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## Democratic Culture and Democratic Shocks: The Limits of Constitutional Cycles

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# **Democratic Culture and Democratic Shocks: The Limits of Constitutional Cycles**

*Jonathan Gienapp\**

Symposium: Jack M. Balkin, *The Cycles of Constitutional Time*

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## I. INTRODUCTION

In his new book, *The Cycles of Constitutional Time*, Jack Balkin achieves something remarkable.<sup>1</sup> He paints an unflinchingly grim portrait of modern American politics that is at once brutally honest about the dire state of our predicament while also somehow brimming with optimism and hope. In that regard, it is Balkinian to its core – sober and trenchant in its analysis, yet buoyant in its outlook. Not many people could have written a book like this. And we should be grateful that he has. At a time like this, when it feels like the democratic sun is ever more likely to be shrouded in total darkness,<sup>2</sup> we need Balkin’s characteristic galloping prose and encouraging spirit to instill the belief that a brighter day lies ahead.

This is not blind hope either. The book’s optimism is based on substantive reflection – on a deep and serious examination of the structures of American constitutional time – of how, in the medium- and long-run, our political system has established and sustained its defining regularities. Perhaps, at present, everything appears hopeless and bleak. Yet Balkin makes a strong case that, if only we look beneath the surface and take a longer view of historical development, if only we could focus on what he calls the cycles of constitutional time, we can begin to appreciate the true sources of the “recent unpleasantness,”<sup>3</sup> and how those same sources may rescue us from the very troubles they have caused. The astronomical forces of our political universe are to blame – but they also provide the tools for renewal. We do not have to settle for relentless partisan warfare and polarization, demagoguery, racial retrenchment, and a persistent stifling of democratic will, trapped in a “cycle of corruption, cynicism, and despair.”<sup>4</sup> We need not continue to suffer in a state of “constitutional rot.”<sup>5</sup> The cycles that brought us here are turning. And if we understand them better, we might just allow them to carry us to a new dawn.

This is an ambitious argument, one that weds constitutional with political theory and is rooted in history. While it focuses on constitutionalism, it does not do so as conventional legal scholarship might. Balkin has much to say about the judiciary (all of it illuminating), yet his understanding of constitutionalism is not tethered to jurisprudence. He rightfully appreciates – as he has in so much of his prior work<sup>6</sup> – that the Constitution is far more than a legal code or even a set of institutions, norms, and practices. It is the interaction of all these things – the normative space sustained by the collective activity of using constitutionalism to make politics and the political system

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1. JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2020).

2. *Id.* at 3-4, 65.

3. *Id.* at 3.

4. *Id.* at 48.

5. *Id.* at 7.

6. *See, e.g.*, JACK M. BALKIN, *LIVING ORIGINALISM* 4 (2011).

work.<sup>7</sup> Accordingly, when Balkin talks about cycles of constitutional time – or constitutionalism more generally – he is talking about nearly everything: democratic politics, institutions, and practices in all their interlocking forms.<sup>8</sup> The book is much better because of this. Balkin is quite right that we cannot understand how we got here without trying to understand how presidential and congressional politics, judicial politics and interpretation, political party structures and governance, and grassroots social activism have interacted. To understand the state of our constitutionalism, we must see the whole picture.

Yet because of this ambition, it is fair to ask if Balkin has identified all of the important pieces and adequately fit them together. More specifically still, has he identified all of the sources of constitutional rot, and, in turn, what is likely to break it? Perhaps if we probe certain aspects of Balkin's portrait, we find cause to be less optimistic than he hopes.

This skepticism will take the form of two distinct, but related, points. The first point is that Balkin has paid insufficient attention to a key variable that has always been a central concern of American constitutional and democratic theorists. This is democratic culture itself – and, by extension, the problem of what defines and sustains a democratic people. If we bring democratic culture into the picture, we might conclude that our rot runs even deeper than Balkin submits. The second point builds from the first. Because our condition of constitutional rot might be deeper than Balkin accepts, it might be harder to escape it. The cycles can only do so much. If history is any guide, the more likely source of change and renewal will come in the form of an external shock to our political system.

## II. DEMOCRATIC CULTURE

Democratic culture is by no means absent from Balkin's account, but it is fair to say that it is not the focal point. He argues that there are three constitutional cycles: the cycle of political regimes, the cycle of polarization, and the cycle of constitutional rot and renewal.<sup>9</sup> Like gears in a machine, each cycle moves more or less on its own, and it just so happens that, at present, all three have lined up in a particularly disturbing way.<sup>10</sup> We are enduring, he persuasively argues, the decadent final days of a decaying political regime,

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7. *See id.* For a related approach that situates the Constitution in the practice of claims making, *see* JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 4–12 (2018).

8. BALKIN, *supra* note 1, at 10 (“My task... is to consider how these global trends are affecting the institutions of American democracy, filtered through our party system, institutional history, and constitutional structures.”).

9. *Id.* at 6.

10. *Id.* at 64–65.

extreme partisan polarization, and a period of sustained (and worsening) constitutional rot.<sup>11</sup> It is bad enough when any of these cycles enters one of these stages; to suffer through the combination of the three is downright debilitating. This is not only illuminating but deeply compelling.

My questions begin to arise when Balkin explains *why* we are in a state of constitutional rot. He identifies “Four Horsemen” of constitutional rot – political polarization, economic inequality, a loss of trust in the political system, and policy disasters<sup>12</sup> – and one would find it difficult to argue with any of those. But, in addition to, and perhaps even more significant than those, are we not in a period of rot because of decay in our democratic culture itself? Is this not an even more fundamental problem, from which the others have sprung and receive essential nourishment? As noted, Balkin alludes to broader democratic culture, especially when he describes the gradual loss of trust in democratic life. As he eloquently puts it, for “republics to function properly,” there must be “trust between members of the public, trust between the public and governments officials, and trust among government officials of different parties.”<sup>13</sup> Indeed, “the public must not view their fellow citizens as incorrigible and implacable enemies.”<sup>14</sup> From there, however, Balkin quickly pivots to democratic political structures and institutions – political parties, checks and balances, the separation of powers, constitutional limits on power, and the formal structure of our constitutional system. He quotes Benjamin Franklin at the Constitutional Convention warning that the American system of constitutional government would only last as long as the American people remained uncorrupted.<sup>15</sup> This warning, however, is only by way of preface to a broader discussion of constitutional structure and the various political and institutional mechanisms that the framers put in place in hopes of combatting inevitable republican rot.<sup>16</sup> Thus, democratic culture tends to be subsumed under an institutional examination of the American regime.

It would seem important, however, to focus as much on democratic life outside of formal political institutions – on the health of the democratic people who make up our body politic. Here it is helpful to consider how some of the nation’s most perceptive democratic thinkers – particularly those who pondered the American political experiment in its earliest years – understood the foundations of representative self-government. At the Founding, commentators stressed time and again that republican political institutions could not stand alone; they could not endure unless Americans behaved like a republican people.<sup>17</sup> There was no surer way the experiment in republican

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11. *Id.* at 44–45.

12. *Id.* at 49.

13. *Id.* at 46.

14. *Id.*

15. *Id.* at 47.

16. *Id.* at 47–48.

17. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 47–48 (1998). There were several dimensions to this line of thinking. Minimizing inequality was especially important to maintaining the kind of republican society that

self-government would fail than if “the people themselves” (an oft-used phrase)<sup>18</sup> ceased to behave like republicans. As the United States transformed into a democracy in the ensuing decades (at least for white males),<sup>19</sup> the point remained as pertinent as ever. Democracy, as one commentator after another stressed, needed more than democratic institutions and political procedures – it required democratic habits, sensibilities, and commitments. Alexis de Tocqueville famously argued in *Democracy in America* – his penetrating portrait of civil society in Jacksonian America – that democracy was a set of mores – a habit of mind.<sup>20</sup> A democratic people were the foundation of democratic governance. The latter essentially depended on the former.

This was often how the Founding generation talked about the Constitution’s prospects. As numerous defenders of the Constitution insisted during the ratification struggle, the document would only be as strong as the people who breathed life into it.<sup>21</sup> One Maryland author declared, “[T]he freedom of a nation does not so much depend on what a piece of parchment may contain, – as their virtue, – ideas of liberty – and ‘*the sense of the people at large*.’”<sup>22</sup> Noah Webster, that astute cultivator of American culture, added, “[A] paper declaration is a very feeble barrier against the force of national habits, and inclinations.”<sup>23</sup> If “on paper a form is not accommodated to those

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could support republican political institutions. See ERIC NELSON, *THE GREEK TRADITION IN REPUBLICAN THOUGHT* 195–233 (2004); Jonathan Gienapp, *Using Beard to Overcome Beardianism: Charles Beard’s Forgotten Historicism and the Ideas-Interests Dichotomy*, 29 *CONSTITUTIONAL COMMENTARY* 367, 374–79 (2014).

18. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 5–8 (2004).

19. In the early nineteenth century, as more white men came to enjoy greater political rights and exercise greater political power, non-white males were increasingly excluded from political life, creating something of a Herrenvolk democracy. See GERALD D. LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS’ CONSTITUTION, 1780S-1830S* 6–7, 43–44, 165–77, 221–23 (2019); ROSEMARIE ZAGARRI, *REVOLUTIONARY BACKLASH: WOMEN AND POLITICS IN THE EARLY REPUBLIC* 164–73, 179–80 (2007).

20. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Isaac Kramnick ed., 2003). On the importance of the concept of civil society in the early United States, see generally JOHN L. BROOKE, *COLUMBIA RISING: CIVIL LIFE ON THE UPPER HUDSON FROM THE REVOLUTION TO THE AGE OF JACKSON* (2010).

21. GIENAPP, *supra* note 7, at 104–07.

22. *Uncus*, MD J., Nov. 9, 1787, reprinted in 14 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE, VOLUME 2*, at 76, 81 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

23. Giles Hickory III, *Government*, AM. MAG., Feb. 1788, at 140 (author pseudonym for Noah Webster).

habits,” he concluded, “it will assume a new form.”<sup>24</sup> The Founding generation often exhibited a clear sense – in some ways far clearer than many who have inherited their work – of the relationship between constitutional text and structure and the spirit of a people.

Given these assumptions, it was often said that, for the political system to work as envisioned, the people needed to exhibit the necessary civic virtue – that oft-invoked cornerstone of early modern republican thinking.<sup>25</sup> Only a virtuous people, willing to sacrifice private interest in favor of the public good, could sustain a republic.<sup>26</sup> “Virtue,” declared Noah Webster, was “the true, safe, and permanent foundation of a republic.”<sup>27</sup> As the Revolutionary period unfolded, however, and it became clear that this spartan commitment to self-abnegation was too easily ignored in practice, focus shifted to republican education and civic-mindedness.<sup>28</sup> The people might not conquer self-interest or forego the fruits of modern commerce, but they could be knowledgeable. And that would provide the project in republican self-government its necessary foundation, molding the people into, as Benjamin Rush famously suggested, “republican machines.”<sup>29</sup> For as John Adams had written so passionately in 1765 in *A Dissertation on the Canon and Feudal Law*, the “spirit of liberty, without knowledge, would be little better than a brutal rage.”<sup>30</sup>

Few ideas, accordingly, were as frequently extolled in Revolutionary America as that of an informed citizenry.<sup>31</sup> “An ignorant people,” declared Reverend Zabdiel Adams, “will never long live under a free government.”<sup>32</sup> Only if the people were sufficiently educated and knowledgeable was self-government even possible. “I have looked on our present state of liberty as a short-lived possession,” Thomas Jefferson warned, “unless the mass of the

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24. *Id.* at 141.

25. See generally J. G. A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLIC TRADITION* (1975).

26. Wood, *supra* note 17, at 53, 55.

27. Noah Webster, *An Oration on the Anniversary of the Declaration of Independence*, in 2 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805*, at 1220, 1226 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

28. Gordon S. Wood, *THE RADICALISM OF THE AMERICAN REVOLUTION* 232–34 (1992).

29. Benjamin Rush, *A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania; to Which are Added Thoughts upon the Mode of Education, Proper in a Republic* 27 (1786).

30. John Adams, *A Dissertation on the Canon and Feudal Law* (1765), reprinted in *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* 32 (C. Bradley Thompson ed., 2000).

31. See generally Richard D. Brown, *THE STRENGTH OF A PEOPLE: THE IDEA OF AN INFORMED CITIZENRY IN AMERICA, 1650-1870* (1996).

32. Zabdiel Adams, *A Sermon Preached before His Excellency John Hancock, Esq.* 39 (1782).

people could be informed.”<sup>33</sup> Nothing, he argued, opened the door for kings, tyrants, and demagogues more than “if we leave the people in ignorance.”<sup>34</sup>

Given the importance of this aim, it was imperative that knowledge be widely disseminated so that public opinion would be adequately enlightened.<sup>35</sup> “The diffusion of knowledge,” George Clinton declared in his 1792 gubernatorial address to the New York legislature, “is essential to the promotion of virtue and the preservation of liberty.”<sup>36</sup> This became one of the era’s defining refrains. “Let us,” beseeched John Adams, “tenderly and kindly cherish, therefore the means of knowledge. . . Let us dare to read, think, speak and write.”<sup>37</sup> “[L]et every sluice of knowledge be open’d and set a flowing.”<sup>38</sup>

In light of this concern, members of the Founding generation focused, often obsessively, on the importance of public education and related mechanisms that might help circulate knowledge and shape people into capable democratic citizens.<sup>39</sup> They often disagreed over what education ought to look like in practice and failed to realize many of their stated ideals.<sup>40</sup> Yet the importance they attached to education and the energy they poured into devising plans to promote it has rarely been paralleled in American history.

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33. Letter from Thomas Jefferson to Littleton W. Tazewell (Jan. 5, 1805), NATIONAL ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/99-01-02-0958>.

34. Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786), in 10 THE PAPERS OF THOMAS JEFFERSON: 22 JUNE TO 31 DECEMBER 1786, at 243, 245 (Julian P. Boyd ed., 1954).

35. On the emergence of public opinion during this period, *see generally* GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 244–74 (2006); TODD ESTES, THE JAY TREATY DEBATE, PUBLIC OPINION, AND THE EVOLUTION OF AMERICAN POLITICAL CULTURE 1–13, 71–149 (2006); MARK G. SCHMELLER, INVISIBLE SOVEREIGN: IMAGINING PUBLIC OPINION FROM THE REVOLUTION TO RECONSTRUCTION 47–54 (2016).

36. George Clinton, Message to the State Legislature (Jan 5., 1792), in 2 STATE OF NEW YORK: MESSAGES FROM THE GOVERNORS COMPRISING EXECUTIVE COMMUNICATIONS TO THE LEGISLATURE AND OTHER PAPERS RELATING TO LEGISLATION FROM THE ORGANIZATION OF THE FIRST COLONIAL ASSEMBLY IN 1683 TO AND INCLUDING THE YEAR 1906, 319, 321 (Charles Z. Lincoln ed., 1909). *See also* ADAMS, *supra* note 32, at 40 (there was an “infinite necessity of diffusing intelligence among the body of the people”).

37. ADAMS, *supra* note 30, at 32.

38. *Id.* at 34.

39. JOHANN NEEM, DEMOCRACY’S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA 5–60 (2017).

40. MARK BOONSHOFT, ARISTOCRATIC EDUCATION AND THE MAKING OF THE AMERICAN REPUBLIC 1-9 (2020).



Jefferson's radical proposal to provide education at public expense in Virginia (although never fully realized) was the most famous project of its kind.<sup>41</sup> The promotion of a national university – which more broadly embodied the widespread belief that American constitutionalism depended upon the cultivation of certain kinds of attitudes, morals, and manners – was another.<sup>42</sup> “Such a system of education as gives every citizen an opportunity of acquiring knowledge,” Noah Webster announced in 1788, was “the *sine qua non* of the existence of the American republics.”<sup>43</sup> Thus, John Adams insisted, “the Whole People must take upon themselves the Education of the Whole People and must be willing to bear the expences of it.”<sup>44</sup> For decades to come, these calls resounded.<sup>45</sup> “Upon the subject of education,” Abraham Lincoln would declare in 1832 in one of his first public addresses, it was “the most important subject which we as a people can be engaged in.”<sup>46</sup>

Cultivating a democratic people, moreover, was conceived in broad terms. Promoting civic education, establishing schools, nourishing virtue, ensuring that the populace was well-informed – these were all means of forging citizens and opening their eyes to the *collective* project of self-governance in which they were engaged with others. Numerous American political writers, consequently, stressed that democracy was far more than crude majoritarianism. No doubt it necessarily presupposed “the majority principle,”<sup>47</sup> but it could not wholly rest on it. Democracy also had to be understood as a set of ethics – a way of relating to one's fellow citizens and participating in the project of collective self-governance.

The themes of social benevolence and mutuality pervaded the first century of American democratic writing. Walt Whitman, among America's greatest democratic poets, in the closing decades of the nineteenth century insisted that democracy was more than “individualism” translated into political practice.<sup>48</sup> “[T]he people of our land . . . may all possess the right to vote – and yet,” he asked, “the main things may be entirely lacking?” That was because democracy ultimately required, he wrote, “adhesiveness or love, that fuses, ties and aggregates, making the races comrades, and fraternizing

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41. ALAN TAYLOR, *THOMAS JEFFERSON'S EDUCATION* 161–91 (2019).

42. GEORGE THOMAS, *THE FOUNDERS AND THE IDEA OF A NATIONAL UNIVERSITY: CONSTITUTING THE AMERICAN MIND* (2015).

43. NOAH WEBSTER, *A COLLECTION OF ESSAYS AND FUGITIVE WRITINGS ON MORAL, HISTORICAL, POLITICAL AND LITERARY SUBJECTS* 24 (1790).

44. Letter from John Adams to John Jebb (Sept. 10, 1785), in *17 THE ADAMS PAPERS* 424 (Gregg L. Lint et al. eds., 2014).

45. See generally BROWN, *supra* note 31.

46. Abraham Lincoln, *Communication to the People of Sangamo County* (Mar. 9, 1832), in *1 COLLECTED WORKS OF ABRAHAM LINCOLN* 8 (Roy P. Basler ed., 1953).

47. Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861), in *4 COLLECTED WORKS OF ABRAHAM LINCOLN* 268 (Roy P. Basler ed., 1953).

48. Walt Whitman, *Democratic Vistas*, in *WHITMAN, COMPLETE POETRY AND COLLECTIVE PROSE* (1982).

all.”<sup>49</sup> Abraham Lincoln poignantly gestured toward a related set of motifs to close his First Inaugural Address,

Though passion may have strained, it must not break our bonds of affection. The mystic cords of memory, stretching from every battlefield, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.<sup>50</sup>

In this vein, James Madison, James Wilson, John Quincy Adams, Ralph Waldo Emerson, Lydia Maria Child, Henry David Thoreau, Margaret Fuller, Calvin Colton, Frederick Douglass, John Stuart Mill, Whitman, Lincoln, and so many others stressed that self-government withered when individuals “retreat to unexamined willfulness” – when they internalized a sense that might alone made right.<sup>51</sup> They each gave voice to the idea that democracy required what James Kloppenberg has called the “ethic of reciprocity” – a willingness to acknowledge the legitimacy of other citizens’ aspirations, especially those with whom you disagree.<sup>52</sup>

What, for instance, made antebellum slaveholders so threatening in the eyes of northerners, what made them the “Slave Power,” as they came to be called in the years preceding civil war,<sup>53</sup> was their rank refusal to behave as democrats. Drawing on the tyranny they practiced at home, slaveholders thought politics was nothing more than an expression of naked political will, an arena for maximizing their peculiar interests at the expense of other members of the polity.<sup>54</sup> When Abraham Lincoln was elected in 1860, the fact that white southerners chose the power play of secession rather than acquiesce to the democratic will of the nation confirmed the mortal threat they posed to the very idea of “government of the people, by the people, for the people.”<sup>55</sup>

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49. *Id.*

50. Abraham Lincoln, *supra* note 47, at 271.

51. JAMES T. KLOPPENBERG, *TOWARD DEMOCRACY: THE STRUGGLE FOR SELF-RULE IN EUROPEAN AND AMERICAN THOUGHT* quote 708, 605–11, 633–47, 705–08 (2016).

52. *Id.* at 6, 10–11.

53. WILLIAM E. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY, 1852-1856* 357–65 (1987).

54. *Id.*

55. Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg* (Nov. 19, 1863), in 7 *COLLECTED WORKS OF ABRAHAM LINCOLN* 23 (Roy P. Basler ed., 1953).

Building on this notion of democratic life and ethics, in the early twentieth century the Pragmatist philosopher and democratic theorist John Dewey contended that democracy was effectively an epistemic sensibility: a rejection of dogma and an embrace of fallibilism.<sup>56</sup> “Democracy is a way of life,” he famously wrote.<sup>57</sup> And “as compared with other ways of life is the sole way of living which believes wholeheartedly in the process of experience as end and as means.”<sup>58</sup> Democracy was self-government through-and-through. It was not pointed toward a higher transcendent aim, nor could it be redeemed by a higher transcendent authority. It demanded “faith . . . in the role of consultation, of conference, of persuasion, of discussion,” because self-government rested on faith in the capacities of fellow citizens.<sup>59</sup> It was, therefore, as much process as end. It was “an ethical conception, and upon its ethical significance,” Dewey argued, “is based its significance as governmental. Democracy is a form of government only because it is a form of moral and spiritual association.”<sup>60</sup> Democracy was not found “in counting the votes to see where the majority is formed. It is in the process by which the majority is formed.”<sup>61</sup> Later in the century, Richard Rorty amplified and expanded upon this Pragmatist defense of democracy, claiming that a spirit of unceasing, open inquiry could help lay the groundwork for new kinds of solidarities – in which a people slowly broadened its capacity to recognize the dignity of others.<sup>62</sup>

According to these various theorists of American democracy, from the Founding to the present, the health of a democratic culture could be measured by how readily it exhibited the various traits and habits thus far identified. A democracy was healthy when its people were educated and informed, when they recognized that democracy was a sensibility and an ethos more than an exercise of power or will, when they recognized the inherent fallibilism of human beings, when they acknowledged a shared reality from which common conversation became possible, and when they redeemed faith in one another through collective commitment to a common project.

Which brings us back to the present. It goes without saying, I think, that by these standards we are in a period of not only constitutional rot, but democratic rot. As is reinforced on almost a daily basis, the citizenry is not informed in any of the ways that it needs to be – an ignorance that is

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56. See generally LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* (2001); RICHARD BERNSTEIN, *THE PRAGMATIC TURN* 70–88 (2010).

57. John Dewey, *Creative Democracy—The Task Before Us*, in 14 *THE LATER WORKS OF JOHN DEWEY* 226 (Jo Ann Boydston, R. W. Sleeper, & Anne Sharpe eds., 2008).

58. *Id.* at 229.

59. *Id.* at 227.

60. John Dewey, *The Ethics of Democracy*, in 1 *THE EARLY WORKS OF JOHN DEWEY* 240 (Jo Ann Boydston ed., 2008).

61. *Id.* at 234.

62. See generally RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* (1999).

perpetuated and entrenched by pernicious information ecosystems that have destroyed any semblance of shared reality or facts (something Balkin identifies and emphasizes,<sup>63</sup> but could stress even more than he does). Meanwhile, deliberation and reciprocity are increasingly unheard of. In the hands of bad-faith actors, disproportionately drawn from certain political corners, politics has become a pure struggle of might – the precise unexamined willfulness that Lincoln and Whitman found so disconcerting (and antithetical to democracy). It is difficult to maintain that we (or at least a sufficient number of us) are currently behaving like a democratic people to allow much of anything else in the political system to work.

Is this not arguably the root cause of so much of our misery? If, as so many of our democratic political theorists have previously stressed, our institutions are nothing more than a mirror of ourselves – a reflection of who we, the people, truly are – and the democratic culture that we embody, then it might just be that polarization, corruption, and the collapse of political trust are more epiphenomenal than foundational. Perhaps even the structural inequities built into the Electoral College and the Senate or rampant partisan gerrymandering, never mind yawning wealth inequality, while no doubt exacerbating all of our problems, are not quite the root cause they sometimes are taken to be.

These other factors should not be diminished, particularly those that have made possible minoritarian rule in the modern United States. And before we are treated to yet another lesson on the perils of liberty under majoritarianism dressed up in the authority of the Founders,<sup>64</sup> it should be stressed that the thoughtful meditations of James Madison and others on the potential tyranny of the majority in republican government and the need for institutional checks does not explain why state legislatures have gerrymandered congressional districts to ensure that their party holds a massively disproportionate number of congressional seats relative to their electoral support in the state,<sup>65</sup> or why almost all states allocate presidential electors on a winner-take-all model.<sup>66</sup>

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63. BALKIN, *supra* note 1, at 49, 60–62, 119–22.

64. See, e.g., Mike Lee, *Of Course We're Not a Democracy* (Oct. 20, 2020), FIRST THINGS, <https://www.firstthings.com/web-exclusives/2020/10/of-course-were-not-a-democracy> [<https://perma.cc/5E92-BSP4>].

65. See Laura Royden & Michael Li, *Extreme Maps*, BRENNAN CENTER FOR JUSTICE: TWENTY YEARS (2016), <https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%2005.16.pdf> [<https://perma.cc/S6PR-59VD>].

66. See ALEXANDER KEYSSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* 27–60 (2020) (on the partisan origins of winner-take-all distribution of state electoral votes).

The two have nothing to do with one another.<sup>67</sup> That the naked promotion of political interest at the local level (what Madison and so many American framers openly reviled)<sup>68</sup> has been twisted into Madisonian principle, is yet further evidence of how deep the rot runs.

So, make no mistake about it, these modern anti-majoritarian entrenchments are contributing to our rot. Abraham Lincoln was surely right when he asserted that “the rule of a minority, as a permanent arrangement, is wholly inadmissible.”<sup>69</sup> That said, it is worth asking if our extra-institutional political culture, shaped by our various information ecosystems and practices of public pedagogy, is not the even deeper cause of our misery.

However far we choose to extend the argument, it seems clear that our democratic culture is rotten – and that it is a key driver of constitutional rot. We might even add that a decay in democratic culture is the most debilitating condition of all and the hardest to break. If so, there might be greater cause for pessimism than we would like to believe.

### III. DEMOCRATIC SHOCKS

Which brings me to my second main point: that it might be harder to get out of a condition of rot than Balkin suggests. Here history is, once again, a helpful, if sobering, guide. I wholly agree with Balkin that the two best examples of past constitutional rot in the United States are the 1850s and the Gilded Age – and that each presents alarming parallels to our current predicament.<sup>70</sup> But I wonder about Balkin’s explanation for how Americans emerged from these rotten states: that the cycles pulled them out. Inequality and polarization, he suggests, helped create new political coalitions that were more responsive to the population’s needs, which, in turn, helped depolarize the nation’s politics.<sup>71</sup> I would suggest, in contrast, that it was not the cycles of constitutional time, but rather large shocks – major disruptions to the system itself, outside of the normal cycles – that pulled the nation out of past conditions of rot. In both instances, catastrophic destruction proved necessary.

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67. See Jacob T. Levy, *Democracy for Republicans* (Feb. 20, 2019), NISKANEN CENTER, <https://www.niskanencenter.org/democracy-for-republicans/> [https://perma.cc/9NFN-JREQ]; George Thomas, “*America Is a Republic, Not a Democracy*” *Is a Dangerous – And Wrong – Argument: Enabling Sustained Minority Rule at the National Level is Not a Feature of Our Constitutional Design, But a Perversion of It* (Nov. 2, 2020), THE ATLANTIC, <https://www.theatlantic.com/ideas/archive/2020/11/yes-constitution-democracy/616949/> [https://perma.cc/N9Z6-7Z4Z].

68. JACK N. RAKOVE, *A POLITICIAN THINKING: THE CREATIVE MIND OF JAMES MADISON* 54–95 (2017).

69. Abraham Lincoln, *supra* note 47, at 268.

70. BALKIN, *supra* note 1, at 45.

71. *Id.* at 171–72.

What saved Americans from the extreme polarization, distrust, and oligarchy that marked the 1850s? The Civil War. That cataclysmic shock recalibrated the entire political system. It enabled northern Republicans to rule for the better part of a decade free from the political obstruction of their former antagonists. That, and that alone, enabled them to enact much of the reform that had been stymied just years earlier.<sup>72</sup> It remains a great irony that so much of what has made our Constitution workable in the past century-plus are found in a set of constitutional amendments that never could have been added had the union hung together.<sup>73</sup> Today, much could be changed in our constitutional and political system if once again a portion of the nation that happened to dominate one political coalition departed for a period of time. But therein lies the problem. Constitutionalism did not fix the Constitution – war did. A catastrophic shock.

As for what eventually toppled the Gilded Age regime, once again external shocks seem to have been essential. No doubt reform movements helped.<sup>74</sup> That said, despite deep disgust with the political system, widespread calls for reforms and fundamental change, and a groundswell of democratic activism, nonetheless, as Balkin shows, the Gilded Age regime not only held on to power, but even expanded its grip on authority through the 1920s.<sup>75</sup> Even if the Progressive era ushered in meaningful changes (the significance and sweep of which historians continue to debate), it is assuredly arguable that the regime survived the onslaught.<sup>76</sup>

It would take the triple shocks of two world wars and a global depression (events Balkin first mentions on the penultimate page of his book)<sup>77</sup> to free the nation from this second period of rot and to usher in the New Deal and a new Democratic political majority. Progressive social activism, in many ways, proved insufficient. Progressive social reformers had certainly done the

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72. HEATHER COX RICHARDSON, *THE GREATEST NATION OF THE EARTH: REPUBLICAN ECONOMIC POLICIES DURING THE CIVIL WAR* (1997).

73. This point stands regardless of what is made of the legality of the Reconstruction amendments or what they signal about constitutional change. One these debates, *see* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 *YALE LAW JOURNAL* 2011, 2021 (1999).

74. *See generally* ROBERT PUTNAM, *THE UPSWING: HOW AMERICA CAME TOGETHER A CENTURY AGO AND HOW WE CAN DO IT AGAIN* (2020) (offering a more optimistic take on how the nation emerged from the Gilded Age).

75. BALKIN, *supra* note 1, at 16.

76. David Brian Robertson, *The Progressive Era*, in *THE OXFORD HANDBOOK OF U.S. SOCIAL POLICY* 41–58 (Daniel Béland, Kimberly J. Morgan, & Christopher Howard eds., 2014).

77. BALKIN, *supra* note 1, at 173.

intellectual work. When Franklin Delano Roosevelt and the New Dealers came to power, as Daniel Rodgers has shown, they did not have to search far for well-worked-out social welfare policy proposals.<sup>78</sup> They simply had to pull them off the shelf, where Progressive thinkers, activists, and politicians had left them. From a later perspective, it could be said that these Progressive social reformers ultimately prevailed.<sup>79</sup> But it is one thing to tell that story in a lecture or a book, and quite another to live through it – to endure decades of roadblocks and failure.

Charles Beard was one of those Progressives, and no doubt it was because he lived through a long period of constitutional rot, defined by yawning inequality and failed political reform, that he hashed out his famous (or infamous) thesis on the original Constitution.<sup>80</sup> Why did big business always win in American public life? Why did it have such a stranglehold on the state? Why did it so effectively stifle grassroots reform? Simple, Beard answered, the system had been designed that way.<sup>81</sup> Just as it should not surprise us that Beard's pessimism took shape during a period of rot, it also should not surprise us that the historians and political scientists who finally toppled Beardianism in the academy did so in the decades following World War II.<sup>82</sup> That is, on the other side of the triple shocks that had helped make possible the kinds of social democratic reform that in Beard's own day had been routinely stymied.

For some time, it has been widely believed that the long period that followed the Second World War – that brought us the high-wage, high-benefit, Fordist economy and an era of bipartisanship – represented the normal state of the American political system.<sup>83</sup> But now, ever more commentators are beginning to wonder if this period was not, in fact, the great aberration – a unique byproduct, as Thomas Piketty has argued, of the extraordinary triple shocks of the first half of the twentieth century.<sup>84</sup> As time has passed, perhaps we have returned to the true normal, entering a second Gilded Age, eerily similar to the first. Balkin assuredly acknowledges these problems, but he thinks (or perhaps hopes) that the same cycles that brought us here contain the

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78. DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE*, 437–46 (1998).

79. For such a story, see PUTNAM *supra* note 74.

80. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

81. *Id.*; see also ALAN GIBSON, *UNDERSTANDING THE FOUNDING: THE CRUCIAL QUESTIONS* 19–42 (2010).

82. Alfred F. Young, *American Historians Confront “Transforming Hand of Revolution”*, in ALFRED F. YOUNG & GREGORY H. NOBLES, *WHOSE AMERICAN REVOLUTION WAS IT? HISTORIANS INTERPRET THE FOUNDING* 33–59, 65–75 (2011); ALAN GIBSON, *INTERPRETING THE FOUNDING: GUIDES TO THE ENDURING DEBATES OVER THE ORIGINS AND FOUNDATIONS OF THE AMERICAN REPUBLIC* 7–21 (2009).

83. On how the transformation of the postwar economy remade social ideas, see DANIEL T. RODGERS, *AGE OF FRACTURE* (2011).

84. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2013).

seeds of renewal. It is worth asking if this misses what has actually saved the nation from rot in the past – not the cycles, but a series of dramatic shocks that briefly freed Americans from their grip.

That, however, raises a sobering question: unless there is a genuine shock to the system, how will we find our way out of the current state of rot? It might have been predicted that a global pandemic as devastating and disruptive as the one we are currently enduring would prove to be such a shock, but it does not seem to have had that effect. Perhaps even more recent, unsettling events, like the violent insurrection, conducted on behalf of the sitting president, against the government of the United States, with the aim of subverting democracy and preventing the peaceful transfer of power, could turn out to be the kind of shock that makes a profound difference.<sup>85</sup> It is certainly as pure a manifestation of our constitutional and democratic rot as anything conceivable, short of outright civil war. But, as with the pandemic, early indications are that the Capitol riot will not have this kind of transformative effect – in either direction. Thus far, it has only intensified partisan polarization. And while things have continued to worsen, I still doubt that a civil war is on the horizon – as much as recent events have made the unthinkable seem plausible and as much as the chattering classes enjoy pondering the possibility.<sup>86</sup> Had there not been a civil war in the middle of the nineteenth century, it is easy to imagine the nation lurching from one bitter, polarizing controversy to the next, unable to forge any lasting compromise, or reform the underlying problems – stuck in a debilitating cycle of rot and decay. Today, the cycles continue to turn. But without a massive shock to the system, will it be enough?

#### IV. CONCLUSION: DEMOCRATIC HOPE

Perhaps, then, Balkin's constitutional cycles have limits – limits that consideration of our rotten democratic culture and past reliance on external shocks might expose. To end on a more positive note, however, what I do know is that democracy is premised on hope.<sup>87</sup> Every one of our great

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85. *America's Friends and Foes Express Horror as Capitol Attack "Shakes the World,"* The NEW YORK TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/world/europe/trump-capitol-2020-election-mob.html> [<https://perma.cc/3TV8-BJ2C>].

86. See Greg Jaffe & Jenna Johnson, *In America, Talk Turns to Something Not Spoken of for 150 Years: Civil War*, (Mar. 2, 2019), WASH. POST, [https://www.washingtonpost.com/politics/in-america-talk-turns-to-something-unspeakable-for-150-years-civil-war/2019/02/28/b3733af8-3ae4-11e9-a2cd-307b06d0257b\\_story.html](https://www.washingtonpost.com/politics/in-america-talk-turns-to-something-unspeakable-for-150-years-civil-war/2019/02/28/b3733af8-3ae4-11e9-a2cd-307b06d0257b_story.html) [<https://perma.cc/8SZD-XP5D>].

87. See RORTY, *supra* note 62.



democratic theorists have been optimists – great believers that things can get better; that our faith in self-government can be redeemed. Our democratic culture is suffering – but nothing is more certain to kill it than cynicism. So however persuasive Balkin’s arguments ultimately are (and, make no mistake, on balance they are deeply persuasive), the act of writing this book is unquestionably a deed of high citizenship. We all need a bit of Jack Balkin in our lives, reminding us that, as bad as things are, they can get better. Just as long as we are willing to hope.