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HOW TO SALVAGE ARTICLE I: THE CRUMBLING FOUNDATION OF OUR REPUBLIC

DAVID SCHOENBROD*

*I pledge allegiance to the flag of the United States of America
and the republic for which it stands*¹

Article I is the first article of the Constitution because it was to be the foundation of our republic. “Republic” means the people’s government rather than that of a king or an oligarchy.² To make the federal government a republic, Article I assigns the power to decide the overarching issues of policy to a legislature whose members are supposed to be accountable to the people.³ The members of this legislature, Congress, would therefore bear personal responsibility to the people for the consequences of these pivotal decisions. This responsibility would tend to link the actions of the federal government to the interests of the people.

As I will argue, this linkage remained strong for over a century and a half—indeed grew stronger as the electorate came to in-

* Trustee Professor of Law, New York Law School. As this Article builds upon my recent book, *DC Confidential: Inside the Five Tricks of Washington*, I owe a debt of gratitude to those who helped me with the book. DAVID SCHOENBROD, *DC CONFIDENTIAL: INSIDE THE FIVE TRICKS OF WASHINGTON* 229–31 (2017). For help specifically with this Article, I owe a special debt to the leadership of the Federalist Society’s Article I Initiative and the fellow participants therein. For thoughtful research assistance on this Article, I thank, Nicole Jolicoeur and Laura Rion, New York Law School class of 2017.

1. 4 U.S.C. § 4 (2012).

2. *Republic*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/republic> [<https://perma.cc/G9NZ-Y38Z>].

3. These primary issues of policy are enumerated in Article I, Section 8. The Constitution requires the House of Representatives to be elected by the people, but prior to the ratification of the 17th amendment allowed the state legislatures to choose Senators. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII. Because, however, the states had to have a republican form of government *id.* art. IV, § 4, the Senators were directly or indirectly accountable to the people. The idea was to make members of Congress personally responsible to the people. See THE FEDERALIST NO. 10 (James Madison).

clude a larger portion of the population—until a half century ago when, members of Congress and Presidents of both parties began to evade Article I's foundational purpose. They devised and used new ways of drafting legislation that let them take the credit for promises of good news while avoiding the blame when government produces bad results. With five key tricks, elected officials now avoid accounting to us for many unpopular consequences.

Part I of my analysis argues that Article I's purpose of making politically accountable officials personally responsible for consequences is vital to the success and endurance of the republic. Part II shows how elected officials began to evade such personal responsibility a half century ago. Part III explains how this evasion of personal responsibility has led to bumptious promises, failed policies, and spiraling distrust of government as well as polarization, gridlock, and the increased influence of special interests. The ensuing distrust set the stage for outsider candidates such as Bernie Sanders and Donald Trump. Whatever the fate of the Trump presidency, the distrust is likely to build so long as the tricks continue. Part IV proposes a statute, the Honest Deal Act, which would change the ground rules of legislative politics to force elected officials to once again shoulder personal responsibility for consequences. We cannot stop the tricks by broadening the powers of the President, constitutional adjudication, or constitutional amendments. Part V argues that it is possible, surprising as it might seem, to get elected officials to enact a statute that forces them to shoulder responsibility.

I. ARTICLE I'S PURPOSE OF IMPOSING PERSONAL RESPONSIBILITY IS CRITICAL

The people who met in Philadelphia in the summer of 1787 to draft a constitution for the United States were not all-knowing, but they did respond sensibly to the challenge of finding a way that a population with clashing interests could get along. They put at the heart of the country's new government a legislative process in which a House of Representatives and a Senate whose members would both represent different constituencies and made them personally responsible for the

consequences of their legislative decisions by requiring them to publish the “Yeas and Nays” on controversial matters.⁴

The Constitution assigned to this legislative process the most pivotal decisions, such as decisions to spend the people’s money, take the people’s money through taxes, or incur debt.⁵ Those assignments put these legislators, including the President when acting under Article I,⁶ in the middle of such conflicts as those between constituents who want more money from the government, constituents who do not want to pay more taxes to the government, and constituents who oppose debt because they fear that it will require cutting spending cuts or increasing taxes in the future.

The legislators would thus be personally responsible for both the popular and unpopular consequences of their decisions. That, in turn would tend to generate open debate. If, for example, citizens of one city pressed their representatives to get Congress to spend money to improve their harbor, those representatives might run up against other representatives whose constituents would resent the cost and might garner support from still-other representatives whose constituents wanted to ship goods through the improved harbor.⁷ Congress would thus collect information from far afield about the consequences of proposed legislative actions. So, however legislators resolved a controversial issue, the clash between them would tend to make evident to both representatives and constituents who would gain and who would lose from the proposed action and in what ways.

Consider now the manifold advantages potential in a form of government in which politically accountable officials are responsible for both the popular and unpopular consequences of the pivotal decisions.

A. A republican form of government

The Declaration of Independence held that governments derive “their just Powers from the Consent of the Governed.”⁸

4. U.S. CONST. art. 1, § 5, cl. 3.

5. *Id.* art. 1, § 8, cl. 1.

6. *Id.* art. 1, § 7.

7. See THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

8. U.S. CONST. art. 1, § 8.

The personal responsibility of accountable officials for both popular and unpopular consequences rested the federal government upon the consent of the governed.

B. Careful attention to the public interest

The Framers were famously concerned about “factions,” by which they meant special interests that, unless checked, would hijack government for selfish purposes.⁹ Personal responsibility for both popular and unpopular consequences would mean that, the Framers hoped, faction would check faction.¹⁰

This hope was borne out to a substantial extent. The open debate between clashing interests, together with the personal responsibility of legislators for both benefits to one group of voters and burdens on another group of voters would give them strong incentives to take into account the interests of both groups. This was the case, for example, during the early 1800s when domestic manufacturers of cloth wanted Congress to set high tariffs on imported cloth to protect them from foreign competition.¹¹ Others opposed higher tariffs because they would increase the price of cloth, and they told their representatives so. These representatives, as Daniel Webster observed at the time, were “afraid of their constituents.”¹² Congress ultimately produced legislation that balanced the interests of both manufacturers and purchasers.¹³

9. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (“By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”).

10. *Id.* at 84 (“The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.”).

11. 42 ANNALS OF CONG. 3124–28 (1824) (reporting a memorial “[o]f sundry manufacturers, mechanics, and friends to national industry . . .”).

12. Letter from Daniel Webster to Isaac P. Davis (Apr. 11, 1825), in THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER 383, 383 (Fletcher Webster ed., 1857).

13. See MARK THORNTON & ROBERT EKLUND, TARIFFS, BLOCKADES, AND INFLATION: THE ECONOMICS OF THE CIVIL WAR 20 (2004).

C. An informed electorate

The drama of open debates would also educate citizens about the choices facing the government, even those who did not take to schooling in classrooms. The people desired this education. Once the states ratified the Constitution, voters insisted on transparency in the political process. For example, when the Senate violated the Constitution by keeping its proceedings secret, public pressure forced it to relent. As historian and professor Robert Wiebe stated, "The anger at secrecy, the demand for openness, was a functional response to situations that made democracy impossible."¹⁴ In the decades after the Constitution was ratified, Congresses actually voted upon the great issues of their era, deciding the law itself on hot-button issues such as tariffs.¹⁵ Legislators took positions on the hard choices; constituents understood.¹⁶ The Constitution had made the government a drama.

Desire to read about the drama contributed to an upsurge in literacy. From 1800 to 1840, literacy rates among white adults increased from 75 percent to around 95 percent in the North and from 50 percent to 80 percent in the South.¹⁷ With a largely literate public, the United States had more newspapers in 1822 than any other country despite its smaller population.¹⁸ According to historian and professor Daniel Walker Howe, "Foreign visitors marveled at the extent of public awareness even in remote and provincial areas."¹⁹

D. A virtuous circle

The open debate informing the public of who would gain and who would lose from a legislative proposal would tend to bring some moderation of demands on government. Given human nature, however, there would still be disagreements,

14. ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 68 (1995).

15. See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT* 272–73 (2007).

16. WIEBE, *supra* note 14, at 21 ("By the late 1820's, as Alexis de Tocqueville noted, it was already American practice in politics to 'strip off . . . whatever conceals it from sight, in order to view it more closely and in the broad light of day.'"); *id.* at 576.

17. *Id.* at 67.

18. HOWE, *supra* note 15, at 227.

19. *Id.* at 231.

but, because Congress would resolve the disagreements in the open with consequences in public view, legislators would usually be required to balance conflicting interests and voters could generally accept the system as fair. Win some; lose some. *The Economist* approvingly summarized the viewpoint of Nobel Prize-winning political economist James M. Buchanan as follows: "A democratic system can maintain legitimacy despite rancorous politics if broad agreement exists on the fairness of the underlying rules [of decision]." ²⁰

The circle of repeated demand, feedback, moderation, balancing, decision, and acceptance induced by the responsibility of representatives would tend to foster virtue. This virtuous circle could, in the best of times, put the goodness in peoples' hearts into the heart of government. There were, of course, the worst of times, such as the Civil War. Yet, despite clashing interests, the nation not only held together, but its Congress could legislate on such sharply contested issues as tariffs in the early 1800s and civil rights in the early 1960s. ²¹

II. HOW LEGISLATORS CAME TO EVADE PERSONAL RESPONSIBILITY

Ironically, the skirting of Article I's purpose came from the success it helped to produce. In the mid-1960s, the federal government seemed capable of working wonders. It had gotten the country through the Great Depression, won World War II, invented the atomic bomb, built the interstate highway system, came to preside over the world's richest economy, and enacted meaningful civil rights legislation. Such successes understandably led voters to want Washington to deal with additional problems such as pollution and haphazard health care for the poor and elderly. Yet voters, of course, preferred not to feel the burdens required to satisfy their wants. That is human nature. Besides, as I can attest from witnessing the inception of the "Great Society,"

20. *The Voice of Public Choice*, *ECONOMIST* (Jan. 19, 2013), <http://www.economist.com/news/finance-and-economics/21569692-james-buchanan-who-died-january-9th-illuminated-political-decision-making> [<https://perma.cc/Q63F-2VF7>].

21. See David Schoenbrod, *We Have a Dream*, 59 N.Y. L. SCH. L. REV. 11, 14 (2014).

many people thought that they would not have to feel burdens when they had a wonder-working government.

In this context, politicians came to sincerely embrace theories that made it seem possible to provide benefits without the burdens needed to deliver the benefits—that is, to bestow something for nothing or very little. One theory: setting strict deadlines to make the air healthy would force industry to invent technologies that would make it feasible to meet the deadlines.²² In fact, the wishing-will-make-it-so theories usually fell short. An example: meeting the deadlines in the 1970 Clean Air Act would have required taking most of the cars off the road in southern California.²³ Instead of confessing error, however, legislators from both parties quietly lobbied the EPA not to impose unpopular burdens and then publicly blamed the EPA for failing to deliver healthy air on schedule and for those burdens it did impose.²⁴

Once Congress began to overpromise, there was no going back. A new way of legislating had begun that changed legislators' personal incentives. To promise good news while avoiding the blame for bad results, members of Congress and Presidents devised and used five key tricks. Here they are very briefly described.

A. *The Money Trick*

The money trick lets members of Congress and Presidents get credit for tax cuts and spending increases while shifting the blame for the inevitable tax increases and spending cuts to their successors in office when the deficits and debt will otherwise become unsustainable. President Franklin Roosevelt and Congress did not play the money trick when they established Social Security in 1935.²⁵ They took responsibility for both the benefits and the burdens, including taxes on employers and employees fully sufficiently to pay the pensions promised into the future. In contrast,

22. See David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 813–14 (1983) (discussing the enactment of the 1970 Clean Air Act with mandatory goals as a means to develop better technology).

23. See DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON* 23–28, 39–51 (2005).

24. Schoenbrod, *supra* note 22, at 774 (“As 1977 approached, it became increasingly evident that the deadlines would not be met in many locales.” (citing COMM’N ON AIR QUALITY, *TO BREATHE CLEAR AIR* 3 (1981) (explaining the failure to meet deadlines due to the inadequacy of certain state regulations.))).

25. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620.

when President Lyndon Johnson and Congress established Medicare in 1965,²⁶ they took credit for the popular health coverage for the aged but shifted blame for raising some of the necessary revenue to their successors in office. President Richard Nixon and Congress acted similarly when they increased Social Security pensions shortly before the 1972 election.²⁷

B. The Debt Guarantee Trick

The debt guarantee trick lets members of Congress and Presidents get support from the too-big-to-fail financial giants whose profits politicians increase by guaranteeing their debts without charging market-based fees for the guarantees. Members of Congress and Presidents shift the blame for the inevitable bailouts to their successors in office when the speculation encouraged by the cheap debt guarantees triggers fiscal crises and economic crashes. The debt guarantee trick began to come on strong in the 1960s. Previously, when President Franklin Roosevelt and Congress established the Federal Deposit Insurance Corporation in 1933,²⁸ they limited the guarantees to \$2,500 per depositor. So the FDIC and thus the government would not guarantee the debts that banks owed to major depositors and other large investors who lent money to the banks. Because these debts would still be at risk, investors would demand higher interest rates from banks that took more risk and refuse to lend at all to those that took much more risk. This approach protected depositors of limited funds without the means to gauge the riskiness of their bank, yet gave banks a powerful incentive to control their appetite for risk. In contrast, when President Johnson and Congress established the Fannie Mae as a private corporation in 1968,²⁹ they implicitly guaranteed all of its debts. In time, it was clear to large investors that

26. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286.

27. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329. This brief description of the trick is drawn from DAVID SCHOENBROD, *DC CONFIDENTIAL: INSIDE THE FIVE TRICKS OF WASHINGTON* 57–62 (2017).

28. Glass-Steagall Act, § 7, Pub. L. No. 73-66, 48 Stat. 162, 168 (1933).

29. Housing and Urban Development Act of 1968, §§ 801–810, Pub. L. No. 90-448, 82 Stat. 476, 536–46.

the federal government essentially guaranteed all the debts of too-big-to-fail financial giants.³⁰

C. *The Federal Mandate Trick*

The federal mandate trick lets members of Congress and Presidents get credit for benefits they coerce state and local government to deliver, but shift the blame for the burdens required to deliver those benefits to state and local officials. The federal mandate trick rose to prominence in the 1970s. Previously, when Congress and Presidents placed conditions on federal grants, it was generally to ensure that the purposes of the grant were achieved, such as requiring that federally-funded highways must be solidly constructed, or to enforce constitutional rights. In 1995, President Clinton stated, “Before 1964, the number of explicit mandates from the Congress on state and local governments was zero,” but “on the day I took office [January 20, 1993] there were at least 172 separate pieces of legislation that impose requirements on state and local government.”³¹

D. *The Regulation Trick*

The regulation trick lets members of Congress and Presidents get credit for granting rights to regulatory protection, but shift to federal agencies the blame for the burdens required to vindicate those rights and the failures to deliver the protection promised. The regulation trick began around 1970. Previously, Congress and Presidents either enacted regulations themselves through the Article I process or told agencies to promulgate the regulations in statutes that said to agencies, in essence, “Here’s a problem, solve it.” Such broad delegations gave the agency most of the credit for the benefits as well as the blame for the burdens.³² In contrast, Congress found a way to get credit for

30. This brief description of the trick is drawn from SCHOENBROD, *supra* note 27, at 62–64, 111–22.

31. William J. Clinton, Remarks on Signing the Unfunded Mandates Refort Act of 1995 (Mar. 22, 1995), reprinted in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, WILLIAM J. CLINTON, 1995, at 381, 382 (1996). This brief description of the trick is drawn from SCHOENBROD, *supra* note 27, at 65–70.

32. While a few law professors suppose that delegation of rulemaking power does not let members of Congress shift blame, the weight of the political science literature is to the contrary. See David Schoenbrod, *Statutory Junk*, 66 EMORY L.J. ONLINE 2023 (2017). Although delegation does shift blame to officials appointed

the benefits, but shift blame for the burdens and the failures to deliver the benefits. With the 1970 Clean Air Act,³³ for example, President Nixon and Congress purported to grant iron-clad rights to regulatory protection (thus reaping credit) and told the agency to impose the duties needed to vindicate those rights (thus shifting blame).³⁴

E. *The War Trick*

The war trick lets members of Congress evade responsibility for wars that might later prove controversial. Until 1950, the tradition was that wars were either declared or authorized by statute, with the great bulk of wars authorized by statute. This tradition made both Presidents and Congress responsible for war. Then, in 1950, President Harry Truman launched the Korean War without seeking authorization from Congress. In 1973, responding to the unpopularity of wars in Vietnam, Laos, and Cambodia, Congress passed the War Powers Resolution.³⁵ It purported to block wars that are neither declared nor authorized by Congress. The Resolution, however, has been interpreted as providing a loophole that allows Presidents to avoid seeking approval from Congress, and Presidents use this loophole when Congress might balk at approving the war.³⁶ Congress has found it convenient to avoid closing the loophole. In 1995, then-Senator Joseph Biden stated that legislators have failed to fix the War Powers Resolution because "they do not have the political courage to take a stand on whether or not we should go to war."³⁷ So members of Congress use the statute to take credit for supposedly wanting to take responsibility for going to war, while colluding with the President to evade responsibility for wars that might later prove controversial. Members of Congress can thus march in the parade if the war

by the President, the President who signs the statute also largely evades most of the blame. See SCHOENBROD, *supra* note 27, at 74-75.

33. Pub. L. No. 88-206, 77 Stat. 392 (1970).

34. This brief description of the trick is drawn from SCHOENBROD, *supra* note 27, at 70-74.

35. Pub. L. No. 93-148, 87 Stat. 555 (1973).

36. See, e.g., *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327, 334-35 (1995).

37. 141 CONG. REC. S3971 (1995) (statement of Sen. Joseph Biden).

proves popular, but put the entire blame on the President if the war proves unpopular.³⁸

Voters, of course, understand that trickery is going on, but cannot see the sleights of hand that allow the legislators to take credit but shift blame. Indeed, legislators cater to constituents' concerns about the trickery through more trickery. Take a bill that the House passed on January 5, 2017, the Regulations from the Executive in Need of Scrutiny Act ("REINS Act").³⁹ The title, which suggests that the root of the problem is aggressive agencies rather than blame-shifting legislation, shows that blame-shifting is again at work. According to the Republican leadership of the House Judiciary Committee, the REINS Act "requires that federal agencies submit major regulations (those that cost the economy \$100 million or more) to Congress for approval" but no mention is made of regulations that cut the costs of compliance.⁴⁰

The REINS Act's sponsors have fashioned it to sound anti-regulatory rather than pro-accountability, which minimizes the chance that it would survive a filibuster in the Senate. The Act's failure would allow its sponsors to strike an anti-regulatory pose popular with their constituents without ever having to vote against specific regulatory protections that their constituents want. No less opportunistically, Democrats are for promises of regulatory protection without having to vote for regulatory burdens.

III. HOW EVADING PERSONAL RESPONSIBILITY HAS BROKEN GOVERNMENT

By allowing legislators to evade personal responsibility, the tricks rob us of critical advantages that we should get from Article I.

38. This brief description of the trick is drawn from SCHOENBROD, *supra* note 27, at 130–37.

39. H.R. 26, 115th Cong. (2017).

40. Press Release, H. Judiciary Comm., Goodlatte and Collins Praise House Passage of Bill to Curb Regulations with Highest Costs (Jan. 5, 2017), <https://judiciary.house.gov/press-release/goodlatte-collins-praise-house-passage-bill-curb-regulations-highest-costs> [<https://perma.cc/U9G2-37GJ>].

A. *From a republican form of government to a republican façade of government*

The tricks deny us a republican form of government by breaking the link between actions and responsibility for their consequences upon which representation depends. We have elections without accountability. By more than a two-to-one margin, voters believe that the federal government does not have the consent of the governed.⁴¹

B. *From careful attention to the public interest to carelessness and worse*

By insulating members of Congress from blame for unwisely entering wars, the war trick short-circuits the debate that ought to take place before the nation commits itself to war. This has led to many ill-conceived military enterprises.⁴²

By insulating members of Congress and Presidents from blame for the burdens needed to deliver on the promises on taxing, spending, debt guarantees, mandates, and regulation, the other tricks encourage legislators to make grandiose promises without regard to the consequences for the public. This means that they fail to consider whether government can in fact fulfill the promises, whether the promises are worth the burdens, and how to minimize the burdens needed to deliver them. Instead of framing legislation to deliver the most benefit to the constituents with the least burden, they frame legislation to deliver the most credit to themselves with the least blame to themselves.⁴³ Framing legislation to maximize the net benefit to constituents would require legislators to do hard work. Framing legislation to maximize the net benefit for themselves requires no hard work for legislators because they are past masters at optics.

It is thus unsurprising that legislators have cut the amount of time they spend in Washington and devote little of that time to legislation. They spend about as much time on legislation as de-

41. See 19% *Think Federal Government Has Consent of the Governed*, RASMUSSEN REP. (Apr. 11, 2014), http://www.rasmussenreports.com/public_content/politics/general_politics/april_2014/19_think_federal_government_has_consent_of_the_governed [<https://perma.cc/H4WP-NEEV>].

42. See SCHOENBROD, *supra* note 27, at 136–37.

43. See *id.* at 50–53.

voted weekend golfers spend on the golf course.⁴⁴ They have also greatly increased the portion of their budgets that go to the district offices that provide constituent service as opposed to the staffs in Washington assigned to help them with Article I legislative work.⁴⁵ The biggest share of the legislators' time in Washington is spent on soliciting campaign contributions.⁴⁶ As political scientists have found, blame-shifting allows legislators to benefit big campaign contributors at the expense of the general public without losing votes at the next election.⁴⁷ Conservatives as well as liberals argue that the tricks have encouraged policies that have benefited the rich at the expense of average citizens.

C. *From an informed electorate to a deceived electorate*

Some observers dismiss voters as ignorant and therefore rightly left in the dark. Yet, others have found, the trickery helps to cause ignorance.⁴⁸ As the legal philosopher and professor Jeremy Waldron wrote, those who dismiss voters as ignorant "have done democracy a great disservice" by portraying the public's seeming lack of understanding as an inevitable fact rather than as "the consequence of something comparable to malfeasance in office or corruption or electoral fraud"⁴⁹—in other words, the tricks.

D. *From a virtuous circle to a vicious circle*

The perverse consequences of trickery have included distrust of government. According to Pew Research, in 1964, before the trickery began, 76 percent of voters trusted Washington to "do the right thing almost always or most of the time."⁵⁰ That impressive figure fell to a woeful 19 percent in 2015.⁵¹

44. See *id.* at 89–90.

45. See *id.*

46. See *id.*

47. See *id.* at 90–92.

48. See JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS (2010).

49. Jeremy Waldron, *Accountability: Fundamental to Democracy* 28 (NYU Sch. of L. Pub. L. Paper No. 14-13, Apr. 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410812 [<https://perma.cc/UR66-5Q4Y>].

50. *Public Trust in Government: 1958–2015*, PEW RES. CTR. (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015> [<https://perma.cc/K62J-5YT8>].

51. *Id.*

The great bulk of American people believe that Washington insiders have tricked them. By a four to one margin, voters agreed with the statement in Trump's inaugural address that "a small group in our nation's capital has reaped the rewards of government while the people have borne the cost."⁵² The Rasmussen poll showed that large majorities of Democrats, Republicans, and independents agreed.⁵³ It is thus unsurprising that Bernie Sanders and Donald Trump, both running as outsiders, did better than expected in the 2016 presidential primaries and so many voted to "drain the swamp" in the 2016 general election.

Whatever the fate of the Trump presidency, unless the legislators stop shirking their Article I duties and the accountability that comes with them, an increasingly resentful electorate will bring an increasingly erratic government. For example, then-Judge Stephen Breyer showed how something-for-nothing environmental statutes produced a "vicious circle," by telling the EPA to produce benefits by imposing burdens that the legislators failed to acknowledge in passing the statutes.⁵⁴ When the agency attempted to implement the statutes and constituents voiced objections to the burdens, legislators pressured administrators not to impose those burdens. This, in turn, meant that the agency failed to deliver the promised environmental quality. As a result, environmental advocates blasted the agency and complained to members of Congress, who responded by ordering the agency in yet-more-absolute statutes to protect the environment, still of course without taking responsibility for the required burdens. The result of this vicious circle, Breyer showed, is that the EPA sometimes fails to stop major environmental harms for modest costs, instead stopping trivial environmental harms at huge costs.⁵⁵ Not only in the environmental arena but in general, something-for-nothing legislation has turned the virtuous circle into a vicious circle by promising

52. *Voters Strongly Share Trump's Criticism of D.C. Establishment*, RASMUSSEN REP. (Jan. 24, 2017), http://www.rasmussenreports.com/public_content/politics/general_politics/january_2017/voters_strongly_share_trump_s_criticism_of_d_c_establishment [https://perma.cc/F3F7-Y3VG].

53. *See id.*

54. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 3–54 (1995).

55. *See id.* at 21–23.

benefits the government fails to deliver and burdens of which legislators fail to forewarn us. As a result, all sides feel cheated.

Voters, of course, know that the promises of something for nothing, or for very little, are too good to be true, and so we sense that trickery is going on even though we do not quite understand how the trickery works. The sense that cheating is going on negates the broad agreement on the fairness of a democratic system that has the ability to be legitimate despite rancorous politics. With cheating in the air, people grab for what they can get.

By using the tricks, Congress fails to set realistic expectations and thereby provide a context in which society can prosper and its members can individually pursue happiness. To the contrary, Congress tells everyone, in essence, that he or she is entitled to prevail, much like the corrupt officials in *The Hunger Games* tell each and every combatant, "May the odds be ever in your favor!"⁵⁶ The conflicting expectations that Congress creates set up our government to disappoint. No wonder we distrust the federal government.

Moreover, by failing to face up to the inevitable trade-offs between benefits and burdens, Congress fails to educate voters about what makes sense and what is fair. Legislators tell us what they are against rather than what they are for. Most legislators say they are against killing children with pollution. Most legislators also say they are against killing jobs with regulation. Which they say depends upon whom they are talking to. Such absolutism is possible in sound bites or tricky statutes, but not in deciding how much to cut emissions of a pollutant, where trade-offs between health and jobs are inevitable. Yet, only when government leaders focus on the concrete rather than the abstract can they tap into our shared sense of fairness.⁵⁷

56. SUZANNE COLLINS, *THE HUNGER GAMES* 19 (2012) (emphasis omitted).

57. Ralph Nader described this sense of fairness as "the common core of people's humanity, which finds expression in factual realities, and the many senses of fairness and fair play that appear right where people are interacting every day—their workplaces, neighborhoods, marketplaces, public spaces, and the all-encompassing physical environment." RALPH NADER, *UNSTOPPABLE* 16 (2014).

The distrust of the federal government is often blamed on gridlock and polarization, but the trust steeply declined in the 1960s and 1970s, long before the gridlock and polarization set in.⁵⁸

IV. HOW THE LEGISLATORS COULD STOP THE SHIRKING

We cannot escape the tricks of Congress by looking to Presidents for salvation. As already noted in passing, Presidents have often instigated the tricks that Congress uses. With the power to veto bills, the President usually has more power over legislation than anyone and therefore more responsibility. As the legislator-in-chief, the President is the trickster-in-chief.

The tricks poison the entire government rather than just the legislative branch. The executive branch's primary job is to execute the statutes legislated, and the judicial branch's primary job is to apply those statutes in litigation. Statutes once gave the executive more leeway, but to take full advantage of the blame-shifting tricks, the statutes enacted since the 1960s impose so many precisely specified duties on the executive branch that it has much less leeway to rescue us from the bad decisions that statutes make. For example, in December, 2008, the newly elected President, Barack Obama, asked Congress to pass a bill to stimulate an economy in the depths of recession by putting people to work on "shovel-ready" projects repairing roads and other deteriorated infrastructure.⁵⁹ Later, however, he lamented that "there's no such thing as shovel-ready projects."⁶⁰ The White House reported in February 2014 that the government could devote only 3.6 percent of the \$832 billion program to fixing bridges, roads, and the rest of our transportation system.⁶¹ As Philip Howard explained: "[T]he President had no authority to build anything, and most of the money got

58. See *Public Trust in Government*, *supra* note 50 (demonstrating increases and declines in public trust of government).

59. Michael D. Shear, *Obama Lesson: 'Shovel Ready' Not So Ready*, N. Y. TIMES (Oct. 15, 2010), http://thecaucus.blogs.nytimes.com/2010/10/15/obama-lesson-shovel-ready-not-so-ready/?_php=true&_type=blogs&r=0 [https://perma.cc/G78J-7B8X].

60. *Id.*

61. See EXEC. OFFICE OF THE PRESIDENT, COUNCIL OF ECON. ADVISORS, THE ECONOMIC IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT 8, 34 (Feb. 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_arra_report.pdf [https://perma.cc/JR7C-FLBD].

diverted to a temporary bailout of the states. The money was basically wasted.”⁶² Howard showed that the President’s hands were tied again and again by old statutes.⁶³

Presidents are often tempted to circumvent Congress by usurping the legislative powers that the Constitution assigns to Congress. In this, commentators on the left and the right see grave danger. For example, on the left, Bruce Ackerman, a prominent progressive professor of law and political science who had vigorously defended the growth of executive power during the New Deal, expressed alarm at more recent changes in our government. Writing in 2010, he warned that although Presidents try to dress their unilateralism in high purpose:

[I]n America, it is not enough to be right. Before you can impose your views on the polity, you have to convince your fellow citizens that you’re right. That’s what democracy is all about. So it makes good sense to require the president to gain the support of Congress even when his vision is morally compelling. He should not be allowed to lead the nation on a great leap forward through executive decree.⁶⁴

Nor do the American people want their President to usurp the powers of Congress. Although opinion polls for decades have reflected disapproval of Congress, the public continues to believe that Congress, rather than the President, should make the major policy choices.⁶⁵ I share that belief, because systematic studies show that nations with strong executives and weak legislatures tend to suppress political liberty, go to war more frequently, and suffer from more corruption.⁶⁶

So we must fix the legislative process, but we cannot do so by enforcing the Constitution in court. Some of the tricks, such as the money trick, plainly violate no constitutional structure.

62. PHILIP K. HOWARD, *THE RULE OF NOBODY: SAVING AMERICA FROM DEAD LAWS AND BROKEN GOVERNMENT* 156 (2014).

63. *See id.*

64. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 39 (2010). Posner and Vermeule’s *The Executive Unbound* is a spirited defense of the President being unbound by legislative power. ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010). Their argument is deeply flawed. *See* SCHOENBROD, *supra* note 27, at 74–75.

65. *See e.g.*, DAVID R. MAYHEW, *THE IMPRINT OF CONGRESS* (forthcoming 2017).

66. F. H. BUCKLEY, *THE ONCE AND FUTURE KING: THE RISE OF CROWN GOVERNMENT IN AMERICA* 181–234, 315–320 (2014).

The federal mandate trick has been stopped in court, but only once until 2012.⁶⁷

Nor can we feasibly stop the tricks in court by amending the Constitution. Take, for example, the decades-long drive to amend the Constitution to limit budget deficits. Whether such an amendment is good economics, it is unlikely to succeed. Such an amendment has never gotten the required two-thirds approval in both houses of Congress needed to submit it to the states for ratification. Even if it were to get this approval, it is unlikely that it would then be ratified by three-quarters of the states, as is necessary to amend the Constitution.⁶⁸ The balanced budget amendment does, however, let some elected officials strike a pose in favor of fiscal responsibility without actually having to take the blame for raising taxes or cutting spending.

The good news is that, even under the existing Constitution, the Republic avoided the five tricks for over a century and a half. Tradition impelled legislators to act in ways that gave them responsibility for consequences. That tradition got swept away in the middle of the twentieth century. We should not necessarily go back to the old tradition. Today's times are different. We need a new tradition suitable for our times that will stop the five tricks.

To that end, my recent book, *DC Confidential: Inside the Five Tricks of Washington*, proposes a statute, the Honest Deal Act.⁶⁹ It would change the ground rules of legislative politics to force elected officials to shoulder blame for unpopular consequences. Here, in a nutshell, is how each of the five tricks lets them shift blame and the way that the Honest Deal Act would stop the blame shifting.

The money trick lets members of Congress and Presidents shift to their successors in office the blame for the tax increases and benefit cuts that will result from current policy. Much as the Truth

67. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 632 (2012). Jonathan Adler argues that *NFIB*, even though framed as a response to extreme and patent coercion, may have an impact in some other instances. Jonathan H. Adler & Nathaniel Steward, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending after NFIB v. Sebelius*, 43 *ECOLOGICAL L.Q.* 671, 721–22 (2017).

68. U.S. CONST. art V.

69. The following discussion of the Honest Deal Act is based on SCHOENBROD, *supra* note 27, at 139–60.

in Lending Act requires lenders to disclose to prospective borrowers how much they will have to pay in the future,⁷⁰ the Honest Deal Act would require government to disclose to voters in the present the average cost per family of the spending cuts or tax increases needed for it to make ends meet in the long run and how much that cost changed in the last Congress.⁷¹

The debt guarantee trick lets members of Congress and Presidents shift to their successors in office the blame for the fiscal crises and economic misery that will result from current debt guarantees that increase profits on Wall Street. The Honest Deal Act would charge the businesses that benefit from the debt guarantees market-based fees. The market would drive the fee up when a firm takes more risk, thereby cutting its profits when it takes risks that could help lead to a fiscal crisis.⁷²

The federal mandate trick lets federal officials shift to state officials the blame for the burdens needed to deliver the benefits for which the federal officials take credit. The Honest Deal Act would trigger roll call votes on the most controversial new mandates and thus make members of Congress responsible for the burdens that they impose through state and local government.⁷³

The regulation trick lets current members of Congress and Presidents shift blame to federal agencies for the burdens required to vindicate rights to regulatory protection and the failures to deliver the promised regulatory protection. Implementing the proposal by James Landis, the New Deal expert, as fleshed out by then judge Stephen Breyer, the Honest Deal Act would require members of Congress to cast roll call votes on major regulatory changes, whether to strengthen or weaken regulation.⁷⁴

The war trick lets members of Congress shift to the President blame for wars that prove unpopular. The Honest Deal Act would require members of Congress to vote on wars at the outset.⁷⁵

These proposals do not tilt for or against spending or taxing, benefits or burdens, war or peace, or any of the rest; rather,

70. 15 U.S.C. §§ 1631–51 (2012).

71. *Id.* at 139–45.

72. *Id.* at 145–48.

73. *Id.* at 148–50.

74. *Id.* at 150–56.

75. *Id.* at 156–60.

they tilt toward making elected officials accountable to us for the consequences they impose.⁷⁶

V. HOW WE CAN GET THE LEGISLATORS TO GIVE US AN HONEST DEAL

Getting the Honest Deal Act passed looks impossible when we blame our broken government on politicians currying favor with special interests on the left or the right. Such special interests can seem invincible because, as Professor Mancur Olson famously taught, the small number of their members—sometimes only a single monopolistic firm—makes it easier for them to organize to wield political influence.⁷⁷ This appearance of impossibility rests, however, on two false premises: (1) that special interests can't be defeated and (2) the fault lies exclusively with members of Congress and Presidents.

The first premise is false because the general public can sometimes prevail over special interests. As Professor Olson wrote:

[I]deas certainly do make a difference. May we not then reasonably expect, if special interests are (as I have claimed) harmful to economic growth, full employment, coherent government, equal opportunity, and social mobility, that students of the matter will become increasingly aware of this as time goes on? And that the awareness eventually will spread to larger and larger proportions of the population? And that this wider awareness will greatly limit the losses from the special interests? That is what I expect, at least when I am searching for a happy ending.⁷⁸

Ideas are indeed what allowed the broad public interest to prevail over special interests in the 1970s. The idea that government should protect the public from pollution brought regulation despite imposing large costs on the well-organized interests in the auto, coal, and other industries. And the idea that the government regulation of airlines, railroads, telephone, and other companies

76. For a description of the terms of the Honest Deal Act and a detailed explanation for its design, see DC-CONFIDENTIAL, <http://www.dc-confidential.org> [<https://perma.cc/PWP4-S9V3>].

77. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

78. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 237 (2008).

was actually enabling these firms to charge inflated prices brought deregulation that has saved consumers huge sums.

I wrote *DC Confidential* to spread the idea that the trickery does us great harm. The time is ripe for the public to see the harm that five tricks do to us. As noted in Part III, distrust of the federal government had reached an all-time high in 2015. Although the public generally does not yet understand the sleights of hand that enable these tricks to work, we have glimpsed the harm that comes from them. To mollify our anger, Congress has passed a succession of statutes:

- Anger about unauthorized or sloppily-authorized military campaigns led to the War Powers Resolution in 1973.⁷⁹
- Anger about deficits led to the budget-balancing statutes of the 1980s⁸⁰ and 1990s.⁸¹
- Anger about mandates to states and localities led to the Unfunded Mandates Reform Act of 1995.⁸²
- Anger about regulation led to the Congressional Review Act of 1996.⁸³
- Anger about bailouts of financial giants led to Dodd-Frank.⁸⁴

These statutes have not, however, stopped the tricks. The problem was that the citizens voicing complaints to Congress

79. Pub. L. No. 93-148, 87 Stat. 555 (1973). For more information about the origins of the War Powers Resolution, see *War Powers Legislation: Hearings Before the Committee on Foreign Relations*, 92nd Cong. 58 (1971) (statement of Sen. J. W. Fulbright); *id.* at 125 (statement of Sen. Claiborne Pell); *id.* at 261 (statement of Sen. Robert Taft, Jr.); *id.* at 336 (statement of Sen. Charles Mathias).

80. Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037.

81. Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388. For origins of budget balancing statutes, see, for example, Dick Thornburgh, *Gramm-Rudman-Hollings and the Balanced Budget Amendment: A Page of History*, 25 HARV. J. LEGIS. 615 (1988).

82. Pub. L. No. 104-4, 109 Stat. 48. For origins of the Unfunded Mandate Reform Act, see 141 CONG. REC. 7, S833-34 (daily ed. Jan. 12, 1995) (statement of Sen. Bob Dole).

83. Pub. L. No. 104-121, 110 Stat. 847 (1996). For origins of the Congressional Review Act, see, for example, James T. O' Reilly, *EPA Rulemaking after the 104th Congress: Death from Four Near-Fatal Wounds?*, 3 ENV'T L. 1, 5-10 (1996).

84. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). For information on the origins of Dodd-Frank, see SCHOENBROD, *supra* note 27, at 120.

did not insist on a specific design for new ground rules sufficient to stop the tricks. With the design left to Congress, it produced reforms that were more apparent than real, at least in the long run.⁸⁵ My book suggests specific changes to the ground rules of legislative politics sufficient to stop the tricks. I have dealt with these five tricks together because that shifts the focus from their adverse policy consequences in specific contexts to being cheated. Being cheated gets the blood boiling.

The second false premise behind the notion that we cannot stop the tricks is that the fault lies exclusively with politicians. We, in fact, participate in cheating ourselves. Many politicians would embrace honesty if we only made clear that we prefer honesty to being falsely promised something for nothing. To see why politicians who so often duck blame might enact a statute that forces them to accept responsibility, we need a fuller understanding of why they behave as they do, for it will show our own part in their behavior.

Many people go into politics in the hope of exercising power responsibly, but find that they must engage in trickery in order to have power to exercise. The reason is, as suggested in Part II, many voters have become accustomed to being promised something for nothing, and will reject politicians who fail to promise it. Tim Penny wrote, after serving in the House as a Democratic representative from Minnesota, "Voters routinely punish lawmakers who . . . challenge them to face unpleasant truths."⁸⁶ So legislators are "running scared," as the political scientist and professor Anthony King put it.⁸⁷

Thus, legislators found that using tricks was a recipe for getting reelected, and showing other legislators how to do the same was a recipe for getting the power to shape legislation within Congress. When today's incumbents came to Congress,

85. Members of Congress played a critical role in designing these illusory ground-rule statutes. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH*, 48-49 (1993); PAUL L. POSNER, *THE POLITICS OF UNFUNDED MANDATES* 180-207 (1998); *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2176-83 (2009).

86. TIMOTHY PENNY & MAJOR GARRETT, *COMMON CENTS: A RETIRING SIX-TERM CONGRESSMAN REVEALS HOW CONGRESS REALLY WORKS—AND WHAT WE MUST DO TO FIX IT* 72 (1995).

87. Anthony King, *Running Scared*, ATLANTIC (Jan. 1997), <http://www.theatlantic.com/magazine/archive/1997/01/running-scared/376754/>, [<https://perma.cc/G4XP-K78C>].

they found themselves in an institution that was doing business through tricks. They had to go along or become irrelevant. In sum, powerful evolutionary pressures have turned Congress into the trick-playing institution that it is today.

As a result, we cannot simply get rid of the tricks by voting against the members of Congress who join in them. Their replacements would also feel pressures to deceive voters. So, both voters and politicians are trapped in a dishonest game. As the saying goes, "Don't hate the player, hate the game." The Honest Deal Act is a way to change the ground rules of the game.

We can begin to escape the trap by asking politicians to pledge to pass the Honest Deal Act and faithfully implement it. An associated webpage⁸⁸ provides voters with the means to quickly and easily send such messages. It also provides the means to ask friends to send such messages.

Taking the pledge would appeal to the part of the many incumbents who went into office hoping to exercise power honorably. True, some legislators may prefer to keep up the trickery and the ridiculous posturing it entails because they believe that trickery will ease their reelection. Their hunger to get reelected would, however, similarly force them to support the Honest Deal Act if many voters wanted them to.

Voters should want them to because the five tricks harm far more voters than they help. To see why, ask yourself this question: do you want your government to be run by officials who are accountable to us on the basis of sound bites or the consequences of their actions? Incumbents will not have to start taking responsibility until later, when the necessity to do so will apply to both parties.

Each one of us who asks politicians to pledge to support the Honest Deal Act will make a substantial difference, because in the end it will not take the concern of that many people to tilt the political balance against the tricks. This response is because many sorts of politicians—Presidents, governors, mayors, other state and local officials, and the candidates for these offices—have reasons to want to stop the tricks.

The Presidents will welcome the Honest Deal Act, except perhaps for the cure for the war trick, which would deprive

88. DC-CONFIDENTIAL, <http://www.dc-confidential.org> [<https://perma.cc/PWP4-S9V3>].

them of the power to wage war without securing approval from Congress. While some legislators find the tricks helpful to secure their seats for many terms, the President is limited to two terms and is often frustrated by the unwillingness of Congress to come to grips with pressing issues before those two terms end. In addition, by pledging to press for passage of the entire Honest Deal Act, candidates for President can show voters that they support the accountability that is the prerequisite for democracy. We have had successful candidates for President who promised a New Deal and a Fair Deal. Now, let us have one promise an Honest Deal. Governors, mayors, and other state and local officials will want to stop the federal mandate trick, which Congress and the Presidents use to shift blame to them.

VI. CONCLUSION

The need for change is urgent. In 2016, former Indiana Governor Mitch Daniels, now the President of Purdue University, warned that democracy itself is at risk:

A record 1 in 4 young people say that democracy is a “bad way” to run the country, and an even larger fraction of the citizenry would prefer an authoritarian leader who did not have to deal with the nuisance of elections If national leadership continues to allow our drift toward a Niagara of debt, until solemn promises are broken as they would then inevitably be, today’s sense of betrayal will seem tame. When today’s young Americans learn the extent of the debt burden we have left them, they may question the premises of our self government, with good reason. When tomorrow’s older Americans finally understand how they have been actively misled about the nature and the reliability of our fundamental social welfare programs, it may be the last straw breaking the public confidence on which democracy itself depends.⁸⁹

Failure to stop the tricks would bring even greater peril than we already face.

89. *Federal Debt: Direction, Drivers and Dangers: Hearing Before U.S. Cong. Joint Econ. Comm.*, 114th Cong. (2016), http://www.jec.senate.gov/public/_cache/files/e0c59f8a-c965-416c-b6f1-3ffcd78e343d/daniels-jec-testimony-9-8-16.pdf [<https://perma.cc/Z8DQ-5V9P>] (written testimony).