

THE CYCLES OF CONSTITUTIONAL TIME: SOME SKEPTICAL QUESTIONS

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INTRODUCTION

Though regular readers of law journals may not be aware of it, there is a burgeoning subfield in political science known as American political development. In general terms, American political development may be described as history with a distinctly political science spin. It examines the ways that American political institutions and practices have changed over the course of our nation's history, with a focus less on simple narrative description than on how such changes have affected the operations and outputs of the political system. To date, almost all of this work has focused on Congress, the presidency, the bureaucracy, political parties, and voting behavior. Jack Balkin's *The Cycles of Constitutional Time* is one of the first major attempts to apply such an approach to the judiciary, particularly the Supreme Court.¹ For that reason alone, I suspect it will attract a wide readership. The remarkable range of Balkin's analysis is also quite impressive. In the pages that follow, I will raise a number of questions and put forward a few criticisms, but that in itself is a kind of back-handed compliment. Provocative, wide-ranging books invariably raise as many questions as they answer.

Since my own work in political science is primarily concerned with elections and political behavior, I will confine most of my comments to the first five chapters in Professor Balkin's book.

1 All subsequent references to Balkin's analysis are drawn from JACK BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2020).

I. A NEW, DEMOCRATIC POLITICAL REGIME?

For many readers, the most hopeful part of Professor Balkin's book will probably be chapter 2, in which he argues that what he calls the "Reagan regime," in which the Republicans have been the electorally dominant party, will soon be replaced by a new era in which Democrats will win most elections. The framework that Balkin uses to analyze American politics is borrowed from his fellow Yale Stephen Skowronek's book *The Politics Presidents Make*.² Though Balkin asserts at one point that Skowronek's schema is different from the theory of partisan realignment,³ which is more popular—and more thoroughly analyzed—among political scientists, I think the two ways of dividing up American political history are all but identical. On page fifteen of his book, Balkin provides a table listing the various "political regimes" in American history.⁴ This table is point-for-point the same as the standard list of realignments and party systems, except that most political scientists would claim that 1896 was also a realigning election and that the years between 1896 and 1928 constitute a distinct, fourth party system.⁵ In my comments with respect to chapter 2, I will therefore discuss its central argument mainly through the prism of realignment theory.

To provide a brief summary of a quite substantial body of political science writing: The theory of partisan realignments argues that American electoral history under the Constitution can be divided into "a number of distinct periods of relative stability, often called *party systems*, in which the identities of the two major parties, the relative electoral success of these parties, and the composition of the party coalitions don't change very much."⁶ One party may do unexpectedly well in an election or two, but

2 STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (1997).

3 Balkin, *supra* note 1, at 13–14.

4 *Id.* at 15.

5 For a table that lists the standard division of American electoral history into six party systems, see MORRIS P. FIORINA ET AL., *THE NEW AMERICAN DEMOCRACY* 213 (7th ed. 2010).

6 WILLIAM G. MAYER, *THE USES AND MISUSES OF POLITICS: KARL ROVE AND THE BUSH PRESIDENCY* 8 (2021) [hereinafter MAYER, *THE USES AND MISUSES*]. For an introduction to and assessment of the realignment literature, see William G. Mayer, *Changes in Elections and the Party System: 1992 in Historical Perspective*, in *THE NEW AMERICAN POLITICS: REFLECTIONS ON POLITICAL CHANGE AND THE CLINTON ADMINISTRATION 19–50* (Bryan D. Jones ed., Taylor & Francis 2018) (1969) [hereinafter Mayer, *Changes in Elections*]. Other major works in the realignment canon include WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* (1970); EVERETT CARLL LADD, *AMERICAN POLITICAL PARTIES: SOCIAL CHANGE AND POLITICAL RESPONSE* (1970); JEROME M. CLUBB ET AL., *PARTISAN REALIGNMENT: VOTERS, PARTIES, AND GOVERNMENT IN*

soon the forces of continuity and stability reassert themselves, and the normal pattern of electoral politics returns. And then, quite suddenly, the existing party system breaks down, and a new one emerges to take its place. Over a period of just one or two elections, the balance of strength between the parties changes, and the composition of each party's regular, core supporters is substantially recast. Once established, this new regime—the new party system—lasts for about twenty-eight to thirty-six years until it too is overturned by the next realignment. The elections that are usually singled out as critical or realigning elections are those of 1800, 1828, 1860, 1896, and 1932.⁷

If realignments occur about every thirty years, it was hardly surprising that in the late 1960s, many political scientists believed that we might be on the cusp of another realignment. And when Richard Nixon was elected president in 1968 and then overwhelmingly re-elected in 1972, and the once solidly Democratic South seemed no longer willing to vote for Democratic presidential candidates, a fair number of commentators became convinced that the next realignment was now in process.⁸ The glaring problem with this claim involved Congress: while Republicans would win five of the six presidential elections between 1968 and 1988, they would have a Senate majority only between 1980 and 1986, and not once would they win a majority of seats in the House of Representatives. Democrats also won a regular majority of gubernatorial and state legislative elections.

What all this meant for the theory of realignment was a subject of some disagreement. Some commentators believed that 1968 was a realigning election, though, for various reasons, it was not as thorough-going as the realignment of 1932.⁹ Another school of thought held that 1968 might have initiated a realignment had it not been interrupted by Watergate; but once memories of that nightmare had dimmed, the realignment was consummated by Ronald Reagan's triumph in 1980.¹⁰ Yet others have argued that the whole idea of realignments was no longer applicable—indeed, perhaps

AMERICA (1980); and JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* (2d ed. 1983).

7 Mayer, *Changes in Elections*, *supra* note 6.

8 For the most influential statement of this claim, see KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY: UPDATED EDITION* (Princeton Univ. Press 2014) (1969).

9 This is, for example, the conclusion that I reach in Mayer, *Changes in Elections*, *supra* note 6.

10 See KEVIN P. PHILLIPS, *POST-CONSERVATIVE AMERICA: PEOPLE, POLITICS, AND IDEOLOGY IN A TIME OF CRISIS* 53–62 (1982); Thomas E. Cavanagh & James L. Sundquist, *The New Two-Party System*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 33–67 (John E. Chubb & Paul E. Peterson eds., 1985).

never had been.¹¹ To further complicate matters, developments since 1990 seemed to point in two very different directions. On the one hand, what had once seemed to be a reliable Republican majority at the presidential level has apparently disappeared. In the last eight presidential elections, only one Republican candidate has managed to win a plurality of the popular vote. Yet, at the same time, ten of the last fourteen congressional elections have resulted in a Republican majority in the House of Representatives¹² and, putting aside the difficult-to-classify case of 2000,¹³ Republicans have had Senate majorities on eight of twelve occasions. It is most unclear, in short, that there really was such a thing as the “Reagan regime” (or a “Nixon regime” that was derailed by Watergate).

Whatever one makes of such issues, analysts have regularly insisted that the coming years would see a new political era in which the Democrats would win consistent majorities in elections at all levels of American government. One of the first such claims was put forward in 1974, when Lanny Davis, a political operative who would later become a top advisor to Bill Clinton, wrote a book called *The Emerging Democratic Majority*.¹⁴ As its title indicates, Davis’ book argued that the Democrats were on the verge of starting a new political era, different in some ways from the New Deal Era, but nevertheless dominated by the Democrats. And his argument was recognizably similar to the one Balkin suggests: that the Democrats would draw a special strength from rising groups like women, racial minorities, the student left of the 1960s, and New Politics suburbanites, while the Republican Party was based on groups that represented a declining share of the electorate.¹⁵ Given what happened just six years later, when Ronald

11 Anyone interested in realignment theory—or Skowronek’s classification of political regimes and their associated presidencies—must come to grips with DAVID R. MAYHEW, *ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE* (2002).

12 *Party Divisions of the House of Representatives, 1789 to Present*, HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Feb. 1, 2021). Since Balkin and other commentators imply that the Republican House majorities owe much to partisan gerrymandering, it is worth pointing out that the GOP won a majority of House votes in eight of fourteen elections. *Id.*

13 The 2000 election produced a tie in the U.S. Senate: 50 Democrats and 50 Republicans. With Vice President Dick Cheney casting the tie-breaking vote, the 107th Congress began with Republicans in control of the Senate. In May 2001, however, Vermont Senator Jim Jeffords, up to that time a Republican, announced that he would now be an independent who would caucus with the Democrats, thereby giving the Democrats an effective 51-to-49 majority in the upper house.

14 See LANNY J. DAVIS, *THE EMERGING DEMOCRATIC MAJORITY: LESSONS AND LEGACIES FROM THE NEW POLITICS* (1974); see also Arthur M. Schlesinger, Jr., *How McGovern Will Win*, N.Y. TIMES, July 30, 1972, at 10.

15 Balkin, *supra* note 1, at 12–29.

Reagan decisively trounced Jimmy Carter and brought in a Republican Senate majority along with him, I doubt that even Davis himself would stand by his prediction.

Undeterred by Davis' example, in 2002, John Judis and Ruy Teixeira wrote a book, also called *The Emerging Democratic Majority*, that made much the same argument, albeit with better data.¹⁶ And though the 2002 and 2004 elections didn't exactly turn out the way they had hoped, the 2008 election seemed to bear out their prophecy. The Democrats won the presidency that year by a decisive margin; they also scored large majorities in both the House and the Senate. More than a few commentators were accordingly convinced that the new Democratic era had finally arrived. Harold Meyerson, for example, said that "[e]ven though Obama's victory was nowhere near as numerically lopsided as Franklin Roosevelt's in 1932, his margins among decisive and growing constituencies make clear that this was a genuinely realigning election."¹⁷ John Judis similarly proclaimed, "[Obama's] election is the culmination of a Democratic realignment that began in the 1990s[.]"¹⁸ And then the Democrats suffered major losses in the 2010 and 2014 midterm elections and surrendered the White House in 2016.

Against that background, readers will understand why I am skeptical that Professor Balkin's prediction of a new Democratic electoral regime will come to pass. The 2020 election results might superficially seem to support his analysis. Joe Biden defeated Donald Trump by a comfortable margin in the popular vote (the electoral vote was much closer), and the Democrats managed to win fifty seats in the Senate, which, with a Democratic vice president, gives them effective control of that body as well. The Democrats also retained their majority in the House of Representatives, though they lost thirteen seats. But I do not think this can be interpreted as a wholesale rejection of Republican policies or even of the party as a whole. What ailed the Republican Party in 2020 was the man at the head of the ticket: a President, Donald Trump, who was, as compared with all other contemporary Presidents, uniquely intemperate, dishonest, narcissistic, overconfident in his own abilities and therefore loath to take advice, and showing no apparent qualms about using his office to benefit his own and his family's economic interests.¹⁹

The impact of Trump's personal failings, independent of his policies, was clearly visible in 2019, well before anyone anticipated the COVID-19

16 See JOHN B. JUDIS & RUY TEIXEIRA, *THE EMERGING DEMOCRATIC MAJORITY* (2002).

17 Harold Meyerson, *A Real Realignment*, WASH. POST, NOV. 7, 2008, at A19.

18 John B. Judis, *America the Liberal*, NEW REPUBLIC, NOV. 5, 2008, at 20.

19 For a good summary of Trump's many problems, see JOHN J. PITNEY, JR., UN-AMERICAN: THE FAKE PATRIOTISM OF DONALD J. TRUMP (2020).

pandemic. Though the Democrats and the media were loath to give Trump credit or even to acknowledge the facts, as of 2019, the American economy was enjoying its best-sustained performance in the last fifty years. From February 2019 through February 2020, the national unemployment rate was consistently below 4.0%, averaging a remarkable 3.6%.²⁰ Nor, contrary to an often-made Democratic charge, was it only whites and the wealthy who were benefiting. In late 2019, both Black and Hispanic communities enjoyed their lowest unemployment rates since the federal government began keeping statistics by race.²¹ In virtually any other circumstances, a President who presided over such a record-breaking economy would have had an approval rating of at least 60%.²² Yet throughout this period, more Americans disapproved of Trump's job performance than approved of it. According to RealClearPolitics, which averages the results from numerous polls and thereby largely washes out the effects of sampling error, Trump's approval rating during this time of stunning economic performance never climbed above 46%, and his disapproval numbers never fell below 50%.²³ By comparison, in the final two years of Bill Clinton's presidency—the last time when the U.S. unemployment rate was even roughly comparable to Trump's pre-pandemic record—his average approval rating was 60% in 1999 and 61% in 2000.²⁴

Will Trump's image continue to haunt the Republican Party after he leaves office? Given the highly personal nature of Trump's failings, I doubt this will occur—unless the Republicans nominate him or one of his children as their next presidential candidate. In 2008, George W. Bush's approval ratings were far lower than Trump's,²⁵ and his failings, in both

20 See the data reported at *Unemployment Rate from 2010 to 2020*, U.S. BUREAU LAB. STAT., https://data.bls.gov/timeseries/LNS14000000?years_option_=all_years (last visited Dec. 28, 2020).

21 In August 2019, the Black unemployment rate was 5.2%. Its previous low point was 7.0% in April 2000. *Unemployment Rate—Black or African American Men*, FED. RSRV. BANK ST. LOUIS: FRED ECON. DATA, <https://fred.stlouisfed.org/series/LNS14000031> (last visited Oct. 18, 2020). Hispanic unemployment bottomed out at 4.0% in September 2019; prior to the Trump presidency, its lowest point was 4.8% in October 2006. *Unemployment Rate—Hispanic or Latino*, FED. RSRV. BANK ST. LOUIS: FRED ECON. DATA, <https://fred.stlouisfed.org/series/LNS14000009> (last visited Oct. 18, 2020).

22 The strong relationship between economic performance and presidential approval ratings is a standard finding in the large literature on approval ratings. See, e.g., Samuel Kernell, *Explaining Presidential Popularity*, 72 AM. POL. SCI. REV. 506, 506–22 (1978).

23 See *President Trump Job Approval*, REALCLEAR POLITICS, realclearpolitics.com/epolls/other/president_trump_job_approval-6179.html (last visited Jan. 13, 2021).

24 See *Presidential Approval Ratings – Bill Clinton*, GALLUP, <https://news.gallup.com/poll/116584/presidential-approval-ratings-bill-clinton.aspx> (last visited Feb. 4, 2021).

25 See *President Bush Job Approval*, REALCLEAR POLITICS, <https://www.realclearpolitics.com>

the economy and foreign policy, were far more severe.²⁶ Yet just two years later, the Republicans had regained all of their lost ground in the House of Representatives and most of their losses in the Senate and might have won back the presidency in 2012 had Mitt Romney not run such a poor campaign.²⁷

Why do predictions of a new party system keep falling short? As I argued in an article published a few years ago, I believe it's because all these predictions are based on a fundamentally inaccurate theory as to the causes of realignments.²⁸ What is probably the dominant theory on this subject is that realignments are a kind of inevitable product of social change. This is also pretty clearly the theory Balkin endorses in his book.²⁹ A party system is created around one set of issues and cleavages, like slavery and the Civil War, or the problems of industrialization. But gradually, that set of issues fades in significance, there is an accumulation of social and demographic changes, and so, finally, a new party system is established to take its place.³⁰

I have a very different take, which might be called the catastrophe theory of realignments. In my view, realignments—or political regimes—are created in the wake of some kind of serious catastrophe. For example, what political scientists have called the third party system—what Balkin calls the Republican regime—was forged by the Civil War, which threatened to divide the nation into two antagonistic countries and eventually resulted in the deaths of more than 600,000 American soldiers. The next party system was established in reaction to the second-worst economic depression in American history. And the New Deal system was the result of the worst depression in American history. There are analysts who have tried to claim that in the late 1920s, the pre-New Deal party system was already being steadily undermined by various social changes, such as the huge number of immigrants who had come to this country in previous decades, and that

com/epolls/other/president_bush_job_approval-904.html (last visited Jan. 13 2021).

26 Between 2003 and 2008 inclusive, 4,539 American soldiers died in Iraq; nothing remotely similar occurred during Trump's presidency. See *Iraq Coalition Casualty Count*, ICASUALTIES.ORG, <http://icasualties.org/> (last visited Feb. 4, 2021). The lowest unemployment rate during George W. Bush's presidency was 4.4% at a number of points in 2006 and 2007; in the final six months of Bush's tenure, the average unemployment rate was 6.4%. See BUREAU LAB. STAT., *supra* note 20.

27 On the many failings of the Romney campaign, see William G. Mayer, *How the Romney Campaign Blew It*, in *THE FORUM* 10, at 40–50 (2012).

28 William G. Mayer, *With Enemies Like This, Who Needs Friends? How Barack Obama Revived the Republican Party*, in *DEBATING THE OBAMA PRESIDENCY* 103–22 (Steven E. Schier ed., 2016).

29 See Balkin, *supra* note 1, at 14.

30 Probably the fullest statement of this perspective is found in EVERETT CARLL LADD, *AMERICAN POLITICAL PARTIES: SOCIAL CHANGE AND POLITICAL RESPONSE* (1970).

Franklin Roosevelt's election in 1932 merely administered the coup de grace. I think this argument is entirely unsupported by the election results. In 1928, Republican presidential candidate Herbert Hoover won 58% of the popular vote and 444 electoral votes, while Republicans racked up a 100-seat majority in the House and a 17-seat majority in the Senate.³¹ Had the Great Depression not begun in late 1929, there is not the slightest reason to think that the GOP would not have scored reasonably similar victories in 1930 and 1932.

My perspective on realignment theory has several important implications for the likely future of American politics—and for Balkin's prediction that succeeding years will be dominated by the Democratic Party. First, it is far from clear that the events of the last several years constitute a real "catastrophe." Up until early 2020, as I have already noted, the American economy was in very good shape, and while many other countries deplored Trump's foreign policy, that alone was not likely to affect many votes in this country. Foreign policy generally becomes an important voting issue only when many American soldiers are being killed in foreign conflicts or other vital U.S. interests are seriously threatened.³² Nothing of that sort has taken place during Trump's presidency. As for COVID-19, while it has cost the country many thousands of lives and administered a significant hit to the economy, it is far from clear how much voters will blame Trump for such consequences. In shutting down the economy, Trump was following a course of policy that was, at least in the beginning, endorsed by both parties and experts of all political stripes. How voters will assess the loss of life that occurred because of COVID-19 during Trump's presidency is more difficult to estimate. While more than 335,000 US deaths were attributed to COVID-19 in 2020, the number of deaths per capita is not very different from that in most European countries.³³ Though it came too late to affect the 2020 election, Trump will also probably receive some credit for the rapid development and implementation of the COVID-19 vaccines.

More importantly, catastrophes only create the *opportunity* for a new party system. Whether a realignment actually comes about depends on the success of the new, incoming party in handling the set of problems they

31 Results of the 1928 elections are taken from CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 249, 288, 928 (1975).

32 See Kernell, *supra* note 22. The only foreign policy variables that are usually included in presidential approval ratings are "rally events," which generally have significant but temporary effects, and casualties in foreign wars. *Id.*; See also Douglas A. Hibbs, Jr., et al., *On the Demand for Economic Outcomes: Macroeconomic Performance and Mass Political Support in the United States, Great Britain, and Germany*, 44 J. POLS. 426, 426–62 (1982).

33 See *Reported Cases & Deaths by Country or Territory*, WORLDOMETER, <https://worldometers.info/coronavirus/> (last visited Dec. 28, 2020).

are confronted with. The Civil War only made Republicans the dominant party because the North won the Civil War. If the South had prevailed, the Republicans would probably have disappeared from the political scene or at least become the minority party. The Republicans gained new life and new votes after 1896 because, beginning in 1897, the depression that began in 1893 ended and a sustained period of economic expansion soon followed.³⁴ The New Deal was a bit less successful in bringing the Great Depression to an end, but at least Roosevelt did a whole lot better than Herbert Hoover, and he also enacted a fair amount of useful social and regulatory legislation.

In order to establish a new political regime, in short, the Democrats will have to show that they can actually solve most of the problems that now afflict the country. A useful take-off point for thinking about such matters appears on page seventeen of *The Cycles of Constitutional Time*, where Professor Balkin provides a list of problems that the Republicans have supposedly not been able to cope with: “stagnant wages, decreasing social mobility, an opioid epidemic, crumbling infrastructure, a decaying educational system, crippling student debt, unaffordable health care, and so on.”³⁵ What is notable is that Balkin simply assumes that the Democrats have the answers to all these problems. Based on past performance, I find such a view highly questionable.

Did the Democrats make health care more affordable? Maybe for some people, but not for most Americans. When the proposal was being debated, the White House claimed that their bill would “cut the cost of a typical family’s premium by up to \$2,500 a year.” In fact, no such savings ever materialized.³⁶ Did stagnant wages revive during the Obama presidency? Did social mobility increase? In fact, as has been widely pointed out, the Obama “recovery” was the slowest and most anemic since the Great Depression.³⁷

34 For data on unemployment rates during and immediately after the 1893 depression, see Christina Romer, *Spurious Volatility in Historical Unemployment Data*, 94 J. ECON. HIST. 31 (1986).

35 Balkin, *supra* note 1, at 17.

36 For two good analyses of Obama’s promise and the actual results of the Affordable Care Act, see Yevgeniy Feyman, *Dispelling Obamacare Cost Saving Myths*, FORBES (Sept. 28, 2015), forbes.com/sites/theapothecary/2015/09/28/dispelling-obamacare-cost-saving-myths/#669a74821ae2, and J.B. Wogan, *No Cut in Premiums for Typical Family*, POLITIFACT (Aug. 31, 2012), politifact.com/truth-o-meter/promises/obameter/promise/521/cut-cost-typical-familys-health-insurance-premium-/.

37 See Louis Woodhill, *Obama Wins the Gold for Worst Economic Recovery Ever*, FORBES (Aug. 1, 2012), <https://www.forbes.com/sites/louiswoodhill/2012/08/01/obama-wins-the-gold-for-worst-economic-recovery-ever/?sh=15f81a353ca2>; Heather Long & Tami Luhby, *Yes, This Is the Slowest U.S. Recovery Since WWII*, CNN BUS. (Oct. 5, 2016), <https://money.cnn.com/2016/10/05/news/economy/us-recovery-slowest-since-wwii/index>.

The “decaying educational system” provides a particularly good venue for considering the problematic nature of many traditional Democratic policies. For most of the last fifty years, the Democratic plan for improving the shortcomings of American education has been to increase spending. And contrary to what some have asserted, this policy has been implemented—dramatically so.³⁸ As education scholar Jay Greene has shown, between 1945 and 2001, real per-pupil spending for elementary and secondary education increased by more than 700%. But as Greene also shows, educational test scores during this same period were absolutely flat.³⁹ Yet Democrats continue to insist that the key to better education is more spending. Given the very large number of American children who are now raised in single-parent households, there are probably distinct limits on how much the schools alone can accomplish.⁴⁰ But if our decaying educational system can be revived, it will almost certainly require a major effort to shake up the educational bureaucracy and its associated practices—but the Democrats, given their substantial indebtedness to teachers’ unions, are unlikely to make an attempt.

html?iid=hp-stack-dom.

38 On the strange—and false—claim that educational spending has been cut, see Corey DeAngelis & Matthew Nielsen, *No, We Haven’t “Defunded Education for Years.”* WASH. EXAMINER (June 11, 2020), <https://www.washingtonexaminer.com/opinion/no-we-havent-defunded-education-for-years>.

39 JAY P. GREENE, EDUCATION MYTHS: WHAT SPECIAL INTEREST GROUPS WANT YOU TO BELIEVE ABOUT OUR SCHOOLS—AND WHY IT ISN’T SO 9–12 (2005).

40 The literature on this point is voluminous, see, e.g., Sheila Fitzgerald Krein & Andrea H. Beller, *Educational Attainment of Children from Single-Parent Families: Differences by Exposure, Gender, and Race*, 25 DEMOGRAPHY 221, 221–32 (1988).

II. A CYCLE OF POLARIZATION?

In chapter 3 of his book, Balkin, like virtually every other commentator on contemporary American politics, takes note of the substantial level of polarization between the Republican and Democratic parties in Congress.⁴¹ More boldly, Balkin predicts that polarization will decline in the years ahead. Recent problems, he argues, are part of a long “cycle of polarization” that will “slowly turn once again.”⁴² On the whole, I hope he is right, but again I am more skeptical.⁴³

To begin with, it is far from clear that the changes in the level of congressional polarization can truly be called cyclical. The essence of a cycle is precisely that it occurs with some regularity. A cycle, according to one authoritative dictionary, is “a recurring succession of events or phenomena[.]” It is also defined as “a course or series of events or operations that recur regularly[.]”⁴⁴ One reason so many political scientists were intrigued by the theory of realignments was that realignments really did seem to occur about every thirty-six years or so. The rise and fall of polarization is nowhere near as regular as that. By almost all measures (including the one Balkin relies upon), polarization existed at a fairly high level from the years immediately preceding the Civil War through the Gilded Age, began to decline near the end of the Progressive Era, stayed at a reduced level to the end of the 1960s, then began to grow again in the mid-to-late 1970s, reaching very high levels in the mid-1990s. Such a pattern could just as easily be read as indicating that a high level of polarization is the normal condition of American politics and that the years from about 1912 to 1976 were simply an exception to the norm.⁴⁵ My demurral here is not simply a quibble about wording. If

41 For a good overview of the issue, see JAMES E. CAMPBELL, *POLARIZED: MAKING SENSE OF A DIVIDED AMERICA* (2018). *But see* MORRIS P. FIORINA, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2005).

42 Balkin, *supra* note 1, at 37.

43 There is no doubt that congressional polarization imposes a number of costs on the American political system. But when most political activists lament polarization, what they really mean is not, *People on my side should become more moderate*, but, *The other side should give in and endorse our policies*. For example, if the pro-choice side of the abortion wars were really bothered by the level of polarization around this issue, as they so often claim, they could easily reduce it by agreeing to some of the more widely-supported proposals advanced by the pro-life side, such as requiring minors who want abortions to get parental consent. In fact, what abortion advocates really want is for pro-life groups to fold their tents and go home.

44 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 310 (11th ed. 2009).

45 One reason why the level of polarization between 1912 and 1976 may have been so anomalous was the strange alliance then existing between southern Democrats, who were part of the Democratic Party because they were still refigiting the Civil War, and

polarization is genuinely cyclical, then presumably, it will come back down again. If it has simply gone up and down at various times in the past, the future is much less certain.

Why might polarization decline in the years ahead? Drawing on the work of McCarty, Poole, and Rosenthal,⁴⁶ Balkin claims that the level of polarization is correlated with the level of income inequality.⁴⁷ Actually, the correlation between these two variables is much more ragged than Balkin (or McCarty, Poole, and Rosenthal) acknowledges, and it is not clear what is causing what or if the correlation is entirely spurious. The years immediately after the Civil War were a time of decreasing inequality, Professor Balkin tells us,⁴⁸ yet polarization remained at a very high level. More importantly, such a pattern, if true, suggests that contemporary American politics faces a serious predicament. Polarized politics means that there is unlikely to be a serious attack on income inequality, and high levels of income inequality mean that our politics is likely to remain polarized.

This kind of stalemate was broken during the late Progressive Era, according to Professor Balkin, largely because of a set of outside or exogenous influences:⁴⁹ the declining salience of Civil War-related issues; the change in party coalitions after the 1896 realignment; and the decline in the rate of immigration.⁵⁰ But it is far from clear if a similar constellation of factors can be counted upon to depolarize the parties in the third or fourth decades of the twenty-first century. For example, on page thirty-seven, Balkin notes that the rate of illegal immigration has declined somewhat in recent years. But if the economy recovers from the COVID-19 recession and Trump's anti-illegal-immigration policies are replaced by the less aggressive stance of Joe Biden, immigration rates will likely rebound. As of December 2020, there is already an indication of a surge in illegal immigration in anticipation of the Biden presidency.⁵¹

northern Democrats, who by 1912 had become increasingly progressive. On the latter point, see DAVID SARASOHN, *THE PARTY OF REFORM: DEMOCRATS IN THE PROGRESSIVE ERA* vii–xvii (1989).

46 See generally NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006).

47 Balkin, *supra* note 1, at 34.

48 *Id.*

49 Outside or exogenous, that is, to the polarization-income inequality connection. The three factors named here are not, of course, exogenous to the American political system as a whole.

50 Balkin, *supra* note 1, at 36.

51 Sumner Park, *Biden's Immigration Plans to be Put to the Test with Recent Surge in Border Crossings*, FOX BUS., foxbusiness.com/lifestyle/illegal-immigrants-up-ahead-of-biden-presidency (last visited Dec. 28, 2020).

III. WHO'S AT FAULT?

The final disagreement I wish to lodge against Professor Balkin's analysis, which applies with particular force to chapters 3 and 5, is that he places the blame for current problems almost entirely on the Republicans. Why, for example, has our politics become so polarized? According to Balkin, it was a deliberate *Republican* strategy. Newt Gingrich "perfected a new slash-and-burn style of rhetoric" because it was "the best way for Republicans to become a majority party[.]"⁵² No doubt Gingrich often attacked Democrats in very sharp and uncivil terms. But does Balkin truly believe that Democrats have been innocent of such practices? Had he consulted a few conservatives in the course of writing his book, they would have told him that the real turning point in the decline of American political civility came in 1987 with the liberal campaign against the Supreme Court nomination of Robert Bork. In the words of Roger Kimball:

The vicious campaign waged against Judge Bork set a new low—possibly never exceeded—in the exhibition of unbridled leftist venom, indeed hate . . . So hysterical was the campaign against Judge Bork that a new transitive verb entered our political vocabulary: "To Bork," scruple at nothing in order to discredit and defeat a political figure.⁵³

In defending Bork, Cass Sunstein has noted, Republicans "argued that public vilification of judicial nominees would become common, and that constraints of civility and charity might be obliterated . . . You could make a good argument that they were right."⁵⁴

In a similar way, Balkin blames George W. Bush for failing to reach out to Democrats after he became president in the disputed election of 2000.⁵⁵ This characterization ignores a fair number of times when Bush *did* push programs that might reasonably have been expected to win bipartisan support, such as the No Child Left Behind education act, which dramatically increased federal spending on and control over elementary and secondary education, and the Medicare prescription drug bill, the first major expansion of federal entitlements since the 1960s. Bush also refrained from blaming the September 11 attacks on his Democratic predecessor's failure to take

52 Balkin, *supra* note 1, at 31.

53 Roger Kimball, *Robert H. Bork, 1927-2012*, PJ MEDIA (Dec. 19, 2012), pjmedia.com/rogerkimball/2012/12/19/robert-h-bork-1927-2012-n117242.

54 Cass R. Sunstein, *Beware the Revenge Impeachment*, BLOOMBERG: OPINION (Jan. 30, 2020), <https://www.bloomberg.com/opinion/articles/2020-01-30/trump-impeachment-beware-of-republican-revenge?sref=47bobj3>.

55 See Balkin, *supra* note 1, at 31.

more aggressive action against terrorism.⁵⁶ And though Barack Obama first came to national attention after a speech to the 2004 Democratic National Convention in which he asserted that “we are one people, all of us pledging allegiance to the stars and stripes,” his approval ratings among Democrats and Republicans were even more polarized than those of George W. Bush.⁵⁷ Did Karl Rove, Bush’s principal political strategist, try to energize the Republican base when Bush sought re-election in 2004, as Balkin also argues?⁵⁸ Yes, though most of this involved on-the-ground mobilization efforts that were not incompatible with a parallel effort to win the support of more moderate swing voters. In his memoirs, Rove argues, on the basis of quite a bit of hard data, that it is impossible to win a national election today just by appealing to a party’s “base vote.”⁵⁹ A dispassionate look at the 2000 and 2004 Bush campaigns shows, I believe, that Rove and Bush really did make a strong, good-faith effort to win the support of swing voters. They were not entirely successful in this endeavor—but they certainly tried. Nor, again, are Democrats innocent of playing to their base. In 2012, to cite just one example, then-vice president Joe Biden told an audience comprised of many Black individuals that if Republican policies were enacted, “[t]hey’re going to put you all back in chains.”⁶⁰ Given that virtually every recent Democratic presidential candidate has won about 90% of the Black vote, it is unlikely that Biden’s crude allegation was made to gain the support of swing voters.

I have similar problems with Balkin’s chapter on “constitutional rot.” No doubt Republicans deserve their share of the blame for such problems, but the Democrats are quite far from guiltless.

First, Balkin notes correctly that many prominent structural features of the US Constitution were designed to “dampen and limit the downside

56 See MAYER, *THE USES AND MISUSES*, *supra* note 6, at 204–48 (detailing the arguments Bush could have used against the Democrats but for some reason declined to do so).

57 For the text of Obama’s 2004 speech, see *Barack Obama’s Remarks to the Democratic National Convention*, N.Y. TIMES (July 27, 2004), <https://www.nytimes.com/2004/07/27/politics/campaign/barack-obamas-remarks-to-the-democratic-national.html>. The partisan gap in Obama’s approval ratings is discussed in Jeffrey N. Jones, *Obama Approval Ratings Still Historically Polarized*, GALLUP (Feb. 6, 2015), <https://news.gallup.com/poll/181490/obama-approval-ratings-historically-polarized.aspx>.

58 See Balkin, *supra* note 1, at 31 (“Karl Rove[] recognized that Republicans were more likely to win national elections if they appealed to their base of loyal voters and got them out to vote in large numbers.”).

59 KARL ROVE, *COURAGE AND CONSEQUENCE: MY LIFE AS A CONSERVATIVE IN THE FIGHT 70–72* (2010).

60 Rodney Hawkins, *Biden Tells African-American Audience GOP Ticket Would Put Them “Back in Chains,”* CBS NEWS (Aug. 14, 2012), <https://www.cbsnews.com/news/biden-tells-african-american-audience-gop-ticket-would-put-them-back-in-chains/>.

of inevitable decay in our republican institutions—to keep democracy afloat and republicanism running until the political system has a chance to renew and right itself.”⁶¹ One such feature he mentions is federalism. But Democrats and liberals, especially on the Supreme Court, have done far more to undermine federalism than Republicans. A great deal of the polarization in contemporary American politics can be traced back to liberals’ efforts to take a number of issues that were once handled by state and local governments on a highly decentralized basis and insist that, because fundamental rights were involved, one national policy had to be imposed on the entire country. School prayer, abortion, and same-sex marriage are obvious examples.

Second, Balkin’s picture of how wealthy individuals and interests have used their money to influence the course of American politics⁶² is strikingly one-sided. No doubt conservative money has been used to establish think tanks and research institutions, but there are also a sizable number of left-wing think tanks. Prominent examples include the Brookings Institution, Center for American Progress, Guttmacher Institute, Center on Budget and Policy Priorities, Urban Institute, and Open Society Foundation. And as a great deal of survey research has shown, the professors at America’s principal research institutions, colleges and universities, are disproportionately liberal, especially in law schools and the social sciences.⁶³

Third, at a number of points in his book, Balkin laments the rise of conservative media, especially talk radio and Fox News.⁶⁴ What he might have more profitably asked is why conservative media have thrived in recent years. The simple answer is that the so-called mainstream media are dominated by reporters and editors who are substantially more liberal than most of the American people. In an unpublished paper, I reviewed twenty-nine separate surveys of American journalists of one kind or another.⁶⁵ These surveys clearly demonstrate that the people who produce contemporary American journalism are far to the left of their purported audience. When journalists are

61 Balkin, *supra* note 1, at 48.

62 *Id.* at 51.

63 The literature on this point is voluminous. See e.g., STANLEY ROTHMAN ET AL., *THE STILL DIVIDED ACADEMY: HOW COMPETING VISIONS OF POWER, POLITICS, AND DIVERSITY COMPLICATE THE MISSION OF HIGHER EDUCATION* (2010); Christopher Ingraham, *The Dramatic Shift Among College Professors That’s Hurting Students’ Education*, WASH. POST (Jan. 11, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/01/11/the-dramatic-shift-among-college-professors-thats-hurting-students-education/>; Mitchell Langbert et al., *Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology*, 13 *ECON. J. WATCH* 422, 422–51 (2016).

64 See generally Balkin, *supra* note 1, at 57.

65 See generally William G. Mayer, *The Political Attitudes of American Journalists: A Survey of Surveys 2010* (unpublished manuscript) (on file with author).

asked whether they consider themselves liberal, moderate, or conservative, self-described liberals generally outnumber conservative by margins of about three-to-one.⁶⁶ In surveys of the mass public, conservatives outnumber liberals by a margin of about two-to-one.⁶⁷ When surveys concentrate on elite journalists, such as those who work for the major television networks, the *New York Times*, and the *Washington Post*, liberal dominance increases to four- or five-to-one⁶⁸ and, in one case, twelve-to-one.⁶⁹ I was also able to find fifteen instances where a survey organization asked a sample of journalists whom they had voted for in a recent presidential election. On average, 76% of journalists voted for the Democratic candidate—this in a set of elections in which the American electorate as a whole voted just 45% Democratic.⁷⁰

The gap between journalists and their audience is particularly wide on social and cultural issues, such as crime, abortion, and immigration. In one survey of elite journalists conducted in 1995, the journalists rejected a proposal to give “[l]ifetime jail[] sentence[s] with no chance of parole for anyone convicted of three or more violent crimes”⁷¹: 44% in favor, 55% against. The public, by contrast, overwhelmingly supported such a law: 86% in favor, just 12% against. 24% of journalists endorsed “[c]utting off the eligibility of illegal immigrants for government benefits,” versus 58% of the public.⁷² In a survey of national newspaper journalists, 83% were pro-choice on abortion, as against 49% of the public.⁷³

It is sometimes said (usually by journalists) that nobody likes the press coverage their side gets and that the media get criticism from both the left and the right, thus allowing journalists to claim that they are comfortably in the middle, holding up the light of truth to all sides without fear or favor. It’s a nice thought, but it’s quite untrue. Surveys of the mass public show that conservatives are far more convinced of media bias than liberals.⁷⁴

66 *Id.* at 11.

67 *Id.*

68 *Id.* at 35–37 tbl.1.

69 *Id.*

70 *Id.* at 38 tbl.2.

71 *Id.* at 57–58 tbl.8.

72 *Id.*

73 *Id.* at 47 tbl.5. The 1995 survey of journalists at fourteen nationally influential news outlets was conducted by Stanley Rothman and Amy Black in April–December, 1995 (n=242). *Id.* at 18. Figures for the American public are drawn from, respectively, Times Mirror/PSRA survey of July 1994 (n=3,800) and Times Mirror/PSRA survey of October 1995 (n=3,800). *Id.* at 59 tbl.8, nn.5 & 7. Parallel surveys of newspaper journalists and the American public were conducted by the *Los Angeles Times* in February 1985 (n journalists=2,703). *Id.* app. at 33 (Surveys Analyzed in This Article).

74 All surveys were conducted by the Gallup Poll, and the results are archived at the Roper Center for Public Opinion Research at Cornell University, accessible via its

On fourteen occasions between 2001 and 2014, the Gallup Poll asked its respondents, “[i]n general, do you think the news media is too liberal, just about right, or too conservative?” In every single instance, the number who thought the media were too liberal swamped the number who thought the media had a conservative bias, generally by a margin of about three-to-one.⁷⁵ Even more revealing are the results when these figures are broken down by ideology. Conservatives have no doubt about the tenor of news media reporting: 73% say the media are too liberal, versus just 7% who thought them too conservative. By contrast, liberals are much less upset about the media. Only 33% of liberals said the media were too conservative. Most liberals—51%—said the media got things “just about right.”⁷⁶

From this perspective, what some critics dismiss as an unfortunate effort to deny the American public a basis of common knowledge and facts that can serve as a foundation for political discussion could also be celebrated as a case of pluralism in action. Finding that the mainstream media have repeatedly ignored their concerns and criticisms, conservatives have created a set of alternative institutions, just as many ethnic groups have done throughout American history. Meanwhile, the established media institutions have almost uniformly failed to acknowledge that there is even a problem, much less act to remedy it. Though almost every media organization today proudly touts its efforts to improve its racial and gender diversity, I know of none that has made a concerted effort to make its workforce more politically diverse. A similar criticism could be leveled at most American colleges and universities. In short, if lots of Americans distrust elites in such areas as journalism and academia, most conservatives would argue that the elites have done a great deal to earn that distrust.

As is clear throughout this book, Jack Balkin’s political perspective is strongly left of center. I do not mean this as a criticism; it is hard to imagine that a person could spend decades studying current constitutional debates without developing some kind of rooting interest. But one does sometimes wish that he had made a greater effort to acknowledge and respond to the most obvious conservative counterarguments.

iPOLL database.

75 The average results were 46% too liberal, 15% too conservative, 36% about right.

76 The ideological breakdown is based on the Gallup survey of September 13–16, 2010.