

**UNIVERSITY *of* PENNSYLVANIA**  
**JOURNAL *of* LAW & PUBLIC AFFAIRS**

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Vol. 1

July 2016

No. 1

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**IS GOVERNMENT REALLY BROKEN?**

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# IS GOVERNMENT REALLY BROKEN?

Cary Coglianese\*

## ABSTRACT

*The widespread public angst that surfaced around the 2016 presidential election in the United States revealed that many Americans believe their government has become badly broken. Given the serious problems that continue to persist in society—crime, illiteracy, unemployment, poverty, discrimination, and more—these beliefs in a government breakdown are understandable. Yet a breakdown is actually far from self-evident. In this Article, I explain how diagnoses of governmental performance depend on the perspective from which current conditions in the country are viewed. Certainly when judged against a standard of perfection, America has a long way to go. But perfection provides no meaningful basis on which to conclude government has broken down. I offer and assess three alternative, more realistic benchmarks of government’s performance: (1) reliance on a standard of acceptable imperfection; (2) comparisons with other countries or other time periods; and (3) the use of counterfactual inferences. Viewed against these perspectives, the notion of any fundamental governmental failure in the United States becomes quite questionable. Although serious economic and social shortcomings remain, the nation’s strong economy and steadily improving living conditions simply could not have occurred if government were significantly broken. Rather than embracing despair, citizens and their leaders would do better to treat the nation’s problems as conditions*

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*of disrepair. Rather than giving in to cynicism and resignation, they should remain committed to the constant struggle that is inherent in democratic governance. It still remains possible to achieve a stronger democracy, a more just rule of law, and better economic and social conditions for all—but only if members of the public do not give up.*

## INTRODUCTION

During the first two decades of the twenty-first century, a wave of calamities swept the globe, including terrorist attacks, civil uprisings, economic crises, industrial accidents, and natural disasters. In the United States, these critical challenges have engendered a deep angst that pervades vast segments of the U.S. populace, and new-century social movements on both the political left and right have emerged that call for dramatic policy changes.<sup>1</sup> The nation's elected leaders have failed to respond to the country's problems to the satisfaction of their constituencies, making the governmental process itself come to be viewed as a central problem afflicting the nation.

Critics point their fingers at a slew of perceived causes of America's ailments, including globalization, the rise of social media, irresponsible fiscal management, biased law enforcement officials, and a polarized and rigged political system. Despite different diagnoses and different priorities, much of the public shares a sense of growing governmental and societal crisis. Both major political parties have seen anger bubble over into the electoral process, with prominent presidential candidates in both parties in the 2016 election cycle giving voice to the outrages many voters feel. To many Americans, the future looks downright bleak.

Against this pessimistic backdrop, a group of publicly minded students at the University of Pennsylvania Law School has worked over the last several years, on the students' own initiative, to establish the *Journal of Law & Public Affairs*. This inaugural issue of the journal has featured a collection of articles related to a critical question: Is government broken? The answer to this question might seem obvious, given prevailing views among pundits and angst-ridden members of the public. But the question is too important to leave to casual impressions. Rather, it deserves to be investigated thoroughly and dispassionately—not only because the answer is not nearly so obvious as it might seem at first blush, but also because an accurate diagnosis of any ailment is the first step toward identifying its cure.

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<sup>1</sup> These social movements include Occupy Wall Street and Black Lives Matter on the left, and the Tea Party movement on the right. The subsequent activation of large numbers of previously alienated, white middle-class voters around the candidacy of Donald Trump in the 2016 presidential election might well qualify as another recent movement.

Assessing the state of governmental performance is vital for yet another, still more profound reason. Besieged by the resounding trumpets of doom, current and future elected officials, civic leaders, and lawyers—not to mention members of the public—confront an existential challenge. If they accept the notion that the problems and divisions in society today are intractable—that is to say, if they believe that government is truly broken—then citizens and public-spirited leaders (and future leaders) may conclude they ought to give up and leave the public arena altogether, concluding that the game has been lost.

Yet as I explain in this Article, that kind of cynical conclusion ought to be resisted. Government is not nearly as broken as it might seem. It is in a state of disrepair, to be sure, but democracy is always in a state of disrepair. It always needs work—a function, in part, of the fact that the problems government tackles are extremely difficult ones.<sup>2</sup> Solving public problems often requires overcoming near-Herculean, technical obstacles with limited resources and through a decision-making process in which choices over competing values are sharply contested and decided through the least-worst means available: namely, democracy.

Recognizing the reality of the harsh environment within which government must operate need not lead to despair. Rather, it can serve as a valuable, even affirming, lesson to leaders and citizens alike that they should not give up. How members of the public and their representatives respond to society's woes will ultimately determine whether, and to what degree, social and economic conditions can be improved, and the extent to which the government can be made “more perfect”—or at least less broken. Only if democracy's disrepair leads citizens and their representatives to embrace a fatalistic despair will democratic government in the United States truly and irrevocably become broken.

## I. AMERICA'S WOES

The problems facing the United States have been well documented, with many prominent commentators suggesting that the U.S. government has become badly broken. Reviewing numerous instances where federal programs have resulted in suboptimal outcomes, legal scholar Peter Schuck has condemned “the government's record of poor performance” and argued that the root cause lies with “structural and thus largely inescapable” features of the

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<sup>2</sup> See Cary Coglianese, *Because It's Hard*, THE REGULATORY REVIEW (Jan. 11, 2016), <https://www.theregreview.org/2016/01/11/coglianese-because-its-hard/> (explaining that we should be realistic about public policy challenges because “government's work is rarely easy”).

federal government.<sup>3</sup> In writing about what he has termed America's "political decay," political scientist Francis Fukuyama has observed, with what seems to be intended understatement, that "American government is hardly a source of inspiration around the world at the present moment."<sup>4</sup> Lawyer Philip Howard has bluntly asserted that the U.S. "government is broken."<sup>5</sup> Former Harvard University President Derek Bok has recognized the need for government to help solve social ills, but he also has gone to considerable lengths to show that American government itself "has been a major problem."<sup>6</sup>

Government in the United States does clearly confront major social and economic challenges, among them the following:

- *Violent crime.* Over 1.1 million violent crimes were reported across the nation in 2014, the latest year for which statistics are available.<sup>7</sup> Mass shootings persist, and the specter of terrorism from abroad continues to lurk beneath the surface of the public's consciousness.
- *Illiteracy.* Thirty-four million adults are either completely illiterate or inadequately literate.<sup>8</sup> An additional 63 million adults possess only the most basic literacy skills that simply allow them to get through daily living.<sup>9</sup>
- *Discrimination.* Racial and gender discrimination continues to permeate society. The poverty rate for African-Americans is over sixty-five percent higher than for the country overall.<sup>10</sup> More than six

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<sup>3</sup> PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN —AND HOW IT CAN DO BETTER* 30 (2014).

<sup>4</sup> FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 548 (2014).

<sup>5</sup> Philip K. Howard, *Practical Fixes for a Broken Washington*, WALL ST. J. (Sept. 18, 2016), <http://www.wsj.com/articles/practical-fixes-for-a-broken-washington-1474235004>.

<sup>6</sup> DEREK BOK, *THE TROUBLE WITH GOVERNMENT* 51 (2001).

<sup>7</sup> FBI, *UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2014* (2015) 1, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-lawenforcement/violent-crime/violent-crime.pdf> [hereinafter FBI CRIME REPORT] ("In 2014, an estimated 1,165,383 violent crimes occurred nationwide.").

<sup>8</sup> JUSTIN BAER ET AL., *BASIC READING SKILLS AND THE LITERACY OF AMERICA'S LEAST LITERATE ADULTS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY (NAAL) SUPPLEMENTAL STUDIES 14* (Feb. 2009), <http://nces.ed.gov/pubs2009/2009481.pdf> (reporting that "30 million adults have *Below Basic* prose literacy" and an additional "estimated 4 million adults [have] limited English proficien[cy] which prevented their participation in the assessment").

<sup>9</sup> NAT'L CTR. FOR EDUC. STATISTICS, *NATIONAL ASSESSMENT OF ADULT LITERACY*, [https://nces.ed.gov/naal/kf\\_demographics.asp](https://nces.ed.gov/naal/kf_demographics.asp) (reporting that 63 million adults can only "perform simple and everyday literacy activities").

<sup>10</sup> THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 330 (2014).

decades after *Brown v. Board of Education*, stark racial differences in school attendance and resource levels persist.<sup>11</sup> In the workforce, women continue to face a pay gap.<sup>12</sup>

- *Stagnant earnings.* For decades, household income has remained stagnant, if not declined somewhat.<sup>13</sup> Most people do not expect today's youth will be able to achieve enough economically in their lives to be as well off as their parents.<sup>14</sup>

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<sup>11</sup> Over three-quarters of Hispanic and African-American students attend public schools where racial minorities make up the majority of students, while only about fifteen percent of white students do. Jens Manuel Krogstad & Richard Fry, *Public School Enrollment Disparities Exist 60 Years After Historic Desegregation Ruling*, PEW RES. CTR. (May 16, 2014), <http://www.pewresearch.org/fact-tank/2014/05/16/public-school-enrollment-disparities-exist-60-years-after-historic-desegregation-ruling/>; Press Release, U.S. Dep't of Educ., *Expansive Survey of America's Public Schools Reveals Troubling Racial Disparities* (Mar. 21, 2014), <http://www.ed.gov/news/press-releases/expansive-survey-americas-public-schools-reveals-troubling-racial-disparities>. The trend seems to be toward increasing patterns of racial concentration or segregation in the nation's public schools, not the reverse. U.S. Gov't Accountability Office, GAO-16-345, *K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination 2* (2016), <http://www.gao.gov/assets/680/676745.pdf> ("The percentage of K-12 public schools ... with students who are poor and are mostly Black or Hispanic is growing and these schools share a number of challenging characteristics."). For recent media reports, see Gillian B. White, *The Data Are Damning: How Race Influences School Funding*, THE ATLANTIC (Sept. 30, 2015), <http://www.theatlantic.com/business/archive/2015/09/public-school-funding-and-the-role-of-race/408085/> (finding that an increase in minority students in a particular district leads to a deflation in funding) and Lindsey Cook, *U.S. Education: Still Separate and Unequal*, U.S. NEWS & WORLD REPORT (Jan. 28, 2015), <http://www.usnews.com/news/blogs/data-mine/2015/01/28/us-education-still-separate-and-unequal>.

<sup>12</sup> The wage gap is often claimed to be about twenty-three percent. See, e.g., CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011*, U. S. CENSUS BUREAU 5 (2012), <http://www.census.gov/prod/2012pubs/p60-243.pdf>. Other research, however, suggests the wage gap is smaller. See, e.g., Glenn Kessler, *The 'Equal Pay Day' Factoid that Women Make 78 Cents for Every Dollar Earned by Men*, WASH. POST (Apr. 2, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/04/02/the-equal-pay-dayfactoid-that-women-make-78-cents-for-every-dollar-earned-by-men/> (citing data from the Labor Department's Bureau of Labor Statistics that suggests a wage gap between men and women of eighteen cents in terms of weekly wages and thirteen cents in terms of hourly wages).

<sup>13</sup> See DENAVAS-WALT, PROCTOR & SMITH, *supra* note 12, at 7.

<sup>14</sup> See Andrew Kohut, *What Will Become of America's Kids?*, PEW RES. CTR. (May 12, 2014), <http://www.pewresearch.org/fact-tank/2014/05/12/what-will-become-of-americas-kids/> ("When asked about the future prospects of 'children today,' Americans generally said that when today's kids grow up, they would be worse off financially than their parents."); Eugene Steuerle, Signe-Mary McKernan, Caroline Ratcliffe & Sisi Zhang, *Lost Generations? Wealth Building Among Young Americans*, URBAN INST. (March 2013), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412766-Lost-Generations-Wealth-Building-among->

- *Economic insecurity.* Although unemployment dropped from its peak in 2009–2010, nearly 8 million adults still remained unemployed by mid-2016, with nearly 2 million Americans facing long-term unemployment at that time.<sup>15</sup> Over 45 million people in the United States live below the poverty level.<sup>16</sup> Levels of wealth and income inequality in America have increased dramatically over the last fifty years, reaching levels higher than in most other developed economies.<sup>17</sup>

These grim realities reflect only some of the serious problems afflicting society in the United States. Numerous other challenges abound, including issues surrounding climate change, public debt, cybersecurity, pension solvency, opioid abuse, childhood obesity, and discrimination based on sexual orientation and gender identity, to name a few.

Acknowledging a list of woes like this may well reinforce the deep angst and disaffection felt by many segments of the public. Hence, anyone focusing on such a list of social and economic issues might easily be forgiven for thinking that government is in fact quite badly broken—especially when considering the fact that many, if not most, of these problems are ones for which government has established laws and programs to solve. Notwithstanding significant governmental resources devoted to law enforcement, education, and welfare, for example, the problems of violent crime, illiteracy, and poverty persist. Indeed, the source of a few important problems even literally lies in the hands of government officials—an obvious example being the all-too-frequent tragic instances of police officers killing unarmed African-American males.

In other cases, society’s problems might be perceived as a function of woeful governmental neglect. For example, Congress faces criticism nearly every year for setting new records for the fewest laws

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Young-Americans.PDF (“Today, those in Gen X and Gen Y have accumulated less wealth than their parents did at their age over a quarter-century ago. Their average wealth in 2010 was 7 percent below that of those in their 20s and 30s in 1983.”).

<sup>15</sup> BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (Jan. 17, 2017), <http://data.bls.gov/timeseries/LNS14000000>; BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, EMPLOYMENT SITUATION SUMMARY (last updated May 6, 2016), <https://www.bls.gov/news.release/empstat.nr0.htm> (finding that the unemployment rate declined by 178,000 to 1.9 million in May of 2016).

<sup>16</sup> CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, INCOME AND POVERTY IN THE UNITED STATES: 2014, U.S. CENSUS BUREAU (Sept. 2015), <http://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf>.

<sup>17</sup> *E.g.*, PIKETTY, *supra* note 10, at 330 (noting the “explosion of wage inequality in the United States . . . after 1970”).

passed<sup>18</sup>—records perhaps rivaled only by Congress’s own record-low approval ratings among the public.<sup>19</sup> And although approval ratings for other governmental institutions—the Presidency and Supreme Court—are considerably higher than those for Congress, no branch of the federal government can claim to hold truly overwhelming public support.<sup>20</sup> Overall, fewer than one in five Americans report that they trust government in Washington, D.C., to take the right steps for the country.<sup>21</sup>

## II. IS GOVERNMENT BROKEN?

If government’s purpose is to “promote the general welfare,” then whenever society suffers, the public’s conclusion that government must have failed in its mission and become irreparably broken might seem to be well-justified.<sup>22</sup> And yet, despite how understandable succumbing to such a judgment may be, it is by no means a foregone conclusion that government has suffered a fundamental breakdown. Societal breakdowns

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<sup>18</sup> E.g., Steve Benen, *Obama Blasts “Least Productive Congress in Modern History,”* MSNBC (Apr. 10, 2014), <http://www.msnbc.com/rachel-maddow-show/obama-blasts-least-productive-congress> (noting that the 112th Congress is on track to pass fewer laws than any Congress since Congress began tracking this data nearly seventy years ago); Lauren French, *Congress Setting New Bar for Doing Nothing*, POLITICO (Mar. 22, 2016), <http://www.politico.com/story/2016/03/congress-supreme-court-budget-do-nothing-221057> (asserting that the 112th Congress is unusually unproductive as compared to past Congresses); Ezra Klein, *14 Reasons Why This Is the Worst Congress Ever*, WASH. POST (July 13, 2012), <https://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever> (exploring the 112th Congress’s record-low productivity record).

<sup>19</sup> *Congress and the Public*, GALLUP (2016), <http://www.gallup.com/poll/1600/congress-public.aspx> (noting that eighty percent of people polled disapprove of the way Congress is handling its job).

<sup>20</sup> *Presidential Approval Rating—Barack Obama*, GALLUP (2016), <http://www.gallup.com/poll/116479/barack-obama-presidential-job-approval.aspx> (noting that fifty percent of people polled approve of President Obama’s performance); *Supreme Court*, GALLUP (2016), <http://www.gallup.com/poll/4732/supreme-court.aspx> (noting that forty-five percent of people polled approve of the U.S. Supreme Court’s performance).

<sup>21</sup> *Trust in Government*, GALLUP (2016), <http://www.gallup.com/poll/5392/trust-government.aspx>.

<sup>22</sup> Cf. Cary Coglianese, *Preface* to REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION vii (Cary Coglianese ed., 2012) (“Has the United States suffered a regulatory breakdown? The answer to this question would appear to be an obvious ‘yes.’”). But see Christopher Carrigan & Cary Coglianese, *Oversight in Hindsight: Assessing the U.S. Regulatory System in the Wake of Calamity*, in REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 5 (Cary Coglianese ed., 2012) (questioning the public’s tendency to make “reflexive judgments” accusing government of failure in the wake of calamities).



and woes do not automatically constitute or even imply an underlying governmental breakdown. Rather, the answer to the question of whether government is broken depends on the perspective from which the question is approached.<sup>23</sup>

### A. Perfection

Through a perfectionist lens, government is broken as long as the problems that it is supposed to be solving persist. Perfectionism holds that the persistence of poverty, crime, unemployment, and other maladies means that government has necessarily failed, either due to its having not adopted sufficiently aggressive policies, or, perhaps, by having adopted policies that counterproductively create or contribute to societal problems. But perfection is obviously an impossible standard to meet, which means that, according to this view, government will always be broken beyond repair.<sup>24</sup> There is thus a fine line between perfectionism and cynicism.

Still, perfectionism crops up with some frequency in contemporary political rhetoric. When problems arise that government was supposed to prevent—such as oil spills, mine explosions, or bank failures—the reflexive reaction on the part of both political leaders and the general public is to assign “blame to a general breakdown” in governmental institutions.<sup>25</sup> The perfectionist logic holds that because government is supposed to prevent calamitous incidents from occurring, when these tragic events do in fact occur, government must have failed. Party activists also have an especially strong incentive to exploit such perfectionist thinking during periods of time when their political party is out of power, as it helps to undermine incumbent officeholders.

Although at times government is in fact to blame when disaster strikes, that conclusion does not follow *res ipsa loquitur*—that is, simply from the existence of societal problems.<sup>26</sup> Notwithstanding the public’s

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<sup>23</sup> For a related argument about how conclusions drawn from performance data used in assessing government programs and agencies depend on background assumptions, see DONALD P. MOYNIHAN, *THE DYNAMICS OF PERFORMANCE MANAGEMENT: CONSTRUCTING INFORMATION AND REFORM* (2008) (arguing that the question of whether government is broken changes based on perspective).

<sup>24</sup> See CARY COGLIANESE, *LISTENING, LEARNING, AND LEADING: A FRAMEWORK FOR REGULATORY EXCELLENCE* 26 (2015), <https://www.law.upenn.edu/live/files/4946-pprfinalconvenersreport.pdf> (noting that, even in excellent governmental organizations, mistakes will happen).

<sup>25</sup> Carrigan & Coglianese, *supra* note 22, at 4–12.

<sup>26</sup> *Res ipsa loquitur* means “the thing speaks for itself,” and it is used in tort law to refer to the principle that the very occurrence of an accident by itself implies that someone was negligent.

and government officials' sincere desire to avoid all calamities—in other words, notwithstanding the most laudable of perfectionist impulses—government in reality faces unavoidable tradeoffs, some of which are unfortunately quite tragic. For example, a risk of an accident, however slight, accompanies *any* industrial activity. The only way to ensure that no industrial activity-related accidents occur would be to eliminate industry altogether—but doing so would induce its own negative consequences, such as lost jobs and diminished living standards.<sup>27</sup> Much the same could be said for other kinds of problems that government seeks to solve. Government could reduce crime much more dramatically, for example, by vastly expanding surveillance, but such efforts would come at the expense of individual liberty and privacy.<sup>28</sup>

Acknowledging the existence of tradeoffs is just another way of saying that perfection is not possible. In a perfect world, it would be possible to have the proverbial problem-free cake while still eating it too. But in the real world, individual liberty and economic activity are accompanied by some degree of risk that problems will arise. When a problem persists, this is not necessarily a sign that government is broken; on the contrary, it very well may be that government is working at its best, but efforts to reduce the problem further would prove counterproductive or generate still more serious problems.<sup>29</sup> Whenever that is the case, achieving an optimal balance between competing values—such as

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<sup>27</sup> Carrigan & Coglianese, *supra* note 22, at 10.

<sup>28</sup> See Marguerite Rigoglioso, *Civil Liberties and Law in the Era of Surveillance*, 91 STAN. LAWYER 1, <https://law.stanford.edu/stanford-lawyer/articles/civil-liberties-and-law-in-the-era-of-surveillance/>.

<sup>29</sup> Sometimes governmental action to address a problem might only exacerbate that same problem. For example, efforts to suppress forest fires might unintentionally contribute to environmental conditions that make massive forest fires more likely. Likewise, the provision of certain kinds of governmental benefits, such as subsidized flood insurance or welfare benefits, might inherently contribute to some irreducible degree of moral hazard that actually blunts and counteracts a given policy's desired effects. If conditions like these in fact prevail, citizens may need to accept that there will be some problems that government can never eliminate altogether. The challenge in such cases is for government simply to try to minimize the problem, even though it is never eliminated altogether. In other circumstances, however, it might be possible to eliminate a problem altogether, but doing so would come at too high a price in terms of other values. As noted, certain kinds of crime might well be eliminated entirely in the severest of police states, but imposing such oppressive conditions would come at a grave cost to individual liberty. In cases like these, the challenge for government will be to reduce the targeted problem to its optimal level, that is, until any further reductions of the problem would start to impose still greater problems in terms of other values. The point is that, in both types of circumstances, some non-zero level of a problem would remain, even when government is operating at its very best.

by allowing some risky activities to take place while managing, but not eliminating, any resulting risks—constitutes a sign of responsible, well-functioning government.<sup>30</sup> Admittedly, in the immediate aftermath of calamity, when human pain and suffering are palpable, it will hardly look like the outcome was the result of an optimal choice of responsible government. Any caring human being would, at such a time, understandably feel the perfectionist impulse to condemn government for failing to prevent tragedy. Yet recognizing that problematic outcomes are sometimes the unlucky manifestation of the residual risk that exists even when a government is working well does not deny or diminish tragedy when it occurs.<sup>31</sup> An outcome can be tragic and yet still be the unfortunate result of the best possible governmental policy or program. One could even say that perfection *in optimizing across competing values* necessitates accepting imperfection in terms of at least one or more of the competing values being balanced against the others.

For these reasons, although no one should be discouraged from aspiring to achieve perfection, it is not meaningful to use perfection as the defining benchmark in assessing whether government is broken. We should not, as the aphorism goes, let the perfect become the enemy of the good—or have it become government’s key performance indicator. Of course, revealing perfection’s unsuitability for assessing governmental effectiveness is only instructive as far as establishing that government *might not* be broken in the face of serious social and economic problems. Much more work would be needed to justify firm judgments about governmental performance. In light of prevailing societal woes, what is needed is a basis for determining whether the levels of these woes are unavoidable or otherwise “acceptable.”

### B. Acceptable Imperfection

Deciding what might constitute an acceptable level of social and economic woes is itself a difficult task—and one that is almost certainly impossible to undertake with respect to government writ large. For more discrete issues, expert consensus can sometimes emerge on an acceptable, or at least unavoidable, level of a social malady. For example, economists have for years considered the “natural rate” of unemployment to be around five

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<sup>30</sup> E.g., Cary Coglianese & Howard Kunreuther, *Insurance and the Excellent Regulator*, in *ACHIEVING REGULATORY EXCELLENCE* 238–54 (Cary Coglianese ed., 2017).

<sup>31</sup> Cf. GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 20 (1978) (explaining how societies must confront “tragic decisions” due to tradeoffs presented by scarcity and competing values rather than by inherent flaws in society).

percent.<sup>32</sup> Environmental officials have, within their domain, tended to treat cancer risks of less than one in a million as falling within an acceptable range.<sup>33</sup> More generally, in order to discern acceptable outcomes, analytic techniques such as benefit-cost analysis and risk-risk analysis can be employed to give formal, explicit attention to tradeoffs and to help define “optimal” levels of various environmental, health, and safety problems.<sup>34</sup> Of course, these techniques are neither without controversy nor challenge in execution.<sup>35</sup> More importantly, when analysts have used these techniques most successfully, they have done so to inform very specific policy decisions—not to cut across the full range of governmental policies and programs in order to determine how close or far away conditions in society are from where they should be.

One core difficulty in making an overarching assessment of overall government lies in combining all the different conditions in society—education, employment, equality, and so forth—and then aggregating them into some kind of total measure of governmental “performance.” Such aggregation is impeded not only by the fact that the available data on these conditions use different units, but also by more fundamental questions about commensurability. Is government working better, for example, if it lowers crime but allows inequality to increase? In the face of real-world

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<sup>32</sup> E.g., Stuart E. Weiner, *The Natural Rate of Unemployment: Concepts and Issues*, 71 *ECON. REV.* 11, 22 (Jan. 1986). The notion of a natural rate of unemployment dates back to the 1960s and refers generally to the “normal” churning of the labor market. *Id.* at 23. More recently, some economists have raised questions about the concept in general as well as about the specific rate of unemployment. See Mary C. Daly, Bart Hobijn, Ayşegül Şahin & Robert G. Valletta, *A Search and Matching Approach to Labor Markets: Did the Natural Rate of Unemployment Rise?*, 26 *J. ECON. PERSP.* 3, 3–5 (2012); Roger E. A. Farmer, *The Natural Rate Hypothesis: An Idea Past Its Sell-by Date*, 53 *BANK OF ENGLAND Q. BULL.* 244, 247 (2013).

<sup>33</sup> E.g., Paul R. Hunter & Lorna Fewtrell, *Acceptable Risk, in Water Quality Guidelines, Standards AND HEALTH: ASSESSMENT OF RISK AND RISK MANAGEMENT FOR WATER-RELATED INFECTIOUS DISEASE 208* (Lorna Fewtrell & Jamie Bartram eds., 2001), [http://www.who.int/water\\_sanitation\\_health/dwq/iwachap10.pdf](http://www.who.int/water_sanitation_health/dwq/iwachap10.pdf).

<sup>34</sup> For a discussion of benefit-cost analysis and risk-risk analysis, see RICHARD O. ZERBE & ALLEN S. BELLAS, *A PRIMER FOR BENEFIT-COST ANALYSIS* 1–60 (2006) (detailing the economic theories and legal and philosophical foundations of benefit-cost analysis); W. Kip Viscusi, *Risk-Risk Analysis*, 8 *J. RISK & UNCERTAINTY* 5, 5 (1994). For an application of benefit-cost analysis outside the domains of environmental, health, and safety policy, see David S. Abrams, *The Prisoner’s Dilemma: A Cost-Benefit Approach to Incarceration*, 98 *IOWA L. REV.* 905, 905–06 (2013) (presenting a benefit-cost analysis of imprisonment).

<sup>35</sup> Benefit-cost analysis in particular presents a range of challenges, both to its normative underpinnings in utilitarianism or welfarism, as well as to its application. E.g., FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 8–9 (2004). It does, of course, have many defenders. E.g., MATTHEW D. ADLER & ERIC POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006) (defending the use of benefit-cost analysis based on overall well-being).

tradeoffs, deciding how well government is working demands knowing how much a unit of one value or condition equates with a unit of another.<sup>36</sup> The attraction of benefit-cost analysis lies in its ability, in principle, to convert different outcomes and values into a common, monetized metric. Yet therein also lies precisely one of the principal objections raised against such analysis—namely the view that certain values, such as human life, are not appropriate for monetization.<sup>37</sup>

One possible strategy for overcoming the commensurability problem would be to rely on a single, non-monetary measure to gauge overall social conditions and governmental performance. In recent decades, researchers have used surveys that ask individuals to rate their own happiness or life satisfaction.<sup>38</sup> As a means of gauging governmental performance, happiness research has certain appealing features—the simplicity and feasibility of the measures being chief among them. But satisfaction surveys also have their limitations, especially when it comes to assessing how government is performing.<sup>39</sup> For the purpose of gauging whether the U.S. government is broken, one key problem is that, even if happiness measures can reliably estimate overall well-being, they cannot tell us what is the

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<sup>36</sup> For about the last five years, the Organization of Economic Cooperation and Development (OECD) has reported an overall index of societal well-being for about thirty-five developed countries by aggregating indicators on eleven different topics (such as health, housing, education, jobs, safety, life satisfaction). In creating this “Better Life Index,” the OECD does rely on some reasonable but still somewhat arbitrary methods to normalize disparate types of data within each topic; it does not, however, aggregate across topics. Instead, visitors to the OECD website can enter their own relative weightings for the different categories, such as by weighting housing higher than environment, and then a calculator will create an overall ranking across countries based on the users’ weights. See Organization of Economic Cooperation and Development, *What’s the Better Life Index?*, OECD BETTER LIFE INDEX, <http://www.oecdbetterlifeindex.org/about/better-life-initiative/>. On the OECD’s methods, see generally ANGEL GURRIA, ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT, *HOW’S LIFE: MEASURING WELL-BEING* (2011), [https://www.oecd-ilibrary.org/economics/how-s-life\\_9789264121164-en](https://www.oecd-ilibrary.org/economics/how-s-life_9789264121164-en).

<sup>37</sup> *E.g.*, ACKERMAN & HEINZERLING, *supra* note 34, at 35–37.

<sup>38</sup> *E.g.*, Bruno S. Frey & Alois Stutzer, *The Happiness Research: State and Prospects*, 62 *REV. SOC. ECON.* 207 (2005); JOHN HELLIWELL, RICHARD LAYARD & JEFFREY SACHS, *WORLD HAPPINESS REPORT* 3–9 (2012), [http://worldhappiness.report/wp-content/uploads/sites/2/2012/04/World\\_Happiness\\_Report\\_2012.pdf](http://worldhappiness.report/wp-content/uploads/sites/2/2012/04/World_Happiness_Report_2012.pdf). The OECD also collects life satisfaction data as part of its Better Life Index. See Gurria, *supra* note 35, at 266–68.

<sup>39</sup> *E.g.*, DEREK BOK, *THE POLITICS OF HAPPINESS: WHAT GOVERNMENT CAN LEARN FROM THE NEW RESEARCH ON WELL-BEING* 5–7 (2010); ERIC A. POSNER & CASS R. SUNSTEIN, *LAW AND HAPPINESS* 1–3 (2010); *cf.* Cary Coglianese, *Is Satisfaction Success?: Evaluating Public Participation in Regulatory Policy Making*, in *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* 69 (Rosemary O’Leary & Lisa Bingham eds., 2003).

“right” level of happiness that a survey should show. Knowing that Americans on average rate their level of happiness at 7.1 on a ten-point scale does not by itself tell us much about whether existing imperfections in society should be treated as falling within an acceptable range.<sup>40</sup> People can be happy, at least to a degree, even under conditions that most observers would still view as unacceptable.

### C. Comparison

The absence of a clear benchmark for determining the acceptability of existing levels of economic and societal woes leads most high-level assessments of governmental performance to be based on comparisons, either historical or cross-national ones. On the basis of many—but by no means all—criteria, the United States compares favorably to most other nations.<sup>41</sup> It has, after all, the largest economy in the world.<sup>42</sup> In terms of

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<sup>40</sup> See JOHN HELLIWELL et al., *supra* note 37, at 20 (reporting that the U.S. average happiness score from 2013–2015 was 7.104). The same lack of a benchmark exists when survey researchers effectively ask people whether the current overall level of social problems is acceptable or not. See, e.g., ALLSTATE/ATLANTICMEDIA, HEARTLAND MONITOR POLL XXVI (2016), [http://heartlandmonitor.com/wp-content/uploads/2016/07/Topline\\_Allstate\\_Heartland-Monitor-Poll-XXVI\\_D1client\\_062816.pdf](http://heartlandmonitor.com/wp-content/uploads/2016/07/Topline_Allstate_Heartland-Monitor-Poll-XXVI_D1client_062816.pdf) (reporting that sixty-six percent of adults in the United States believe the country is “seriously off on the wrong track”). Not only is it unclear how many people need to agree that the current level is unacceptable to deem it so, but, even if everyone were to agree that the current level is unacceptable, this would not tell us anything about what exact level is *acceptable*. Presumably, on that point, people will disagree—or, if they agree, it would surely only be on perfectionism. All in all, such an exercise of lumping all problems together commensurately and asking people to assess the acceptability of their level presumably does little more than tap into general feelings of angst or satisfaction, rather than offer anything precise about an acceptable level of imperfection. It is possible, after all, to ask Americans directly whether they think government is broken; survey researchers have done just that. See, e.g., Paul Steinhäuser, *Survey: Most Americans Believe Government Broken*, CNN (Feb. 22, 2010), <http://www.cnn.com/2010/POLITICS/02/21/poll.broken.govt/> (reporting that eighty-six percent of Americans believe government is broken, although only five percent believe it to be beyond repair). The fact that most Americans perceive government to be broken is itself a problem, but, on their own, such survey results do not necessarily mean that government is truly or significantly broken, nor do they provide any clear basis for defining a level of acceptable imperfection.

<sup>41</sup> Derek Bok argues that the *rate of improvement* over the last half-century has been, for two-thirds of the seventy-five policy realms or criteria he considered, less than average in the United States compared with other countries. DEREK BOK, *THE STATE OF THE NATION: GOVERNMENT AND THE QUEST FOR A BETTER SOCIETY* 26–27 (1996). Without more, it is not possible to know what to make of such an observation because, in some policy domains, the greatest strides forward occurred earlier for the United States than for other countries.

<sup>42</sup> THE WORLD BANK, *GDP RANKING* (2017), <http://databank.worldbank.org/data/download/GDP.pdf>.

happiness, its average of 7.1 places it thirteenth among 157 countries.<sup>43</sup> (Denmark ranks number one, at 7.5.) On the United Nations's composite index of overall conditions for human development, the United States falls within the "very high human development" category, ranking eighth out of 188 countries.<sup>44</sup> Moreover, following the 2007–2008 financial crisis, the U.S. economy rebounded much more quickly and robustly than did the economies in the dozen other countries that experienced systemic economic crisis at that same time. As of 2014, only the United States and Germany had seen their economies return to their pre-crisis levels of economic activity.<sup>45</sup>

From a historical perspective, the U.S. economic rebound in the wake of the most recent financial crisis also fares quite favorably. It took only four years for the economy to return to pre-crisis levels following the current century's financial crisis, whereas it took eleven years for it to make a comparable rebound following the Great Depression—despite similar financial shocks precipitating both crises.<sup>46</sup> On the basis of other comparisons over time, the United States looks much more successful than it might seem when the absolute level of today's negative conditions serves as the benchmark. For example, even though the most recent federal crime report reveals that 1.1 million violent crimes occurred in 2014—a stunningly large number in absolute terms—such crime has generally trended downward in recent years. Violent crime dropped nearly seven percent over the preceding five years and more than fifteen percent over the preceding ten years.<sup>47</sup>

On a longer view, many other aspects of life in the United States have seen significant improvements.<sup>48</sup> The U.S. economy has dramatically expanded since 1960,<sup>49</sup> with median household income having risen twenty

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<sup>43</sup> See HELLIWELL et al., *supra* note 37, at 22. Americans' high levels of happiness are undoubtedly explained in part by the size of the U.S. economy and its generally high standard of living. See Betsey Stevenson & Justin Wolfers, *Economic Growth and Subjective Well-Being: Reassessing the Easterlin Paradox*, 39 BROOKINGS PAPERS ECON. ACTIVITY 1, 23–24 (2008).

<sup>44</sup> United Nations Development Programme, Human Development Report 2015 1, 208 tbl.1 (2015), [http://hdr.undp.org/sites/default/files/2015\\_human\\_development\\_report.pdf](http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf).

<sup>45</sup> COUNCIL OF ECONOMIC ADVISERS, 2014 ECONOMIC REPORT OF THE PRESIDENT 3, 117 (2014), [http://www.nber.org/erp/2014\\_economic\\_report\\_of\\_the\\_president.pdf](http://www.nber.org/erp/2014_economic_report_of_the_president.pdf). The return to pre-crisis levels of GDP was on a per-adult basis. *Id.*

<sup>46</sup> *Id.* at 116.

<sup>47</sup> FBI CRIME REPORT, *supra* note 7, at 1.

<sup>48</sup> E.g., BOK, *supra* note 40, at 359.

<sup>49</sup> *Real GDP per Capita, by Country, 1960–2011*, U.S. DEP'T OF LABOR, [http://www.bls.gov/ilc/intl\\_gdp\\_capita\\_gdp\\_hour.htm#table01](http://www.bls.gov/ilc/intl_gdp_capita_gdp_hour.htm#table01).

percent over the last fifty years.<sup>50</sup> The infant mortality rate has improved by about forty percent over the last thirty years.<sup>51</sup> Environmental conditions have improved too, with air emissions of lead declining by ninety-eight percent since 1970 and emissions of other major air pollutants dropping between twenty-five and seventy-nine percent during the same period.<sup>52</sup> The average person born in 2014 can expect to live seventy-nine years, compared to a life expectancy of only seventy-one years for the average person born in 1970.<sup>53</sup>

This is not to say that on every measure life looks better in the United States today than it did fifty years ago, nor that the United States compares favorably against other countries on every metric. On the contrary, against certain criteria, the United States compares less favorably. Among developed countries, for example, the United States ranks last in terms of the mathematical skills of its young adults.<sup>54</sup> The overall infant mortality rate in the United States ranks in the bottom quarter of countries worldwide.<sup>55</sup> Income inequality is more pronounced in the United States than in other countries.<sup>56</sup> Even though some environmental conditions have improved markedly over

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<sup>50</sup> DENAVAS-WALT & PROCTOR, *supra* note 16, at 23.

<sup>51</sup> *Infant Mortality: Death Rates Among Infants by Detailed Race and Hispanic Origin of Mother, 1983–1991 and 1995–2012*, FED. INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, <https://www.childstats.gov/americaschildren/tables/health2.asp>.

<sup>52</sup> J. CLARENCE DAVIES & JAN MAZUREK, POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM 58 (1998). The only major air pollutants to increase during this period of time were nitrogen oxides, which increased by six percent. *Id.* The declines in air emissions generally translated to cleaner ambient air, and “[o]verall, air quality appears to have improved significantly since 1976.” *Id.* at 60–63. Longitudinal measures on other environmental conditions in the United States are generally not available. *Id.* at 95–96.

<sup>53</sup> NAT’L CTR. FOR HEALTH STATISTICS, U.S. DEP’T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2015: WITH SPECIAL FEATURE ON RACIAL AND ETHNIC HEALTH DISPARITIES 95 (2016), <http://www.cdc.gov/nchs/data/abus/abus15.pdf>.

<sup>54</sup> ANGEL GURRIA, OECD SKILLS OUTLOOK 2013: FIRST RESULTS FROM THE SURVEY OF ADULT SKILLS 83 (2013), [http://www.oecd.org/site/piaac/Skills%20volume%201%20\(eng\)-full%20v12--eBook%20\(04%2011%202013\).pdf](http://www.oecd.org/site/piaac/Skills%20volume%201%20(eng)-full%20v12--eBook%20(04%2011%202013).pdf).

<sup>55</sup> Central Intelligence Agency, *The World Factbook Country Comparison: Infant Mortality Rate*, CIA (2016), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2091rank.html>. Part of the difference between infant mortality rates in the United States and other countries is due to differences in how neonatal births are reported. Alice Chen, Emily Oster & Heidi Williams, *Why Is Infant Mortality Higher in the United States than in Europe?*, 8 AMER. ECON. J. ECON. POL. 89, 105 (2016) (evaluating “evidence [that] suggests that aggregate comparisons are misleading”). Moreover, infant mortality rates in some states and among higher socioeconomic groups in the United States are on par with some of the best rates globally. *Id.* Unfortunately, rates for births occurring in the lowest socioeconomic groups in the United States remain among some of the worst in the world. *Id.*

<sup>56</sup> PIKETTY, *supra* note 10, at 300.



the last five decades, the fact remains that consequences of climate change are worsening (although, in this respect, the United States is in the same position as many other countries).

Comparisons of social and economic conditions over time and across jurisdictions provide valuable insights into areas of strength as well as possibilities for improvement. As benchmarks for determining whether government is broken, comparisons are also both more realistic than perfection and more accessible than an undefinable overall level of acceptable imperfection. Nevertheless, such comparisons do not provide a definitive basis for determining whether government is broken. For one, the actual comparisons are mixed: the United States is doing better today than in the past on some dimensions but not on others, and it is doing better than other countries in terms of some criteria but not others. To escape the conclusion that the United States's government is broken, must the nation meet a "Lake Wobegon test," under which its measures on all criteria are above average? That would certainly be a very high standard to meet. And although achieving it would surely indicate that government is working well, failing to achieve it does not necessarily imply that government is broken.

Another limitation of cross-national comparisons stems from the fact that underlying circumstances are not always the same in every country. It may simply be harder for a larger, more geographically dispersed country to solve certain problems, even on a per-capita basis. If so, then perhaps the United States fares worse on some criteria than other countries not because government is not working well, but because the underlying challenges are that much greater in the United States. Simple comparisons will not take into account how factors unrelated to governmental performance might explain differences in ultimate outcomes.

#### *D. Counterfactual Inference*

For these very sorts of reasons, social scientists and program evaluators widely recognize that unstructured comparisons cannot by themselves support reliable inferences about how much improvement can be attributed to governmental performance. After all, even if conditions turn out to be better today than they were in the past, this does not mean that government is responsible for all of these improvements, or even that it had anything to do with them at all. Some portion of the United States's progress on air quality over the last fifty years undoubtedly stems from the general shift in the American economy away from a heavy manufacturing base and toward a greater reliance on a lower-polluting service economy—not from the effects of the nation's environmental laws. On the flip side, though, despite the persistence of significantly high rates of crime, if these rates would have been

even higher in the absence of law enforcement officials' efforts, then the conclusion can still follow that law enforcement has been effective.

For these reasons, the better evaluative standard is usually a counterfactual one: namely, one that asks whether conditions are better or worse than they *would have been* in the absence of governmental intervention. If environmental conditions would have improved anyway for reasons unrelated to environmental laws, then those laws cannot be said to have been very effective. More generally, we could say that the test for brokenness is whether society overall would be better off without government than with it; if so, then government is definitely broken. Yet if it is possible to attribute meaningful improvements in society to governmental efforts, then that is a good sign that government is working, at least to some degree.

Admittedly, a counterfactual world-without-government benchmark can be hard to estimate, but it does at least provide a meaningful way to think about how to assess whether government is broken. A counterfactual benchmark is more realistic than perfectionism, and it does not require making a determination of an acceptable imperfection goalpost. Instead, it asks whether government is making progress by causing conditions to be better than they would have otherwise been. This may sound a lot like an approach that relies on comparisons over time or across jurisdictions—and it does bear certain affinities to the comparative impulse, which itself probably stems from a tacit desire to make causal inferences. Those inferences can only be drawn from temporal or cross-jurisdictional (or, technically, cross-sectional) comparisons.<sup>57</sup> It is just that in order to attribute improvement causally to government, these comparisons must be made carefully and systematically. Research strategies and statistical techniques must be used that can isolate the extent to which differences in conditions in the world can be attributed to governmental intervention and not to extraneous factors.

The gold standard for making causal attributions is to rely on random assignment to experimental conditions, something that is clearly not possible in assessing government writ large. (Imagine assigning some people at random to a society subject to government, while banishing others to a Hobbesian state of nature!) Randomization can often be difficult even with respect to specific governmental programs and policies.<sup>58</sup> Fortunately, other statistical techniques can be used to approximate that gold standard

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<sup>57</sup> See generally Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111 (2002) (explaining basic strategies for empirically evaluating governmental institutions).

<sup>58</sup> It would be possible, however, to use randomization more frequently than it is presently employed. See Ian Ayres, Michael Abramowicz & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929, 974–1005 (2011).

and provide reliable estimates of the impact of discrete governmental interventions.<sup>59</sup> Although relative to the number of governmental programs and policies we still have too little research that deploys these techniques,<sup>60</sup> what systematic evidence we do have indicates that government can lead to demonstrable improvements in society. Federal regulations phasing out the use of lead as an additive in gasoline have produced major public health gains.<sup>61</sup> The Social Security program, notwithstanding legitimate concerns about its longer-term viability, has reduced poverty among the elderly.<sup>62</sup> Unemployment insurance and food stamp benefits have proven to be significantly beneficial sources of social support during economic downturns.<sup>63</sup> Other examples could be added to the list of programmatic successes, and taken together they make it hard to conclude that government is completely broken. This is not to say, of course, that all governmental programs lead to significantly improved outcomes; rather, the point is that, when such attributional research is conducted to assess governmental programs against a counterfactual world, it becomes clear that some important policies and programs do work.

A still larger point concerns the proper test for governmental performance overall, which would be to consider whether the United States is better off today compared with a counterfactual world. Has government made society and the economy better or worse on balance? In other words, are policies and programs that yield results that, on net, are negative outweighed by those policies and programs with results that, on net, are positive?

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<sup>59</sup> E.g., Cary Coglianese, *Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy*, OECD Expert Paper No. 1 at 38–43 (2012), [https://www.oecd.org/gov/regulatory-policy/1\\_coglianese%20web.pdf](https://www.oecd.org/gov/regulatory-policy/1_coglianese%20web.pdf). The logic behind these research designs can also be used when making broader, qualitative inferences about government. GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 3–7 (1994); see also JARED DIAMOND & JAMES A. ROBINSON, *NATURAL EXPERIMENTS OF HISTORY* 1–5 (2011).

<sup>60</sup> Jim Nussle & Peter Orszag, *Let's Play Moneyball*, in *MONEYBALL FOR GOVERNMENT* 4 (Jim Nussle & Peter Orszag eds., 2014).

<sup>61</sup> For a review of U.S. efforts to eliminate lead additives from gasoline, see Richard G. Newell & Kristian Rogers, *The Market-Based Lead Phasedown*, in *RESOURCES FOR THE FUTURE* 1 (2003), <http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-03-37.pdf> (“One of the great successes during the modern era of environmental policy was the phasedown of lead in gasoline.”).

<sup>62</sup> See Gary V. Engelhardt & Jonathan Gruber, *Social Security and the Evolution of Elderly Poverty*, in *PUBLIC POLICY AND THE INCOME DISTRIBUTION* 259 (Alan J. Auerbach, David Card & John M. Quigley eds., 2006).

<sup>63</sup> See Peter Ganong & Jeffrey B. Liebman, *The Decline, Rebound, and Further Rise in SNAP Enrollment: Disentangling Business Cycle Fluctuations and Policy Changes*, National Bureau of Economic Research, Working Paper No. 19363 at 1, 2 (2013), <http://www.nber.org/papers/w19363>.

These are difficult questions to answer with great precision, especially given limitations in available research. But these questions do reflect a counterfactual way of thinking about overall governmental performance. Against a counterfactual world without government, it would be hard to dispute that society is markedly better off with government, notwithstanding all of its imperfections and all the additional work left to be done to improve social and economic conditions. Of course, such a test for whether government is broken would surely prove to be far too easy to pass. After all, under this test, society theoretically could be better off with a thoroughly corrupt and unjust, and hence woefully broken, government than with no government at all.

But there is another, more meaningful way to think counterfactually, and that is to consider whether the totality of current conditions in society could exist if government were badly broken. Less-than-perfect government, which is what the United States has, is not the same as broken government. Broken government drags down society, makes living conditions unstable, and thwarts the private ordering of affairs. It would be extremely difficult for American society to be doing as well as it is, even taking into account its shortcomings, if government were truly broken in this sense. The U.S. economy simply could not be the largest economy in the world on a per-capita basis, nor could life in America have improved on so many dimensions as it has over recent decades, without a well-functioning government.<sup>64</sup>

### III. DISREPAIR, NOT DESPAIR

Government in the United States is far from self-evidently broken. Still, the persistence of old problems and the constant introduction of new ones leave plenty of room for improvement. It might therefore always be appropriate to describe American democracy as being in a state of disrepair, even though it is not at all fundamentally broken. But this need not lead to despair or resignation. A gap will always exist between the current state of the world and what would be ideal. Rather than concluding that government has broken down when it fails to achieve perfection, thereby risking a descent into cynicism, perfectionism ought instead to inspire a constant striving to make society better. Democracy, in other words, should be viewed as a work in progress.

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<sup>64</sup> See DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 4–5 (2012) (demonstrating that economies thrive when supported by well-functioning governmental institutions where political power is “broadly distributed, where the government [is] accountable and responsive to citizens, and where the great mass of people [can] take advantage of economic opportunities”).

Writing in 1927, the philosopher John Dewey noted that American “democracy is today under a cloud,” subjected to “adverse criticism in abundance.”<sup>65</sup> These same words aptly describe the way in which democracy is widely perceived today. Pundits, scholars, and politicians alike question whether the U.S. political system possesses the capacity needed to continue to make progress in solving the nation’s problems. They worry that, as political scientists Thomas Mann and Norman Ornstein have put it, “the political system has become grievously hobbled at a time when the country faces unusually serious challenges and grave threats.”<sup>66</sup>

Much of the recent loss of faith in American democracy stems from what seems to many observers to be a semi-permanent state of gridlock in Washington, D.C. The shutdown of the federal government in 2013, combined with subsequent showdowns over federal budgets and debt ceilings, constitute perhaps the most tangible symbols of the “hobbling” of the nation’s political system. Americans on the political right have been dismayed by the government’s inability to bring the national debt under control, while those on the political left have been horrified by the government’s inability to enact measures requiring background checks for gun purchases, even in the wake of repeated mass shooting tragedies. A substantial majority of Americans report feeling that, on the policy issues that matter most to them, their side is losing more than it is winning—a sentiment that is particularly notable given that it is shared by individuals identifying with both political parties.<sup>67</sup> During the Obama Administration, Republicans tended to think they had been losing, and yet Democrats did not feel as though they had been winning.

At the same time that policy gridlock has gripped the federal government, the political system has witnessed ever-deepening partisan polarization. Not since the end of Reconstruction has the ideological divide between Democrats and Republicans in Congress been as large as it is now.<sup>68</sup> Ordinary Americans are much more polarized in their political views: the typical Republican is markedly more conservative than in previous decades,

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<sup>65</sup> JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 110 (1927).

<sup>66</sup> THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 101 (Melvin L. Rogers, ed. 2016).

<sup>67</sup> Hannah Fingerhut, *In Politics, Most Americans Feel They’re on the Losing Side*, PEW RES. CTR. (Nov. 25, 2015), <http://www.pewresearch.org/fact-tank/2015/11/25/winners-and-losers-in-politics/>.

<sup>68</sup> Christopher Hare, Keith T. Poole & Howard Rosenthal, *Polarization in Congress Has Risen Sharply. Where Is It Going Next?*, WASH. POST (Feb. 13, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/13/polarization-in-congress-has-risen-sharply-where-is-it-going-next/>.

while the typical Democrat is notably more liberal than in the past.<sup>69</sup> Different segments of the public get their news from different ideologically tilted sources,<sup>70</sup> and partisans' animus toward those in the opposite party has sharpened considerably in recent decades.<sup>71</sup> The polarization of the electorate presumably exacerbates polarization among elected officials, particularly because the members of the public who tend to be most politically active—whether in terms of voting, contributing to campaigns, or even writing letters to Congress—tend also to be the same individuals who are the most ideologically extreme, on both ends of the spectrum.<sup>72</sup>

Polarization affects trust in government as well. Republican voters' trust in government is much lower when a Democrat is in the White House, and vice versa for Democrats.<sup>73</sup> Of course, overall levels of public trust have declined since the 1950s, and partisans on both sides of the aisle appear increasingly to agree that the system is rigged in favor of special interests. What interests count as “special” does vary, but survey results suggest that, across the ideological spectrum, voters worry a lot today about undue influence associated with campaign contributions and the rise of super-PACs.<sup>74</sup> Republicans as well as Democrats also express great concern about privileged groups' “capture” of government to the detriment of the overall public—whether such capture stems from influence by those in the top one percent of the income bracket or by large, incumbent firms blocking competition by new, small businesses.<sup>75</sup>

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<sup>69</sup> MICHAEL DIMOCK, JOCELYN KILEY, SCOTT KEETER & CAROOLL DOHERTY, PEW RES. CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTIPATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE 9–10 (2014), <http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf>.

<sup>70</sup> AMY MITCHELL, JEFFREY GOTTFRIED, JOCELYN KILEY & KATERINA EVA MATSA, PEW RES. CTR., POLITICAL POLARIZATION & MEDIA HABITS 11–12 (2014), <http://www.journalism.org/files/2014/10/Political-Polarization-and-Media-Habits-FINAL-REPORT-7-27-15.pdf>.

<sup>71</sup> DIMOCK, et al., *supra* note 68, at 11.

<sup>72</sup> *Id.* It is possible, of course, that polarization among elite officials might contribute to some degree of polarization by voters too. For an example of empirical research suggesting such a direction, see Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 AMER. POL. SCI. REV. 619, 626 (2001).

<sup>73</sup> PEW RES. CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 19–20 (2015), <http://www.people-press.org/files/2015/11/11-23-2015-Governance-release.pdf>.

<sup>74</sup> Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES (June 2, 2015), <https://nyti.ms/2lvVSrF>. In addition to campaign finance, different segments of the public also worry how gerrymandering and so-called voter suppression efforts have affected representativeness and equality in the electoral process.

<sup>75</sup> Republican Senator Mike Lee and Democratic Senators Sheldon Whitehouse and Elizabeth Warren spoke out against the perils of regulatory capture at a workshop organized by a federal agency devoted to improving government. Administrative Conference of the United States,

As with substantive social and economic problems facing the United States, these concerns about the vibrancy of the nation's political process reveal clear signs of America's disrepair. So, too, do real needs that exist in the day-to-day administration of government, including human capital, information technology, financial resources, and effective public management.<sup>76</sup> Yet counterintuitively, the existence of worries like these are themselves indications of something about American democracy that at its core is healthy. Political scientist Robert Dahl once noted that an essential precondition for avoiding a "democratic breakdown" is a widespread and deep commitment to democracy embedded within a society's culture.<sup>77</sup> The current salience of alarm about a rigged and out-of-touch political system evinces just such commitment and provides some reason for optimism.

Democracy demands a sustained commitment because democratic governance is not easy. To make it work, society must not become complacent but instead must always strive toward reinvention and improvement—or what Dewey called the continual "rediscovery" of the democratic state.<sup>78</sup> If government is to continue to maintain what is working reasonably well in society, and if it is to stand a chance to improve what is not, society must remain dedicated to the core principles of governmental fairness, neutrality, and representativeness that are essential prerequisites to a well-functioning democratic state.<sup>79</sup>

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*Meetings & Events* (Mar. 3, 2016), <https://www.acus.gov/meetings-and-events/event/regulatory-capture-workshop>; see also *Rooting Out Regulatory Capture*, THE REGULATORY REVIEW (June 13, 2016), <https://www.theregreview.org/2016/06/13/rooting-out-regulatory-capture/> (presenting sixteen essays, including several essays authored by prominent Republicans as well as prominent Democrats, on the dangers of regulatory capture).

<sup>76</sup> For discussion of opportunities for improvements in governmental administration, see PAUL C. LIGHT, A GOVERNMENT ILL EXECUTED: THE DECLINE OF THE FEDERAL SERVICE AND HOW TO REVERSE IT 224–39 (2008); JOHN J. DI IULIO, JR., BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT (2014); Paul R. Verkuil, *Save the Bureaucrats*, THE REGULATORY REVIEW (Sept. 8, 2015), <https://www.theregreview.org/2015/09/08/verkuil-save-the-bureaucrats/>; Cary Coglianese, *Optimizing Government for an Optimizing Economy*, in NEW ENTREPRENEURIAL GROWTH AGENDA (Dane Stangler ed., 2016), <http://www.kauffman.org/neg/section-8#optimizinggovernmentforanoptimizingeconomy>; DONALD F. KETTL, ESCAPING JURASSIC GOVERNMENT: HOW TO RECOVER AMERICA'S LOST COMMITMENT TO COMPETENCE 149–65 (2016); Shelley H. Metzenbaum & Gaurav Vasishth, *What Makes a Regulator Excellent? Mission, Funding, Information, and Judgment*, in ACHIEVING REGULATORY EXCELLENCE 148–65 (Cary Coglianese ed., 2017).

<sup>77</sup> ROBERT A. DAHL, ON DEMOCRACY 157 (1998) (articulating preconditions for democracy based on a study of seventy-eight countries).

<sup>78</sup> DEWEY, *supra* note 64, at 15.

<sup>79</sup> To be sure, there are reasons to wonder whether such commitment is waning, or at least to be concerned that it is not sufficiently strong across all segments of society. See, e.g., Pippa

The policy gridlock afflicting Washington, D.C., may hardly seem like anything to celebrate and, yet, especially in light of a widening polarization among the electorate, gridlock at least has some virtue in the degree of even-handedness it brings to the U.S. political system. The fact that a majority of Americans of both parties see themselves as losing in the policy arena is almost certainly better for a pluralist society than having one side constantly winning at the expense of the other side. Even-handedness matters because disagreement in society cannot be—and will never be—eliminated altogether. Conflict over values is, as political philosophers Amy Gutmann and Dennis Thompson have written, “a condition with which we must learn to live, not merely an obstacle to be overcome on the way to a just society.”<sup>80</sup> But how we live with disagreement matters, and today incivility and cynicism unfortunately loom as larger dangers to responsible democratic governance than even gridlock. Society could benefit from much less coarseness, dismissiveness, and ad hominem posturing, especially as such rhetoric and behavior seems to garner an unhelpful and disproportionate degree of attention in the media.<sup>81</sup>

Society needs a greater willingness on the part of its citizens and leaders to engage in respectful deliberation with those with whom they disagree.<sup>82</sup> What the United States does not need is for the public to give up on democratic government altogether. Agreeing with Dewey, political scientists Jack Knight and James Johnson have recently argued that, even though democracy remains “under a cloud” in the United States, “the proper response . . . is not to shrink from but rather to renew our commitment to and engagement in democratic politics.”<sup>83</sup> In the end, the most serious condition that merits despair is not the great distance the nation still has to travel toward its ideals; rather, it is the risk of widespread despair itself. Society needs citizens and leaders who hold fast to their aspirations for a better world and who possess the determination to roll up their sleeves and engage with others respectfully in pursuit of achieving those aspirations through the democratic process.

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Norris, *It's Not Just Trump. Authoritarian Populism Is Rising Across the West. Here's Why*, WASH. POST (Mar. 11, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/11/its-not-just-trump-authoritarian-populism-is-rising-across-the-west-heres-why/> (reporting that forty-four percent of Americans with less than a college education “approved of having a strong leader unchecked by elections and Congress”).

<sup>80</sup> AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 26 (1996); *see also id.* at 360 (“[G]iven the intractable sources of disagreement, citizens cannot expect to reach mutually justifiable agreement over the whole range of significant issues in politics.”).

<sup>81</sup> *See* DIANA C. MUTZ, *IN-YOUR-FACE POLITICS: THE CONSEQUENCES OF UNCIVIL MEDIA* 3–5 (2015).

<sup>82</sup> GUTMANN & THOMPSON, *supra* note 79, at 346.

<sup>83</sup> JACK KNIGHT & JAMES JOHNSON, *THE PRIORITY OF DEMOCRACY: POLITICAL CONSEQUENCES OF PRAGMATISM* x (2011).



## CONCLUSION

The question of whether government is broken may seem to imply its own answer, calling to mind immediately all that is not working in society today. Nevertheless, it is a serious question deserving of serious reflection, rather than pat, presupposed answers. For such a vital question, clear and careful thought is needed, as are answers to still further questions about what “broken” really means. Broken for whom? Broken in terms of what functions or issues in particular? When the underlying question of governmental performance is given its proper due, the supposed brokenness of government in the United States is far from as obvious as it might seem at first glance. Government has added, and still does add, positively to society. Many societal and economic conditions are improving.

A perfectionist lens can be helpful for setting worthy goals, but perfection simply cannot provide a meaningful basis for concluding that government is fundamentally broken. Merely recognizing that present conditions in the United States leave much room for improvement does not preordain a conclusion that government is broken; instead, such recognition actually offers citizens and public leaders alike a choice about how to approach the future. They can face the future with resignation, or with aspiration. They can see the future as bleak and hopeless, or they can see it open to possibility and progress.

I take it as an encouraging sign, however modest it may seem in the grand scheme of things, that a group of students at the University of Pennsylvania Law School has signaled its own commitment to aspiration over resignation by organizing the *Journal of Law & Public Affairs* and dedicating its inaugural issue to challenges facing government today. A journal like this offers something that society needs in still greater abundance: reasoned analysis of serious problems, and respectful but careful assessment of possible solutions, regardless of how politically and morally contentious some of them may be. Writer Maria Popova put it well when she said, “critical thinking without hope is cynicism. But hope without critical thinking is naïveté.”<sup>84</sup> The students involved in the *Journal of Law & Public Affairs* seem to understand the need for both hopefulness and critical analysis.

It is fitting for law students at the University of Pennsylvania to have organized this symposium, for Philadelphia is the city where, in 1787, the U.S. Constitution came to be forged because leaders at that time asked

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<sup>84</sup> KRISTA TIPPETT, *BECOMING WISE: AN INQUIRY INTO THE MYSTERY AND ART OF LIVING* 256 (2016). As Tippet aptly observes, “cynicism is not more reasonable than hope. Unlike almost every worthwhile thing in life, cynicism is easy. It’s never proven wrong by the corruption or the catastrophe. It’s not generative. It judges things as they are, but does not lift a finger to try to shift them.” *Id.* at 236.

themselves if the new nation's government was broken. Even with the Constitution, of course, much work remained, and still remains, to be done. After all, the Constitution's preamble never promised that changing the nation's form and structure of government would lead to a "perfect" union; rather, the preamble promised a framework for striving toward a "more perfect" one.

Nearly two centuries after the establishment of the Constitution, Martin Luther King, Jr. would go on to speak eloquently about striving for a more perfect union. In a commencement address he delivered at Lincoln University, near Philadelphia, two years before his famous speech at the March on Washington, he remarked that, "in a real sense, America is essentially a dream, a dream as yet unfulfilled . . . Now, more than ever before, America is challenged to bring her noble dream into reality."<sup>85</sup> Those words rang true in 1961 when King spoke them. They still ring true today. And they will, no doubt, ring true a century and more from now, with respect to the new and pressing issues of justice that exist at that time.

Yet recognizing the continual need for striving and aspiration need not lead to despair and resignation. We can only identify what remains to be improved by holding fast to the dreams to which government should work to make real. Those ever-present dreams of a stronger democracy, more just rule of law, and better economic and social conditions for all should constitute the lodestar for citizens and leaders alike in forging the future of American democracy.

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<sup>85</sup> Martin Luther King, *The American Dream*, Commencement Address at Lincoln University 1, 2 (June 6, 1961), <http://www.thekingcenter.org/archive/document/american-dream#>.