

Spring 2021

## The Myth of Eternal Return and the Politics of Judicial Review

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### Recommended Citation

Samuel Moyn, *The Myth of Eternal Return and the Politics of Judicial Review*, 86 MO. L. REV. (2021)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol86/iss2/12>

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# The Myth of Eternal Return and the Politics of Judicial Review

*Samuel Moyn*\*

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## I. INTRODUCTION

“Some people see in all earthly things only a dreary cyclical movement,” Heinrich Heine wrote around 1833.<sup>1</sup> “In contrast to the fatal and indeed fatalistic view,” he added, “there is a brighter view, more closely related to the idea of providence.”<sup>2</sup> As Heine described it, from this alternative perspective “all earthly things are maturing towards a beautiful state of perfection . . . a higher, godlike condition of the human race, whose moral and political struggles will at last lead to the holiest peace, the purest brotherhood, and the most everlasting happiness.”<sup>3</sup>

Constitutionalism is an ancient idea, albeit one long associated with the form of regimes in general rather than self-governance under written charters that lay down fundamental law.<sup>4</sup> As such, constitutionalism began its life linked to “dreary cyclical” stories of rise and decline, improvement and decadence, splendor and ruin.<sup>5</sup> In doing so, it repurposed archaic thinking from even earlier to decry the direction of constitutional politics. But modern constitutionalism, especially the neo-providentialist form that many Americans have learned to associate with self-governance under a written document, is not the same as the archaic or the ancient. It works with a dualism of fundamental and ordinary law that owes its sources to Christian theology, making it difficult for any Americans to embrace fully the stories of proud ascendancy and inevitable fall in which the archaic imagination and then ancient Greeks and Romans trafficked so long.

At first glance, Jack Balkin’s sparkling new book, *The Cycles of Constitutional Time*, seems to be about a revival of cyclical thinking familiar to the ancients amid some sort of ongoing commitment to progressive redemption that the moderns brought online.<sup>6</sup> But it turns out that it is defined less by an ancient dreariness than by a cautious optimism. In this reflection on Balkin’s argument, I wonder if we need to go further for the sake that optimism, and therefore break more thoroughly with the analytical and moral premises of the ancient framework he adopts.

There is no doubt that Balkin converts his master concept of cycles from the basis for blind guesses and soothsaying prognostications that repetition-minded premoderns indulged into a sense of probable regularities boasting the authority of contemporary political “science.” But I nonetheless want to

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1. HEINRICH HEINE, *THE HARZ JOURNEY AND SELECTED PROSE 195* (Ritchie Robertson ed. and trans., 2003).

2. *Id.*

3. *Id.* at 195–96.

4. *See generally* CHARLES H. MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (1947).

5. HEINE, *supra* note 1 at 195.

6. JACK BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* 3–4 (2020).

express some restlessness regarding the cyclical modeling and prognosticating goals of Balkin's new book before turning to focus a few skeptical remarks on his account of judicial review.

Oddly, Balkin's story about judicial review has some features that prove the distinctive originality of our moment, but it also treats judicial review itself as in some sense outside the regularities of cycles or the possibility of greater progress alike.<sup>7</sup> I want to put maximum analytical and normative pressure on how hard a constraint Balkin makes the sort of judicial authority America has consecrated, in a moment when more and more Americans are taking a second look at it. Examining what Balkin says, I will reach for the conclusion that optimism requires a rather different account of the past and future of judicial review – and the country itself.

## II. CYCLES

On inspection, *The Cycles of Constitutional Time* is actually three nearly separate books.<sup>8</sup> One is indeed about cycles, exploring how to generate a story of American constitutional regimes from Stephen Skowronek's influential extrapolation from history of the rise and fall of presidential regimes.<sup>9</sup> And following Skowronek, Balkin presents the main cycle of American constitutional history as having various intermediate points, as an arc that seems to head one direction bends back towards the beginning in a series of stages.<sup>10</sup> The other two books – on polarization and rot – are not about cycles, exactly.<sup>11</sup> If they are, they concern circles collapsed into lines with two endpoints.<sup>12</sup> They are, that is, about oscillations.<sup>13</sup> Polarization waxes and wanes, and rot increases until renovation is necessary, before rot sets in again.<sup>14</sup> In these latter two cases, there is, so far as I can tell, no attempt to build a theory of oscillation between two points into a theory of circular movement on a path with identifiable stages.

Balkin's investigation of his dynamics is actually three because it is organized as separate inquiries.<sup>15</sup> The book is itself organized as two cycles, first proceeding through each dynamic on its own then repeating the drill to

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7. *Id.* at 69–71.

8. *Id.* at 6.

9. *Id.* at 13 (citing STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (1997)).

10. *Id.* at 13–19.

11. *Id.* at 6.

12. *Id.* at 6–7.

13. *Id.*

14. *Id.* at 30, 63.

15. *Id.* at 6.

theorize judicial review.<sup>16</sup> (As I will argue below, some crucial relaxation of Balkin’s separation of the dynamics occurs, but only in the book’s second half.) True, the combination of books is amply justified by the repeated assertion that America right now is in a particular place within each story. But again, as far as I could tell, there is no deeper attempt to correlate the dynamics,<sup>17</sup> to explain whether the three always track one another, or whether to treat the current perfect storm – the brink of a new regime with extraordinary polarization and advanced rot – as explicable or stochastic. The intelligible patterns that Balkin attempts to discern appear *within* each dynamic rather than among them.

None of these observations is meant to be critical, only to describe my understanding of Balkin’s enterprise, and to prepare the ground for placing it in a particular tradition. Of the book’s ambition, there is no doubt. It marshals very different political science literatures in its three parts in order – a literature on regimes supplemented by one on the political foundations of judicial review in the first part, a literature on polarization in the second, and a literature pondering the death of democracy in the third – to apply them to constitutional phenomena in what is supposed to be not an ad hoc response to our moment but a systemic and unified account of how American history works.

In many ways, it is a heroic enterprise. But what most deeply unites Balkin’s three-books-in-one, aside from the common assertion that the present is a fateful moment in all trajectories, is a strikingly naturalistic imaginary. Cycles are what planets do, polarization – I believe – comes from wave theory, and decrepitude and rot are the fate of living things, not human political communities that endure in intergenerational projects of precisely the kind constitutions are supposed to allow. Balkin’s naturalistic metaphors in this book are revealing, I want to suggest. They represent the clearest legacy of a premodern mentality in thinking about history and politics, which may compromise his attempt to wrest a shred of optimism from the jaws of fate.

The search for cyclical patterns in history, even more than the other natural dynamics Balkin revives, is a classic irrationality that goes all the way back.<sup>18</sup> Anthropologist Mircea Eliade famously claimed in *Cosmos and History: The Myth of Eternal Return* that the “archaic mind” works by seeing

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16. *Id.* at 3–154.

17. Of course, the account of rot incorporates that of polarization by reference since the latter is one of the “four horsemen of constitutional rot.” *Id.* at 49. But unless I missed an earlier instance, Balkin first suggests polarization and rot (if not necessarily then “usually”) come together rather late in the book. *Id.* at 135.

18. BALKIN, *supra* note 6, at 5.

what are actually novel events as a matter of “archetypes” and “repetition.”<sup>19</sup> In such consciousness, the eternal return functioned at the cosmic level, and among puny humans as part of the universal processes.<sup>20</sup> And Eliade therefore thought the problem was identifying how fateful it was that, in response to difficulties in experience, moderns who had once resolved to “consciously and voluntarily creat[e] history” sometimes renounced that goal by reviving mythological frameworks.<sup>21</sup> “The reappearance of cyclical theories in contemporary thought,” Eliade worried skeptically, long before Balkin took his turn, “is pregnant with meaning.”<sup>22</sup>

The Greco-Roman legacy in theories of “recurrence” proved equally massive.<sup>23</sup> As Balkin notes, the Greek historian Polybius, writing in the Hellenistic period, propounded the most renowned classical account of circular stages.<sup>24</sup> A bit less mythological and a bit more secular than archaic irrationality, and profoundly influential on America’s founders, Polybian and other cyclical theories of ancient politics died out in part because they denied human freedom and explained too little about what allows for similarity in widely divergent settings.

Though not in exactly the same way, there are similar premodern roots to Balkin’s neo-republican story of “rot.” It is reminiscent of a long-standing genre of decadence and renewal only slightly newer than cycles, which has been revived almost as often as cyclical history over the centuries. Often deployed to think through Roman decline, it was useful for those anxious for the fate of many later polities. In fact, very often over the centuries of Polybius’s influence, the go-to grid of decadence and renewal was *embedded within* the theory of cyclical recurrence, and it is interesting that Balkin hives it off as a potentially separate phenomenon to explain the American experience.<sup>25</sup>

Regardless, the gambit of Balkin’s book is that we can retain the analytical and especially the predictive uses of old mythologies of natural dynamics in human politics by regrounding them in the framework of current political science. He disclaims any reliance on literal repetition in favor of a theory of “rhyming.”<sup>26</sup> But in fact, for Balkin’s enterprise to be plausible, he has to assume that the cycles and oscillations he charts do have real causal

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19. MIRCEA ELIADE, *COSMOS AND HISTORY: THE MYTH OF ETERNAL RETURN* 147 (Willard R. Trask trans. 1959).

20. *Id.*

21. *Id.* at 141.

22. *Id.* at 147.

23. G.W. TROMPF, *THE IDEA OF HISTORICAL RECURRENCE IN WESTERN THOUGHT: FROM ANTIQUITY TO THE RENAISSANCE* (1979).

24. Balkin, *supra* note 6, at 5.

25. *Id.*

26. *Id.*

foundations that allow sufficiently like situations to recur, because otherwise both the analytical and predictive uses of the scheme fall away.

I am not entirely sure what justifies this crucial last assumption, especially given the risks it imposes. Balkin cryptically acknowledges the need for some justification: “People cause these cycles,” he remarks in the closest gesture to deep theory in the book, “the mobilization, organization, and the exercise of political will in a particular institutional environment.”<sup>27</sup> I infer that, while Balkin accepts the characteristically modern belief that history is whatever humans make it, somehow, and for unexplained reasons, they end up doing similar things over and over in relation to institutions they have built. There is no account, however, of why freedom ends up falling into ruts. Balkin insists that – notwithstanding the excellent cover-image of the book – “[p]olitics is not astronomy.”<sup>28</sup> But he still affirms that things “tend to cycle in intelligible ways.”<sup>29</sup> Why does that happen?

Only if there really is something to recurrence does the book make sense, and Balkin clearly believes there is. He is dealing with real phenomena, even if nowhere in the book is there a deep accounting for why such patterns can obtain across time. Presumably Balkin thinks that, even if the eternal return of the same does not function with the deep foundations that some have supposed, in some histories – like American constitutional history – there are factors that lead to determination, in an ongoing institutional history that remains continuous across difference, constraining whatever freedom actors have to tweak their fate. Within each dynamic, to be sure, there is more to go on. As Skowronek described, within a bipartisan system there will be various handoffs of long-term power as parties (more precisely, the presidents who lead them) establish long-term hegemony.<sup>30</sup> But notably, Balkin does not ever really stress that freedom can consist in *escaping* patterns.

It was clearly worth a try for Balkin to develop these assumptions, and the results illuminate a lot. There is so much in the framework that is interesting and striking on which I have not wasted my words. But somehow – for me at least – the results still bear too many worrisome hallmarks of premodern attempts to read the signs of the times. Such accounts offer insight but risk two distortions in particular. They have a difficult time dealing with new situations and original moves, and suppress both by transforming them into recurrence and repetition. Analytically, they reverse engineer logics to explain contingency in real time as necessity after the fact.<sup>31</sup> Prescriptively,

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27. *Id.* at 5.

28. *Id.* at 6.

29. *Id.*

30. *Id.* at 13–14 (citing SKOWRONEK, *supra* note 9).

31. One especially interesting example, because it involves a failure of self-reference, is Balkin’s own placement of his trajectory in the story. He reports that his current “living originalist” strategy was one among many ways liberals

they offer hope, if it is available at all, within the terms of recurrence, rather than in the possibility of fuller novelty.

In both respects, Balkin's stories share the trademark sin of the premodern past: they are about qualifying or even renouncing freedom. This is especially true when whatever determination is associated with quasi-natural processes is revealed to be far weaker than otherwise because their triple convergence – as now – gives rise to an unprecedented situation that no longer rhymes with the past. As I want to show next, Balkin's story of judicial review verges on portraying just that kind of distinctive moment right now.

### III. JUDICIAL REVIEW

Balkin's engagement with how judicial review figures in the three dynamics is wonderful all the way through, and taught this amateur a great deal about how admiration for and criticism of judicial review tracks the cycle of constitutional regimes. Equally interesting is Balkin's exploration of polarization and rot, and their effects both on the functions of judicial review and on theories about its uses. His predictions are powerful, and might even be right. But it is possible that Balkin's framework both concedes too much to the durability of judicial review in the first place, and misses the unique features of our moment on Balkin's own account.

Start with how Balkin sees our present. Balkin's constitutional regimes story suggests that America is on the brink of a new one, which – on its own – does plausibly justify the inference that liberals currently calling more and more plaintively for judicial restraint will move to embrace judicial power as soon as they dominate.<sup>32</sup> But the polarization and rot stories, which crucially turn out to be companions, have collapsed the credibility of judicial politics at the end of their cycles. So there is not just the fact that, within the tales of polarization and rot, judicial review is powerless to negate the extreme situation within each dynamic. Rather, for that very reason, it is hard to understand why judicial review would play its expected role should progressives found a new constitutional regime. The unique moment coming

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responded to the erosion of their side's capture of the judiciary in the middle of the twentieth century, without mentioning his origins as a "crit" and defender not of liberalism but rather of "transcendent justice." See, e.g., J.M. Balkin, *Being Just with Deconstruction*, 3 SOC. AND LEGAL STUDIES 393 (1994).

32. Perhaps because the generational arguments on which Balkin relies put me in a different place, I read the liberal trajectory as less about the relinquishment of investment in judicial review than about its preservation, in part for the sake of the institutional and public authority of constitutional scholarship, and the main puzzle from where I sit is *why it took so long* for the credibility of politics through constitutional judges to endure as an organizing proposition. BALKIN, *supra* note 6, at 27.



or starting, in other words, seems *on Balkin's own account* to be one in which progressives will face the temptation to re-embrace judicial review after a bout of skepticism when the political supports for it have been polarized and rotted away. This is not something that has happened before. Why, then, assume the cycle of regimes will stick to type?

Balkin starts the judicial review section of his book with a chapter that generalizes about the topic, rather than delving into one cycle or another.<sup>33</sup> In particular, Balkin offers some compelling reasons for the endurance and growth of political supports for judicial review across time.<sup>34</sup> Balkin independently supposes that judicial review is desirable, a proposition he does not defend, especially with arguments about the intrusive and strong form Americans developed (and the rest of the world rejects).<sup>35</sup> But – in the traditions of public law theory in political science – he believes that regardless of its moral importance, judicial power always grows, in part because politicians have good strategic reasons to transfer authority to the courts.<sup>36</sup>

As the plot thickens, however, chapters nine and ten about polarization and rot both come closest in Balkin's generally disunified account to a combined story of all three dynamics, with both polarization and rot undermining the political supports for judicial review.<sup>37</sup> Indeed, I found the rot chapter the most compelling in the book because I take it to weaken the ordinary expectations one might have (again, on Balkin's own theory) of what is likely to happen when the judiciary is dragged over the threshold of a new cycle. Its breakdown in a time of polarization and, especially, its failures to help counteract rot mean it may lack enough basic legitimacy for political supports to be likely to return like magic once a comprehensive reset of the dynamics has occurred.

I may be wrong about the case for internal self-refutation in Balkin's book. But I also have some independent doubts leading in the same direction. It is significant that Balkin starts the second half of *The Cycles of Constitutional Time* with a chapter about the endurance – indeed intensification – of judicial review through history no matter what.<sup>38</sup> But once one places Balkin's provincially American political science literature about judicial review in its place, it is hard to fathom why the secular increase in judicial power across time or the idea that politicians inevitably turn to judiciaries to do their dirty work are anything like iron laws.

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33. *Id.* at 69–80.

34. *Id.* at 74–77.

35. *Id.* at 10–11 (“[J]udicial review remains a desirable feature of constitutional design.”).

36. *Id.* at 74–77.

37. *Id.* at 112–147.

38. *Id.* at 69.

For most of modern history outside America, the progressive consensus was that transferring policy authority to judges, for all its uses, involved greater risks, and was generally avoided.<sup>39</sup> Even once America's model became hegemonic in its unipolar geopolitical moment around 1989, no one acted to establish the extreme form of judicial review of our system. Balkin's cycles bake in all this provincialism outside the frame, I suspect simply because Balkin is allowing his normative support for judicial review, repeatedly expressed in his pages, to constrain our options in our distinctive current moment.

This has a lot of consequences for Balkin's nearly standalone chapter, late in the book, on judicial reform.<sup>40</sup> I have no quarrel, of course, with Balkin's advice "not to expect too much from courts, and endeavor to keep them from doing too much harm" in the next few years.<sup>41</sup> That a now Trumpified judiciary is not going to provide the way out of polarization and rot strikes me as quite right. But it by no means follows that we must and will limit progressive engagement with the institutional power of courts to damage control, before making them our instrument when the time is right. Neither the obvious uses of doing so nor Balkin's plea that "Americans should not give up on judicial review" are conclusive.<sup>42</sup>

Balkin's specific proposals for judicial reform – docket control, on the one hand, and bench renewal plus term limitation, on the other – are striking because they are almost entirely unrelated to the intellectual project of reading the tea leaves of American regularities.<sup>43</sup> Alteration in docket control has been done on its own (or at least, without Balkin explaining where it fits in his stories), while bench renewal plus term limitation has never been done before.

In other words, even to the extent Balkin includes it in *The Cycles of Constitutional Time*, court reform is independent of the processes the book is about, past and future. And if that is true, one might ask, why not do other things, especially with the current extraordinary coincidence of the brink of a new regime with advanced polarization and rot? In any event, Balkin's own proposals are guided principally by the normative desire, at least as I read the chapter, of de-dramatizing appointments battles. It is not just that there are many other plausible normative goals to shape court reform, but that no coming concatenation of causal factors in American cycles could preempt the need to compare and contrast them and do the right thing.<sup>44</sup> If Democrats

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39. *Id.* at 74.

40. *Id.* at 148–56.

41. *Id.* at 150–51.

42. *Id.* at 150.

43. *Id.* at 152–56.

44. Cf. Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. \_\_\_\_ 51–71 (2021),

triumph and face down the Supreme Court, and then choose to stock it with their jurists, it will have been one option among others – a choice that, even if Balkin is proven right that they make it rather than altering judicial power, will come not so much a predictive necessity as a choice with benefits and risks that could have gone differently.

#### IV. HOPE AND OPTIMISM

When we scratch the surface, my suspicion is that Balkin has developed the intellectual scheme of *The Cycles of Constitutional Time* in response to short-term events – above all, Donald Trump’s presidency – to domesticate the shock of the recent outcome and wrest optimism from a catastrophe that no cyclical theory could ever explain. This is not a book that would have been written before 2016, and it will come to be seen as a product of its time, a clarifying but also confused attempt to reckon with genuine novelty by diminishing it and salvaging from the latest American wreckage a modicum of liberal hope. Perhaps the Trump presidency requires something else: acknowledging more of its originality as a basis for a more radical optimism instead.

Not that there is a neat alternative to cyclical histories in my kind of progressive futurism, which – like most accounts of linear evolution – are freighted themselves with profound ancient legacies in their own right. Those who have long since given up religion but think of history as a forum of opportunity indulge in one of Judeo-Christianity’s biggest contributions to Western culture.<sup>45</sup>

As Heine understood, in hoping not for cyclical return but novel “progress,” the expectation that the arc of the moral universe is bending towards justice, people are caught up in profound neo-providentialist legacies in modern thought. To endorse a plausible account of betterment, the task of extricating ourselves from the premodern legacies so as to reconcile our beliefs about history and institutions with our understanding of human freedom is no easy matter. But then, a progressive understanding of time is no less amenable to reconstruction in modern and secular terms than archaic and ancient cyclicity, and in any event Balkin wants both things.

On their own, I am not so sure Balkin’s cycles justify the modestly optimistic scenario the book champions as an alternative to outright despair. One of the interesting features of Balkin’s rhetoric throughout his book is that he assumes his readers are depressed, and might need the tonic of political science to get out of bed; and he reassures them at each stage that while the

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[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3665032](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665032)  
[<https://perma.cc/EPJ7-QFEL>].

45. See, e.g., KARL LÖWITH, MEANING IN HISTORY: THE THEOLOGICAL IMPLICATIONS OF THE PHILOSOPHY OF HISTORY 19 (1949).

current situation is bleak, there is no reason to give in to cynicism or demobilization. Though courts may not save us from our circumstances, the American nation has been here before and can both survive and thrive, if it seizes the possibilities of the moment.

Even within the terms of his own argument, it is not clear how Balkin can justify near term optimism. Donald Trump lost, but Joe Biden's victory most likely marks an attempted restoration rather than anything like realignment, and there is no particular reason to believe that it will only take "five to ten years" to get through the current impasse.<sup>46</sup> Those on the left and right who have been operating roughly within Balkin's own assumptions, like Ross Douthat and Corey Robin, are generally careful to note that the *availability* of a new regime by no means guarantees it comes about in the near term, instead of the dithering of late-cycle repetition.<sup>47</sup> "We are in transition," Balkin observes.<sup>48</sup> But you can be in a transition a long time.

And I am very sure that cycles fail to allow for a more grandiosely utopian set of possibilities. In the end, my own frustration with Balkin's account is that he relies too heavily on naturalistic thinking, without seeking opportunities for free action outside the terms of his reconstructed past. *The Cycles of Constitutional Time* seems to curtail our grounds for hope without enough warrant, and shut down reasonable demands for bigger alternatives to our constitutional history – including the role it has accorded judicial review – than Balkin seems to want.

Do not get me wrong: I love everything about Balkin's book, for its achievements in rethinking American's constitutional past in wonderfully compelling ways. I just bridle at the modesty of its predictions for the future, which the past does not seem to require. But I would not bet on Balkin being wrong either.

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46. Balkin, *supra* note 6, at 12; see generally Scott Detrow & Asma Khalid, *Biden Wins Presidency, According to AP, Edging Trump in Turbulent Race*, NPR, (Nov. 7, 2020), <https://www.npr.org/2020/11/07/928803493/biden-wins-presidency-according-to-ap-edging-trump-in-turbulent-race> [<https://perma.cc/VHS4-C2LT>].

47. Ross Douthat, *Trump, Sanders, and the Revolt Against Decadence*, N.Y. TIMES (Jan. 30, 2016) (observing "how hard it is for a decadent society to escape the trap of repetition"); Corey Robin, *The Politics Trump Makes*, N+1, (Jan. 11, 2017) (stating Trump could "founder in disjunction").

48. Balkin, *supra* note 6, at 7.