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Some Linear Thoughts on a Cyclical Vision

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Some Linear Thoughts on a Cyclical Vision

*Frank O. Bowman, III**

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I. INTRODUCTION

I am honored to have been included in this Symposium on Jack Balkin's new book, *The Cycles of Constitutional Time*.¹ Professor Balkin is a giant in the legal academy and a public intellectual of the first rank. Here, as elsewhere,² he has written a book that combines careful study of American history and constitutionalism with lucid, propulsive prose. The other contributors to this Symposium are themselves a Who's Who in constitutional law, history, and political science. I am not sure I quite belong in this exalted company. Even though I have written about some specialized – if sometimes topical – corners of the American Constitution,³ I am not a constitutional theorist in the large sense. I am also not a trained historian. Such historical writing as I have done is mostly small-bore inquiries into things like the import of homicide prosecutions in Boone County, Missouri, in the Civil War era,⁴ or might be disparaged by real certificated historians as what Alfred Kelly labeled “law office history.”⁵ Nor am I a political scientist, despite having the bachelor's degree in that topic that so often presages a descent into law school. I am just an old criminal lawyer who now teaches and writes about whatever interests him. Hence, I am not really qualified to critique constitutional theory of the sweep presented in Professor Balkin's book. Nonetheless, reading it has not only informed me, but stimulated a few questions, which I explore in this Article.

There is a great deal to admire about the substance of this book, particularly its analysis of the difficult constitutional moment in which we now find ourselves, as well as its interweaving of large themes into a hopeful vision of our constitutional resilience. Still, I confess to remaining unconvinced of the central proposition encapsulated in the book's title – that history, particularly American constitutional history, moves in identifiable cycles. I am particularly doubtful that such cycles, if they exist, are those described by Professor Balkin. A full exegesis of my concerns on this score

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

2. *See, e.g.*, JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011); JACK M. BALKIN, *LIVING ORIGINALISM* (2d prtg. 2014).

3. *See, e.g.*, FRANK O. BOWMAN, III, *HIGH CRIMES & MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* (2019); Frank O. Bowman, III, *Presidential Pardons and the Problem of Impunity*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y ___ (2021); Frank O. Bowman, III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. OF CHI. L. REV. 367 (2010).

4. Frank O. Bowman, III, *Getting Away With Murder (Most of the Time): Civil War-Era Homicide Cases in Boone County, Missouri*, 76 MO. L. REV. 323 (2012); Frank O. Bowman, III, *Stories of Crimes, Trials, and Appeals in Civil War Era Missouri*, 93 MARQ. L. REV. 349 (2009).

5. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13. I rather hope that some of my historical output rises above the level that provoked Kelly's jibe, but I am no proper judge of that question.

would run as long as the book itself, so I will raise only three, and those only in outline.

II. HISTORICAL TIME

Time, certainly as humans experience it, is linear. For us, its arrows run one direction only. I realize that the folks in the Physics Department will probably insist that in some weird corners of the relativistic universe time can stop,⁶ or perhaps even run backwards.⁷ But that is not true in the humanly observable sections we inhabit.

There certainly are cyclical phenomena. But cyclicity presumes entities moving or interacting in a system that has laws governing the interactions of all its components during a period with more or less constant conditions. Day turns to night, and reliably back to day. Fall progresses to winter and then to spring, then to summer, then back to fall. Leaves turn brown and drop, snow comes, snow melts, leaves return. All this happens, and is observable to us, because the rules of physics govern, quite intractably, the actions of large masses like the sun and the earth interacting in a vacuum, and because the rules of biology – the physics of life – respond to those recurring phenomena in verifiable and predictable ways.

Perhaps, in the mind of God, human behavior in the mass is subject to its own set of rules decreeing cyclicity or perhaps oscillation between various states of temporary equilibrium. But I doubt that. My own observations suggest that history – constitutional and otherwise – is both linear and pretty contingent. Even radically contingent.

If some jittery North Carolinian Confederates hadn't shot Stonewall Jackson at Chancellorsville in 1863,⁸ then maybe he and not that old slowpoke James Longstreet would have been commanding the Confederate right two months later at Gettysburg.⁹ In which case, Joshua Lawrence Chamberlain's

6. See RICHARD MORRIS, *TIME'S ARROWS* 175–80 (1984) (noting that, in theory, time would stop at the event horizon of a black hole).

7. *Id.* at 161–62 (describing the as-yet unconfirmed possibility of particles called tachyons which might move faster than the speed of light and thus backwards in time); Bertrand Wong, *Existence of Tachyons and their Detection*, 8 RES. & REVS.: J. PHYSICS 23–26 (2019).

8. BYRON FARWELL, *STONEWALL: A BIOGRAPHY OF GENERAL THOMAS J. JACKSON* 506–08, 520–26 (1992) (describing the friendly fire shooting of Jackson at the Battle of Chancellorsville on May 2, 1863, and his later death on May 10, 1863); ERNEST B. FURGURSON, *CHANCELLORSVILLE: 1863* 201–06, 325–28 (1992) (same).

9. STEPHEN W. SEARS, *GETTYSBURG* 254–57 (2004) (describing disagreement between General Robert E. Lee and General Longstreet about the timing and positioning of the assault by the Confederate right on the second day of the Battle of Gettysburg). As an aside, I should note that in characterizing General Longstreet as a

20th Maine maybe doesn't have time to get into position at the end of the Union line on Little Round Top.¹⁰ And Lee's men pour over the hill and behind the Union Army. Meade flees back to Washington.¹¹ A discouraged North forces Lincoln to sue for peace. And we have two, or maybe three, or even four countries where the United States now sits.

Nor do I think historical contingency is limited to the dramatic circumstances of war. Suppose that late in 2019, some wayward coronavirus in a Chinese bat or pangolin had not mutated in just the right way to make it transmissible to humans.¹² Or that particular bat or pangolin had not been brought to the Wuhan wet market. In which case we would not have had a global pandemic raging, and being grotesquely mishandled, in an election year by President Donald Trump.¹³ Without that wayward Chinese virus particle, one rather suspects Mr. Trump would have won. And the

"slowpoke" in the text above, I do so only for rhetorical effect. Longstreet was a very good general. He may have been deliberate, but at Gettysburg he was certainly right to want to move around the flank of the powerful Union position rather than assaulting it head-on, as Lee stubbornly insisted on doing. On the other hand, had Longstreet moved faster to carry out an order he disagreed with, perhaps the Union's own tardiness in securing Little Round Top, which anchored the left flank of the Union line, might have produced success.

10. *Id.* at 269–71, 292–97. In the late afternoon of July 2, 1863, in the middle of the Confederate assault, Union General Gouverneur Warren discovered, to his shock, that the rocky hill anchoring the Union left, immortalized in American history as Little Round Top, was undefended. *Id.* at 269. He hastily sought troops to man the hill. Col. Strong Vincent took the initiative to place his brigade on the height. *Id.* at 270–71. Among his units was the 20th Maine, commanded by Col. Joshua Lawrence Chamberlain, which was stationed on the farthest left flank of the Union line. The 20th Maine's desperate fight to hold the hill may have saved the entire Union position. That fight, and Chamberlain's later remarkable combat record, revealed Chamberlain as one of the most outstanding combat officers of the Civil War. For a brief description of his life, see James M. McPherson's introduction to the 1993 edition of Chamberlain's own war memoir, *JOSHUA LAWRENCE CHAMBERLAIN, THE PASSING OF THE ARMIES ix–xxi* (1993). Chamberlain became famous in the 20th Century due to his appearance as a central character in a novel about Gettysburg, *MICHAEL SHARA, THE KILLER ANGELS* (1974).

11. The reference is to General George G. Meade, who commanded the Union Army at Gettysburg. *SHELBY FOOTE, THE CIVIL WAR: A NARRATIVE, FREDERICKSBURG TO MERIDIAN 462–64* (1963).

12. See *Evolution of pandemic coronavirus outlines path from animals to humans*, *SCIENCE DAILY* (May 29, 2020), <https://www.sciencedaily.com/releases/2020/05/200529161221.htm> [<https://perma.cc/4CSR-D3Y6>]; Y. R. Rastogi, et al., *The novel coronavirus 2019-nCoV: Its evolution and transmission into humans causing global COVID-19 pandemic*, *INT. J. ENV'T SCI. TECH.* 1–8 (May 26, 2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7247958/> [<https://perma.cc/Z4W5-X8MB>].

13. *Id.*; *Presidential Election Results: Biden Wins*, *NEW YORK TIMES* (last accessed February 5, 2021) <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html>.

constitutional history of the United States might soon be coming to another kind of end.

Even if there are discoverable rules or forces bending societies toward cyclicity, I tend to think that the history of the United States is probably a uniquely poor place to discover them. This country, whether conceived geographically or demographically, culturally or economically, or using virtually any other significant metric, has changed so radically and so constantly throughout its entire relatively short life that even treating the United States of 2021 as the same country as the United States of 1788 or the United States of 1860 or 1870 or 1929 or 1945 seems an almost categorical error. In the types, magnitude, and speed of changes we have undergone, we are immediately distinguishable from, say Britain or France, or even China or Japan, all of which have changed over time, of course, but all of which have maintained a far greater degree of geographic, ethnic, and cultural consistency, even as their forms of government have changed quite dramatically. As much as I admire the ambition of Professor Balkin's book, any effort to isolate a small number of factors that have both persisted throughout the life of our uniquely fluid country and remained so powerful that they could bend its history into recurring cycles, like the gravitational mass of the sun entrapping planets in its orbit, seems an improbable undertaking.

Moreover, Professor Balkin proposes, not one type of historical cycle, but three, each operating "on a different time scale,"¹⁴ and thus it would seem more or less independently of one another, but nonetheless interacting from time to time to cause particularly notable effects.¹⁵ His three cycles are the "cycle of the rise and fall of regimes," the "cycle of polarization and depolarization," and the "cycle of constitutional rot and constitutional renewal."¹⁶ This brief Article is not the forum for examining all three cycles and their interplay, so I am going to consider only the cycle of constitutional rot and focus primarily on the first of the three eras of such rot identified by Professor Balkin – the period immediately preceding the Civil War.

14. BALKIN, *supra* note 1, at 6 ("Each of these cycles operates on a different time scale.").

15. As an aside, I am a bit puzzled by the assertion that these cycles operate asynchronously because Professor Balkin identifies polarization as one of the four causes of constitutional rot. *Id.* at 49. If all four causes must be present for constitutional rot to occur, then the turn of the cycle of polarization from non-polarized to polarized will always coincide with the turn of the cycle of constitutional rot from renewal to rot. I suppose this means that one can have cyclical polarization without rot, so long as the other three causes of rot do not happen to appear at the right moment in the polarization cycle. *Id.*

16. *Id.* at 6.

III. CONSTITUTIONAL ROT AND THE SECESSION CRISIS OF 1860

Professor Balkin describes constitutional rot as “the decay of those features of a constitutional system that maintain it as both a democracy and as a republic,”¹⁷ in particular, “the process by which a constitutional system becomes less democratic and less republican over time.”¹⁸ He adds that this rot “has a second dimension: the gradual destruction of political norms of mutual forbearance and fair political competition that make it possible for people who disagree with each other to jointly pursue the public good.”¹⁹ The “third dimension” of constitutional rot, Balkin says, is “loss of the kinds of trust that are necessary for republics to function properly.”²⁰

Later, Balkin identifies four “causes” of rot that he colorfully dubs the “Four Horsemen of Constitutional Rot”: political polarization, increasing economic inequality, loss of trust, and “policy disasters.”²¹ Astute readers may already perceive two oddities in this typology. Professor Balkin explicitly identifies loss of trust as both a characteristic of constitutional rot and as one of its causes.²² Moreover, the “second dimension” of rot – destruction of norms of forbearance and fair political competition that make possible joint pursuit of the public good – sounds an awful lot like “political polarization.” Unless there is a sharp distinction between these two ideas that I have not perceived, then polarization, too, is seemingly defined as both a characteristic and a cause of rot. At least these two components of the cycle of constitutional rot assume a sort of Zen koan-like status as both cause and effect, or perhaps causeless causes.

Be that as it may, in order for there to be a cycle of constitutional rot, there must be multiple instances of it over a period of time. Professor Balkin identifies three: the period of the 1850s during which northern and southern states gradually fell into mutual recrimination and finally civil war; the Gilded Age; and our own period.²³ As an aside, the designation of the Gilded Age as the second of three major cycles of American constitutional rot is a bit peculiar in itself. Professor Balkin’s hypothesis of constitutional rot is that rot happens, is followed by a period of democratic and republican renewal leading to a new constitutional equilibrium, which is followed inevitably by decay toward another period of rot.²⁴ Professor Balkin’s first 1850s episode of rot

17. *Id.* at 44.

18. *Id.* at 45.

19. *Id.*

20. *Id.* at 46.

21. *Id.* at 49.

22. *Id.*

23. *Id.* at 45. Perhaps Balkin mentions these three only as the best illustrations of a larger set of frequent rotten oscillations, but, if so, I would need to know more about which other periods he would include in order to fully assess his thesis. *Id.* at 45.

24. *Id.* at 48.

culminated in the explosion of bloodshed of the Civil War, which ran from 1861-1865, and was itself followed by the turbulence of Reconstruction, which did not sputter to its unsatisfactory and ignominious close until roughly 1877.²⁵

The peculiarity is that the Gilded Age is variously considered to have begun as soon as the end of the Civil War in 1865 or as late as the end of Reconstruction in 1877, and to have ended around 1895.²⁶ Mark Twain gave the era its name with the title of his co-authored novel, *The Gilded Age: A Tale of Today*, published in 1873.²⁷ Hence, it is hard to see a meaningful interval of democratic and republican renewal between the first two of Professor Balkin's major cycles of constitutional rot. Whatever Reconstruction was, it certainly was not a period of equilibrium from which later events were a species of decay. Such equilibrium as emerged from the War and Reconstruction (a highly unsatisfactory one for America's new freedmen) came later, during the very period Balkin identifies as another cycle of constitutional rot. Certainly, if there was a sort of calm democratic/republican interregnum before the constitutionally rotten Gilded Age, it was awfully brief. In sum, Professor Balkin's chronology of the cycles of constitutional rot begins with the founding in 1788, presents its first instance of major rot from 1850 to 1861, its second sometime in the 1870s through the 1890s, and no major repetition until our own day, more than a century later.²⁸ If there are cycles here, they recur at oddly irregular intervals.

But let us consider in somewhat greater detail the crisis of the 1850s, the first of Professor Balkin's periods of constitutional rot.²⁹ To do so, begin with the transformation of the United States of America between the ratification of the Constitution in 1788 and the country that stood on the precipice of war in 1860.

In 1788, there were as yet only thirteen states, together with contiguous territories that would shortly become states, such as Kentucky, Vermont, Tennessee, and Ohio.³⁰ These states and territories contained roughly 3.9

25. See generally, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988).

26. CHRISTOPHER M. NICHOLS & NANCY C. UNGER, A COMPANION TO THE GILDED AGE AND PROGRESSIVE ERA 7 (2017); BERNARD A. WEISBERGER, THE LIFE HISTORY OF THE UNITED STATES, VOL. 7: 1877-1890, THE AGE OF STEEL AND STEAM 37 (1964).

27. MARK TWAIN & CHARLES DUDLEY WARNER, THE GILDED AGE: A TALE OF TODAY (1873).

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

29. *Id.*

30. *List of U.S. states by date of admission to the Union*, WIKIPEDIA (last edited Feb. 2, 2021),

million souls, overwhelmingly Northern European whites, predominantly British and Protestant, plus 694,000 Black African slaves and a steadily dwindling number of Native Americans.³¹ West of the advancing line of American settlement lay a vast tract of largely unexplored territory stretching over two thousand miles to the Pacific Ocean, land primarily inhabited by Native Americans, but claimed, and settled in pockets, by subjects of France, Spain, and Great Britain.³² In 1790, west of the Ohio Valley, virtually the only European settlements were New Orleans and Baton Rouge (then held by the Spanish), outposts maintained by the French on the Mississippi River, such as St. Louis, and small Spanish settlements in Texas, at Santa Fe, and in a string of missions along the California coast.³³

By 1860, only a single long-ish lifetime from the American founding, the United States extended to the Pacific Ocean, with thirty-three states already admitted to the Union,³⁴ and multiple territories in the process of being subdivided, remorselessly cleared of Native inhabitants,³⁵ and prepared for incorporation into the whole. This massive conquest added roughly two million square miles of territory,³⁶ and brought within the national jurisdiction

https://en.wikipedia.org/wiki/List_of_U.S._states_by_date_of_admission_to_the_Union [<https://perma.cc/6R66-56LA>].

31. *1790 United States census*, WIKIPEDIA (last edited Dec. 19, 2020), https://en.wikipedia.org/wiki/1790_United_States_census [<https://perma.cc/CS5G-YQPU>].

32. Russia also made largely notional claims on parts of the Pacific Northwest.

33. *Colonial history of the United States*, WIKIPEDIA (last edited Feb. 4, 2021), https://en.wikipedia.org/wiki/Colonial_history_of_the_United_States [<https://perma.cc/E9QD-PP9D>].

34. *1860 Fast Facts*, UNITED STATES CENSUS BUREAU (last accessed Feb. 6, 2021), https://www.census.gov/history/www/through_the_decades/fast_facts/1860_fast_facts.html [<https://perma.cc/NK78-ZX8J>].

35. For partial treatments of this long, sad story, *see generally*, DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* (1970); S.C. GWYNNE, *EMPIRE OF THE SUMMER MOON: QUANAH PARKER AND THE RISE AND FALL OF THE COMANCHES, THE MOST POWERFUL INDIAN TRIBE IN AMERICAN HISTORY* (2010).

36. The Louisiana Purchase of 1803 alone added over 800,000 square miles to U.S. possession. *National Archives and Records Administration*, AMERICAN ORIGINALS, https://www.archives.gov/exhibits/american_originals/loupurch.html [<https://perma.cc/ZRX5-HY5F>] (last visited Apr. 5, 2021). The annexation of the Republic of Texas in 1845 added another 389,166 square miles in what are now the states of Texas, New Mexico, Oklahoma, Kansas, and Wyoming. *Republic of Texas*, WIKIPEDIA, (last edited Mar. 27, 2021) https://en.wikipedia.org/wiki/Republic_of_Texas [<https://perma.cc/9JMJ-5UZL>]. A treaty with Great Britain in 1846 confirmed U.S. possession of the Oregon Territory covering the current states of Oregon, Washington, Idaho, and part of Montana. *The Oregon Territory, 1846*, OFFICE OF THE HISTORIAN, U.S. DEPT. OF STATE, <https://history.state.gov/milestones/1830-1860/oregon-territory> [<https://perma.cc/6Q86-Z2GL>] (last visited Apr. 5, 2021). The Oregon Territory covered 286,541 square miles. *US Territorial Acquisitions*, GLOBAL POLICY FORUM,

not only subjugated indigenous peoples, but large populations of other distinctly un-British folks – French Creoles in Louisiana; Mexicans of Spanish or Spanish-Indian heritage in Texas (annexed in 1845) and in the territories the United States stole after the Mexican-American War of 1846-48; and Chinese in growing numbers in California.³⁷ These new U.S. subjects in the American West had little or no experience of republican self-governance and were mostly Catholic or of no Christian confession. Meanwhile, the perceived need for manpower to settle, till, and exploit the newly acquired western land, and to work the mines and factories of the industrializing north, drew across the Atlantic a steady flow of non-English-speaking, culturally diverse, European immigrants.³⁸ Of equal or greater importance, at least in national politics, was the survival, flourishing, and regionalization in the South of slavery as an economic driver and cultural institution.³⁹ By 1860, the U.S. population had increased ten-fold compared to 1790 and stood at more than 31 million,⁴⁰ 3.9 million of whom were slaves, almost all resident in fourteen southern or border states.⁴¹

In short, the United States of 1860 may have had the same paper constitution as was adopted in 1788 and the same formal governmental structure, but it was otherwise almost incommensurably different. Professor

<https://www.globalpolicy.org/us-westward-expansion/25994.html> [https://perma.cc/R7P2-VHCF] (last visited Apr. 5, 2021). The conquests of the Mexican-American War added another 525,000 square miles in 1848. *The Annexation of Texas, the Mexican-American War, and the Treaty of Guadalupe-Hidalgo, 1845–1848*, OFFICE OF THE HISTORIAN, U.S. DEPT. OF STATE, <https://history.state.gov/milestones/1830-1860/texas-annexation#:~:text=Under%20the%20terms%20of%20the,by%20Mexico%20to%20U.S.%20citizens> [https://perma.cc/HG24-U4MQ] (last visited Apr. 5, 2021). The Gadsden Purchase of 1853 brought in another 29,670 miles from Mexico. *US Territorial Acquisitions, supra*.

37. See generally, Anthony Daniel Perez & Charles Hirschman, *The Changing Racial and Ethnic Composition of the US Population: Emerging American Identities*, 35 *POPUL. DEV. REV.* 1–51 (2009); *History of Chinese Americans*, WIKIPEDIA, (last edited Mar. 28, 2021), https://en.wikipedia.org/wiki/History_of_Chinese_Americans#First_wave:_the_beginning_of_Chinese_immigration [https://perma.cc/L5XA-5LY6].

38. See generally Frederick C. Luebke, "Introduction" to *EUROPEAN IMMIGRANTS IN THE AMERICAN WEST: Community Histories*, UNIV. OF NEW MEXICO PRESS (1998), <http://digitalcommons.unl.edu/historyfacpub/172> [https://perma.cc/V9KU-MKDR] (last visited Feb. 4, 2021).

39. See U.S. CENSUS BUREAU, *1860 Census: Population of the United States 599* (1864) (cataloguing the distribution of enslaved peoples by state).

40. *Id.* at 597.

41. *Id.* at 595.

Balkin describes the crisis of the 1850s as a period of “constitutional rot.”⁴² And I suppose it was, in the sense that the country was sliding toward disunion and war. But it seems very hard to argue, as Balkin does, that the events and conditions of the period immediately preceding the Civil War constituted the first instance of a recurrent “cycle” of “constitutional rot” in the special sense he employs that term.

The causes of the political breakdown that led to war were unique. To oversimplify dramatically: The Constitution of 1788 permitted (perhaps inevitably given the interlocking interests of Southern agriculturalists and Northern merchants) the survival of slavery. The naïve hopes of many Framers that slavery would fade away were thwarted by, among other things, the invention of the cotton gin and the rise of British (and later American) cotton textile manufacturing, which together made slavery terrifically profitable in the growing conditions of the American South.⁴³ In the North, slavery, never an economic pillar, was increasingly viewed as both a moral abomination and as threateningly incompatible with the economic interests of free-labor Northern industry and agriculture.⁴⁴ The division between Northern and Southern views on slavery extended even into religious life. Formerly national Christian denominations split into sectional pro-slavery and anti-slavery churches, creating schisms that persist in some cases to the present day.⁴⁵

Had the country not been in the midst of a dramatic westward expansion, the interests of North and South might have remained in uneasy equipoise far longer than they did. But cotton depletes soil rapidly, which pushed slaveholding planters steadily west as old fields wore out.⁴⁶ Northerners in general resisted westward expansion of slavery, for a mixture of moral and economic reasons.⁴⁷ Southerners feared that, if slavery was prohibited in the newly

42. BALKIN, *supra* note 1, at 49.

43. See SVEN BECKERT, *THE EMPIRE OF COTTON: A GLOBAL HISTORY* 98–135 (2014). Slavery was also integral to the production of important agricultural and industrial commodities other than cotton, particularly rice, indigo, and tobacco. WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* 11 (1996).

44. See, e.g., CHARLES & MARY BEARD, II *THE RISE OF AMERICAN CIVILIZATION* 3–10 (1927); JOSHUA R. GIDDINGS, *SPEECHES IN CONGRESS [1841-1852]* 104–05, 254–57 (1853), excerpted at 73–75 in KENNETH M. STAMPP, *THE CAUSES OF THE CIVIL WAR* 73–75 (1959) (noting that Southern opposition persistently defeated “free-labor” legislation favored by Northern states).

45. See Allen Carden, *Religious Schism As a Prelude to the American Civil War: Methodists, Baptists, and Slavery*, 24 *ANDREWS UNIV. SEMINARY STUDIES* 13 (1986), <https://www.andrews.edu/library/car/cardigital/Periodicals/AUSS/1986-1/1986-1-03.pdf> [<https://perma.cc/W45C-LXHN>] (describing schisms during the 1840s in both American Baptist and Methodist churches dividing pro-slavery congregations in the South and anti-slavery congregations in the North into separate religious conventions).

46. BECKERT, *supra* note 43, at 103.

47. See generally, STEVEN E. WOODWORTH, *MANIFEST DESTINIES: AMERICA'S WESTWARD EXPANSION AND THE ROAD TO THE CIVIL WAR* (2010).

forming western states, pro-slavery interests would in short order be rendered a permanent and shrinking minority in Congress and effectively excluded from competition for the presidency.⁴⁸ Once the political balance shifted far enough against them, Southerners believed, slavery itself would inevitably be banned and their economic and social structure utterly overturned.⁴⁹

In short, the country was divided by an irreconcilable disagreement over a single institution, human chattel slavery, which nonetheless implicated virtually every area of human thought and endeavor – religion, morals, economics, social ordering, national identity, and politics. Slavery and its place in the unique circumstances of nineteenth-century America was the central, indispensable cause of the dissension that led to the Civil War.⁵⁰ Accordingly, the constitutional deterioration of the 1850s just will not fit into Balkin’s model of cycles *caused by* the “Four Horseman of Constitutional Rot” – political polarization, loss of trust, increasing economic inequality, and policy disasters.⁵¹

I would certainly agree that the political disintegration of the 1850s was *characterized* by political polarization and loss of trust. The polarization between political factions and leaders of the North and South was, if anything, worse than we see today. Loss of trust in the good faith of those of opposing views was epidemic. Northerners who opposed slavery increasingly considered its supporters moral monsters. Southerners viewed abolitionists with equal repugnance as uninformed zealots who did not understand beneficent southern institutions and recklessly invited slave rebellion and the mass murder of southern whites. From 1830 to 1860, open violence between legislators became increasingly common in the national Capitol building.⁵² The most famous of these assaults was South Carolina Congressman Preston Brooks’ brutal 1856 beating of Massachusetts Senator Charles Sumner on the Senate floor in retaliation for Sumner’s speech maligning the “slave oligarchy.”⁵³ By 1860, it was reported that many, perhaps most, members of both houses were coming to the Capitol armed.⁵⁴ Open, if irregular, warfare

48. *Id.*

49. *See, e.g.*, Richard K. Cralle, ed., IV *The Works of John C. Calhoun* 542–73 (1853-1856), excerpted in STAMPP, *supra* note 44, at 24–29.

50. WOODWORTH, *supra* note 47.

51. BALKIN, *supra* note 1, at 49.

52. *See generally*, JOANNE B. FREEMAN, *THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR* (2018).

53. *Id.* at 218–22.

54. *Id.* at 257.

between organized pro- and anti-slavery forces in Kansas began as early as 1855-56.⁵⁵

But these phenomena were symptoms, not causes, of the national turmoil. Slavery and its pervasive consequences caused polarization and distrust between sections. Not the other way around. Indeed, I am doubtful that polarization and distrust are ever causal in any fundamental sense. It seems to me that if people in a previously harmonious polity become polarized and distrustful, they do so for reasons particular to their time and circumstances, not because the rotations of some mysterious cyclical alchemy decree that now is the season for polarization and distrust.

As for increasing economic inequality, that certainly might be a cause of societal disturbance. But at least in the case of the period of constitutional unease preceding the Civil War, I cannot see that it played a material role, certainly not the dominant one that would be required to slot this period into Balkin's cycles. Indeed, so far as I can see, Balkin himself does not make much of a case for it doing so. In a few summary paragraphs, he frames the conflict over slavery as resistance by northern Republicans to "an oligarchical system that Republicans called the 'Slave Power.'"⁵⁶ And he attempts to ground Republican resistance largely in fear of "slaveholders' economic dominance – throughout the rest of the country," by which he presumably means both north and west of the core slaveholding states of the South.⁵⁷ This seems a terribly reductionist account of a far more complex struggle. But more to the point, it does not relate to income inequality, at least in any sense I would understand the term.

Normally, one would think of rising income inequality as describing a trend in which one segment of the population gains an increasing share of a society's wealth or income relative to some other segment, or perhaps all other segments, of the population. Intuitively, it seems likely that sufficiently large disparities could cause discontent with prevailing social and political arrangements, and perhaps in due course contribute to the phenomenon Balkin calls constitutional rot. But presumably the political fault lines created by rising inequality ought to fall roughly along the divide between those advantaged and those disadvantaged by the change. The disadvantaged will become disillusioned with a constitutional order that maintains or increases their disadvantage and agitate for change. The advantaged will maneuver to preserve or enhance their advantages. That is not the story of the lead-in to the Civil War.

Both North and South displayed income inequality (though Balkin never tries to show that its degree was increasing notably prior to the War).⁵⁸ The rise of manufacturing in the North permitted larger accumulations of wealth

55. NICOLE ETCHESON, BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA 89–112 (2004).

56. BALKIN, *supra* note 1, at 52.

57. *Id.*

58. Edward Pessen, *The Distribution of Wealth in the Era of the Civil War*, 4 REVS. IN AMER. HISTORY 222 (1976).

in the owners of capital than had previously been possible.⁵⁹ The workers needed to man the new factories, dig the canals, lay the railroad tracks, and so forth were often paid little and were often poor even by the standards of the time.⁶⁰ But the North was also characterized by a very large middle class of independent farmers, craftsmen, shopkeepers, fishermen, mariners, merchants, lawyers, clerics, and the like.⁶¹

In the South, there certainly was a class of wealthy slave-owning landowners which exerted disproportionate political power, both locally and nationally.⁶² The income disparity between these nabobs and their Black slaves was incommensurable, and the wealth gap between them and poor southern whites could be just as great as that between a northern industrialist and his factory workers.⁶³

However, in the gradually accelerating crisis of the 1850s, the laboring masses did not rise up against the capitalists of the North, nor did Dixie's hardscrabble white poor revolt against the landed aristocrats of the South.⁶⁴ More to the point, the nation's less fortunate certainly did not organize across the Mason-Dixon Line to rearrange the systemic unfairness of the national economy. Any serious student of the Civil War recognizes that economics in the broad sense had a great deal to do with the passions and discontents that produced secession.⁶⁵ But I am not aware of any analysis claiming that income disparity was a significant contributor to, still less the sole identifiable material factor that caused, the accelerating political deterioration – constitutional rot, if you will – that led to war.

The last of Professor Balkin's causative "Four Horsemen of Constitutional Rot" is "policy disasters."⁶⁶ It is hard to critique this claim because the term is so imprecise and is left effectively undefined. In place of definition, he provides examples: "the Vietnam War, the Iraq War, and the 2008 global financial crisis."⁶⁷ One certainly cannot cavil that the Vietnam and Iraq Wars were mistaken wars of choice that killed a great many people, failed to accomplish their purported objectives, and damaged American

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. For a succinct summary of some of the economic circumstances of the period and the economic effects of the Civil War, see Roger L. Ransom, *The Economics of the Civil War*, EH.NET, <https://eh.net/encyclopedia/the-economics-of-the-civil-war/> [<https://perma.cc/3NVC-LYRB>] (last visited Feb. 3, 2021).

66. BALKIN, *supra* note 1, at 49.

67. *Id.* at 50.

standing in the world.⁶⁸ But it is not clear what those episodes share with the 2008 global financial crisis other than unfortunate outcomes. If one is propounding a cyclical theory of history which, at least by implication, would permit prediction of future events, it would be helpful to provide more precise descriptors of an assertedly key causal factor than . . . policy makers made a dog's breakfast of something important.

The indeterminacy of Professor Balkin's conception of a "policy disaster" is revealed even more starkly in the discussion of the pre-Civil War period, in which he never tells us what "policy disaster," led to constitutional rot. I suppose the answer might be the advent of slavery in British North America; or the Framers' failure to ban it, or at least put it on the road to rapid extinction, in some provision of the Constitution; or the three-fifths clause allowing slaveholding states electoral power in proportion to the numbers of their human property; or the invention of the Senate, with its representational scheme permitting prolonged Southern legislative dominance; or the succession of compromises that permitted the gradual expansion of slavery into the West; or perhaps American imperialist expansion into the West that finally brought the simmering crisis to a head. But none of those things was necessarily any more disastrous than any other. The problem was slavery itself and its metastasis into an evil, but central, pillar of the economic and social structure of one-half the country. The dreadful institution, the politically insoluble dilemmas it created, its poisonous persistence, and its terrible consequences were *sui generis* and simply not meaningfully comparable to any other "policy" errors, large or small.

I should add that the consequences of the war that destroyed slavery, although not, tragically, other forms of racial subordination, were so constitutionally profound that I am particularly resistant to any theory of cyclical constitutional time that treats as a continuum the time before and after that war. That cataclysm transformed the United States so dramatically that it seems to me a boundary event which any cyclical theory will have a very rough time bridging.

IV. CYCLICITY, BOUNDARY CONDITIONS, AND THE FAILURE OF THE ENLIGHTENMENT CONSENSUS

Whatever quibbles I may have with Professor Balkin's particular construct, I do not think everything is random. I do think that human behavior, individually and in the mass, has patterns, even if not cycles. Sometimes those patterns are discernible – and discerned better by very capacious intellects like Jack Balkin's. I also think that, within limits, those patterns, once discovered, can help us respond to new circumstances, and may even have mildly predictive use.

68. See, e.g., HARRY G. SUMMERS, JR., ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR (1982) (a post mortem of America's military and political failure in Vietnam); THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ (2006) (a post mortem of America's military and political failure in Iraq).

One worry I have about even this modest view of the utility of seeking recurrent historical patterns is that its utility depends on the maintenance, within the region of our study, of at least fundamental boundary conditions throughout the period under examination. Here in my office, I confidently expect that, if I drop my coffee cup, it will fall to the floor because gravity will pull it rapidly toward the center of the very large mass on whose surface I am sitting. But if we move my office into Earth's orbit, a dropped cup will stubbornly refuse to fall.⁶⁹

If we consider the American constitutional project at a high enough level of generality, there may indeed be discernible patterns. But if so, their repetition depends, I think, on the maintenance of some fundamental political boundary conditions. In the American setting, one of those conditions is that our whole national political enterprise depends at bottom on the Enlightenment consensus about the nature of knowledge. That consensus holds that the world is a comprehensible place that can be understood through the application of human reason. That there are facts. That facts matter. That society should be built on the foundation of a shared factual understanding of the world. And also that there are methods of determining those shared facts – including scientific inquiry and the evidentiary processes of the law – which will be broadly accepted as authoritative. Finally, the Enlightenment foundation of American constitutionalism insists that a shared commitment to seeking truth, and to belief in the modes by which it is determined, is a precondition for serious participation in political life. It is not that we cannot argue about what the facts are. Humans always do that. But the success of our particular system depends on a shared belief that there are facts, and on general acceptance of a set of methods or authoritative sources for resolving the question.

What seems to me unique, and uniquely dangerous, about this constitutional moment is that this boundary condition may be disappearing. Professor Balkin certainly recognizes this issue. Indeed, he describes it eloquently and in detail. But it is not clear that he is quite willing to accept how bad the problem is – how deep is the rot, if you will – or how corrosive it may be for his optimistic vision.

The magnitude of our danger stems in large part from the recognition that the centrality of truth, rationality, and recognized sources of authority is not just some antique, eighteenth-century notion. Nor is it only a pillar of democratic republicanism. It is also the foundation of the modern

69. In fact, it will “fall” in the sense of accelerating toward the gravitational center of the Earth, but that falling tendency will be offset by its velocity at an angle to Earth, producing orbital motion. Because I and the capsule in which I and the cup were both enclosed would be subject to the same forces and moving in the same way, the cup would not “fall” relative to me, nor drop rapidly onto a wall of the capsule.

administrative state. The truth is that even when the president is a knucklehead, Congress is ineffectual, and the courts are ideologically divided, most of the things we want the national government to do on a daily basis are going to roll along just fine, so long as the career civil servants are left to tend their knitting reasonably unmolested – to do their studies, use Administrative Procedure Act⁷⁰ processes to make rational regulations, and administer the programs Congress has funded. What has been especially terrifying about the Trump administration is that it cheerfully undermined and degraded this apparatus and routinely disparaged the very idea of discoverable truth, disinterested expertise, and professional competence.

The happy version of the 2020 election is that the majority of Americans, in just the right proportions in just the right electoral-vote-rich states, rejected a man Professor Balkin rightly describes as a classic demagogue. The more foreboding version is that over seventy million Americans, some forty-eight percent of the politically active adult population, watched this demagogue in action for four years. Watched him lie, every day.⁷¹ Watched him deny provable, inescapable facts, day after day. Watched him denigrate all the institutions and norms of constitutional governance, time after time. And they said, “This is good. We want more.”

Still more distressingly, now that the election is over, both Mr. Trump and his party are continuing to insist that he won, that unseen forces somehow inserted literally millions of fraudulent votes into the system, depriving him – and them – of victory. A distressing fraction of the general population believes this lie. They will, I fear, go on believing it. They will do so because they already inhabit a parallel information system which long ago began undercutting the very idea of authoritative, rational determination of shared facts. This system disparages science, promotes paranoid fantasy, and seduces people into believing nonsense and hating anyone who believes otherwise. Moreover, the information networks that promote this sort of thing are becoming even more extreme.

People of the left and center are wont to disparage Fox News as the locus of right-wing disinformation. It often has been. But for Trump’s loyalists, Fox itself has become suspect because, at least in its “news” division, it has grudgingly reported some truths uncongenial to Trump. Not only is Trump himself raging at Fox, but new outlets – e.g., OANN, Newsmax, and individual entrepreneurs – have sprouted, flourished, and gained millions of viewers by moving politically to the right of Fox and even further away from any residual commitment to fact.⁷² The same is true online, where entire

70. 5 U.S.C. § 551, et seq. (2020).

71. Glenn Kessler, *Trump made 30,573 false or misleading claims as president. Nearly half came in his final year*, WASH. POST (Jan. 23, 2021), https://www.washingtonpost.com/politics/how-fact-checker-tracked-trump-claims/2021/01/23/ad04b69a-5c1d-11eb-a976-bad6431e03e2_story.html [https://perma.cc/QP7R-G3ZP].

72. Nathan Bomey, *Could Fox News lose its grip on far-right conservative viewers to Newsmax, OAN?*, USA TODAY (Dec. 21, 2020),

ecosystems of irrational, fact-free discourse have already grown, and seem to be gaining strength.⁷³

More ominously still for a stubbornly two-party system, one of them – the Republican Party – has essentially abandoned any pretense of interest in facts, at least when inconvenient to the pursuit of power. In the weeks following the election, the majority of nationally elected Republicans actively supported President Trump’s efforts to undercut faith in the integrity of the American electoral process, or at best remained timorously silent. Their active promotion or passive acceptance of the lie that the presidential election was “stolen” by Democrats, or RINOs,⁷⁴ or the invisible “deep state” contributed directly to the violent invasion of the Capitol on January 6, 2021, by Trump supporters deluded into believing that lie. That most, though not all, elected Republicans have since grudgingly come around to admitting that Donald Trump lost this election will not undo their prior complicity in the claim that it was stolen. Millions and millions of Americans will continue to believe, or at least strongly suspect, that dark forces snatched victory from them.

If a significant fraction of the American polity no longer believes in the possibility of nationally shared facts, and believes that the election process is fundamentally crooked, that, I think, is unique in the American experience. If one of the major parties no longer believes that primary markers of good governance are devotion to facts, rationality, and disinterested technical competence, that too is unique. I fear these unique phenomena may have changed the boundary conditions for the American system in ways that will make restoration of democratic and republican norms and values in the coming years far more difficult, and perhaps nearly impossible.

Perhaps, however, I should take comfort in Jack Balkin’s happier vision. At all events, I am pleased that he shared it with us in this book. We are all the wiser for his doing so.

<https://www.usatoday.com/story/money/2020/12/21/fox-news-newsmax-oan-cable-news-donald-trump-2020-election/3881624001/> [<https://perma.cc/JR76-V5UZ>].

73. See, e.g., Kaitlyn Tiffany, *Parler’s Rise Was Also Its Downfall*, THE ATLANTIC (Jan. 18, 2021); Hannah Murphy, *The new AI tools spreading fake news in politics and business*, FINANCIAL TIMES (May 9, 2020), <https://www.ft.com/content/55a39e92-8357-11ea-b872-8db45d5f6714> [<https://perma.cc/9Q7H-QLBJ>].

74. “RINO” is the disparaging acronym for the phrase “Republicans in name only” now applied by members of the far-right to Republicans insufficiently devoted to Donald Trump. *RINO*, DICTIONARY.COM, <https://www.dictionary.com/e/acronyms/rino/> [<https://perma.cc/UGW3-QFXW>] (last visited Apr. 5, 2021).