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Symposium: A New Hope? An Interdisciplinary Reflection on the Constitution, Politics, and Polarization in Jack Balkin's "The Cycles of Constitutional Time"

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Symposium: A New Hope? An Interdisciplinary Reflection on the Constitution, Politics, and Polarization in Jack Balkin’s “The Cycles of Constitutional Time”

SYMPOSIUM FOREWORD

*Paul Litton**

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* Associate Dean and R.B. Price Professor of Law, University of Missouri School of Law. I am so thankful to Jack Balkin for organizing this wonderful symposium with me. I also sincerely thank all of our participants for the fascinating and insightful conversations: Tommy Bennet, Frank Bowman, Guy-Uriel Charles, Carli Conklin, Erin Delaney, Jonathan Gienapp, Amanda Hollis-Brusky, Lynn Itagaki, Sandy Levinson, and Samuel Moyn. Many thanks to the staff of the Missouri Law Review for their excellent work publishing the written pieces.

I. INTRODUCTION

Politically, we are living in dark times. Political polarization has increased over the past forty years, reaching an extreme and causing real damage to our political system and to our interpersonal lives. Americans are experiencing more hostility and anger towards their neighbors, family members, and fellow citizens with opposing political views.¹ Growing distrust in government and intense polarization causally contributed to the 2016 presidential election of a populist demagogue whose appeals to toxic prejudices, racial resentment, and baseless fears were designed to exacerbate political and civil division.² After he lost the 2020 election, a mob of his most ardent supporters attacked the United States Capitol harboring the delusional belief that the vote was somehow rigged and fraudulent.

Despite this “recent unpleasantness,”³ perhaps – hopefully – history will view the riot at the Capitol as the nadir of our democratic republic’s maladies during our lifetimes. Jack Balkin’s newest masterpiece, *The Cycles of Constitutional Time*,⁴ attempts to provide optimism. It urges us to take a deep breath, relax, and travel with Professor Balkin through American history, political science research, and constitutional theory to grasp how we arrived at this predicament and to see that we are probably headed towards sunnier days. Balkin wrote this book before the insurrection at the Capitol, but that riot does not undermine the reasons he sees for hope that the health of our political system and society will improve considerably in the decades ahead.

During the week following the 2020 election, the *Missouri Law Review* hosted a symposium (via video conferencing during the coronavirus pandemic), convening an extraordinary and interdisciplinary group of scholars to discuss and debate Balkin’s powerful and intriguing arguments for hope. The conversations were captivating, deep, and insightful. The *Missouri Law Review*, along with the University of Missouri School of Law, is proud to publish the written contributions to this symposium in this volume. This foreword will briefly summarize the main arguments of *Cycles*, provide a brief preview of the essays herein, and draw some thematic connections among them.

1. Benjamin R. Warner and Astrid Villamil, *A Test of Imagined Contact as a Means to Improve Cross-Partisan Feelings and Reduce Attribution of Malevolence and Acceptance of Political Violence*, 84 COMMUNICATION MONOGRAPHS 447 (2017).

2. JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* at 49 (2020).

3. *Id.* at 3 (citing ELAINE MARIE ALPHIN, *AN UNSPEAKABLE CRIME: THE PROSECUTION AND PERSECUTION OF LEO FRANK* 23 (2010)).

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

II. BALKIN'S *CYCLES OF CONSTITUTIONAL TIME*

“The malaise is only temporary[,]”⁵ Balkin asserts. He argues that the history of American politics flows in three cycles which interact with one another.⁶ Along these cycles and at particular intersections, we find healthier times, but sometimes, like now, they cause darkness.⁷

The first cycle is “the rise and fall of political regimes in American history.”⁸ Balkin divides American political history into six regimes, each one identified by the political party that “dominate[d] politics practically and ideologically”⁹ during the period. The party characterizing a regime does not win all elections, but most, and,

more importantly, [its] ideals and interests construct the basic agenda for politics during the regime. Put another way, the dominant party sets the baseline of what is considered possible and impossible politically. It structures the basic ideological assumptions of the politics of its time.¹⁰

The current regime, which he argues is coming to an end, is the Reagan regime, beginning in 1980.¹¹ The Republican Party's commitment to the ideals of individualistic capitalism – deregulation, lower taxes, weakened labor unions¹² – stand in contrast to the previous regime, ushered in by Franklin Roosevelt and the New Deal. Democrat Bill Clinton occupied the White House during the Reagan regime, yet he famously acknowledged that “the era of big government is over.”¹³ Of course, all regimes end. New issues and circumstances fracture the dominant coalition. Parts of an outgoing coalition become radicalized, other parts marginalized, and an opposition party, with a new coalition, can emerge.¹⁴ According to Balkin, that is where American politics currently resides.¹⁵

The second cycle Balkin describes is one of political polarization and

5. *Id.* at 3.

6. *Id.* at 6.

7. *Id.* at 64–65.

8. *Id.* at 6.

9. *Id.* at 13.

10. *Id.*

11. *Id.* at 8.

12. *Id.* at 13.

13. William Jefferson Clinton, President of the United States, State of the Union Address, January 23, 1996, available at <https://clintonwhitehouse4.archives.gov/WH/New/other/sotu.html> [<https://perma.cc/3RPS-QNSW>].

14. BALKIN, *supra* note 2, at 14.

15. *Id.* at 17.

depolarization.¹⁶ We are currently polarized, but past periods of greater social and political cohesion made legislative achievements possible. The political reforms of the New Deal and Civil Rights eras were possible precisely because of the overlapping interests of the political parties and their coalitions.¹⁷ In addition to being a phase, Balkin argues, polarization also been a tool of regimes to obtain and maintain power.¹⁸ Nixon and Reagan capitalized on social issues that divided Americans, and the use of polarization was brought to new levels by Newt Gingrich, conservative media, and Donald Trump.¹⁹ But the dark sides of polarization even affect the party which it aided. It is difficult to govern in an environment where compromise is highly unlikely and serious policy deliberation is impossible.²⁰

The third cycle in Professor Balkin's account of our political history is one of constitutional rot and renewal.²¹ Balkin describes 'rot' as "the decay of those features of a constitutional system that maintain it both as a democracy and as a republic."²² A republic decays when government officials are not motivated by the public good but are rather more interested in appeasing a "relatively small set of powerful individuals and groups or using government to benefit themselves."²³ We have become less democratic, as well, Jack argues, as our representatives have become less responsive to popular opinion.²⁴

In a most fascinating part of the book, Balkin details the role of the federal judiciary – in particular, its exercise of judicial review – in these three cycles.²⁵ With respect to the cycle of regimes, the parties' respective attitudes towards judicial review depend on the party in power and where we are in the cycle. A party coming to power in the executive and legislative branches most likely will lack control over the courts, given that the previous regime populated the bench with likeminded jurists.²⁶ Accordingly, the new dominant power will urge judicial restraint so that it can enact measures through the elected branches, that is, until it recognizes ways to advance its agenda through the courts.²⁷ Opponents, just having lost power, will begin their new role as supporters of judicial review, yet rescind

16. *Id.* at 6.

17. *Id.* at 56–57.

18. *Id.* at 31.

19. *Id.* at 31.

20. *Id.* at 32

21. *Id.* at 6.

22. *Id.* at 44.

23. *Id.*

24. *Id.*

25. *See id.* at chapters 6–10.

26. *Id.* at 69.

27. *Id.*

their enthusiasm as the dominant party pursues judicial activism.²⁸

Our place in the cycle of polarization and depolarization affects the reasons political elites support or pursue policymaking through the judiciary. For example, in times of extreme polarization, when major legislative reforms are rare, political elites pursue litigation and judicial activism as the best means to policymaking.²⁹ However, when our politics reaches an advanced stage in a cycle of constitutional rot, judicial decisions, themselves, also tend to be highly polarized.³⁰ During such times, “[j]udicial majorities tend to reach decisions that increase economic inequality, shrink the electorate, and help maintain political oligarchy.”³¹ As such, Balkin argue, we cannot rely on the federal judiciary, including the Supreme Court, to lead a transition from constitutional rot to renewal.³²

As Balkin concludes his analysis of the federal judicial within the cycles, his focus turns from historical and predictive to prescriptive. Even though the Supreme Court will not be the catalyst to constitutional renewal, Balkin urges us to maintain its power of judicial review.³³ Rather, reforms of the judiciary should aim to decrease polarization and increase public trust in its independence from politics.³⁴ Towards those ends, Balkin suggests a number of measures, including term limits for Justices and reducing the Court’s control over its docket.³⁵

Returning to the cycles more generally, Balkin argues we are now at a dark, intersecting point. The Reagan regime has lost its ideological coherence – its championing of the free market, including free trade and rejection of social welfare programs – is now in tension with the desires of a large percentage of its working class constituents.³⁶ Trump has stepped in, maintaining some of the Reagan ideology, but combining it with populist and nativist elements.³⁷ And we are experiencing a dimension of constitutional rot: the gradual destruction of norms that make healthy governance possible by parties who disagree with one other.³⁸ During periods of constitutional rot, we see politicians disrespect the rule of law and the results of fair elections; we see a loss of trust between the public and its officials.³⁹

28. *Id.* at 69–70.

29. *Id.* at 70.

30. *Id.*

31. *Id.*

32. *Id.* at 150.

33. *Id.*

34. *Id.* at 151–52.

35. *Id.* at 152–55.

36. *Id.* at 161.

37. *Id.* at 21.

38. *Id.* at 45.

39. *Id.* at 46.

Balkin argues that “there are four causes of constitutional rot,”⁴⁰ all of which “mutually reinforce each other”:⁴¹ political polarization, increasing economic inequality, loss of public trust, and disastrous policies.⁴² Inequality causes polarization; polarization means citizens do not trust fellow citizens and politicians in opposing parties; inequality destroys trust in government; polarization permits politicians to distract with debates about trivial issues to enact laws that benefit the donor class, further increasing inequality and representing unjust and unwise policy.⁴³ Balkin reminds us, though, that we have endured periods of constitutional rot in the past yet our democracy endured.⁴⁴ The inequality, corruption, and demagoguery of the First Gilded Age yielded eventually to the expansion of protections for the working class during the Progressive Era.⁴⁵

Our era of constitutional rot – the Second Gilded Age – will also cycle out, Balkin predicts.⁴⁶ Current party alignments will break apart and new coalitions will form. We have already seen the change in the parties’ constituencies. Cultural, religious, racial issues emphasized by the Republican Party have driven away many college-educated GOP voters, including moderates, suburbanites, professionals.⁴⁷ And currently, both parties seem to be “organized around issues of identity and status.”⁴⁸ Women, minorities, LGBTQ persons on one side, white evangelical Christians on the other.⁴⁹ That means both parties’ coalitions “cross-cut class lines.”⁵⁰ Each party has business interests; each party has a working class, populist constituency.⁵¹ In Jack’s words, “new issues are likely to displace older ones, diluting the power of identity-based politics.”⁵² Issues of class can take center stage, driving a new coalition, decreasing polarization, opening the possibility for reforms supported by a broad coalition.⁵³

40. *Id.* at 49.

41. *Id.* at 50.

42. *Id.* at 49.

43. *Id.* at 50.

44. *Id.* at 63.

45. *Id.*

46. *Id.* at 63–64.

47. *Id.* at 163.

48. *Id.* at 167.

49. *Id.*

50. *Id.* at 172.

51. *Id.*

52. *Id.* at 173.

53. *Id.*

III. SYMPOSIUM THEMES AND CONTRIBUTIONS

Two major themes of the contributions to this symposium are whether Balkin misses other causes of constitutional rot and whether his optimism about our democracy's future is justified. Indeed, the two themes are related: if Balkin has missed causes of our current unpleasant state, then his predictions, based on the evolving interactions of those causes, will fail to convince.

In his essay, "Democratic Culture and Democratic Shocks: The Limits of Constitutional Cycles,"⁵⁴ Jonathan Gienapp expresses skepticism about Balkin's hopefulness for two reasons. First, Gienapp argues that Balkin misses a crucial cause of malaise: democratic rot.⁵⁵ That is, Gienapp argues, a democratic republic can function healthily only if its citizens are capable of shared governance by virtue of their education, modesty in opinion, faith in fellow citizens, and commitment to the common good. Could anyone reasonably attribute these traits to an adequate percentage of Americans right now? Second, Gienapp doubts that Balkin's cycles will lead to constitutional renewal. When we have emerged from darkness in the past, the cycles do not bear the credit. Rather, Gienapp argues, democratic shocks – "major disruptions to the system itself" – such as the Civil War, the two world wars, and the Great Depression – have been the catalysts.⁵⁶

Sandy Levinson and Frank Bowman echo Gienapp's comments in two ways: both think Balkin misses important causes of rot, and both are skeptical that the American people currently possess the traits and attitudes required for a healthy, functioning democratic republic. In "Cock-Eyed Optimist Meets Chicken Little: Jack Balkin on the American Future,"⁵⁷ Levinson attributes the sky falling to the "iron cage[] constructed by the framers in 1787, from which we desperately need to escape."⁵⁸ He questions whether we should understand our state of rot as involving democratic decay when the framers purposely rejected a democracy, prescribing undemocratic institutions, such as the Senate and Electoral College, to place power in elites.⁵⁹ Moreover, Levinson agrees, a healthy republic requires a citizenry committed to the "public good," yet our society is too fractured to sustain a shared and unified notion of the "public good."⁶⁰

In "Some Linear Thoughts on a Cyclical Vision,"⁶¹ Frank Bowman's

54. Jonathan Gienapp, *Democratic Culture and Democratic Shocks: The Limits of Constitutional Cycles*, 86 MO. L. REV. 501 (2021).

55. *Id.* at 510–11.

56. *Id.* at 512.

57. Sanford Levinson, *Cock-eyed Optimist Meets Chicken Little: Jack Balkin on the American Future*, 86 MO. L. REV. 555 (2021).

58. *Id.* at 558.

59. *Id.* at 559.

60. *Id.* at 560–62.

61. Frank O. Bowman, III, *Some Linear Thoughts on a Cyclical Vision*, 86

description of our current state reinforces Gienapp's claims about democratic rot. Even if one can find discernible cycles and patterns in American history, Bowman argues, they have occurred in a context in which citizens, even if polarized, shared a belief in the existence of discoverable facts.⁶² We live in unprecedented times, Bowman argues, because we do not even share a commitment to facts and the idea that they matter.⁶³ Like Gienapp and Levinson, Bowman critiques Balkin's account of the causes of rot. He urges that specific and divisive issues of the day – like slavery in the nineteenth century – propel constitutional rot, not Balkin's "four horsemen" of income equality, public distrust, polarization, and policy disaster.⁶⁴

Bowman's piece reflects another theme of the symposium: does Balkin persuasively describe American history as moving cycles? Bowman raises doubts. The course of history depends too heavily on contingencies for it to unfold in cycles, let alone overlapping cycles discernible in a country that has so radically evolved over two-hundred forty-five years.⁶⁵ Samuel Moyn argues similarly in his essay, "The Myth of Eternal Return and the Politics of Judicial Review."⁶⁶ He submits that cyclical accounts of history, characteristic of the ancients, deal poorly with novel situations and tend to distort by characterizing contingency as necessity with twenty-twenty hindsight.⁶⁷

Moyn's essay raises a separate, normative issue: Given that history depends on choices by free human agents, should Balkin offer more prescriptive, radical proposals to lift us from our state of rot? Predictive cyclical thinking, on Moyn's view, causes Balkin to be too cautious in considering how we can improve the health of our constitutional democracy, particularly with respect to the power of the courts.⁶⁸

We then see a fascinating connection between Moyn's essay and Amanda Hollis-Brusky's piece, "Exhuming Brutus: Constitutional Rot and Cyclical Calls for Court Reform."⁶⁹ Hollis-Brusky details how our state of constitutional rot has been exacerbated by a captured federal judiciary and a partisan Supreme Court whose power has grown because polarization in Congress diminishes its ability to respond to the Court's rulings.⁷⁰ She notes that Balkin, like President Biden, rejects more extreme calls from the left to

MO. L. REV. 483 (2021).

62. *Id.* at 496–99.

63. *Id.*

64. *Id.* at 493.

65. *Id.* at 485–87.

66. Samuel Moyn, *The Myth of Eternal Return and the Politics of Judicial Review*, 86 MO. L. REV. 571 (2021).

67. *Id.* at 580.

68. *Id.* at 580–81.

69. Amanda Hollis-Brusky, *Exhuming Brutus: Constitutional Rot and Cyclical Calls for Court Reform*, 86 MO. L. REV. 517 (2021).

70. *Id.* at 520–36.

pack the Court, preferring more modest reforms that would “take down the heat” between the parties in hopes of reducing polarization.⁷¹ It is here – on Balkin’s interesting yet arguably cautious approach to judicial reform – where Moyn asks whether we should consider bolder reforms to judicial review to extract us from our state of rot.

Lynn Itagaki’s contribution, *Compromising Trust*,⁷² raises very important historical and normative points. On Balkin’s account, periods of depolarization and constitutional renewal represent healthier times; the fact that cycles might be headed towards renewal and depolarization is, after all, reason for hope and optimism. However, Itagaki emphasizes, historical compromises that led to new coalitions and consensus were often struck in the service of white supremacy and to the detriment of African-Americans and other vulnerable minority communities.⁷³ From a normative perspective, such compromises “among political elites who represent[] wealthy white interests,”⁷⁴ if needed for cycles to advance to renewal and depolarization, do not provide hope for better days for those most in need of justice.

Part of Itagaki’s arguments echoes Guy Charles’ criticism of *Cycles*, which he expressed during his presentation: Balkin’s book talks about cycles without saying much at all about race.⁷⁵ In response, Balkin’s masterful contribution to this symposium – “Race and the Cycles of Constitutional Time”⁷⁶ – retells the story of his three cycles with race as the “organizing principle.” Balkin’s retelling demonstrates that he agrees with Itagaki: historically, compromise and new coalitions made possible by depolarization came “at the expense of African Americans.”⁷⁷ In terms of history, we have agreement.

With respect to Itagaki’s normative point – that cycling toward constitutional renewal and depolarization does not necessarily mean a healthy democracy, especially for vulnerable racial minorities – Balkin’s essay emphasizes an important aspect of his theory and provides relevant predictions. He emphasizes that “constitutional renewal” and “constitutional rot” are relative terms.⁷⁸ That is, a period of constitutional renewal is one during which our institutions improve relative to the norms of a healthy democratic republic, although they continue to fall far short of their respective ideals for many.⁷⁹ Otherwise, Balkin does not deny Itagaki’s

71. *Id.* at 538.

72. Lynn Mie Itagaki, *Compromising Trust*, 86 MO. L. REV. 541 (2021).

73. *Id.* at 552–53.

74. *Id.* at 553.

75. Jack M. Balkin, *Race and the Cycles of Constitutional Time*, 86 MO. L. REV. 443, 444 (2021).

76. *Id.*

77. *Id.* at 454, 465.

78. *Id.* at 479.

79. *Id.*

normative point. Rather, he suggests that the compromise and coalition-building on the horizon might not come “at the expense of African-Americans” and other minorities, at least not in the same devastating ways of the past. Racial demographics of the country are changing. Whites will make up a decreasing percentage of the population, forcing the parties to seek multiracial coalitions.⁸⁰

IV. CONCLUDING REMARKS

Political times may be dark, but our symposium’s scholars will lift your minds. This foreword merely skims the surface of arguments you will find in Balkin’s book and this volume. The detailed accounts of American history, illuminating findings of political science, and expert descriptions of constitutional jurisprudence and theory in *The Cycles of Constitutional Time* will reward all readers, as will this symposium’s insightful commentaries.

80. *Id.* at 474.