the-killing-of-an-american.html> [<https://perma.cc/X4NU-YGGP>]; see Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268, 1268–69, 1272–74 (2013) (analyzing whether a “duty to capture” might apply to the Obama Administration’s decision to carry out targeted killings).

he explained that executive process can, in some instances, be an effective and reliable substitute for judicial process.<sup>53</sup> As “The Who,” wryly observed:

Yeah

Meet the new boss

Same as the old boss.<sup>54</sup>

Despite prominent public law scholars—including Levinson and Balkin, but also including others, such as Bruce Ackerman<sup>55</sup>—expressing grave concerns about how our national governing institutions are failing to perform adequately, unless and until these sentiments are much more widely held and deeply felt by average voters, the prospects for either moderate or profound change are bleak. Accordingly, good reasons exist for believing that continued drift and evolution will continue over time with institutional changes taking place on an interstitial basis (rather than via major statutory or constitutional change).

The Senate, for example, is clearly evolving from a deliberative body into an institution that functions more or less identically to the House of Representatives. Moreover, Congress, as an institution, seems to function more and more as a parliamentary body, with members of the President’s party serving as little more than a cheering squad for the White House.<sup>56</sup> The Senate GOP’s abject deference to Donald Trump’s most questionable decisions, from shuttering the federal government for over a month,<sup>57</sup> to

53. Eric Holder, Attorney Gen. of the U.S., Speech at Northwestern University School of Law (Mar. 5, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> [<https://perma.cc/82EA-82L3>] (arguing that the President is not required to seek and obtain permission from a federal court before taking action against a United States citizen who was allegedly a senior operational leader of Al-Qaeda or associated forces because “[d]ue process’ and ‘judicial process’ are not one and the same, particularly when it comes to national security” and “[t]he Constitution guarantees due process, not judicial process”); *cf.* Ohlin, *supra* note 52, at 1325–31 (arguing that the Constitution imposes concrete limits on the ability of the federal government to kill a citizen without judicial process that comports with the minimum requirements of procedural due process and the specific procedural guarantees of the Bill of Rights).

54. THE WHO, *Won’t Get Fooled Again, on WHO’S NEXT* (Polydor Records 1971).

55. See ACKERMAN, *supra* note 12, at 1–13, 15–28, 181–88 (arguing that the separation of powers has become distorted by the increasingly unchecked office of the President); *see also* Bruce Ackerman, *Foreign Policy: The Imperial Presidency of Obama*, NPR (Mar. 25, 2011, 8:23 AM), <https://www.npr.org/2011/03/25/134848072/foreign-policy-the-imperial-presidency-of-obama> [<http://perma.cc/QBR9-7MJQ>] (arguing that the Obama Administration’s intervention in Libya exemplified a disturbing trend toward an even more imperial presidency).

56. Bradley & Morrison, *Historical Gloss, supra* note 28, at 442–43; *see* Bradley & Morrison, *Presidential Power, supra* note 5, at 1101 (observing the existence of a growing scholarly consensus that “whether Congress curbs presidential power depends more often on partisan political considerations or situation-specific policy objections than on any systematic effort to protect institutional prerogatives”).

57. *See* Sheryl Gay Stolberg & Michael Tackett, *Trump Suggests Government Shutdown Could Last for ‘Months or Even Years,’* N.Y. TIMES (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/us/politics/democrats-trump-meeting-government-shutdown.html> [<https://perma.cc/2GHF-Q8Q6>] (describing President Trump’s unwillingness to compromise on border-wall funding in order to end

potentially defaulting on the national debt,<sup>58</sup> to appointing, or attempting to appoint, nominees like former Acting Attorney General Matthew Whitaker<sup>59</sup> or Ronny Jackson to helm the Department of Veterans Affairs,<sup>60</sup> all provide salient examples of how Congress no longer conceives of itself as a coequal branch of the federal government with the President.

In light of these political facts of life, one might posit that Balkin is far too hopeful about the willingness of political institutions and the federal courts to adopt structural and process-based reforms that would make Congress less dysfunctional and perhaps arrest the consistent accumulation of more and more unilateral power in the Executive Branch (and more specifically in the President). Adoption of the reforms that Balkin has in mind, for example, banning partisan gerrymanders, limiting big money and dark money in elections, and the like (pp. 199–201), have not a prayer of adoption in the current Congress. Or, for that matter, any Congress in which forty senators have a veto over any and all ordinary legislation through the filibuster.<sup>61</sup> Even if, by some political miracle, comprehensive campaign

the shutdown); Nicholas Fandos, Sheryl Gay Stolberg & Peter Baker, *Trump Signs Bill Reopening Government for 3 Weeks in Surprise Retreat from Wall*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/us/politics/trump-shutdown-deal.html> [https://perma.cc/U2AP-NJNW] (noting that the shutdown over border-wall funding lasted for thirty-five days).

58. See Jose A. DelReal & Anne Gearan, *Amid Expert’s Alarm, Trump Tries to Clarify His Economic Proposals*, WASH. POST (May 10, 2016), [https://www.washingtonpost.com/politics/amid-experts-alarm-trump-tries-to-clarify-his-economic-proposals/2016/05/09/7096e09a-1611-11e6-924d-838753295f9a\\_story.html](https://www.washingtonpost.com/politics/amid-experts-alarm-trump-tries-to-clarify-his-economic-proposals/2016/05/09/7096e09a-1611-11e6-924d-838753295f9a_story.html) [https://perma.cc/S3NJ-S932] (reporting that a number of economists interpreted comments from then-candidate Trump as an attempt to use the threat of defaulting on the national debt as leverage).

59. See Charlie Savage, *Acting Attorney General Matthew G. Whitaker Once Criticized Supreme Court’s Power*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/matthew-whitaker-courts-inferior.html> [https://perma.cc/TCV6-EKF4] (discussing Whitaker’s deeply partisan background, relatively limited professional experience prior to becoming the Acting Attorney General, and his apparent lack of institutional independence from the White House and President Trump, and also questioning whether Whitaker was lawfully appointed to serve in this capacity under the Vacancies Reform Act because he was not confirmed by the Senate to a Department of Justice post under the prior Attorney General, Jeff Sessions).

60. See Nicholas Fandos & Maggie Haberman, *Ronny Jackson, Failed V.A. Pick, Is Unlikely to Return as Trump’s Doctor*, N.Y. TIMES (Apr. 29, 2018), <https://www.nytimes.com/2018/04/29/us/politics/ronny-jackson-trump-white-house.html> [https://perma.cc/6Z8R-JDZC] (chronicling the allegations of impropriety that forced Jackson to withdraw from the nomination process); Lisa Rein, Philip Rucker, Emily Wax-Thibodeaux & Josh Dawsey, *Trump Taps His Doctor to Replace Shulkin at VA, Choosing Personal Chemistry Over Traditional Qualifications*, WASH. POST (Mar. 29, 2018, 6:33 AM), [https://www.washingtonpost.com/world/national-security/trump-ousts-veterans-affairs-chief-david-shulkin-in-administrations-latest-shake-up/2018/03/28/3c1da57e-2794-11e8-b79d-f3d931db7f68\\_story.html](https://www.washingtonpost.com/world/national-security/trump-ousts-veterans-affairs-chief-david-shulkin-in-administrations-latest-shake-up/2018/03/28/3c1da57e-2794-11e8-b79d-f3d931db7f68_story.html) [https://perma.cc/BQ8A-AVD5] (reporting Jackson as Trump’s pick to lead the V.A. after Shulkin’s departure).

61. See SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE 6–8 (1997) (explaining that the use of filibusters “has increased in recent decades and that the dynamics favoring obstructionism . . . have only intensified in this century”); GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE (2010).



finance reform legislation was enacted and signed into law, it would face the prospect of almost certain judicial invalidation in the Supreme Court.<sup>62</sup>

At the same time, however, one should be equally, if not more, skeptical about the prospects for a constitutional convention. The chances of Professor Levinson's proposed solution, a fundamental reboot (pp. 11–14, 44–45, 175–77), coming to fruition are even less good. After all, it is considerably easier to enact ordinary legislation or to obtain a favorable Supreme Court decision than it is to use the Article V amendment process to change the Constitution itself. It seems unlikely that enough states (three-fourths) would call for a convention without considerably more dysfunction that affects a much larger part of the voting population.

Moreover, many of the most objectionable Trump policies primarily affect immigrants and the poor. Noncitizens, whether documented or not, cannot vote. And, although the poor can vote,<sup>63</sup> more often than not they do not participate in the electoral process in large numbers. Simply put, voting in federal elections correlates positively with age, education, and wealth.<sup>64</sup> For most middle- and upper-class Americans, however, times are relatively good and one should probably be skeptical that these citizens have either major structural reforms or a constitutional revolution in mind.

In sum, one could fault both Balkin and Levinson for being *too optimistic* about the prospects for organized and proactive institutional reform programs (whether via legislation and judicial decisions that reinforce democracy and democratic institutions or fundamental constitutional reform). The Roman Republic devolved from a limited democracy to a monarchy—but there was never a precise moment in time when the plebs or the senatorial class formally embraced the institution of the emperor or formally acquiesced in his assertions of unilateral power.<sup>65</sup> The emperor's constitutional position, with its broad and largely unchecked powers, evolved

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62. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339–42 (2010) (emphasizing that First Amendment protection extends to corporations, finding that a law restricting corporate independent expenditures in support of political candidates could not withstand strict scrutiny, and positing that most government interventions in the political marketplace of ideas are inherently distortionary to and disruptive of the process of democratic deliberation essential to democratic self-government).

63. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666–69 (1966).

64. See RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* 102 (1980) (explaining that education and age are the two variables most positively correlated with voting); see also Rodolpho O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEXAS L. REV. 1479, 1504 (1993) (noting that “age, education, and income” are “positively correlated” with voting).

65. See 1 EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 35–38 (1841) (“[T]he system of the imperial government . . . may be defined an absolute monarchy disguised by the forms of a commonwealth.”); GRUEN, *supra* note 33, at 498–507 (noting that considerable superficial institutional consistency existed between the late Republic and the Empire despite fundamental changes in the operational realities of these governing institutions).

through sustained deference over time by both Rome’s voting citizens and the members of the Senate, even as the emperor made ever greater and more regularized unilateral assertions of executive authority.<sup>66</sup> If this could happen in ancient Rome, it could also happen here; our national institutions are not necessarily immune to fundamental changes of an extraconstitutional stripe.

Thus, a third option would involve the United States more or less following the example of Rome—with democratic and republican values eroding in favor of greater levels of unilateral executive power. We see the demise of democracy in places like Russia, Poland, and Hungary.<sup>67</sup> Antidemocratic parties and politicians are increasingly competitive in places like France, Germany, Spain, and Sweden.<sup>68</sup> We should not blithely assume that the United States, and its governing institutions, are immune from such antidemocratic trends (and outcomes).

Things were not always so. Our federal governing institutions once seemed to be more jealous of their powers and prerogatives. For example, when President Harry Truman seized and nationalized the nation’s steel mills in 1952, the Supreme Court immediately worked to effectively check this bald assertion of unilateral executive authority.<sup>69</sup> The Court moved with dispatch to protect the separation of powers—and President Truman stood down.

Justice Robert Jackson’s *Steel Seizure* concurring opinion is much celebrated (and properly so) for its discussion of the conditions under which the President’s power is at its zenith (when Congress authorizes an action and the President also possesses Article II authority over a matter) and its nadir (when Congress has expressly denied the President a particular power or authority but the President acts unilaterally anyway).<sup>70</sup> Another part of Jackson’s concurrence, however, increasingly appears to be prophetic:

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66. See CRAWFORD, *supra* note 33, at 187–91 (describing the Roman tendency to view the institution of the emperor as consistent with Roman Republican principles); GIBBON, *supra* note 65, at 35–38 (describing the Senate’s deference to the emperor); GRUEN, *supra* note 33, at 505–07 (emphasizing the institutional consistency between the late Republic and the Empire).

67. For a description and discussion of the creeping authoritarianism and the advent of “illiberal democracy,” see generally Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018) (discussing, among other examples, Russia, Poland, and Hungary’s devolutions from democracies to autocracies).

68. See, e.g., Raphael Minder, *Socialists Strengthen Hold in Spain Election*, N.Y. TIMES (Apr. 28, 2019), <https://www.nytimes.com/2019/04/28/world/europe/spain-election-socialists.html> [perma.cc/LHF8-47HZ] (noting that although the Socialist Party retained its control of Spain’s parliament in the April 2019 general election, Vox, an extreme far right nationalist party, won sufficient support to enter parliament); Yascha Mounk, *How Populist Uprisings Could Bring Down Liberal Democracy*, GUARDIAN (Mar. 4, 2018, 2:05 AM), <https://www.theguardian.com/commentisfree/2018/mar/04/shock-system-liberal-democracy-populism> [https://perma.cc/EMF4-DKNA] (noting the increasing success of extremist parties in Germany, France, and Sweden).

69. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 589 (1952) (“The Founders of this Nation entrusted the lawmaking power to the Congress alone . . .”).

70. See *id.* at 635–38 (Jackson, J., concurring) (explaining that Presidential powers fluctuate because the separation of powers creates autonomy but also interdependence and reciprocity among

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.<sup>71</sup>

Today, we have a President who has demonstrated little, if any, interest in observing constitutional norms or traditions—as opposed to ignoring or smashing them.<sup>72</sup> To provide one concrete example, President Trump regularly muses about appointing plainly unqualified persons to important government offices—whether it be Herman Cain for the Federal Reserve Board or First Daughter Ivanka Trump to helm the World Bank.<sup>73</sup> Patently unqualified nominees, particularly for administrative entities that require considerable nonpartisan expertise, should be a shocking proposition. On the other hand, Caligula is said to have appointed his much-beloved prize horse, Incitatus, to the Roman Senate.<sup>74</sup> Trump’s crazy appointments and attempted appointments do not yet rival Caligula’s—but they are certainly trending in that general direction.

To date, the Senate’s institutional response to President Trump’s unqualified and marginally qualified nominees leaves much to be desired from the Madisonian perspective. From this vantage point, under a well-functioning separation of powers, clearly incompetent nominees for important government posts should constitute complete nonstarters for all members of the Senate—not just for Democrats. However, relatively few GOP senators have publicly opposed even the most insane Trump nominees (whether to Executive Branch positions or federal judgeships). Rather than a

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the three branches of government).

71. *Id.* at 654.

72. See Siegel, *supra* note 6, at 198–203 (providing examples of President Trump’s contraventions of constitutional conventions, including his firing of FBI Director James Comey).

73. Bess Levin, *Not a Joke: Trump Wanted Ivanka to Lead the World Bank*, VANITY FAIR (Apr. 12, 2019), <https://www.vanityfair.com/news/2019/04/ivanka-trump-world-bank> [<https://perma.cc/7GVX-XMGZ>]; Alan Rappoport, Neil Irwin & Maggie Haberman, *Trump Says He Wants Herman Cain, Former Pizza Executive, for Fed Board*, N.Y. TIMES (Apr. 4, 2019), <https://www.nytimes.com/2019/04/04/business/herman-cain-federal-reserve.html> [<https://perma.cc/8SHD-PWVF>].

74. TOM HOLLAND, DYNASTY: THE RISE AND FALL OF THE HOUSE OF CAESAR 286 (2015); see Alan Grayson, *Caligula’s Horse*, HUFFINGTON POST (Sept. 23, 2010, 6:42 PM), [https://www.huffpost.com/entry/caligulas-horse\\_b\\_737286](https://www.huffpost.com/entry/caligulas-horse_b_737286) [[perma.cc/C3R7-R55D](https://perma.cc/C3R7-R55D)] (observing that “in 39 A.D., Emperor Caligula appointed his horse, Incitatus, to the Roman Senate” to show the impotence of the institution). Several contemporary Roman historians write that Caligula only *threatened* to make Incitatus a senator and a consul (the republic’s highest civil office), but did not actually do so. See ALOYS WINTERLING, CALIGULA: A BIOGRAPHY 103 (Deborah Lucas Schneider et al. trans. 2011) (describing the threatened appointment as a cruel joke intended to humiliate the senators).

bipartisan insistence on competence, we see instead a litany of straight party-line votes.

President Trump has adopted a regular practice of naming “acting” agency heads under the Vacancies Act,<sup>75</sup> and then never submitting a formal nominee to the Senate for its advice and consent. He has regularly named acting agency heads, such as Matthew Whitaker as acting Attorney General, and Ken Cuccinelli as acting Director of U.S. Citizenship and Immigration Services, who probably could not obtain the Senate’s approval.<sup>76</sup> And, what has the Senate done to reassert its constitutional authority over the appointment of senior Executive Branch officials under the Constitution’s Appointments Clause? Precisely nothing.

The Senate, under the Trump Administration, has essentially waived off its advice and consent duties, permitting the President to name whom he pleases to the most important positions in the Executive Branch, including the Attorney General and Secretary of Defense. Levinson and Balkin do not include the routine bypassing of the Senate for Executive Branch appointments in their bill of indictment against the Congress (pp. 1–203)—but this unfortunate practice certainly constitutes part of a larger picture of dysfunction and shirking by the Legislative Branch of government (and provides further compelling evidence of the collapse of the Madisonian system of checks and balances). The Senate (and House, for that matter) have basically nullified the Appointments Clause by permitting the President to appoint someone who can exercise all of an agency’s delegated powers under the law without ever receiving the imprimatur of the Senate. This practice, now quotidian, constitutes a gross perversion of the careful system of checks and balances that Madison devised to ensure responsible government accountable to the people.

The Framers anticipated a President making highly questionable (perhaps even corrupt) appointments to important executive and judicial offices. They sought to prevent such appointments from happening by requiring the Senate’s advice and consent for all principal offices and federal judgeships, and even for inferior Executive Branch offices in the absence of a statute permitting appointments by “the President alone,” by “the Heads of Departments,” or by “the Courts of Law.”<sup>77</sup> The Framers intended for the

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75. The Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-611 (codified at 5 U.S.C. §§ 3345–3349c (2012)). For a detailed discussion of the Vacancies Act, as amended, see VALERIE C. BRANNON, CONG. RESEARCH SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW (2018).

76. See Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 933–35 (2009) (discussing the Vacancies Act and the use of “acting” officers to fill senior level Executive Branch positions without the person exercising the powers of the office ever seeking or receiving Senate approval).

77. U.S. CONST. art. II, § 2, cl. 2 (providing that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose

Senate to serve as a reliable institutional check on the President. Unfortunately, the self-described “World’s Greatest Deliberative Body”<sup>78</sup> has ceased to play that role. Indeed, Senate Majority Leader Mitch McConnell has used the nuclear option (twice) to make it easier and faster for a simple majority of the Senate to ram through both executive and judicial nominees in record time and without any bipartisan support.<sup>79</sup>

In sum, a continuing degradation, and devolution, of the national legislature vis-à-vis the president continues unabated. What is more, the Senate today serves as the President’s enabler rather than a meaningful check. This is particularly unfortunate with respect to Article III judges. Permitting Trump to stack the federal courts with judges like Brett Kavanaugh and Neomi Rao, who embrace the unitary executive theory with real brio,<sup>80</sup> will

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Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments”); see THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the Senate’s power to approve or reject presidential nominees to executive and judicial posts “would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity”). The Framers clearly foresaw the possibility of a President, like Donald Trump, attempting to make unwise and arbitrary appointments to senior federal government posts. Accordingly, the Senate’s approval of presidential nominations was required as an important structural check against corrupt appointments and, more generally, to serve as “an efficacious source of stability in the administration.” *Id.* Unfortunately, however, the Framers did not foresee the members of the Senate serving, more or less, as a rubber stamp for an impetuous and vindictive President; the contemporary Senate no longer serves as a reliable check on arbitrary presidential appointments. See Bradley & Morrison, *Presidential Power*, *supra* note 5, at 1101, 1112 (contending that neither the courts nor Congress provide adequate checks on the Executive Branch).

78. 115 CONG. REC. 607 (1969) (statement of Sen. Thurmond) (“I have gained tremendous respect for the Senate because it has always been considered as the greatest deliberative body in the world.”); see THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK* 146–47 (2006) (noting that “[t]he rules and procedures of the Senate were a key to its unique role as the world’s greatest deliberative body”).

79. Adam Jentleson, *Opinion, Mitch McConnell’s Nuclear Trigger Finger*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/opinion/mitch-mcconnells-nuclear-trigger-finger.html?searchResultPosition=1> [<https://perma.cc/4SS9-TEGN>]; Editorial, *Mitch McConnell Is Making the Senate’s Minority Party Increasingly Powerless*, WASH. POST (Apr. 4, 2019), [https://www.washingtonpost.com/opinions/mitch-mcconnell-accuses-the-democrats-of-obstruction-he-should-know/2019/04/04/06defa30-5645-11e9-814f-e2f46684196e\\_story.html](https://www.washingtonpost.com/opinions/mitch-mcconnell-accuses-the-democrats-of-obstruction-he-should-know/2019/04/04/06defa30-5645-11e9-814f-e2f46684196e_story.html) [<https://perma.cc/RWJ7-2YPN>].

80. See *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (“The Framers lodged full responsibility for the executive power in a President of the United States, who is elected by and accountable to the people.”); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 689 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (“The Framers established a single President by design: A single head of the Executive Branch enhances efficiency and energy in the administration of the Government. And a single head furthers accountability by making one person responsible for *all* decisions made by and in the Executive Branch.”), *aff’d in part, rev’d in part*, 561 U.S. 477 (2010); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1213 (2014) (“The text and structure of Article II support a conclusion in favor of presidential control over administration. A unitary executive would provide energy, encourage good administration, and ensure an important form of accountability through responsibility for execution in one person.”).

effectively neutralize the courts as a meaningful check on policies that arguably reflect gross abuses of executive power.<sup>81</sup> Indeed, the selection of Brett Kavanaugh for the Supreme Court may well have had as much, if not more, to do with his expansive views of unilateral presidential power than with his presumed willingness to overturn *Roe v. Wade*.<sup>82</sup> We cannot look to the contemporary Supreme Court to do today what the Burger Court did in 1974 when another president, Richard M. Nixon, held himself to be above the law.<sup>83</sup>

When Congress and the Supreme Court cease to defend reliably their institutional turf against the Executive Branch, the system of checks and balances carefully devised by the Framers will no longer protect “We the People” from arbitrary or irrational action by the Executive Branch. Ambition will no longer check ambition.<sup>84</sup> And yet, neither Levinson nor Balkin seems to have an effective proposed solution for making either Congress or the Supreme Court bestir themselves to check, on a reliable basis, the President’s unbridled assertions of executive authority. To be sure, they identify with precision and clarity the various institutional failures of our national government, but their reform proposals have little realistic chance of actual implementation and, even if adopted, would not necessarily mean that Congress and the federal courts would more consistently put their institutional duties above seeking short-term partisan advantage.

But wait, it actually gets *worse*. Although it is certainly true that one cannot reform (or save) governing institutions like Congress that have not demonstrated any real interest in saving themselves from the prospect of growing irrelevance and desuetude, getting Congress and the federal courts to play their part in the Madisonian system of checks and balances is actually a second-order problem. A preliminary problem involves securing institutional reforms that would make these institutions more reliably accountable to “We the People.” In this regard, the problems that we face as a nation may have less to do with our governing institutions than with how

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81. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2400 (2018) (holding that President Trump lawfully exercised his broad discretion “to suspend the entry of aliens into the United States”).

82. 410 U.S. 113 (1973); see Sheryl Gay Stolberg & Nicholas Fandos, *Collins and Manchin Will Vote for Kavanaugh, Ensuring His Confirmation*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/us/politics/brett-kavanaugh-vote-confirmed.html> [<https://perma.cc/4GDB-CLCQ>] (“Democrats warned that Judge Kavanaugh would be a threat to women’s rights, and would overturn *Roe v. Wade*, the landmark 1973 Supreme Court decision that created a constitutional right to abortion. They spotlighted his expansive rulings in favor of gun rights, and his broad interpretation of executive power — a view that they found troublesome in light of the continuing investigations involving Mr. Trump.”).

83. See *United States v. Nixon*, 418 U.S. 683, 713–14 (1974) (holding that the district court did not err in authorizing the issuance of a subpoena for the production of tapes and documents related to alleged violations of federal statutes by President Nixon and his staff).

84. See THE FEDERALIST NO. 51, *supra* note 10, at 322 (“Ambition must be made to counteract ambition.”).

our democracy functions—and with the willingness and capacity of voters to engage seriously in the process of democratic deliberation.<sup>85</sup>

Can we put the imperial president genie back into the bottle? To be sure, the United States has faced great accumulations of executive authority before; salient examples include Lincoln and the Civil War<sup>86</sup> and FDR with respect to both the Great Depression and World War II.<sup>87</sup> But, in both instances, fate intervened and we never had to find out if the system of checks and balances would return to the status quo ante.

President Lincoln's assassination on April 14, 1865, a little over a month after being sworn into his second term, placed Andrew Johnson, a "Copperhead" (meaning a Democrat loyal to the Union) from Tennessee, in the Oval Office.<sup>88</sup> The overwhelming, pro-Reconstruction, GOP majorities in both houses of Congress feared and loathed Johnson—and their worst fears were borne out when he almost immediately began issuing presidential pardons to the former leaders of the Confederate States of America on a mass basis.<sup>89</sup> So, the system of constitutional checks and balances reset because of a de facto change in power and the White House and Congress being in different hands (effectively).

FDR died on April 12, 1945, about three months after his fourth inauguration on January 20, 1945. FDR's death put Harry Truman, serving in his first term as Vice President, in the Oval Office. Truman did not have the same cult of personality that FDR had established—and he was a replacement for Henry Wallace (whom FDR dumped unceremoniously from the ticket in 1944). We do not know if unilateral presidential policies, such

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85. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 19–21 (1993) (positing that active and ongoing deliberation about issues of public concern among the citizenry is a precondition for a well-functioning democratic polity that relies on the electoral process reliably to secure government accountability); see also ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22–27, 90–91 (1948) (arguing that voters must be knowledgeable about the government and its operations and engage in ongoing and broad-based public deliberation if the U.S. experiment in democratic self-government is to flourish and succeed).

86. See SCHLESINGER, *supra* note 13, at 60–67 (noting the expansion of the President's war powers under President Lincoln during the Civil War).

87. See *id.* at 115–16 (analyzing the growth in presidential authority under FDR, including the Emergency Price Control Act).

88. See KELLY, HARBISON & BELZ, *supra* note 11, at 333 (discussing President Johnson's accession to the executive office and his position as "a Democrat and a southerner" who "enjoyed a strong position in relation to the Republican party").

89. See JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 69–74 (1961) (describing Congress's outrage at Johnson's "misuse and abuse of power"); see also KELLY, HARBISON & BELZ, *supra* note 11, at 334–35, 345–48 (noting that President Johnson "pardoned all persons lately engaged in rebellion" and describing President Johnson as "alienated from the Republican party," which was "united in opposition to Johnson's [reconstruction] policy"); SCHLESINGER, *supra* note 13, at 71–74 (noting that Johnson set "himself against the mood and will of Congress on the question of policy toward the defeated Confederacy").

as the Japanese internment<sup>90</sup> and domestic price controls,<sup>91</sup> would have continued without congressional input (much less overt approval) during FDR’s fourth term of office.

Perhaps the nation will quickly return to relative “normalcy” after the Trump Administration concludes. But perhaps it will not and the Trump presidency will serve as a new template for presidential authority (and behavior) going forward into the future. In either case, however, good cause exists for believing that Trump and Trumpism are merely symptoms of a more fundamental breakdown in how the governing institutions of the federal government function.

The Framers carefully designed a system that assumed those animating it would hold primary loyalties of an *institutional*, not *partisan*, stripe. Today, we live in a world where support or opposition to the occupant of the Oval Office trumps (so to speak) any perceived duty to the institution in which a federal officer serves.<sup>92</sup> This is clearly true of Congress and arguably true even of the Supreme Court.<sup>93</sup> Even with fairer and more competitive elections for federal office, there is little reason to believe that Congress will reliably serve as a meaningful check on the President (particularly in the areas of foreign and military affairs).

If institutional ambition is to check institutional ambition, there must be “ambition” within the checking body in the first place. Today, there simply isn’t—not unlike the Roman Senate at the end of the Roman Republic, which

90. To be sure, Congress endorsed Roosevelt’s Japanese-American citizens internment policy on a post-hoc basis. SCHLESINGER, *supra* note 13, at 116; see KELLY, HARBISON & BELZ, *supra* note 11, at 562 (explaining that after FDR ordered the segregation and confinement of the Japanese-American citizens living in the western part of the continental United States, “Congress . . . enacted a statute embodying substantially the provisions of the original order, so that the segregation program also received legislative approval”); see also *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (upholding the constitutionality of FDR’s internment policy because, among other reasons, “Congress, reposing its confidence in this time of war in our military leaders—as it inevitably must—determined that they should have the power to do just this”).

91. SCHLESINGER, *supra* note 13, at 115.

92. Bradley & Morrison, *Historical Gloss*, *supra* note 28, at 414–15.

93. The Supreme Court dissolved an injunction and thereby permitted President Trump to reallocate over two billion dollars of previously appropriated defense funds to build his border wall. *Trump v. Sierra Club*, No. 19A60, 2019 WL 3369425 (U.S. July 26, 2019) (order staying permanent injunction); see also Adam Liptak, *Supreme Court Lets Trump Proceed on Border Wall*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/us/politics/supreme-court-border-wall-trump.html> [<https://perma.cc/3S2G-YTUY>] (“The Supreme Court on Friday gave President Trump a victory in his fight for a wall along the Mexican border by allowing the administration to begin using \$2.5 billion in Pentagon money for the construction. In a 5-to-4 ruling, the court overturned an appellate decision and said that the administration could tap the money while litigation over the matter proceeds.”). Would the Justices have done the same if, in 2021, President Elizabeth Warren did the same thing to fund emergency relief for immigrants in sanctuary cities? So too, would *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), be decided the same way if a President Warren banned entry by persons who propagate anti-Muslim hate speech and white-nationalist ideologies? In sum, the Supreme Court’s approach to the limits of presidential power seems to be contingent on the partisan affiliation of the person who happens to hold the office—rather than on a principled reading and application of the separation-of-powers doctrine.



ceded control of foreign and military affairs to the emperor before ceding control of domestic affairs as well. Congress, as an institution, is AWOL. For structural reforms to work, voters will have to make clear that the safest path to reelection requires members to shoulder, not shirk, their duties and responsibilities to the Congress as an institution.

Our governing institutions may simply be adjusting to the new dynamics that have come to define our nation's politics. If the problem is actually the voters, rather than the institutions themselves, tinkering with the institutions and the electoral process may not bring about the reforms that both Levinson and Balkin believe to be essential to the well-being and flourishing of our national governing institutions (and hence the nation) (pp. 177, 180, 199–203). Phenomena such as the advent of fake news, micro-targeting, and the “siloeing” of voters, all three of which the internet has greatly facilitated, rather than systematic institutional failures by Congress and the federal courts, may be primarily responsible for our democracy's growing dysfunction.<sup>94</sup>

In the end, then, any potentially successful effort at either statutory or constitutional reform will require a general consensus within the American public that the system is currently broken and requires fixing. In other words, the kind of systemic reforms that both Levinson and Balkin propose must have support from the bottom up, not just from the top down. If the revolution comes, it almost certainly will not be led by law professors (no matter how thoughtful, intelligent, and well-meaning). The project requires a body politic that is seriously engaged and highly attuned to matters of governance.<sup>95</sup> The real question, then, boils down to this: How do we successfully engage the American people in a wide-scale project of institutional reform? My preliminary answer is that a reform project of this scale and scope will require a highly civically literate public—which, at present, the United States would seem to lack.

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94. See also CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at 10–11, 145–46 (2007) (positing that democracy suffers when voters cast poorly-informed ballots, whether because of the widespread propagation of disinformation or because of truthful but fundamentally incomplete information that reinforces the preexisting biases and prejudices of some voters).

95. See SUNSTEIN, *supra* note 85, at 19–21 (noting that for democratic self-government to function well, ordinary citizens have to be well informed about and engaged with important questions of the day); see also George Washington, *The Farewell Address*, Sept. 17, 1796 (“Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.”), *reprinted in* 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1908*, at 220 (James Daniel Richardson ed., 1908).

#### IV. Facing Up to the Limits of Sound Governmental Design: On the Critical Need to Create and Maintain a Citizenry Equal to the Difficult Task of Democratic Self-Government

No matter how well-conceived and well-executed, institutional reforms, whether of a statutory or constitutional stripe, will not achieve their intended purposes if the superintendence of the new and improved system of federal governance falls to a poorly informed and incurious citizenry. John Dewey, the philosopher of education, repeatedly drew the link between effective education for all persons within a polity and the success of a project of self-government. In his seminal work *Democracy and Education: An Introduction to the Philosophy of Education*, Dewey emphasizes the central importance of “civic efficiency,” which he equates with “good citizenship.”<sup>96</sup> Civic efficiency ensures that ordinary people will have the “ability to judge men and measures wisely and to take a determining part in making as well as obeying laws.”<sup>97</sup> Dewey warns that “[o]nly as the schools provide an understanding of the movement and direction of social forces and an understanding of social needs and of the resources that may be used to satisfy them, will they meet the challenge of democracy.”<sup>98</sup>

Despite the evident necessity of a well-grounded and well-designed civics curriculum, however, Dewey expressed a fear that most civics curricula would not be sufficiently “connected with how government is actually run, with how parties are formed and managed, what machines are, what gives machines and political bosses their power.”<sup>99</sup> He asks, “But without so rudimentary a preparation for intelligent voting or for intelligent legislation, how could we say that we were preparing for any kind of democratic self-government?”<sup>100</sup>

As one scholar of Dewey explains, “Dewey’s (1916) conception was of a democracy and a form of democratic education that would lead to a democratic citizenry for a democratic society.”<sup>101</sup> His approach “required democratic classrooms that would adequately prepare students to enter a radically transformed society that lay beyond the classroom walls”; public education would facilitate the “social and political engagement in the direction of shared experience” essential to democratic self-government.<sup>102</sup>

96. JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 140 (23d reprt. 1950).

97. *Id.*

98. John Dewey, *The Challenge of Democracy to Education*, 14 *PROGRESSIVE EDUC.* 79 (1937), reprinted in 11 *JOHN DEWEY: THE LATER WORKS, 1925–1953*, at 181, 183 (Jo Ann Boydston ed., 1987).

99. *Id.* at 185–86.

100. *Id.* at 186.

101. Patrick M. Jenlink, *Introduction to Part VI of DEWEY’S DEMOCRACY AND EDUCATION REVISITED: CONTEMPORARY DISCOURSES FOR DEMOCRATIC EDUCATION AND LEADERSHIP* 327, 331 (Patrick M. Jenlink ed., 2009).

102. *Id.*

Dewey posits that two conditions are necessary for the democratic process to function correctly. First, the voters must be “equipped with the intelligence needed, under the operation of self-interest, to engage in political affairs.”<sup>103</sup> Second, there must be “general suffrage, frequent elections of officials and majority rule.”<sup>104</sup> Together, these two conditions will “ensure the responsibility of elected rulers to the desires and interests of the public.”<sup>105</sup> Writing in 1927, Dewey warned that “[t]he prime condition of a democratically organized public is a kind of knowledge and insight which does not yet exist.”<sup>106</sup> He advocated free speech and freedom of intellectual inquiry as means that might help to perfect our efforts to create a self-sustaining democratic polity in which citizens render sensible, well-informed electoral decisions at the ballot box.<sup>107</sup>

Other iconic political thinkers—notably Thomas Jefferson<sup>108</sup> and Alexander Meiklejohn<sup>109</sup>—echo Dewey’s concerns. Jefferson warned that in the absence of an educated and engaged citizenry, democratic self-government could not survive—a nation simply cannot exist as both “ignorant & free, in a state of civilisation.”<sup>110</sup> Along similar lines, Meiklejohn argued that if voters are to hold government accountable, they must have the tools necessary to make wise collective decisions: “When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them.”<sup>111</sup> In fact, for Meiklejohn, “[t]he primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life.”<sup>112</sup>

The question then becomes: How do we create and sustain a body politic capable of reliably making prudent collective decisions incident to the electoral process? We seem to be reaching something of a crisis point

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103. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 157 (1927).

104. *Id.*

105. *Id.*

106. *Id.* at 166.

107. *See id.* at 167 (“Whatever obstructs and restricts publicity, limits and distorts public opinion and checks and distorts thinking on social affairs. Without freedom of expression, not even methods of social inquiry can be developed.”).

108. Letter from Thomas Jefferson to Charles Yancey (Jan. 6, 1816), *reprinted in* 9 *THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES, SEPTEMBER 1815 TO APRIL 1816*, at 328, 331 (J. Jefferson Looney ed., 2013) [hereinafter Letter from Thomas Jefferson to Charles Yancey] (“[W]here the press is free and every man able to read, all is safe.”).

109. *See* MEIKLEJOHN, *supra* note 85, at 88 (arguing that “[w]e need the truth as a basis for our actions,” positing that “the truth is better attained if men trade ideas freely than it is if each man stays within the limits of his own discoveries,” and concluding that democratic self-government involves “the clear necessity of trading ideas with everyone else who is studying the same problems” thereby testing them through “the competition of the market”).

110. Letter from Thomas Jefferson to Charles Yancey, *supra* note 108, at 331.

111. MEIKLEJOHN, *supra* note 85, at 88.

112. *Id.* at 88–89.

regarding the voters necessary to make a majority rendering electoral verdicts based on empirically false facts.<sup>113</sup> When voters cast ballots based on misinformation, such votes are not likely to lead to good governance or to advance the cause of using the electoral process to hold government accountable.

In order to ensure that the process of democratic deliberation facilitates the use of elections and voting as a means of securing government accountability, Professor Cass Sunstein posits that citizens must be exposed to a wide range of ideas and viewpoints from myriad sources and that they “should have a wide range of common experiences” that will reduce the problem of “social fragmentation.”<sup>114</sup> A lack of interaction among groups, coupled with social fragmentation, significantly decreases prospects for mutual understanding and, hence, compromise. Sunstein explains that “[w]hen society is fragmented, diverse groups will tend to polarize in a way that can breed extremism, and even hatred and violence.”<sup>115</sup> Social fragmentation also leads groups of citizens to credit objectively false statements of fact—and to cast ballots based on those fallacies.<sup>116</sup>

Voters today, however, are less likely than voters in the past to have the facts needed to render well-informed electoral verdicts. Sunstein argues that “[b]ecause of self-sorting, people are often reading like-minded points of view, in a way that can breed greater confidence, more uniformity within groups, and more extremism.”<sup>117</sup> Making matters worse, this self-sorting often involves placing undue trust in entirely unreliable narrators who peddle fiction rather than facts. As Sunstein laments, “[o]n any day of any year, it is easy to find unjustifiable rage, baseless attacks on people’s motivations, and ludicrous false statements of fact in the blogosphere.”<sup>118</sup>

The advent of cable television and podcasting over the internet has permitted voters to access bespoke information—news and information feeds that tend to reinforce or confirm pre-existing beliefs and biases (rather than challenge them). Sunstein cautions that, “[i]n a well-functioning democracy, people do not live in echo chambers or information cocoons.”<sup>119</sup> Instead, voters will “see and hear a wide range of topics and ideas” and “do so even

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113. CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 11–12, 92–97 (2017) (observing that “[e]cho chambers can lead people to believe in falsehoods” and that such falsehoods can and will exact an electoral toll).

114. *Id.* at 6–8.

115. *Id.* at 57.

116. *See id.* at 57–58, 93–95 (arguing that social fragmentation, which involves the lack of regular, meaningful interaction among and between people with fundamentally different political and ideological viewpoints, renders voters less capable of reliably rendering prudent electoral verdicts and also makes siloed voters more susceptible to confirmation bias, herding effects, and groupthink, all of which compromise the exercise of sound judgment).

117. SUNSTEIN, *supra* note 94, at 145.

118. *Id.* at 145–46.

119. SUNSTEIN, *supra* note 113, at ix.

if they did not, and would not, choose to see and hear those topics and ideas in advance.”<sup>120</sup>

Echo chambers are particularly problematic because they correlate with crediting empirically false statements of fact. They “can lead people to believe in falsehoods, and it may be difficult or impossible to correct them.”<sup>121</sup> What’s even worse: Social science has established that it can be difficult, bordering on impossible, to get citizens trapped within informational echo chambers to accept the truth. Furthermore, and quite perversely, when efforts are made to correct false factual beliefs, those holding them will, quite often, double down and “end[] up believing [a false claim] more fervently than those who did not receive a correction.”<sup>122</sup>

Professor Sunstein posits that echo chambers and siloing will, over time, “make self-government less workable.”<sup>123</sup> This seems to be something of an understatement. It’s not merely a question of democratic self-government being “less workable”; a citizenry armed with, and voting based upon, empirically false facts simply will not be able to render prudent electoral judgments on a reliable basis.<sup>124</sup>

John Dewey tells us that “[t]he foundation of democracy is faith in the capacities of human nature; faith in human intelligence, and in the power of pooled and cooperative experience.”<sup>125</sup> Dewey is not, however, a starry-eyed optimist; he cautions that “[i]t is not belief that these things are complete but that if given a show they will grow and be able to generate progressively the knowledge and wisdom needed to guide collective action.”<sup>126</sup> However, Professor Sunstein, armed with reams of social science data, tells us that many voters are badly informed and that efforts to correct mistaken beliefs about objective facts will, more often than not, lead these misinformed voters to cling to their cherished falsehoods with even greater tenacity.<sup>127</sup> How can one rely on voting to secure reliable government accountability when many votes, perhaps even the votes needed to secure a majority in favor of a candidate for public office, are so badly informed?

And, returning to this Review Essay’s focal point, *Democracy and Dysfunction*, how can institutional reform efforts aimed at creating a more reliably functional federal government succeed when an essential

120. *Id.*

121. *Id.* at 11.

122. *Id.* at 94.

123. *Id.* at 253.

124. See MEIKLEJOHN, *supra* note 85, at 88–89, 91 (positing that the “citizens of the United States will be fit to govern themselves under their own institutions” only if they “understand the issues which bear upon [their] common life” and do not have any truth hidden from them).

125. John Dewey, *Democracy and Educational Administration*, in 2 JOHN DEWEY: THE LATER WORKS, 1935–1937, at 219 (Jo Ann Boydston ed., 1987).

126. *Id.*

127. SUNSTEIN, *supra* note 113, at 11–12, 93–95, 108–11.

precondition for these institutional reform efforts to work—namely, well-informed electors casting rational ballots on election day that successfully operationalize the reformed national governing institutions—does not exist? Prudent electoral judgments require a well-informed citizenry that is actively engaged in a process of democratic deliberation.<sup>128</sup>

Sunstein argues that “broad communication about matters of public concern” is an essential condition for self-government to function.<sup>129</sup> He posits that “two minimal features” are requisite for the Madisonian vision of self-government to be actualized: First, “*broad and deep attention to public issues*,”<sup>130</sup> and second, “*public exposure to an appropriate diversity of view*.”<sup>131</sup> He acknowledges that, circa 1993, when he published *Democracy and the Problem of Free Speech*, neither of these conditions might be met.<sup>132</sup>

And, as for solutions? Sunstein is far more adept at diagnosing the illness than at prescribing an efficacious course of treatment: “The appropriate remedy for this state of affairs is far from clear.”<sup>133</sup> He suggests more government subsidies for news and information programming—even as he forthrightly acknowledges that most people would be no more likely to watch new government-supported civics-related programming than already watch such programming.<sup>134</sup> He concedes that “regulatory strategies that attempt to counter current audience desires for entertainment” might well be met with “get[ting] people to change the channel, to turn off the television[,] or to turn to other kinds of entertainment.”<sup>135</sup>

The problem is that for most of the people Sunstein has in mind, the ship has already sailed and their distaste for objective news and public affairs programming is already well-established. I suspect that it’s much harder to alter preexisting aesthetic preferences that favor infotainment over genuine public affairs programming than to instill an interest in public affairs in the first place—before a person has reached the age of majority and navigated the public schools.

In this regard, retired Justice Sandra Day O’Connor has been laboring mightily since leaving the Supreme Court to create a stronger commitment to civics education in the nation’s classrooms.<sup>136</sup> Like Dewey, O’Connor

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128. See SUNSTEIN, *supra* note 85, at 19–23, 119, 241–50 (discussing how the protection of free speech, which facilitates the process of democratic deliberation, serves as a bedrock condition for operationalizing and maintaining our system of democratic self-government).

129. *Id.* at 19.

130. *Id.* at 20.

131. *Id.* at 21.

132. *Id.* at 20.

133. *Id.* at 21.

134. See *id.* at 68–75, 89–91 (explaining and discussing several normative and policy arguments that would credibly support the creation and implementation of a regulatory scheme that subsidizes the dissemination of legitimate news and information programming to the body politic).

135. *Id.* at 89.

136. See Seth Schiesel, *Former Justice Promotes Web-Based Civics Lessons*, N.Y. TIMES

strongly believes that preparing young people for active, engaged, and well-informed citizenship has to be an important part of creating and sustaining the conditions necessary for the U.S. experiment in democratic self-government to flourish. Her argument possesses more than a modicum of persuasive force. One cannot rationally disagree with the proposition that “[t]he better educated our citizens are, the better equipped they will be to preserve the system of government we have.”<sup>137</sup>

Unfortunately, “America as a whole suffers from profound civic illiteracy”<sup>138</sup> because “[f]or decades, we have failed to teach our young people the basic functions of American government.”<sup>139</sup> Over time, public and private schools alike have substantially reduced the amount of instructional time devoted to civics education, routinely shrinking or eliminating entirely courses in “civics, democracy, and government.”<sup>140</sup> Justice O’Connor explains that “[b]y the turn of the millennium, thirty states did not require high school students to take *any* course in civics or government.”<sup>141</sup> The situation is no better with respect to elementary schools or middle schools.<sup>142</sup> This lack of focus on civics in the nation’s classrooms “has coincided with stunningly low student achievement on civics achievement tests.”<sup>143</sup> In sum, “schools are failing to impart even basic civic knowledge to our students.”<sup>144</sup>

Widespread public ignorance of the institutions of our federal and state governments is both shocking and profoundly depressing—and very well documented. Study after study, most based on either student assessment through standardized testing or public polling, clearly establish that the United States currently suffers from an appalling lack of civic competence. For example, based on recent testing, “[f]ewer than half of American eighth graders knew the purpose of the Bill of Rights” and “only one in 10 demonstrated acceptable knowledge of the checks and balances among the legislative, executive and judicial branches.”<sup>145</sup> Results from the National Assessment of Educational Progress showed that 75% of high school *seniors* do not understand the purpose or effects of U.S. foreign policy and cannot

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(June 9, 2008), <https://www.nytimes.com/2008/06/09/arts/09sand.html> [<https://perma.cc/5MUC-XPEF>] (“Justice O’Connor is helping develop a Web site and interactive civics curriculum . . .”).

137. *Id.*

138. O’Connor, *supra* note 8, at 698.

139. *Id.* at 697.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 698.

145. See Sam Dillon, *Failing Grades on Civics Exam Called a ‘Crisis,’* N.Y. TIMES (May 4, 2011), <https://www.nytimes.com/2011/05/05/education/05civics.html> [<https://perma.cc/Q6ZF-5Z9W>].

name a single power the Constitution grants to Congress.<sup>146</sup> David Eisenhower, President Eisenhower’s grandson, morosely observes that “[m]ore young Americans could name the Three Stooges than the three branches of government.”<sup>147</sup> Justice O’Connor laments that more Americans can name judges serving on *American Idol* than the Supreme Court’s incumbent Chief Justice.<sup>148</sup>

The Leonore Annenberg Institute for Civics, at the University of Pennsylvania, published a major study in 2011 that found an appalling lack of basic knowledge of the federal and state governments—including a total lack of understanding of the separation of powers, the legal effect of a Supreme Court ruling, or the limited scope of unilateral presidential authority.<sup>149</sup> In 2019, the American Bar Association commissioned a survey of civic literacy that made very similar findings about basic ignorance regarding the institutions of our federal government and their operation.<sup>150</sup> Among some of the more astonishing findings of this survey: fewer than half the public knows John Roberts is the Chief Justice of the Supreme Court of the United States, one in ten Americans believe that the Declaration of Independence “freed slaves in the Confederate states,” about 20% of the respondents confused the Declaration of Independence with the Bill of Rights, and half of the respondents believed that the First Amendment permits the criminal punishment of flag burning incident to a political protest.<sup>151</sup>

It seems reasonably clear that the problem of civic illiteracy is not simply going to go away on its own. As between a teenage boy reading *The Federalist Papers* or playing *Fortnite*, one should bet the farm on *Fortnite*.

146. *Id.*

147. Sam Dillon, *From Yale to Cosmetology School, Americans Brush Up on History and Government*, N.Y. TIMES (Sept. 16, 2005), <https://www.nytimes.com/2005/09/16/politics/from-yale-to-cosmetology-school-americans-brush-up-on-history-and.html> [<https://perma.cc/T7YX-4LBA>].

148. Schiesel, *supra* note 136 (“Two-thirds of Americans know at least one of the judges on the Fox TV show ‘American Idol,’ but less than 1 in 10 can name the chief justice of the United States Supreme Court.”). Justice O’Connor has compiled a compelling litany of social science data that clearly establishes that (1) basic civic literacy has declined over time in the United States; (2) this decline appears to be strongly correlated with K–12 schools in the United States placing a much greater emphasis on reading and math competence and reducing or eliminating mandatory courses in civics, government, and democracy; and (3) that both students and adults in the United States do not possess even very basic knowledge about the institutions of federal and state governments and how these institutions function. See O’Connor, *supra* note 8, at 696–98 (discussing numerous studies about different aspects of civic literacy and their starkly negative findings and conclusions about levels of civic literacy in the contemporary United States).

149. CAMPAIGN FOR THE CIVIC MISSION OF SCHOOLS, *GUARDIAN OF DEMOCRACY: THE CIVIC MISSION OF SCHOOLS 4* (Jonathan Gould et al. eds., 2011).

150. AM. BAR ASS’N, *ABA SURVEY OF CIVIC LITERACY 2019* (2019), <https://www.americanbar.org/content/dam/aba/images/news/2019/05/ABASurveyOfCivicLiteracy.pdf> [<https://perma.cc/AC4X-SRKN>].

151. *Id.*



No easy or obvious solutions present themselves for implementation. More cynically, to the extent some politicians or political associations believe that widespread public ignorance enhances their electoral prospects,<sup>152</sup> one would predict, as a matter of political economy, that they would agitate in favor of maintaining the status quo.

The fact of the matter is that civics education in the United States has been in broad decline for decades, and this gradual process of decline was greatly accelerated by the George W. Bush Administration's "No Child Left Behind" legislation. The No Child Left Behind initiative emphasized regular testing in the nation's schools to ensure reading and mathematics competence—but this initiative entirely omitted the successful inculcation of social science, history, and civics as measures of whether a public school receiving federal funds is failing.<sup>153</sup> Because of regular math and reading testing and the dire financial consequences of poor No Child Left Behind test scores for a public school,<sup>154</sup> civics, government, and history are being kicked to the curricular curb.<sup>155</sup>

The failure of the nation's primary, middle, and high schools to teach civics, social studies, and American history correlates with a sharp and alarming increase in civic illiteracy. As Justice O'Connor puts it, "Most young people today simply do not have an adequate understanding of how our government and political system work, and they are thus not well

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152. See Charles McNulty, *The Theater of Trump: What Shakespeare Can Teach Us About Donald*, L.A. TIMES (May 26, 2016, 10:23 AM), <https://www.latimes.com/entertainment/arts/la-ca-cm-0529-shakespeare-trump-20160518-snap-htmlstory.html> [https://perma.cc/HAU7-4EJ9] (reporting Donald Trump's excited exclamation, "I love the poorly educated!" after winning the Nevada GOP caucus in February 2016); see also *Educational Divide in GOP White House Race; What's Behind It*, DENVER POST (Apr. 3, 2016, 1:20 PM), <https://www.denverpost.com/2016/04/03/educational-divide-in-gop-white-house-race-whats-behind-it/> [https://perma.cc/E3N6-AW2N] (observing wryly that "[h]e should love them" because "Trump overwhelmingly leads his rivals for support among the less educated").

153. See Dillon, *supra* note 147 ("Because of No Child Left Behind, sadly, history is being put on the back burner or taken off the stove altogether in many or most schools, in favor of math and reading . . .").

154. See Mark Hansen, *Flunking Civics: Why America's Kids Know So Little*, A.B.A. J., May 2011, at 32, 34 (discussing the decline in civics and government curricula in the nation's schools since the late 1990s and noting that federal government funding policies, including "the Bush administration's landmark No Child Left Behind Act, which gives priority to federal funding for efforts to improve student performance in reading and math" and "the Obama administration's support for so-called STEM programs, which reward student achievement in the fields of science, technology, engineering, and math" have accelerated this trend in education policy). By way of contrast, and as Justice O'Connor explains, "[a]s late as the 1960s, students in American high schools were commonly required to take as many as three courses in civics, democracy, and government." O'Connor, *supra* note 8, at 697.

155. See Hansen, *supra* note 154, at 34 (discussing how "long-range focus on a few limited subjects that are considered fundamental to student success is squeezing out the amount of time and effort devoted to subjects considered nonfundamental, such as history, social science, government and civics"); see also Dillon, *supra* note 147 (noting the decline in history and social science offerings in the nation's schools).

prepared to participate as citizens.”<sup>156</sup> This lack of civic competence has serious and problematic spillover effects. As Justice O’Connor explains, “Research shows that the better people understand our history and system of government, the more likely they are to vote and participate in civic life.”<sup>157</sup> One might also add that a citizen who understands and appreciates our system of government is also much more likely to be capable of casting a well-informed ballot.

The question that must be asked and answered: What is to be done? More and better civics education is surely part of the answer to the problem of civic illiteracy. In this regard, Justice O’Connor has launched a broad-based effort to restore civics education to the nation’s public and private school classrooms, including the creation and promotion of a web-based learning portal called “iCivics.org.”<sup>158</sup> The iCivics initiative has been quite successful, with K–12 students playing one game, “‘Win the White House,’ more than 1 million times in October” of 2016.<sup>159</sup> Justice O’Connor reports that “[n]ationally, more than 72,000 teachers have created accounts with iCivics, giving digital civic education to more than 7.5 million students.”<sup>160</sup> In fact, iCivics “is now used by more than half the nation’s middle-school social-studies teachers.”<sup>161</sup>

Initiatives, such as iCivics.org, to improve and enhance civics education in the nation’s schools clearly constitute a step in the right direction. However, enhancing education in civics, government, and democracy constitutes a necessary, but hardly sufficient, condition for creating and maintaining a body politic capable of rendering wise electoral judgments on a regular basis. After all, as one commentator observes, “Teaching civics is only partly the job of the schools.”<sup>162</sup> Civil-society organizations, including “unions, membership organizations and community groups,” have an important role to play as well, but to date “aren’t taking up the slack.”<sup>163</sup>

This is not entirely the fault of these civil-society entities. The broad-based polarization of the American public, coupled with the emergence of media “echo chambers” and the intentional siloing of voters into self-

156. Sandra Day O’Connor & Roy Romer, *Not by Math Alone*, WASH. POST (Mar. 25, 2006), <https://www.washingtonpost.com/archive/opinions/2006/03/25/not-by-math-alone/dec72991-421e-4e0c-abda-71fd0eb2a7c7/> [<https://perma.cc/E7UP-D2T3>].

157. *Id.*

158. Dillon, *supra* note 145.

159. Leslie Brody, *Civics Game Advanced by Former Justice Is Classroom Hit*, WALL ST. J. (Nov. 13, 2016, 5:15 PM), <https://www.wsj.com/articles/civics-game-advanced-by-former-justice-is-classroom-hit-1479063396> [<https://perma.cc/7JFP-4WRK>].

160. Sandra Day O’Connor & John Glenn, *Teaching Better Civics for Better Citizens*, WALL ST. J. (May 12, 2015, 7:03 PM), <https://www.wsj.com/articles/teaching-better-civics-for-better-citizens-1431471803> [<https://perma.cc/AC2A-G77H>].

161. *Id.*

162. Hansen, *supra* note 154, at 35.

163. *Id.*

contained tribes, have made it more difficult for organizations like labor unions, public interest groups, and nonpartisan civic organizations, such as Common Cause and the League of Women Voters, to successfully engage ordinary citizens on a reliable basis.<sup>164</sup>

The most fundamental critique of Levinson and Balkin is that they do not address, at all, the crisis in civic competence that presently afflicts our electorate. No amount of institutional reform will ensure better, more effective governance if electoral decisions are being driven by Russian trolls and push polling by groups like the NRA and Chamber of Commerce. No matter how well designed a system of democratic self-government, it cannot function if those required to operationalize it are simply not up to the task.

Both Plato and Aristotle analogize a political community to a ship—and for a ship to traverse the seas safely and reliably, not only the captain but also the sailors must be up to the task of successful collective action. Plato famously launched the metaphor of the “ship of state” in his *Republic*. Socrates compares the state to “a ship or a number of ships” on which “[t]he sailors are quarreling over the control of the helm.”<sup>165</sup> The sailors fight to secure control over the ship, its cargo, and its course.<sup>166</sup> Some particularly evil sailors will resist having a competent navigator at the helm, preferring instead someone who will cater to their base desires.<sup>167</sup> Plato, of course, was no fan of democracy, and his ship of fools is a metaphor that expresses his contempt for the rule of the many.

Aristotle makes a similar point, using the same metaphor, with respect to the design of the governing institutions of a polity. He explains that “a ship which is only a span long will not be a ship at all, nor a ship a quarter of a mile long; yet there may be a ship of a certain size, either too large or too small, which will still be a ship, but bad for sailing.”<sup>168</sup> Aristotle, like Plato, analogizes citizens to sailors on the ship of state: “Like the sailor, the citizen

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164. See SUNSTEIN, *supra* note 94, at 1–11, 57–68, 114–30 (discussing the problems associated with the common practice of seeking out corroborating information from like-minded people, creating echo chambers, and reinforcing personal views that willfully ignore contrary views).

165. PLATO, *THE REPUBLIC* 195 (Francis MacDonal Cornford trans., Oxford University Press 1945).

166. *Id.* (explaining that the crew members will attempt to gain control of the ship through argument or force, make “free with its stores” after securing control, and will “turn the voyage, as might be expected of such a crew, into a drunken carousel”).

167. See *id.* at 195–96 (positing that misguided sailors with extremely poor judgment “will besiege the master himself, begging him urgently to trust them with the helm” or, in the alternative, will endorse the selection of an ersatz navigator who will enable their vices and has the ability to “persuad[e] or forc[e] the master to set them in command” and will “be likely to call the expert in navigation a mere star-gazer, who spent his time in idle talk and was useless to them”). Plato explains that the sailors “do not understand that the genuine navigator can only make himself fit to command a ship by studying the seasons of the year, sky, stars, and winds, and all that belongs to his craft.” *Id.* at 196. In other words, a genuine navigator possesses the knowledge and technical skill to direct the ship’s course expertly and thereby ensure a safe and successful voyage.

168. ARISTOTLE, *POLITICS* 287–88 (Benjamin Jowett trans., Random House, Inc. 1943).

is a member of a community.”<sup>169</sup> Although “sailors have different functions” on a ship, “they have all of them a common object, which is safety in navigation.”<sup>170</sup> What is more, “the salvation of the community is the common business of all of them.”<sup>171</sup> Aristotle argues that “[t]his community is the constitution; the virtue of the citizen must therefore be relative to the constitution of which he is a member.”<sup>172</sup>

Both Plato and Aristotle reject democracy as a form of government because they believe that ordinary citizens will be too easily tricked and misled into endorsing disastrous leaders hawking truly terrible public policies. In this, they make arguments in a negative form that political thinkers such as Jefferson, Dewey, and Meiklejohn put in a more positive, or affirmative, light. In all cases, however, the main argument is the same: Democratic self-government can steer the ship of state on a true and straight course *only* if the sailors, or citizens, are up to making the voyage. This, then, helps to provide a broader theoretical and normative basis for Justice O’Connor’s alarm over the paucity, if not absence, of formal training for engaged citizenship in our nation’s schools. After all, sailors who know nothing about either ships or navigation are apt to come to a bad end.

It would be madness to ignore important questions related to the institutional design of a nation’s governing institutions; questions related to this enterprise certainly merit serious, sustained, thoughtful—and regular—consideration. Professor Levinson correctly argues, rather emphatically, that, as a nation, we are entirely too sanguine about simply accepting our present institutional arrangements as we find them (pp. 11–14, 44–45). We are, as he posits, far too incurious about questions of government structure and function (pp. 175–76). As he states the point, “our entire institutional structure needs at least rethinking, even if not, perhaps, replacement” (p. 176).

And, yet, how can we hope to have a well-informed and sensible national discourse about whether the equal representation of the states in the Senate is defensible in an ostensibly democratic polity—or the wisdom of continuing to use an Electoral College system in which voters in presidential elections are corralled within the states (rather than a national popular vote)—if a great many of our fellow citizens do not know what the Senate or Electoral College are or how they presently function?

To shift metaphors, one must walk before one can run, and one generally must crawl before one walks. In terms of our national civic competence, we are still working on crawling. The prospects for significant structural changes in our present constitutional arrangements as advocated by Professor Levinson—and to some extent by Professor Balkin (pp. 164–66, 202–03)—

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169. *Id.* at 130.

170. *Id.* at 130–31.

171. *Id.* at 131.

172. *Id.*

are and will remain minuscule unless and until more citizens understand the deep flaws in our existing institutional arrangements. What is more, even ordinary legislative reforms, such as abolishing districting for seats in the House of Representatives, are certain never to occur without some sort of popular demand for reform.

Why would rational incumbent politicians take steps, on a voluntary basis, that would render their prospects for reelection less certain? Most incumbents in Congress, of either party, seek reelection over any other personal or political objective.<sup>173</sup> As Professor Bradley and Dean Morrison have observed, “[r]eelection is always part of the picture, and on many accounts it is the ‘dominant goal.’”<sup>174</sup> Accordingly, a rational incumbent member of Congress would promote institutional structural reforms *only* if doing so would enhance her chances for reelection—particularly when adoption of a structural reform, like abolition of legislative districts for the House of Representatives, would in most cases render reelection both less certain and more difficult.

This is not to say that reforms will never be enacted; it is to say that the political economy of incumbent legislators must be enhanced, not reduced, by so doing. Those who presently hold government office have no incentive to rock the boat (or “ship of state”) on which they already hold positions of authority; attempting to get them to act against rational self-interest would be a quixotic undertaking. For reform to be enacted through the regular political process—much less for constitutional reform to take place—the body politic must be fully engaged and demanding action.

Which brings us around to a rather serious chicken-and-egg problem. For many voters, the federal government is just fine, as is and where is. Around 40–45% of the nation’s regular voters believe that Donald Trump is doing a bang-up job. To be sure, public approval ratings for all three branches of the federal government are negative—wildly so for Congress as an institution, and less so for the President and Supreme Court. Nevertheless, even in the Senate, the least popular incumbent senator, Mitch McConnell, registered a disapproval rating of only 50% from his constituents in summer 2019 (a year before he must stand for reelection).<sup>175</sup> There is simply no broad-based, grassroots cry for reform—on either a constitutional or statutory level.

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173. See Bradley & Morrison, *Historical Gloss*, *supra* note 28, at 442 (“Political science scholarship has made clear, however, that a primary motivation for many members of Congress is reelection.”).

174. *Id.*

175. *Morning Consult’s Senator Approval Ratings*, MORNING CONSULT, <https://morningconsult.com/senator-rankings-q2-19-2/> [<https://perma.cc/LVP2-E5LL>]. In the first half of 2019, McConnell, the Senate’s least popular member with his constituents, maintained a 36% approval rating, meaning that he had a net approval deficit of 13%. *Id.*; see Nathaniel Rakich, *How Every Senator Ranks According to ‘Popularity Above Replacement Senator,’* FIVETHIRTYEIGHT (May 8, 2019, 10:14 AM), <https://fivethirtyeight.com/features/how-every-senator-ranks-according-to-popularity-above-replacement-senator/> [<https://perma.cc/A73B-8HKP>] (calculating the 13%

Levinson and Balkin are surely correct to posit that our national institutions are performing poorly, suffer from serious flaws in their design and operation, and create a nontrivial risk of creeping authoritarianism in the form of an all-powerful, and unaccountable, President. But, so long as the economy hums along, with a car in every driveway and a chicken in every pot, the average voter does not seem much inclined either to listen or to care. This goes, by a rather direct route, to Professor Sunstein’s point about the Madisonian project requiring an active, engaged, and well-informed citizenry that will hold the government’s feet to the fire.<sup>176</sup> But if a poorly informed, civically illiterate electorate has placed those in the office where they sit, what incentive do those incumbents have to work to empower voters to render better informed electoral verdicts? Reform, if there is to be reform, will have to be the product of agitation from outside the government itself, rather than from within it.

#### V. Conclusion: Charting a Course Toward Constitutional Redemption

In *Democracy and Dysfunction*, Professors Levinson and Balkin sound an important warning that an evolutionary process in the functioning and operation of the federal government has largely negated the Madisonian safeguards against unchecked government power running amok. As Professor Bradley and Dean Morrison argue, Congress today functions less as an independent branch of government—a serious institution that provides reliable oversight and plays a crucial checking function on executive overreaching—and more like a group of NFL cheerleaders, working to rally the masses to support the efforts of their team’s quarterback (i.e., a President of their party).<sup>177</sup> As Bradley and Morrison have noted, “Congress by itself often seems either unable or unwilling to provide adequate checks on executive power.”<sup>178</sup>

The Supreme Court, meanwhile, uses doctrines like standing and political questions to abjure responsibility for keeping the Executive Branch within constitutional bounds.<sup>179</sup> As Ackerman has observed, “it is all too likely that the Court will use the ‘political question’ doctrine to stage a

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approval deficit).

176. See SUNSTEIN, *supra* note 85, at 19–23, 68–75, 88–91 (“If many or most people are without information, or if they do not attend to public issues, the Madisonian system cannot get off the ground.”).

177. See Bradley & Morrison, *Historical Gloss*, *supra* note 28, at 443 (observing that “individual members of Congress tend overwhelmingly to act in accord with the preferences of their party”).

178. Bradley & Morrison, *Presidential Power*, *supra* note 5, at 1112.

179. See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401–02 (2013) (holding that persons and organizations whose communications with persons and organizations located abroad were subject to pervasive and ongoing NSA surveillance lacked standing to challenge the constitutionality of the government’s mass-surveillance program).

dignified retreat and allow the plebiscitary presidency to work its will.”<sup>180</sup> In sum, Levinson and Balkin are entirely justified in issuing Cassandra-like warnings about the inadequacy of the traditional separation-of-powers doctrine to protect us against incompetent, corrupt, or even despotic behavior by the federal government (pp. 105–15, 169–89).

The Framers’ vision for the federal government rested on a great number of *unwritten* assumptions—assumptions that have not entirely been borne out in practice. For example, they anticipated that the Electoral College would operate as a kind of elite institution that would seek out the most capable person to serve as President; a kind of Platonic guardian selected from among the *aristoi* and certainly not by and from the *hoi polloi*. The Framers did not foresee that the selection of the President would evolve into a popular election, literally a plebiscite, that worked to convey a mantle of direct democratic legitimacy on the occupant of the Oval Office (what some scholars now term a “plebiscitary” electoral process that confers a popular mandate on a newly elected president).<sup>181</sup>

So too, based on the examples of postrevolutionary state governments, such as Virginia and Pennsylvania, the Framers also feared that an all-powerful Congress might well come to dominate the Executive and Judicial Branches.<sup>182</sup> The verdict of history is now in—and the Framers obviously got it wrong. The President, not the Congress, constitutes the greatest threat to maintaining a form of limited self-government under the rule of law.

If we are to recover from the present “constitutional rot,” as Balkin optimistically predicts could happen (pp. 191–94), a necessary precondition will be an active, engaged, and well-informed citizenry that demands institutional reforms that will render the federal government more transparent, accountable, and capable of crafting and implementing sensible policies on a reliable basis. Given the high level of civic illiteracy,<sup>183</sup> one might well worry from what precincts the sustained call for political reform will issue, and how the ground troops necessary to secure the electoral victories required to implement it will be mustered. An incurious and ignorant electorate—an electorate capable of being led by the nose by

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180. ACKERMAN, *supra* note 12, at 142.

181. *See id.* at 16–17 (contrasting the Framers’ expectations for the election of Presidents with the democratic pattern which arose and gave Presidents popular mandates “for sweeping changes in the name of We the People”).

182. *See* THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961) (“The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”); *id.* at 310–12 (criticizing the absence of an effective separation of powers in the contemporary state governments in Virginia and Pennsylvania and warning that “concentrating these [powers] in the same hands is precisely the definition of despotic government”).

183. *See* O’Connor, *supra* note 8, at 697–99 (“Since 1994, no more than 27% of American fourth, eighth, or twelfth graders have scored at a ‘proficient’ level on national history or civics assessments.”).

Russian trolls—is not a promising source of broad-based and systemic political and institutional reforms.<sup>184</sup>

If we are to escape dysfunction, our salvation will have to rest in major part on ordinary voters, on a nationwide basis, rising up in support of sensible, boring, reliable government—as opposed to venting their spleen with their ballots (which is arguably what happened in the 2016 presidential election). Casting reasoned and responsible ballots is undoubtedly less enjoyable, or cathartic, than the political equivalent of exploding cherry bombs in high school bathroom toilets.

Sober and reflective voters have, of late, been in shorter supply than voters motivated by rage, economic disappointment, and class and racial resentments. Too many voters have sought to settle old scores, rather than elect candidates committed to and capable of stable, effective governance. What is more, this pathology is precisely what led classic political philosophers, such as Plato and Aristotle, to categorically reject democracy as a model for collective self-government; they both believed that democracy inevitably leads first to chaos and then to tyranny. I believe that Plato and Aristotle were wrong, and I would cast my lot with more optimistic political thinkers, including Jefferson, Dewey, and Meiklejohn. Mass participatory democracy, on a one-person, one-vote basis, can produce effective, functional, sane governance; chaos followed by tyranny is not inevitable.

For democracy to work, however, our body politic must possess—both individually and collectively—the ability and self-discipline to reliably render prudent electoral judgments. Civic literacy is an essential condition for this to occur, and, literally for decades, we have grossly neglected basic civics education in the nation’s schools. We are now reaping what we have sown—a population that is largely ignorant of the institutions of government, their powers, and the role of the *demos* in rendering these institutions accountable through the electoral process. Justice O’Connor’s work to enhance and improve civic literacy may not by itself be sufficient to ensure basic civic literacy, but initiatives such as iCivics clearly constitute an important step forward. In the end, we must either take steps to make voters fit to oversee the government or run the risk that our governing institutions will fail us. Democracy need not lead to dysfunction; an engaged, intelligent, and civically literate electorate is the key to avoiding such a tragic outcome.<sup>185</sup>

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184. Cf. LEVINSON & BALKIN, *supra* note 3, at 199–203 (proposing eight reforms to “help renew our constitutional order” but without specifying the mechanism that will lead to their successful adoption in the current political environment).

185. See Letter from Thomas Jefferson to Charles Yancey, *supra* note 108, at 331 (arguing that “if a nation expects to be ignorant & free, in a state of civilisation, it expects what never was & never will be” and that responsibility for holding government accountable must rest “with the people themselves” who cannot perform this task effectively “without information”).



