

REFLECTIONS ON CONGRESSIONAL ABDICATION AND CONSTITUTIONAL EROSION

*Jeffrey K. Tulis**

ABSTRACT

The political pathologies of the Trump era—polarization, hyper-partisanship, and a newly imperial presidency—are nested within a deeper problem of congressional abdication of core duties and responsibilities. Congressional abdication, in turn, is nested within a still-deeper problem of civic education—for office holders and citizens alike. The Author argues that civic education in America has decayed over the past century partly due to the legalization of American politics. As important as judicial process is to the health of democracy in America today, it is also a serious problem. Americans think of the Constitution as the preserve of the Judiciary and the meaning of the Constitution as a matter of juridical determination. But the juridical constitution, he argues, is only an important part of a larger Constitution. Tulis seeks to resuscitate the capacious civic constitution and the kind of constitutional thinking and practice that goes with it.

TABLE OF CONTENTS

I. Introduction	644
II. The Juridical Constitution	652
III. The Civic Constitution	656
IV. Conclusion.....	664

* Professor of Government and Professor of Law at The University of Texas at Austin. This Article is a revised and expanded version of the Author's previous essay: Jeffrey K. Tulis, Essay, *The Civic Constitution*, CONSTITUTIONALIST (Sept. 17, 2021), <https://theconstitutionalist.org/2021/09/17/the-civic-constitution/> [<https://perma.cc/HA8C-2M94>]. The Author is grateful to the many students and colleagues whose responses to that post helped him to craft this Article, and especially to Sotirios Barber, Stephen Engel, Jeremy Fortier, and Bonnie Honig. The *Drake Law Review* edited the substantive text according to the *Drake Law Review's* Stylistic Guide and added many new sources that can be found in the footnotes. The Author thanks the staff of the *Drake Law Review* for their considerable work on the citations.

I. INTRODUCTION

Robert Carlyle Byrd from West Virginia was the longest serving U.S. Senator in American history.¹ He became the leader of the Senate for the Democratic Party and held the office of President Pro Tempore of that body four times in his career, making him third in the line of succession to the presidency.² He died in 2010, while still serving in the Senate, at the age of 92.³

Very few Americans in the past century cared more about, or were as shaped by, the Constitution of the United States as Senator Byrd. As a young man in his twenties, Byrd established and led a chapter of the Ku Klux Klan—a biographical fact that he regretted and for which he apologized countless times over the later course of his life.⁴ There were further regrets and apologies for some of his votes on issues of race and civil rights, but he eventually became a champion for civil rights.⁵ In 2003, he received the National Association for the Advancement of Colored People's (NAACP) highest rating and was mourned by the organization upon his death.⁶ Byrd's views on race and civil rights were shaped by events in his life, in politics, and in his changing ambitions—not by the Constitution directly.⁷ But Byrd understood his politics over time as better conforming to the nation's constitutional vision. He came to these deeper understandings by virtue of his job and his office.⁸ Byrd sought to do his job well, and for that he turned to the Constitution as the Framers of it had hoped politicians would.⁹

1. *Robert C. Byrd: A Featured Biography*, U.S. SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_ByrdRobertC.htm [https://perma.cc/D9YN-KY8G].

2. *Byrd, Robert Carlyle*, BIOGRAPHICAL DIRECTORY U.S. CONG., <https://bioguide.congress.gov/search/bio/B001210> [https://perma.cc/9UMB-UYQX].

3. *Id.*

4. Eric Pianin, *A Senator's Shame*, WASH. POST (June 19, 2005), <https://www.washingtonpost.com/archive/politics/2005/06/19/a-senators-shame/95f623af-7bed-4389-9369-05a428ae4994/> [https://perma.cc/P8FZ-Y7SR].

5. *Id.*

6. J. Taylor Rushing, *NAACP Mourn's Byrd's Death*, THE HILL (June 29, 2010, 4:47 PM), www.thehill.com/blogs/blog.briefing-room-news/164967-naacp-mourns-byrds-death/ [https://perma.cc/FPF8-LLZX].

7. *See* Pianin, *supra* note 4.

8. *See A Short Biography of Senator Byrd*, ROBERT C. BYRD CTR., byrdcenter.org/byrd-biography.html [https://perma.cc/E6KE-TKDF].

9. *Id.*

Byrd became a successful leader of the Senate largely because he was an institutionalist, as the Framers had hoped all elected politicians would be.¹⁰ He stood up for the Senate in its contests with the House, and still more in its contests with the President.¹¹ He stood up for the Senate when other institutions encroached on the Senate's powers and duties, even when the President of his own party was advancing a policy that he and his own party favored.¹² He insisted that the Senate be respected and allowed to do its job, as the Constitution designed, although that might mean slowing or even defeating policies of his own party.¹³ Nothing marks the descent from constitutional government more than the willingness of its politicians to openly and shamelessly disparage the oaths of office if doing so will advance their partisan position—such as refusing to hear from relevant witnesses in an impeachment trial of a President.¹⁴

Byrd always carried a pocket copy of the Constitution.¹⁵ He would often pull it out and read sections to fellow Senators and fellow citizens to buttress some point or to remind them of their duties.¹⁶ The reaction of most of his colleagues was bemusement.¹⁷ Byrd was seen as an odd duck in the Senate—notwithstanding his power and position.¹⁸ He seemed like an anachronism, a throwback to a prior century.¹⁹ He was.

There is nobody like Robert Byrd in the Senate today, or in the House. When partisan electoral prospects align with the institutional prerogatives

10. Jeffrey K. Tulis, *On Congress and Constitutional Responsibility*, 89 B.U. L. REV. 515, 520 (2009) [hereinafter *On Congress and Constitutional Responsibility*]; M. Blane Michael, *The Power of History to Stir a Man's Blood: Senator Robert C. Byrd in the Line Item Veto Debate*, 108 W. VA. L. REV. 593, 594 (2006).

11. DAVID A. CORBIN, *THE LAST GREAT SENATOR* 239–63 (Patomac Books 2012).

12. *Id.*

13. *Id.*

14. See, e.g., Brian Naylor, *Agreement Reached to Avoid Witnesses in Trump's Impeachment Trial*, NPR (Feb. 13, 2021, 1:20 PM), <https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/13/967650922/agreement-reached-to-avoid-witnesses-in-trumps-impeachment-trial> [<https://perma.cc/9M6D-HWGF>].

15. Ray Smock, *The Power in Robert Byrd's Shirt Pocket*, ROBERT C. BYRD CTR. (Sept. 23, 2014), byrdcenter.org/blog/the-power-in-robert-byrds-shirt-pocket [<https://perma.cc/QH3N-YB5C>].

16. *Id.*

17. See Massimo Calabresi, *Robert Byrd, Longest-Serving Senator, Dies*, TIME (June 28, 2010), <https://content.time.com/time/magazine/article/0,9171,2001021,00.html> [<https://perma.cc/2PG6-KS5H>].

18. *Id.*

19. CORBIN, *supra* note 11, at 219.

of Congress, some members will still stand up for their institution.²⁰ But Byrd's example illustrates how the Congress was originally designed to absorb partisanship and to transform it into a resource of constitutional purposes.²¹ He illustrates how parties were invented to make Congress work better than it had without them. They were not invented to subvert or hijack constitutional institutions as hyper-partisans do today.²²

In the nineteenth century constitutional order, Congress robustly contended with the President over the boundaries of institutional power.²³ Today the whole Congress is anemic and seemingly powerless.²⁴ For most of American history, political practice exemplified the intention of the original constitutional design to create multiple robust sources of power rather than just one.²⁵ Congresspeople and presidents routinely stood up for the responsibilities of their offices throughout the nineteenth century and through the first half of the twentieth.²⁶

Over the past half century, Congress has abdicated all its core responsibilities for the national budget;²⁷ for accountability for appointments to the executive offices and the Judiciary;²⁸ for war powers and foreign affairs;²⁹ for attendance to the domestic problems of the nation,³⁰ and, most generally, for assuming constitutional custody of its own powers and responsibilities.³¹ This near-total abdication of legislative power and

20. Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331, 1343 (1997) [hereinafter *Constitutional Abdication*].

21. See THE FEDERALIST NO. 51 (James Madison).

22. See MARTIN VAN BUREN, INQUIRY INTO THE ORIGIN OF POLITICAL PARTIES IN THE UNITED STATES 365–68 (Abraham Van Buren & John Van Buren eds., Hurd & Haughton 1867); JAMES W. CEASER, PRESIDENTIAL SELECTION 41–46 (Princeton Univ. Press 1979); RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 49–54 (Univ. Cal. Press 1969).

23. JOSH CHAFETZ, CONGRESS'S CONSTITUTION 145–48 (Yale Univ. Press 2017).

24. STEPHEN R. WEISSMAN, A CULTURE OF DEFERENCE: CONGRESS'S FAILURE OF LEADERSHIP IN FOREIGN POLICY 31–34 (Basic Books 1996).

25. CHAFETZ, *supra* note 23, at 15–26.

26. *Id.* at 172–79.

27. LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 115–16 (Texas A&M Univ. Press 2000); JASMINE FARRIER, PASSING THE BUCK: CONGRESS, THE BUDGET, AND DEFICITS 1–8 (Univ. Press of Ky. 2004).

28. *Constitutional Abdication*, *supra* note 20, at 1341–42.

29. FISHER, *supra* note 27, at 76–79; WEISSMAN, *supra* note 24, at 63–69.

30. THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS 98–101 (Basic Books 2012).

31. *On Congress and Constitutional Responsibility*, *supra* note 10, at 516–18.

responsibility is the core constitutional pathology of our time, one that arguably lies behind other serious problems that are more familiar and more discussed, such as polarization, hyper-partisanship, populism, and a seemingly imperial presidency.³²

The broad historical contrast between Congress as it used to work and today is vital because political scientists misdiagnose the problem of abdication to the President or the Court. For many, the Legislature poses a collective action problem that doesn't hamper presidential power.³³ The fact that Executive power is vested in one person enables efficient decisions while the multiplicity of the Congress generates cycles of conflict and preference aggregation within it that prevents important legislation from being passed. The problem with this picture is that for most of American history Congress overcame collective action dilemmas and robustly used its own powers to defend its core constitutional duties in context with presidents.³⁴ A long historical perspective on Congress reveals the importance of its internal culture to its functioning. Collective action problems do not emerge in a congressional culture that has strong norms that mitigate them.³⁵

Presidential populism today—and the contempt of constitutional thinking that Trump exemplified—reveals that the decay of congressional culture is nested within a larger problem of civic education in the nation at large. A responsible Congress depends on a constitutionally intelligent and watchful people. Contests between President and Congress depend upon a watchful people. Impeachment for abuse of office and dereliction of duty requires a watchful people. But Americans have lost the ability to think about the Constitution. Alongside the decay of constitutional thinking within the Legislature is the degradation of democracy outside and around the Congress.³⁶

32. See MANN & ORNSTEIN, *supra* note 30, at 81–100.

33. SAMUEL KERNELL ET AL., *THE LOGIC OF AMERICAN POLITICS* 8–25 (CQ Press 10th ed. 2022).

34. See CHAFETZ, *supra* note 23, at 145–48.

35. See Jeffrey K. Tulis, *Deliberation Between Institutions*, in *DEBATING DELIBERATIVE DEMOCRACY: PHILOSOPHY, POLITICS AND SOCIETY* 200, 201–05 (James S. Fishkin & Peter Laslett eds., Blackwell Publishing 2003) [hereinafter *Deliberation Between Institutions*].

36. See Jeffrey K. Tulis, *Impeachment in the Constitutional Order*, in *THE CONSTITUTIONAL PRESIDENCY* 229, 243–46 (Joseph M. Bessette & Jeffrey K. Tulis eds., Johns Hopkins Univ. Press 2009).

In the nineteenth century there was nothing at all odd about a senator talking to his colleagues about the Constitution. Senators did not need to carry copies of the Constitution with them to talk about it because they knew its contents well. Byrd, himself, did not need a copy to aid his own memory.³⁷ He carried his copy because few Americans, indeed very few senators, actually know what the Constitution says and still fewer can articulate what it means.³⁸ To address this situation, Senator Byrd successfully attached a rider to an appropriations bill in 2004 that established Constitution Day and Citizenship Day.³⁹

The country did not need a Constitution Day in the nineteenth century. More citizens were constitutionally literate then, even though they were less able to read and write than are citizens today.⁴⁰ Consider the Lincoln-Douglas debates: They are among the most sophisticated arguments about the Constitution in our history.⁴¹ Those debates lasted hours, and the large audiences of ordinary citizens listened to them with rapt attention, interjected comments, and conversed about them afterwards.⁴² No such event could occur anywhere in the United States today.

How did it come to pass that most Americans, including most congresspeople, senators, and others who work in government, know so little about the Constitution today? Let me suggest two big reasons. First, over time, Americans have come to think of the Constitution as the apex of a legal system that requires a special education—a legal education—to understand.⁴³ For most Americans, the Constitution means what the Supreme Court says it means, or what litigants before the Court argue that it means.⁴⁴ Few citizens are equipped to follow the technical debates that

37. Smock, *supra* note 15.

38. *Id.*

39. Alan E. Garfield, *What Should We Celebrate on Constitution Day?*, 41 GA. L. REV. 453, 454 (2007); Danna Bell, *The Constitution and Citizenship Day*, LIBR. OF CONG. BLOGS (Sept. 12, 2017), <https://blogs.loc.gov/teachers/2017/09/the-constitution-and-citizenship-day/> [<https://perma.cc/PQU5-YFG5>].

40. CHRISTOPHER DREISBACH, CONSTITUTIONAL LITERACY vii–viii (Palgrave Macmillan 2016).

41. Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923, 923–26 (2006).

42. *Id.*

43. Aziz Rana, *Why Americans Worship the Constitution*, PUB. SEMINAR (Oct. 11, 2021), <https://publicseminar.org/essays/why-americans-worship-the-constitution/> [<https://perma.cc/PVC3-ZRMW>].

44. Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176, 176–78 (2016).

surround most constitutional controversies in the courts.⁴⁵ This aspect of our political culture can be called *the juridical constitution*.⁴⁶ It is a vital aspect of the Constitution, which, after all, presents itself as the supreme law of the land.⁴⁷ Who better to understand the law than specially trained lawyers? Increasingly, citizens, legislators, and presidents turn to the Court for the answers to questions about constitutional meaning.⁴⁸

Because the Courts and the legal system are established by the Constitution, they are only a part of it—a big part, to be sure, but only a part.⁴⁹ All of the rest of the Constitution—the design of our entire polity, including the Judiciary—is what I am calling here the civic constitution to distinguish it from the usual juridical understanding. Because I need to label this neglected understanding, it sounds like a remnant, a residue of what is left of the Constitution when we look outside the courts. *It is important to note that the civic constitution that needs to be revived and remembered is actually what was originally understood as the Constitution—the whole thing.* Shortly, I will describe in more detail the difference between the juridical and civic constitution. Part of the reason we have lost sight of the Constitution as citizens is that the juridical dimension has swallowed up the rest of the constitution in the dominant understanding of our political culture, a part has swallowed the whole.

John Finn coined the terms civic constitution and juridical constitution in 2001 and developed these ideas in 2014.⁵⁰ Following Finn, Elizabeth Beaumont also elaborated the idea of a civic constitution.⁵¹ My depiction here is somewhat different from those of Finn and Beaumont but very compatible with the thrust of their understandings.

A second reason citizens and office holders generally have a poor understanding of the Constitution is, paradoxically, wedded to their admiration of it. Americans still revere the Constitution even though they

45. See John E. Finn, *The Civic Constitution: Some Preliminaries*, in CONSTITUTIONAL POLITICS 41, 60 (Sotirios A. Barber & Robert P. George eds., Princeton Univ. Press 2001).

46. *Id.* at 53.

47. *Id.*

48. *Id.* at 53–54; *Deliberation Between Institutions*, *supra* note 35, at 208–10.

49. See U.S. CONST. art. III, § 1. See also Jeffrey K. Tulis, *On the State of Constitutional Theory*, 16 L. & SOC. INQUIRY 711, 711–16 (1991).

50. See *id.* at 1–4; see also Finn, *supra* note 45, at 41–69. See also JOHN E. FINN, PEOPLING THE CONSTITUTION 24–25 (Univ. Press Kan. 2014).

51. See generally ELIZABETH BEAUMONT, THE CIVIC CONSTITUTION (Oxford Univ. Press 2014).

do not understand and cannot discuss it intelligently.⁵² This is not an accident but partly a result of the Constitution itself. When the Constitution was proposed, Thomas Jefferson objected that it provided no mechanism for easy and periodic revision by the people.⁵³ Jefferson also thought the people should arbitrate constitutional disputes between the Congress and the President.⁵⁴ James Madison opposed Jefferson on these points strenuously and explained why in *The Federalist No. 49*.⁵⁵ He thought that regular appeals to the people to reconsider the merit of the design or to decide its meaning would deprive the project of the veneration that he thought it needed to succeed.⁵⁶ Madison thought:

it may be considered as an objection inherent in the principle, that as every appeal to the people would carry some implication of defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.⁵⁷

Madison prevailed, and the result was a Constitution that contains a provision for amendment—but is an intentionally difficult process.⁵⁸

Madison may have had a very good argument at the time of the Constitution's ratification. We hear echoes of Madison today, when some call for a new constitutional convention (which is one of several ways we can amend the Constitution, if a movement could meet the demanding hurdle of persuading two thirds of our state legislatures to call for one).⁵⁹ A commonly

52. *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUB. POL'Y CTR. (Sept. 12, 2017), <https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/> [<https://perma.cc/EBD3-M6SC>].

53. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 396–97 (Julian P. Boyd ed., Princeton Univ. Press 1958), <https://jeffersonpapers.princeton.edu/selected-documents/thomas-jefferson-james-madison> [<https://perma.cc/W873-Y4TU>].

54. See THE FEDERALIST NO. 49 (James Madison).

55. *Id.*

56. *Id.*

57. *Id.*

58. See U.S. CONST. art. V; see also Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. Rev. 1029, 1032–34 (2014).

59. See U.S. CONST. art. V; Clay S. Jenkinson, *Is It Time for a New Constitutional Convention?*, GOVERNING (July 24, 2022), <https://www.governing.com/context/is-it-time-for-a-new-constitutional-convention> [<https://perma.cc/YAD6-Z7WN>].

expressed fear is that such a move might produce a runaway convention that did not improve the Constitution but instead replaced it with something worse.⁶⁰ Madison may have been right that during his own time, any subsequent convention would have likely resulted in a product much worse than the Constitution proposed and ratified.

But Madison's preference for veneration through habituation—that is through living under the Constitution but not collectively reconsidering it as a matter of course—succeeded so well that it has rendered each subsequent generation less capable of constitutional reasoning.⁶¹ Jefferson may have the better argument now that the American understanding of the Constitution, and of the polity it brought into being, could be improved if citizens were asked to assess it, to rethink it, and to consider alternatives to it.

Precisely because the Constitution is so venerated now (even though most Americans have lost faith in government),⁶² it is difficult to generate sufficient support to surmount the multiple hurdles of the amendment process. Thus, one should have little fear that there would be a runaway convention today. The bottom line is that asking citizens to rethink the Constitution today is not dangerous and is an excellent way to rediscover its meaning.

Ironically, Madison was right to worry about too frequent recourse to the people when the people and their leadership were constitutionally literate, while Jefferson might be right that one vital way to educate a constitutionally illiterate people and leadership class today is to publicly rethink the constitution—to engage more robustly in constitutional conversation.

What would it mean to recover the civic constitution today? I begin with a sketch of some of the main features of the juridical constitution as an introduction to its contrasting and more capacious alternative.

60. Jenkinson, *supra* note 59 (“[Some] say, ‘We’d never get anything better and probably something much worse!’”).

61. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741–42 (2007).

62. *Americans’ Views of Government: Decades of Distrust, Enduring Support for Its Role*, PEW RSCH. CTR. (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/americans-views-of-government-decades-of-distrust-enduring-support-for-its-role/> [<https://perma.cc/2TRT-DKYX>].

II. THE JURIDICAL CONSTITUTION

Our citizenry behaves as if the Constitution means whatever the U.S. Supreme Court says it means.⁶³ We know this cannot be true because the Court sometimes reverses its previous decision on important constitutional questions.⁶⁴ The meaning of the Constitution stands apart from the will of its interpreters who seek to discern it. Nevertheless, it is definitely true that constitutional law at any given moment is what the Judiciary determines it to be. This means that there may be some distance between the best understanding of the Constitution and the judicial understanding—not just because judges might be mistaken, but more because of the purposeful constraints that shape their work.

Unlike legislatures and executives, courts do not decide what problems to solve or policies to pursue. Problems are solved and decisions have policy implications, but these are both the result of their task to decide cases and controversies brought to them by litigating parties.⁶⁵ Sometimes to resolve these cases they are asked to review the constitutionality of some law. Although the Constitution does not explicitly mention the power of courts to do this—the power of judicial review—classic defenses of this power in *The Federalist No. 78* and in the landmark Chief Justice John Marshall opinion in *Marbury v. Madison* explain that the power follows ineluctably from the job.⁶⁶ If the Judiciary's essential function is to interpret the law, and if the Constitution is the highest law, it follows that ordinary law that conflicts with the higher law should be struck down.⁶⁷

But note that constitutional review, even landmark decisions that alter the course of American politics, are always the by-product of a complicated legal process designed principally to resolve cases and controversies. Courts do not directly address matters of constitutional interpretation. For example, courts do not give advisory opinions on what the Constitution means.⁶⁸ To be sure, the Supreme Court decides to consider very few of the petitions it

63. See Segall, *supra* note 44, at 184–87.

64. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1954); *Lawrence v. Texas*, 539 U.S. 558, 564–78 (2003); *Citizens United v. FEC*, 558 U.S. 310, 363–64 (2010).

65. U.S. CONST. art. III, § 2, cl. 2.

66. THE FEDERALIST NO. 78 (Alexander Hamilton); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

67. *Marbury*, 5 U.S. at 177–78.

68. *Carney v. Adams*, 141 S. Ct. 493, 498 (2020) (“The Constitution grants Article III courts the power to decide ‘Cases’ or ‘Controversies.’ We have long understood that Constitutional phrase to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions.”).

receives—and thus it seeks out and chooses cases that raise important constitutional issues.⁶⁹ Still, this process is indirect and is filtered through the multiple mechanisms designed by the Congress and the courts themselves to establish and maintain a legal system that is fair and devoted to impartially resolving disputes between litigating parties.⁷⁰ Before constitutional questions are seriously discussed, parties need to establish: that they have standing to bring a lawsuit; that they have suffered a harm that courts can address; that they have brought their suit in the right venue, the correct jurisdiction; that it is a kind of dispute that courts have deemed justiciable (that is, suitable for resolution through courts); that they have exhausted any other remedies that the law may have provided for their sort of dispute; and so forth.⁷¹ Lawyers have a specialized language and a special education for all of this. These matters may be extraordinarily important in a case, but citizens are generally poorly equipped to understand these matters and journalists rarely explain them. The juridical constitution is indirect and, for most citizens, opaque.

One result of this indirection is that courts do not entertain the full range of constitutional disputes and constitutional questions. To take recent and obvious examples, whether a President has abused his power or violated the oath of office is left to the electoral process or to Congress to assess and respond to with its own tools, up to and including impeachment, trial, and removal from office. In the nineteenth, and for much of the twentieth century, most separation of powers disputes were left to be resolved by the Congress and President in dialogue and contestation with each other.⁷² These aspects of constitutionalism are part of the civic constitution that I will discuss shortly—not the juridical aspect—and it is a mark of the decay of the civic aspect, that in recent years, the Congress and President have appealed to courts to resolve their disputes and the courts have been increasingly willing to entertain these lawsuits giving over the civic to the juridical.⁷³

A third distinctive feature of the juridical constitution is the need for courts to insure that its decisions are consistent for parties who bring similar

69. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 406–16 (2004).

70. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 120–24 (2002).

71. *See Carney*, 141 S. Ct. at 498–99.

72. CHAFETZ, *supra* note 23, at 15–21 (discussing controversial cases such as *Citizens United v. FEC*, 558 U.S. 310 (2010)).

73. *See infra* Part II.

disputes. The court does this by explaining its reasoning and solving the legal problems presented to them with doctrines that can guide future courts.⁷⁴ Constitutional questions are not revisited afresh with every new case. Instead, courts first try to apply, extend, or modify the existing doctrine—the existing framework for understanding that particular constitutional matter.⁷⁵ Thus, a commitment to precedent—to not overruling prior decisions and to rationalizing new decisions in light of the reasons given for the earlier ones—means that there may be a gap between rendering a stable and just system of constitutional law and the best understanding of the Constitution itself. If an earlier precedent or doctrine is found to be seriously defective, the Supreme Court will abandon its precedent and make new law—as it did in the famous case *Brown v. Board of Education* which abandoned the doctrine that racially separate schools could be educationally equal.⁷⁶ It is important to note that decisions like *Brown*—that reverse a century of constitutional law—are rare, even if there are widely agreed upon mistakes in the reasoning of a long train of cases that shape the doctrine of law.⁷⁷

In the study of American political development, there is a concept recently popular among social scientists. This is the idea of path dependence.⁷⁸ The notion is that the movement of history is not the product of inevitable historical necessity that rules out human intervention.⁷⁹ But when political actors do make choices at crucial moments in history, they can set a future path or course for subsequent developments and rule out other paths that once were possible.⁸⁰ Crucial Supreme Court cases that set in motion a new or distinctive doctrine of law are like that. After the original doctrine is adopted—for example, a particular interpretation of a particular

74. Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 74–78 (1991).

75. Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 795–96 (2018).

76. 347 U.S. 483, 494–95 (1954) (“We conclude that in the field of public education, the doctrine of ‘separate but equal’ has no place.”).

77. Dan Keating et al., *How Often Does the Supreme Court Overturn Precedents like Roe v. Wade?*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/politics/2019/05/21/how-often-does-supreme-court-overturn-precedents-like-roe-v-wade/>.

78. See James Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY & SOC’Y 507, 510 (2000).

79. *Id.* at 510–12.

80. Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 261 (2000).

clause of the Constitution—subsequent cases are decided by applying, tweaking, or in some way extending that doctrine rather than inventing a new one, a new path. This means that large portions of the Constitution that might logically be relevant to some matter might be off limits once the Court has established a governing doctrine.

A fourth distinctive feature of the juridical constitution, related to this last point, is that it highlights relatively few clauses of the Constitution and rarely discusses much of the document. If one is a law student, you will learn a lot about the Commerce Clause, about parts of the 14th Amendment and parts of the Bill of Rights, but not all of the Bill of Rights. You will learn about parts of Article I and Article II—about the President and Congress—but more about such things as the doctrine of separation of powers even though there is no doctrine of separation of powers mentioned in the Constitution.⁸¹ You will learn a lot about the Due Process Clause of the Fourteenth Amendment but probably nothing about the Republican Guarantee Clause in the text of Article IV of the basic document.⁸² You will learn much about the Necessary and Proper Clause that speaks to powers not explicitly mentioned but in most constitutional law courses; and in very few Court cases, you will learn little about the Ninth Amendment that speaks to rights not listed.⁸³

One clause of the Constitution that you will be familiar with—and is the one part of the Constitution that many citizens have some awareness of—is the Preamble.⁸⁴ But, as a law student and lawyer, you will learn that the Preamble has no legal effect—that it cannot be cited for constitutional warrant the way that the rest of the document can.⁸⁵

This is a bare outline—indeed a stylized and over-simplified picture of the juridical mindset. It is a useful foil for recovering what I am calling the civic constitution. Let me conclude this picture of the juridical with a final observation that follows from the diminished significance of the Preamble for lawyers. For the most part, when thinking about the Constitution, courts try to determine what it prohibits government from doing rather than what it requires government to do.⁸⁶ Again, this is a simplification but still helpful

81. U.S. CONST. arts. I, II, III.

82. See U.S. CONST. art. IV, § 4, cl. 1; U.S. CONST. amend. XIV.

83. See U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. amend. IX.

84. See U.S. CONST. pmbl.

85. See *District of Columbia v. Heller*, 554 U.S. 570, 578 n.3 (2008).

86. FINN, *supra* note 50, at 44–45 (citing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 95–128 (Princeton Univ. Press 1999)).

to suggest that the thrust of the usual juridical picture is one that thinks of the Constitution as a charter of negative rights and proscriptions rather than a document that requires government to fulfill or advance positive purposes.⁸⁷

III. THE CIVIC CONSTITUTION

After the Constitution was ratified and citizens began to live under it, they continued to understand it from the perspective similar to a Framers—that is, like one responsible for making and maintaining a whole polity.⁸⁸ They understood the Constitution as something more than, though including, a legal system. From this perspective—the civic perspective—the Constitution is more like an architectural design than it is a legal code. To be clear, to think like a Framers or a founder is not a search to determine their concrete intentions for each clause of the Constitution. It is not a historical project of original intention—though some Federalists and Anti-Federalists were so insightful that one can certainly be helped by reading them and emulating how they thought. I want to stress how they thought, not necessarily what they thought about a particular clause, institution, or right. We need to think for ourselves, but we have almost lost the art of constitutional thinking that they exemplified.

Interpreting and conversing about a polity as designed is different than talking about it as a set of laws to be enforced. It is a different mindset and requires a different set of skills. To be clear, informed citizens should be able to converse about important court decisions as well. But even those conversations will be better if citizens began from a more capacious point of view.

Recapturing this kind of civic perspective takes an act of the imagination—imagining how one would think about the constitution as a whole if one were in the kind of situation the American Framers were confronted with in 1787. That situation was one in which an old constitution, the Articles of Confederation, had failed,⁸⁹ and the Framers sought a new constitution—a constitution that would work.⁹⁰ Work to accomplish what?

87. See generally SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* (Princeton Univ. Press 2005).

88. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 105–07 (Harvey Mansfield & Delba Winthrop eds., Univ. of Chi. Press 2002).

89. See Joseph M. Bessette & Jeffrey K. Tulis, *On the Constitution, Politics, and the Presidency*, in *THE CONSTITUTIONAL PRESIDENCY*, *supra* note 36, at 1, 31–32.

90. *Id.*

Many of us would cite the founding generation's revolt against power, centralized in the British Crown, and declare that the Constitution's chief purpose was to establish a "limited government." But think about that answer for a moment. Limiting government is certainly an important objective of the U.S. Constitution. But how can it be the Constitution's most important objective? Why would anyone establish a government for the *chief* purpose of limiting the government? Why would anyone establish a government if fear of government were stronger than the felt need of government? The actual language of the U.S. Constitution does not use the phrase "limited government" or anything synonymous with that phrase—anything but, in fact. The language starts with a set of positive goods: the common defense, the general welfare, the blessings of liberty, domestic tranquility, and justice.⁹¹ This is a list of good things—good things that can be pursued only through well-designed structures and powers of government. It is not *primarily* a list of legal restraints on government.

Thus, the civic perspective begins with a common sense reading of the whole Constitution and explores how its various parts fit together to depict and generate an actual polity. When citizens debated whether to adopt the Constitution in the first place, they argued about the meaning of specific words and phrases, to be sure.⁹² But the bulk of their arguments were about what the whole design meant and what kind of polity would be generated by this design.⁹³ Would this new regime be capable of avoiding the problems the states could not resolve under the Articles of Confederation? They argued about what kind of polity the commitments represented by the Constitution would bring into being and how they would look in the future.⁹⁴ The Constitution as an architectural design was not just a settlement of a political dispute in their own time but rather an argument over how to reconstitute the polity for the future.⁹⁵ That is why, for example, there was a lot of

91. U.S. CONST. pmbl.

92. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 7 (Random House 2005) ("In the extraordinary extended and inclusive ratification process envisioned by the Preamble, Americans regularly found themselves discussing the Preamble itself.").

93. PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION* 333–40 (Simon & Schuster 2010).

94. JEFFREY K. TULIS & NICOLE MELLOW, *LEGACIES OF LOSING IN AMERICAN POLITICS* 145–48 (Univ. of Chi. Press 2018).

95. See *THE FEDERALIST* NO. 49 (Alexander Hamilton) ("The future situations in which we must expect to be usually placed, do not present any equivalent security against the danger which is apprehended. But the greatest objection of all is, that the decisions which would probably result . . . would not answer the purpose of maintaining the constitutional equilibrium of government.").

argument about whether the Constitution would create a large, commercial, increasingly urban polity even though the ones they inhabited were small, rural, and agricultural.⁹⁶ The opponents of the Constitution did not want to give all that up, and they agreed with the proponents of the new plan that this was the kind of future it would bring into being.⁹⁷

The idea that the Constitution would set in motion social, economic, cultural, and political change—that it would generate a polity expected to change over time, in ways that it induced, and that its institutions were designed to change as well to meet those foreseeable futures—means that the idea of change was built into the Constitution from the very beginning. This renders a common debate within the juridical perspective—that between so-called originalists and living constitution advocates—as fundamentally mistaken. As a future oriented design, the meaning of the Constitution cannot be tethered to the extant practices or prejudices of the eighteenth century. Nor are most changes in the scope of government or making of new institutions fundamental alterations of the Constitution merely in response to extra-constitutional social and cultural development. Rather, the founding design set in motion change at its origin. The Constitution contains a political logic, induced from the beginning, such that it might be said that much of what is new—later in a practical sense—was theoretically there all along.⁹⁸

The Federalist No. 10—which articulates the case for a large commercial republic of continental scope—a dramatic change from the Articles of Confederation and from the earlier ideas of how to create a successful constitutional democracy, is often regarded as the most profound and important essay ever written defending the proposed Constitution.⁹⁹ It does not mention a single clause, but rather highlights the fundamental aspects of this design and their implications for the political development of the polity set in motion by a commitment to fundamental features of the

96. See Merrill Jensen, *The American Revolution and American Agriculture*, 43 AGRIC. HIST. 107, 107 (1969) (“American society . . . was an overwhelmingly agricultural society with perhaps ninety percent of a population of two and a half million people living on farms and plantations . . .”). See generally Martin Diamond, *Ethics and Politics: The American Way*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 75 (Robert H. Horwitz ed., Univ. of Va. Press 3d ed. 1986).

97. TULIS & MELLOW, *supra* note 94.

98. See *id.*

99. THE FEDERALIST NO. 10 (James Madison); Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10*, 27 CONST. COMMENT. 9, 29 (2010).

Constitution. From a civic perspective, the design commitments of a Constitution go well beyond parsing specific clauses. It speaks to the Constitution's fundamental commitments (and how they differed from the previous Articles of Confederation), the philosophic or theoretical bases for those commitments, and the political implications of them. These features define constitutional thinking from a Framers' perspective, but they are alien to the juridical mindset.

Returning to the most basic or fundamental level, the Constitution is a project to empower and advance purposeful government.¹⁰⁰ The Constitution generates power to serve specified purposes. As I mentioned, many legalists, especially today, think that the Constitution is fundamentally a set of limits on government. The Constitution contains both positive purposes and powers and negative limits or restrictions.¹⁰¹ The ineluctable civic starting point is that positive purposes are fundamental and restrictions or limits on power, though vitally important, are secondary.

Thus, from the civic perspective, the Preamble is and ought to be the most important paragraph of the plan.¹⁰² It sets out the positive purposes of our governing order—and the standard by which one should judge the success of this political design. The rest of the plan are the structures and powers designed as means to achieve these ends: “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity. . . .”¹⁰³ The civic perspective asks how the means of the Constitution are fitted to these ends and whether they work to advance these ends. If we can no longer say that government is capable of serving the ends of the Preamble or of advancing toward better realization

100. See generally BARBER, *supra* note 87.

101. U.S. CONST. art. I, § 8 (“The Congress *shall have Power* To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”) (emphasis added); U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .”).

102. Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INTL. J. CONST. L. 714, 721 (2010) (citing SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 13 (Oxford Univ. Press 2006)).

103. U.S. CONST. pmb. l.

of those ends, then it is time to think about a new Constitution.¹⁰⁴ This is why it is important today not to venerate the Constitution but to think about it.

The meanings of the ends are also subjects for reasoned debate. For example, what is justice in the Constitution? It is a mistake to think that justice is some specific conception shared by the citizenry at the time of the Founding, or that it is whatever our current generation thinks justice to be. Rather, justice is a real aspect of the world that we seek to understand and to better realize.¹⁰⁵ This idea, that the values and ends of the Constitution are aspects of the world about which one can have better or worse understandings, is an ineluctable premise of political argument. When we disagree about what justice means, we presuppose that there is something to disagree about. Just as the natural world is understood through testing revisable hypotheses, so too in the political and moral world, contestable ideas like justice, equality, democracy, and the general welfare are always revisable ideas. We seek the best understanding that we can find of ideas like justice on the basis of still better accounts, or new evidence. Later versions of our ends are not necessarily better versions merely because they reflect our current consensus. But neither are the original specific conceptions of ends authoritative merely because they were the conceptions common to the Founding Era.

Citizens in the nineteenth century had a more robust understanding of moral ideas than do citizens, jurists, and academics today.¹⁰⁶ It was the premise of former President Abraham Lincoln's famous argument in which he wedded the Declaration of Independence to the Constitution.¹⁰⁷ He argued that the commitment to self-evident rights was not merely an axiom to be accepted or assumed, but rather a proposition to be proved through politics.¹⁰⁸ Lincoln argued that even though most colonial Americans were full of prejudice—given that some owned slaves and most of the non-slave

104. See Beau Breslin, *Why the Preamble Matters*, DEMOCRACY, Summer 2021, <https://democracyjournal.org/magazine/61/why-the-preamble-matters/> [<https://perma.cc/PY6R-GVUY>].

105. See generally LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES* (Yale Univ. Press 2004); SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* (Johns Hopkins 1984).

106. TOCQUEVILLE, *supra* note 88, at 403–15.

107. ABRAHAM LINCOLN, *A Speech at Lewistown, Illinois, in 2 COLLECTED WORKS OF ABRAHAM LINCOLN* 545, 545–47 (Roy P. Basler ed., Rutgers Univ. Press 1953).

108. Leon R. Kass, *The Gettysburg Address and Lincoln's Reinterpretation of the American Founding*, AEI (Nov. 19, 2013), <https://www.aei.org/articles/aei-classics-the-gettysburg-address-and-lincolns-reinterpretation-of-the-american-founding/>.

holding population still regarded Blacks as inferior to whites—the Constitution’s commitment to equality represented an aspiration built into the design at odds with and challenging the cultural attitudes of the citizens who ratified the Constitution.¹⁰⁹ Black Americans always were equal to white Americans in the Constitution even when the citizenry did not realize the full meaning of the document they ratified; Black Americans did not, and still do not, experience full equality.¹¹⁰ The civic constitution invites the elaboration of its commitments and is not tethered to the extant practices and prejudices of the past.

The design of the Constitution is an organization of ends and means, with the ends more important than the means. The civic perspective begins from this basic idea, whereas the juridical perspective tends to elevate means over ends. It seeks to ensure that the means prescribed are the ones deployed. Process and forms are vitally important, so the legal aspect is a way to safeguard them. The Judiciary is a kind of hall monitor for process. But when the juridical point of view dominates all of constitutional thinking, the polity as a whole comes to think of the Constitution only as a charter of negative liberties or as a safeguard against the abuse of power by government—of the things a government should not do rather than the things it is obligated to do.

One reason the juridical perspective has this emphasis is that there are many ways a polity can seek to perfect itself, and the choice among these are the point of partisan debate and legislative deliberation. Seeking not to supplant the Legislature, courts try to confine themselves to the question of whether some action is permissible—yes or no.

But from a civic perspective one could argue not only whether some policy is permissible—whether it is allowed by the Constitution—but also which policy advances constitutional purposes better than another. It was common in the early nineteenth century for congresspeople and senators to argue whether some proposal was *more* constitutional than another.¹¹¹ This is a concept anathema to the juridical point of view. Judges do not and should not decide whether some policy is more constitutional than another—that would supplant the Legislature. Courts rightly confine themselves to the

109. GARY J. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* 95–112 (Rowman & Littlefield 1986).

110. *Id.*; TOCQUEVILLE, *supra* note 88, at 326–48.

111. See Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 708–14 (1995) (discussing some of the earliest constitutional debates held in Congress).

minimal threshold of permissible.¹¹² Is the law within the range of constitutionally permissible policies? So the juridical constitution asks yes or no with respect to matters of constitutionality while the civic perspective may ask about more or less, as well as yes or no.

It is a further mark of the decay of democratic discourse in our time that legislatures do not even consider minimal permissibility or constitutionality for themselves when they draft legislation today—the yes or no question. This is a fairly recent development—the total abdication of constitutional analysis by the Legislature.¹¹³ Today, if a question arises regarding potential constitutional problems within a piece of legislation, the Congress includes severability clauses in their bills.¹¹⁴ These clauses allow the Congress to avoid constitutional questions altogether by throwing the whole matter to the courts by stipulating that if they find some aspect unconstitutional, they can sever it from the rest of the legislation.¹¹⁵ This rarely, if ever, happened in the nineteenth and early twentieth centuries.¹¹⁶ In the past, Congress developed its own views regarding the constitutionality of legislation that it passed and those views shaped and informed their deliberation.

Because the Judiciary is designed to resolve cases and controversies, it seeks definitive and lasting answers to the problems posed. It seeks to settle the issue. The political theorist Mariah Zeisberg has labeled this the settlement thesis—the idea that in issues of constitutional contestation, courts seek to settle the issue not just between the parties, but also as a matter of constitutional interpretation for future similar controversies.¹¹⁷ The reason the Judiciary stayed out of disputes between the Congress and the Presidency for most of American history is because the political branches contesting claims to constitutional authority—regarding war powers or information, for example, were independently legitimate and not appropriate for settlement.¹¹⁸ Each institution has viable and important

112. See Cordray & Cordray, *supra* note 69, at 404–05.

113. See Douglas R. Williams, *Congressional Abdication, Legal Theory, and Deliberative Democracy*, 19 ST. LOUIS U. PUB. L. REV. 75, 77–80 (2000); see also FISHER, *supra* note 27, at 74; WEISSMAN, *supra* note 24, at 1–7.

114. Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. LEGIS. 227, 228–40 (2004) (discussing laws such as the McCain-Feingold Act which contained severability clauses).

115. *Id.* at 227–32.

116. *Id.* at 232 (“No early federal statutes contained severability clauses. . .”).

117. MARIAH ZEISBERG, *WAR POWERS* 8, 53 (Princeton Univ. Press 2013).

118. *Id.* at 236–42.

constitutional authorities that were designed to conflict.¹¹⁹ These issues were not settled but rather temporarily resolved by the political institutions themselves in argument and contestation with each other—such that the same constitutional question might be resolved differently in different political circumstances.¹²⁰ Zeisberg calls this a relational understanding of constitutional interpretation as opposed to a settlement understanding.¹²¹

To give one example of how this is supposed to work and used to work, consider the issue of executive privilege—the claim by presidents that they can keep confidential advice or deliberations within the Executive branch.¹²² There is no explicit clause on this matter in the Constitution but it is a reasonable inference that the Executive power vested in the president requires confidential advice—for law enforcement so as not to tip off targets of investigation, for national security, and for the advice giving function itself—to make it more likely that advisers will feel free to give confidential and controversial advice and not hold back.¹²³ These are the grounds, all legitimate constitutional grounds, for secrecy. But the Constitution gives the Legislature responsibilities that require information for oversight, accountability, and lawmaking.¹²⁴ So, the Legislature also has constitutionally legitimate grounds for information from the Executive. Who should prevail? That is a political question—not in the merely partisan sense of which side are you on—but in the larger sense of how important is the information to Congress versus how vital the secrecy is for the Executive.¹²⁵ The balancing of those questions was routinely and regularly resolved by negotiation in which each side responds to the arguments of the other.¹²⁶ For example, if the Executive is worried about leaks of national security or law enforcement information, a congressional committee might propose limiting the access to the information and making provisions to maintain its confidentiality. In normal administrations, these accommodations are made all the time. In the event that agreement cannot be achieved, each branch has tools at its disposal to either extract or protect the information—and the willingness to use those tools is a rough measure of the importance of the issue in the conspectus of political concerns at that time. Congress may subpoena

119. *Id.* at 41–51.

120. *Id.*

121. *Id.*

122. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032–34 (2020).

123. *Id.* at 2033–34 (citing *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

124. U.S. CONST. art. I, § 8.

125. ZEISBERG, *supra* note 117, at 242–43.

126. *Id.* at 78–91.

witnesses and documents, hold witnesses in contempt, and if the issue is serious enough, censure or impeach an office holder or the President himself.¹²⁷

This is an example of the results of architectural aspects of the Constitution that are missed by the juridical point of view and are subverted to the extent that one thinks too legalistically. The civic constitution envisions a government designed to vindicate different desirable qualities of democratic governance. Democracies require responsibility to public opinion and majority will, but they also require competing needs like attendance to rights and the safety and security of the nation and its people. To achieve these sometimes competing objectives, the Constitution reimagines governmental design to be a complex of structures, powers, duties, and induced perspectives and dispositions (like deliberation, decisiveness, and judgment). Political conflict in this vision is a virtue to be exploited and made fructifying, not a pathology or malady to be overcome.¹²⁸

IV. CONCLUSION

The vision I just described captures well constitutional understanding and practice in the nineteenth and early twentieth century because legislators and presidential advisers were constitutionally literate and had what could be called constitutional consciousness.¹²⁹ This is the civic constitution, and it has waned and withered in our time. It has withered not just because legislators no longer have the memory and skills for this kind of argumentation, but also because these contests between President and Congress require a watchful people—a people that can understand enough of the argument to be a factor in the resolution of disputes between the political branches.

Yet as striking the contrast between the robust civic constitution of the past and the constitutional decay in our time, it must be conceded that the

127. Gary J. Schmitt, *Executive Privilege: Presidential Power to Withhold Information from Congress*, in *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* 154 (Joseph M. Bessette & Jeffrey Tulis eds., Louisiana State Univ. Press 1981); David A. Crockett, *Executive Privilege*, in *THE CONSTITUTIONAL PRESIDENCY*, *supra* note 36, at 203, 205–08; Gary J. Schmitt & Jeffrey K. Tulis, *Trump v. Thompson and the Meaning of Executive Privilege Today*, *CONSTITUTIONALIST* (Feb. 7, 2022), <https://theconstitutionalist.org/2022/02/07/trump-v-thompson-and-the-meaning-of-executive-privilege-today/> [<https://perma.cc/KT72-MG92>].

128. See generally JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (Princeton Univ. Press 2017); see also *Deliberation Between Institutions*, *supra* note 35, at 207–10.

129. See generally all four volumes of DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS* (Univ. of Chi. Press 1996)

problem might have been unintentionally induced by the original Constitution itself. It may be the case that constitutional literacy in the past was a residue of the education of the generations who formed our polity rather than the success of their architecture. Our problems today may have been latent from the beginning. I conclude with this point because of a remarkable observation by Alexis de Tocqueville in his classic *Democracy in America*, written after his trip to the United States in the 1830s. Tocqueville remarked that in America, all political questions eventually turn into legal issues.¹³⁰ Tocqueville praised this aspect of our new democracy.¹³¹ It was not yet true about most political issues at the time he wrote, but it was a tendency that he was able to see and note.

Tocqueville was afraid that democracy itself, for all its virtues, was its own worst enemy.¹³² The problem for democracy he feared was that it would become too democratic, leading to majority tyranny and other pathologies.¹³³ He thought the solution to this problem was to find some substitute for aristocracy, some democratic institution that could mitigate democracy's worst tendencies.¹³⁴ He thought lawyers and the Judiciary did this.¹³⁵ They were compatible with democracy—anyone could become a lawyer; judges were selected by democratic processes, and so forth.¹³⁶ But the special training, the focus on process, on forms, and on formalities made the legal community a kind of ersatz aristocracy that could mitigate the worst aspects of democracy.¹³⁷

Tocqueville was right that over time political questions would become legal disputes and that lawyers and legalism would loom large in our political culture. In that he was brilliantly prescient. He was wrong, very wrong, that this would prove to be healthy for democracy. The ersatz aristocracy of lawyers and legalism would truncate our Constitution and diminish our constitutional culture. Civic engagement, also prized and lauded by Tocqueville, would wither, not thrive, partly because of the dominance of the juridical constitution in the civic life of the United States.

130. TOCQUEVILLE, *supra* note 88, at 93–100.

131. *Id.* at 130.

132. *Id.* at 250–51.

133. *Id.*

134. *Id.* at 251.

135. *Id.* at 257.

136. *Id.*

137. *Id.*