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Cock-eyed Optimist Meets Chicken Little: Jack Balkin on the American Future*

Sanford Levinson **

Given that we are close friends and the co-authors of some twenty articles and a book, *Democracy and Dysfunction*,¹ it is not surprising that I think very highly of and agree with much of Jack Balkin's new book, *The Cycles of Constitutional Time*.² I read it in two sittings; it is a real page-turner, written with brio as Jack presents a remarkably comprehensive overview of what he discerns as various cycles in American politics (importantly including the Supreme Court and the development of constitutional doctrine) from the beginning of the new national government in 1789 to the present.³ It is a book to be savored and studied, particularly with regard to the interplay of his three analytically separable cycles, dealing, respectively, with the developments of the party system that structures so much of our politics; polarization; and the role played by the federal judiciary – or, more particularly, the Supreme Court – in trying to adjudicate or control some of the implications of the first two. It is also, inevitably, a book to argue with.

For me, the central question is whether Jack ultimately has a tragic or a comic view of our constitutional saga. Will there be bodies strewn all over the stage at the end of the play, or will there be whatever might be the modern equivalent of a “constitutional marriage,” with smiles all around and stories

* This was originally drafted for a symposium on Balkinization on Jack's book, <https://balkin.blogspot.com/2020/09/cock-eyed-optimist-meets-chicken-little.html>. I have revised it a bit, in part to take account of the obvious fact that an election intervened between the symposium in September 2020, and the truly wonderful symposium on the book that took place, albeit virtually, at the University of Missouri School of Law on November 12-13. And, as these final revisions are being written on January 6, 2021, it is impossible not to take account of what occurred following the New Year, including the election in Georgia. I am extremely grateful to Paul Litton and others who organized the symposium and provided gracious Zoom hospitality on the occasion, as well as to the editors of the *Missouri Law Review* for making sure that the collective comments will be available in this one place.

** W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin

1. SANFORD LEVINSON & JACK M. BALKIN, *DEMOCRACY AND DYSFUNCTION* (2019); JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2020).

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

3. *Id.*

as to how the now-happy country surmounted a variety of challenges and travails to achieve their happy ending? Jack, I believe, has an ultimately comedic view. He forthrightly states, both at the beginning of the book and again at the end, that for all of the justified depression we might feel at the present moment about the health of our constitutional order – during which, for example, I have posted suggestions that the preferable alternative to the incipient civil war is peaceful dissolution of the United States – it is ultimately only the darkness before a brighter dawn.⁴ It might take quite a while for us to dig our way out of the multiple problems facing us today – including what I regard his most important analytical contribution, the notion of “constitutional rot” (about which more anon) – but do not lose hope. Thus, the concluding words of the book:

The problems of American democracy will not be cured overnight, or even in a decade. Constitutional rot is a stubborn condition; emerging from it will be a painful process. The good news is that the cycles of constitutional time are slowly turning. Politics is re-forming. The elements of renewal are available to us, if we have the courage to use them.⁵

From the moment that Professor Litton introduced Jack at the *Missouri Law Review* symposium, a great deal of emphasis was placed on the “hope” he articulated and, therefore, engendered in his sympathetic readers. Perhaps this was more true if one read it before the election, when it appeared – and I think Jack himself anticipated – a resounding repudiation not only of Donald J. Trump, which one can argue did in fact happen, but also of the contemporary Republican Party that had acquiesced in its service as Trump’s enablers. If one wishes to be even harsher, many of his Republican supporters might well have been described, in Lenin’s term, as as “useful idiots” willing to contribute their stature to endorsing modes of political conduct that one suspected they had qualms about, or even detested, in private.

The latter repudiation did not occur. Quite remarkably, Republicans picked up seats in the House of Representatives, leaving Nancy Pelosi with the smallest majority of any recent Speaker.⁶ And Republicans, even after Georgia’s remarkable election on January 5, 2021, retain half the seats in the Senate, losing their majority only because Vice President Harris will be spending far more time at the Capitol than she probably envisioned in order

4. *Id.* at 65, 173.

5. *Id.* at 174.

6. Allan Smith, *Pelosi Wins Re-Election as House Speaker with Slim Majority*, NBC NEWS (Jan. 3, 2021, 10:43 AM), <https://www.nbcnews.com/politics/congress/pelosi-readies-speaker-vote-new-congress-sworn-n1252688> [<https://perma.cc/9SUT-XNYU>].

to break tie votes.⁷ Moreover, former University of Missouri School of Law Professor Josh Hawley, a product of Stanford and the Yale Law School, has lent himself to collaborating with Trump's most demagogic and anti-democratic (and not only anti-Democratic) fantasies about non-existent "frauds" that deprived Trump of the majority support he delusionally believes was his.⁸ As the *Kansas City Star* has written, Hawley has "blood on his hands"⁹ with regard to his de facto legitimation of the attempted coup that occurred at the Capitol on January 6, 2021. That he surely did not "intend" those events is equivalent to the claim of a callow child whose playing with matches set off a forest fire. And even though Mitch McConnell will become the Minority Leader in the Senate on January 20, when Harris takes office, he will, unless Democrats actually abolish the filibuster on all legislation, be able to stymie President Biden in much the same way that he did, even without a Senate majority, during most of President Obama's tenure in office.¹⁰ One reason that the filibuster, even if somewhat modified, may survive, in addition to West Virginia Senator Joe Manchin's opposition to eliminating it, is that it is not clear that Biden, nostalgic for a Senate that no longer exists, would support such a clearly polarizing decision. Still, even if Jack is somewhat chastened, he does remain the optimist, apparently full of faith that the United States will pull out of its Trumpian tailspin.

I am less optimistic. Within our partnership, which has been central to my intellectual life for at least three decades, I suppose I have become Chickety Little to his sometimes cockeyed optimist. So my contribution to this symposium, beyond urging everyone to read and grapple with Jack's interesting and fully accessible meditation on the past and current state of American politics, is to cast some doubt on his relative optimism. I was skeptical prior to the election; I am even more so now, whatever my elation that Donald J. Trump is out of office and Mitch McConnell relegated to being only the Minority Leader.

Given Jack's time horizon, he is not really trying to reassure me that things will necessarily get better in *my* lifetime, as I am completing my eighth decade of life. Rather, his reassurance is that my children and, more certainly,

7. *Id.*

8. Dan Zak, *What Does Josh Hawley Think He's Doing?*, THE WASHINGTON POST (Jan. 17, 2021, 5:00 AM) https://www.washingtonpost.com/lifestyle/style/josh-hawley-missouri-senator-trump-election-fraud/2021/01/16/2fed38a6-55e4-11eb-a817-e5e7f8a406d6_story.html [<https://perma.cc/4GPY-TJGJ>].

9. *Assault on Democracy: Sen. Josh Hawley Has Blood on His Hands in Capitol Coup Attempt*, THE KANSAS CITY STAR (Jan. 6, 2021), <https://www.kansascity.com/opinion/editorials/article248317375.html>.

10. David Horsey, *Georgia On Our Minds*, THE SEATTLE TIMES (Dec. 23, 2020, 8:57 AM), <https://www.seattletimes.com/opinion/georgia-on-our-minds/> [<https://perma.cc/2YZU-BCK7>].

my grandchildren may have reason to look forward to sunnier futures (defined, among other ways, by the return to more-or-less hegemonic power, for at least a while, of the Democratic Party). For obvious reasons, I hope that I am wrong and Jack is right. However, I am not convinced and will not be so even after Joe Biden takes the oath of office.¹¹ Even if, as now (August, 2021) appears to be the case, he is willing to think boldly and even “transformatively,” will he take the lead in suggesting that we need a long-overdue national conversation about constitutional reform if we are serious about curing our “rot”? The answer, I am afraid, is no. Even if Biden is truly audacious in terms of policy proposals, he would still need to confront the extent to which we are all imprisoned in an iron cage, constructed by the Framers of 1787, from which we desperately need to escape.

So let’s talk about “rot.” What is it? “It is,” says Jack, “the decay of the features of a constitutional system that maintain it both as a democracy and as republic.”¹² A “democracy” presumably is defined by the degree to which it reflects the actual preferences of the demos, sometimes with reference to the “median voter.”¹³ When a system in fact systematically honors the preferences of others, who will invariably be only a minority of the overall public, it is not a “democracy.” And Jack presents good reason to believe that we are indeed in such a situation. We live far more in an “oligarchy,” where money not only talks but screams with delight as the wishes of the donor class are translated into concrete political victories.¹⁴ This is especially notable in Republican administrations, as with the obscenity of the Trump “tax cut,”¹⁵ but also, if truth be known, in the more-or-less “neo-liberal” administrations of both Bill Clinton and Barack Obama – where the well-off became even better off, even if there were also some efforts, as with the Earned Income Tax

11. I am making my final editorial corrections on August 15, 2021, at which time Joseph Biden has been in office for more than six months. To be sure, I am pleasantly surprised by the early days of the Biden Administration and his apparent willingness to “think big.” But, to put it mildly, it is still altogether unclear that Congress will be able (and willing) to pass any bold legislation that does not fit within the constraints of the byzantine “reconciliation” process, including, for example, any pre-emption of egregious efforts to suppress votes in the 2022 election and thereafter.

12. BALKIN, *supra* note 2, at 44.

13. H. Clay Jent, *Demos Kratos: Democracy, Old and New*, THE SOCIAL STUDIES 58, 242 (2015).

14. An oligarchy is a government by the few, in which a small group exercises control especially for corrupt and selfish purposes. “Oligarchy.” MERRIAM-WEBSTER ONLINE DICTIONARY (Feb. 2, 2021), <https://www.merriam-webster.com/dictionary/oligarchy> [<https://perma.cc/6GUW-BD3J>].

15. Kimberly Amadeo, *Trump’s Tax Plan and How It Affects You*, THE BALANCE (Oct. 22, 2020), <https://www.thebalance.com/trump-s-tax-plan-how-it-affects-you-4113968> [<https://perma.cc/D5CM-KUS5>].

Credit or Obamacare,¹⁶ to pay at least some attention to the plight of those seen by Mitt Romney in 2012 as “the takers” rather than the “makers” who deserved to hoard any economic gains. Of course, there is the reality that the Constitution was designed by people who were profoundly antagonistic to the notion of “democracy”; that would require some genuine faith in the capacity of ordinary people to engage in what *Federalist* No. 1 described as “reflection and choice” about how we should in fact be governed.¹⁷ Inasmuch as the Framers did whatever they could to assure that we would live within the confines of a significantly “undemocratic Constitution,” it is not clear what it means to say that our present situation represents a “decay” rather than, for some at least, the realization of their hopes.

After all, *Federalist* No. 63, written by Madison, goes out of its way to note with pride that a Constitution ordained in the name of “We the People” in fact deprived the actual public of any direct role whatsoever in their governance.¹⁸ *Everything* would in fact be done by ostensible “representatives” of the public – some directly elected, as with the House of Representatives (though with a quite truncated electorate, of course), and some indirectly so, as with the original members of the Senate until the passage of the 17th Amendment in 1913, and, notoriously, the President of the United States, selected through the mechanism of the truly egregious electoral college. Moreover, in *Federalist* No. 78, beloved by most lawyers because it is a defense of the importance of the Supreme Court in maintaining the rule of law, Hamilton’s chief worry, regarding what we might be tempted to call a “discrete and insular minority,” is the fate of the eighteenth century version of the well-off, whether one percent or even the top ten percent.¹⁹ The point is that they would be fearful of the redistributive inclinations of the hefty remainder of the public.

There are always more have-nots than haves in any political order. At times, there has been a welcome development of a strong middle class and diminution of plutocratic power. But, as Jack so well notes, there is nothing inevitable about that. He argues convincingly that we are currently living through a second Gilded Age – the first occurred after the failure of the “new birth of freedom” promised by Lincoln in the Gettysburg Address – featuring the same kinds of grotesque economic inequalities and the successful capture of our formal political system by a rapacious economic class devoted to enhancing its class privileges.²⁰ But Jack is also concerned about the health

16. *Tax Policy Center Briefing Book: Key Elements of the U.S. Tax System*, TAX POLICY CENTER, 2020, <https://www.taxpolicycenter.org/briefing-book/what-earned-income-tax-credit> [<https://perma.cc/5DMS-PF8R>].

17. THE FEDERALIST NO. 1 (Alexander Hamilton).

18. THE FEDERALIST NO. 63 (James Madison).

19. THE FEDERALIST NO. 78 (Alexander Hamilton).

20. BALKIN, *supra* note 2, at 45.

of what the Constitution specifies as our “Republican Form of Government.” What does this mean? “A republic,” he writes, “is more than a representative form of government. It is a joint enterprise by citizens and their representatives to pursue and promote the public good.”²¹ It requires an internal set of dispositions, where people are genuinely willing and able to subordinate their self-interest to pursuit instead of “the public good.” One is reminded of seventeenth-century voters’ oaths, where the members of the community pledged to think only of what would be best for the community at large rather than their own particular interests. This is the deep meaning of the fact, for example, that four of the American states – Massachusetts, Virginia, Pennsylvania, and Kentucky (originally, of course, part of Virginia) – styled themselves as “commonwealths,” i.e., communities organized around the seeking of a common good.²² Constitutional rot occurs when “public servants are increasingly diverted into the pursuit of their own wealth, or when they are increasingly diverted into serving the interest of a relatively small number of very powerful individuals,”²³ as against being committed to “the public good.”

In my book *Framed*, I delineated what I called the “Madisonian anxiety,” spelled out most clearly in the famed *Federalist* No. 10, where Madison acknowledged, as the Protestant he was, that we are all ineluctably selfish and thus prone to prefer our own interests, whether economic gain or the triumph of our own religious sectarianism over those who are classified as “heretics” or otherwise “ungodly.”²⁴ Was there a solution? Is a “republican” society – organized around the quest for a common good that will be sought by suitably socialized citizens – destined to become a distinctly more “liberal” order that accepts the priority of individual interests and the psychology associated with self-seeking? In an exchange with Professor Bowman following my presentation, I suggested that one important form of what might be described as “legal liberalism” is that set out by Oliver Wendell Holmes in his conceptualization of actual persons as completely egoistic “bad men” concerned only with maximizing individual utilities.²⁵ To be sure, one can read him only as offering a useful heuristic for defining the nature of a legal system, but I think it is also the case that Holmes’s suggestion has become part and parcel of the legal culture as transmitted in our law schools, where

21. *Id.* at 44.

22. “Commonwealth.” MERRIAM-WEBSTER ONLINE DICTIONARY (Feb. 5, 2021), <https://www.merriam-webster.com/dictionary/commonwealth> [<https://perma.cc/577K-4W66>].

23. BALKIN, *supra* note 2, at 45.

24. SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012); *THE FEDERALIST* NO. 10 (James Madison).

25. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

students are invited to think of their clients as trying to maximize their own interests and the lawyer as having a concomitant duty to provide “zealous representation” on their behalf. And I suspect this is especially true as one moves away from small towns and genuinely personal lawyering into the world of large law firms and younger lawyers who are likely never in fact to meet individual clients.

In any event, I read Madison as offering the quite implausible hope that the new Constitution can endure as a “republican” order by limiting the power of “we the people” and hoping for rule by virtuous political elites. In the Madisonian vision, one way of identifying these elites, presumably, is through their willingness to be independent of factional party interests. Why should one expect this to alleviate Madison’s anxiety? It is because, for reasons left almost completely unexplained, he believes that voters for, say, the House of Representatives – the one branch of the national government in which “the people” will play any role at all – will vote for enlightened elites who will use their powers *not* to pursue the interests of their selfish constituents, but rather to achieve the “public good.” The Senate, of course, was to be selected by state legislatures, and the president by electors who, we were solemnly promised in *Federalist* No. 68, would protect us against demagogues by using their discretion to select only truly trustworthy leaders.²⁶ (The Supreme Court, of course, paid absolutely no attention to Hamilton’s assurances in deciding in July of 2020 that electors could actually be turned into mindless minions of whoever voted them into office, the one example at the national level of fully “instructed” delegates instead of at least partial “trustees” for the public good.)

For better or worse, though, the Madisonian hope empirically failed only shortly after the Constitution went into operation with Washington’s inauguration in 1789.²⁷ The only debate among serious historians is whether the American party system had developed by 1795 and the presidential election of 1796, or whether it took until the extraordinarily bitter election of 1800 and near-civil war when Federalists were tempted to deny the presidency to Thomas Jefferson as a result of the tie vote between Jefferson and Aaron Burr, his ostensible running mate.²⁸ No one could seriously believe that either political parties or polarization are a development only in our own times. The more serious problem, in a way, altogether relevant to Jack’s really fine book, is our difficulty today in supplying any convincing meaning to the term “public good” (save in the economists’ sense of a particular kind of good that cannot in fact be distributed through a market price because there is no way

26 .THE FEDERALIST NO. 68 (Alexander Hamilton).

27. George Washington’s First Inaugural Address (April 30, 1789).

28. THE AMERICAN PRESIDENCY PROJECT,
<https://www.presidency.ucsb.edu/statistics/elections/1800> [<https://perma.cc/B592-JVNF>].

to limit beneficiaries of, say, a dam or a national defense system only to those who pay a relevant fee).

The Democratic Party in particular has been based for at least the past seventy-five years on what came to be described as “interest-group liberalism,”²⁹ a collection of groups, sometimes in conflict with one another – the famed “big tent” until the 1960s of white Southern segregationists and urban Black politicians like Adam Clayton Powell – who would, nonetheless, all receive the benefits accruing from various “tax and spend” programs endorsed by the New Deal and Democratic presidents who governed in Roosevelt’s wake. In his famed *Preface to Democratic Theory*, the great political scientist Robert Dahl ridiculed the notion of a public interest, replacing it by drawing our attention to the fact that any political party is necessarily an uneasy coalition of groups pursuing their own often conflicting notions of welfare.³⁰ Perhaps if one shares the optimism of Bernard Mandeville’s *Fable of the Bees* or Adam Smith’s notion of “the invisible hand,” then it will turn out, as Mandeville famously asserted, that out of the pursuit of private vice will magically emerge “the public benefit.”³¹ To put it mildly, I doubt that many of Jack’s likely readers, whether democrats or Democrats, are so optimistic today. And by the end of his life, Dahl himself had repudiated much of the relative optimism of his earlier vision of a benignly pluralistic polity. Indeed, toward the end of his life, he authored *How Democratic is the American Constitution?*³² And the answer was, most certainly, that it was insufficiently so, to the detriment of our actual polity. Much earlier, at the end of the 1960s, Cornell political scientist Ted Lowi had published *The End of Liberalism*,³³ where he castigated the shallow political theory underlying interest group liberalism, not least because it appeared to rely for implementation on open-ended delegation to the executive branch. Craven legislators could tell their constituents that they had supported programs in their interest while at the same time leaving it up to more-or-less unaccountable administrators to make the genuine discretionary decisions that could literally determine, on occasion, who shall live and who shall die. He suggested that we had transitioned to a distinctly different form

29. Theodore J. Lowi, *The Public Philosophy: Interest-Group Liberalism*, AMERICAN POLITICAL SCIENCE REVIEW 5, 18 (1967).

30. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

31. BERNARD MANDEVILLE, THE FABLE OF THE BEES: OR, PRIVATE VICICES, PUBLIC BENEFITS (1988); Emma Rothschild, *Adam Smith and the Invisible Hand*, AMERICAN ECONOMIC ASSOCIATION, May 1994, 319.

32. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2002)

33. THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (1979).

of “republic,” and he was not happy about it.³⁴ But both mainstream political science and legal academics agreed that almost nothing useful could actually be said about what governance in “the public good” might actually look like. Or, should we seek guidance, some legal academics suggested it would come from the collective wisdom of the Warren Court. Even Alexander Bickel, before he lost his faith in the judiciary, commended the judiciary as the privileged enunciator of our “fundamental values” and, therefore, what presumably united us as a singular people with certain transcendent commitments.³⁵ Jack does not appear to accept such an exalted view of the Court or of those who serve on it.

An exceptionally interesting chapter, about the cycles of judicial time, draws a clear contrast between the relative “depolarization” that existed in the otherwise disorderly 1960s and the belief, now regarded as near-delusionary, that elite lawyers and judges, especially if trained in the “legal process” school of Henry Hart and Albert Sachs and exported to Yale by Bickel, could achieve “settlement” of the issues that might otherwise appear to be insoluble, including race relations (see *Brown*)³⁶ or what exactly “representative government” might really entail (see *Baker v. Carr*³⁷ and then *Reynolds v. Sims*³⁸).³⁹ And even the sexual revolution could be handled, as with *Griswold* and then *Roe*.⁴⁰ Presumably, serious people – two of them trained at Harvard, the third at Stanford – could write in their plurality opinion in *Casey* (1992) that the function of the Supreme Court was to resolve basic conflicts and the function of the public at large was to accept the Court,⁴¹ in its own words going back to *Cooper v. Aaron* (1958), as the “ultimate interpreter” of the Constitution.⁴² To adopt the language from my book *Constitutional Faith*, the Court presented a “catholic” (note the little-c)

34. *Id.*

35. Alexander M. Bickel, *Toward a Theory of Politics*, THE JOURNAL OF POLITICS, Feb. 1985 at 126–27.

36. See *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (ending the doctrine of “separate but equal” de jure segregation).

37. See *Baker v. Carr*, 369 U.S. 186, 333 (1962).

38. See *Reynolds v. Sims*, 377 U.S. 533, 564–65 (1964).

39. BALKIN, *supra* note 2, at ch. 7.

40. *Roe v. Wade*, 410 U.S. 113 (1973) (identifying a woman’s right to choose an abortion as a fundamental right); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (identifying privacy in marital relations as a fundamental right).

41. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (Kennedy, J. and Souter, J. attended Harvard Law School, O’Connor, J. attended Stanford Law School).

42. *Cooper v. Aaron*, 358 U.S. 1 (1958).

view of itself as the equivalent of the Vatican so far as the Constitution was concerned.⁴³

Today, almost no one takes seriously this self-presentation of the Court, not least because its present majority is truly Catholic – a reality almost literally inconceivable when I was in graduate school many decades ago, having just experienced John Kennedy’s reassuring of a Baptist audience in Houston that his religion was irrelevant to understanding him as a person or political leader (which, perhaps, was empirically correct).⁴⁴ And the Catholic identity of certain justices is not deemed a mere factoid, similar to having been born, as Ruth Ginsburg was, in Brooklyn,⁴⁵ but, rather, genuinely constitutive of how the judges in question look at the world, especially and most obviously with regard to such “culture-war” issues as abortion and the willingness to include non-heterosexuals as full members of the American constitutional community. Justice Antonin Scalia “broke the fourth wall,” as it were, in his angry *Obergefell* dissent when he explicitly noted that the Court did not include a single justice who might be said to represent the strong Evangelical Protestant strain in American society and politics.⁴⁶ (Indeed, most analysts attribute the strength of the Trump coalition to the resentment by this group at their relative exclusion from elite consideration.) If one gives even a scintilla of credence to Scalia’s complaint, then it is at least as fair to note that, for many, the absence of Evangelical justices was more than made up for by the dominating presence of strongly Catholic justices.

But it would be a mistake to reduce the current majority to their religious identities. They are also strongly Republican (capital R), fully committed to the general worldview that was associated at least with the pre-Trump Republican Party. As Jack well notes, every Republican appointee since David Souter – partly as a reaction to the Republican disappointment about Souter’s subsequent career on the Court – has been a strong, “movement” conservative Republican, especially, the Federalist Society- and Heritage Foundation-vetted Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett,

43. SANDFORD LEVINSON, *CONSTITUTIONAL FAITH* 29 (Princeton Univ. Press 1988).

44. John F. Kennedy, Presidential Candidate, Address to the Greater Hous. Ministerial Ass’n (Sept. 12, 1960) (transcript available at <https://www.npr.org/templates/story/story.php?storyId=16920600> [<https://perma.cc/QZV2-P6EW>]).

45. *Biography of Associate Justice Ruth Bader Ginsburg*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographyginsburg.aspx> [<https://perma.cc/6QTG-CV7F>] (last visited Jan. 29, 2021).

46. *Obergefell v. Hodges*, 576 U.S. 644, 717–18 (2015) (Scalia, J., dissenting) (“Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination.”).

added to the Court with unseemly haste just before the election.⁴⁷ And it is fair to say that Biden, should he have the opportunity, will be strongly expected to pick, at least as a successor to the retiring Breyer, strong liberals who might well receive votes only from Democrats, and unanimous opposition from Republicans. The Georgia results make it reasonably likely that Biden will be able to replace Justice Breyer if he behaves responsibly and announces his retirement, subject to the confirmation of a successor, no later than the end of the current Term of Court.⁴⁸ The ruthless dismissal of Merrick Garland's nomination by Mitch McConnell may simply become a precedent for all Supreme Court appointments in the contemporary political world.⁴⁹

The contemporary Court, like the contemporary legal profession and, of course, the country at large, is very much divided into different ideological teams. This is what "polarization," a major theme of the book, is all about.⁵⁰ Devoted partisans of their respective teams believe their opponents are "heretics," willfully rejecting the obviously true doctrines, whether of "originalism" or "living constitutionalism," in favor of trying to impose their narrow "political" objectives. This is to assume the sharp separation of law and politics that Jack rightly ridicules. Instead, I think it is fair to say that, like Mark Tushnet in his own recent book, *Taking Back the*

47. BALKIN, *supra* note 2, at 120; Lawrence Hurley, *Trump's Supreme Court appointee Gorsuch plots rightward course*, REUTERS (Dec. 20, 2017), <https://www.reuters.com/article/us-usa-court-gorsuch/trumps-supreme-court-appointee-gorsuch-plots-rightward-course-idUSKBN1EE0IJ> [<https://perma.cc/M53H-LZEK>]; Lawrence Hurley, *U.S. Justice Kavanaugh upbeat in first major public speech*, REUTERS (Nov. 14, 2019), <https://www.reuters.com/article/us-usa-court-kavanaugh/u-s-justice-kavanaugh-upbeat-in-first-major-public-speech-idUSKBN1XO2WI> [<https://perma.cc/ZU6N-ZSTB>]; Andrew Chung, Lawrence Hurley, *U.S. Supreme Court nominee Barrett has proven steadfastly conservative*, REUTERS, (Oct. 12 2020), <https://www.reuters.com/article/us-usa-court-barrett-profile/u-s-supreme-court-nominee-barrett-has-proven-steadfastly-conservative-idUSKBN26X18I> [<https://perma.cc/G3PE-F5P9>].

48. Rich McKay, Nathan Layne, *Georgia delivers Senate to Democrats with Warnock, Ossoff wins*, REUTERS (Jan. 6, 2021), <https://www.reuters.com/article/us-usa-election-georgia/georgia-delivers-senate-to-democrats-with-warnock-ossoff-wins-idUSKBN29B173> [<https://perma.cc/8QH9-CG3V>]. Needless to say (for readers of this essay), Justice Breyer has resolutely rejected the numerous calls for his resignation and gives every indication that, like Ginsburg before him, he prefers to roll the dice as to whether in fact Mitch McConnell returns to his role as majority leader of the Senate in the 2022 mid-term elections.

49. Lawrence Hurley, *Supreme Court nominee out in cold as election heats up*, REUTERS (July 19, 2016), <https://www.reuters.com/article/us-usa-election-garland/supreme-court-nominee-out-in-cold-as-election-heats-up-idUSKCN0ZZ17L> [<https://perma.cc/LNG7-WN7R>].

50. See BALKIN, *supra* note 2, at 112.

Constitution,⁵¹ Jack does *not* view Republican judges as “heretics,” but, instead, as skilled professionals who happen to have an unfortunate, albeit plausible, view of what the Constitution (or statutory interpretation) means.⁵²

To describe Chief Justice Roberts and his Republican cohort, as I sometimes have done in conversation, as “running dogs of the capitalist empire,” is for better or worse to suggest that they are self-consciously asking what they can do to enhance the powers of capital against, say, consumers injured by corporate malfeasance. However, it is probably more accurate to say simply that they have incorporated into their understanding of what is best for America – and the “true meaning” of the Constitution – Republican nostrums about the glories of the so-called “free market” and concomitant notions of what it means to “secure the blessings of liberty” at the present time. No justices, at either end of the current ideological spectrum, need be viewed as “insincere” in their beliefs about what fidelity to their constitutional oath entails. And nothing is gained by traducing any of them, as Justice Scalia was sometimes prone to do, as not “behaving like judges” because they come to different conclusions as to what the Constitution requires. But such “civility” toward one’s opponents scarcely resolves the political and jurisprudential dilemmas that Jack limns.

In fact, one of the surprising features of the book is his modification of one of the most important of our co-authored essays, a 2001 article in the *Virginia Law Review* in which we tried to explain how “constitutional revolutions” operate.⁵³ In that essay, we proffered the distinction between “high politics” and “low politics.”⁵⁴ We suggested, as had, for example, Felix Frankfurter in an essay in the *International Encyclopedia of the Social Sciences* in the 1930s, that *all* judges (and lawyers), without exception, carried in their heads conceptions of what sorts of policies or approaches to law would in fact best serve “the public good.”⁵⁵ They would, not surprisingly, always interpret any ambiguous laws in ways that would best achieve the results dictated by “high politics.” It would be extraordinary if they did anything else. Why would anyone expect or want them to do so? Perhaps, on occasion, the harsh demands of the text alone would remove any grounds for claiming ambiguity, so that conscientious judges would reluctantly be forced to enforce something that they viewed as at least stupid and even out-and-out evil. But cases, especially that reach the Supreme Court,

51. MARK TUSHNET, *TAKING BACK THE CONSTITUTION*, (Yale Univ. Press, 2020).

52. See BALKIN, *supra* note 2, at 70–74.

53. See J. M. Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1064–65 (2001).

54. *Id.* at 1061–62.

55. *Id.* at 1068; Felix Frankfurter, *Advisory Opinions in 1* ENCYCLOPEDIA OF THE SOC. SCI. 475–78 (Edwin R. A. Seligman et al. eds., 1930).

rarely feature truly unambiguous text, and one would expect “high politics” to play a prominent explanatory role in the decisions actually reached by given justices.

On the other hand, “low politics” was concern for what would serve the interests of a judge’s political party or political associates in the next election. We suggested that “low politics” was rarely present at the level of the Supreme Court, though this probably was not true if one looked at local courts in Chicago, Louisiana, or some other state courts.⁵⁶ Jack now suggests, however, that the distinction might have outlived its use-by date, precisely because it is getting ever more difficult to separate the two realms.⁵⁷ When Chief Justice John Roberts, for example, systematically votes to uphold what Democrats have no trouble defining as “voter suppression” efforts by, say, Alabama (*Shelby County*) or declares that ruthless partisan gerrymanders are non-justiciable (*Rucho*), is he manifesting a “high” political vision or instead serving as an agent of the GOP that placed him in office to do whatever he can to maintain them in power through thick and thin? This does not require that he be consciously thinking of what will serve GOP interests, only that he is, from “our” point of view, recklessly indifferent to the consequences for the American polity of adopting his readings of the Constitution, because, overall, they best fit what we formerly would have described as (only) his “high politics.”

But the crucial problem, as Jack spells out, is that an older generation, influenced by footnote four of *Carolene Products* and culminating in John Hart Ely’s 1980 *Democracy and Distrust*, accepted wide-ranging decision-making powers on the part of legislatures and even executives in return for a promise that the Court would monitor the procedures by which officials were selected.⁵⁸ One should be expected to be a “good loser” in the ordinary political process if, in fact, the process was demonstrably fair (or at least fair enough) to avoid being described, in contemporary parlance, as “rigged.” But recent decisions on campaign finance, gerrymandering, and voter suppression have removed any reason to believe that the American electoral system in fact meets standards of fairness. Perhaps the most truly regrettable reality of the immediate political scene is the baseless charge by a near-sociopathic former president that he did not in fact lose the election, and, even more so, the willingness of Republican officials who should know better, including Missouri’s own senators, to humor him and refuse to acknowledge the completely legitimate coming-to-power of Joseph Biden as the forty-sixth

56. See BALKIN, *supra* note 2, at 1061–62.

57. BALKIN, *supra* note 2, at 125–26.

58. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152–53, n. 4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 (Harvard Univ. Press, 1980).

president.⁵⁹ One can only shudder at what the current polity would look like if 2020 emulated 2000 in having the election come down to an almost literal handful of votes in Florida.⁶⁰ We have been spared that, but it is clear beyond argument that Donald J. Trump is no Al Gore, who was willing to offer an immediate concession after the Supreme Court's decision in *Bush v. Gore* and who, even during the hiatus between election day and December 12, never denounced the election as a whole as being simply a "rigged" enterprise.⁶¹ But no one should believe that the American system of elections is necessarily defensible under twenty-first century notions of democratic theory. The problem is that much of the most important "rigging" took place in 1787.

So there is much of Jack's analysis that I thoroughly agree with. Where we diverge, however, is that I deeply wish, more than ever, that his diagnosis of our "constitutional rot" had included more attention to the Constitution itself. Might *it* be part of the rot, as against the potential cure? For me, that has become a rhetorical question. Whether or not I would emulate William Lloyd Garrison in burning the Constitution, I have certainly stopped venerating it and almost desperately wish that we had a culture willing to engage in what Hamilton, in *Federalist* No. 1, termed "reflection and choice" about the adequacy of the 1787 document.⁶² Jack often writes eloquently of "redeeming" the promises of the Constitution, as set out, most surely, in a Preamble that should indeed continue to speak to us today.⁶³ But for me, "redemption" of those promises requires a wholesale revision of what comes after the Preamble, which may serve to make effectively impossible the realization of the aspirations to, say, "establish justice" or achieve "general welfare."

The closest Jack comes to recognizing this possibility is near the very end of the book, when he acknowledges that the United States Senate is organized in such a way that it places what has become the core Democratic

59. Jason Lange, *Republican senator says he will challenge Biden victory in Congress*, REUTERS (Dec. 30, 2020), <https://www.reuters.com/article/us-usa-election-senate/republican-senator-says-he-will-challenge-biden-victory-in-congress-idUSKBN29424P>; *Biden sworn in as U.S. President*, REUTERS (Jan. 20, 2021), <https://www.reuters.com/article/us-usa-biden-inauguration-oath/biden-sworn-in-as-u-s-president-idUSKBN29P2A3> [<https://perma.cc/M63E-H7UU>].

60. *Bush v. Gore*, 531 U.S. 98, 100–01 (2000).

61. *Id.*; Mario Parker & Colin Keatinge, *Trump Pulls Back From Concession, Tweets Vote Was 'Rigged'*, BLOOMBERG (Nov. 15, 2020), <https://www.bloomberg.com/news/articles/2020-11-15/trump-tweets-that-biden-won-election-says-vote-was-rigged> [<https://perma.cc/VV37-5FT9>].

62. Ronald Osborn, *William Lloyd Garrison and the United States Constitution: The Political Evolution of an American Radical*, 24 J. L. & Religion 65, 83 (2009); THE FEDERALIST NO. 1 (Alexander Hamilton).

63. BALKIN, *supra* note 2, at 6.

constituency at a decided disadvantage.⁶⁴ This means that we may face a future of “only modest, slow change, which will often be frustrating.”⁶⁵ “Obstacles” like the Senate “will make it harder to chip away at the causes of constitutional rot.”⁶⁶ Well, yes. And for me this portends further tragedy and the ever-growing and fully justified disillusionment with the political system foisted on us in 1787. As Erin Delaney noted in her own very acute remarks, within the lifetime of all but the oldest readers of this symposium, approximately seventy percent of the population will be living in no more than fifteen states.⁶⁷ This means, thanks to the Constitution’s text, that the thirty percent living in the remaining thirty-five states (assuming no new states) will have seventy percent of the votes in the Senate, while the overwhelming majority of Americans will have to settle for a thirty percent share. And there is nothing random about the distribution of populations as between the large and smaller population states. The Senate more and more serves as an affirmative action program for older, whiter, more religious, less cosmopolitan, and, of course, rural Americans.

People are literally dying, or faced with the prospect of miserable futures, in part because of the obvious problems with the American political system. At what point will enough people consider what is happening to them a sufficiently “long train of abuses” that they will not simply wait for the happy ending that Jack promises? This is most certainly not to say that I can envision a more plausible comedic ending.

One can understand the pull toward comic rather than tragic endings. *Four Threats: The Recurring Crises of American Democracy*, by Suzanne Mettler and Robert Lieberman, an often brilliant analysis of our current dire situation, also concludes with some hopeful reassurance that all is not lost.⁶⁸ It is certainly reassuring, and even true, to be reminded that “we survived the great pandemic of 1918-1919, various depressions, and two world wars in the

64. *Id.*

65. Erin Delaney, Professor of Law, Northwestern University Pritzker School of Law, Panel One: Constitutional Design at the Missouri Law Review Symposium: A New Hope? An Interdisciplinary Reflection on the Constitution, Politics, and Polarization in Jack Balkin’s “The Cycles of Constitutional Time” (Nov. 12, 2020), <https://law.missouri.edu/faculty/symposia/2020-missouri-law-review-symposium/> [<https://perma.cc/3CTD-ZXEN>].

66. BALKIN, *supra* note 2, at 165.

67. Erin Delaney, Professor of Law, Northwestern University Pritzker School of Law, Panel One: Constitutional Design at the Missouri Law Review Symposium: A New Hope? An Interdisciplinary Reflection on the Constitution, Politics, and Polarization in Jack Balkin’s “The Cycles of Constitutional Time” (Nov. 12, 2020), <https://law.missouri.edu/faculty/symposia/2020-missouri-law-review-symposium/> [<https://perma.cc/3CTD-ZXEN>].

68. SUZANNE METTLER & ROBERT C. LIEBERMAN, *FOUR THREATS: THE RECURRING CRISES OF AMERICAN DEMOCRACY* (St. Martin’s Press, 2020).

20th century,” not to mention a civil war that killed 750,000 persons and blighted the lives of millions of others.⁶⁹ So this, too, will pass. The sky is not really falling or, even if one might be wary at the present moment, it will stop, and our descendants will be able to sing, “Happy Days are Here Again.” I can only say, I hope so, but at this moment I continue to look up at the sky with trepidation. I am inclined to believe Edgar, from Act IV of *King Lear*: “The worst is not / So long as we can say ‘This is the worst.’”⁷⁰

69. *Id.*

70. WILLIAM SHAKESPEARE, *THE TRAGEDY OF KING LEAR* Act IV, Sc.I.