

**CONSTITUTIONAL SPIRALS**

*By Jeremy Paul\**

---

\* Jeremy Paul is a Professor of Law at Northeastern University. This essay expands upon my comments at the Constitution Day presentation delivered at Northeastern University by Yale Law School Professor Jack Balkin on September 17, 2020. As the text makes clear, the essay was completed prior to the November 3, 2020 presidential election and focuses on Professor Balkin's pre-election book, *The Cycles of Constitutional Time*. Long delays occasioned by the pandemic have created space in these pages for post-election updates, and both Professors Balkin and Mayer have seized this opportunity. The editors of the *Northeastern University Law Review* kindly offered me the chance to do the same, but I would have written an entirely different piece post-election and thus have declined that invitation. I applaud Professor Balkin's elaboration in these pages of the implications of demographic changes in the United States and am otherwise content to let this pre-election piece speak for itself. Special thanks to Sarah Midkiff for editorial assistance.



As I complete this essay, only days remain before the 2020 election. As a professor of constitutional law, as an American, and as a father, I am terrified. From my vantage point, the nation is in the grip of leaders, especially President Trump, who, if given the chance, will crush the democratic and legal traditions that have made the United States the long-time leader of “the free world.” During his first term, President Trump has openly solicited foreign assistance in his efforts to win re-election,<sup>1</sup> brazenly exploited racial divisions by making rhetorical peace with white supremacy,<sup>2</sup> politicized the Department of Justice and the intelligence community, personally profited by steering government and campaign funds to his business interests from which he should have divested himself, manipulated the security clearance process in pursuit of nepotistic hiring, demolished the line between governing and politics by holding his convention speech on the White House lawn, openly celebrated the extrajudicial killing of an alleged criminal, withdrawn the nation from crucial international cooperative efforts (such as the Paris Climate Accords, the nuclear treaty agreement with Iran, and the World Health Organization), and repeatedly lied to the American people while attacking the press as the enemy of the people. Despite these corrosive actions, leading members of the Republican Party in the Senate and the House supported him every step of the way. The overwhelming majority of GOP elected officials presumably concluded that confirmation of conservative federal judges and tax cuts for corporate America and the nation’s wealthiest individuals outweighed any risks Trump’s volatile presidency entailed. We can only imagine how much further the nation will sink should voters grant Trump an Electoral College victory again.

In his erudite, easily accessible, and undeniably compelling new book, *The Cycles of Constitutional Time*,<sup>3</sup> Professor Jack Balkin articulates a

---

1 “Using the powers of his high office, President Trump solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election.” Articles of Impeachment Against Donald John Trump, Article 1, H.R. Res. 755, 116th Cong. (2019) (enacted). For a description of similar transgressions during the 2016 campaign, see Michael S. Schmidt, *Trump Invited the Russians to Hack Clinton. Were They Listening?*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/us/politics/trump-russia-clinton-emails.html>.

2 Following a neo-Nazi march in Charlottesville, Virginia in August 2017, Trump condemned the neo-Nazis but then said: “You had many people in that group other than neo-Nazis and white nationalists . . . You also had some very fine people on both sides.” Rosie Gray, *Trump Defends White-Nationalist Protesters: ‘Some Very Fine People on Both Sides,’* ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/>.

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

view of the Trump presidency that parallels my harsh assessment.<sup>4</sup> Yet, nonetheless, Balkin adopts an optimistic stance that encourages readers to temper their alarm over the nation's political predicament.<sup>5</sup> He concedes that President Trump may win re-election, offering many sound and sober warnings that the future has not yet been written and anything can happen,<sup>6</sup> but Balkin places his money tentatively on former Vice President Biden. In his grand narrative, and it really is grand, Professor Balkin sees the United States as coming to the end of a long political era, begun under President Reagan, in which unbridled individualism and suspicion of collective action have permeated American life. A new progressivism aimed at revivifying democracy and reducing economic inequality is on its way, Professor Balkin tells us, a trend he infers partly from a lack of support for conservative principles among younger voters. He then predicts the imminent collapse of the Reagan coalition, now barely held together by President Trump, as part of a longtime process within American democracy in which one coalition and loose set of ideas dominates for long periods only to ultimately "cycle" out in favor of new coalitions and ideas.<sup>7</sup>

For those who worry that our current situation is simply too different from past eras to draw conclusions about future cycles, Professor Balkin begins with an opening foray—reassuring us that we have not faced, during the Trump administration, what could fairly be called a constitutional crisis.<sup>8</sup> Such a crisis might understandably turn our attention away from the desirable arrival of a new political regime and toward the fear that we have come to the end of what is often called the "American experiment." Yet, as Professor Balkin sees it, constitutional crises occur only when the Constitution itself ceases to have the ability to prevent disputes between rival political factions from spiraling out of control into violence or chaos or both.<sup>9</sup> A constitutional crisis might occur when those in power openly refuse to follow the Constitution (perhaps employing the military to reverse an election or defying a Supreme Court order); when everyone agrees that

---

4 *Id.* at 55 ("Trump is a demagogue."); *id.* ("[He] is by turns uncouth, ill-mannered, boorish, corrupt, cunning, and entertaining."); *id.* at 56 ("His administration is a mess, his executive branch is woefully understaffed, his backstabbing underlings leak like sieves, the country is perpetually in an uproar, and he lurches daily from scandal to scandal.").

5 *Id.* at 3 (stating that our current "malaise is only temporary"); *id.* at 10 ("The message . . . is ultimately optimistic. We have been through these cycles before and we will ultimately get out of our present troubles[.]").

6 *Id.* at 6–8.

7 *Id.* at 12–29.

8 *Id.* at 38–43.

9 *Id.* at 38–39.

following the Constitution would require the nation to take some entirely self-destructive act; or when people conclude that only violence can solve current political problems.<sup>10</sup> Admittedly, we may be teetering on the edge of such things; for example, the Trump Administration's attitudes toward congressional subpoenas and foreign election meddling strike many as lawless. But, Balkin argues, we are not there yet.<sup>11</sup>

Instead, he tells us, what we are experiencing is something slightly different, which often occurs near the end of a political regime: an excess of what Professor Balkin calls "constitutional rot."<sup>12</sup> As its name implies, constitutional rot is a slowly deteriorating condition in which the country's political leaders drift away from their commitment to pursue the public good in favor of personal gain, and the country as a whole backslides from higher levels of commitment to democracy. Additional features of constitutional rot include a decline in public trust in government and steady erosion of the mutual forbearance that permits political leaders to govern successfully despite deep disagreements.<sup>13</sup> There's no more striking example than the bitterness generated when the GOP-controlled Senate denied a hearing to Supreme Court nominee Merrick Garland in March 2016 on the grounds that voters should have a say about the Court in the November 2016 election but then on a partisan vote confirmed Amy Coney Barrett as an Associate Justice just eight days before the 2020 presidential election. GOP leaders routinely point to the passage of Obamacare on a partisan vote as evidence of the Democratic party legislating without due regard for the strong opposing views on the other side. Both parties might agree that the inability of officials in Washington to come together on a second COVID-19 relief package is a dramatic example of constitutional rot.<sup>14</sup>

Balkin attributes our current high levels of constitutional rot to what he calls "the Four Horsemen": political polarization; increasing economic inequality; loss of trust; and significant policy failures such as the Vietnam War, the Iraq War, and the 2008 financial crisis.<sup>15</sup> Had he been writing now, I suspect he might add the failed response to the COVID-19 pandemic to his list of catastrophes. I agree wholeheartedly that each of Balkin's Four Horsemen characterizes our era, and data certainly support his conclusions

---

10 *Id.*

11 *Id.* at 43.

12 *Id.* at 44–62.

13 For a sterling treatment of the importance of forbearance to the maintenance of a stable democracy, see STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 106–17 (2018).

14 BALKIN, *supra* note 3, at 44–45.

15 *Id.* at 49–50.

concerning polarization and inequality.<sup>16</sup> I find these trends deeply alarming. Polarization and inequality make it difficult for our citizens to come together to tackle the problems of our day, including racial justice, housing affordability, student debt, declining life expectancy, and above all, climate change. But Balkin reminds us that the country has faced similar challenges before and yet has managed to make progress as new political cycles brought solutions to chronic problems. His paradigm example is the country's emergence from the Gilded Age in the 1890s, which was also marked by dramatic inequality and rampant public corruption. The Progressive Era's attack on monopoly power and ultimately the New Deal's embrace of an activist government are part of his story of a new political cycle. He celebrates past success in having surmounted constitutional rot and suggests we may one day soon begin marching again on the path toward a more perfect union.

Whether a second progressive era can take root depends on many factors to which I will return. But first, let me offer a word in response to Balkin's argument that it is easier to rebound from rot than from crisis. Imagine a married couple that has been traveling a loving but bumpy path over many years. One spouse then receives an attractive job offer in a distant city. In scenario one (crisis), the other spouse's initial reaction is: "go if you want, but if you do, we are through." In scenario two (rot), the two sit down and agree that they are getting much less out of the marriage than before and that the physical separation really shouldn't be a problem. Which of these two marriages would you bet on succeeding over the long run? My money would be on the pair facing a really tough crisis from which they might move on and recover. The couple whose marriage had slowly deteriorated might plow on from a distance, but the handwriting of a split appears to be clearly on the wall.

The same walk-the-plank potential of rot strikes me as prevailing in our current political moment. Consider how quickly things went back to seeming normal after we came to the brink of crisis during the hotly contested 2000 presidential election. This high-stakes struggle went unresolved for more than a month until, on December 11th, the Supreme Court of the United States ordered a halt to the Florida recount that left George W. Bush in the lead in the Sunshine State by only 537 votes. Vice President Gore accepted the Supreme Court's decision, and the potential "crisis" was averted. But the constitutional system succeeded due to forbearance from

---

16 Juliana Menasce Horowitz et al., *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewsocialtrends.org/2020/01/09/trends-in-income-and-wealth-inequality/>; *Partisan Antipathy: More Intense, More Personal*, PEW RSCH. CTR. (Oct. 10, 2019), <https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/>.

the losing side and a lack of any non-violent alternatives and not because Vice President Gore's supporters had confidence that he or they had been treated fairly.

So while the crisis was dodged, the rot grew deeper. The newly elected President George W. Bush fueled the polarization and lack of trust, which Professor Balkin highlights,<sup>17</sup> by governing as if he had won in a landslide. Were we then in an era of mutual forbearance and trust of the kind Balkin prizes, Bush might have openly acknowledged the evenly divided nation and the uncertainty of the election's outcome. He might have made half his cabinet Democrats and perhaps even worked on a way to have Joseph Lieberman become Vice President. Instead, in almost a parody of the well-worn slogan that "elections have consequences," he ran his administration, with the help of hard-right conservative Dick Cheney, as if he had a mandate.

Of course, it's tendentious to pinpoint the 2000 election or any particular moment as the origin of constitutional rot. Income inequality and increased polarization had begun long before the 2000 election, with the defeat of Robert Bork's Supreme Court nomination, the confirmation of Justice Thomas despite Anita Hill's testimony, and the partisan impeachment of President Clinton being just the most prominent examples. But the years since, including the peddling of birtherism, government shutdowns, budget sequestration, the battle over the Affordable Care Act, the elimination of the filibuster for judicial nominees, another partisan impeachment, the stonewalling of Merrick Garland, and now a dysfunctional government being swamped by COVID-19, leave us wondering whether our nation can sustain itself as a constitutional democracy. We now face an election in which the battle to persuade voters is taking second fiddle to the struggle over how we will count the votes, and many worry that we have gone well beyond partisan cycles that eventually resolve themselves and plunged into a spiral from which we will not recover.

It is at precisely this point of despair that Professor Balkin hopes to come to the rescue.<sup>18</sup> He wants those of us transfixed by daily assaults on law, norms, and traditions to look back through broader lenses to note how the nation's democracy has waxed and waned over more than two centuries. He notes that our founding framers well understood that the thirst for power would often tempt political leaders to subvert constitutional norms in favor of immediate political advantage. The constitutional design, which staggers election for federal office across different election cycles, helps place a check

---

17 BALKIN, *supra* note 3, at 49–50.

18 *Id.* at 62–65, 161–74.

on the immediate entrenchment of a potentially dangerous regime. The 1994, 2010, and 2018 elections, for example, all featured an immediate change of direction in which control of the House of Representatives switched from one party to the other, and in all three cases away from the party of the President who had prevailed just two years earlier. Thus, from the moment a new President takes the oath of office, fear of mid-term rebuke at the polls serves to temper unwarranted grabs for executive power that might prove unacceptable to the public.

Each year constitutional law professors across the country begin their courses with the standard story. The Constitution relies principally on two basic strategies for protecting citizens against an excessively powerful national government. First, the Constitution goes to great lengths to divide power. This is accomplished through our nation's commitment to federalism, a division of authority between the states and the federal government. Power is then further divided within the federal government among the three branches, legislative, executive, and judicial, to establish our well-known system of checks and balances. Second, the Constitution spells out fundamental individual rights that government cannot infringe, such as the rights to free speech, to bear arms, to free exercise of religion, to equal protection of the law, and many more. Yet, as Professor Balkin emphasizes, the system of staggered elections is an underappreciated constitutional feature. House members must stand for office during off-year elections with no presidential race, making it significantly harder for a policy program to be enacted and implemented without the public having the chance to weigh its merits free from the issues of personal popularity that often dominate campaigns for the White House. And Senators' six-year terms provide some protection for Senators against being swept away during temporary fervor that might be stirred by a charismatic presidential candidate. I plan to add Balkin's emphasis on election cycles to my course each year from now on; indeed, Balkin's emphasis on this kind of cycle represents perhaps his book's greatest contribution.

But, of course, Balkin draws his book's title not from election cycles but from the deeper political cycles that provide grounds for his major thesis. In his re-telling of U.S. political and judicial history, the nation has experienced long periods in which one party or another has dominated the agenda. Balkin builds on the work of Stephen Skowronek to categorize various eras in our history and then to describe distinct roles particular Presidents played within those eras.<sup>19</sup> We had the Federalist period from

---

19 *Id.* at 12–27 (relying on STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (1997) and STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISAL AND REAPPRAISAL* (2d ed. 2011)).



1789 to 1800, the Jeffersonian period from 1800 to 1828, and the Jacksonian period from 1828 to 1860. Since the Civil War, the country has experienced long domination by Republicans from 1860 through 1932; what Balkin calls the New Deal/Civil Rights period from 1932 to 1980; and the Reagan era that began in 1980. It's the Reagan Era that Balkin speculates might now be coming to an end.

Balkin presents a capsule view of history that provides delightful reading.<sup>20</sup> Within each era, again building on Skowronek's work, Balkin highlights Presidents who cleared the ground for the new regime (Lincoln, F.D. Roosevelt, and Reagan); Presidents who kept on keeping on (Grant, T. Roosevelt, Taft, Truman, Kennedy, Johnson, and George H.W. Bush, though G.W. Bush would fit here too); Presidents, often from the opposite party, who sought to temper the strength of dominant forces (Eisenhower, Nixon, Clinton, and Obama) and Presidents who presided over the dissolution of the regime (Hoover, Carter, and perhaps now Trump). It is very well presented, and this book should be widely adopted in undergraduate courses as a marvelous introduction to political history and its links to developments at the Supreme Court.

There are, however, obvious difficulties in drawing lines between purportedly distinct political periods. Labeling the years between 1932 and 1980 as the New Deal/Civil Rights Era strikes me as somewhat like calling the years between 1955 and 1980 the Rock 'n' Roll/Disco Era. Yes, some of the same record companies may have produced hits throughout the entire period, but the music and culture of the decades varied widely. So, too, while the Democrats may have been the dominant party from 1932 through 1980, attitudes on race shifted dramatically between the New Deal and the emergence of the civil rights movement. One might also argue that Republican dominance began in 1968 rather than 1980 since the Nixon plus Wallace vote in the 1968 election signaled the collapse of the New Deal coalition. Carter's brief interlude was far more a holding action than a return to the Democratic traditions. Despite these nuances, given the long-run vitality of democratic institutions in the United States, the story Balkin tells of political and constitutional cycles is compelling enough.

Balkin insightfully describes how dominant regimes eventually dissolve as different sectors of their constituencies pull them in divergent directions.<sup>21</sup> He deftly explains that as the issues in the nation change, the many constituencies that have united to form a dominant regime may splinter as new issues arise, exposing previously hidden fissures and old solutions

---

20 *Id.* at 12–29, 69–96.

21 *Id.* at 12–29, 85–91.

prove no longer adequate to confront the problems at hand. For example, in the late 1920s, Republicans had no solutions for the pressures that led to the Great Depression, and therefore lost the public trust, resulting in Democrats prevailing in the next five presidential elections. By analogy, it is easy to make out a case that the Reagan regime, in which Balkin currently situates us, is not built to handle collective threats to public health such as pandemics and, most significantly, climate change; therefore, its era of dominance may be ending. We may indeed be about to witness the dawn of a new, dominant, more progressive political ethos. Or this era may have already begun with the election of Barack Obama, with the Trump catastrophe just a speed bump along the way. The more progressive attitudes of younger voters on issues such as racial equality and same-sex marriage, which Balkin highlights, are certainly evidence of profound shifts.<sup>22</sup>

The question on everyone's mind today, however, is whether the nation's long-term commitment to democracy and the rule of law will withstand the dark forces that President Trump has unleashed. Predicting a political turn based on past cycles is not persuasive unless the conditions that prevailed during earlier cyclical shifts continue to hold. The paramount question Balkin faces is why he believes our current situation sufficiently resembles the past to make a cyclical analysis persuasive. Yet this core problem never assumes prominence in his otherwise compelling account. Yes, our constitutional structure remains in place, although, as noted above, the constitutional rot Balkin describes is serious. Yes, we are about to hold an election, although our President is undermining its legitimacy almost daily. And yes, our national character endures, although our level of civic education seems dangerously on the decline. But what gives us confidence that the center will hold?

Many aspects of contemporary life are strikingly different from any we have previously experienced, in ways that call into question Balkin's prediction that the country is headed for another robust political cycle fueled by popular demands for change. Here are the three current fissures that scare me the most. First, the United States is experiencing a dramatic demographic change in which, for the first time in our history, white Americans are headed for minority status. Balkin certainly sees racial backlash as a major component of Donald Trump's rise. But he offers no reason to suggest that when faced with the choice between respect for democracy and maintaining racial dominance, millions of white Americans won't throw democracy under the bus. The constitutional rot Balkin

---

22 As Balkin puts it, "the [Republican P]arty's brand is increasingly toxic among the millennial generation and younger voters." *Id.* at 27.

describes has been cheered on by GOP elected officials across the country. The President has built a constituency that loves him far more than it loves our constitutional traditions. This is precisely what Trump himself alluded to when he bragged about being able to shoot someone on Fifth Avenue without losing any votes.<sup>23</sup> He has willfully ignored public health guidelines leading to unnecessary deaths, and yet win or lose on November 3rd, he is certain to garner millions of votes. Balkin never explains how a President Biden is going to woo these voters back into the democratic fold and prevent a spiral into increasing violence and disdain for constitutional traditions.

Second, the economic position of the United States is meaningfully different from what it was during previous cyclical changes. Of course, the nation has gone through many economic downturns. But from the moment the Constitution was ratified until today, we have been a rising nation. The post-World War II Era was unique as we strode mightily across the globe. Throughout our history, each generation had strong reason to believe that the next one would have a higher standard of living. Today, however, Americans have lost faith in the prospects for economic progress, and it seems certain that China will soon outstrip us as the world's largest economy. Climate change looms on the horizon as a daunting challenge to future growth. And the millions of Americans who have not benefited from the gains of globalization may have reason to question their allegiance to a democratic, constitutional system that they feel has left them behind. Balkin pays far too little attention to the effect that diminished economic prospects can have on the capacity of ordinary politics to produce cyclical shifts in governing regimes.

Indeed, the Trump movement is fueled by anger and resentment to the point of ignoring the guardrails—such as keeping the President away from prosecutorial decisions, consulting with the opposition party, respecting congressional directives on the allocation of funds, complying with legitimate oversight hearings, and separating public governance from private business—that have allowed reform within the system. As we approach November 3rd, many of us are hopeful that traditional safeguards will hold, and a free and fair election will take place. But win or lose, Trump and his followers are a powerful force whose primary belief is that if they continue to support the constitutional system, they will continue to get the short end of the economic stick. Joe Biden, as President, will need a creative strategy to turn that resentment around, or the forces of disintegration will

---

23 Then candidate Trump's comments were widely reported. See, e.g., Jeremy Diamond, *Trump: I Could 'Shoot Somebody and I Wouldn't Lose Voters,'* CNN (Jan. 24, 2016), <https://www.cnn.com/2016/01/23/politics/donald-trump-shoot-somebody-support/index.html>.

continue spiraling the country into a vortex of conflict, which no ordinary cycle will redeem.

Finally, and this point is one to which Professor Balkin does refer, we live in an unprecedented media environment. Of course, there's nothing new about a polarized, partisan press. But the power of Fox News and social media to create an alternative reality in the minds of viewers is among the scariest aspects of contemporary life.<sup>24</sup> Balkin's entire theory is based on the idea that as the problems facing the country change, voters may adjust to new types of leaders capable of confronting new challenges. But a shockingly high percentage of the electorate is no longer exposed to those new challenges. It is instead fed a diet of lies in which COVID-19 is a hoax, climate change an invention, Russia didn't meddle in the 2016 election, etc. How can we expect the political cycles that have marked our long history to continue to keep turning when the distribution of news is poisoned with what have come to be known as "alternative facts"? The fact that in past eras the truth has perhaps prevailed tells us little about what will happen when such powerful forces are eager to ensure it does not.

Ultimately, the description of political cycles, no matter how astutely observed and compellingly presented, cannot substitute for a more granular analysis of where we can find, in current conditions, the resources to pull back from the constitutional abyss. If the nation is fortunate on November 3rd, and Biden prevails, it will be incumbent on the new President and his capable team, not merely to control the pandemic and build the economy back better, but to discern how to knit together a country confronting unprecedented demographic change, diminished prospects for growth, and media enterprises for whom truth is subservient to power and glory. Should President Trump be re-elected, Professor Balkin offers few persuasive words explaining why more than 200 years of cycles won't spiral into chaos, autocracy, or worse. May the Force be with us.

---

24 For a particularly powerful demonstration of the influence of right-wing media, see YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 7, 14 (2018).