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## Democracy's Discontents

David Bateman

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# DEMOCRACY'S DISCONTENTS

David Bateman\*

KEITH BYBEE, *HOW CIVILITY WORKS* (STANFORD UNIVERSITY PRESS 2016). PP. 88. PAPERBACK \$14.00.

JAMES FISHKIN, *DEMOCRACY WHEN THE PEOPLE ARE THINKING: REVITALIZING OUR POLITICS THROUGH PUBLIC DELIBERATION* (OXFORD UNIVERSITY PRESS 2018). PP. 272. HARDCOVER \$24.95.

SANFORD LEVINSON & JACK M. BALKIN, *DEMOCRACY AND DYSFUNCTION* (UNIVERSITY OF CHICAGO PRESS 2019). PP. 208. HARDCOVER \$75.00. PAPERBACK \$25.00.

JEFFREY K. TULIS & NICOLE MELLOW, *LEGACIES OF LOSING IN AMERICAN POLITICS* (UNIVERSITY OF CHICAGO PRESS 2018). PP. 224. HARDCOVER \$85.00. PAPERBACK \$27.50.

## DEMOCRACY'S NEEDS

What does it take to sustain a democracy?

By democracy, I do not mean the simulacra offered by Joseph Schumpeter, with its reduction of popular voice to a brief choice between pre-defined alternatives.<sup>1</sup> I mean something closer to what Robert Dahl called “polyarchy,” a regime whose institutions and procedures are intended to secure “continuing responsiveness . . . to the preferences of its citizens, considered as political equals.”<sup>2</sup> Many of us might want to go even further, and ask what it takes to sustain a regime in which the people are regularly engaged in deliberating and making authoritative decisions on public issues.

Any persuasive answer will surely stress the importance of institutions. The dangers

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\*David Alexander Bateman is assistant professor in the Department of Government at Cornell University, where he studies American political institutions. He is the author of *Disenfranchising Democracy: Constructing the Electorate in the United States, the United Kingdom, and France* (Cambridge University Press, 2018) and a co-author of *Southern Nation: Congress and White Supremacy After Reconstruction* (Princeton University Press, 2018).

1. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 245, 269, 291–96 (3d ed. 1950).

2. ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1, 2–4 (1971).

of majority tyranny, for example, have prompted considerable innovation in constitutional design, while electoral and party reformers regularly offer prescriptions for enhancing voters' ability to make choices, hold leaders accountable, and determine public policy.<sup>3</sup> But not even democracy's most parsimonious theorists have believed that institutions were enough. Indeed, most have argued that democracy places at least some additional demands on "the people," including some basic level of political knowledge, rationality, and civic engagement.<sup>4</sup>

The four books reviewed here each offer distinct perspectives on this question. James S. Fishkin's *Democracy When the People Are Thinking* makes a powerful argument for "deliberative democracy." *Democracy and Dysfunction* is an extended conversation between two of the most important figures in American constitutional law, Sanford Levinson and Jack M. Balkin, as they engage with the last tumultuous few years and continue a long-running debate over the nature, causes, and possible solutions to the dysfunctions of American democracy. Keith J. Bybee's *How Civility Works* is a philosophical engagement with this paradoxical concept, detailing its centrality to democratic life. Finally, Jeffrey K. Tulis and Nicole Mellow's *Legacies of Losing in American Politics* offers a provocative analysis of American political development, recovering the importance of successive "anti-moments" in American history when political movements, in losing, laid the foundations for ultimate success.

#### WHEN THE PEOPLE ARE THINKING

James S. Fishkin is among the world's leading experts on deliberative democracy, a concept he has tried to bring into practical reality through the approach he pioneered (and trademarked), Deliberative Polling. *Democracy When the People Are Thinking* begins with a defense of deliberative democracy, critiquing what he terms the party competition model of democracy for its failure to provide a meaningful opportunity for public will-formation. Fishkin usefully reduces many of the difficulties of democratic politics to a choice between political equality, mass participation, and public deliberation, arguing that for the most part democrats have been forced to sacrifice one of these goals in exchange for the other two. For example, a democratic politics organized around relatively programmatic parties competing in universal suffrage elections approximates the first two values, but at the expense of the third.<sup>5</sup>

The core of the book is found in two parts, "Making Deliberation Practical" and "Reimagining Democratic Possibilities." The first is a series of case-studies, most of them co-authored, detailing the experiences they have had with Deliberative Polls around the world. Deliberative Polls are efforts to practically institutionalize the ancient technique of randomly sampling citizens to serve in deliberative assemblies, creating a counterfactual example of what the public *would* think if it could do so under favorable conditions.<sup>6</sup> The criteria they are evaluated by include demographic representativeness, attitudinal

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3. David A. Bateman, *Majority Tyranny*, 53 TULSA L. REV. 179–89 (2018).

4. SCHUMPETER, *supra* note 1, at 294–95; JAMES S. FISHKIN, *DEMOCRACY WHEN THE PEOPLE ARE THINKING: REVITALIZING OUR POLITICS THROUGH PUBLIC DELIBERATION* 6 (2018).

5. FISHKIN, *supra* note 4, at 7.

6. *Id.* at 69.

representativeness, and sample size—essential if they are going to be a representative microcosm—plus the opportunity for participants to engage arguments from all sides, to gain knowledge, and to change their opinions.<sup>7</sup> Two additional criteria are essential for evaluating the quality of deliberation, namely whether distortions in the dialogue were avoided and whether the post-deliberation judgments are rooted in identifiable reasons. Much of the book’s empirical analysis focuses on assessing how well Deliberative Polls measure up to these standards. While at times the discussion can be repetitive, it adds up to a compelling demonstration of the possibility of meaningful deliberation.

“Reimagining Democratic Possibilities” is an extended argument that these approaches can be scaled up, supplementing existing liberal democratic institutions in the hopes of eventually creating an integrated deliberative democratic system. Fishkin defends the polls against four common critiques of deliberative democracy: (1) there will be an inevitable domination of dialogue by the more advantaged<sup>8</sup>; (2) deliberation will create a polarization of opinion<sup>9</sup>; (3) citizens are simply not competent to fulfill the expectations of them<sup>10</sup>; and (4) perhaps most critically, that there will be an inevitable gap between these microcosms and the broader public they are supposed to adequately represent.<sup>11</sup>

The book offers a useful overview of different contemporary theories of democracy, and its commitment to a robust conception of democracy—and Fishkin’s fundamental belief in human capacity for collective dialogue—is truly inspiring. At a minimum, the reader is likely to be persuaded that processes such as deliberative polling can, and should, become a more important aspect of contemporary democratic life.

And yet one is left with the suspicion that something is missing. Consider two seemingly minor items in the deliberative process, the role of experts and moderators in facilitating discussion and the issue agenda that the microcosms are invited to deliberate on. For the most part, the issues are set in advance and the citizen forums are simply asked to consider competing proposals, with expert advocates on hand to answer their questions and provide them basic factual information. While Fishkin is aware of the importance of citizens setting the agenda themselves, a practical mechanism for their doing so is never fully fleshed out, at least not beyond abstract proposals to integrate a so-called “deliberation day” with a National Issues Convention into a revised primary and general election cycle.<sup>12</sup> While intriguing, this proposal seems, in a context of heightened polarization, more than a bit utopian.

Similarly, while the central role of experts and moderators in deliberative polling seems eminently reasonable, it also points to the difficulties of scaling up these forums in any politically contentious environment. The more important these proceedings become to actual policymaking, the more likely it is that those whose interests will be affected will try to game the process (the political parties not least among them). So long as these are local and relatively small-scale affairs, the experts and moderators can be relied on to be

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7. *Id.* at 69–70.

8. *Id.* at 140–42.

9. *Id.* at 142–43.

10. FISHKIN, *supra* note 4, at 143–46.

11. *Id.* at 146–48.

12. *Id.* at 205.

balanced and honest and to not tip the scales. If we make these procedures central to democratic government, however, they will also need to be made responsive to political actors, which under polarized conditions will provide these actors with an interest and ability to manipulate the process.

Fishkin is aware of the difficulties but invites us to think beyond them. At its most idealistic, one can even imagine how the integration of such processes into the rhythms of our political life might mute our collective antagonisms. But it is difficult to shake the suspicion that deliberative democracy, on a mass scale, might only be feasible if the conflicts incipient to democracy have been sufficiently tamed, such that a broadly shared respect for fair institutions and procedures can be taken for granted.

#### A REPUBLIC (MAYBE) IF YOU CAN KEEP IT

Sanford Levinson and Jack M. Balkin's volume is similarly concerned with institutional reforms that might enhance American democracy. But while Fishkin is primarily interested in deepening democratic politics beyond the narrow limits of party competition, Levinson and Balkin are anxiously worried that even the United States' non-deliberative form of democracy might be at risk: "our goal," writes Balkin, should be to "defend the republic."<sup>13</sup>

Writing in an epistolary form, the authors probe each other's arguments across six chapters and seventeen letters. The first set were written between September and November 2015, before Donald Trump but well after many of the core dysfunctions of America's contemporary politics had become apparent. Or maybe not, for at least initially Balkin refuses to accept "dysfunction" as the right word, arguing against Levinson—who roots dysfunction in the Constitution's many undemocratic features—that what looks like dysfunction is actually evidence of a transition between "political regimes."<sup>14</sup> If the underlying problem is the Constitution, then it will require the nearly impossible task of Article V amendments. If, as Balkin claims, the problem lies in aspects of the constitutional order that are separate from the "hard wired constitution"—and in particular the possibility that we are at a moment in time when the old Reagan coalition is cracking up but a new dominant regime is not yet in place—then the solution is much easier: wait for the new regime to appear and revise, through statute and judicial reinterpretation, those aspects of the constitutional order that still need reforming.<sup>15</sup>

Nearly a year passed before the next volley, which came as Donald Trump won the Republican nomination for president. The authors were shocked and disgusted at this turn of events, and the dramatic irony in reading these missives from the fall of 2016 is palpable. Balkin by now has abandoned his insistence that dysfunction is the wrong word—fair enough—but he remains optimistic that "the familiar story of the decline and fall of republics is not destined to be our fate."<sup>16</sup> The constitutional structures so maligned by Levinson, Balkin argues, in fact work to secure republicanism.<sup>17</sup> Levinson, for all his

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13. SANFORD LEVINSON & JACK M. BALKIN, *DEMOCRACY AND DYSFUNCTION* 81 (2019).

14. *Id.* at 18–19.

15. *Id.* at 51–61.

16. *Id.* at 67, 70.

17. *Id.* at 74.

critiques of the Constitution as undemocratic, has spent his fall and early winter of 2016 urging the least democratically legitimate actors in our entire polity—the presidential electors—to deny Trump what the hard-wired Constitution had given him, the presidency.<sup>18</sup>

As the first year of the Trump administration grinds on, the authors increasingly focus their attention on Balkin’s notion of constitutional rot, “a decay in the features of our system that maintain it as a healthy democracy and a healthy republic.”<sup>19</sup> Their diagnosis of the problem is that our political system has gradually become less democratic, less republican, and more oligarchical.<sup>20</sup> While continuing to differ on the degree to which constitutional rot is the product of the “hard-wired” Constitution or of the political system more broadly, both conclude by endorsing some set of constitutional and sub-constitutional reforms that will “make American democracy great again.”<sup>21</sup>

The epistolary form is an interesting choice, but it is ultimately an unfortunate one. The letters often seem to talk past each other, while the exaggerated reactions to unfolding events end up being superficial distractions from the more stable points of agreement and disagreement.<sup>22</sup> Despite these shortcomings, the dialogue raises and elaborates on several questions of vital importance for American democracy. Levinson is surely right that the structure established by the Constitution saddles us with grossly undemocratic and unrepresentative institutions whose inadequacy contributes to their weak responsiveness to public opinion and the unequal voice and deep corruption of which both authors despair.<sup>23</sup> And Balkin is surely right that at least some of the undemocratic features of the Constitution have impeded authoritarianism. Because it is so difficult to do anything of significance, it is difficult to do that.<sup>24</sup>

Balkin’s claim that dysfunction is the result of a transition between political regimes, however, amounts to a deep indictment of the US constitutional order, insofar as it suggests that the Constitution is so poorly designed that it can only work when there is a dominant, nearly hegemonic, political coalition, capable of substantially narrowing the scope of policy competition and reducing one party or the other to a minor participant.

As the conversation turns more toward constitutional rot, their shared concern with the *political* underpinnings of what passes for democracy in America becomes more apparent. It is not just the Constitution, but the entire panoply of supporting institutions and mores that seem to be rotten. And while Levinson early on acknowledges that America “may need new kinds of citizens rather than a new Constitution,”<sup>25</sup> the text rightfully makes clear that the fault lies in the proverbial fish’s head, i.e., our political leaders, media

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18. LEVINSON & BALKIN, *supra* note 13, at 72–73.

19. *Id.* at 105.

20. *Id.*

21. *Id.* at 203.

22. The form seems to have excused them of the need to fact-check their claims or substantiate them with reference to the relevant social scientific literature. One example, among others, is the authors’ repeated misinterpretation of the significance of the so-called “Hastert Rule,” which is neither a rule nor an innovation of Dennis Hastert but rather a strategic use of procedural institutions by the majority party that has been a central feature of House dynamics since the 1890s. *Id.* at 22.

23. LEVINSON & BALKIN, *supra* note 13, at 19.

24. *Id.* at 81.

25. *Id.* at 14.

executives, Supreme Court Justices, and yes, the elite legal academy<sup>26</sup> that provide the credentials, character references, and ideological rationales<sup>27</sup> for our rotting governing class. What is to be done with them is as important for the fate of American democracy as reforming the Senate.

## HELL IS OTHER PEOPLE

Keith Bybee's *How Civility Works* is a thoughtful examination of the function performed by "civility," which, he makes clear, concerns not just individual standards of behavior or the "ongoing quest for pleasant company," but the contending rules of social etiquette that are essential not only for living together but for governing together.<sup>28</sup>

Civility, according to Bybee, is a code of public conduct, which like politeness, courtesy, gallantry, and chivalry has its origins in the forms of social conduct expected of ruling elites. Unlike these other forms, which have retained the tiresomely snobbish coloring of their origins, civility very early on became more democratic. It was more social than courtly, commercial than feudal, intended "to facilitate coordination in increasingly complex urban communities" by outlining the "most basic kinds of consideration that we owe one another in public life."<sup>29</sup> The democratizations of the nineteenth and twentieth centuries, moreover, fatally undermined the capacity of our elite classes to uniquely determine the content of this social code. Given the rot at the top, alluded to in *Democracy and Dysfunction* and part of the background ambience of the Kavanaugh hearings—even apart from the specific, credible, and numerous allegations of sexual assault<sup>30</sup>—we should all be grateful for their diminished, if still too great, influence in defining the standards for civility.

As a result, however, there is no one code of elite-sanctified conduct, but instead a cacophonous proliferation "of different beliefs about correct behavior that creates an environment about common courtesies that do not seem very common."<sup>31</sup> Paradoxically, argues Bybee incisively, many instances of what seems to be incivility are in fact efforts to establish or assert a new and different code of public conduct. Sometimes these codes, and the appeals to "civility" that back them up, are premised upon more egalitarian and inclusive bases; but just as often they are asserted in defense of new or old hierarchies of moral and social worth, where "be civil" means "know your place."<sup>32</sup> Bybee is wholly convincing that the apparent "crisis" of civility today is not its absence, but its proliferation.<sup>33</sup>

Bybee explores still other tensions immanent to the concept. Civility, for example,

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26. Ryan Cooper, *Brett Kavanaugh and the Corruption of the American Aristocracy*, THE WEEK (Sept. 24, 2018), <https://theweek.com/articles/797410/brett-kavanaugh-corruption-american-aristocracy>.

27. Aziz Rana, *Goodbye, Cold War*, N+1 (Winter 2018), <https://nplusonemag.com/issue-30/politics/goodbye-cold-war/>.

28. KEITH J. BYBEE, *HOW CIVILITY WORKS* back cover (2016).

29. *Id.* at 7, 9–10.

30. Stephanie Saul, Robin Pogrebin, Mike McIntire & Ben Protess, *In a Culture of Privilege and Alcohol at Yale, Her World Converged with Kavanaugh's*, N.Y. TIMES (Sept. 25, 2018), <https://www.nytimes.com/2018/09/25/us/politics/deborah-ramirez-brett-kavanaugh-allegations.html>.

31. BYBEE, *supra* note 28, at 15.

32. *Id.* at 19.

33. *Id.* at 68–69.

can be equally a mechanism for repressing dissonant voices and for facilitating egalitarian and inclusive communication. While any particular standard of civility can be justified by reference to something resembling “public reason,”<sup>34</sup> their origins are usually found in efforts to socially establish a particular hierarchy of social worth. The civility that required African Americans to step off the sidewalk when a white person walked by was justified by the claim that it would reduce public frictions, by requiring one set of citizens to avoid any suggestion of equality that might antagonize the dyspeptic citizens whose status was prioritized. This was as much a code of civility as today’s demand that social and political elites be allowed to lecture captive audiences without any response from the audience.<sup>35</sup> There is nothing inherently egalitarian about civility, and quite often the opposite.<sup>36</sup>

So why not discard it altogether?

Bybee’s defense of civility is subtle. Civility’s virtue lies in how it promises to reveal information about our core selves but which, precisely because it can be faked, does not do this at all. In short, civility has always been virtue signaling, a way of “projecting integrity and good character” whose appeal lies precisely in the fact that it allows us to be “better than [we] might be” by pretending to be better than we are.<sup>37</sup> By enabling us to project around ourselves an aura of decency, we can feel free to advance arguments with which people are likely to disagree, we can pretend to accept the moral worth of others with whom we do disagree, and as a result we can all go on living together contentiously and pluralistically and disingenuously.

The implications of civility for democratic politics are similarly subtle. Since it is often a way of signaling social belonging, and thus of reproducing social exclusion, those of us committed to egalitarianism should not accept just any old code of civility. We must instead devise and model schemes of etiquette that advance genuinely egalitarian values and “ensure that the etiquette we seek to establish is fit for a free and equal people.”<sup>38</sup>

The inevitability of conflict over what the standards of civility should be points to another implication. Because civility can shape the terms of our collective political life, it is inevitably going to be “a subject of political struggle and debate” rather than something that can be established *a priori* or by appeal to authority.<sup>39</sup> Indeed, that is what many of the fights over political correctness tend to be about: an effort by some to render discourses which reinforce certain hierarchies beyond civility’s pale, and a counter-reaction in defense of different civilities that would allow those who want to retain these hierarchies the space to do so.

These are not arguments that will or ought to be decided on procedural grounds or

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34. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 766 (1997).

35. Bianca Padró Ocasio, *At Notre Dame, Pence Attacks Campus “Political Correctness”*, POLITICO (May 21, 2019), <https://politi.co/2TUg1bs>; Katie Zezima, *Everything is Political These Days. Even Commencement Speeches*, WASH. POST (May 14, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/05/14/everything-is-political-these-days-even-commencement-speeches/>.

36. BYBEE, *supra* note 28, at 39.

37. *Id.* at 38, 54, 58.

38. *Id.* at 38, 42.

39. *Id.* at 51, 69.

by empty appeals to “free speech,” as though what were at stake were not the capacity to say something but the moral valuation or stigma that attaches to the act of saying it. These are political contests over the type of codes that ought to govern our collective life, and thereby about the vision of collective life that we wish to pursue. Not every disagreement needs to be a battle, and not every hill is worth dying on. The stakes, however, are not between civility and its opposite, but between different notions of social worth.

#### SORE LOSERS

*Legacies of Losing* offers a provocative new synoptic perspective on American political development, one that shifts our focus away from the winners—the Federalists, the abolitionist Republican Party, the New Deal order—and places it squarely on the losers—the Anti-Federalists, Andrew Johnson, and Barry Goldwater. In doing so, Tulis and Mellow critique two distinct lines of theorizing about American political development. The first of these emphasizes moments of transformational regime change, occurring at “critical elections” or “constitutional moments” that segment American political history into distinct regimes or republics.<sup>40</sup> The second perspective argues instead that the United States, from its founding, has been characterized by a hegemonic liberalism, with much of its political development best understood as efforts to recalibrate American institutions to better reflect the ideals and aspirations of their liberal underpinnings.<sup>41</sup>

Against both of these perspectives, Tulis and Mellow develop the metaphor of a “braided developmental process in which liberal constitutional moments are entwined with constitutional antimoments that sustain and ingrain illiberalisms and ascriptive hierarchies,” such as white supremacy, that supposedly run counter to the liberal tradition.<sup>42</sup> The losers focused on by Tulis and Mellow were not simply written out of a progressively advancing liberal tradition, nor were they irrelevant protests against successive dominant regimes. Instead, in the specific patterns of agency they revealed in their loss, they laid the foundation for a subsequent form of success.

Tulis and Mellow start with the Anti-Federalists, who—defeated in their efforts to structurally revise the proposed United States Constitution or prevent its ratification—extracted a set of rhetorical concessions from the Federalists that have since become dominant themes of constitutional interpretation. The irony of American history is that in the pattern of their losing, the Anti-Federalists obscured the actual political logic established by the Federalists’ constitution. Tulis and Mellow convincingly recover a rhetorical pattern in *The Federalist Papers*: after an initial attempt at mollifying Anti-Federalist fears, Publius would outline the underlying political logic of the proposed structure in a way that entirely validated these worries. The result is a series of mollifying sops, whether in the *The Federalist* or in the Constitution itself (the Tenth Amendment, for instance), that leave the Constitution’s centralizing logic untouched: “The structural properties of the regime are much more determinative of real power than the nominal allocations of power,” while the “state-oriented features of the Constitution are not core or

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40. JEFFREY K. TULIS & NICOLE MELLOW, LEGACIES OF LOSING IN AMERICAN POLITICS 3–4 (2018).

41. *Id.* at 6.

42. *Id.*

constitutive aspects—they are peripheral to a regime whose animating logic is national.”<sup>43</sup>

The Anti-Federalist’s way of losing provided resources to subsequent political movements to reinterpret the Constitution along the lines they preferred. Thomas Jefferson and others would point to *The Federalist* and the few gestures toward state authority in the Constitution to claim this as the defining characteristic of the Constitution.<sup>44</sup> The result is that the centralizing political logic remains intact, but is overlaid with misinterpretations that have both cramped the country’s political development and left us unable to understand it.

Our next loser is Andrew Johnson, remembered today for his racism, his disastrous efforts to reconstruct a Union in which the emancipatory potential of the Civil War was squelched, and for his political defeat, brought about when he so polarized Republicans that it allowed Radicals to briefly take control over Reconstruction policy. Tulis and Mellow complicate Johnson’s stature as a loser, crediting his own unsuccessful actions with charting a path for white southern elites to pursue in their ultimately successful efforts to establish white supremacy and Jim Crow.<sup>45</sup> White supremacy naturally brings us to our third loser, Barry Goldwater, whose 1964 presidential run was crushed under the largest landslide since the uncontested election of 1820. For Tulis and Mellow, Goldwater’s defeat-in-victory was achieved through its direct legacy in fostering a dense network of conservative activists who would organize both in and outside the Republican Party. Goldwater’s “reluctance” as a candidate led conservatives to construct their own mobilizing infrastructure which, when combined with their joint appeal to white southerners opposed to civil rights legislation, would eventually enable them to conquer the Republican Party and usher in the Reagan Revolution.<sup>46</sup>

These cases, however, are not equal in importance. The Anti-Federalists failed to fundamentally alter the structure of the Constitution, but bequeathed to us a constitutional interpretation that runs almost wholly counter to the actual intent of the founders and grates against its actual political logic. The subsequent cases occur within this basic mental cage, a constitutional order that the authors insist is fundamentally national and liberal (so much so that they suggest that the Constitution’s explicit protections for slavery might be “better understood as necessary features of an antislavery Constitution”<sup>47</sup>), but which we can only seem to interpret as its opposite.

What implications does this story have for our opening question? One might simply be that the potential losers of democracy and democratization—often the former elites—need conciliating, or at least constraining, especially if they still have the resources to make trouble. Perhaps the only way America’s (grossly deficient) democracy has survived at all has been because the losers could find glimmers of hope and strategies for fighting another day. The cost, however, has been immense: a basic inability to grasp the political logic of our institutions,<sup>48</sup> the quotidian cruelty of conceiving of people as rugged individuals who

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43. *Id.* at 48–49, 50.

44. *Id.* at 53.

45. TULIS & MELLOW, *supra* note 40, at 99.

46. *Id.* at 114.

47. They attempt to sustain this claim by appealing to the authority of Frederick Douglass, without acknowledging the political and strategic circumstances in which Douglass was intervening. *Id.* at 164.

48. *Id.* at 60–61.

are better-beggared-than-assisted,<sup>49</sup> a conservatism that manifests itself in, and is most energized by, the defense of ascriptive hierarchies,<sup>50</sup> the brutal curtailing of citizenship for African Americans, as well as open acceptance of oligarchic hegemony across much of the country for nearly a century,<sup>51</sup> and the absurd marshaling of the language of liberty in the defense of the above. With a democracy like this, who needs authoritarianism?

### THE NECESSITY OF POLITICS

Precisely because democracy requires robust contestation and disagreement, it has often been asserted that it needs some pale beyond which contestants will not cross. Such a limiting principle to conflict has often been found in national unity<sup>52</sup>; or it has been located in some supposed creedal consensus, perhaps embedded in a constitutional tradition or in other such fictions.<sup>53</sup> The purpose, in either case, is to constrain the scope of political conflict.

This is the backdrop which Fishkin's model of deliberative democracy assumes, and it is the consensus whose absence Balkin diagnoses as being at the root of America's dysfunctionality. And it is the very possibility of such a limiting principle that, in their own ways, Bybee and Tulis and Mellow call into question. As Bybee argues with regard to civility, institutions are endogenous to politics. Even if we could logically deduce a boundary beyond which political conflict should not pass, it would command assent only so long as it did not seriously impede the aspirations of powerful actors. Any such boundary must be established and defended politically, a task that requires forms of coercion both hard and soft, including sometimes repressive appeals to civility.<sup>54</sup>

Balkin's hope for a new political regime whose popular support and institutional embeddedness would be sufficient to deter and tame serious opposition seems to be of this same basic character. The New Deal order—like the Republican ascendancy that preceded it and the Reagan era that followed—rested on forms of soft and hard coercion and an elite-regulated “consensus” that attempted to force politics into acceptable channels.<sup>55</sup> To root out constitutional rot, it seems, it is necessary for one of the major political coalitions to lose decisively and to stay down. But Tulis and Mellow make clear that such attempts to establish and sustain distinct regimes will remain inherently unstable.<sup>56</sup> Moreover, even their sophisticated argument for a fundamentally liberal character to America's constitution locates this liberalism in a political logic which we have ultimately lost sight of, and concedes that at the level of discourse and supra-constitutional institutions an ascriptive illiberalism has become an enduring feature of the American landscape. The losers, even the anti-democratic and illiberal ones, cannot be reliably kept down in a

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49. *Id.* at 110.

50. TULIS & MELLOW, *supra* note 40, at 7–8, 123–24, 163–68.

51. *Id.* at 98.

52. This might seem a low bar, but the United States has tripped over it at least once in its history and some observers worry it might do so again. LEVINSON & BALKIN, *supra* note 13, at 98.

53. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 260 (1989).

54. BYBEE, *supra* note 28, at 22.

55. TULIS & MELLOW, *supra* note 40, at 103.

56. *Id.* at 83–84.

democracy.

As a result, there is likely no blueprint for constructing a fully consolidated democratic regime, for there is no mystical incantation which can forever keep politics at bay. What, then, does it take to sustain democracy? Constant political struggle seems to be the inevitable answer.