These remarks were delivered at the Jurist-in-Residence Lecture on October 21, 2021, in Provo, Utah. Similar remarks were originally given at the Cato Institute’s Constitution Day symposium on September 17, 2020.
CIVIC ILLITERACY AND THE RULE OF LAW

The past year and a half has been a pretty wild ride, and I say that as a former rodeo cowboy. The most normal part has been *Tiger King*. But we look for silver linings where we can. And the turmoil has perhaps sharpened our focus on first principles. According to the 2021 Constitution Day Civics Survey, which just came out a month ago, 56 percent of American adults can now name all three branches of government. In 2019, that number was in the 30s (which was the all-time high). But truth be told, our nation still has an abysmal civic IQ. We inhabit an age of miracles and wonders, with access to mankind’s accumulated knowledge at our fingertips. Yet it’s also an age of staggering civic illiteracy. Our civic *temperature* may be high, but our civic *knowledge* is not. There is much to indict. But through commendable events like this one, perhaps we can move from indicting to informing—and, better still, inspiring and invigorating.
Two hundred thirty-four years ago, a throng of Philadelphians waited outside Independence Hall. And like most Philly crowds, it was tense. Our infant nation was floundering. The United States was anything but united. The Articles of Confederation had created a loose “league of friendship,” but the former colonies had yet to coalesce into a country. For four months, delegates to the Constitutional Convention huddled in behind closed doors and windows, curtains drawn, sweltering. And those outside were wary of those inside.

Presiding was the “venerated Virginian veteran,”2 George Washington—the indispensable man. No Washington, no republic. But Benjamin Franklin was the nation’s renaissance man. His achievements in science, diplomacy, and letters were unrivaled. Franklin was the first embodiment of the American dream. He was a penniless runaway. He became a protean polymath. He was the most illustrious figure in early America, and he truly was “the incarnation of the true American character.”3

On the convention’s final day, Franklin delivered the last great speech of his life, urging adoption of the new Constitution “with all its faults.”4 And Franklin found plenty of faults. He wanted federal judges to be elected, for example. But Franklin, at 81 years old, the oldest delegate and the most renowned American in the world, flexed his considerable diplomatic skills and implored his fellow delegates to “doubt a little of his own infallibility.”5 And it worked. There was unity, if not unanimity. And as James Madison scribbled in his notes—rather understatedly, if you ask me—“[t]he members then proceeded to sign the instrument.”6

We all know what happened next. As a triumphant Franklin exited Independence Hall, he was approached by Mrs. Powel, who blurted out, “Well Doctor, what have we got, a republic or a monarchy?”

Franklin delivered his now famous, sharp-witted rejoinder: “A republic, if you can keep it.”7 Franklin’s zinger was heartening—“a republic”—no more imperialism, no more royal absolutism! But it was also frightening—“if you can keep it”—because it suggested that the survival of freedom was going to depend on people, not merely on parchment.

The duty of preserving our rich civic inheritance falls on us. This is a job for everyday Americans, like Mrs. Powel, who posed a question for the ages, one that echoes today—“What have we got?” This republic is ours. Ours to keep. And ours to lose.

Franklin was not the first to recognize whose job it is to build an enduring nation. Eleven years earlier, on the same politically sacred spot, the Declaration of Independence—our original birth announcement, the greatest breakup letter of all time—proclaimed that we wanted government, as Abraham Lincoln put it four score and seven years later, “of the people, by the people, for the people.”8

This uniquely American theory of government9 was a radical experiment; it was the first time in history that a nation came into being asserting the inborn, individual natural rights and equality of every human being.10

Listen to this word choice from the Declaration:

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

The Founders made clear pre-Constitution that the people wield supreme sovereignty over their government—to lay its foundation, to structure its powers, all according to what seems “to them” most likely to secure their safety and happiness.11 This power of the people is a truth that provides great comfort—and grave discomfort.

And, again, these paltry percentages are all-time record highs.

In my judgment, many Americans don’t know the how of our republic because they don’t know the why of our republic. Margaret Thatcher once noted that Europe, unlike the United States, is “the product of history and not of philosophy.” America is sui generis, she said, because it was “built upon an idea—the idea of liberty.”15 She was echoing Winston Churchill, who called the Declaration a
The father of the country would be dismayed. Washington made clear in his first inaugural address that this is on us: “[T]he preservation of the sacred fire of liberty, and the destiny of the Republican model of Government, are . . . staked[] on the experiment entrusted to the hands of the American people.” And frankly, Washington was pessimistic, confiding to another delegate, “I do not expect the Constitution to last for more than 20 years.” Thank fully, he was wrong.

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

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

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

Several months ago, a government committee in the District of Columbia identified what they called “various persons of concern” and urged that numerous landmarks be “removed, relocated, or contextualized.” Among them was George Washington—the guy the city is named after. The San Francisco School Board recently voted to remove Abraham Lincoln’s name from a school. John Marshall Law School got a new name.

THE ASPIRATIONAL DECLARATION: OUR GOLDEN APPLE

Amid today’s pandemic is something endemic: a deep misunderstanding of American self-government, and not just about the Constitution. Our confusion also runs to our true founding document: the Declaration of Independence.

Thomas Jefferson called the Declaration “an expression of the [A]merican mind.” Lincoln called the promise of the Declaration an “apple of gold” framed by the silver frame of the Constitution. Lincoln explained that “[t]he picture” frame “was made, not to conceal, or destroy the apple, but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture.” The Constitution exists to serve the Declaration’s promise of “[l]iberty to all.” The Constitution provides the tools to build a government that secures the rights proclaimed in the Declaration.

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

Every spring, there’s a Colonial Day at my kids’ school. And I put on an itchy costume, unroll a scroll, and recite the Declaration of Independence accompanied by tiny fifth-grade voices. My daughter recently memorized and recited the entire thing beside me.

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

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

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

As Professor Randy Barnett famously put it, “[F]irst come rights and then comes government.”

The Declaration unveiled this uniquely “American theory of government,” and its bottom line is clear: government exists to protect our individual, unalienable rights—rights that are ours by virtue of our very humanity.

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

It is undeniable that at the founding, **ideals** collided with the **reality** of America’s original sin of slavery. One-third of the Declaration’s signers were slave owners. We were flawed and stained at the start. America is imperfect, as all human things are.

Even so, the Declaration’s underlying ideals are timeless. Lincoln would not abandon them even to avoid civil war. At Independence Hall, just before he was inaugurated, Lincoln described equal liberty as a gift “not alone to the people of this country, but, I hope, to the world, for all future time.” The Declaration was a linchpin argument for abolitionists, and the Supreme Court feebly tried to explain it away in **Dred Scott**.

My favorite piece of art in my chambers is an oil painting of Frederick Douglass. In his iconic speech “What to the Slave Is the Fourth of July?,” Douglass noted that the promises of liberty and equality in the Declaration are eternal, even if America broke those promises. There was a jarring disconnect between the commendable words of the Declaration and the condemnable deeds of those who adopted it.

But those founding ideals still laid the foundation for righting wrongs, including the “new birth of freedom” wrought by our second founding and the Civil War amendments that belong at the center of America’s constitutional story.

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

Martin Luther King Jr., perhaps the most renowned protestor in our nation’s history, called on his fellow citizens not to tear down America’s heritage but to live up to it. After his own March on Washington, Dr. King demanded not that our founding documents be changed to fit new ideals but that our government change to fit the **enduring** ideals of our founding documents, which he called “a promissory note to which every American was to fall heir.” Perfection is elusive in this life. But bit by bit, amendment by amendment, we are drawing nearer to the first enumerated purpose of the Preamble: formation of that “more perfect Union.”

**THE ARCHITECTURAL CONSTITUTION: OUR SILVER FRAME**

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

The Framers were not tinkerers. They didn’t fiddle around the edges. They didn’t pledge their lives, fortunes, and sacred honors for incremental change. They upended things. Madisonian architecture infused with Newtonian genius—three coequal branches of government
locked in synchronous orbit by competing interests. “Ambition . . . counteract[ing] ambition,” as Madison put it. A radical structure that divided power to control power.

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

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

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

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

- 71 percent of Americans can’t identify the Constitution as the supreme law of the land.
- 63 percent can’t name one of their state’s US senators.
- 62 percent can’t identify the governor of their state.
- Heck, 10 percent of American college graduates think Judith Sheindlin (aka “Judge Judy”) sits on the Supreme Court.

Madison warned of this expressly: “A popular Government, without popular information . . . is but a Prologue to a Farce or a Tragedy; or, perhaps both.” Get this: most of America’s elite universities no longer require history majors to take a single course in US history.

But there is a ray of hope: naturalized Americans. These are people who have risked everything to help write the next chapter of the American story. When it comes to the US citizenship exam, there are one hundred possible questions—fundamental bedrock questions—about the structure of America and how the Constitution allocates governing power. Do you know what percentage of immigrants pass the civics test their first try? Ninety percent. When it comes to this exam, “immigrants, we get the job done.” The same exam was given to some American high school seniors. The passage rate was 5 percent. The generation with the greatest access to information is also the least informed.

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

American patriotism is anchored in that Tocquevillian vision of proactive citizens, sleeves rolled up, who take charge of their own economic, social, and political happiness. American citizenship is not a spectator sport. Justice Louis Brandeis put it well: “[T]he only title in our democracy superior to that of president is the title of citizen.” Our constitution is an exquisite charter of freedom, but freedom requires patriots, not passersby. It demands fierce defenders, not feeble bystanders.

Take Lincoln. In 1858 he was “a financially insecure, failing politician,” but the Supreme Court’s Dred Scott decision galvanized Lincoln. That June, he delivered his “House Divided” speech. It was poetic and prophetic. Lincoln lost that election, but it was that legal analysis of a judicial decision that catapulted him to Mount Rushmore. Lincoln was no mere bystander. His civic participation educated voters, who liked what they heard and sent that “failing politician” to the White House two short years later.
Civic engagement can ripple across centuries. Let me tell you about a tenacious Texan with a Mensa-level civics IQ.

In 1982, Gregory Watson was a 19-year-old sophomore at the University of Texas at Austin. He wrote a research paper for a government class, arguing that one of James Madison’s proposed constitutional amendments was still eligible for ratification. The dormant proposal would’ve barred Congress from giving itself a midterm pay raise; there would have to be an election before the pay raise could kick in. It was part of the batch of amendments that eventually became the Bill of Rights.

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

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

From Flunking to Dunking

In 2019 the federal judiciary convened its first-ever national civics conference.
Hundreds of Article III judges, including three Supreme Court Justices, joined with law school deans, bar leaders, and others from Maine to Guam to discuss how the judiciary could help boost civics literacy.

A month later, Chief Justice John Roberts wrote in his *Year-End Report on the Federal Judiciary*, “Each generation has an obligation to pass on to the next, not only a fully functioning government responsive to the needs of the people, but the tools to understand and improve it.” The Chief Justice was echoing Justice Sandra Day O’Connor, who has devoted her post-court life to civics education: “Knowledge about our government isn’t handed down through the gene pool.” And she was echoing President Ronald Reagan, who warned, “Freedom is never more than one generation away from extinction.” We didn’t pass it to our children in the bloodstream.

They’re right. This isn’t something hardwired into our DNA as Americans. The habits of citizenship must be taught and learned anew by each generation, just as you would teach and learn math or grammar or a foreign language.

And schoolchildren are often center stage in transforming our nation. Take Linda Brown, the schoolgirl at the center of *Brown v. Board of Education*. When the Supreme Court rejected racial segregation, it stressed the importance of education as a crucible for good citizenship.

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

As Jefferson put it, “[I]f a nation expects to be ignorant & free, . . . it expects what never was & never will be.” Education has to underscore, not undermine, our common civic identity. It must instill in children a respect for American self-government and the tools to achieve it. But in the mission and vision statements of the one hundred largest school districts in America, the word America, the word American, the word citizen, and the word citizenship appeared exactly zero times. Schools, however, shouldn’t bear the full burden. Judges play a role too. As Chief Justice Roberts put it, “Civic education, like all education, is a continuing enterprise and conversation,” and judges “are necessarily engaged in civics education.” We explain our reasoning in written opinions, lead naturalization ceremonies, and oversee moot courts and mock trials. The Administrative Office of the US Courts has developed terrific online resources for judges, teachers, attorneys, and parents.

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

1. 25 of 56 signers of the Declaration of Independence were lawyers.63
2. at least 33 of 55 delegates to the Constitutional Convention were lawyers,64
3. 22 of 39 signers of the Constitution were lawyers,65 and
4. more than half our nation’s presidents were lawyers.66

The legal profession, as Justice Brandeis put it, affords “unusual opportunities for usefulness [that are] probably unequalled. There is a call upon the legal profession to do a great work for this country.”7 Lawyers are vital community connectors and civic switchboards. The calling of lawyers to public spiritedness endures.

We made a recent trip to Disney World. My wife and children were mortified in the Hall of Presidents when I yelled, “Woo-hoo!” for animatronic Calvin Coolidge. But Silent Cal understood the ineffable genius of what had happened 234 years ago: “To live under the American Constitution is the greatest political privilege that was ever accorded to the human race.”

A republic comes with responsibility. Self-government is not self-perpetuating. It’s tough sledding, and each generation must take its turn. This raucous republic belongs to us all, and its preservation is up to us all. Franklin told Mrs. Powel, “[I]f you can keep it.” A quarter of a millennium later, with every tool laid at our feet, there is no longer a question of capability; there is only a question of culpability. America boasts the oldest written national constitution on earth. What an extravagant blessing. But preserving that inheritance requires a culture that prizes liberty and public-spirited virtue. For now, We the People are—and through God’s grace will remain—the world’s oldest constitutional republic. If we can keep it. 

NOTES
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EDITOR’S NOTE: These notes have been modified for the Clark Memorandum. For expanded references, see Don R. Willett, Flunking the Founding: Civic Illiteracy and the Rule of Law, CATO SUP. CT. REV. 13 (2020–21), cato.org/sites/cato.org/files/2021-09/supreme-court-review-2020-2021-1.pdf.