BREAKING THE CYCLE: ROT AND RECRUDESCENCE IN AMERICAN CONSTITUTIONAL HISTORY

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ABSTRACT

This Essay draws on Jack Balkin's The Cycles of Constitutional Time *to evaluate the prospect of constitutional renewal through judicial review. It begins by questioning Balkin's conclusion that historical change operates cyclically. It then addresses his assumption that courts have served as a source of constitutional renewal during some periods, including the mid-twentieth century. It argues that the* Carolene Products *regime that Balkin describes should be understood not as a solution to economic inequality and republican rot in a period of declining political polarization, but rather as a precipitating cause. Indeed, the New Deal settlement may have staved off durable change and thereby produced the seemingly cyclical pattern Balkin observes.*

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INTRODUCTION

In the congressional debate over President Franklin D. Roosevelt's judiciary reorganization bill, Senator Joseph Guffey of Pennsylvania expressed his conviction that the President's so-called Court-packing plan was both socially desirable and historically justified.[1] Voters had entrusted Congress with a bold social and economic agenda. To effectuate their aspirations would require transforming the Supreme Court "from a superlegislative body that is above and beyond the law into the kind of impartial tribunal for the adjudication of judicial disputes that it was originally intended to be."[2] In support of his position, Guffey marshaled evidence of recurrent past abuses. "History shows conclusively that throughout most of its existence the Supreme Court has been enmeshed in partisan party politics," he insisted, citing a long list of ostensibly partisan appointments from the founding to the New Deal.[3] Speaking in support of Roosevelt's bill, he urged his fellow members of Congress to stand by their President and to accept the Court-packing debate for what it was: "[A] political struggle between the two parties."[4] Whether or not the Democrats in power acknowledged it, he asserted, "the leaders on the other side [were] fully conscious of that fact."[5]

Notably, Guffey embedded his remarks "in the theory that history repeats itself."[6] In that respect and others, his assessment closely tracks the structure of Jack Balkin's illuminating new book, *The Cycles of Constitutional Time*. Both espouse a cyclical model of history in which ideology, partisanship, and anti-republican constitutionalism periodically converge to undermine democracy; both lament a corrosive but foreseeable judicial slippage from principle to politics.[7] But when it comes to Guffey's prescribed remedy—support for "Mr. Roosevelt's proposal to enlarge the Supreme Court"[8]—Balkin's consonance with Guffey runs out. According to Balkin, "attempting to increase the size of the Supreme Court to ensure an ideological majority is a bad idea, even if it could be accomplished."[9] Curing "constitutional rot" will instead require reducing economic inequality and improving democratic representation.[10]

Balkin's conception of constitutional time brilliantly elucidates the parameters within which the American political economy has operated. Yet, in my view, it is better suited to Joe Guffey's goals—namely, justifying the

[1] *See* 81 CONG. REC. 6873-77 (1937) (statement of Sen. Joseph Guffey).
[2] *Id.* at 6873.
[3] *Id.* at 6874.
[4] *Id.* at 6878.
[5] *Id.*
[6] *Id.* at 6874.
[7] *See id.*; JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 4-7 (2020).
[8] 81 CONG. REC. 6876 (1937) (statement of Sen. Joseph Guffey).
[9] BALKIN, *supra* note 7, at 151.
[10] *See id.* at 156.

perpetuation of constitutional hardball[11]—than to Balkin's aspirations for a "new constitutional order."[12] Cycles, after all, inevitably circumscribe. What American democracy needed during the New Deal, and what it needs today, was to jump the track.

My goals in this brief Essay are twofold. First, I engage with Balkin's principal historical claims, together with his central argument about the development of constitutional law: namely, that historical change operates cyclically and that we are currently living in a Second Gilded Age, on the cusp of a Second Progressive Era.[13] Second, I take up the related proposition that courts have served as a source of constitutional renewal during some periods, including the mid-twentieth century, but that "we cannot and should not expect courts to extricate us from our current difficulties."[14] I agree with Balkin on the latter point: what we need now is democratic mobilization, not litigation. But I resist his rosier assessment of the past. In my view, the *Carolene Products* regime that Balkin describes should not be understood as a solution to economic inequality and republican rot in a period of declining political polarization.[15] On the contrary, if it seems like history is moving in cycles, and if we appear to be back in the Gilded Age, it may well be because the New Deal settlement staved off durable and meaningful change.

I. BALKIN'S HISTORICAL CYCLES

Balkin begins *The Cycles of Constitutional Time* by situating "our current political predicament" in the longer trajectory of American constitutional democracy.[16] As bad as our present moment may seem, he argues, it is not unprecedented.[17] Historical time is a cycle, and Balkin places us optimistically on the upswing.[18] To be sure, the path ahead will be difficult. But republican rot is nearing its nadir. Indeed, improvement is just around the bend, as long as reformers do not disembark the train.

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[11] Balkin borrows the concept of "constitutional hardball" from Mark Tushnet. *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) ("[C]onstitutional hardball . . . consists of political claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings.").

[12] BALKIN, *supra* note 7, at 7. Notably, Senator M. M. Logan, who joined Guffey in support of the Judicial Procedures Reform bill, also used the metaphor of cycles. 81 CONG. REC. 6889 (1937) (statement of Sen. Marvel Mills Logan) ("We learn from 'the preacher' in the Bible that there is nothing new under the sun. Things move in cycles. That which has occurred will occur again.").

[13] *See* BALKIN, *supra* note 7, at 7.

[14] *Id.* at 10.

[15] *See id.* at 112-13.

[16] *Id.* at 3.

[17] *See id.* at 9-10.

[18] *See id.* at 12.

Balkin offers his theory of constitutional cycles as a counterpoint to the two dominant modes of constitutional interpretation in the United States: originalism and living constitutionalism.[19] Despite their opposing ideological valences, he explains, both involve linear understandings of time.[20] The latter presupposes progress, charting a trajectory from the dark ages of inequality and oppression to the comparative enlightenment of our current constitutional regime.[21] Declension narratives, by contrast, depict a departure from a golden age or foundational moment. Originalists may call for a return to origins, but they envision not so much a cycle as an about-face, a direct retracing of a linear path.[22]

So far, Balkin is on familiar terrain. This rejection of teleological history has been a defining tenet of historical scholarship in the legal academy since the advent of critical legal history almost forty years ago.[23] From here, however, Balkin departs sharply from the dominant understanding among legal historians. Balkin offers not primarily contingency—the breaks and discontinuities that suffuse most historical accounts of legal and constitutional change. His is no more a stochastic theory of time than a linear one. What he propounds instead are historical cycles.[24]

Balkin describes three interrelated and overlapping cycles that together generate "constitutional time": the cycle of the rise and fall of political (or, more broadly, constitutional) regimes, of polarization and depolarization, and of constitutional rot and renewal.[25] The first, which draws on the work of Stephen Skowronek, posits a series of governing regimes dominated practically and ideologically by successive parties (even as electoral patterns shift).[26] The Reagan regime, with its neoliberal commitments to deregulation and privatization, supplanted the New Deal/Civil Rights regime, which spanned from 1932 to 1980.[27] The earlier Republican regime was the most durable

[19] *Id.* at 4.

[20] *Id.* at 4-5.

[21] *See id.*

[22] *See id.* at 4.

[23] *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59 (1984) (detailing "criticisms of a tradition of historiography called 'legal functionalism'"); Robert W. Gordon, *The Struggle over the Past*, 44 CLEV. ST. L. REV. 123, 130 (1996) (describing critiques of teleological mode).

[24] *See* BALKIN, *supra* note 7, at 6.

[25] *See id.*

[26] *See id.* at 12-27. *See generally* STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON (Harvard Univ. Press rev. ed. 1997) (1993) (constructing cycles of history based upon presidential regimes); STEPHEN SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE AND REAPPRAISAL (2d ed. 2011) (assessing presidential impact on political cycles).

[27] *See* BALKIN, *supra* note 7, at 13, 15-16.

regime in American history; it lasted from 1860 to 1932 and would have persisted even longer had the Great Depression not finally brought it down.[28]

The cycle of political regimes interacts, in Balkin's model, with the long cycle of partisan polarization and depolarization.[29] The modern division between two major political parties—Republican and Democratic—grew out of the Civil War.[30] Since that time, the United States experienced an initial period of high polarization during the nineteenth century, followed by depolarization into the middle of the twentieth century, and then repolarization beginning in the 1970s.[31]

The third circle, the cycle of constitutional rot and renewal, presupposes that the central function of a constitution is "to channel people's disagreements and struggles for power into a system of law and political procedures," as opposed to violent conflict.[32] A constitutional crisis occurs when the Constitution fails to make politics possible or when failure appears likely and imminent, both of which have been rare in American history.[33] By contrast, constitutional rot—the erosion of those features of the constitutional system that preserve democracy and representative government—has infected our republic at least twice before: in the decade preceding the Civil War and during the Gilded Age.[34] In periods of constitutional rot, government is less responsive to popular will, and representatives are increasingly beholden to powerful groups and individuals rather than the public good.[35]

According to Balkin, we are currently living at the tail end of the Reagan political regime, in a period of peak polarization and severe constitutional rot, verging on oligarchy.[36] Democratic institutions, mutual toleration, and rule of law have eroded, together (fittingly, in a vicious cycle) with the trust in one another and in and between government officials that underpins republican government.[37] Yet Balkin urges us not to despair. The Framers understood that "history operates in cycles of rot and renewal," and they crafted the Constitution as "an insurance policy for republics."[38] The American political system has rebounded from challenges that resemble current conditions; it has weathered the scourges of economic inequality, corruption, divisiveness, and distrust before, and it will do so again. "We are in our Second Gilded Age," Balkin

[28] *See id.* at 16.

[29] *See id.* at 30-37.

[30] *See id.* at 15.

[31] *See id.* at 16-17.

[32] *Id.* at 38.

[33] *See id.* at 39-40.

[34] *See id.* at 45. Balkin defines constitutional rot as "the process through which a constitutional system becomes less democratic and less republican over time." *Id.*

[35] *See id.* at 44.

[36] *See id.* at 64.

[37] *See id.* at 46.

[38] *Id.* at 48.

argues, "and on the cusp of a Second Progressive Era."[39] And we will be delivered from our present predicament by "political mobilization and reform movements, like those in the first decades of the twentieth century."[40]

The Cycles of Constitutional Time is a "story about what happens in the long run," Balkin tells us, "but it is not a deterministic story."[41] He rejects the notion that "things occur exactly in the same way they occurred before";[42] the structural pressures he describes are mediated by the mutually constitutive relationship between institutions, on the one hand, and popular and political mobilization on the other. Still, Balkin promises more than mere resonances between historical periods. Even if "one can't be entirely sure of the future," the core assumption in *The Cycles of Constitutional Time* is that the convergence or divergence of the historical cycles Balkin maps out will produce predictable results.[43] If we look to a previous period in which the three cycles aligned as they do today, we will find circumstances very similar to ours. More to the point, we can assume that their subsequent trajectories will predict our own.

Balkin's study usefully complicates the single-factor explanations so often posited for historical change. It demonstrates that confluences of discrete currents better account for the complexities of American constitutional development. Maybe it is unhelpful, then, to object that Balkin's more complicated analysis is not yet complicated enough. Nonetheless, I feel compelled to point out that Balkin's cycles neglect factors that were instrumental in producing the formative conflicts over democracy, liberalism, and the role of the judiciary that ultimately produced the modern constitutional regime.

Take, for example, the interaction between polarization and economic inequality. Balkin argues that the two are mutually reinforcing: when income inequality worsens, politicians and political activists find it easier to polarize politics, which in turns renders it easier for the wealthy to block redistribution.[44] Thus, the political polarization that ushered in the Gilded Age "stayed high because of increasing income inequality."[45] It is true that income inequality in the United States was extremely high at the turn of the twentieth century, peaking in 1916, then dipping slightly until 1923, and then rising sharply again until the stock market crash.[46] During that same period, however, partisan polarization in the United States dropped sharply as parties scrambled to

[39] *Id.* at 7.

[40] *Id.*

[41] *Id.* at 6.

[42] *Id.* at 5.

[43] *Id.* at 6.

[44] *See id.* at 34 ("It is easier for politicians and political activists to polarize politics as income inequality gets worse. Conversely, when politics is polarized, it is easier for the wealthy to block reforms that might redistribute income downward . . . .").

[45] *Id.* at 36.

[46] *See* Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q.J. ECON. 1, 11 fig.1 (2003).

redefine their agendas and attract voters.[47] Balkin does acknowledge that income inequality can eventually become so high as to depolarize rather than polarize politics,[48] but the disjuncture between the two trajectories is so striking as to cast doubt on any causal relationship between them. It is especially difficult to square his account with the 1912 election, in which a former President broke with the Republican Party to launch one of the most successful third-party bids in American history and Socialist Party candidate Eugene Debs received 6% of the vote.[49] Balkin's explanation of the effect of immigration on the public appetite for redistribution is even harder to reconcile with the history of Progressive Era reform. Balkin argues (borrowing from the work of Nolan McCarty, Keith Poole, and Howard Rosenthal) that high rates of immigration bolster the median income of voters relative to average household income, which reduces the electoral pressure for redistribution.[50] But immigration to the United States skyrocketed between 1897 and 1907 and remained near its height until the beginning of World War I.[51] Those were, of course, the years of the most notable redistributive reforms of the Progressive Era, culminating with the graduated income tax.[52]

No doubt Balkin's model would benefit from some tweaks and the inclusion of omitted variables. But the concern runs deeper than that—to the implication, Balkin's disclaimers notwithstanding, that historical actors have responded to inexorable forces or that they have tended simply to play scripted parts. In practice, partisan realignment in the United States began almost as soon as the Republican Party abandoned its commitment to the rights of Black Americans.[53] Demands for economic redistribution emerged apace.[54] The triggers were not cyclical problems; they were new ones. The Civil War and Reconstruction unsettled established orthodoxies about the purpose of government and the

[47] *See* BALKIN, *supra* note 7, at 36.

[48] *See id.*

[49] *See 1912 Electoral Vote Tally, February 12, 1913*, NAT'L ARCHIVES, https://www.archives.gov/legislative/features/1912-election [https://perma.cc/HW52-VFEQ] (last visited Sept. 23, 2021).

[50] *See* BALKIN, *supra* note 7, at 35; *see also* NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 123-25 (2d ed. 2016).

[51] *See U.S. Immigrant Population and Share over Time, 1850-Present*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time [https://perma.cc/QDJ6-94PW] (last visited Sept. 23, 2021).

[52] The Sixteenth Amendment was ratified in 1913. *See* U.S. CONST. amend. XVI.

[53] Balkin develops this point in Jack M. Balkin, *Race and the Cycles of Constitutional Time*, 86 MO. L. REV. (forthcoming 2021) (manuscript at 12) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3770410) ("Republican abandonment of Black civil rights created an opening for Northern Democrats to compete for Black votes.").

[54] *See, e.g.*, DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925, at 371-73 (1987) (noting increased support of socialist party and affiliated organizations at start of World War I).

precepts of a just legal and political order.[55] Appeals to racial justice were met with violent and vicious opposition.[56] Moreover, the Gilded Age coincided with the rise of class consciousness in the United States.[57] Class conflict exploded (sometimes literally) the myths of free labor and a unitary common good, and it bore an uneasy relation to the ongoing struggle over racial subordination and resistance.[58] Balkin is aware of these developments, of course, but he does not explain how they mesh with his assumption that "[t]he actions of many individuals over time, pursuing their values and interests, but constrained by institutional arrangements, will tend to cycle in intelligible ways."[59] The fundamental questions that activists, legislators, and judges were grappling with were unprecedented. The solutions they tried were unfamiliar and untested, at least in the United States.[60]

Perhaps there is value in overstating the effect of cyclical pressures in service of explanatory elegance. At bottom, though, my quarrel with Balkin's model is more fundamental. It is not so much that Balkin's cycles cannot fully explain constitutional change; it is that Balkin's cycles tends to assume, if not excuse, constitutional stasis. Balkin eschews fatalism, and he is careful to preserve a role for individual actors, social movements, and the "exercise of political will."[61] Nonetheless, he treats the missteps and malfeasance of advocates and officials as symptomatic more than causative—as "exhibiting the effects of the cycles of constitutional time on political life in the United States."[62] As a result, *The Cycles of Constitutional Time* shifts attention away from the individual decision-makers who impeded innovation and entrenched or exacerbated inequality. By the same token, it discounts moments of near rupture, when fundamental change was possible but averted.

I share Balkin's sense that there are similarities between the first Gilded Age and our present moment, even if there are also pronounced differences. At that time, too, left-leaning lawyers and advocates decried economic inequality and

[55] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 10 (1992).

[56] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at xxv (Henry Steele Commager & Richard B. Morris eds., HarperCollins 2011) (1988).

[57] *See, e.g.*, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 10-14 (1991).

[58] *See* Herbert G. Gutman, *Workers' Power*, *in* THE GILDED AGE 31, 36-37 (H. Wayne Morgan ed., 1970); *see also* Edward W. Bemis, *The Homestead Strike*, 2 J. POL. ECON. 369, 382 (1894) (documenting violence that occurred at Homestead Strike in Pennsylvania); SIDNEY FINE, "WITHOUT BLARE OF TRUMPETS": WALTER DREW, THE NATIONAL ERECTORS' ASSOCIATION, AND THE OPEN SHOP MOVEMENT, 1903–1957, at 86 (1995) (documenting union dynamiting campaign).

[59] BALKIN, *supra* note 7, at 6.

[60] *See, e.g.*, DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 3-4 (1998).

[61] BALKIN, *supra* note 7, at 5.

[62] *Id.* at 6.

racial injustice.[63] They called for a fair distribution of resources.[64] They promoted the rights of organized labor and demanded representation for disenfranchised voters.[65] They condemned the "illegal action of the police," and they recommended "that effective means be employed to subject to criminal and civil liability officers violating rights of persons."[66] If their calls for justice went unanswered, it hardly seems an "optimistic" message that several decades of quiescence separated their own period of agitation from our own.[67]

II. CONSTITUTIONAL CATALYSTS FOR REPUBLICAN ROT

In Part II of *The Cycles of Constitutional Time*, Balkin explores the relationship between the three cycles described in Part I—the rise and fall of political regimes, polarization and depolarization, and constitutional rot and renewal—and a fourth cycle: the cycle of judicial review.[68] His starting premise is that support for judicial review in a depolarized world is often bipartisan. Political actors find it convenient to defer to the courts on difficult issues that would divide electoral coalitions. Many embrace the so-called New Deal settlement, commonly associated with footnote four of *United States v. Carolene Products Co.*, which calls for deference to legislators and administrators on social and economic issues coupled with judicial enforcement of minority rights and judicial policing of the integrity of the political process.[69] When politics are depolarized, politicians trust judges to set "set down the basic rules of fair political combat, leaving everything else to be worked out in political struggle."[70]

Despite these occasional advantages, support for judicial review ultimately depends in Balkin's model on political considerations. One's perspective on judicial review is a function of partisan politics and the rise and fall of regimes.

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[63] *See* William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 38-39 (1999).

[64] *See id.* at 39.

[65] *See Annual Convention Approves Progressive Measures*, NAT'L LAWS. GUILD NEWSL. (Nat'l Laws. Guild, Washington, D.C.), Apr. 1938, at 2, 3 (on file with Dartmouth College Library).

[66] NAT'L LAWS. GUILD, RESOLUTIONS ADOPTED AT THE FIRST ANNUAL CONVENTION 11 (1937). They also proposed legislation "imposing responsibility upon local communities for such violations." *Id.*

[67] BALKIN, *supra* note 7, at 10.

[68] *See id.* at 69-80.

[69] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-54 n.4 (1938) (preserving possibility of "more exacting judicial scrutiny" of legislation involving "a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth"; "restrict[ing] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"; or "directed at particular religious . . . or racial minorities" or involving "prejudice against discrete and insular minorities" (citations omitted)).

[70] BALKIN, *supra* note 7, at 113.

At the beginning of a new political regime, when the ascendant party has not yet appointed a critical mass of sympathetic judges to the bench, partisans of the new regime will argue that judges should defer to the political branches and exercise judicial restraint. Over time, as the new party reshapes the composition of the judiciary, politicians and allied intellectuals will warm to judicial review as a means of enforcing the party's agenda. Conversely, the opposing party will sour on the courts and call for judicial restraint. On this theory, judicial review is neither inherently liberal nor inherently conservative: it is cyclical, like political regimes, polarization, and constitutional rot.[71] In short, the two parties will simply switch sides as a matter of practical expediency. The older generation may cling to their earlier positions, but "[t]he younger generation of partisans and legal intellectuals" will feel no compulsion to agree with them.[72]

According to Balkin, these effects are heightened in periods of political polarization.[73] When politics are depolarized, elites of both parties may prefer to leave some questions to the judiciary, either to create space to debate other issues, or as a means of imposing the values of national elites on local outliers. As polarization increases, however, compromise in the political branches becomes impossible, and courts become partisan players that impose the policy preferences of the dominant party. As a result, Balkin believes that attitudes toward judicial restraint, judicial reasoning, and majority rule depend primarily on whether the courts, in a given period, are promoting or impeding one's policy commitments.[74]

In Balkin's view, conflict over the judiciary becomes particularly acute when the composition of the judiciary is out of step with the political regime.[75] Because federal judges have life tenure, "judicial time" tends to trail behind "political time."[76] Judicial appointments are a tool of partisan entrenchment. Indeed, "[f]rom the earliest days of the republic, the political parties have used the judicial appointments process to stock the courts with ideological allies."[77] And when a given party falls from favor in the political realm, its rearguard judges engender especially fierce political resistance.[78]

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[71] Balkin assumes that the courts have cycled from conservatism during the Republican regime, to liberalism during the New Deal/Civil Rights era, and then back to conservatism under the Reagan regime. He brackets earlier periods as preceding the "period of constitutional modernity." *Id.* at 85. He has sound reasons for doing so: "Earlier in the history of the republic, the Supreme Court was less powerful and exercised judicial review in less politically salient ways." *Id.* at 86. But by omitting all but the modern era, Balkin's model loses sight of the possibility that judicial review during the New Deal/Civil Rights, to the extent it eschewed conservatism, was an outlier.

[72] *Id.* at 85.

[73] *See id.* at 83.

[74] *See id.* at 85.

[75] *See id.* at 86-87.

[76] *Id.* at 72.

[77] *Id.* at 82.

[78] *See id.* at 83-84.

Such was the situation, Balkin recounts, at the inception of the New Deal/ Civil Rights regime. Most federal judges had been appointed by Republicans and were antagonistic to President Roosevelt and his legislative agenda.[79] Even though the Republican Party had been "cast into the political wilderness" by mid-decade, the Democratic Party found itself unable to govern: out-of-step judges enforcing outmoded constitutional jurisprudence consistently stood in their way.[80] Put simply, the time lag between Roosevelt's 1932 election and the Supreme Court vacancies of spring 1937 was responsible for the famous New Deal struggle over the Court and the Constitution.

If Balkin's account is accurate, then New Deal efforts to curb the judiciary were as predictable as they were partisan. Roosevelt proposed his judiciary reorganization bill in a period of depolarized politics but pronounced constitutional rot.[81] A new political regime had recently commenced, and judicial time and political time were out of step. Senator Joe Guffey (whose congressional testimony opened this Essay) was therefore correct to cast the Court-packing fight as a straightforward partisan battle whose outcome rightly depended on the election returns.[82] Friction was bound to persist until President Roosevelt made his own partisan appointments in the spring of 1937, and the harmony between political and judicial time was restored.[83]

But Guffey's was not the only perspective on the court fight, and court-packing was not the only proffered solution. In fact, the Supreme Court's fiercest critics expressed concern about preserving judicial power irrespective of who was appointing the judges. Socialist Norman Thomas—exasperated by the notion that a particular crop of Justices, rather than the Constitution, was at fault—pithily expressed this point in commentary on the Court-packing plan. "It is amazing," he reflected, "to find organized Labor, with its traditional distrust of government by courts, waxing so enthusiastic for fifteen judges instead of nine."[84]

It is possible that figures like Thomas simply convinced themselves that courts were conservative because conservative entrenchment in their composition meant that the high-salience cases of the era disproportionately undermined liberals' policy commitments. But my own reading of the progressive and New Deal era critics of judicial review is that their concerns about judicial review were neither nakedly partisan nor narrowly political. They understood the fundamental conservatism of the early twentieth-century judiciary not as a holdover from an earlier regime during which the judges were

[79] *Id.* at 73.

[80] *Id.* at 86.

[81] *See id.* at 131.

[82] *See supra* note 1 and accompanying text.

[83] *See* BALKIN, *supra* note 7, at 73.

[84] COLUMBIA BROAD. SYS., INC., TALKS: SPECIAL SUPREME COURT EDITION COVERING BROADCASTS OVER THE COLUMBIA NETWORK IN FEBRUARY AND MARCH, 1937, at 162 (1937).

appointed but as a structural feature of the judiciary as an institution.[85] They believed that a strong form of judicial review was antithetical to both participatory democracy and social justice.[86] That they were unsuccessful in accomplishing fundamental reform of the judiciary during the New Deal was not the inevitable outcome of the alignment of historical cycles. Rather, it was a function of missteps by the Roosevelt administration, miscalculations by advocates, and fierce opposition by corporate lawyers, among other factors.[87] If the rise of a new political regime played a role, it was a counterrevolutionary one. Its effect was to sacrifice an opportunity for lasting change in the interest of short-term partisan gains.

To be sure, Balkin does not altogether dismiss these deeper critiques of judicial review. He acknowledges that in periods of advanced constitutional rot, which typically coincide with periods of high political polarization, judicial decisions often serve to entrench economic inequality and buttress political oligarchy.[88] The New Deal settlement presumes that judges will defend democracy and republicanism against constitutional rot. But Balkin tells us that polarization and constitutional rot eventually undermine judicial independence itself. The judges appointed by the dominant party engage in motivated reasoning.[89] The *Carolene Products* compromise breaks down because the dominant party's judges can dictate unilaterally whether a given issue (for example, campaign finance regulation or voter identification laws) involves democratic structures and minority rights, and therefore warrants judicial intervention. Moreover, judges are free to redefine who counts as a vulnerable minority deserving of protection—a status they are inclined to impart to their own co-partisans, despite their outsized political power. The result is that once constitutional rot has set in, the judiciary is more likely to exacerbate than to alleviate partisan entrenchment, and more likely to undermine than protect the democratic process and vulnerable minority groups.[90]

To Balkin, then, judicial review is not a panacea: "[t]he judiciary cannot bring the country out of constitutional rot by itself."[91] But neither is it inherently antidemocratic. Although it cannot correct advanced constitutional rot, judicial review can serve "as a safeguard to protect democracy and republican

[85] *See* Laura Weinrib, *Rethinking the Myth of the Modern First Amendment*, *in* THE FREE SPEECH CENTURY 48, 58 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019) [hereinafter Weinrib, *Rethinking the Myth*].

[86] *See id.* (describing belief among New Dealers that judicial review impeded economic redistribution).

[87] *See id.* at 59.

[88] BALKIN, *supra* note 7, at 150 ("The lesson of history seems clear enough: during a period of advanced constitutional rot and high political polarization, the federal courts are unlikely to be an instrument of constitutional renewal.").

[89] *See id.* at 137.

[90] *See id.* at 71, 142.

[91] *Id.* at 71.

government," at least when the political system is working reasonably well.[92] Indeed, the Supreme Court will sometimes "rise above the times, and for that reason, one should never give up hope in the institution."[93] On this view, judicial review is no better or worse than other institutions; when politics goes bad, so too do the courts. Americans should not "oppose judicial review per se," but they should "not expect too much from courts" either.[94]

By contrast, the Court's New Deal critics understood *Lochner*-era judicial review not merely as an incomplete cure for constitutional rot, or even an exacerbating factor, but as a significant precipitating cause at its inception.[95] Needless to say, it was a central tenet of progressive legal thought during the early twentieth century that courts are inherently conservative, anti-redistributive, and hostile to group rights.[96] In fact, progressive academics and advocates anticipated many of the arguments that Balkin himself highlights: courts can invalidate redistributive and protective legislation, they can impede legislative antitrust efforts, they can limit measures designed to protect workers and consumers, and they can hamper the ability of labor unions to bargain collectively for better wages and working conditions.[97] They can protect the interests of wealthy individuals and corporations in the workplace, in the marketplace, and in the electoral and legislative arenas.[98]

When progressive critics of judicial review examined these phenomena, they did not attribute them to partisan political factors. Explanations ran the gamut, from accusations of graft to the effects of peer groups or legal education to sophisticated accounts of the conservative tendencies of legal formalism or classical legal thought.[99] They did see life tenure as part of the problem.[100] But they endorsed the popular recall of judges to promote democratic accountability, not because they regarded the judges who impeded reform during the Progressive Era and New Deal as especially retrograde.[101] In fact, during the

[92] *Id.* at 146.

[93] *Id.*

[94] *Id.* at 150-51.

[95] Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U. CHI. LEGAL F. 513, 530-31 (2017) [hereinafter Weinrib, *The Right to Work*].

[96] *See id.* at 523.

[97] BALKIN, *supra* note 7, at 138.

[98] *Id.* Labor injunctions were a particular concern, though the passage in 1932 of the Norris-LaGuardia Act made them less salient in debates over judicial review during the mid-1930s. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115).

[99] On progressive critiques of judicial review, see, for example, HORWITZ, *supra* note 55, at 4-6; WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 1-2, 12-21 (1994); and Laura Kalman, *In Defense of Progressive Legal Historiography*, 36 LAW & HIST. REV. 1021, *passim* (2018).

[100] INT'L JURID. ASS'N, CURBING THE COURTS 17 (2d ed. 1937).

[101] *See* Weinrib, *The Right to Work*, *supra* note 95, at 522-23.

conservative resurgence of the 1920s, one well-known labor lawyer expressed relief that the judges were "behindhand."[102]

As for the role of partisanship in defining attitudes toward the judiciary, contemporaries certainly used the term. But the polarization they had in mind had little to do with political parties. Instead, they divided the world into partisans of capital versus labor, a class cleavage less easily remediated by political appointments of professionally acculturated judges.[103] Thus the *Chicago Tribune*, defending a Supreme Court decision on secondary boycotts against the criticism of American Federation of Labor president Samuel Gompers, pronounced that "the shallow partisan will always accuse of partisanship any arbiter or judge who does not yield him what his interest, passion, or prejudice demands."[104] Whether sincere or demagogic, the *Tribune* continued, the Court's critics inflicted a "grave injury" on the state "when without evidence they charge[d] or impl[ied] partisanship in court decisions."[105] Even those who accused the Court of political partisanship were prone to exploit the class implications of the term as well. "[T]he Supreme Court of the United States has been partisan, prejudiced, and biased in denying workingmen and farmers their fundamental legal rights," Senator Guffey alleged.[106]

It bears emphasis that the New Deal opponents of judicial review were fully cognizant of the potential for courts to enforce the rights of political dissidents and disfavored minorities. Balkin assumes that today's liberals, having learned the value of countermajoritarian constitutionalism in such cases as *Roe v. Wade* and *Obergefell v. Hodges*, will espouse a position "more complicated than the strong progressive critique of judicial review in the 1920s and 1930s."[107] But the New Deal critique of judicial review was neither naive nor monolithic. After careful consideration, the very advocates who had invested most in transforming the courts into a friendly forum for civil rights and civil liberties claims concluded grimly that the Supreme Court had "more often failed to protect the Bill of Rights than preserve it."[108] More to the point, they worried that preserving judicial review would ensure the continued elevation of property rights and would ultimately stand in the way of economic equality and democratic participation.[109]

I have argued in prior work that bifurcated review was not an innovation that originated spontaneously with footnote four of *Carolene Products*. Rather, it

[102] Letter from Walter Nelles to Arthur Garfield Hays (Jan. 26, 1926) (on file with author) (invoking William Graham Sumner's 1906 book *Folkway*s).

[103] *See Criticizing the Supreme Court*, CHI. TRIB., Jan. 6, 1921, at 6.

[104] *Id.*

[105] *Id.*

[106] 81 CONG. REC. 6874 (1937) (statement of Sen. Joseph Guffey).

[107] BALKIN, *supra* note 7, at 96.

[108] ACLU, *Analysis of Court's Decisions Shows Record Unfavorable to Civil Liberties—Authorities Disagree on Effect of Court Proposals*, C.L.Q., June 1937, at 1.

[109] *See* INT'L JURID. ASS'N, *supra* note 100, at 12.

was the product of two decades of social movement activism. In substance, it closely tracked a constitutional amendment (championed by many of the most prominent civil liberties advocates of the interwar period) that would have restricted application of the Due Process Clause while preserving judicial enforcement of the Bill of Rights.[110] I have also suggested that the bargain at the foundation of our modern constitutional order backfired on its pro-labor architects, and that the cracks that precipitated its collapse lay just below a thin veneer of interest convergence.[111] Judicial review survived New Deal court-curbing measures in large part because civil liberties advocates managed to recast the judiciary as a force for occasional good. In the foundational First Amendment cases of the late 1930s, joint briefing by labor lawyers, the ACLU, and the ABA emboldened the Supreme Court to reimagine the Bill of Rights as the principal constitutional constraint on government power.[112] The champions of the new approach were an unlikely coalition of state-skeptical labor radicals eager to protect the right to strike;[113] progressives who believed that deliberative openness would improve social policy and buttress state authority;[114] and conservatives who wagered that if the Commerce Clause and freedom of contract were unavailable, courts would protect business interests through the First Amendment instead (as Walter J. Kohler told the Annual Meeting of the Chamber of Commerce in April 1937, "[f]reedom of enterprise and personal freedom are but expressions of one and the same thing"[115]).

Left out of the bargain were the inveterate New Dealers who trusted the state to ameliorate social ills and who believed the judiciary would seize on constitutional rights to invalidate social and economic legislation.[116] They stressed that court-centered constitutionalism was poorly suited to mitigate private oppression, which they regarded as more pervasive and pernicious than its government counterpart.[117] Also excluded were fellow travelers who believed that personal rights could be meaningfully exercised only under conditions of relative economic independence. In their view, judicial enforcement of the Bill

[110] *See generally* LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016) [hereinafter WEINRIB, THE TAMING OF FREE SPEECH].

[111] *See* Weinrib, *Rethinking the Myth*, *supra* note 85, at 66 (explaining that the Supreme Court has accepted strong limitations on rights to picket and boycott while extending First Amendment protection to rights of employers and antiunion employees); *see also* Laura Weinrib, *Labor History and the Clash of Capabilities*, *in* THE CAPABILITY APPROACH TO LABOUR LAW 159, 178-79 (Brian Langille ed., 2019).

[112] Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 354 (2014) [hereinafter Weinrib, *Civil Liberties*].

[113] *See id.* at 315-16.

[114] *See id.* at 316-18.

[115] Walter J. Kohler, President, Kohler Co., Address at Annual Meeting of the Chamber of Commerce of the United States 103 (Apr. 29, 1937) (transcript available in the Hagley Museum and Library).

[116] Weinrib, *Civil Liberties*, *supra* note 112, at 322.

[117] *See id.*

of Rights replicated the pathologies of Lochnerism.[118] As the left-wing International Juridical Association stated (riffing on Justice Holmes's formulation in his dissenting opinion in *Coppage v. Kansas*[119]), the courts were blind to power differentials that undermined "the equality of position between the parties in which *liberty of speech* begins."[120]

For Balkin, the problem with the New Deal settlement is primarily a problem of fragility. Because the relative consensus about judicial review during the middle of the twentieth century was driven by depolarization as opposed to a particularly commanding constitutional theory, the New Deal settlement was bound to unravel eventually.[121] In this vision, law figures as little more than superstructure. The courts are not constitutive of the constitutional regime in any real sense. Other cycles are driving change.

To New Deal-era critics of judicial review, conversely, court-centered constitutionalism threatened democratic progress.[122] From their perspective, the New Deal settlement promised not to stave off constitutional rot, but rather to preserve and seed it.[123] Whether their concerns were borne out is not a question I can answer conclusively in this Essay, but in my view, it is one that requires investigation. The point is not (as historians and legal scholars have argued for decades) that judicial enforcement of the rights contained within footnote four was almost always feeble and selective, and that courts almost always found ways to temper redistribution.[124] The point is that the New Deal settlement may have entrenched economic inequality and, in the long run, produced constitutional rot.

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[118] *See id.* at 319.

[119] 236 U.S. 1, 26-27 (1915) (Holmes, J., dissenting) ("In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins." (citations omitted)).

[120] *N.L.R.B and Free Speech*, MONTHLY BULL. (Int'l Jurid. Ass'n), Sept. 1938, at 36.

[121] *See* BALKIN, *supra* note 7, at 129 (arguing that arrangements like New Deal settlement were possible because Supreme Court operated in depolarized system).

[122] *See* INT'L JURID. ASS'N, *supra* note 100, at 16-17.

[123] *See id.*

[124] The vast literature includes Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (arguing that "[r]acial remedies" rest on "judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites"); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 6 (2004) (arguing that judicial decisions "simply reflect the dominant opinion of their time and place"); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 3 (1991) (discussing role of majority preferences and social and economic resources in Supreme Court decisions); and RISA LAUREN GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 5, 13 (2007) (describing narrowing of civil rights constitutionalism to exclude "labor-based and economic harms").

There are multiple avenues through which this may have occurred. First and most important, the New Deal settlement preserved a strong form of countermajoritarian constitutionalism in the United States, and in so doing, cut off a national conversation about other options.[125] It is crucial to recognize that the *Carolene Products* approach was an alternative not to the continuation of Lochner-era legalism, but to sweeping institutional reform of the judiciary.[126] The New Deal settlement shut down experimentation and debate on this issue for many decades. Once it took root, proposals to rethink judicial review were, to use Balkin's term, "off-the-wall."[127]

In addition, the New Deal settlement reoriented the discussion among many advocates and academics from substantive demands to the channels of securing them. Many Americans were convinced during the Civil Rights era and afterwards that the demands of justice are met if protest is protected and formal legal rights are observed.[128] In other words, convergence around rights can produce a false sense of reconciliation, masking deep disagreement about underlying goals and thereby draining energy from a movement. On this view, the fact that the New Deal settlement commanded such broad-based buy-in for so long should tell us just how anodyne it ultimately was.

Indeed, the allure of representation reinforcement can serve to legitimate the status quo. Justice Holmes famously wrote that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[129] But the inverse is often mistakenly taken to be true, as well. That is, if a transformative agenda has *not* taken root, the fact of robust constitutional protection for free speech and minority rights serves as evidence that the relevant community is satisfied with the world as they find it. As long as the channels of representation have been preserved, the failure to achieve change is rendered as tacit endorsement of inaction, or at least the legitimate outcome of the democratic process. Put differently, the New Deal settlement can lead us to see broad-based, popular consensus where none existed.[130]

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[125] *See* Weinrib, *Civil Liberties*, *supra* note 112, at 321 (arguing that New Deal settlement effectively foreclosed alternatives to countermajoritarian constitutionalism).

[126] *See id.* at 356.

[127] *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 179-82 (2011).

[128] *See* WEINRIB, THE TAMING OF FREE SPEECH, *supra* note 110, at 324-27.

[129] Gitlow v. New York, 268 U.S. 652, 673 (Holmes, J., dissenting).

[130] That phenomenon may even help explain why, after the New Deal, the "consensus school" of history eclipsed such alternatives as the conflict-saturated cyclical history advanced by Arthur Schlesinger, Sr., and Arthur Schlesinger, Jr., and invoked by Balkin. *See* ARTHUR M. SCHLESINGER, PATHS TO THE PRESENT 77-80 (1949); ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 27-29 (1986). Notably, their principal contributions to the genre straddled the period that the younger Schlesinger described as "the alleged

If the maladies Balkin identifies in *The Cycles of Constitutional Time* are harder to situate in identifiable cycles than he allows, the solutions may not flow as ineluctably, either. As Balkin concedes, the reforms adopted during the Progressive Era and New Deal never excised the malignancies of American democracy. They left intact the "veto points" that prevent our constitutional system "from being fully democratic."[131] "If you believe, as the Framers did, that rot and decay in republics are inevitable," Balkin speculates, that price "is probably well worth paying."[132] But those less skeptical of democracy are likely to regard Progressive Era reforms as partial and tepid remedies that merely ameliorated, or even masked, the rot that had set in. After a period of partial remission, it is no wonder that a relapse is underway.

III. CHARTING A PATH FORWARD

Balkin deems it unlikely that the current generation of legal intellectuals will prove as skeptical of judicial review as "their progressive forebears,"[133] and he declares it "simply not plausible for politicians on either side to take as strong a position in favor of judicial restraint as progressives once did in the 1920s and 1930s."[134] My own prediction differs from Balkin's—not only because of the generational change within the legal academy that Balkin describes, but also because the writings, records, and correspondence of the actors and organizations who promoted court-curbing measures during the Progressive Era and New Deal furnish rich alternatives that today's advocates may well deem preferable to better known proposals.[135] To be skeptical of cyclical history does not mean ignoring past insights or struggles. History may not provide a roadmap

domestic tranquility of the Eisenhower years." Arthur M. Schlesinger, Jr., *Richard Hofstadter*, *in* PASTMASTERS: SOME ESSAYS ON AMERICAN HISTORIANS 278, 289, 292 (Marcus Cunliffe & Robin W. Winks eds., 1969). On consensus history, see, for example, John Higham, *The Cult of the "American Consensus": Homogenizing Our History*, 28 COMMENT. 93, 94 (1959); Alan Brinkley, *Richard Hofstadter's* The Age of Reform*: A Reconsideration*, 13 REVS. AM. HIST. 462, 476-77 (1985) (book review); and Daniel Joseph Singal, *Beyond Consensus: Richard Hofstadter and American Historiography,* 89 AM. HIST. REV. 976, 976-77 (1984). The pioneering (if ambivalent) consensus historian Richard Hofstadter considered ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON (1945), to be one of the two "last distinguished historical studies to be written squarely in the Progressive tradition." RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON 438 (1968).

[131] BALKIN, *supra* note 7, at 48.

[132] *Id.*

[133] *Id.* at 109.

[134] *Id.* at 98.

[135] Recent proposals for structural reform of the judiciary that draw on historical alternatives include Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, CALIF. L. REV. (forthcoming 2021); Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy,* 130 YALE L.J.F. 821 (2021); NIKOLAS BOWIE, THE CONTEMPORARY DEBATE OVER SUPREME COURT REFORM: ORIGINS AND PERSPECTIVES (2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf [https://perma.cc/7MF2-6LMR].

for our future, but it is a rich repository of paths not taken along with wrong turns. Lasting and fundamental change will require sustained pressure and broad-based organization and activism that builds on past efforts and achievements. As the ACLU reflected in 1937, "the fight for personal rights has consistently to be fought over."[136]

With that in mind, it is worth revisiting the debates of the 1930s with an eye toward the proposals that the New Deal settlement displaced. While some New Dealers defended court-packing, most advocates of reform favored other alternatives, including jurisdiction-stripping, the legislative veto of Supreme Court decisions, relaxed requirements for constitutional amendment, and substantive amendments authorizing congressional power in particular spheres.[137] Many activists endorsed amendments seeking to preserve judicial power to strike down state and local, but not federal, laws.[138] Responding to a concern that state and local governments (especially but not exclusively in the Jim Crow South) were particularly susceptible to majoritarian overreach and abuses, they sought to empower Congress to compel local officials and even private actors to respect civil liberties and civil rights.[139] In a similar vein, one proposal popular among progressive lawyers was to impose a supermajority rule of decision on the Supreme Court in cases involving the exercise of judicial review, a method that had already been debated and adopted in a handful of states.[140] Proponents understood that there would "always be one justice whose vote determine[d] the issue,"[141] and that politicization of judicial appointments would persist. But they believed that overall a supermajority requirement would curb judicial overreach while addressing the most egregious of incursions on personal rights.[142]

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[136] Press Release, ACLU (May 21, 1937) (on file with author).

[137] *See generally* Osmond K. Fraenkel, *What Can Be Done About the Constitution and the Supreme Court?*, 37 COLUM. L. REV. 212 (1937) (describing several reform proposals including those mentioned).

[138] For a discussion of representative positions, see WEINRIB, THE TAMING OF FREE SPEECH, *supra* note 110, at 210-12.

[139] *Id.* at 260 (describing plans within Civil Liberties Unit of the Department of Justice to recommend legislation authorizing federal intervention to protect civil rights and civil liberties against incursions by local and private actors).

[140] *See* Fraenkel, *supra* note 137, at 222 (considering proposal to require 5-4 or 6-3 rule of decision in the Supreme Court's constitutional cases). For a review of supermajority proposals at the state and federal level, see Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 951-71 (2003); and Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 94-101 (2003).

[141] Fraenkel, *supra* note 137, at 222.

[142] *Id.* (explaining proponents' endorsement of a supermajority requirement). A supermajority rule would also be responsive to a phenomenon Balkin identifies: the breakdown or shrinkage of elite consensus. *See* BALKIN, *supra* note 7, at 112 (noting that polarization leads to evaporation of elite consensus). If the space of agreement has shrunk, perhaps the sphere for judicial intervention should shrink as well.

Proposals like these may be preferable to, or more politically palatable than, eliminating judicial review altogether. They may be more democratically accountable and more responsive to our present political reality than efforts to resurrect a countermajoritarian progressive constitutionalism. And they may clear space for the kind of "sustained political mobilization and demands for reform" that Balkin considers a prerequisite for curing constitutional rot.[143]

In the end, though, I doubt that curbing judicial review will resolve the pathologies of American democracy. Robust social rights of the kind that flourished briefly during the New Deal were as fragile and fleeting in Congress and administrative agencies as they were in the courts. This basic problem is presumably why in 1938, the National Lawyers Guild resolutions for "Constitution and Judicial Review" called for direct election of the President and Vice President, the elimination of poll taxes and property or educational requirements for voting, and deployment of the reduction clause of the Fourteenth Amendment.[144] The new task was to make democracy more inclusive and more representative—a goal that Balkin shares. As Balkin observes, it is a goal that will be difficult to achieve in the absence of popular agitation and a "transformative social movement."[145]

In introducing his theory of republican rot, Balkin asks why republics are "so difficult to maintain."[146] Reaching across world history from ancient Greece to the Trump presidency, his answer is as ageless as his historical cycles: "Because of ambition, because of greed, because of the ever-present lust for power among human beings."[147] Testifying before Congress at the height of the New Deal, the Secretary of the Ohio Chamber of Commerce offered a different explanation: because of progressive taxation.[148] His account, too, was transhistorical.[149] First Athens and then Rome had succumbed to such evils as redistribution, centralized government, and the appropriation of private property. Along with "hostility to our Constitution and hatred of the Supreme Court," they signaled the nation's downward trajectory within the "vicious cycle of history."[150] If history moves in circles, up and down are a matter of perspective.

The Cycles of Historical Time is meant to be an optimistic book.[151] Its goal "is not to tell people that their democracy will take care of itself without any

[143] *Id.* at 71.

[144] NAT'L LAWS. GUILD, *supra* note 65, at 3.

[145] BALKIN, *supra* note 7, at 164.

[146] *Id.* at 47.

[147] *Id.*

[148] *See Proposed Taxation of Individual and Corporate Incomes, Inheritances, and Gifts: Hearing Before the H. Comm. on Ways & Means*, 74th Cong. 173 (1935) (statement of George B. Chandler, Sec'y of Ohio Chamber of Com.).

[149] *See id.* at 172-73.

[150] *Id.* at 173.

[151] *See* BALKIN, *supra* note 7, at 174.

effort on their part."[152] Rather, its ambition is to stir people to action by dispelling the notion that we have embarked on a path of inevitable and irreversible decline.[153] "The good news," Balkin concludes, "is that the cycles of constitutional time are slowly turning."[154] That prior generations have faced circumstances as dire as ours is meant to "offer a bit of hope."[155] And hope, in turn, "makes beneficial action more likely."[156] American democracy will pivot again toward renewal as long as we grease the wheels.[157]

I applaud Balkin's intention. Yet it seems to me that a cyclical vision of history can furnish only a pallid hope. It is hard to mobilize around the prospect of several decades of relative stability and moderated inequality, to be followed in due time by a descent back into rot. Surely it is more inspiring to chart a new trajectory than to settle for recycling the palliatives of the past.

[152] *Id.* at 6.

[153] *Id.* ("If people misunderstand our situation, and conclude that American decline is inevitable, they may unwittingly help to make that fate a reality; but if they understand the cycles of constitutional time, they may come to believe that their democracy can be redeemed, and do their part to realize that worthy goal.").

[154] *Id*. at 174.

[155] *Id*. at 6.

[156] *Id*.

[157] *Id.* at 10 ("We have been through these cycles before and we will ultimately get out of our present troubles, not simply by waiting for things to get better, but by actively working to renew our democracy.").