

Saving Democracy, State by State?

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In his Jorde lecture, Professor Steven Levitsky offers an important account of the nation at a crossroads. Down one path is a thriving multiracial democracy; down the other lies democracy's demise. To avoid the latter path, Levitsky presses the need for major institutional reform, including constitutional amendments to change the structure of the United States government in ways that could stave off minoritarian rule.

This Response offers a modest reframing. A crossroads suggests uncertainty, but democratic decline has already begun. Democratic decline may thus resemble what climate change scholars call a “super wicked” problem: an unfolding emergency where existing institutions and incentives block optimal solutions. Evaluating the state of our democracy this way paints a bleaker picture, but also forces reformers to think creatively and search for all available remedies, even if partial.

In that vein, I focus on the states as one vital site for increased engagement. Reforms to protect U.S. democracy should incorporate smaller-scale steps at the state-level to forge pro-democratic and anti-backsliding initiatives. Reformers should also aim to increase participation and dialogue at subnational levels of government. Strengthening state democracy cannot solve everything, but it might slow or even reverse democratic decline—and neglecting states could accelerate the decline beyond repair.

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Introduction	2070
I. “Super Wicked” Problems and Their Solutions.....	2074
A. Understanding the Problem	2074
1. “Time is running out.”.....	2075
2. “Those who cause the problem also seek to provide a solution”.....	2076
3. “[T]he central authority needed to address it is weak or non-existent.”.....	2077
4. “[A]nd, partly as a result, policy responses discount the future irrationally.”.....	2077
B. Solutions to Super Wicked Problems Include Small Steps.....	2079
II. Looking to the States	2080
A. Understanding the “Democratic Opportunity” States Provide	2082
B. Looking Ahead	2084
Conclusion.....	2085

INTRODUCTION

Professor Steven Levitsky’s important lecture, based on his forthcoming book, portrays American democracy “at a crossroads.”¹ Down one path, he describes the possibility of “an unparalleled achievement” of a functioning “multiracial democracy,” apparent in both political representation and public opinion.² Down the other, he portrays “democratic breakdown.”³

Levitsky details a potent trio of factors that could lead to this latter path. First, American electoral institutions are decentralized, administered by partisan officials, and susceptible to hardball. Second, the Republican Party, Levitsky posits, is poised to exploit this susceptibility, because it has taken an “authoritarian turn:” its leaders now reject core tenets of democracy, including that those who lose elections accept defeat.⁴ Third, due to modern political sorting, the countermajoritarian institutions of the United States government—namely the Electoral College, the Senate, and the United States Supreme Court—now confer minoritarian advantage on the Republican Party.⁵ Taken together,

1. Steven Levitsky, *The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Reaction Against It*, 110 CALIF. L. REV. 1991, 1991 (2021) (recording available at 2021 Jorde Symposium—*The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Reaction Against It*, CALIF. L. REV. (Nov. 4, 2021), <https://www.californialawreview.org/event/2021-jorde-symposium-the-third-founding-the-rise-of-multiracial-democracy-and-the-authoritarian-reaction-against-it/> [https://perma.cc/23GA-96JC]).

2. *Id.*

3. *Id.*

4. *Id.* at 1993.

5. *Id.* at 1998–99.

these factors yield an accelerating risk that “America . . . will not be a democracy”⁶ but will instead face down a “violent, undemocratic future,”⁷ including the possibility that “Republicans will try to steal the 2024 election.”⁸

While a crossroads may suggest uncertainty about which path the nation will choose, Levitsky’s account is best understood as a warning call. He notes that the nation has already taken steps down the path of democratic breakdown, and that walking them back will not be easy. The most obvious and effective way to improve democracy is to change our government itself. Levitsky thus implores that “[w]e desperately need institutional reform.”⁹ His solutions include eliminating the Electoral College, reconfiguring the Senate, entrenching voting rights, and eliminating the filibuster.¹⁰

Yet as Levitsky himself observes, “[w]e are trapped . . . by our institutions.”¹¹ The Constitution, most prominently, is too difficult to amend. The same institutions that we most need to solve the problems facing democracy will prevent those changes from happening. When it comes to national reform, help is not on the way.

In this responsive Essay, I want to offer a modest reframing of the problem of democratic breakdown that may help illuminate solutions. On one hand, the problem Levitsky describes is even darker than he emphasizes. That the institutions best positioned to halt democratic breakdown cannot or will not do so is not a side issue, but a defining feature. On the other, there may be more that we can do about the problem than Levitsky’s important speech relays—namely, by pursuing partial, state-level progress that can help keep democracy afloat during challenging times.

Consider first the framing of the problem. Although analogies and terminology only get us so far, they sometimes illuminate throughlines or overlooked options. In that spirit, I observe that democratic decline resembles what policy scholars have called a “super wicked” problem: an urgent, high-stakes predicament where incentives work against solutions.¹² Climate change is the archetypal example—an epic problem that is barreling towards us, that has

6. *Id.* at 2003.

7. *Id.* at 1993.

8. *Id.* at 1994.

9. *Id.* at 2003.

10. *Id.*

11. *Id.* at 2002.

12. See Kelly Levin, Benjamin Cashore, Steven Bernstein & Graeme Auld, *Overcoming the Tragedy of Super Wicked Problems: Constraining Our Future Selves to Ameliorate Global Climate Change*, 45 POL’Y SCIS. 123, 123 (2012); Kelly Levin, Benjamin Cashore, Steven Bernstein & Graeme Auld, *Playing It Forward: Path Dependency, Progressive Incrementalism, and the “Super Wicked” Problem of Global Climate Change*, 6 IOP CONF. SERIES: EARTH & ENV’T SCI., no. 502002, at 1 (2009). For the ensuing legal literature, see Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159 (2009); J.B. Ruhl & James Salzman, *Introduction to Symposium, Governing Wicked Problems*, 73 VAND. L. REV. 1561, 1561–84 (2020).

no easy or optimal solutions, and that worsens while we wait. Democratic decline has similar traits. The state of U.S. democracy may therefore be even bleaker than Levitsky suggests.

Viewing the problem this way forces creativity in solutions. When a super wicked problem is afoot, reformers cannot focus exclusively on optimal but unlikely fixes, even as those aspirations must remain part of the conversation.¹³ Instead, reforms must begin wherever they are feasible—and as soon as possible. That includes small-scale interventions that might add up, that might limit the extent of harm, that might serve as a stopgap, or that might provide a springboard to larger changes.¹⁴ Climate reformers have become accustomed to seeking out these partial measures, even as they keep their eyes on grander overhauls. One important strategy for these reformers has been to make headway at the state and local level.¹⁵ When it comes to addressing democratic decline, a similar pivot to subnational governance is crucial. We might wait forever to restructure the Senate; in contrast, states offer arenas where consequential democracy-reinforcing actions are possible today.

It is true that state-level reforms cannot be as effective at swiftly securing democracy as a federal constitutional amendment.¹⁶ But, as the Essay will explain, state-level institutions are vital to democracy, and they can do either a lot of good or even more harm.

13. Levin et al., *Overcoming the Tragedy of Super Wicked Problems*, *supra* note 12, at 125.

14. For discussion of stopgap measures in the environmental context, see Holly Jean Buck, Laura Jane Martin, Oliver Geden, Peter Kareiva, Liz Koslov, Will Krantz, Ben Kravitz, John Noël, Edward A. Parson, Christopher J. Preston, Daniel L. Sanchez, Lynn Scarlett & Shuchi Talati, *Evaluating the Efficacy and Equity of Environmental Stopgap Measures*, 3 NATURE SUSTAINABILITY 499 (2020).

15. See, e.g., Kirsten Engel, *Climate Federalism in the Time of Covid-19: Can the States “Save” American Climate Policy?*, 47 N. KY. L. REV. 115 (2020); Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669 (2010); Barry Rabe, *States on Steroids: The Intergovernmental Odyssey of American Climate Policy*, 25 REV. POL. RES. 105 (2008) [“[P]erhaps the biggest single surprise as climate policy continues to evolve is that in the American case and many others, it is becoming increasingly evident that climate policy constitutes an issue of federalism or multilevel governance.”]; Daniel Farber, *State Governmental Leadership in U.S. Climate Policy*, WILSON CTR. (June 23, 2021), <https://www.wilsoncenter.org/article/state-governmental-leadership-us-climate-policy> [https://perma.cc/3AQG-26P7]. The Inflation Reduction Act, a major piece of legislation passed between the delivery and publication of this lecture, in some sense reflects the critical role of states as both holding the door open for large-scale improvements while national solutions stalled, see, for example, Maggie Astor, *As Federal Climate-Fighting Tools Are Taken Away, Cities and States Step up*, N.Y. TIMES (July 7, 2022), <https://www.nytimes.com/2022/07/01/climate/climate-policies-cities-states-local.html> [https://perma.cc/M5KE-CL5S], and also playing a lead role in implementing those improvements, see *The Inflation Reduction Act’s Implications for Biden’s Climate and Environmental Justice Policies*, HARV. ENV’T & ENERGY L. PROGRAM (Aug. 12, 2022), <https://eelp.law.harvard.edu/2022/08/ira-implications-for-climate-ej-priorities/> [https://perma.cc/R8PB-9XFE] (“The IRA also directs several billion dollars to support states’ climate efforts, including for example, funds for building electrification, energy efficiency initiatives, port electrification, heavy-duty electric vehicles and charging infrastructure, and states’ climate plans and GHG reduction programs. These programs are essential to accelerate investments in clean energy across the country and help to establish the basis for more ambitious federal regulation.”).

16. Levitsky, *supra* note 1, at 1995.

Because states are integral to the functioning of the national elections, their actions may help secure fair elections directly. States can also help foster incremental progress in other ways, such as rejecting extreme partisan gerrymandering, expanding the franchise, or adopting ranked-choice voting or other alternatives that may limit extremism.¹⁷ These efforts, in turn, may serve as a springboard for pro-democracy reforms and social movements.

To be sure, states might instead do the opposite: they might adopt measures that undermine fair elections, limit democratic participation, or encourage extremism. And state-level actions—whether for good or for ill—may be more potent in the democracy context than in the climate context, where individual states can, at best, make just a small dent in global emissions.¹⁸ When it comes to the functioning of the American democracy, the choices of individual states can dramatically affect the fate of the system as a whole, whether in a positive or negative direction. All things considered, state-level interventions provide an important and time-sensitive opportunity to reinforce democracy. Failing to seize the opportunity threatens to accelerate anti-democratic developments.

The Essay unfolds in two parts, offering three ideas about the democratic present and future. Part I identifies democratic decline as a super wicked problem and explores the implications of that status. In particular, it defends the idea of investing in solutions that are not first-best, that don't solve the whole problem at once, or that only prevent greater harm rather than marking net improvements. The challenges of addressing climate change provide a reference point, even if imperfect.

But why states? Aren't state governments best known for their shortcomings?¹⁹ Don't states have an odious civil rights legacy—indeed, shouldn't we worry more about “subnational authoritarianism”?²⁰ And hasn't the American public largely tuned out from state government, such that state-level elections are poor accountability mechanisms?²¹ Urging a focus on state-level reforms might seem like an unrealistic, starry-eyed brand of federalism.

17. See, e.g., Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275 (2022) (collecting examples). On ranked-choice voting, see *Ranked Choice Voting Information*, FAIRVOTE, <https://fairvote.org/our-reforms/ranked-choice-voting-information/#where-is-ranked-choice-voting-used>.F [https://perma.cc/8URU-9PLV].

18. Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1963 (2007) (“It is . . . well understood that these state-level efforts, even those of large states such as California, will have little impact on global emissions and hence little impact on global climate.”).

19. See, e.g., JON C. TEAFORD, *THE RISE OF THE STATES* (2002) (documenting but critiquing this account of state government).

20. EDWARD L. GIBSON, *BOUNDARY CONTROL: SUBNATIONAL AUTHORITARIANISM IN FEDERAL DEMOCRACIES* (2013) (describing “the rise and maintenance of state-level authoritarian regimes in the American South in the 19th and 20th centuries”); see also Johanna Kalb & Didi Kuo, *Reassessing American Democracy: The Enduring Challenge of Racial Exclusion*, 117 MICH. L. REV. ONLINE 55, 57 (2018) (“Democrats were given free rein to establish authoritarianism in the southern states by eliminating political competition and instituting racial segregation.”).

21. See David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763 (2017).

Part II of the Essay offers a different way to think about the promise of states' role in American democracy. Most basically, preserving state-level democracy requires developing and sustaining communities of actors—constitutional communities, as I call them—who attend to and engage with state governance. To see how states can help slow democratic decline, we need to look within states, to their constitutions and the institutions those constitutions create. Doing so shows that a key set of state institutions can serve an important role as our nation's remaining majoritarian institutions: state executive branches, ballot initiatives, many state courts, and many state legislatures. Determined majorities shut out at the national level can still wield power in these spaces, a possibility I call *democratic opportunity*.²² They can do so affirmatively, when they enact policies and reach decisions that expand the franchise and make elections fairer. They can also instantiate democracy by enacting popular policies that the national branches have spurned. And, most urgently, they can help to forestall democratic backsliding. In this sense, to mix my ecological metaphors, we should see states as akin to a keystone species: let the states collapse and our democratic ecosystem will collapse around them.

Part II then briefly addresses what we should do now. There are steps that individuals, reformers, academics, state courts, and other state officials can take. Engaging in state elections and governance, discussing and elevating state constitutional law, and calling out antidemocratic attacks on state majoritarian institutions are all feasible places to begin.

I.

“SUPER WICKED” PROBLEMS AND THEIR SOLUTIONS

A. *Understanding the Problem*

The problem Professor Levitsky addresses is large, but states are small. If looking to states to shore up democracy is not a silver bullet, why bother?

My answer is that we shouldn't think of democratic decline as an ordinary problem, one where it is rational to insist upon the first-best solution. Rather, we should think of it as what climate policy scholars refer to as a “super wicked problem”—one calling for attainable, if partial solutions, wherever they can be found.

In a paper presented in 2007, Kelly Levin and her co-authors coined the term “super wicked” problem to refer to a subspecies of “wicked problems” (a term coined by scholars here at Berkeley in the 1970s),²³ with climate change as

22. For a fuller treatment of this idea, see Seifter, *supra* note 17.

23. See Horst W.J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCIS. 155, 155 (1973). For a summary of the critical literature, see Jonathan M. Gilligan & Michael P. Vandenbergh, *Beyond Wickedness: Managing Complex Systems and Climate Change*, 73 VAND. L. REV. 1777 (2020).

the archetype.²⁴ The key insight of this intervention is an observation that applies in the climate space as it does today in the realm of democracy: that some problems are so epic, and their optimal solutions so unlikely, that they seem to barrel towards tragedy. In these circumstances, beginning with smaller solutions becomes imperative; small steps can provide damage control and a platform for scaling up to bigger change.

In particular, a super wicked problem has four attributes: (1) time is running out; (2) even would-be reformers have incentives to maintain the status quo; (3) there's only weak or no central authority to address the problem; and (4) partly as a result of those factors, existing policy proposals irrationally discount the future.²⁵ These factors capture the problem of climate change, and we should think of the problem of democratic breakdown as bearing a family resemblance.

1. *"Time is running out."*²⁶

When it comes to climate change, time is running out in the sense that the planet is approaching an irreversible level of temperature rise. The Intergovernmental Panel on Climate Change has concluded that "unless there are immediate, rapid, and large-scale reductions in greenhouse gas emissions, limiting warming to close to 1.5 degree Celsius or even two degrees Celsius will be beyond reach."²⁷ That future is likely "[e]ven if nations started sharply cutting emissions today."²⁸ "At 1.5 degrees of warming, scientists have found, the dangers grow considerably."²⁹ And passing 1.5 degrees portends frightening results: "[H]eat extremes would more often reach critical tolerance thresholds for agriculture and health,"³⁰ and "an increasing likelihood that we may soon trigger a tipping point that leads to non-linear changes—think of the melting of Arctic permafrost that releases huge quantities of methane, for example, that in turn leads to even faster warming."³¹

In the realm of democracy, a failure to implement safeguards in 2022 and 2024 could spell the end of fair and competitive elections. Apocalyptic predictions about American democracy giving way to an authoritarian future,

24. Levin et al., *Overcoming the Tragedy of Super Wicked Problems*, *supra* note 12, at 126.

25. *Id.* at 124.

26. *Id.* at 127.

27. *Climate Change Widespread, Rapid, and Intensifying – IPCC*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Aug. 9, 2021), <https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/> [<https://perma.cc/YG86-TT7S>].

28. Brad Plumer & Henry Fountain, *A Hotter Future Is Certain, Climate Panel Warns. But How Hot Is Up to Us*, N.Y. TIMES (Aug. 9, 2021), <https://www.nytimes.com/2021/08/09/climate/climate-change-report-ipcc-un.html> [<https://perma.cc/T6MB-JYP3>].

29. *Id.*

30. *Climate Change Widespread, Rapid, and Intensifying – IPCC*, *supra* note 27.

31. See Justin Worland, *Did We Just Blow Our Last, Best Chance to Tackle Climate Change?*, TIME (Dec. 30, 2021), <https://time.com/6130470/climate-change-2021-build-back-better/> [<https://perma.cc/U5VA-7EUE>]; see also DAVID WALLACE-WELLS, *THE UNINHABITABLE EARTH* (2019).

like those about climate, have become startlingly commonplace.³² This is a worst-case scenario, but not a far-fetched one. For example, the Supreme Court recently granted certiorari in a case involving the fringe independent state legislature theory.³³ In its broadest version, this theory could allow extreme state legislators to overturn the results of federal elections.³⁴ As the historian Sean Wilentz put it recently, the Republican Party at that time could “secure . . . a more or less ironclad system of undemocratic minority rule.”³⁵

2. “*Those who cause the problem also seek to provide a solution*”³⁶

Second, climate change and democratic decline are both thwarted by problematic incentives, in that even those who support reform would have to engage in difficult acts of self-sacrifice to achieve it. Most climate reformers still must burn fossil fuels as a way of life.³⁷ And officials seeking climate action often cannot afford to completely alienate industries that contribute to climate change.

Similarly, political incumbents benefit from the electoral system we have, including features like big money, a polarized media environment, and protective districting. The White House’s 2021 characterization of pro-democracy advocates as just one “constituency” it needs to please reflected this problem.³⁸ In the lead up to the 2022 election, some members of both parties, most prominently Congresswoman Liz Cheney, instead called to make the

32. Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 266 (2022) (“The time to act is now, before American democracy disappears.”).

33. *Moore v. Harper*, 142 S. Ct. 2901 (2022) (granting certiorari); *see generally* Hansi Lo Wang, *How the Supreme Court Could Radically Reshape Elections for President and Congress*, NPR (June 30, 2022), <https://www.npr.org/2022/06/30/1107648753/supreme-court-north-carolina-redistricting-independent-state-legislature-theory> [<https://perma.cc/Y5TW-69QT>].

34. Amicus briefs in the case pressed broader versions of the independent state legislature theory than the parties themselves. *See* Brief for the Honorable John R. Ashcroft, Secretary of State of Missouri, as Amicus Curiae Supporting Neither Party, *Moore v. Harper*, No. 21-1271 (2022); Brief for Honest Elections Project as Amicus Curiae Supporting Petitioners, *Moore v. Harper*, No. 21-1271.

35. *See* Sean Wilentz, *The Tyranny of the Minority, from Calhoun to Trump*, 2 LIBERTIES J. FOUND. (2021), <https://libertiesjournal.com/articles/the-tyranny-of-the-minority-from-calhoun-to-trump/> [<https://perma.cc/K25Q-ZX63>]. For an example of a similar take, *see* Charles M. Blow, *Last Chance to Save American Democracy*, N.Y. TIMES (Oct. 17, 2021), <https://www.nytimes.com/2021/10/17/opinion/voting-rights-congress.html> [<https://perma.cc/5LUM-CPGD>].

36. Levin et al., *Overcoming the Tragedy of Super Wicked Problems*, *supra* note 15, at 127.

37. *See id.*

38. *See also* Peter Nicholas, *Is Biden Doing Enough to Protect Democracy?*, ATLANTIC (Oct. 17, 2021), <https://www.theatlantic.com/politics/archive/2021/10/biden-democrats-2024-election-interference/620392/> [<https://perma.cc/JQ7F-C5M9>] (relaying White House comments regarding activists’ frustration with the lack of progress on voting rights as: “Every constituency has their issue. If you ask immigration folks, they’ll tell you their issue is a life-or-death issue too.”).

preservation of democracy a top priority.³⁹ But the fact that those calls have often been acts of political self-sacrifice—Cheney lost her primary in a landslide⁴⁰—only underscores the difficult incentives that our modern political environment creates.

3. “[T]he central authority needed to address it is weak or non-existent.”⁴¹

Third, a super wicked problem occurs when the central authority needed to solve the problem is weak or non-existent.⁴² That’s true with climate because there is no strong global body that can impose the requisite decarbonization.⁴³ Governance tools like the Paris Agreement “are not legally binding and cannot be enforced,”⁴⁴ rendering climate change an epic collective action problem.

This problem bedevils democracy too. As Levitsky points out, a Congress featuring the design of the Senate and the limit of the filibuster is a weak advocate for popular, pro-democratic policies.⁴⁵ The minoritarian Supreme Court has shut the door to claims of extreme partisan gerrymandering⁴⁶ and has failed to stop the erosion of voting rights.⁴⁷ And amending the federal constitution is regarded as nearly impossible today.⁴⁸

4. “[A]nd, partly as a result, policy responses discount the future irrationally.”⁴⁹

All of these forces lead to a final feature of super wicked problems, which is that resulting policy responses discount the future irrationally. When

39. Katharine Jackson, *Republican Cheney Warns U.S. Democracy Remains Under Threat*, REUTERS (June 5, 2022), <https://www.reuters.com/world/us/republican-cheney-warns-us-democracy-remains-under-threat-2022-06-05/> [<https://perma.cc/U9TC-KEMH>].

40. Jonathan Martin, *Liz Cheney Is Defeated by Trump-Backed Harriet Hageman in Wyoming*, N.Y. TIMES (Aug. 16, 2022), <https://www.nytimes.com/2022/08/16/us/politics/harriet-hageman-liz-cheney-wyoming.html> [<https://perma.cc/87HB-78FY>].

41. Levin et al., *Overcoming the Tragedy of Super Wicked Problems*, *supra* note 12, at 123.

42. *Id.*

43. See, e.g., Stewart Patrick, *The Unruled World: The Case for Good Enough Global Governance*, 93 FOREIGN AFFS. 58, 59 (2014) (noting the “complex and ambiguous” nature of international governance—a “system composed of independent sovereign units that recognize no higher authority”).

44. Robert Falkner, *The Paris Agreement and the New Logic of International Climate Politics*, 92 INT’L AFFS. 1107, 1124 (2016).

45. See Levitsky, *supra* note 1, at 1998.

46. See *id.* at 2002.

47. See, e.g., Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 115 (2019) (describing the Supreme Court as “not just refusing to fix democratic malfunctions judicially, but also thwarting nonjudicial actors from dealing with them”); CAMPAIGN LEGAL CTR., *THE SUPREME COURT’S ROLE IN THE DEGRADATION OF U.S. DEMOCRACY* (2022), https://campaignlegal.org/sites/default/files/2022-07/CLC%202022%20SCOTUS%20Report_final.pdf [<https://perma.cc/EEK9-2RNV>].

48. See generally SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

49. Levin et al., *Overcoming the Tragedy of Super Wicked Problems*, *supra* note 12, at 123.

policymakers act at all, they act as if they have the luxury of time or as if the sensible solution is to study the problem more.⁵⁰ They treat inaction as a neutral decision instead of a costly one.⁵¹ In the climate space, this means policymakers often cater to “society’s immediate policy interests” and “punt” on solutions that require meaningful change.⁵²

In the democracy context, the landscape of policy responses looks somewhat different in light of election-centered misinformation and polarization.⁵³ There is no absence of legal and policy activity; to the contrary, we see a seemingly constant churn around upcoming elections, much of it ominous.⁵⁴

Unfortunately, reforms and rulings that would bolster rather than undermine democracy are in shorter supply. This is particularly notable at the national level, where those in power often do little more than punt to the future. Consider the White House’s decision not to make a serious push for Supreme Court reform, but instead to convene a Supreme Court study commission.⁵⁵ Other policymakers engage with democratic decline by proposing bills that stand no chance of passing or by holding hearings.⁵⁶ Such half-measures may help to educate or create political pressure,⁵⁷ but they are not direct steps to solving pressing problems. The Electoral Count Reform Act, still pending in Congress at the time of this writing,⁵⁸ could become an important counterexample.⁵⁹ Still, the extent to which it may help to prevent election subversion remains to be seen.⁶⁰

50. *Id.* at 128 (“[T]he public and decision makers, even in the face of overwhelming evidence of the risks of significant or even catastrophic impacts from inaction, make decisions that disregard this information and reflect very short time horizons.”).

51. *Cf.* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 364 (2019) (“Because the world is changing at a breakneck clip, a bias toward inaction means that the state will respond too slowly as new risks present themselves and existing risks come into focus.”).

52. Levin et al., *Overcoming the Tragedy of Super Wicked Problems*, *supra* note 12, at 128.

53. On modern political fragmentation in the United States and abroad, including fragmentation caused by social media and new forms of communication, see Richard H. Pildes, *Political Fragmentation in Democracies of the West*, 37 BYU J. PUB. L. (forthcoming 2023).

54. *Guidance Related to Elections and Polling Places*, GEO. L. INST. FOR CONST. ADVOC. & PROT., <https://www.law.georgetown.edu/icap/our-work/guidance-related-to-elections-and-polling-places/> [<https://perma.cc/S4L3-6KK6>].

55. *See Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE, <https://www.whitehouse.gov/pscotus/> [<https://perma.cc/U9RC-FBXG>].

56. *See, e.g.*, Judiciary Act of 2021, H.R. 2584, 117th Cong. (2021) (stalled bill increasing the number of Justices on the Supreme Court).

57. *See* Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529, 529 (2019).

58. *See* S. 4573, 117th Cong. tit. 1 (2d Sess. 2022). <https://www.congress.gov/117/bills/s4573/BILLS-117s4573is.pdf> [<https://perma.cc/S9ML-8PH2>].

59. *See* Genevieve Nadeau & Holly Idelson, *Understanding the Electoral Count Reform Act of 2022*, PROTECT DEMOCRACY (July 2022), <https://s3.documentcloud.org/documents/22122740/protect-democracy-ecra-explainer.pdf> [<https://perma.cc/7N25-ZGLN>].

60. *See, e.g.*, Laurence H. Tribe, Erwin Chemerinsky & Dennis Aftergut, *The Electoral Count Act Must Be Fixed. A New Proposal Doesn’t Go Far Enough*, WASH. POST. (Aug. 1, 2022),

B. *Solutions to Super Wicked Problems Include Small Steps*

Scholars who have conceived of climate change as a super wicked problem have also assessed how to solve it. Although the climate movement is far from the success it requires, what progress it has made illustrates the importance of not waiting for perfect responses. Private governance, technological change, and state and local policy have all been important partial steps.⁶¹ Indeed, when confronted with pressing problems and misaligned incentives, the place to start is simply wherever you can. Sweeping reforms and big-picture rethinks must stay on the table.⁶² But those reforms will become more possible—or less impossible—if we do what is feasible today. In climate, as in other policy areas, reformers know that “lower order policy levels” are where change is “often much easier.”⁶³

Extensive policy scholarship tells us that smaller bites might change the policy calculus in a favorable way. They might change the Overton Window, or the range of possibilities that are viewed as acceptable or on the table at a given time. They might have feedback effects that generate new coalitions⁶⁴ and thus become “sticky.”⁶⁵ And, through their intervention, they might extend slightly the time for action.⁶⁶ Policy scholarship emphasizing small starting points sometimes refers to the need for “silver buckshot” rather than a silver bullet,⁶⁷

<https://www.washingtonpost.com/opinions/2022/08/01/electoral-count-reform-act-suggested-changes/> [https://perma.cc/7N25-ZGLN].

61. See MICHAEL P. VANDERBERGH & JONATHAN M. GILLIGAN, *BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE* (2017); GREGORY F. NEMET, *HOW SOLAR ENERGY BECAME CHEAP: A MODEL FOR LOW-CARBON INNOVATION* (2019); sources cited *supra* note 15 (literature on state leadership on climate policy).

62. For such a call in the climate context, see NAOMI KLEIN, *THIS CHANGES EVERYTHING: CAPITALISM V. THE CLIMATE* (2014); NAOMI KLEIN, *ON FIRE: THE (BURNING) CASE FOR A GREEN NEW DEAL* (2019). Regarding democracy, see Chris Maisano, *It Would Be Great if the United States Were Actually a Democracy: Interview with Aziz Rana*, JACOBIN (Feb. 16, 2021), <https://jacobinmag.com/2021/02/us-constitution-interview-aziz-rana> [https://perma.cc/B25S-2THJ].

63. Levin et al., *Overcoming the Tragedy of Super Wicked Problems*, *supra* note 12, at 133.

64. On “policy feedback effects,” rooted in Schattschneider’s notion that policies create their own politics, see, for example, Suzanne Mettler, *Making What Government Does Apparent to Citizens: Policy Feedback Effects, Their Limitations, and How They Might Be Facilitated*, 685 ANNALS AM. ACAD. POL. & SOC. SCI. 30 (2019); Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POL. 595 (1993) (book review).

65. Levin et al., *Overcoming the Tragedy of Super Wicked Problems*, *supra* note 12, at 123–24.

66. See *id.* (discussing the importance of “progressive incremental” interventions); see also Buck et al., *supra* note 14 (discussing stopgap measures).

67. See Bill McKibben, *Welcome to the Climate Crisis: How to Tell Whether a Candidate Is Serious About Combatting Global Warming*, WASH. POST (May 27, 2006), <https://www.washingtonpost.com/archive/opinions/2006/05/27/welcome-to-the-climate-crisis-span-classbankheadhow-to-tell-whether-a-candidate-is-serious-about-combating-global-warmingspan/26b2ac5a-a4a3-46ff-b214-3fc07a3a5ab3> [https://perma.cc/77YK-3WA2] (arguing for varied strategies to mitigate the climate crisis, because “[t]here are no silver bullets, only silver buckshot”).

stresses the importance of “muddling through,”⁶⁸ or suggests identifying achievable “wedges” that add up.⁶⁹ These terms evoke the significance of using small responses to produce larger solutions and of attacking problems step-by-step.

Moreover, these small-scale beginnings might spread across jurisdictions. Here, the literature on “policy diffusion” is useful. Policy scholars have long explored whether and when an experiment in one state might spread elsewhere.⁷⁰ Although states are of course not literal “laboratories,”⁷¹ it is undeniable that policies do sometimes take root in one jurisdiction and then spread.⁷²

* * *

Carrying the super wicked analogy this far may seem a bit much. But I hope that by reframing the problem Levitsky describes through the lens of another problem that has been on the scene longer, we might gain perspective on both the difficulty of our predicament and ways forward.

II.

LOOKING TO THE STATES

So far, I have argued that democratic decline resembles a super wicked problem, and I have argued that solving super wicked problems involves an all-hands-on deck strategy, including the need to start small. All of this suggests that we should turn our gaze to the states.

It’s not that Levitsky and other commentators have ignored the states altogether. The attack on state election officials in particular has garnered serious concern in recent months. Professor Rick Hasen has prominently sounded the

68. See Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79, 79–88 (1959); Gilligan & Vandenbergh, *supra* note 23, at 1782 (embracing Lindblom’s “muddling through” approach).

69. Stephen W. Pacala & Robert H. Socolow, *Stabilization Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies*, 305 SCIENCE 968, 968 (2004).

70. For early contributions that shaped the discussion, see Jack L. Walker, Jr., *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969); Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174 (1973). For more recent overviews, see ANDREW KARCH, *DEMOCRATIC LABORATORIES* (2007); Charles R. Shipan & Craig Volden, *Policy Diffusion: Seven Lessons for Scholars and Practitioners*, 72 PUB. ADMIN. REV. 788, 793 (2012). For a critical take in the legal literature, see Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333 (2009).

71. See, e.g., Hannah Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661; Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2188 (2022).

72. For just a few discussions, see Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 L. & CONTEMP. PROBS. 115 (2016); Jamila Michener, *Medicaid and the Policy Feedback Foundations of Universal Healthcare*, 685 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 125 (2019) (“Building political momentum in the states is an offensive strategy for eventual national change.”); Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840 (2008).

alarm bell about election subversion,⁷³ as have a number of advocacy groups.⁷⁴ News networks and commentators around the country have become attentive to the risk.⁷⁵

Yet there is not much scholarship assessing the role of states in protecting democracy. What does exist is decidedly mixed. While some scholars have recently urged optimism about how decentralization at least slows and complicates an authoritarian takeover,⁷⁶ others, like Jim Gardner, have noted the rise of “illiberalism and authoritarianism” at the state level.⁷⁷ Still others, like Aziz Huq and Tom Ginsburg, have described the relationship between federalism and democratic decline as indeterminate, because it is difficult to know whether actions in the states will “serve as salutary platforms” for pro-democratic forces, or whether instead state-level developments will “entrench an antidemocratic coalition and render it nationally unassailable.”⁷⁸

73. See Hasen, *supra* note 31.

74. STATES UNITED DEMOCRACY CTR., PROTECT DEMOCRACY, LAW FORWARD, A DEMOCRACY CRISIS IN THE MAKING: HOW STATE LEGISLATURES ARE POLITICIZING, CRIMINALIZING, AND INTERFERING WITH ELECTION ADMINISTRATION (Apr. 22, 2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/04/FINAL-Democracy-Crisis-Report-April-21.pdf> [<https://perma.cc/R3JQ-K2F5>]; Memorandum from States United Democracy Ctr., Protect Democracy, Law Forward, Democracy Crisis in the Making Report Update: 2021 Year-End Numbers (Dec. 23, 2021), https://statesuniteddemocracy.org/wp-content/uploads/2021/12/Democracy-Crisis-Report_FINAL.pdf [<https://perma.cc/S9BA-LAYE>].

75. The coverage paints an alarming portrait. See Bob Bauer & Ben Ginsberg, *State Election Officials Are Under Attack. We Will Defend Them*, N.Y. TIMES (June 4, 2021), <https://www.nytimes.com/2021/06/04/opinion/republican-state-laws-election-officials.html> [<https://perma.cc/K87C-68TN>] (noting that states have passed laws that “establish civil penalties for technical infractions and subject [election] officials to threats of suspension or even criminal prosecution,” and that “[o]ther states are considering laws containing similar threats to the impartial administration of elections”); Jeremy Schwartz, “God’s Will Is Being Thwarted.” *Even in Solid Republican Counties, Hard-Liners Seek More Partisan Control of Elections*, TEX. TRIB. (Oct. 1, 2021), <https://www.texastribune.org/2021/10/01/texas-election-official-hood/> [<https://perma.cc/8SVU-YHFV>]; Stephen Fowler, *After Attacks on the 2020 Election, Secretary of State Races Take on New Urgency*, NPR (Nov. 4, 2021), <https://www.npr.org/2021/11/04/1052211190/after-attacks-on-the-2020-election-secretary-of-state-races-take-on-new-urgency> [<https://perma.cc/8AAH-93HC>] (noting that election officials have “faced the wrath of Trump for defending last November’s election,” and that current GOP candidates for secretary of state in Arizona, Nevada, and Michigan are “running campaigns centered around baseless claims of fraud”); Amy Gardner, Emma Brown & Josh Dawsey, *Inside the Nonstop Pressure Campaign by Trump Allies to Get Election Officials to Revisit the 2020 Vote*, WASH. POST (Dec. 22, 2021), https://www.washingtonpost.com/politics/trump-election-officials-pressure-campaign/2021/12/22/8a0b0788-5d26-11ec-ae5b-5002292337c7_story.html [<https://perma.cc/5E3T-YCT9>]; Dan Mangan, *Texas Man Arrested for Alleged Threat to Kill Georgia Election Official Day Before Trump Capitol Riot*, CNBC (Jan. 21, 2022), <https://www.cnn.com/2022/01/21/texas-man-charged-over-threat-to-kill-georgia-election-official-before-trump-capitol-riot.html> [<https://perma.cc/GZ4B-EH83>].

76. See David Landau, Hannah Wiseman & Samuel Wiseman, *Federalism, Democracy, and the 2020 Election*, 99 TEX. L. REV. ONLINE 96 (2021); David Landau, Hannah Wiseman & Samuel Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187 (2020).

77. James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829, 834 (2021).

78. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 161 (2018).

A way to get more traction on the state role is to look within states. Doing so—and seeing how state institutions differ from federal institutions—illuminates how and when states can advance democracy.

A. *Understanding the “Democratic Opportunity” States Provide*

The promise of state-level reforms begins with state constitutions. State founding documents are different from the federal constitution in their relationship to democracy. As Jessica Bulman-Pozen and I have argued, state constitutions repeatedly and expressly embrace a “democracy principle” encompassing the values of popular sovereignty, majority rule, and political equality.⁷⁹ From provisions declaring that all political power resides in the people, to the express protection of the right to vote, to the relative ease of amendment, to the direct election of numerous state officials with no equivalent of the Senate or electoral college, state constitutions are filled with provisions espousing democracy.⁸⁰ Across the nation, state constitutions offer an abundance of express democratic commitments.⁸¹

These provisions are no accident. They spread across the country through waves of constitution-making and constitutional revision. Taken together, they reflect an approach to government aimed at elevating the popular will over the divergent wishes of unresponsive representatives.⁸²

Rooted in this democracy principle, state constitutions create multiple institutions that are driven by majority rule: state executives, ballot initiatives, and often state courts and state legislatures.⁸³ These institutions have an important role to play right now. They provide distinctive *democratic opportunities*: opportunities for popular majorities to rule on equal terms.⁸⁴ For the reasons Levitsky’s work describes so deftly, federal institutions today provide few such opportunities to national majorities, even if those majorities are organized and highly motivated. But majorities can still prevail in the states. In turn, states can act as counterweights to the minoritarian forces taking hold at the national level.⁸⁵

States can serve this function in a few main ways.⁸⁶ First, state majoritarian institutions can operationalize democracy by giving people what they want when the national government will not. Ballot initiatives have approved a wide array of popular policies that were nationally foreclosed, including Medicaid

79. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021); Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337 (2022).

80. See sources cited *supra* note 79.

81. See LEVINSON, *supra* note 48.

82. See Bulman-Pozen & Seifter, *The Democracy Principle*, *supra* note 79.

83. See Seifter, *supra* note 17.

84. See *id.*

85. See *id.*

86. See *id.*

expansion, a minimum wage, and cannabis legalization. Governors have issued directives and executive orders that track popular preferences. State legislatures, when not countermajoritarian, have led the way on issues ranging from pandemic response to public safety. And state courts can and have protected rights that the Supreme Court has not, including rights with broad popular support.

State-level governance can also help to advance democracy directly and affirmatively. States have used executive action or ballot initiatives to expand the democratic community, as when they enfranchise more voters or improve access to voting,⁸⁷ and to improve the impartiality of the districting or electoral process, as when they adopt independent districting commissions.⁸⁸ Some states and localities, moreover, have adopted ranked-choice voting; the Alaska Supreme Court recently upheld Alaska's new ranked choice system.⁸⁹

More soberly, state majoritarian institutions are also a crucial backstop against antidemocratic efforts. State governors, for instance, have been vetoing some of the most problematic voter suppression bills offered up by countermajoritarian legislatures.⁹⁰ Meanwhile, state courts have rejected efforts to call into question the results of the 2020 election⁹¹ and have resisted efforts at purely partisan redistricting.⁹² If state legislatures attempt dubious maneuvers around the administration of future elections, it will be imperative for state sibling branches to push back.⁹³ In this sense, as mentioned, state majoritarian institutions are like a keystone species: take them away and the whole system will collapse.⁹⁴

Before moving on, a cautionary note is warranted here. Majority rule is not without its problems. A constitutional system needs both majoritarian and

87. See *Felon Voting Rights*, NAT'L CONF. OF STATE LEGISLATURES (June 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/B5MJ-4BYM>]; *COVID-19 State and Local Respond Database*, VOTING RTS. LAB, <https://tracker.votingrightslab.org/covid-19/tracker/1441> [<https://perma.cc/3YLU-2Q42>].

88. See *Creation of Redistricting Commissions*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 10, 2021), <https://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx> [<https://perma.cc/7BUD-6W7Z>].

89. See *Kohlhaas v. State*, 518 P.3d 1095, 1124 (Alaska 2022).

90. See Reid J. Epstein & Nick Corasaniti, *Why Democrats See 3 Governor's Races as a Sea Wall for Fair Elections*, N.Y. TIMES (Oct. 14, 2021), <https://www.nytimes.com/2021/10/06/us/politics/governor-races-democrats.html> [<https://perma.cc/8ZPU-GRG4>].

91. To be sure, many federal courts did this latter thing too; the claims were baseless. But states' prime role in the 2020 election shows how problematic it would be if state courts, too, became a carbon copy of the minoritarian forces at work nationally.

92. For example, North Carolina, Ohio, and Pennsylvania have all issued significant decisions constraining partisan gerrymandering. See *Harper v. Hall*, 868 S.E.2d 499, 508–09 (N.C. 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n.*, Nos. 2021-1193, 2021-1198, and 2021-1210 (Ohio Jan. 12, 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

93. See Bulman-Pozen & Seifter, *supra* note 79.

94. See Nicholas, *supra* note 38 (quoting Adam Schiff as stating: "Efforts to interfere with election officials at the state level are foundational to a democracy. And if the foundation becomes infirm, the whole edifice comes crashing down.").

minoritarian forces in decision making, as each offers distinct advantages and flaws.⁹⁵ But Levitsky is right: the dearth of majoritarian institutions at the national level today has become a threat to democracy.⁹⁶ Further, the circumstances in which constraining majority rule has normative traction are not present in the attacks on state majoritarian institutions that I am about to describe. We can justify constraining majority rule to protect politically powerless or vulnerable groups, for example, or to avoid entrenchment by one faction or another.⁹⁷ But in situations of free and fair political competition, the supposed need to constrain majorities may be mere pretext for allowing an entrenched partisan minority to rule.

B. Looking Ahead

Given the important role of state institutions in facilitating majority rule, it is little surprise that these state institutions are facing attacks. State majoritarian institutions pose an important obstacle to those who aim to cement minority political power. That is why in the past two years we have seen hundreds of bills attempting to curtail the initiative process, reorganize state courts, and limit executive power.⁹⁸ We should be attentive to and skeptical of such measures, and we should push back against them where warranted.

But for that pushback to be realistic, we need to do something else first. Preserving democracy at the state level involves developing communities of actors—constitutional communities, as I call them⁹⁹—who pay attention to and engage with state governance. State constitutions and institutions confer important democratic resources, but only when they are consciously invoked and put to use.

This is partly a jurisprudential point, in that state constitutions may not operate as law when we fail to recognize them.¹⁰⁰ But it is also a practical and actionable point. Constraining antidemocratic forces requires a community of individuals, in and out of state government, who keep tabs on what is going on and discuss how that aligns with constitutional and democratic values.¹⁰¹ The very act of discussing these topics, and understanding the democracy principle, is a first step toward realizing the promise of state constitutions and institutions.

These discussions can pair with concrete steps. Communities of state-level watchdogs can call out power grabs. They can monitor and participate in state

95. Cf. Neil Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657 (1988).

96. Levitsky, *supra* note 1.

97. See Seifter, *supra* note 17.

98. See *id.* (documenting these attacks).

99. See Miriam Seifter, *Extra-Judicial Capacity*, 2020 WIS. L. REV. 385 (2020); Miriam Seifter, *Unwritten State Constitutions? In Search of Constitutional Communities*, in AMENDING AMERICA'S UNWRITTEN CONSTITUTION (Richard Albert, Ryan C. Williams & Yaniv Roznai eds., 2022).

100. See generally H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

101. See Seifter, *Extra-Judicial Capacity*, *supra* note 102.

court litigation. They can turn out even in off-cycle elections. They can know what's on the ballot. And they can understand and foster discussion when obscure decisionmakers wield important power.¹⁰²

None of this requires a naïve belief that state majoritarian institutions are perfect. We shouldn't ignore the flaws and problems that can attend gubernatorial power, elected courts, and ballot initiatives. We should be mindful, though, that they are an important counterweight against present threats, and a necessary ingredient for a more secure democratic future.

CONCLUSION

Professor Steven Levitsky's work on democratic decline is indispensable. In this Essay, I have tried to supplement it with three ideas: the necessity of incorporating smaller-scale solutions to super wicked problems, in addition to attempts at large-scale solutions; the need to look *inside* states to identify key sites for pro-democratic and anti-backsliding initiatives; and the value of participation and dialogue to forestall a state decline that could usher in a national collapse. It is past time to be keenly attentive to the states. State majoritarian institutions can slow democratic decline. Neglecting them could accelerate it beyond repair.

102. The Wayne County fiasco is illustrative of such an institution. See Kayla Ruble & Tom Hamburger, *Board in Key Michigan County Fails, then Agrees, to Certify Vote Totals by Deadline*, WASH. POST. (Nov. 17, 2020), https://www.washingtonpost.com/politics/michigan-vote-canvassing-board/2020/11/17/12141222-287c-11eb-8fa2-06e7cbb145c0_story.html [https://perma.cc/D2W5-4JDT].