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## RESPONSIBLE CONGRESS AND POLITICAL TIME

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Consider the apocalyptic premise and precautionary measures Bruce Ackerman proposes in *Before the Next Attack*.<sup>1</sup> Terrible events *will* come in a form that makes September 11 seem “merely a pinprick,”<sup>2</sup> he tells us, and the President will take precautions against “a second strike.”<sup>3</sup> Ackerman knows that in the face of terrorism, the President, Congress, and a fearful public will unhesitatingly reverse discount, sacrificing present civil liberty to reduce the risk of future death and destruction, as they picture the next attack in catastrophic terms where the stakes are existential survival.<sup>4</sup> Ackerman adds another element to this picture by predicting the total “implosion of liberal democratic values”<sup>5</sup> and the large-scale breakdown of the rule of law. He advocates protection against unchecked executive prerogative via a statute that bolsters Congress’s institutional independence by giving Congress a device to limit unilateral presidential emergency power.<sup>6</sup> The plan is formal and tied to constitutionally assigned responsibility; it involves an initial declaration of emergency power that is time-limited, after which power lapses unless an escalating supermajority of Congress votes to continue the emergency regime.<sup>7</sup>

Ackerman’s statute has not been on Congress’s agenda for many reasons, not least because both present and future infringements on liberty are not randomly distributed but fall on predictably vulnerable groups. Massive detentions that threaten us all are hard to imagine because we displace the costs of counterterrorism policies onto others.<sup>8</sup> Ackerman also proposes that every

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<sup>1</sup> BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 3 (2006).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *See id.* at 2 (describing a continuing cycle of terrorist acts and ever more repressive responses).

<sup>5</sup> *Id.* at 169.

<sup>6</sup> *Id.* at 80.

<sup>7</sup> *Id.*

<sup>8</sup> There are other problems, such as the assumption that Congress can override an escalating supermajority with ease, and the assumption that future incursions on rights are reversible. For a catalogue of the psychological factors that lead to cognitive distortion and displacement as well as a choice of programs that are less effective at forestalling future

election should select a “vice representative” to serve in the event of a decapitating strike on Congress.<sup>9</sup> No one in Congress will propose this either; Thomas Mann and Norman Ornstein devote a chapter of *The Broken Branch* to leadership’s abdication of responsibility to insure institutional continuity.<sup>10</sup>

It is in this spirit that Sotirios Barber seeks to determine “the best theory of the democratic responsibility of Congress.”<sup>11</sup> He uses Congress’s inattention to global warming to illustrate its political immaturity.<sup>12</sup> Acting as sober agents for our future selves and for future others is part of what we mean by “grown up,” and as Congressman Dick Armey confessed, “the practice of politics too often takes the form of professional juvenile delinquency: short-sighted and self-centered.”<sup>13</sup>

These examples underscore the tendency on the part of officials and commentators to swing back and forth between a myopic focus on the present and apocalyptic visions of future events that will change everything. Historically, the chief sources of eschatology were religion and philosophy, but except for “end of timers” and the rare Hegelian alert to the end of history, Americans do not live in sacred time. Instead, we predict apocalyptic secular events. Apocalyptic thinking is as much an obstacle to responsible government as the stubborn “presentism” of news and election cycles against which apocalyptic thinking rebels.

My theme is responsible Congress and the problem of *political time*. Consider four categories of political time:<sup>14</sup>

- *News time*. News time is now instantaneous, incessant, often visually recorded, and every moment is archived so that each instant can be resurrected and replayed.
- *Electoral time*. In the U.S., elections are held at regular intervals. However, like the war on terror, political campaigns have become permanent, with the result that elected officials make and frame

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attacks, see Jonathan H. Marks, *What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559, 566-83 (2006).

<sup>9</sup> ACKERMAN, *supra* note 1, at 149.

<sup>10</sup> THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 192-210 (2006).

<sup>11</sup> Sotirios A. Barber, Address at the *Boston University Law Review* Symposium on The Most Disparaged Branch: The Role of Congress in the 21st Century (Nov. 15, 2008) [hereinafter Barber, Symposium Address].

<sup>12</sup> Sotirios A. Barber, *Congress and Responsible Government*, 89 B.U. L. REV. 689, 689 (2009) [hereinafter Barber, *Responsible Government*].

<sup>13</sup> Dick Armey, ‘Compassionate’ Conservatism Was a Mistake, WALL ST. J., Nov. 7, 2008, at A17.

<sup>14</sup> David Runciman, Does It Make Sense to Discount Liberty? 2-3 (Oct. 2008) (unpublished manuscript delivered to the Harvard Government Department Political Theory Colloquium, on file with author) (proposing categories of political time).

legislation for strategic political purposes and spend less time on actual congressional business.<sup>15</sup>

- *Historical time.* This is the stretch of time in which we see and understand ourselves coherently in a broader historical context. It comprises the narratives of American history and identity that we project into the national future. It is the time frame of responsible political action.
- *Apocalyptic time.* Attention is riveted on some future event – certain, catastrophic, and irreversible – that will change everything.

Perhaps democracies struggle to anticipate and plan for the future. The grip of news time and electoral time on politicians and on the public certainly seems inexorable. Although politicians frequently invoke “the welfare of our children and grandchildren” during campaigns, there are good political reasons why intergenerational sensitivity is mainly rhetorical. As Barber says, responsible democratic “guardians of interests” are politically accountable to voters who elect and sanction them,<sup>16</sup> and who suffer from what political scientists have described as blind retrospection and unenlightened self-interest.<sup>17</sup> We could reasonably conclude that Congress’s preoccupation with the present and inaction with regard to the future reflects constituents’ preferences. Simply, the sanction of retrospective voting operates against imposing present costs on people to whom these burdens have not been persuasively justified. It is hard for people to be good agents for their future selves (e.g., saving for retirement), much less for extensions of themselves (i.e., their children and grandchildren), and least of all for anonymous future generations. The obstacle lies not just with Publius’s “sudden breeze of passion, or . . . every transient impulse,”<sup>18</sup> nor just with selfishness or complacency. The difficulty also includes the limits of imagination about the future, absent a crisis that makes the need to take precautions and to pay present costs cognitively available and popularly desired.

When crises *are* immediate and salient to the public, politicians drastically swing to the opposite extreme of precautionary policy. We can then count on politicians to announce “one-percent” doctrines<sup>19</sup> and become worst-case

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<sup>15</sup> MANN & ORNSTEIN, *supra* note 10, at 170.

<sup>16</sup> Barber, Symposium Address, *supra* note 11.

<sup>17</sup> Christopher H. Achen & Larry M. Bartels, Blind Retrospection: Electoral Responses to Drought, Flu, and Shark Attacks (Aug. 28, 2002) (unpublished manuscript presented at the annual meeting of the American Political Science Association in Boston, on file with author).

<sup>18</sup> THE FEDERALIST NO. 71, at 382 (Alexander Hamilton) (J.R. Pole ed., 2005).

<sup>19</sup> *The Untold Story of al-Qaeda’s Plot to Attack the Subway*, TIME, June 19, 2006, <http://www.time.com/time/magazine/article/0,9171,1205478-1,00.html> (quoting Dick

entrepreneurs; that is Ackerman's point.<sup>20</sup> For example, September 11 enabled Congress to vote for the Patriot Act<sup>21</sup> without reading the bill,<sup>22</sup> and President Bush, to arouse public support for the Iraq War, incessantly referred to the attacks and to the scenario of Saddam Hussein providing nuclear weapons to terrorists.<sup>23</sup> Cass Sunstein also makes this point by contrasting congressional response to ozone levels with congressional inaction on global warming.<sup>24</sup> True, it was not very costly for industry to move away from aerosols, but more importantly, the mental images of a "hole" in the planet's "protective shield"<sup>25</sup> and death from skin cancer made the impact of climate change seem more real to the public than photographs of melting polar ice caps ever could.<sup>26</sup> Similarly, the burden of high gas and oil costs is transient and diffuse, so it is not a dependable source of popular support for reformed energy policy. As a result, until recently advocates relied on apocalyptic predictions that global warming will kill us all as the main recourse for stimulating and sustaining popular attention on environmental and energy policy.

Barber is surely right to argue that part of democratic representatives' responsibility, along with guarding the people's interests, is *creating* a people that appreciates the need for disciplined political responsibility.<sup>27</sup> Or, as David Mayhew acidly remarked, we often seem to want a new people, not a new

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Cheney's claim that "[i]f there's a 1% chance that Pakistani scientists are helping al-Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response").

<sup>20</sup> See ACKERMAN, *supra* note 1, at 3 ("Above all else, we must prevent politicians from exploiting momentary panic to impose long-lasting limitations on liberty.").

<sup>21</sup> USA PATRIOT Act of 2001, Pub. L. No. 107-56, 151 Stat. 272 (codified in scattered sections of the U.S.C.).

<sup>22</sup> See, e.g., Electronic Frontier Foundation, EFF Analysis of the Provisions of the USA PATRIOT Act, [http://w2.eff.org/Privacy/Surveillance/Terrorism/20011031\\_eff\\_usa\\_patriot\\_analysis.php](http://w2.eff.org/Privacy/Surveillance/Terrorism/20011031_eff_usa_patriot_analysis.php) (last visited Feb. 19, 2009) ("[I]t seems clear that the vast majority of the sections included were not carefully studied by Congress, nor was sufficient time taken to debate it or to hear testimony from experts outside of law enforcement in the fields where it makes major changes."); see also ACKERMAN, *supra* note 1, at 2 (describing "the panicky way Congress rushed the bill into law within thirty-three days of its proposal").

<sup>23</sup> See, e.g., David Barstow et al., *How the White House Embraced Disputed Arms Intelligence*, N.Y. TIMES, Oct. 3, 2004, at A1 ("In 2002, at a crucial juncture on the path to war, senior members of the Bush administration gave a series of speeches and interviews in which they asserted that Saddam Hussein was rebuilding his nuclear weapons program.").

<sup>24</sup> CASS R. SUNSTEIN, WORST-CASE SCENARIOS 71-76 (2007) (discussing the Montreal and Kyoto Protocols).

<sup>25</sup> *Id.* at 74.

<sup>26</sup> A significant proportion of the public agrees in the abstract about reducing greenhouse gases but appears unwilling to pay costs out of pocket. See *id.* at 42-43 (arguing that Americans see far less personal benefit from regulatory policies addressing climate change than from counterterrorist policies).

<sup>27</sup> Barber, Symposium Address, *supra* note 11.

Congress.<sup>28</sup> If representatives succeed in the business of public education, then costly actions on behalf of future security and welfare not only provide for the nation's true interest but also reflect popular preferences. It is with this in mind that theorists of deliberative democracy experiment with randomly chosen "citizen juries" and other nonbinding deliberative arrangements. The idea is to provide the public and Congress with the results of popular decision-making that is informed, unbiased, nonpartisan, and the product of sustained deliberation. The expectation is that the unofficial decisions made by "citizen juries" will form a much-publicized and persuasive part of the mix of voices that seek to influence official decision-making. These voices include advocacy groups and self-styled public interest groups, news-time driven media, political parties, and corporate lobbying and campaign contributions directed at committee chairs and congressional leaders. The aggregation of these voices is "widely viewed as a market for public policy."<sup>29</sup> At present, news time and election time make elected officials vulnerable to constituents for whom danger is less cognitively available than costs. Indeed, representatives may very well share their constituents' preferences and beliefs, as well as their tendency to discount the future.

Barber's discussion of the constitutional foundation of responsible government does not acknowledge the problem of political time. Instead, he focuses on the traditional problem of political space. He applauds the founders for designing institutions capable of producing "as nearly as possible right results" on matters of common defense and general welfare.<sup>30</sup> Barber states that the political space of Congress in particular is constitutionally charged with deliberating, and he identifies political responsibility with deliberation.<sup>31</sup> For Barber and for political theorists generally, deliberation gives "public reasons" scope and rules out certain kinds of arguments and justifications.<sup>32</sup>

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<sup>28</sup> David Mayhew, Address at the *Boston University Law Review* Symposium on The Most Disparaged Branch: The Role of Congress in the 21st Century (Nov. 14, 2008).

<sup>29</sup> Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 109 (2003). The authors argue that the "investment" view of campaign finance cannot account for "[t]he discrepancy between the value of policy and the amounts contributed," or for the fact that most firms do not make political contributions. *Id.* at 111-12. "Legislators' votes," they conclude, "depend almost entirely on their own beliefs and the preferences of their voters and their party." *Id.* at 116.

<sup>30</sup> Barber, Symposium Address, *supra* note 11.

<sup>31</sup> See Barber, *Responsible Government*, *supra* note 12, at 707 (arguing that "Congress acts responsibly . . . when it displays a capacity for grown-up debate").

<sup>32</sup> See *id.* at 710 (arguing that "responsible politics," including effective deliberation, cannot occur when one side uses arguments grounded in rational reasoning and another side uses arguments grounded in ideological authority).

For Barber, deliberation should render reasons grounded in experience and science, not authority, decisive.<sup>33</sup>

It goes without saying that for catastrophic future events, experience would serve as an inadequate guide to precautionary policies or alternatives that discount the future. The category of scientific reasons has meaning in contrast to religious authority, but otherwise it is an insufficient ground for deliberation by responsible agents for our future selves and for future others. The difficulty of translating science into policy remains,<sup>34</sup> as does the difficulty of the distinctive congressional responsibility of translating policy into legislation. These two problems are ineradicably political.

However, problems of discounting the future are by no means limited to politicians. Even scientists and economists who take on all the known difficulties of assessing uncertainty and risk but are free of political responsibility cannot escape these difficulties to care for the future. Consider the precautionary principle, which is generally interpreted to permit regulation on the basis of reasonably foreseeable adverse impacts. However, in a worst-case scenario, are officials obligated to take action even before credible evidence is secure? How do we guard against the possibility that attention to one risk will produce aggressive actions (as in Iraq) that create enormous costs themselves? This dilemma plagues policy-making for the future beyond matters of security and global warming. In responding to the prospect of calamitous financial collapse, Congress, “locked in full emergency mode, reacting and defending,” has run up an enormous rescue tab; the “danger is that in fighting today’s crises, the government is teeing up the next one,” when “frank acknowledgment of the dangers would put a premium on getting the rescues right today.”<sup>35</sup> What about discounting? Does intergenerational justice require neutrality between lives today and future lives such that “[p]resent generations are obliged to take the interests of their threatened descendents as seriously as they take their own”?<sup>36</sup> If so, what does that entail? Some argue that without discounting, we will reduce economic growth and impose even greater burdens on future generations, reducing their quality of life. On the other hand, there is the countervailing observation that regulation *creates* innovation; for example, regulation might decrease the costs of controlling emissions. However, there is also the possibility of ecological limits to growth regardless of innovation. Economists are less humble than

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<sup>33</sup> *Id.* at 706 (explaining how public deliberation is stymied by authority-based arguments).

<sup>34</sup> Are you “an enemy of science” if you disagree with the Stern Review, adopted by the British Government? See Freeman Dyson, *The Question of Global Warming*, N.Y. REV. BOOKS, June 12, 2008, at 43, 45 (explaining the Royal Society’s position on climate change as “if you disagree with the majority opinion about global warming, you are an enemy of science”).

<sup>35</sup> Editorial, *Bailing Away*, N.Y. TIMES, Nov. 30, 2008, at WK7.

<sup>36</sup> SUNSTEIN, *supra* note 24, at 12.

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moral philosophers, but they are just as unlikely to agree on the correct discount rate for future scenarios.

Scientists, ethicists, and economists can advise congressional staffs, committees, and regulators on the choice of discount rate and the rate's distributive effects or on an efficient "carbon price." They can design policy and advocate for it. They publicize their positions in news and political time along with think tanks, organized interest groups, and lobbyists. Scientists, ethicists, and economists must sell their expertise to a lay Congress, and members of congressional committees must decide to propose legislation to which these analyses and judgments apply. Again, responsibility is not only a policy matter but also a legislative matter.

The problem of political time compounds every discouraging element of institutional dynamic, as well as every challenge to a responsible Congress surveyed in these symposium essays. Legal scholars and political scientists have produced a long list of recent political obstacles to responsible congressional deliberation. These obstacles range from partisan polarization that results in subordination to the President and weak oversight to decision rules that violate "regular order," preclude majority/minority debate on committees and in conferences, and produce results that are neither amendable nor transparent and that fail to articulate costs. The problem of political time thus increases the difficulty of addressing problems with short-term assignable costs on the one hand and uncertain long-term horizons of harm on the other.

What are the distinctive obstacles political time poses to a responsible Congress? What might encourage Congress, in the grip of news and electoral time, to consider historical time and to think about the future concretely, in terms of reasonable precautions and discounting, and to consider legislation for security and welfare? Several inhibitions constrain Congress in assuming its charge of care for the future. This Essay focuses on the conditions of institutional responsibility and only indirectly on representatives' personal moral dispositions to deliberate for the future.

As a starting point for addressing these questions, Barber's constitutional foundationalism reminds us that Congress's responsibility is for *national* security and welfare. However, global warming causes damage regardless of where it is produced, and it has many different environmental effects in different places. One political difficulty is that the national costs and benefits of programs to reduce the impact of carbon emissions, for example, are not complementary. Experts project that these programs will impose large costs on the U.S.<sup>37</sup> These costs, including financial assistance to poorer countries, may well be morally justified since the U.S. is a principal source of the stock of greenhouse gases and is comparatively rich, but the benefits of reducing global warming redound first to poor people in poor places. Thus, "Thomas

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<sup>37</sup> *Id.* at 91-92.

Schelling argues that 'greenhouse gas abatement is a foreign aid program.'<sup>38</sup> Based on this asymmetric distribution of costs and benefits, the Senate passed a unanimous, bipartisan resolution urging President Clinton not to sign the Kyoto Protocol<sup>39</sup> if it would injure the economic interests of the U.S. or if it failed to mandate scheduled commitments on the part of developing countries.<sup>40</sup>

However, the nationalist perspective is by no means the only lens through which to view these issues. For example, moral philosophers underscore environmentalism as a universal obligation, and religious leaders speak in terms of stewardship of the earth, urging us to see that our true self-interest is inseparable from altruism. Environmental advocates also operate in a moral key. The combination of apocalyptic terms, in which survival is at stake, and moral terms, in which we have an obligation to safeguard the earth and future generations, is powerful, and the sentiments are widespread. Advocacy, lobbying, and the personal commitment of individual representatives could conceivably alter Congress's sense of moral as well as practical urgency, increasing representatives' appetites for enforceable international treaties. Additionally, an empowered popular movement could expand presidential authority, as social movements typically do, and the executive could shift congressional priorities by declaring, say, a Green New Deal.

Nevertheless, moral obligation alone will not guide legislative politics, even if moral advocates are politically organized, because the constitutional structure of election cycles and constituency forcefully support "presentism." Two powerful constraints are the two-year House term and the comparatively small size and homogeneity of House districts. Another constraint involves the understanding of representation in terms of responsiveness to constituents' demands, attention to special interests in the district, and provision of constituent services. Some differences in congressional conduct and policy can be explained by the Senate's longer term, heterogeneous constituency, and internal rules designed to facilitate more talk (a truly latitudinarian view of deliberation!). No study addresses whether these differences in election time, constituency, and internal rules affect agenda-setting and deliberation for the future.

In short, the constraints of election time suggest that responsible governing would require altering public perception of the costs of reducing risk. For example, Congress could portray the development of a cheap way to control emissions as an opportunity for economic renewal. Similarly, Congress could promise that pursuing clean energy policy will create more jobs. Current

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<sup>38</sup> *Id.* at 47 (quoting Thomas Schelling, *Intergenerational Discounting*, in DISCOUNTING AND INTERGENERATIONAL EQUITY 99, 100 (Paul R. Portney & John P. Weyant eds., 1999)).

<sup>39</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, 1771 U.N.T.S. 107.

<sup>40</sup> S. Res. 98, 105th Cong. (1997) (enacted) (passing in the Senate on a unanimous vote of 95-0).



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events suggest that we are now experiencing this transition from the swing between presentism and apocalyptic time to historical time. Take Al Gore's recent *New York Times* editorial, *The Climate for Change*.<sup>41</sup> The opening paragraphs point as expected to the "existential threat to the future of the human species."<sup>42</sup> However, Gore goes on to offer the "good news" that immediate investment in a five-point plan to solve the climate crisis will put people to work creating twenty-first century technologies.<sup>43</sup>

This shift of focus from survival to jobs and investment potentially empowers Congress because it directs attention from a catastrophe that is beyond voters' ken, global warming, to another that is cognitively available, a once-in-a-lifetime economic crisis. In addition, a focus on innovation might serve as an emotionally welcome sea-change from fear to the more familiar mood of American optimism and self-congratulation on our potential for innovation and global leadership.

The main point, however, is that putting global warming in the context of investment in technology and job-creation makes correcting greenhouse gas emissions distributive. In other words, this context allows representatives to focus on the potential for parceling out costs and benefits among geographic constituencies. It invites Congress to link a legislative agenda to their voters and their districts in a politically salient way. This reformulation of the global warming problem does not remove the inhibition of electoral time, but it could help to make election time more congruent with historical time by putting precautions and discounting in the context of a coherent narrative about national identity and values.

Nevertheless, even with the help of contextualization and issue reformulation, election time is not the optimum time frame for committed decision makers to use expert calculations of precautions and discounts sensibly. More than other aspects of congressional business, responsibility for the future argues against term limits by suggesting that incumbency and safe seats are not necessarily undesirable. Of course, entrenchment can serve interests adverse to responsible care for the future, but it also creates conditions for commitment to long-term legislative goals. There are advantages to experience and continuity in the composition of Congress, so re-election is not merely self-serving or partisan. On this view, the competitiveness of elections is not as critical as scholars of election law and democratic theory sometimes claim. Entrenched office-holders can be on the wrong side of history, but congressional leadership that can match expertise with committee roles is a sine qua non of responsible care of the future.<sup>44</sup>

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<sup>41</sup> Al Gore, Op-Ed., *The Climate for Change*, N.Y. TIMES, Nov. 9, 2008, at WK10.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (discussing how his five-part plan would create jobs while reducing the country's reliance on carbon-based fuels).

<sup>44</sup> Representative Henry Waxman recently replaced John Dingell as chairman of the Committee on Energy and Commerce and upset the seniority system. John M. Broder,

Finally, election time also interacts with voting theory. The leading retrospective account sees elections as sanctioning representatives' action (or inaction) during an election cycle. However, another account of voting speaks to the problem of political time in more promising terms. In this second account, elections not only sanction inadequate representatives, but they also select a "good type" of representative who is consistent, competent, and possesses intrinsic ability. These representatives act on constituents' behalf independent of reelection incentives. James Fearon presents the advantages of this selection approach by showing that elections as pure sanctioning devices fail to induce politicians to do what the median constituent voter wants, in part because information deficits make monitoring politicians difficult.<sup>45</sup> He argues that selection is at least as good a mechanism for producing responsiveness.<sup>46</sup> Understanding elections as opportunities to select "good types" becomes even more important when considering what voters want responsible representatives to do. Choosing "good types" is consistent with Barber's insistence that responsible government is not just a matter of institutional design but also of personal commitment to deliberating on security and welfare.<sup>47</sup>

If democracies are particularly poor at caring for the future, then what sort of government would perform better precautionary policy and reverse discounting? Hereditary monarchy is not a good alternative. Consider Henry IV's soliloquy, "[u]neasy lies the head that wears a crown," about the king's personal responsibility for England as *his* estate in Shakespeare's play.<sup>48</sup> This notion is the exception rather than the rule, as contemporary experience with proprietary rulers shows them to be predatory rather than precautionary. Civic republicanism is not a good alternative either. Political theorists laud civic republicanism;<sup>49</sup> they invoke the Romans who valued future citizens as much as they did themselves. Nevertheless, this account, along with most versions of civic republicanism, is not only idealized but also parochial, inward-looking, and inattentive to international politics and global problems.

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*Democrats Oust Longtime Leader of House Panel*, N.Y. TIMES, Nov. 20, 2008, at A1. Waxman is seen as more liberal on climate change and energy legislation. *See id.* ("Some in the [automobile] industry quaked at the ascension of Mr. Waxman, whom they consider an 'irrational environmental zealot . . .'").

<sup>45</sup> James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 57 (Adam Przeworski et al. eds., 1999) ("[A]s the voters' ability to monitor politicians becomes very poor, . . . [elections] approach[] a problem of pure selection . . .").

<sup>46</sup> *Id.* at 56.

<sup>47</sup> Barber, *Responsible Government*, *supra* note 12, at 707.

<sup>48</sup> WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE FOURTH act 3, sc. 1 (Samuel B. Hemingway ed., Yale Univ. Press 1956) (1921).

<sup>49</sup> *See, e.g.*, Rob Atkinson, *Reviving the Roman Republic: Remembering the Good Old Cause*, 71 FORDHAM L. REV. 1187, 1192-93 (2003) (exploring the reasons behind this "[f]ascination with the Roman Republican tradition").

If Congress cannot overcome these obstacles to governing responsibly for the future, it is difficult to imagine what other political entities could fill this role. Neither the courts nor a nonpartisan “Commission for the Future” with broad responsibilities are plausible alternatives. In an essay in this symposium, Jack Beermann analyzes the Supreme Court’s instruction to the EPA that in implementing the Clean Air Act, the agency should include the effects of global warming gases.<sup>50</sup> The case turned on statutory construction, but it is not clear that Congress actually had the intent that the Court attributed to the statute.<sup>51</sup> Regional governments are not an effective alternative either. Some state and local governments have taken action on global warming on their own, which may put pressure on industry to improve technology and reduce costs, and which could influence nationally elected officials. Nonetheless, it still falls to Congress to provide nationally uniform legislation. Perhaps the President may be a more plausible alternative for providing responsible government. Barber’s theory of responsible government nominally applies only to Congress, but he asks “whether friends of responsible government would do better by . . . conceding the case for presidential government.”<sup>52</sup> Similarly, Mann and Ornstein locate their hopes for congressional renewal outside Congress, in new presidential leadership that will alter the divisive institutional dynamics of Congress.<sup>53</sup>

With this, the argument comes full circle: if inaction or delegation by Congress, deference to the executive, and passing decisions off to courts are derogations of constitutional responsibility for the future, what can make representatives act responsibly? This Essay pointed to some of the key obstacles and to some enabling conditions of responsible government, such as moral urgency, institutional design, political incentives in the form of distributive possibilities, and recasting elections from pure sanctioning devices to also include the selection of “good types.” Together these enabling conditions might loosen the grip of news and electoral time, lift the politically unhelpful cloud of apocalyptic time, and give historical time its moment.

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<sup>50</sup> Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 739-41 (2009) (discussing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

<sup>51</sup> *Id.* at 735 (arguing that the Court’s interpretation lacked a statutory basis).

<sup>52</sup> Barber, *Responsible Government*, *supra* note 12, at 707.

<sup>53</sup> MANN & ORNSTEIN, *supra* note 10, at 229. We can only speculate as to why. Perhaps the reason lies with the President’s capacity as decider or with presidential advantages in mobilizing popular opinion as well as educating and proposing transformative political agendas. The day after the 2008 presidential election, Joe Trippi noted that Obama’s socially-networked campaign machine could be mobilized in support of his agenda and against members of Congress “standing in our way on health care.” Frank Greve, *How Will President Obama Deploy His Internet Army?*, MCCLATCHY NEWSPAPERS, Nov. 5, 2008 (quoting Joe Trippi), <http://www.mcclatchydc.com/homepage/story/55350.html>.