

Flunking the Founding: Civic Illiteracy and the Rule of Law

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Ilya, thank you so much for that generous introduction. And thanks to the Cato Institute for having me—or, more accurately, *streaming* me from Austin, Texas. But even from afar, I'm honored to find myself among the distinguished jurists and scholars who've delivered this lecture. I grew up in a tiny Texas town of 32 people. It was so small, our town square had only three sides. (The beauty of Zoom is that you can't hear the groaning.) But for a kid who grew up in a trailer surrounded by cotton and cattle, this is high cotton. So thank you.

2020 has been a wild ride, and I say that as a former rodeo cowboy. A confluence of overlapping crises: pandemic, recession, impeachment, social unrest. So far, the most normal part of 2020 has been *Tiger King*.

But we look for silver linings where we can. And the turmoil has perhaps sharpened our focus on first principles. According to the 2020 Constitution Day Civics Survey, 51 percent of American adults can now name all three branches of government—up from 39 percent last year (which was the all-time high).¹ But truth be told, our nation still has an abysmal civic IQ. We inhabit an age of miracles and wonders, with access to mankind's accumulated knowledge at our fingertips. Yet it's also an age of staggering civic illiteracy. Our civic *temperature* may be high, but our civic *knowledge* is not. There is much to indict. But through commendable events like today's symposium, perhaps we can move from indicting to informing—and better still, inspiring and invigorating.

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¹ "Amid Pandemic and Protests, Civics Survey Finds Americans Know More of Their Rights," Annenberg Pub. Pol'y Ctr., Sept. 14, 2020, <https://bit.ly/3tjCbVw>.

Doctor's Orders

Two hundred thirty-three years ago today, the Rolling Stones cut their first album. No—though Mick Jagger's bunch is a combined 306 years old—on this date, a throng of Philadelphians waited outside Independence Hall. And like most Philly crowds, it was tense. Our infant nation was floundering. The *United States* were anything but. The Articles of Confederation had created a loose "league of friendship," but the former colonies had yet to coalesce into a country.

For four sweltering months, delegates to the Constitutional Convention huddled in secret behind closed doors. And those outside were wary of those inside.

Presiding was the "venerated Virginian veteran,"² George Washington: the indispensable man. No Washington, no Republic. But Benjamin Franklin was the nation's renaissance man. His achievements—in science, diplomacy, letters—were unrivaled. Franklin was the first embodiment of the American Dream. From penniless runaway to protean polymath, he was the most illustrious figure in early America. He truly was "the incarnation of the true American character."³

On the convention's final day, Franklin delivered the last great speech of his life, urging adoption of the new Constitution "with all its faults."⁴ And Franklin found plenty of faults. He wanted federal judges to be elected, for example. But Franklin, 81 years old, the oldest delegate and the most renowned American in the world, flexed his considerable diplomatic skills and implored his fellow delegates to "doubt a little of his own infallibility."⁵ "[T]he older I grow," said Franklin, "the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others."⁶ We could all use a refreshing dose of that intellectual modesty today; more humility and less superiority. Franklin was actually too frail to deliver his rousing

² Lin-Manuel Miranda, "Right Hand Man," on Hamilton, at 1:27 (Atlantic Recording Co. 2015).

³ "The Inauguration of the Franklin Statue," *N.Y. Times*, Sept. 19, 1856, at 1.

⁴ Benjamin Franklin, Final Speech at the Constitutional Convention (Sept. 17, 1787), in James Madison, 2 *The Records of the Federal Convention of 1787*, 642–43 (Max Farrand ed., 1911), <https://bit.ly/2QInsq9>.

⁵ *Id.*

⁶ *Id.*

speech himself. A fellow Pennsylvanian, James Wilson, read it for him. But it was extraordinary. And it worked. There was unity, if not unanimity. And as James Madison scribbled in his notes—rather understatedly, if you ask me—“The members then proceeded to sign the instrument.”⁷

We all know what happened next. A triumphant Franklin was approached by Mrs. Powel, who blurted out, “Well Doctor, what have we got, a republic or a monarchy?” And Franklin delivered his sharp-witted rejoinder: “A republic,” “if you can keep it.”⁸

Franklin’s zinger was heartening—“A republic”—no more royal absolutism! But it was also frightening—“if you can keep it”—because it suggested that the survival of freedom depends on people, not parchment.

The duty of preserving our rich civic inheritance falls on us. *We* must ensure our Republic doesn’t descend into anarchy or monarchy. This is a job for everyday Americans, like Mrs. Powel, who posed a question for the ages, one that echoes today—“What have *we* got?” This Republic is ours. Ours to keep. And ours to lose.

⁷ Madison, *supra* note 4, at 648.

⁸ James McHenry, 3 *The Records of the Federal Convention of 1787*, 85 (Max Farrand ed., 1911) (punctuation added), <https://bit.ly/2So0ll3>. In one retelling of the story, James McHenry added that, after Franklin’s quip, Ms. Powel responded, “And why not keep it?” To which Franklin allegedly retorted, “Because the people, on tasting the dish, are always disposed to eat more of it than does them good.” This extended version was first published by McHenry in a newspaper in 1803, 16 years after the exchange between Franklin and Ms. Powel occurred, but it is not included in McHenry’s original diary entry. See Gillian Brockell, “‘A Republic, if You Can Keep It’: Did Ben Franklin Really Say Impeachment Day’s Favorite Quote?,” *Wash. Post*, Dec. 18, 2019, <https://wapo.st/3xHPNxe>. Perhaps the often-prescient Franklin feared apathy, abdication to “blissful” ignorance. See, e.g., Letter from Benjamin Franklin to Samuel Johnson (Aug. 23, 1750), <https://bit.ly/3iE9OhJ> (“[N]othing is of more importance for the public weal, than to form and train up youth in wisdom and virtue. Wise and good men are, in my opinion, the *strength* of a state: much more so than riches or arms, which, under the management of Ignorance and Wickedness, often draw on destruction, instead of providing for the safety of a people.”). He knew that the death of civic virtue would mean the death of our Republic. Education reformer Horace Mann put it this way: “It may be an easy thing to make a Republic; but it is a very laborious thing to make Republicans; and woe to the republic that rests upon no better foundations than ignorance, selfishness, and passion.” Horace Mann, Report No. 12 of the Massachusetts School Board, in *The Republic and the School*: Horace Mann on the Education of Free Men 79, 92 (Lawrence A. Cremin ed., 1957), transcribed at <https://bit.ly/3nR9f6k>.

But Franklin was not the first to recognize whose job it is to build an enduring nation. Eleven years earlier, on the same politically sacred spot, the Declaration of Independence—our original birth announcement; the greatest breakup letter of all time—proclaimed that we wanted government, as Lincoln put it four score and seven years later, “of the people, by the people, for the people.”⁹

This uniquely American Theory of Government¹⁰ was a radical experiment, the first time in history that a nation came into being asserting the inborn, individual natural rights and equality of every human being.¹¹

Listen to this word choice, from the Declaration:

- “We hold these truths to be self-evident.”
- Governments “deriv[e] their just powers from the consent of the governed.”
- When government becomes destructive, “it is the Right of the People” to change course.
- And when abuses and usurpations lead to despotism, “it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.”

Pre-Constitution, the Founders said the People wield supreme sovereignty over their government. To lay its foundation. To structure

⁹ Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), <https://bit.ly/3riXKGt>; see also Leon Kass, “Abraham Lincoln’s Re-founding of the Nation,” What So Proudly We Hail, <https://bit.ly/3nKqJ4j> (last visited Apr. 26, 2021).

¹⁰ See Randy E. Barnett, The Declaration of Independence and the American Theory of Government: “First Come Rights, and then Comes Government,” 42 Harv. J.L. & Pub. Pol’y 23, 25 (2019).

¹¹ President Reagan said the American Revolution was “the only true philosophical revolution in all history.” Ronald Reagan, “What July Fourth Means to Me,” Parade, June 28, 1981, <https://bit.ly/3vvKMWK>. “Oh, there have been revolutions before and since ours,” he said. “But those revolutions simply exchanged one set of rules for another. Ours was a revolution that changed the very concept of government.” *Id.* The reason that the Declaration is “regarded as one of the great charters,” said President Coolidge on the Declaration’s sesquicentennial, is “not because it was proposed to establish a new nation, but because it was proposed to establish a nation on new principles.” Calvin Coolidge, The Inspiration of the Declaration of Independence (July 5, 1926), <https://bit.ly/3eU48hq>. And lest anyone think that Americans’ civics know-nothingness is unique to the 21st century, President Coolidge lamented almost a century ago, “We do need . . . a better knowledge of the foundations of government.” *Id.*

its powers. All according to what seems “to them” most likely to secure their safety and happiness.¹² This power of the People is a truth that provides great comfort . . . and grave discomfort.

Facts Are Stubborn Things

Fast-forward to Constitution Day 2020:

- 23 percent of American adults still cannot name a single branch of government.¹³
- 19 percent cannot name *one* right guaranteed by the First Amendment.¹⁴
- Only 19 percent of adults under age 45 can pass a rudimentary, 10-question, multiple-choice quiz about our Founding.¹⁵

Many Americans don’t know the *how* of our Republic because they don’t know the *why* of our Republic. Margaret Thatcher once noted that Europe, unlike the United States, is “the product of history and not of philosophy.”¹⁶ America is *sui generis*, she said, because it was “built upon an idea—the idea of liberty.” She was echoing Churchill, who called the Declaration a “great title deed,” praising “the love of liberty and justice on which the American nation was founded.”¹⁷ Madison agreed. The European vision, he said, was “charters of liberty . . . granted by power,” as opposed to the American vision: “charters of power granted by liberty.”¹⁸

Our Founders, imperfect yet inspired, aimed for something transcendent: not to enshrine a *process*—democracy—but to enshrine

¹² See Barnett, *American Theory of Government*, *supra* note 10, at 26–27.

¹³ Amid Pandemic and Protests, *supra* note 1.

¹⁴ *Id.*

¹⁵ News Release, National Survey Finds Just 1 in 3 Americans Would Pass Citizenship Test, Woodrow Wilson Nat’l F’ship Found., Oct. 3, 2018, <https://bit.ly/3ui3eBN>.

¹⁶ Margaret Thatcher, Speech at Hoover Inst. Lunch (Mar. 8, 1991), <https://bit.ly/3nQyXHZ>.

¹⁷ Richard M. Langworth, “Churchill on July 4, 1918,” July 4, 2015, <https://bit.ly/3thTmH3> (quoting Winston S. Churchill, Speech at Liberty Day Meeting, Central Hall, Westminster (July 4, 1918), in Robert Rhodes James, 3 *Winston S. Churchill: His Complete Speeches 1897–1963*, at 2613–16 (1974)).

¹⁸ James Madison, “Charters,” *Nat’l Gazette*, Jan. 18, 1792, <https://bit.ly/3efKnBX>.

a *promise*—liberty. Individual freedom. The essential condition of human flourishing.

Our Founders gambled big, and they hit the trifecta:

- They had *hindsight*: They knew the history of kings and dictators, so they insisted on a government of laws and not of men.
- They had *insight*: They knew that government exists to “ensure the blessings of liberty”; that liberty is not *provided* by government but *preexists* government; that liberty is our natural birthright, not a gift from politicians.
- And they had *foresight*: They knew that to safeguard liberty, government must be structured to control its power.

Knowing that a bunch of guys dumped tea into Boston Harbor means nothing if we don’t know *why* they dumped it, which was, of course, as the Beastie Boys taught us, because, “You gotta fight, for your right, to pour tea!” And if we don’t grasp the *why* of our design, it’ll never command affection and reverence.¹⁹

- Most Americans now say they do not trust any branch of government.²⁰
- American national pride is at an all-time low.²¹
- Only 46 percent of high school and college students say they are patriotic.²²

The Father of the Country would be dismayed. Washington made clear in his first inaugural address that this is on us: “[T]he preservation of the sacred fire of liberty, and the destiny of the Republican

¹⁹ Thatcher made a similar point, explaining that “[p]olitical institutions cannot be imposed if they are to endure. They have to evolve and they have to command the affection, loyalty, and respect of populations living under them, and they have to be accountable to the people.” Thatcher, *supra* note 16.

²⁰ David Byler, “Nobody Can Predict This Election. Here’s Why,” Wash. Post, Sept. 3, 2020, <https://wapo.st/25ncvuu>.

²¹ Megan Brenan, “U.S. National Pride Falls to Record Low,” Gallup, June 15, 2020, <https://bit.ly/3eU621w> (42 percent “extremely,” and 21 percent “very,” proud to be an American).

²² Spencer Brown, “Youth Patriotism Index Shows High School Students More Patriotic than College Peers,” Young America’s Found., July 1, 2020, <https://bit.ly/3gX0TbP>.

model of Government, are . . . staked[] on the experiment entrusted to the hands of the American people.”²³ And frankly, Washington was pessimistic, confiding to another delegate, “I do not expect the Constitution to last for more than 20 years.”²⁴ Thankfully, he was wrong.

Some nations number their years by millennia.²⁵ America is approaching its semiquincentennial: 250 years. And God willing, this Nation has a long life left. But how can we be expectant about our future if we’re ignorant about our past?

It’s a short trip from “ignorance” of our founding ideals to “erasure” of them. When he was 28 years old, Abraham Lincoln spoke of this rich “legacy bequeathed us,” how we are “the legal inheritors of these fundamental blessings.”²⁶ And he warned of how danger would spring from within, from “the increasing disregard for law,” from what he called “this mobocratic spirit.” The Founding generation had died, and Lincoln was worried about lawlessness and the perpetuation of our institutions. The antidote, he said: “the attachment of the People.” And attachment includes “a reverence for the constitution and laws.”²⁷

But civic illiteracy—obliviousness to the what and why of America—accelerates *detachment*. Because if we don’t *know* our history, warts and all, we can never *understand* our history. We’ll have nothing to hold onto. Nothing to ground us.

Just a few weeks ago, Ben Franklin—Mr. “if you can keep it”—who warned of the tendency of republics to implode, was himself targeted for cancellation, thus proving the wisdom of his insight.

²³ George Washington, First Inaugural Address (Apr. 30, 1789), <https://bit.ly/33bzoDl>.

²⁴ Herbert Mitgang, “New Light on 1787 and Washington’s Doubts,” *N.Y. Times*, July 4, 1987, <https://nyti.ms/3egD112>; see also Myron Magnet, *The Founders’ Grandson*, Part II, *City J.* (Winter 2018), <https://bit.ly/3xTX1hZ> (“The Framers had hopes, but no illusions, that the Constitution would be eternal.”).

²⁵ Frederick Douglass, *What to the Slave Is the Fourth of July?*, (July 5, 1852), <https://bit.ly/2QWrGu2> (“Seventy-six years, though a good old age for a man, is but a mere speck in the life of a nation.”).

²⁶ Abraham Lincoln, *The Perpetuation of Our Political Institutions*, Address before the Young Men’s Lyceum of Springfield (Jan. 27, 1838), in 6 *J. Abraham Lincoln Ass’n* 6 (1984), <https://bit.ly/33gfHdn>.

²⁷ *Id.*

Franklin has gone from “The First American”²⁸ to “Person of Concern,” according to a D.C. government committee.²⁹ Franklin’s name should be scrubbed from a historic landmark, they claim, and his statue should be “removed, relocated, or contextualized.”³⁰ And not just him. George Washington, the man after whom the city itself is named, is also a “Person of Concern.” Thus, the Washington Monument—I guess all 81,000 tons of it—should also be removed, relocated, or contextualized.³¹ Notably, the D.C. panel made no recommendation on renaming the city itself.

I suspect that many of those we saw on TV lassoing monuments want to topple more than statues.

The Aspirational Declaration: Our Golden Apple

Amid today’s pandemic is something endemic: a deep misunderstanding of American self-government. Today is Constitution Day. But our confusion also runs to our *true* founding document: The Declaration of Independence.

Jefferson called the Declaration “an expression of the [A]merican mind.”³² Lincoln called the promise of the Declaration an “apple of gold” framed by the silver frame of the Constitution.³³ Lincoln ex-

²⁸ See generally, e.g., H.W. Brands, *The First American: The Life and Times of Benjamin Franklin* (2000).

²⁹ D.C. Facilities & Commemorative Expressions Working Group, DC Faces: Working Group Report 21 (Aug. 31, 2020), <https://bit.ly/3b1okwP>.

³⁰ *Id.* A revised report does not reference the Benjamin Franklin statute. See Laura Wainman, “Task Force Recommends Renaming 49 DC Schools, Parks and Government Buildings,” WUSA9, Sept. 2, 2020, <https://bit.ly/3xIXR0J> (describing revision and relaying screenshots of initial version). The original report is no longer available.

³¹ Associated Press, “Bowser Task Force Targets Washington Monument, Jefferson Memorial, Dozens More,” NBC News, Sept. 2, 2020, <https://nbcnews.to/2PLGc7o> (describing recommendation as to the Washington Monument). The revised report does not reference the Washington Monument. See Wainman, *supra* note 30.

³² Letter from Thomas Jefferson to Henry Lee (May 8, 1825), <https://bit.ly/2QLjvRy>.

³³ Abraham Lincoln, Fragment on the Constitution and Union (Jan. 1, 1861), <https://bit.ly/3efjmtY>. Shortly before his inauguration, President-elect Lincoln, speaking at Independence Hall on George Washington’s birthday, said, “I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence.” Abraham Lincoln, Address at Independence Hall (Feb. 22, 1861), transcribed at <https://bit.ly/3eRTZC2> (citing Mark E. Neely, Jr., *The Abraham Lincoln Encyclopedia* (1982)).

plained that “[t]he picture” frame “was made, not to conceal, or destroy the apple, but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture.”³⁴ The Constitution exists to serve the Declaration’s promise of “Liberty to all.”³⁵ The Constitution provides the tools to build a government that secures the rights proclaimed in the Declaration.

The Declaration was high treason. It was a literal indictment of the Crown, in painstaking detail, that married disobedience with eloquence. Legend has it that one delegate who was afflicted with a palsy, said as he signed, “My hand trembles, but my heart does not!”³⁶

Every spring, there’s a Colonial Day at my kids’ school. And I put on an itchy costume, unroll a scroll, and recite the Declaration of Independence, accompanied by tiny 5th grade voices.

The first two paragraphs are vacuum-packed.³⁷ There was no beating around the bush. No hemming or hawing or throat-clearing. No gauzy phrases like “irreconcilable differences.” The Declaration is declarative. This was the Festivus of 1776, the airing of grievances, and the Founders dialed it up to 11.

The second sentence is the most famous—“We hold these truths to be self-evident . . .” This line does a lot of heavy lifting. It declares: (1) these rights belong to us as individuals; (2) they are fixed, innate, our natural birthright, unrelinquishable, unwaivable, unsunderable; and (3) they are God-given, so they may not be taken by man.

Next is where Jefferson drops the mic—or the quill: the ultimate end of government is to secure these preexisting inborn rights. Boom.

³⁴ *Id.*; see also Barnett, American Theory of Government, *supra* note 10, at 23 (“[T]he Constitution is not our founding document—the Declaration is.”). As historian Allen Guelzo explains, Lincoln understood that our Constitution does not exist as a simple “set of procedural rules with no better goal than letting people do what they pleased *with* what they pleased.” Allen C. Guelzo, *Apple of Gold in a Picture of Silver: The Constitution and Liberty*, in *The Lincoln Enigma: The Changing Faces of an American Icon* 86, 87 (2001).

³⁵ Guelzo, *supra* note 34, at 87.

³⁶ See, e.g., Denise Kiernan & Joseph D’Agnese, *Signing Their Lives Away: The Fame and Misfortune of the Men Who Signed the Declaration of Independence* 52 (2009).

³⁷ See Randy E. Barnett, “What the Declaration of Independence Said and Meant,” *Wash. Post: The Volokh Conspiracy*, July 4, 2017, <https://wapo.st/3h5mteb>.

As Professor Randy Barnett famously puts it, “first come rights and then comes government.”³⁸

The Declaration unveiled the “American Theory of Government,”³⁹ and its bottom line is clear: Government exists to protect our individual, unalienable rights—rights that are ours by virtue of our very humanity.

But as the Founding generation passed away, so too did the Declaration’s uniting principle. In 1838, long before he was president, Lincoln lamented the “mobocratic spirit” that was sweeping the country. He worried that “wild and furious passions” would destroy “the strongest bulwark of any Government . . . the attachment of the People.”⁴⁰ Lincoln warned that when the People lose sight of that which binds us together—the ideal of liberty enshrined in the Declaration—“this Government cannot last.”⁴¹ Again, Lincoln was just 28 when he warned of America being torn asunder from within. Fort Sumter was still 23 years away.

It is undeniable that at the Founding, the *ideals* collided with the *reality*, America’s original sin of slavery. One-third of the Declaration’s signers were slave-owners.⁴² We were flawed and stained at the start. Jefferson’s initial draft included an anti-slavery passage, but it was cut. America is imperfect as all human things are.

Even so, the Declaration’s underlying ideals are timeless, and they are winning out. Lincoln would not abandon them even to avoid civil war. At Independence Hall, just before he was inaugurated, Lincoln described equal liberty as a gift “not alone to the people of this country, but, I hope, to the world, for all future

³⁸ Randy E. Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* 41 (2016). Next comes the bill of indictment against the Crown, and Jefferson lets loose. Many of these itemized “abuses and usurpations” are tackled head-on in our Bill of Rights and also, more fundamentally, in the very structure of our Constitution. Barnett, “What the Declaration of Independence Said and Meant,” *supra* note 37.

³⁹ Barnett, *American Theory of Government*, *supra* note 10, at 24.

⁴⁰ Lincoln, *Perpetuation of Our Political Institutions*, *supra* note 26.

⁴¹ *Id.*

⁴² Yohuru Williams, “Why Thomas Jefferson’s Anti-Slavery Passage Was Removed from the Declaration of Independence,” History Channel, June 29, 2020, <https://bit.ly/3b3f0bj>.

time.”⁴³ The Declaration was a linchpin argument for abolitionists, and the Supreme Court feebly tried to explain it away in *Dred Scott*.

My favorite piece of art in my chambers is an oil painting of Frederick Douglass. In his iconic speech, “What to the Slave is the Fourth of July?,” Douglass notes that the promises of liberty and equality in the Declaration are eternal, even if America broke those promises. There was a jarring disconnect between the commendable words of the Declaration and the condemnable deeds of those who adopted it. But those founding ideals still lay the foundation for righting wrongs, including the “new birth of freedom” wrought by our Second Founding and the Civil War Amendments that belong at the center of America’s constitutional story.

The quest to live up to America’s ideals is never-ending; it requires constant striving. Even the aspirational Fourteenth Amendment failed to fulfill its promise during its first 75 years.⁴⁴ But the central idea of the Declaration—that “all men are created equal”—set in motion an inexorable march.

Martin Luther King, perhaps the most renowned protestor in our nation’s history, called on his fellow citizens not to tear down America’s heritage but to live up to it.⁴⁵ After his own March on Washington, Dr. King demanded not that our Founding documents be changed to fit *new* ideals, but that our government change to fit the *enduring* ideals of our Founding documents, which he called “a promissory note to which every American was to fall heir.”⁴⁶ Perfection is elusive in this life. But bit by bit, amendment by amendment,

⁴³ Abraham Lincoln, Address at Independence Hall, *supra* note 33.

⁴⁴ See Ernest A. Young, Dying Constitutionalism and the Fourteenth Amendment, 102 Marq. L. Rev. 949, 949 (2019).

⁴⁵ See Martin Luther King, Jr., I Have a Dream, Speech Delivered at the Lincoln Memorial, Washington, D.C. (Aug. 28, 1963), transcribed at <https://bit.ly/3ejcPmg>.

⁴⁶ See *id.* (“When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, Black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness. It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. . . . We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check—a check that will give us upon demand the riches of freedom and the security of justice.”).

we are drawing nearer to the first enumerated purpose of the Preamble: formation of that “more perfect Union.”

The Architectural Constitution: Our Silver Frame

So far, I’ve focused on the Declaration, our golden apple, which lies at the heart of the American project. But it is preserved through its silver frame, the Constitution. The Declaration is aspirational; the Constitution is architectural. The Declaration declared the purpose of government: to secure our God-given rights. The Constitution erected an ingenious structure to achieve that purpose.

It is imperative that we understand *both* documents so that, as Lincoln cautioned, “neither picture, or apple shall ever be blurred, or bruised or broken.”⁴⁷

The Framers were not tinkerers. They didn’t pledge their lives, fortunes, and sacred honors to fiddle around the edges. They up-ended things. Madisonian architecture infused with Newtonian genius: three co-equal branches locked in synchronous orbit by competing interests. “Ambition . . . counteract[ing] ambition,” as Madison put it.⁴⁸ A radical structure that *divided* power to *control* power.

And the most extraordinary element? These three rival branches derive power from three unrivaled words, supersized on the page for all the world to see: “We the People.” Not We the Government, We the Judges, or We the Subjects. In an era of kings and sultans, this was a script-flipping heresy. Nothing was more radical than the idea that sovereignty resides not in government but in the governed.

Popular sovereignty is a duty, not a mere theory. Shortly after the Constitution was signed, Jefferson wrote from Paris: “[W]herever the people are well informed they can be trusted with their own government.”⁴⁹

But how can we give informed say-so if we lack informed know-how? We the People are meant to be watchdogs, not lap-dogs. Franklin’s warning “if you can keep it” presumes “if you know it” . . . that everyday Americans will be well-informed and thus wield their sovereignty smartly.

⁴⁷ Lincoln, Fragment on the Constitution, *supra* note 33.

⁴⁸ The Federalist No. 51 (James Madison), <https://bit.ly/3vFQGom>.

⁴⁹ Letter from Thomas Jefferson to Richard Price (Jan. 8, 1789), <https://bit.ly/3ejG60t>.

But again, We the People's civic illiteracy is staggering:

- 71 percent of Americans can't identify the Constitution as the supreme law of the land.
- 63 percent can't name one of their state's U.S. senators.
- 62 percent can't identify the governor of their state.⁵⁰

Heck, 10 percent of college graduates think Judith Sheindlin (aka "Judge Judy") sits on the Supreme Court.⁵¹

Madison warned of this expressly: "A popular Government, without popular information . . . is but a Prologue to a Farce or a Tragedy; or, perhaps both."⁵² Get this: Most of America's elite universities no longer require history majors to take a single course in U.S. history.⁵³

But there is a ray of hope: naturalized Americans, those who've risked everything to help write the next chapter of the American story. When it comes to the U.S. citizenship exam, immigrants "get the job done."⁵⁴ Do you know what percentage of immigrants pass the civics test their first try? 90 percent.⁵⁵ (Congratulations, Ilya, on having been one of those.) The same 100 multiple-choice questions were given to some American high schoolers. The passage rate: 5 percent.⁵⁶ The generation with the greatest access to information is also the least informed.

An *informed* citizenry is indispensable to *self*-government. But even that is no guarantee of *good* government. Beyond education, you need engagement. Franklin said "if you can keep it" because he knew the secret sauce: an *engaged* citizenry.

American civic-spiritedness, Tocqueville explained, is rooted in our three-dimensional sense of participation: (1) we participate in

⁵⁰ Michael F. Ford, "Civic Illiteracy: A Threat to the American Dream," Xavier Univ. Ctr. for the Study of the Am. Dream, Apr. 26, 2012, <https://bit.ly/3xOwU5r>.

⁵¹ Am. Council of Trs. & Alumni, A Crisis in Civic Education 5 (Jan. 2016), <https://bit.ly/3tfiePD>.

⁵² Letter from James Madison to W.T. Barry (Aug. 4, 1822), <https://bit.ly/3eU5eK1>.

⁵³ Am. Council of Trs. & Alumni, No U.S. History?: How College History Departments Leave the United States out of the Major 2 (July 2016), <https://bit.ly/2PMGif4>.

⁵⁴ Miranda, "Yorktown," *supra* note 2, at 0:18.

⁵⁵ Applicant Performance on the Naturalization Test – June 2020, U.S. C' ship & Immigr. Servs., <https://bit.ly/33hkUBT> (last updated Aug. 25, 2020).

⁵⁶ James Marshall Crotty, "Less Than 5% of Arizona Students Can Pass State's Super Simple Civics Exam. Can You?," Forbes, Jan. 16, 2015, <https://bit.ly/3eU6H2Z>.

creating our own, and thus our nation's, prosperity; (2) we participate in the administration of local government and voluntary associations (what Edmund Burke called the "little platoon[s]"⁵⁷ of family, church, and local community that incline us to civic virtue); and (3) through electing our representatives, we participate in the making of laws that advance our freedom and prosperity. American patriotism is anchored in that Tocquevillian vision of pro-active citizens, sleeves rolled up, who take charge of their own economic, social, and political happiness.⁵⁸

American citizenship is not a spectator sport. Justice Louis Brandeis put it well: "The only title in our democracy superior to that of president is the title of citizen."⁵⁹ Our Constitution is an exquisite charter of freedom, but freedom requires patriots, not passersby. It demands fierce defenders, not feeble bystanders.

Take Lincoln. In 1858, he was "a financially insecure, failing politician with no administrative experience."⁶⁰ But the Supreme Court's *Dred Scott* decision galvanized Lincoln. That June, he delivered his "House Divided" speech. It was poetic and prophetic. Lincoln lost that election, but it was that legal analysis of a judicial decision that catapulted him to Mount Rushmore. Lincoln was no mere bystander. His civic participation educated voters, who liked what they heard and leveraged that knowledge into sending that "failing politician" to the White House two years later.

⁵⁷ See Edmund Burke, 24 Reflections on the French Revolution, paras. 75–99 (1790), in *The Harvard Classics* (Charles W. Eliot ed., 1909–14), <https://bit.ly/3b1rLk>.

⁵⁸ Said Tocqueville: "A man understands the influence that the well-being of the country has on his own; he knows that the law permits him to contribute to producing this well-being, and he interests himself in the prosperity of his country at first as a thing that is useful to him, and afterwards as his own work." Alexis de Tocqueville, *Democracy in America* 225 (Harvey C. Mansfield & Debra Winthrop trans., 2000) (1835). As a result, every American "understands the influence that general prosperity exerts on his happiness" and "is accustomed to regarding this prosperity as his own work"; therefore, he "sees in the public fortune his own, and he works for the good of the state not only out of duty or out of pride. . . ." *Id.* at 226. "In our day," he observed, the civic spirit "seems to me inseparable from the exercise of political rights." *Id.*

⁵⁹ "Quotations about Democracy, Politics and Government, and Related Matters," Ctr. for Civic Educ. (cleaned up), <https://bit.ly/3gXjiFq> (last visited Apr. 27, 2021).

⁶⁰ Walter Dellinger, Speech Delivered to Duke Law School's 2020 Graduates (May 9, 2020), transcribed at <https://bit.ly/3ti0FP1>.

Putting the “C” in Constitution

Indeed, civic engagement can ripple across centuries. Let me tell you about a tenacious Texan with a Mensa-level civics IQ.

In 1982, Gregory Watson was a 19-year-old sophomore at the University of Texas. He wrote a research paper arguing that one of James Madison’s proposed constitutional amendments was still eligible for ratification.⁶¹ The dormant proposal would’ve barred Congress from giving itself a mid-term pay raise. It was part of the batch of amendments that eventually became the Bill of Rights.

The teaching assistant was thoroughly unimpressed. She awarded Watson a big fat C. So Watson, fueled by righteous indignation, spent the next 10 years lobbying state capitols from sea to shining sea. Until, in 1992, the Twenty-seventh Amendment was finally ratified—203 years after it was first proposed.

Gregory Watson got a bad grade. So he amended the Constitution, almost singlehandedly. All it took was aptitude and attitude. The cherry on top came in 2017, 25 years after ratification, when the university officially changed his grade. The official form states, “In light of the student’s heroic efforts to prove the professor . . . wrong . . . Mr. Watson deserves A+.”⁶²

From Flunking to Dunking

Last year, the federal judiciary convened its first-ever national civics conference. Article III judges, including three Supreme Court justices, joined with law school deans, bar leaders, and others from Maine to Guam to discuss how the judiciary could help boost civics literacy.

A few weeks later, Chief Justice John Roberts wrote in his Year-End Report on the Federal Judiciary, “Each generation has an obligation to pass on to the next, not only a fully functioning government

⁶¹ See Matt Largey, “The Bad Grade That Changed The U.S. Constitution,” NPR, May 5, 2017, <https://n.pr/33erz6>. See also Scott Bomboy, “Can a dormant proposed constitutional amendment come back to life?,” Nat’l Const. Ctr.: Constitution Daily, May 31, 2018, <https://bit.ly/3vEN6uz> (discussing ratification deadlines).

⁶² Ken Herman, “35 years later, A+ for Austinite who got Constitution Amended?,” Austin Am.-Statesman, Sept. 25, 2018, <https://bit.ly/3tdwA2V>. In explaining why she changed a grade 35 years later, Professor Waite said Mr. Watson “certainly proved he knew how to work the Constitution and what it meant and how to be politically active,” and for that effort, an A+ was deserved. Largey, *supra* note 61.

responsive to the needs of the people, but the tools to understand and improve it.”⁶³ The chief justice was echoing Justice Sandra Day O’Connor, who’s devoted her post-Court life to civics education: “Knowledge about our government isn’t handed down through the gene pool.”⁶⁴ And she was echoing President Ronald Reagan, who warned, “Freedom is never more than one generation away from extinction.”⁶⁵ We didn’t pass it to our children in the bloodstream.

They’re right. This isn’t something hardwired into our DNA. The habits of citizenship must be taught and learned anew by each generation.⁶⁶

And schoolchildren are often center stage in transforming our Nation. Take Linda Brown, the schoolgirl at the center of *Brown v. Board of Education*. When the Supreme Court rejected racial segregation, it stressed the importance of education as a crucible for good citizenship. And for many students, schools may be the *only* place they might be exposed to the American political tradition.⁶⁷

⁶³ John G. Roberts, Jr., 2019 Year-End Report on the Federal Judiciary, at 4 (Dec. 31, 2019), <https://bit.ly/3edKCNP>.

⁶⁴ Sandra Day O’Connor, Speech at Games for Change 5th Annual Festival (June 4, 2008) quoted in Seth Schiesel, “Former Justice Promotes Web-Based Civics Lessons,” N.Y. Times, June 9, 2008, at 7.

⁶⁵ Ronald Reagan, Remarks at the Annual Convention of Kiwanis International (July 6, 1987), <https://bit.ly/3vFvP4n> (borrowing from Ronald Reagan, A Time for Choosing (Oct. 27, 1964), <https://bit.ly/2SrsWWH>); see also Ronald Reagan, Remarks at the Dedication of the James Madison Memorial Building of the Library of Congress (Nov. 20, 1981), <https://bit.ly/3xLit3K>.

⁶⁶ Franklin urged us to focus on young people, as “general virtue is more probably to be expected and obtained from the *education* of youth, than from the *exhortation* of adult persons” since “bad habits and vices of the mind . . . like diseases of the body,” are “more easily prevented than cured.” Letter from Benjamin Franklin to Samuel Johnson (Aug. 23, 1750), <https://bit.ly/3tn5xSN>.

⁶⁷ Research confirms an undeniable link between civics classes in school and civics knowledge (and participation) after graduation. See “Americans’ Civics Knowledge Increases but Still has a Long Way to Go,” Annenberg Pub. Pol’y Ctr. (Sept. 12, 2019), <https://bit.ly/3h1F0YI>; cf. Katharine Cornell Gorka, “Why We Need to Reemphasize America’s Founding Principles in Civics Education,” Heritage Found., May 27, 2020, <https://heritag.org/3vIS7Cy> (“We must teach the next generations a deeper understanding of why our Founders risked their lives for the right to govern themselves, why they believed a Constitution and the Bill of Rights were necessary, and why they committed to equality for all, but then failed to codify that in the Constitution.”).

But it won't be easy. A recent study examined the mission and vision statements of America's hundred largest school districts.⁶⁸ The study asked, "What exactly is our purpose?" I always thought the chief purpose of education was to prepare the next generation for thoughtful self-government. To know math, yes, but to also know how to take the measure of leaders. To know history, yes, but to also know what it means to be an American—to cherish our stunning political heritage and its vision of liberty and equality and justice for all. To help children be not just college-ready or career-ready, but civic-ready.

As Jefferson put it, "if a nation expects to be ignorant & free . . . it expects what never was & never will be."⁶⁹ Education, he said, enables "every man to judge for himself what will secure or endanger his freedom."⁷⁰ For popular sovereignty to work, education must underscore, not undermine, our common civic identity. Education should instill in children a respect for American self-government and the tools to achieve it—to equip students not just academically but civically. But in the mission and vision statements of the 100 largest school districts in America, the word "America" appeared exactly zero times.

Schools, however, shouldn't bear the full burden. Judges play a role too. As Chief Justice Roberts put it, "Civic education, like all education, is a continuing enterprise and conversation," and judges, "[b]y virtue of their judicial responsibilities . . . are necessarily engaged in civics education."⁷¹ We explain our reasoning in written opinions, lead naturalization ceremonies, oversee mock legal proceedings, etc. This past March, the Judicial Conference of the United States affirmed that civics education is a core component of judicial service. And the Administrative Office of the U.S. Courts has developed terrific online resources for judges, teachers, attorneys, and parents.⁷²

⁶⁸ Robert Pondiscio & Kate Stringer, "On Constitution Day, in search of the public mission of schools," Thomas B. Fordham Inst., Sept. 16, 2015, <https://bit.ly/3vMmOqt>.

⁶⁹ Letter from Thomas Jefferson to Charles Yancey (Jan. 6, 1816), <https://bit.ly/3nMYIZM>.

⁷⁰ Letter from Thomas Jefferson to John Tyler (May 26, 1810), <https://bit.ly/3thh0U9>.

⁷¹ Roberts, Report on the Federal Judiciary, *supra* note 63, at 2, 4.

⁷² I provide all of this information both to plug the federal courts' civic education efforts and to emphasize that the opportunities to boost civic literacy are abundant. Certainly, as times change, approaches will need to change too, harnessing technology and experiential learning. I'm even willing to overlook the occasional F-bomb on the *Hamilton* soundtrack if it means more people know the ideals that animated our Founding.

And *lawyers*, which many of you are, are uniquely equipped to help. The public spiritedness of lawyers has *always* been a defining feature of America. Indeed, lawyers have played major roles in some of our most triumphant chapters:⁷³

- 25 of 56 signers of the Declaration of Independence were lawyers;
- At least 34 of 55 delegates to the Constitutional Convention;
- 22 of 39 signers of the Constitution; and
- More than half our nation’s presidents.⁷⁴

The legal profession, as Justice Brandeis put it 116 years ago, affords “unusual opportunities for usefulness. . . . [that are] probably unequalled. There is a call upon the legal profession to do a great work for this country.”⁷⁵ Lawyers are vital community connectors and civic switchboards.⁷⁶ The profession is different today, but the calling of lawyers to public spiritedness and robust citizenship endures.

⁷³ The number of lawyers in Congress has steadily declined even as the ranks of lawyers has grown, both in raw numbers and as a percentage of the population. The peak of Congress’s lawyer population was around 1850: 80 percent. Ana Swanson, “How the Most Disliked—and Elected—Profession Is Disappearing from Politics,” *Wash. Post*, Jan. 19, 2016, <https://wapo.st/2N5nKRE>. Today it’s at an all-time low: just a third. Justin Fox, “Maybe Washington Does Need More Lawyers,” *Bloomberg*, Mar. 8, 2019, <https://bloom.bg/3eXh3iV>.

⁷⁴ Nick Robinson, *The Decline of the Lawyer-Politician*, 65 *Buff. L. Rev.* 657, 667 (2017) (over half of presidents); *id.* at 669 (25 of 56 signers of Declaration of Independence); “Signers of the Constitution: Biographical Sketches,” *Nat’l Park Serv.*, July 29, 2004, <https://bit.ly/2QSLYoq> (22 of 39 signers of the Constitution); “Fascinating Facts about the U.S. Constitution,” *ConstitutionFacts.com*, <https://bit.ly/3xL66JA> (last visited Apr. 27, 2021) (34 of 55 delegates to the Constitutional Convention); “Law Day: 10 famous people who were lawyers,” *Nat’l Const. Ctr.: Blog*, May 1, 2021, <https://bit.ly/3xL6mly> (35 of 55 delegates to the Constitutional Convention).

⁷⁵ Louis D. Brandeis, *The Opportunity in the Law*, in 5 *The Professions* 185, 194 (Melville Weston Fuller ed., 1911).

⁷⁶ Seventy years ago, Justice Robert Jackson penned a lyrical essay and described a lawyer who “understands the structure of society and how its groups interlock and interact,” how the community “lives and works under the law.” Robert H. Jackson, *The County-Seat Lawyer*, 36 *A.B.A. J.* 497, 497 (1950). Justice Jackson portrayed such lawyers as “unsung heroes of the Republic,” whose monument is a “free and self-governing Republic.” David F. Levi, Dana Remus & Abigail Frisch, *Reclaiming the Role of Lawyers as Community Connectors*, *Judicature* 32 (Fall 2019) (quoting Jackson, *County-Seat Lawyer*, *supra*, at 497), <https://bit.ly/2Sm2c9T>.

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At Disney World a few years ago, my children were mortified in the Hall of Presidents when I yelled, “WHOO-HOO!” for animatronic Calvin Coolidge. But Silent Cal understood the ineffable genius of what happened 233 years ago today: “To live under the American Constitution is the greatest political privilege that was ever accorded to the human race.”⁷⁷

A republic comes with responsibility. Self-government is not self-perpetuating. It’s tough sledding, and each generation must take its turn. This raucous Republic belongs to us all, and its preservation is up to us all. Franklin told Mrs. Powel, “if you *can* keep it.” A quarter of a millennium later, with every tool laid at our feet, there is no longer a question of *capability*. There is only a question of *culpability*.

America boasts the oldest written national constitution on earth. What an extravagant blessing. But preserving that inheritance requires a culture that prizes liberty and public-spirited virtue. For now, We the People are—and through God’s grace, will remain—the world’s oldest constitutional republic.

If we can keep it.

⁷⁷ Calvin Coolidge, Speech, Dinner at the White House (Dec. 12, 1924), <https://bit.ly/3d3TTqU>.