

Tulsa Law Review

Volume 54 | Number 2

Winter 2019

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Recommended Citation

Bruce Ledewitz, *What has gone Wrong and what can we do About it?*, 54 Tulsa L. Rev. 247 (2019).

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WHAT *HAS* GONE WRONG AND WHAT CAN WE DO ABOUT IT?

Bruce Ledewitz

BENJAMIN I. PAGE AND MARTIN GILENS, *DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT CAN WE DO ABOUT IT?* (UNIVERSITY OF CHICAGO PRESS 2018). PP. 352. HARDCOVER \$30.00.

STEVEN LEVITSKY AND DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (PENGUIN RANDOM HOUSE 2018). PP. 320. HARDCOVER \$26.00. PAPERBACK \$15.00.

LAWRENCE LESSIG, *AMERICA, COMPROMISED* (UNIVERSITY OF CHICAGO PRESS 2018). PP. 240. HARDCOVER \$24.00.

INTRODUCTION: THIS MOMENT IN AMERICAN POLITICS

It is a mark of how bad things are in American public life that most people who read the title of this book review will immediately understand that it refers to the current state of politics in the United States. Here is how Lawrence Lessig describes our condition in *America, Compromised*, one of the three books discussed in this review:

There is not a single American awake to the world who is comfortable with the way things are. Every one of us has a sense—if only a sense—that with our nation, something is not quite right . . . We’ve not been as divided as a people since the Civil War.¹

Now, ignore Lessig’s smug reference to Americans “awake to the world.”² That is his partisanship showing, a matter I return to below. Lessig is saying that all or most Americans know that something is wrong. Perhaps that by itself is not so shocking. The reader probably feels that way, too. I know I do.

But why are we so sure that anything is wrong? The unemployment rate is hovering around 4%. The economy is growing. Our military is still engaged in the Middle East, but at low levels. Racism is declining, as evidenced by the effectiveness of the Black Lives Matter movement in bringing attention to police wrongdoing and the historically low black unemployment rate. The #MeToo movement has exposed various forms of sexual oppression and harassment in the workplace. Nothing is objectively wrong in America

1. LAWRENCE LESSIG, *AMERICA COMPROMISED* 1 (2018).

2. *Id.*

right now.

Yet, despite all that, Lessing is obviously correct that Americans are divided—more than at any time since the Civil War.

Think about that. At the time of the Civil War, Americans were divided over slavery. A moral demand for freedom was imposing itself, threatening the fundamental social, economic and political arrangements of nearly half the country. Americans would go to war against each other over that demand for freedom, resulting in over 200,000 combat deaths.

Compared to slavery, what are Americans divided over today? Free trade? Wages have stagnated, but for most people are not actually falling.³ People are economically stressed, but how could that make us more divided than we were during the Depression?

White resentment over the loss of privilege is certainly a part of this story of division. But, Pennsylvania was won by President Donald Trump when Erie County, which President Barak Obama in 2012 had won by sixteen percentage points, went Republican.⁴ The story of how that happened cannot be simple racism.

Some people would say that abortion is a moral issue equivalent to slavery, but surely that view is a minority one. In one survey, only 45% of registered voters said that abortion was “very important” to their votes in the 2016 Presidential election.⁵

And it is not really the case that Americans are divided over President Trump. It would be more accurate to say that the deep divisions in America allowed him to become President in the first place. We must remember that as early as 1993, not a single Republican in Congress voted for President Bill Clinton’s first budget.⁶ American divisions were becoming set as early as twenty-five years ago.

In the Jewish tradition, the rabbis taught that Jerusalem fell to the Romans because of “baseless hatred.” The defenders of the city were so divided that they could not concentrate on its defense.

Surely that description—baseless hatred—is the most accurate description of America today. We hate and mistrust each other and we seize on issues not so much because we disagree, but in order to express that very mistrust and hatred.

But why do we hate each other? And what can be done about it? That is the question books like these seek to answer.

In a recent book review, Daniel Drezner refers to the “21st-century cottage industry of books devoted to how things went off course.”⁷ The bar for adding to this genre, Drezner

3. Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budged In Decades*, PEW RESEARCH CENTER (Aug. 7, 2018), <http://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/>.

4. Trip Gabriel, *How Erie Went Red: The Economy Sank, And Trump Rose*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/us/politics/pennsylvania-trump-votes.html>.

5. *Top Voting Issues In 2016 Election*, PEW RESEARCH CENTER (July 7, 2016), <http://www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election/>.

6. Karen Tumulty & William J. Eaton, *Clinton Budget Triumphs, 51-50: Gore Casts a Tie-Breaking Vote in the Senate: Deficit: President says Congress 'laid the foundation for the renewal of the American dream.'* Sen. Kerrey's decision to back plan in last hours assured its passage, L.A. TIMES (Aug. 7, 1993), http://articles.latimes.com/1993-08-07/news/mn-21325_1_deficit-reduction-plan.

7. Daniel W. Drezner, *America Has Gone Off The Rails. Steven Brill Sees Ways To Get It Back On Track*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/books/review/steven-brill-tailspin.html>.

says, should be high.⁸ The three books reviewed here meet that bar. Each book has an important story to tell concerning what went wrong and how America might go forward in a better direction.

Nevertheless, in the end, there is something elusive about America's current moment that none of these books, nor indeed any of the other books in this genre, can quite touch. As I suggest at the end of this review, in each of these three books there is a hint of a spiritual crisis—a crisis in American secularism and American religion—that they do not address, but which eventually will have to be confronted if America is ever to heal.

I. *DEMOCRACY IN AMERICA?*: THE DIAGNOSIS AND PRESCRIPTION OF BENJAMIN PAGE & MARTIN GILENS

Benjamin Page and Martin Gilens ("P&G") are quite conscious that readers want to know, in the words of their subtitle, *What Has Gone Wrong and What We Can Do About It*.⁹ What has gone wrong is a government no longer democratically responsive to the people.¹⁰ Unequal wealth and other forms of unequal influence distort American politics.¹¹ The result has either been the enactment of policies that the majority of Americans oppose or polarization leading to gridlock that has prevented the enactment of any policies at all.¹² Either way, the will of the majority has not been served.¹³

In terms of what can be done, P&G describe steps that would create an equal voice for all citizens.¹⁴ They believe this would overcome gridlock and lead to more responsive institutions.¹⁵ In addition to specific reforms, they call for a social movement for democracy that would promote such changes in general.¹⁶ And they see some signs that such a movement is already beginning and already is achieving some success.¹⁷

Rule by the majority in the form of policy responsiveness to the wishes of ordinary people is what P&G mean by democracy.¹⁸ The absence of responsiveness to the wishes of the majority is thus why the question mark in their title of the book asks whether there actually is democracy in America? What Americans really want usually does not even make it onto a ballot to be voted on.¹⁹

P&G defend majority rule, although not at length, against criticisms of the ability of ordinary citizens to recognize and choose the best policies for our nation.²⁰ They also set aside concerns about aggregation of policy preferences in a footnote. As long as the rights of minorities are respected, the traditional understanding of democracy serves the nation

8. *Id.*

9. See BENJAMIN PAGE & MARTIN GILENS, *DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT CAN WE DO ABOUT IT?* (2017).

10. *Id.* at 55–57.

11. *Id.*

12. *Id.* at 210.

13. *Id.* at 68.

14. See PAGE & GILENS, *supra* note 9, at 181–209.

15. *Id.* at 228.

16. *Id.* at 239–40.

17. See *id.* at 264–69.

18. *Id.* at 5.

19. PAGE & GILENS, *supra* note 9, at 6.

20. *Id.* at 5.

well.²¹

If the general tenor of all this sounds familiar, the sophistication of analysis in the book, and the details of how influence in Congress actually works, are new and impressive. P&G document just how little the opinions of average Americans matter in the halls of Congress.²² (In his book, Lessig relies on some of P&G's research).

The book is divided into four parts. Part I sets forth the history of economic and political equality that P&G believe underlay the foundations of American democracy.²³ In the early Nineteenth Century, relatively equal wealth led to high levels of political participation, but the concentration of wealth by 1910 led to a decline in democracy.²⁴

This very concentration of wealth triggered the creation of a mass movement of democratic reform, including direct election of Senators and the right of women to vote. The postwar period culminating in the 1970's was a golden age of economic equality and popular influence on government.²⁵

Since the 1970's, economic inequality has surged again.²⁶ Stagnation of wage growth in real terms, and a decline in upward mobility, led to voter anger and antiestablishment voting trends.²⁷

Obvious public policy choices, such as higher taxes, changes in bankruptcy laws and unionization rules, could ameliorate some of the inequality and counter some of the downward pressure on wages. Opinion surveys show that most Americans want such policies, but they are not enacted or even discussed. The influence of money in politics is the main reason.²⁸

Part II shows in detail how majority will is thwarted.²⁹ The political system is dominated by wealthy individuals and corporate interests, leading to restricted choices that dampen voter turnout to yield an unrepresentative electorate. These tendencies are amplified by arcane and unneeded voter registration and election laws, intentional distribution of false and misleading information about candidates and policies, lobbying by special interests and structural biases against vigorous government action, such as judicial review, federalism and the separation of powers.³⁰

Research by P&G shows that the average citizen has little independent influence on government policy.³¹ Average citizens do often get what they want, but only because the wealthy often want what the majority of citizens also want.³² P&G then list the differences between what surveys show people want and what policies are actually pursued, from infrastructure to climate change to gun control to financial regulation.³³ The result is tax

21. *Id.* at 14.

22. *Id.* at 172.

23. *Id.* at 1–52.

24. PAGE & GILENS, *supra* note 9, at 25.

25. *Id.* at 27.

26. *Id.* at 27–36.

27. *Id.* at 27–28.

28. *Id.* at 37.

29. *See* PAGE & GILENS, *supra* note 9, at 53–180.

30. *Id.* at 53.

31. *Id.* at 68.

32. *Id.* at 69.

33. *Id.* at 73–79.

cuts, restricted public works, free trade, bank bailouts and deregulation, favored by the wealthy.³⁴

Democrats have their billionaires too. They are more liberal on social issues, but less so on money issues, thus preventing formation of a real working class coalition.

Big money also shapes the overall climate of national opinion, creating policy and opinion shaping networks that undermine confidence in government.³⁵ This leads to concerns about the viability of perfectly stable programs, like social security, that could easily be shored up to cover temporary shortfalls, but which are detested by many rich people.

Organized interest groups overwhelmingly favor the interests of wealth.³⁶ Business lobbying is not as broadly ideological as is the influence of wealthy individuals. Instead, business lobbying changes policy behind the scenes in smaller, but not less important ways.³⁷

Until recently, wealth and structural issues have kept popular policies from being enacted. Now, polarization and gridlock are also factors.³⁸ The Constitution itself makes it difficult to enact policies. If, in addition to those structural impediments, the parties cannot cooperate, then divided party rule means that not much gets done. The House and Senate have also adopted rules and practices that further frustrate legislative action.³⁹

Part III of the book suggests reforms that would make American government more democratic.⁴⁰ Obviously, this part of the book is more hope than fact, but a large number of potential reforms are gathered together.⁴¹

The crucial issue is to curb the power of money in elections. P&G hold out the possibility that the Supreme Court might be influenced by public opinion to overturn or limit the reach of cases like *Citizens United*, but this unlikely outcome is not pursued. Much more public election money is needed to reinvigorate public finance options.⁴² Full disclosure laws need to be enacted.⁴³

Outside of elections, P&G offer numerous suggestions to curb the power of lobbying, including fuller disclosure and the creation of public lobbying institutions.⁴⁴ A more effective public voice would lead to higher levels of public participation in politics. In addition, voting can be made much simpler and easier and the two-party system can be opened up to a greater variety of parties.⁴⁵

Congress could also be reformed. Senate rules could be democratized—eliminating the filibuster is a start in that direction—and the House could be made more democratic

34. PAGE & GILENS, *supra* note 9, at 67–78.

35. *Id.* at 91.

36. *Id.* at 136.

37. *Id.* at 149.

38. *Id.* at 150.

39. PAGE & GILENS, *supra* note 9, at 154.

40. *See id.* at 181–269.

41. *Id.* at 181.

42. *Id.* at 188–89.

43. *Id.* at 188–90.

44. *See* PAGE & GILENS, *supra* note 9, at 185–95.

45. *Id.* at 199–200.

and gridlock proof by the abolition of one-Party dominance, including the Hastert Rule, which allows a majority of the majority Party, and thus a minority of the House as a whole, to prevent consideration of a matter.⁴⁶

P&G also recommend significant changes in the structure of voting—multi-member districts, instant runoffs, single primaries open to all, maybe some form of proportional representation.⁴⁷

P&G call the final Part of the book, *How To Do It*. They recognize that the task will be difficult. A new social movement for democracy is needed, one that will be much like previous social movements.⁴⁸

P&G draw some concrete lessons from that history, including the need to concentrate on serious grievances that violate shared values and creating broad coalitions. In particular, P&G recommend working with the existing political Parties and within the current election structure.⁴⁹

P&G are optimistic. They see signs of progress around the country and even in the rhetoric of candidates and politicians. They have certainly given other reformers powerful tools to attempt to pursue change. Nevertheless, there are some conceptual weaknesses in their analysis.⁵⁰

One conceptual problem is the question of how one knows what Americans really want. If the result of free and fair elections does not answer that question, what does? P&G uncritically rely on poll results, but there is reason to doubt their accuracy.⁵¹ After all, a poll showing that Americans favor spending on infrastructure does not necessarily mean they favor enacting the taxes necessary to pay for it.

This lesson was illustrated in the recent failed mass transit initiative in Nashville. The landslide rejection of the \$5.4 billion plan stunned local leaders, since polls showed the proposal to be popular and supporters had outspent opponents.⁵² A Koch brothers sponsored phalanx of volunteers had gone door to door arguing that the money would be wasted and the resulting sales tax would be too high. These arguments resonated with the public.

Americans, after all, are pretty conservative and individualistic. As Emily Cooke noted in a book review of Alissa Quart's book, *Squeezed*, Americans stuck on an economic treadmill tend to feel guilty for not making more money, rather than blaming capitalism for its failures.⁵³

When Senator Bernie Sanders recently travelled to Pittsburgh in support of John Fetterman's progressive candidacy for Lieutenant Governor, the Pennsylvania Republican

46. *Id.* at 173–75.

47. *Id.* at 225–27.

48. *Id.* at 239–40.

49. PAGE & GILENS, *supra* note 9, at 251.

50. *Id.* at 17.

51. *Id.*

52. Hiroko Tabuchi, *How The Koch Brothers Are Killing Public Transit Projects Around The Country*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/climate/koch-brothers-public-transit.html?rref=collection%2Fissuerecollection%2Ftoday-new-york-times&action=click&contentCollection=todayspaper®ion=rank&module=package&version=highlights&contentPlacement=2&pgtype=collection>.

53. Emily Cooke, *In the Middle Class, and Barely Getting By*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/books/review/alissa-quart-squeezed.html>.

Party immediately released a statement asking whether Governor Tom Wolfe agreed with the positions of his running mate, including single-payer health care and free higher education.⁵⁴

This was a real-world experiment for P&G. Even if polls show that these policies are popular, Republicans are betting that most voters will reject them. This is not because of wealthy donors or barriers to voting, but because the people of Pennsylvania might not want to pay for these things. Maybe the political results that P&G decry are actually the democratic truth of things.

Another fundamental question is whether elaborate structural changes are really needed to change political outcomes. If a lot of Americans are not registered and are not voting, then the obvious solution would be to register them and help them get to the polls. This is notoriously difficult work, but the Democratic Party has lately not even tried to do it in a serious way. Progressives are today attempting to remedy this failing, but it will take time. P&G are indifferent to this kind of detailed, Party-building work.

Next is a question that the authors themselves are aware of. Popular mobilizations have certainly been effective recently, from blocking the repeal of the Affordable Care Act to preventing “entitlement reform.” It is not clear that these mobilizations are working because wealthy donors also support them or whether this might be a genuine, grass roots response that Congress is listening to. P&G acknowledge that it is easier to block action than to take action, but it is not clear how these successes by ordinary citizen fit into their thinking.

Finally, there is the question, again one the authors are aware of, but do not discuss, of the relationship between minority rights and democratic responsiveness. At several points, P&G suggest limiting the authority of the Supreme Court, though often with a caveat that minority rights must be respected. But it is an assumption of our system that majorities will not always respect minority rights. That is basically why the courts are authorized to enforce the Constitution in the first place. P&G need a more nuanced framework to evaluate the Supreme Court than the simple one of democratic responsiveness.

II. *AMERICA COMPROMISED*: THE DIAGNOSIS AND PRESCRIPTION OF LAWRENCE LESSIG

America Compromised has the feeling of something not quite finished. Lessig examines five American institutions that, he says, are compromised today in the view of the public: Congress, Finance, Media, the Academy and Law.⁵⁵ The problem in American public life, and the reason for our intense unease and dissatisfaction, is that we can no longer trust our basic institutions. They are now “less worthy of our trust because they’ve given up a certain integrity that trust demands.”⁵⁶

In the first Chapter, Lessig gives an analysis that sounds like his previous work in

54. Julian Routh, *Bernie Sanders on John Fetterman, Pittsburgh Politics and the Rising Tide of Democratic Socialism*, POST GAZETTE (July 12, 2018), <http://www.post-gazette.com/news/politics-state/2018/07/12/Bernie-Sanders-Summer-Lee-John-Fetterman-Sara-Innamorato-costa-pittsburgh-democratic-socialists-america-dsa-our-revolution/stories/201807120146>.

55. See LESSIG, *supra* note 1.

56. *Id.* at xi.

Republic, Lost—Congress is dependent on donors rather than on the people, which is why Congress is widely held in disrepute.⁵⁷ But, in context, this analysis of Congress is not a recapitulation, but a forerunner of Lessig's quite new evaluative approach to institutions in general.

By the end of the book, it is clear that Lessig is writing a work of political morality, in which he is attempting to reform American institutions so that they can realistically serve the public good.⁵⁸ Lessig is asking what norms of conduct we can expect from our public institutions, given technological and economic changes that have taken place.

Lessig is very clear that "ought implies can."⁵⁹ If there is nothing that can be done to change an institution's behavior, then there is for Lessig no corruption of that institution. Only when we adjust the incentive and regulatory environment in ways that could lead to better behavior is the failure to behave properly an institutional corruption. That term, institutional corruption, is the centerpiece of Lessig's book. Corruption refers to an influence that weakens the effectiveness of an institution, given its purpose.

This approach is why Lessig at several points insists that moral hectoring will not improve the trustworthiness of our institutions.⁶⁰ If people are only doing what they have to do, given their environment, then why blame them?

In a latter chapter, Lessig sets forth various remedies for institutional corruption.⁶¹ This is important because the whole point of making the distinction about what is and is not corruption is to de-corrupt, as he puts it, by better alignment of information and incentives.

It is not an ultimate criticism to say that Lessig's categories are not quite clear and his prescriptions are somewhat contradictory. Given the extraordinary ambition of Lessig's attempt in this book, that is almost to be expected.

To outline Lessig's case, we have to look briefly at his treatment of each institution. As stated, Congress is institutionally corrupt because its purpose is to be dependent on the people and our leaders are dependent on money instead.⁶²

In finance, Lessig sharply distinguishes between the role of the banks in the 2008 housing crisis, and resulting recession, and the role of the rating agencies.⁶³ The banks were foolish to overestimate the safety of underlying assets. But, fundamentally, given that government regulators had in effect outsourced a public role to the rating agencies, banks were legally justified in using those ratings. The banks were pursuing their institutional purpose of trying to make money. The banks were thus not institutionally corrupt.

In contrast, the rating agencies had been given a public role—evaluating the safety of assets under certain circumstances. Thus, the failure of the rating agencies to do what was expected of them did represent institutional corruption and did weaken public trust.

Lessig concedes that much of his analysis turns on the determination of an

57. *Id.* at 5–28.

58. *Id.* at 199–205.

59. *Id.* at 94.

60. *See* LESSIG, *supra* note 1.

61. *Id.* at 173–97.

62. *Id.* at 11–28.

63. *Id.* at 29–61.

institution's purpose and that determination is not self-evident.⁶⁴ Lessig does not bother to spell out what the disagreements might be, but the reader can easily do this for herself. We might, for example, hold that banks should not pursue profit to the exclusion of safety given the fundamental role of banks in the overall financial system.

The chapter on the media illustrates the surprising conclusions to which Lessig's method can lead him.⁶⁵ There is no point in nostalgically and moralistically holding onto the currently unattainable norm of journalistic objectivity that is dependent on truth alone, at the exclusion of concern about profit. Lessig admires that model of democratic journalism,⁶⁶ which aimed to make the American people fit for self-government, but we must accept that technological fragmentation of the media has rendered that model unattainable. People want partisan news and they always have. American journalism was historically partisan, not objective. Objectivity became the norm because the concentrated media domination by the three networks in the mid-20th Century allowed for objectivity. But, if he were alive today, Walter Conkrite would not appeal across the political aisle, and if he tried to do so, he would not last one season.⁶⁷

Because objectivity is not attained today, but is still proclaimed, the media is justifiably not trusted. This is why dueling political narratives, such as in the case of climate change, can simply go on and not be resolved.

Given the unattainability of objective reporting, and given the difficulty of reforming journalism because of the first amendment, Lessig suggests relaxing the norm of journalistic objectivity, in favor of open embrace of partisanship, but with the caveat of honesty.⁶⁸ So, Fox would not claim to just report, but would announce its commitment to conservative values along with a commitment to honest reporting in light of those values.

Lessig's treatment of the media illustrates the maddening imprecision and inconsistency in his creative and insightful book. If the norm of objectivity is not attainable, why is the norm of honesty attainable? Whether tax cuts pay for themselves or whether humans are changing the climate are questions that have nothing whatever to do with conservative values. If, because of partisan commitment, Fox were to refuse to report the facts of these matters, then its reporting would not be truthful. The current lack of trust over objectivity would simply become distrust over a lack of honesty. Yet honesty is not a norm that Lessig is willing to jettison.

Lessig is also unwilling to treat Congress the same way he treats the media. Instead of trying to hold on to the outdated norm of dependency on the people,⁶⁹ why does Lessig not endorse relaxation of that norm in favor of representatives who admit their dependence on the wealthy, but do so in ways that they claim also serve the common good? Then we could structure incentives in Congress to balance the influence of some wealthy interests against those of others. The result would be more in keeping with Lessig's overall approach than is his "nostalgia" for the democratic norms of the 18th Century.⁷⁰

64. *Id.* at 53–61.

65. *See* LESSIG, *supra* note 1, at 63–110.

66. *Id.* at 68.

67. *Id.* at 79.

68. *Id.* at 79–93.

69. *Id.* at 100–10.

70. *See* LESSIG, *supra* note 1, at 79–93.

Lessig's chapter on corrupting influence in the Academy should be required reading for every university professor who has ever accepted a gift of any kind relating to her research. Lessig hopes that the Academy can take up some of the role that democratic journalism used to fill.⁷¹ He shows that objectivity in this institution is attainable and illustrates how it can be gained, but also how it can, and has been, lost.⁷²

The problem is that academics do not understand how easily influenced we are by even small favors and gifts. Academics need to create incentive structures in which industry support, which is inevitable, is necessarily independent of result. This is not that difficult to do and is in the interest of industry itself, since it is the only way for research to regain public trust.

The only reason that we academics do not do this now is that we believe we are not easily influenced. Lessig demolishes that complacency.

The institutional corruption in academia is endemic. As I was reading Lessig's Chapter, I received an offer of \$1000 as an "honorarium" to attend a workshop on law and economics. That offer was generous but not really unusual. No one would think of this as a bribe, but Lessig suggests that it, and similar arrangements, are suspect.⁷³

Lessig does not spare the corruption of the legal profession, which is subject to the loss of its independence from the base desires of its clients. The particular instance of institutional corruption that draws his attention, but is plainly meant to stand for a larger threat, is the decline of prosecutions of individuals for corporate wrongdoing, which has largely been replaced by the prosecution of corporations instead, with the acceptance of a small fine without admission of guilt.⁷⁴ This change has rendered the discovery of wrongdoing merely a cost of doing business, rather than a deterrent.

Lessig attributes this change in the form of prosecution to a phenomenon he says in the conclusion is the source of a lot of the corruption of everyday life: growing and extreme economic inequality.⁷⁵ As part of society grows exceedingly rich, the rest of society is tempted to do whatever is necessary to try to obtain some of that wealth. Lessig sees this going on in finance and Congress and more generally.

The way this change affects prosecution is that the gap in income between prosecutors and private practitioners is now so great that the lifetime prosecutor is a dying species. Everyone eventually is seduced into private practice. It also means that prosecutors who turn to private practice are more likely to compromise in order to get those jobs, either consciously or unconsciously, and are unlikely to do anything that might anger the clients of those potential future firms.

Lessig says that this should not be thought of as a moral failing by prosecutors.⁷⁶ The mother who wants a better life for her children should not be condemned. The only answer in the long run is taxation and anti-trust policy that break up concentrations of wealth, both corporate and individual. Lessig concludes, in a sentiment parallel to that of

71. *See id.* at 111–58.

72. *Id.*

73. *See id.*

74. *Id.* at 159–72.

75. *See LESSIG, supra* note 1, at 199–205.

76. *Id.* at 159–72.

P&G, that the vast inequality that we have now threatens democratic life.⁷⁷

There is a kind of moral blindness that afflicts Lessig concerning these matters. The attitude that Lessig is looking at used to be called the vice of envy. In order to get the kind of money other people are making, this hypothetical prosecutor who wants to move up, betrays her responsibility to protect the people from wrongdoing by letting corporate wrongdoers off the hook.

Lessig assumes that once the money is great enough, everyone would do that. But, why should we not assume the opposite—that there has been a moral breakdown and that is why people do these things. Maybe the kind of people we have become would have cheated in years past as well, even without the extremes of current wealth inequality.

There is reason to believe that there has been a moral breakdown unrelated to new wealth. In Lessig's own example, the clients of white collar defense firms might not have been angry in the past at a prosecutor doing her job well for the people. They might even have admired her for it. Also, at one time, the lawyers at the white collar firm would have insisted to any angry clients that the legal system has norms and that prosecutors are supposed to be zealous within those bounds. They would have gladly hired a zealous prosecutor. In other words, Lessig is describing a much greater moral breakdown than he admits and his easy explanation of increased incentives to cheat is probably inadequate.

At the end of this review, I will return to this question of a spiritual breakdown, one that these authors are quite unable to see, let alone to consider.

III. *HOW DEMOCRACIES DIE*: THE DIAGNOSIS AND PRESCRIPTION OF STEVEN LEVITSKY & DANIEL ZIBLATT

American Democracy? and *America Compromised* are books of reform. They attempt to improve the political system that we have, which has declined for reasons the authors set forth.

Levitsky and Ziblatt ("L&Z") have written a different kind of book, one which is self-consciously a warning that liberal democracies have died in the past and that American democracy needs to be rescued or it may suffer that same fate.⁷⁸

The book is not particularly well-organized. It does not achieve clarity in analysis. Nor, despite the promise of the subtitle, is there a road map for rescuing American democracy.

What the book does achieve, however, is an atmosphere of foreboding, in which the parallels to prior democratic disasters seem overwhelming. It can happen here. It is already happening. If the prospect of death concentrates the mind, the prospect of the death of American democracy should concentrate all of our efforts toward finding ways to save it. L&Z have published a warning that our political disagreements have to be put aside in order for us to work together toward that end.

L&Z conclude that democracies die because the informal norms of democracy are repeatedly broken. The norms they mention are mutual toleration and forbearance.⁷⁹ The first means that rule by the other side is regarded as legitimate and the second is that not

77. *Id.* at 199–205.

78. See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

79. *Id.* at 8–9.

all legally permissible means of opposition will be utilized to prevent effective rule by the other side. These norms produce rules of politics, usually unwritten, by which what might be called ordinary politics go on.

To illustrate what democratic erosion looks like, L&Z begin with an episode of violent takeover—the last day of Salvador Allende in Chile.⁸⁰ But military coups are not the focus of this book. Rather, L&Z emphasize how a nation's own leaders can subvert democracy, either rapidly, like Hitler, or gradually, like Hugo Chavez.⁸¹ In such subversion, democratic forms, like elections, can be maintained for a time, or can be immediately suppressed. L&Z develop a litmus test of authoritarian tendencies: rejection of the rules of the game, denial of opponents' legitimacy, toleration of violence and readiness to curtail civil liberties and the media.⁸²

In the chapters that follow, L&Z move back and forth between historical and world events and American political history. Chapter 1—Fateful Alliances—offers examples of how political insiders and Parties sometimes bring authoritarians into a nation's political life in the mistaken belief that they can be controlled to the Party's advantage.⁸³ In instances where democracy is saved, Parties refuse to do this even for short-term political gain. They refuse to normalize anti-democratic tendencies.

Chapter 2—Gatekeeping in America—then applies these lessons to America, where, they say, Party gatekeeping worked well before the reforms of the 1970's reduced the power of Party leaders.⁸⁴

Chapter 3—The Great Republican Abdication—blames the Republican Party establishment for failing to recognize the aforementioned authoritarian tendencies of Donald Trump and prevent his nomination. Once nominated, Republican Party leaders had an obligation to oppose his election.⁸⁵ When they refused to do so, they normalized his candidacy to the public and rendered the election a toss-up because of the nation's preexisting political divisions.⁸⁶

In Chapter 4—Subverting Democracy—L&Z give examples of how democracies can be eroded without formally being overthrown.⁸⁷ Courts can be captured, as can intelligence agencies, to prevent their watchdog roles. Business leaders can be bought off. The rules of the game, as in gerrymandering, can be altered. The most striking example of such erosion was the post-Reconstruction American south, which disenfranchised African-Americans in the space of a few short years.⁸⁸ Crisis, external or internal, can also lead to democratic erosion.

Chapter 5—The Guardrails of Democracy—is the heart of the book and sets forth the authors' argument that democratic norms, not formal laws, are the basis for democratic

80. *Id.* at 2–6.

81. *Id.* at 2–6, 13.

82. *Id.* at 65–67.

83. LEVITSKY & ZIBLATT, *supra* note 78, at 11–32.

84. *Id.* at 33–52.

85. *Id.* at 53–71.

86. *Id.*

87. *Id.* at 72–96.

88. LEVITSKY & ZIBLATT, *supra* note 78, at 87–92.

life.⁸⁹

In Chapter 6—The Unwritten Rules of American Politics—L&Z illustrate how the norms of toleration and forbearance have worked since the Civil War to allow American democracy to function.⁹⁰ Where there have been threats, such as in the FDR Court-packing plan, the system operated to protect those norms.⁹¹ L&Z expressly note that this period of democracy was premised on toleration of white rule in the South.⁹² Two essentially white political Parties cooperated in peaceful democratic competition.

Modern American political history, in contrast, is filled with democratic norm violation, culminating prior to the election of President Trump, in the refusal of the Republican leadership in the Senate to consider President Barack Obama's nomination of Judge Merrick Garland to the Supreme Court. This long story of democratic decline is told in Chapter 7, The Unravelling, and begins with the rise of Newt Gingrich in 1978, who turned politics into warfare.⁹³ Republicans have become the anti-system Party, which means the guardrails of democracy are unmoored. The result has been polarization and separation, as Republicans and Democrats sort themselves not just ideologically, but socially, ethnically and culturally. In 1960, only around 5% of Americans said they would be unhappy if a child married someone from the other Party.⁹⁴ Now the figure is 49% for Republicans and 33% for Democrats.⁹⁵

Chapter 8—Trump Against the Guardrails—brings the story to the present moment. Trump has not broken the guardrails yet, but he may.⁹⁶ And even if he does not, a future President is now more likely to do so.

Chapter 9—Saving Democracy—should have been the point of the book, but it is disappointingly hazy. It is definitely not a road map. The authors say that Democrats must resist calls to fight like Republicans.⁹⁷ Democrats must continue to practice mutual toleration and forbearance. Polarization must be reduced, but the authors do not agree with calls for the Democratic Party to forego identify politics toward that end. Rather, we must work together to build the world's first genuinely multiethnic and democratic society.⁹⁸

L&Z demonstrate throughout the book that once rule by the other side is regarded as illegitimate, the end of democracy is possible and perhaps even likely. The reader is likely to feel that America is already in that condition. Some Republicans regarded the 2016 election as the Flight 93 Election—"charge the cockpit or you die."⁹⁹ If you really believed that, why would you not prefer the cancellation of an election to the victory of a Democrat? And, just as clearly, millions of Democrats would say they would rather take

89. *Id.* at 97–117.

90. *See id.* at 118–45.

91. *Id.* at 118–19.

92. *Id.* at 121–25.

93. LEVITSKY & ZIBLATT, *supra* note 78, at 146–51.

94. *Id.* at 167.

95. *Id.*

96. *Id.* at 176–203.

97. *Id.* at 204–31.

98. *See* LEVITSKY & ZIBLATT, *supra* note 78, at 204–31.

99. *The Flight 93 Election*, CLAREMONT REV. OF BOOKS (Sept. 6, 2015), <https://www.claremont.org/crb/basicpage/the-flight-93-election/>.

to the streets than sit by and see Donald Trump reelected. Reading this book is a wake-up call that it can happen here, just as it has happened elsewhere.

In the face of this genuine emergency, I have begun asking law professors I know if we could form a Pro-Democracy caucus that would transcend Party lines, and, ignoring substantive political and legal disagreements, would concentrate on reintroducing the democratic norms that have broken down. Most of this work would be consciousness-raising among the public, but it would also include convincing the entire Supreme Court that the intention to manipulate the will of the people, whether in gerrymandering, voter ID laws or selectively altering the selection of electors to the Electoral College, should be regarded as presumptively unconstitutional. A unanimous Supreme Court decision involving such matters might break the momentum of polarization in the nation. Thus far, the results have not been encouraging.

IV. WHY DON'T BOOKS LIKE THESE WORK?

The cottage industry of books about what went wrong has been arriving regularly for months now. Yet, it is safe to say that these books have not really helped, as my experience with the Pro-Democracy Caucus reinforces. We are still divided and hateful. The three books reviewed, as well argued as they are, suggest why that is so. They are, in turns, partisan, fatalistic and materialistic.

The partisanship of these books is striking. They are written for liberals and Democrats to blame conservatives and Republicans for our troubles. And I want to assure any reader who is now shaking her head and saying that this is just reporting what happened, that many Republicans and conservatives would respond that the other side drove our country to its current impasse and that they were just responding to provocation. Obviously, to be helpful, a book about what has gone wrong would at least have to address these alternative narratives. None of these books do so.

Let me give just one example of surprising partisan blindness that afflicts each book. P&G do not accept the NRA as a genuinely democracy promoting organization, calling it an example of an interest group that undermines democracy.¹⁰⁰

This analysis makes no sense. The NRA is effective because its millions of members actually vote based on the issue of gun control. Among the 81% of Americans who the authors say favor universal background checks, many will not vote just on this issue, but will vote for candidates who do not favor universal background checks. Admittedly, this is a problem for democracy—it is the aggregation problem that P&G sequester in a footnote—but it also democracy in action. Why should not intense preferences be part of democratic life?

Lessig's partisanship is not so obvious or pervasive. He is critiquing institutions, such the Academy, that include problematic behavior by liberals.

But the partisanship is still there. So, for example, in a whole chapter on the lack of objectivity in the media, Lessig says nothing about the treatment of President Trump by the mainstream media, not just MSNBC. Has not that treatment verged on caricature? It is a pretty cheap shot to use Fox as the example of desired candor by naming it as committed

100. See PAGE & GILENS, *supra* note 9.

to conservative values. It would have taken a little more courage to suggest that the New York Times fess up to its liberal commitments in its reporting. And, if Lessig feels that the New York Times is more objective than Fox, that needed to be stated and shown.

L&Z are as partisan as are P&G, but with a bit more self-awareness. L&Z note that their analysis renders the Republican Party as more to blame for democratic norm violation and they detail the misdeeds of Texas and North Carolina Republicans in particular.¹⁰¹

L&Z admit that Democrats have violated norms also, but they suggest that this has been in response to Republican provocations or obstruction. They ignore, however, a whole universe of left-wing anti-democratic behavior, in which, from abortion to same-sex marriage to the environment, liberals turn to the courts to obtain fundamental changes in society. If this is not a violation of democratic norms, it behooved L&Z to explain why not. Furthermore, at least some Republican actions, such as the treatment of Judge Garland, cannot be understood without that context.

In terms of fatalism, all three books assume that money, and the inequality of income distribution, lead in some simple fashion to the outcomes they deplore. But this is not obvious at all.

So, in P&G, money certainly has influence in setting the legislative agenda in Congress and in the details of drafting legislation or administrative rules. But it is much less obvious how money shapes the national climate of opinion. They refer to “relentless” efforts to undermine trust in government by the wealthy, but all they report is the promotion, by no means unfair, of what they call “right-wing ideas.” So what? If Americans cannot decide for themselves even such a basic matter as the proper role of government, then what is the point of P&G’s commitment to democracy? If people don’t know what they want, why design a system that gives them what they want?

Lessig is much worse in his fatalism, which occupies a large part of his analysis of public life. He makes the point that Trump’s success does not undermine his conclusions about money in Congress and elections. Maybe that is so, but Lessig does not discuss the success of Bernie Sanders, who certainly did not win any preliminary money primary toward the Presidential nomination. Sanders lost that nomination, of course, but he did so because of ordinary political considerations, not because of a lack of money. Sanders had never really cultivated communities of color, while Secretary Clinton had. There is no reason the Sanders model would not work in elections for Congress.

For L&Z, income inequality is one of the two drivers of polarization—growing ethnic diversity being the other. But in their very telling of the story of polarization, race is the constant theme, not money. The process of polarization begins very early, in the late 1970’s, and absolutely predates the Recession of 2008 that hurt so many working people. In other words, the threat to democratic norms began to grow in a serious way while the economy was doing very well.

In asking what could account for that, I come to the third criticism of these books—their materialism. The context they describe suggests a spiritual, as well as a material change in American life. For P&G, all of the problems they point to are a result of unequal money and power. But they fail to ask why the rich feel no obligation to their fellow

101. See LEVITSKY & ZIBLATT, *supra* note 78, at 146–75.

citizens. Why are the wealthy and powerful so greedy? They quote Susan B. Anthony's call for justice, but they otherwise have nothing to say about justice or its power for change.

Similarly, Lessig describes a landscape of greed, envy and meanness. But as far as he is concerned, this is just a matter of misaligned incentives. Perhaps it is not. Perhaps it is a change in spiritual life. Perhaps we are not as good as we used to be.

And obviously, this is also the case for L&Z. When they describe the rise in anger and combativeness beginning in the 1970's, with Newt Gingrich, they fail to note the almost complete lack of religious sensibility that begins to infect political leadership around that time. For all the influence of Evangelical Christianity, there is less and less actual religious background and influence in American political leadership itself. Presidents Obama and Trump are good examples of this trend.

Democracy requires faith—not necessarily faith in a God, but faith in the universe and in each other. That kind of faith is what allows the tolerance and forbearance that saves democracy.

That faith is justified. Martin Luther King, Jr, famously taught that “the arc of the moral universe is long, but it bends toward justice.” We have no reason to doubt that. Perhaps one of our problems is that we have simply forgotten.

And we should have faith in each other. Democracy did not fail in the election of Donald Trump. It is a great irony that the framers created the Electoral College because they feared a majority of the people might vote for an authoritarian. But we rejected Donald Trump. If the framers had had more faith in the people, he would not be President today.