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## Indecisive Liberal Faith, Capitalism, and the Constitution

Balkin, Jack M. 2011a. *Constitutional Redemption: Political Faith in an Unjust World*. Harvard University Press.

Balkin, Jack M. 2011b. *Living Originalism*. Harvard University Press.

Balkin, Jack. 2020. *The Cycles of Constitutional Time*. Oxford University Press.

*Abstract:* Jack Balkin's scholarship exhibits an indecisive faith, symptomatic of legal liberalism, committed to belief in the future moralization of politics and disavowal of that belief. This yields indecisive theories of constitutionalism, politics, jurisprudence, and history; repeatedly, focus on progress, open-endedness, and discussion neglects how previous decisions and entrenched institutions foreclose alternatives. Above all, Balkin disregards how capitalism precludes democratic redemption of liberal ideals. The Constitution entrenched capitalist social property relations and insulated them from the democratic process. Capitalism's social compulsions foreclose democratic redemption of the liberal ideal of equally respecting the freedom of all. Constitutional legitimacy in capitalist democracy is entangled in contradictory imperatives to sustain both civic solidarity and accumulation. By undermining regimes of constitutional legitimation, accumulation has yielded cyclical patterns of constitutional development. Responsible struggle to achieve liberal ideals must acknowledge that capitalism forecloses their redemption but that no liberal overcoming of capitalism is currently possible.

*Keywords:* constitutional theory, regime theory, capitalism, Karl Marx, Jack Balkin, American political development, Law and Political Economy, legal liberalism, originalism

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## I. Jack Balkin and the Limits of Legal Liberalism

Jack Balkin is among a handful of the very best and most prominent constitutional law scholars in the United States. His recent book, *The Cycles of Constitutional Time*, draws heavily on the metaphor of planetary cycles. The book's dust jacket depicts what astronomers call a diamond ring, which appears just after a solar eclipse, as the sun's disk and corona first reemerge in a scintillating chiaroscuro. Balkin begins the book by deploying the astronomical metaphor to reassure his readers that although we live in "dark" political times, our present condition is only a transient "eclipse" (Balkin 2020, 4).

Balkin has written a "book about the United States, its constitutional structures, and the cycles of American constitutional history" (Balkin 2020, 8). He argues that three distinct cycles of constitutional history have converged to create our current political eclipse. First, political regimes, characterized by a dominant political party and ideology, rise and fall. Second, there are cycles of political polarization and depolarization. Third, there is a cycle between constitutional "rot"—when the constitutional system becomes less connected to the common good and less responsive to the public—and constitutional "renewal." Balkin claims that "[o]ur current political problems stem from the fact that we are in the final days of a crumbling, decadent political regime, and no new regime has yet appeared to take its place. Its difficulty is enhanced by the fact that this transition between political regimes occurs at a time of peak polarization . . . and at the low point of a cycle of constitutional rot" (ibid. at 12).

Balkin occupies a special liminal position in the field that makes him uniquely worthy of careful attention. With incisive and fresh contributions like the concept of constitutional life cycles, his work exemplifies mainstream American constitutional scholarship at its most sophisticated. But in its originality, it also gestures beyond the conventional without quite breaking with it. Balkin's thinking is set apart by the import of ideas taken from outside of traditional legal scholarship. Here it is the metaphor of planetary cycles; previously it has been theological concepts of fall, faith, and redemption. These are rich categories—too rich, it turns out, for Balkin. Their deployment carries entailments that escape his own intents. The basis of Balkin's creativity and originality is also the grounds for criticizing him—and, with him, mainstream American constitutional theory that he has pushed to its limits.

I begin by making use of the astronomical metaphor myself. Between the second and sixteenth centuries, the geocentric theory of the cosmos located the earth as its stationary central point. Astronomers were nevertheless unable to provide a simple explanation that corresponded to the observed patterns of planetary motion. The planets did not revolve in neat circular orbits around the earth. Working in second-century Alexandria, Ptolemy famously endeavored to reconcile geocentrism with observation by claiming that the sun, moon, and planets revolved around the earth in a "deferent" orbit, but also moved in small circular "epicycles" centered on the wider deferent. Subsequent astronomers found that this, too, was inadequate and added a second epicycle, circling within the main epicycle, to settle their models with observation. Adding epicycles to the Ptolemaic model better fit the data—though still with inexplicable anomalies—but at the expense of increasing complication and incoherence. The more the geocentric theory was extended to match the *what*, the less convincing it became as an explanation of *why*.

In the sixteenth century, the Polish aristocrat Nicolaus Copernicus initiated the scientific revolution by working out a heliocentric theory of the cosmos. The planets, including Earth, revolved around the sun, and only the moon revolved around Earth. By "removing the earth from the center of the

world and placing it among the planets,” Copernicus “undermined the very foundations of the traditional cosmic world-order” and its “qualitative opposition” between celestial and terrestrial realms (Koyré [1957] 2016, 29). Galileo would later build telescopes to collect experimental evidence confirming the Copernican theory. Around the same time as Galileo, Johannes Kepler’s work mathematized the Copernican model of the cosmos and remains the starting point today for the scientific understanding of planetary motion. Athwart the breakthroughs of Copernicus, Galileo, and Kepler had been the geocentric presumption, protected by the dogmas of Catholic faith, that the earth does not move. A parsimonious and empirically verified cosmology could emerge only once Christian doctrine was challenged, and the earth was set in motion. This epoch-defining paradigm shift eliminated the need for epicycles to match observations.

Balkin has gone as far as anyone in today’s legal academy to relativize law to politics. But alongside the rest of mainstream constitutional theory, he continues to presuppose the autonomy of the political from the economic. He remains within what today’s Law and Political Economy (LPE) movement calls the “twentieth-century synthesis,” which has falsely partitioned economics and politics by filtering the politics out of economic analysis and the economics out of political analysis (Britton-Purdy et al. 2020). His heterodoxy at one level has reinforced his orthodoxy at another. For Balkin, politics is often *about* economics and economic power certainly *affects* politics. Indeed, arguably the first mover of his theory of constitutional cycles is economic inequality. But inequality is depicted as an exogenous cause while politics and economics remain discrete, externally related social domains largely amenable to independent analyses. As social science, political economy is bracketed from the search for insights into the interactions between law and politics. As a practical guide to constitutional politics, the possibility is never considered that the capitalist economy truncates political autonomy and limits the control that citizens have over their own society. Faith in a constitutional project of progressively actualizing justice through democratic self-determination comes alongside taking the fundamentals of the capitalist economy for granted as an essentially unchanging ground of political life. In other words, Balkin commits his own geocentric fallacy.

It is time to make an epistemological break and *relativize the relativizers*. Copernicus brought the earth out among the other planets as an object of astronomical study; we must bring the capitalist economy into the study of constitutional law and politics. It took renouncing tenets of Catholic faith for the heliocentrists to think and act differently. Constitutional thinking that adequately breaks down the barrier between economics and politics calls for an analogous departure from the old faith of legal liberalism. Here, too, Balkin proves indispensable because he explicitly articulates the terms of this liberal faith and, in spite of himself, reveals its shortcomings and points toward its supersession.

Because Balkin’s thought is not just a diagnostic symptom of the pathologies of legal liberalism but also a starting point for prescriptions to move beyond it, extended study of his oeuvre is an opportunity to begin to construct the rudiments of an alternative grounded on a critique of capitalist political economy. The relativization of politics and law to the economy can draw from many of Balkin’s insights—above all, it also yields a cyclical theory of constitutional development—but offer a more robust empirical account and chasten implausible liberal presumptions.

This article starts with historiography: the scholarly community’s commitment to legal liberalism situates Balkin’s idiosyncratic yet conventional thinking. An extended critical appraisal of Balkin’s scholarship follows. Balkin suffers from an *indecisive liberal faith* committed both to belief in the future moralization of politics and to disavowal of that belief. This liberal indecision stains Balkin’s entire corpus, yielding indecisive theories of constitutionalism, politics, jurisprudence, and history; in each

case, a tendentious focus on progress, open-endedness, and discussion submerges acknowledgment that prior exercises of power and preexisting institutional configurations foreclose alternatives. Balkin's indecisions are symptomatic of legal liberalism generally and of how its analyses are systematically distorted by its foundational principles.

Above all, indecisive liberal faith neglects a serious engagement with capitalism. This thoroughgoing critique of Balkin's version of liberal legalism sets up an alternative treatment of the same gamut of fundamental topics grounded on a largely Marxist understanding of the capitalist compulsion to accumulate and its contradictions. It starts with a reinterpretation of the Constitution as pivotal for the consolidation of a separate economic sphere of capitalist property relations protected from the political sphere of democratic politics. It then outlines a theory of capitalist society governed by the imperative to accumulate and shows how such a society forecloses the redemption of liberal faith. Next, it elucidates the entanglement of constitutional legitimacy in capitalist democracy by contradictory imperatives to sustain both civic solidarity in which people are acknowledged as ends and accumulation dependent on people being instrumentalized as means. This leads to a substitute account of the cyclical patterns of constitutional development and the life cycles of constitutional regimes derived from the cyclical, self-undermining dynamics of capital accumulation. Finally, the argument considers how responsible struggle to achieve liberal ideals must acknowledge that capitalism forecloses their realization but that no liberal overcoming of capitalism is currently possible.

## II. Liberal Orthodoxies

### A. *Constitutional Veneration and Legal Liberalism*

In the early decades of the twentieth century, Progressives and Legal Realists fought insurgencies against fundamental binaries structuring American government: the distinction between rationally principled constitutional law and politics governed by majority will was challenged as a specious instrument of "rule by judiciary"; and the regnant social theory dividing a political sphere of coercive state action from an economic sphere of free individual choice coordinated by naturally self-regulating markets was intellectually discredited. These efforts culminated in the New Deal breakthrough and the Supreme Court's capitulation to an expanded federal regulatory state actively intervening in the economic sphere while drawing its basic political legitimacy from democratic majorities.

But the political revolution was soon routinized, and Progressive rebellion became liberal hegemony. By the 1950s liberals had "turned their back on their own radical history" by reestablishing novel versions of the old binaries (TerBeek 2021, 884). A new "creedal constitutionalism" combining veneration of the 1787 text with a narrative of American history as the redemption of the Founding promise of equal liberty took root in a Cold War context where universalistic constitutional principles served to justify American global primacy (Rana 2024, 10–13). An antitotalitarian horizon recentered an account of freedom that emphasized, above all, individual rights as protections from the state and identified the fundamental threat as mass democracy prone to actuation by demagogues and tyranny of the majority. The legitimacy of constitutional restraints on democratic majorities was renewed by their relocation from economic to political and civil rights. Antifascism exemplified by protections for political speech (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)) was later joined by the Cold War civil rights identified foremost with *Brown v. Board of Education*, 347 U.S. 483 (1954). The Supreme Court—alongside the constitutional system of checks and balances that it crowned—was restored as the great guardian of liberty against mass democracy. According to the new public

philosophy, the United States fended off irrational mass outburst calling for radical change through a temperate political culture of liberal consensus and public deliberation. This was modeled and managed by elites—above all, by the Supreme Court, whose interpretive practices were increasingly equated with the Constitution itself.

The recrudescence of courts as constitutional superintendents of politics came in concert with a fresh division between the political and economic spheres. The old regime's constitutional jurisprudence bifurcated robust protections for economic rights (*Lochner v. New York*, 198 U.S. 45 (1905)) and indifference to basic civil rights and liberties (*Plessy v. Ferguson*, 163 U.S. 537 (1896)). The subsequent antitotalitarian regime did not overcome this constitutional forking so much as invert it: court deference to economic regulations (*United States v. Carolene Products Co.*, 304 U.S. 144 (1938)) was paired with discourses of uncompromising judicial vindication for civil rights. The all-or-nothing paradigm meant that justices “steadfastly insisted that any rights that can't be protected absolutely aren't rights at all” (Greene 2021, xxvii). Their very forcefulness ensured the limitation of constitutional protection to negative rights against intentional state action; enforcing positive rights against socioeconomic structures of inequality and domination in an absolute way would have required judicial commandeering of government to transform society. This left aggregate policymaking in the economic sphere largely beneath the horizon of constitutional oversight. When legal process theory first revived courts as suprapolitical sites elaborating rational principles that were limited to supervising the regulatory process, they did so as the handmaidens of interest-group liberalism (Horwitz 1992, 257). The public interest was defined as the outcome of an intragovernmental ersatz process of market equilibration achieved through the bargaining and balancing of organized interest groups. Set loose from judicially enforced deontological values like freedom and equality, the rationality and legitimacy of regulatory government was instead grounded on utilitarian principles of making market capitalism function well. Even after the critique of regulatory capture undermined pluralist ideology, the rationality of market ordering as the basis for legitimating depoliticized administrative regulation remained under the new sign of efficiency.

This entanglement between the resuscitated law/politics and political/economic dichotomies appeared to offer the best of both worlds. It promised redemption of high-flown constitutional ideals of freedom and equality but cabined their content by truncating the political sphere and affirming the basic structures of the economic status quo. This explicit project limited to freeing the state from violating constitutional rights implicitly entrenched the freedom of market society from constitutional politics. Given meaning by Cold War antitotalitarianism, the elevation of the Supreme Court to unrivaled primacy as the quintessential locus of this deliberative process of constitutional redemption was thus essentially an endorsement of capitalism as the unquestioned background horizon of American life.

The heyday of the Warren Court as constitutional redeemer imbued the legal community with “legal liberalism”: a confident dedication to the Supreme Court identifying fundamental public values and authoritatively promulgating higher law (Kalman 1996). The stamp left by the Warren Court on legal liberals has been indelible; never again have they relinquished commitment to a fundamental difference between constitutional law, associated with principled objectivity grounded in rationality, process, or morality, and merely subjective, unprincipled, and partial assertions of political will. Whether it is John Hart Ely's “experts in process,” Ronald Dworkin's “forum of principle,” or John Rawls's “exemplar of public reason,” the Supreme Court has remained at the capstone of liberal thinking ever since.

Despite its lasting grip on the minds of proponents, legal liberalism's moment of institutional authority was remarkably short. Political and academic polarization quickly discredited trust in a consensus on public values and sowed new doubts over legal objectivity. Novel departures from doctrinal analysis reached outside the law schools. The Chicago School made law an accessory to economics. Critical Legal Studies (CLS) claimed that critical theory taught that law was little but politics in disguise. Above all, the Warren Court became one of the major flashpoints of conservative reaction against the liberal state. It represented a distant federal government imposing controversial values by force. Conservatives also turned to the origin, but jettisoned the narrative of progressive redemption, and deployed their Constitution to authorize retrenchment against liberalism.

In the face of these emerging controversies, legal liberals doubled down on the constitutional creed. Among other reasons, the professional status of legal elites—especially the professoriate—was predicated on the law/politics distinction, which elevated legal intellectuals from mere partisans to scholars whose elite training in a craft conferred special authority. By making the centerpiece of legal education and discourse the formalistic shibboleth, briefly vanquished by the Realists, that knowledge of doctrine can yield “correct” suprapolitical legal decisions, law professors could simultaneously claim that they deserved privileged access to influence the exercise of official power and were entitled by their knowledge to status on campus and in the broader culture. Legal liberalism let law schools and their faculty negotiate their schizophrenic location within both academia and the ideological state apparatus, blurring the lines between the production of knowledge and legitimacy. The entanglement of the constitutional creed with the politics/economics division meant, most of all, that their own status depended on affirming capitalism.

Their self-interested cossetting of these constitutive dichotomies manifested in their contrasting institutional responses to CLS and originalism (TerBeek 2021, 879–80). Liberals beat back the CLS movement because they expressly denied that law, especially the liberal foundation of private law, was anything but constitutively political. By contrast, they reluctantly admitted their political foes into the academy as legitimate interlocutors because originalists likewise pledged fealty to law beyond politics. The conservatives much more deftly exploited the ambivalent positioning of legal ideas between truth and power. Originalism was forged as “value-laden, goal-oriented politics in the Justice Department of the Reagan Presidency” and then subsequently painted over with the patina of scholarly legitimacy as a “presumptively value-neutral method of interpretation in the legal academy” (Siegel 2023, 1132). In their long march to dominance in the federal courts, conservatives made use of originalism as the justificatory grammar of an essentially partisan project of reforming constitutional meaning.

Clinging to the creed of constitutional redemption directed legal liberalism toward rearguard efforts to fight originalism on its own turf: the past (Kalman 1996). The republican revival rediscovered civic virtue and participatory freedom in the Founding Era. By identifying the right of political participation as a foundational freedom, republicans articulated a constitutional theory that promised to overcome the antinomy between court-protected rights and democratic legitimacy that had beleaguered legal liberalism. Reframing the constitutional tradition as an ongoing dialogue supported a theory of legal objectivity justifying evolving public values and judicial review. Civic republicans could also accede to the Legal Realist thesis that law was not wholly autonomous without following CLS all the way to the conclusion that law was ideological mystification. Despite decentering the Court, the lawyers' republicanism still portrayed the constitutional tradition as a deliberative process and acquiesced to the checks and balances that tamped down responsiveness to mass democracy. While supplementing negative freedom in the private sphere with a positive ideal of public freedom, the republican revival also still accepted a fundamental division between the participatory political sphere and the economic

sphere organized by market capitalism. The continuation of these tenets of the Cold War creed meant that the history the republicans recovered was in a certain sense no history at all. There was nothing new except the realization of what was already latent at the beginning. Veneration of a liberal past to be democratically redeemed led them to faith in a liberal future.

But republicanism did not stem the conservative tide. The law professors' Faustian bargain was a raw deal. They have maintained professional status at devastating political cost, fighting to "an intellectual standstill and a political rout" (TerBeek 2021, 883). Precluded by their creed from acknowledging that they have been in a political fight without a stable legal ground, legal liberals have fallen into increasingly desperate fulminations about originalism's scholarly inadequacy and the incorrectness of official legal decisions by courts staffed by their opponents. Legal liberals have been unable to disavow redemptive faith in history despite their extrusion from power and mounting failures. Instead, their philosophy of history has shifted from self-assured confidence in the progressive ratification of liberal ideals to consoling theodicy that history will one day return them from the wilderness (Chemerinsky 2018, 232–33).

Constrained by their constitutional veneration to theories of constitutional politics that acquiesce to a thorough system of checks on mass democracy and depoliticize the basic structures of market capitalism, legal liberals have proven unable to understand constitutional history, their own failures, or the current political conjuncture. The explicit constitutional faith in the redemption of liberal ideals and the implicit acceptance of capitalism without regard to its constraints on democratic possibilities are two sides of the same coin. To elaborate on this, I will now turn to Jack Balkin's characteristically liberal constitutional faith. Submerged acknowledgment of the myriad ways in which the constitutional tradition forecloses possibilities—above all by sidestepping capitalism—leads him into quandary after quandary. I will then build from this critique to point the way toward constitutional theory that properly foregrounds capitalism.

### B. *Indecisive Liberal Faith*

As perhaps the legal liberal most willing to spotlight the politics of constitutional law, Balkin is of particular interest insofar as he is nevertheless unable to break with legal liberalism's commitments to the Constitution and progressive constitutional stories of past and future. At the very outer edge of legal liberalism, his scholarship best illuminates liberal failures.

Balkin's earlier scholarship was a deflationary gloss on the republican legal project. Among the leading lights of the republican revival was Bruce Ackerman, who extended the rediscovery of active citizenship beyond the Founding to identify subsequent moments of public effervescence (Ackerman 1991). His constitutional history focused on moments of extraordinary mobilization through which the people exercised their constituent power and legitimately amended the Constitution outside of formal channels. Balkin enters the historiography here. Together with his frequent coauthor Sanford Levinson, he presented an alternative to Ackerman's theory of constitutional change. Balkin and Levinson tamped down on the normative themes of republican civic virtue and constitutional legitimation and played up the Legal Realist elision of a sharp law/politics boundary. They relocated their analysis from extraordinary eruptions of sovereign will to the long-term political tectonics of judicial appointments. Constitutional change, they argued, happens through "partisan entrenchment" (Balkin and Levinson 2001). When a party wins enough elections, it can staff the judiciary with



representatives of its political ideology and remake the Constitution through cumulative reinterpretation.

Despite this Realist step, Balkin did not break with legal liberalism. His more recent constitutional thinking is grounded in Rawlsian theory—an edifice in which liberal legitimacy derives from presumptive *consent* to fundamental law through an *overlapping consensus* on *neutral* principles. Liberal theory generally reconciles a moral respect for all citizens as free and equal with political coercion through consent. The Rawlsian version of liberalism acknowledges that respect also requires accepting reasonable political disagreement stemming from the burdens of exercising reason and judgment. The fact of reasonable pluralism constrains the terms of consent. Coercion can be legitimate only if the basic constitutional principles of political order are reasonable. This means that they must satisfy the criterion of reciprocity by which it is reasonable to believe that all citizens could reasonably endorse them. It also stipulates an overlapping consensus of reasonable citizens on the political conception of justice embedded in these constitutional essentials. This consensus depends on justifiability according to public reasons independent of any comprehensive moral doctrine and neutrality with respect to permissible conceptions of the good.

While remaining within this Rawlsian normative architecture, Balkin nevertheless accepts Frank Michelman's extremely significant, quasi-empirical concession that any constitutional essentials in place as binding rules cannot be an object of consensus (Michelman 2003). These constitutional essentials would have to be abstract enough to secure agreement among all reasonable citizens but sufficiently determinate for them to know what they were endorsing. The dilemma is that if the content of the constitutional order is thin enough to be a viable object of consensus, citizens will not know what they are endorsing, but if it is thick enough for them to know, then it will be too controversial for agreement. Michelman proposes that legitimating consensus can instead be found in the Constitution as a common object of interpretation by the people themselves. A range of "rational reconstructions" of the constitutional order's overall meaning are available to them. Liberals committed to finding legitimate principles can exercise interpretive charity by identifying reconstructions of the constitutional order that bring it into maximum feasible conformity with their own ideals of democracy, fairness, and justice. They can interpret specific existing constitutional essentials that they do not endorse as mistaken aberrations. An overlapping consensus can be recovered if each reasonable citizen can identify some rational reconstruction that they can endorse.

The toehold for Balkin's ensuing three-book corpus is Michelman's remark that the liberal citizen's interpretive charity entails "moral optimism" (Balkin 2011a, 41). Balkin reads this as stipulating confidence "in the possibility that, in the long run, the system can be moved closer to the ideals of democracy, fairness, and justice, and that the system will move in that direction" (ibid. at 41). Judgments about the legitimacy of the constitutional order are essentially temporal; they "look[] backward to the past and forward to the future" (44). This brings Balkin to the most fundamental thesis of his project: "Legitimacy rests in part on faith in the future" (44). Legitimizing faith has a narrative form that "rests on believing in a story about the political system: where it has been and where it should be going" (44). The otherwise delegitimizing divergence of an existing constitutional order from the interpretive reconstructions that each reasonable citizen would endorse is met by their faith in their stories of progressive "redemption."

Balkin thinks that reasonable pluralism means that one citizen's redemption will be another's "nightmare" (Balkin 2011a, 10). But this cannot be true for the liberal citizens he is depicting. To retain the liberal principle of respect for all other citizens as free and equal, faith remains constrained

by the criterion of reciprocity. For a citizen's faith in the redemption of their own reconstruction of the Constitution to remain liberal, it must be accompanied by belief that all other reasonable citizens will also be able to endorse it. For the liberal, present legitimating overlapping consensus on the Constitution as a contested object of pluralistic interpretation depends on faith in a future overlapping consensus on their particular interpretation. Liberal faith in constitutional redemption must be faith in the overcoming of struggle over fundamental issues of constitutional interpretation by a consensus that realizes moral respect for all. Balkin's Rawlsian account of liberal legitimacy must stipulate beliefs in progress toward and ultimate realization of "a world after politics" (Newey 2001, 11).

Balkin is far from the first to reach for religious categories to understand how premoral politics could bring about a constitution that legitimated politics by moralizing it. Rousseau worked out a "transformation of a theological idea, the general will of God to save all men, into a political one, the general will of the citizen to place the common good of the city above his particular will as a private self and thereby to 'save' the polity" (Riley 1986, ix). He acknowledged that this was extremely difficult to achieve; for people to accept the constitution that would moralize them, they would already have to be moral. Rousseau's solution to this paradox was an "extraordinary Lawgiver" who would trick the people into accepting the constitution by claiming that it was of divine origin. Kant instead relied on belief in divine providence to solve Rousseau's paradox. Humanity's innate but latent capacity for morality through rational self-determination must be developed and ultimately requires a "perfectly just civil constitution" for actualization (Kant 1991, 46). Antagonisms rooted in "enviously competitive vanity" and "insatiable desires for possessions or even power" offer social resistance to people's wills (ibid. at 45). Nevertheless inclined to live in society and seek social status, people endeavor to overcome such resistance. This "unsocial sociability" rouses efforts to cultivate talents and engenders enlightenment (44). That irrational and unsociable impulses could unintentionally drive the development of reason and moral maturation "would seem to indicate the design of a wise creator" (45). History should be "regarded as the realization of a hidden plan of nature" (50).

No such intricate appeal to divine agency capable of morally redeeming politics is available to Balkin. The establishment of a constitution cannot be understood as a morally transformative act legitimated by divine authorship because it must be conceded that "all constitutions are agreements with hell, flawed, imperfect compromises" (Balkin 2011a, 6). Faith in providential guidance toward moral perfection under a wholly just constitution is foreclosed by disavowal of a divine will that endowed nature with purpose. Balkin nevertheless clings to a secularized soteriology of fall and redemption imported from Judaism and Christianity. The people's faith can only be in themselves—in their own redemptive capacity to fulfill the promises of their constitution. This is a political Pelagianism: belief that despite the fallenness of their world, the people are free to choose morality and capable of acting to realize their redemption. In this faith that abjures the divine, it is their own wills rather than God's to which citizens must conform to earn redemption. Rawlsian political liberals forswear any single correct political morality based on a metaphysical account of human nature that the free exercise of judgments and reason would ever converge on. They can be assured of no true political morality like the general will or the categorical imperative. Redemption can only be defined by the burdened moral judgments of the very people who are to be redeemed.

That the same citizens must both politically achieve redemption and morally define it yields a dilemma. A legitimacy based on respect for free individuals stipulates a faith that politics will one day achieve a constitution supported by moralizing consensus. But respect for free individuals and their judgments also requires conceding the fact of reasonable pluralism and, as a result, that there could never be a binding constitution whose "thick" essentials could be endorsed by moralizing consensus. Balkin

mostly admits this dilemma. He describes faith as a “steadfast belief that the evils of the present can and will be recognized and remedied” (Balkin 2011b, 62). Nevertheless, “[r]edemptive constitutionalism does not assert that redemption is guaranteed.” We can only “gamble on the future” (ibid. at 62). Despite the imperative for all to have faith that their redemption will be achieved, Balkin concedes that pluralistic struggle makes anyone’s particular vision of redemption unsure—even if he does not quite grasp that, granting Michelman’s dilemma, this renders the overlapping consensus necessary for liberal redemption impossible.

Faith is a decision to believe that requires an exclusive either/or existential commitment. “No one can say, ‘God and world, they are not, after all, so absolutely different. One can combine them both in one choice.’ This is to refrain from choosing” (Kierkegaard 2014, 10). But this is precisely what liberal faith entails—a faith in the future that is not faith in it, a decision to believe that is not a decision to believe. It is a faith without a decision, an *indecisive faith*. A liberal theory of legitimacy that combines faith in the progressive overcoming of politics by morality based on public justification with acknowledgment that sufficiently deep disagreement about morality forecloses consensus leads to indecision. This falls prey to Carl Schmitt’s critique of liberalism: to the question “‘Christ or Barabbas?’” the liberal responds with “a proposal to adjourn or appoint a committee of investigation” (Schmitt [1922] 2005, 62). Balkin’s liberalism “suspend[s] the decision at the crucial point by denying that there was at all something to be decided upon” and “permit[s] the decision to be suspended forever in an everlasting discussion” (ibid. at 61, 63).

### C. *Indecisive Constitutionalism*

This liberal indecision cascades throughout Balkin’s ensuing theories. The resulting indecisions share the same form: *superficial acknowledgment of decisions submerged by deeper evasion of them*. They each cursorily concede the inescapability of acts of political will that exercise coercive power in the face of opposition and entrench institutional forms that foreclose alternatives, only to neglect this recognition and its consequences with tendentious focus on rationality, discussion, consensus, and openness to possibilities.

The indecisive combination of faith in a single redemptive story and acknowledgment of perpetual struggle among rival narratives leads Balkin to his constitutional originalism. Balkin “became an originalist” because future redemption implies a past promise to be redeemed. Interpretive divergence imperils faith in the people as a unified redemptive subject. Constitutional text provides something “that all Americans hold in common and that all must be faithful to” (Balkin 2011a, 247).

Balkin’s “framework originalism” understands the Constitution’s fundamental purpose to be “setting up a basic structure for government, making politics possible, and creating a framework for future constitutional construction” (Balkin 2011b, 21). The job of the Constitution is “not to prevent future decisionmaking but to enable it” (ibid. at 24). Its open-ended texture “leaves to each generation the task of how to implement the Constitution’s words and principles in their own time” (3). But alongside this emphasis on open-endedness are scattered acknowledgments of constitutional constraints on future politics: constitutional provisions “*channel and discipline* future political judgment” (29); “the continuation of any tradition must necessarily kill off other possible lines of development and relegate them to the margins or brand them as heretical” (Balkin 2011a, 120); and “[w]e live in compromises with the evils of the past, and we are compromised by them” (ibid. at 27). These add up to a subterranean anti-thesis that subverts the project’s central normative assertion that citizens should

approach the Constitution with faith, which depends on denying that the Constitution forecloses any political possibilities they deem necessary for redemption.

Evasions of the import of constitutional closure are particularly clear in Balkin's theories of political contingency and legal interpretation. Balkin relies on the contingency of the personnel selected for the Supreme Court, Senate, and presidency to carry the burden of testifying to constitutional open-endedness (Balkin 2011a, 216–17). In doing so, he indicates just how limited these possibilities are. What sorts of ideological views and agendas are necessarily culled as inviable among elites contingently vying for office remains beyond his analysis. By establishing relations of political rule and structuring the means of acquiring and exercising power, the Constitution itself plays a principal role in securing this narrowing.

Balkin models official legal interpretations as “performances” that “delight, satisfy, entertain, shock, instruct, edify, move, govern, organize, and inspire” their “audience” (Balkin 2011a, 93–94). This submerges the fact that official interpretation is an “imperial” exercise of “jurispathic” state power that is violent in the sense that it destroys interpretive possibilities (Cover 1995). Balkin almost confronts the interpretation-violence nexus when he appropriates the theory of “democratic constitutionalism” to depict an ongoing colloquy between the top-down unifying “Catholic” interpretive authority of the Supreme Court and bottom-up, pluralizing “Protestant” interpretive practice by the people (Balkin 2011a, 94–101). But his gloss is without exception one-sidedly about how the popular face of this process makes doctrine democratically responsive and “allow[s] citizens to take ownership of their Constitution” (Balkin 2011b, 280).

Constitutional “aspirationalism begins with the problem of constitutional evil, viewing it as a basic condition of politics that must perpetually be overcome” yet “holds that despite constitutional evil, adequate resources for constitutional redemption exist” (Balkin 2011a, 120). The Constitution admittedly institutionalizes a disciplinary structure of political relations and imperial authorities that violently truncate interpretive possibilities. Yet liberal faith also requires it to be an open-ended legal architecture that does not foreclose any political and interpretive possibilities that citizens might think necessary for redemption. The constitutional framework must be expounded as a political decision that did not decide, which established an interpretive tradition of decisions that do not decide.

#### D. *Indecisive Politics*

Grounding legitimacy on narratives of future constitutional reform makes those reforms into political goals and steers a liberal theory of legitimacy into a liberal theory of political responsibility. As an “object of political and moral aspiration” offering a “potential for redemption,” the Constitution is a “set of principles that critiques present political arrangements and that we must try to realize over time” (Balkin 2011b, 62). Given the fact of pluralism, “[d]isagreement is the engine of constitutional change” (*ibid.* at 133). Political responsibility thus requires that liberals struggle against others. “Political agitation” reshapes the boundaries and composition of what is considered reasonable, which “sits at the heart of judgments of legitimacy” and frames constitutional interpretation (Balkin 2011a, 68). Balkin occasionally indicates awareness that struggle over reasonable interpretation is inextricable from struggle over the legal authority configuring the state's capacity to make coercive decisions backed by the capacity for violence. In the “short run, at least,” the “practical meaning of the Constitution is determined by the powerful social institutions and well-placed actors who create social

and legal meanings” (ibid. at 119). Those who seek to change constitutional meaning must “attempt to gain control of the levers of institutional authority” (97).

Here, too, Balkin is not the first to relate political struggle, violence, and responsibility to religious categories. Max Weber famously described the modern world consisting of rationally insuperable pluralism and a political sphere defined by violence as a “polytheism” of warring gods and demons. Because the “decisive means for politics is violence,” it is often the case that “the attainment of ‘good’ ends is bound to the fact that one must be willing to pay the price of using morally dubious means or at least dangerous ones—and facing the possibility or even the probability of evil ramifications” (Weber 1958, 121). Responsible politics requires knowing that one is “responsible for what may become of [oneself] under the impact” of the “ethical paradoxes” of diabolical politics (ibid. at 120, 125). This must be combined with convictions, for in politics “some kind of faith must always exist” (117). Weber appropriates Luther’s “Here I stand; I can do no other” as the superlative maxim of a responsible political faith (127).

Balkin’s scattered gestures toward Weberian responsibility are submerged by deeper theoretical commitments with which they are incongruous. Liberal political responsibility is depicted essentially as an obligation of citizens to try to convince others (Balkin 2011a, 96). The content and boundaries of reasonability are refigured through “social mobilizations” that “change people’s minds about what is just and unjust, plausible and implausible” (ibid. at 61). The “process of raising arguments and making claims in the name of the Constitution, of persuading people about what the Constitution really means” is “*the process of constitutional development in America*” (119, italics added).

This submersion is determined by a consistent application of liberal faith itself. Coercion organized by an existing, morally deficient constitution would be domination in the absence of legitimation by consent—consent that only exists because of each liberal’s faith in the future realization of their imagined rendition of a just constitution and its acceptance by all of their reasonable adversaries. That faith in future consensus legitimates what otherwise would be nonconsensual coercion constrains how faithful liberals can politically relate to this existing coercion. If the end of politics is retroactively legitimating future consensus, then legitimate political conduct must be oriented toward realizing consensus. Political struggle that is true to liberal faith can only be a struggle to overcome disagreement through persuasion. Such fealty proscribes political conduct aimed at either compelling rivals without their consent or resisting objectionable coercion by rivals via any means other than trying to persuade them to change. “We can only make arguments to each other in the present and have faith that we are on the right side of history” (Balkin 2011a, 68).

Balkin has stumbled into an irresponsibility that was already openly affirmed by Kant when he expounded a politics consonant with faith in perpetual moral progress. Kant’s faith was unequivocal: “moral evil has by nature the inherent quality of being self-destructive and self-contradictory in its aims . . . so that it makes way for the moral principle of goodness, even if such progress is slow” (Kant 1991, 124). It is never necessary and always unacceptable to be a “political moralist” willing to subordinate morality to expedience by treating others as means in pursuit of political ends (even if those ends themselves are moral). Kantian faith in progress through discussion absolves citizens from the Weberian responsibilities of political action. The more consistent the faith in the progressive moralization of politics, the more irresponsible is the political struggle it dictates. Conversely, a politics that amalgamates redemptive faith with responsibility is possible only to the extent that faith becomes inconsistent.

Liberal faith in redemption counsels irresponsibly acquiescent faith in existing institutions as achievements on the progressive road toward justice, impeding liberals from taking responsibility for struggling to reorganize the institutional authority of the state and using its power to fortify particular demarcations of reasonability. Liberal faith also cannot but recommend irresponsible trust that any reasonable opponent can be persuaded—and that seemingly illiberal opponents will be reasonable—leading away from the possibility that political responsibility may simply demand that opponents be defeated. Juxtaposed against the lofty talk of liberalism as a project of committed struggle to overcome constitutional evil—epitomized by slavery—is Balkin’s startling admission that the liberal faith he himself definitively endorses would be committed to compromise with it. “The enlightened liberal position on slavery—detesting it but . . . wishing to make peace with the slaveholding South—is not the attitude of some bygone era. It is the attitude of the contemporary constitutionalist about the distinctive issues of justice in our own era. It is the attitude of the enlightened, realistic person in an age of political imperfection and political compromise—the age we always inhabit” (Balkin 2011a, 134).

### *E. Indecisive Jurisprudence*

Balkin understands that ideas about the Constitution orient struggle. A constitutional story can serve as a “self-fulfilling prophecy” because “[n]arratives are also scripts, and scripts are made to be followed” (Balkin 2011a, 4). Balkin acknowledges that “[s]howing that a story is incomplete or false does not always undermine its persuasive appeal.” But “it is better to know the truth” because it “helps us understand what features of the past need to be redeemed in the present.” Faith in future redemption based on a true story of the past depends on “faith that historical truth is always more edifying than any manufactured tale.” A “story gains persuasive force from its claim to be true,” he asserts, because “discover[ing] that a story” is false undermines “belief in what the story demonstrates” (*ibid.* at 26–27).

Acknowledgment that the purpose of political ideas is effective motivation is submerged by a primary commitment to truth based on its assumed efficacy. Left by the wayside is the civic humanist conceit that the essence of political rhetoric is not teaching others the truth but persuading them how to act. Social division, pluralistic disagreement, and endemic struggle make the language and ideas wielded in politics polemical. They operate politically—in concrete existential situations—as weapons that demarcate frontiers of struggle, hegemonic terms of reasonability, and hierarchies of authority. This makes the “primary task of the jurist,” understood politically, to be the “formation of concepts in the face of new realities” that “shape a political situation by distilling it into a conceptual scheme” (Müller 1999, 67, 71).

Indecision between efficacy and truth leads to a dire misunderstanding of the politics of originalism. Balkin does espy the polemical core of originalism’s political vitality. “The conservative movement’s turn to originalism was natural for a revolutionary political movement. It was a way of expressing faith in the values of the country that conservatives believed liberals had forgotten” (Balkin 2011a, 238). Based on the quasi-theological aura of the Framers’ wisdom and the sovereign act of ratification, originalism endows original public meaning with a legal authority beyond politics and then alleges that determinate, correct constitutional answers can be derived from it. Nonetheless, the insuperable and cumulative indeterminacies of language, legal principles, the constitutional compromise, historical knowledge, and the ratifying public’s understanding render originalism stillborn as a genuine scholarly enterprise. It is what Balkin calls an “idolatry” that “treats an imperfect object made by people as

superhuman or divine” and that “distracts and confuses, drawing us away from true objects of understanding and contemplation” (ibid. at 11). But far from detracting from originalism’s vitality, it is *politically effective precisely because it is false idolatry*. Originalists ground constitutional meaning in the past *because* it was a time in which power concentrated in the hands of white male property owners was explicitly justified according to timeless natural status hierarchies. The indeterminacy of original meaning usually makes available interpretations that capitalize on these hierarchies to justify the politics of contemporary conservatives. When the history is too inconvenient to reach favored outcomes, conservatives just set it aside. By claiming objective legal truth rooted in a transcendent origin but subjectively determining its substance “occasionally” in response to shifting, historically situated enmities with political rivals, originalism is also fundamentally indecisive (Löwith [1935] 1995). But because “truth” serves politics rather than vice versa, originalism’s indecisive idolatry is empowering. It is a powerful myth that effectively mobilizes by drawing a conflictual frontier against liberals purportedly fixed by transcendent authority. Try as they might, liberals can never dispel originalist jurisprudence through scholarly refutation or historical evidence because originalism is essentially a rallying cry only masquerading as a hypothesis inviting academic parley.

While nevertheless binding him by faith to the strictures of the original Constitution, Balkin’s living originalism relinquishes the invigorating features of originalism. The people’s Pelagian faith in their own immanent wills loses touch with the quasi-religious authority of the Framers and ratifiers. While originalism mobilizes politics by promising restoration of transcendent constitutional meaning fixed in an unchanging past, living originalism merely describes what historically has mobilized others to remake constitutional meaning. The conservative movement uses originalist scholarship to help secure the future it wants; living originalism is a scholarly endeavor to discern the truth of the past. Whereas originalism claims to “tell[] us who should win the argument,” Balkin’s theory “doesn’t tell us . . . how a person who . . . deciding how to interpret the Constitution . . . should determine whose ‘values and ideals’ ought to be incorporated into the law” (Strauss 2013, 374–75). Balkin depicts the origin as initiating an open-ended project of interpretive construction in which citizens must futilely endeavor to persuade everyone of their doctrines of justice. His rivals use original meaning as a tool in wielding power to decisively close interpretive possibilities and to beat political opponents.

Balkin’s gambit is that progressive stories can be sufficiently motivating—that a politics of redemption might outcompete a politics of restoration. But for liberal faith to be operationalized as a polemical myth genuinely suited to political struggle against those who cannot be persuaded, it would have to rid itself of its devitalizing indecision between faith in future consensus and acknowledgment of the legitimacy of unending disagreement. This would require unequivocal belief that fundamental political struggle will actually one day be overcome by morality. Resolving the contradictory indecision between faith and nonfaith would come at the cost of becoming contradictorily liberal and illiberal. Those with faith in a coming moral age beyond struggle and domination could only deem unpersuadable rivals to be obstacles beyond the moral pale and would be enjoined to dominate them permanently. Liberal faith in morally redeeming politics despite disagreement is caught in a dilemma between indecision and illiberalism because decisiveness demands illiberal struggle to overcome struggle and illiberal domination to overcome domination. The supreme value of achieving the end of final redemption would mandate any means necessary to achieve it. Turning redemptive liberalism into an effective fighting faith matching originalism would come at superlative moral cost. Liberal struggle to end struggle would be “unusually intense and inhuman” because those who oppose the redemptive moralization of politics would become “monster[s] that must not only be defeated but also utterly destroyed” (Schmitt [1932] 2007, 36).

### F. *Indecisive History*

In his latest book on constitutional cycles, Balkin explicitly disclaims a providential view of historical determination and affirms human responsibility in the face of historical uncertainty. The stipulation of liberal faith that citizens orient themselves to constitutional politics optimistically nevertheless slips into Balkin's own scholarly appraisal of the patterns of constitutional history, which, he surmises, point toward a liberal future. "We are in our Second Gilded Age, and on the cusp of a Second Progressive Era" (Balkin 2020, 7). For Balkin to maintain this optimistic interpretation of history alongside a prediction of liberal redemption while not falling into providentialism, he would need to base his appraisals on convincingly specified mechanisms of historical development grounded in immanent social logics. He fails to do so, and indecision recurs: Balkin relies on a providentialism he disavows.

None of the mechanisms for Balkin's three constitutional cycles—the rise and fall of political regimes, polarization and depolarization, and rot and renewal—are adequately specified. First, he describes political regimes as relatively stable configurations of governing coalitions, party competition, and ideology in which a dominant party sets the terms of the debate for long periods of time (Balkin 2020, 13). In addition to three antebellum regimes, Balkin identifies three successive regimes since 1860: the Republican regime beginning with Lincoln lasted until FDR's breakthrough in 1932; the New Deal/Civil Rights regime dominated by the Democratic Party governed for forty-eight years; this regime was vanquished by Ronald Reagan in 1980, and Americans have been living in a regime under Republican Party dominance ever since.

Balkin argues that political regimes decline and fall for two reasons. First, "[c]ircumstances change. The country faces new problems and threats. Demographic, social, economic, and technological changes test the coalition's dominance" (Balkin 2020, 14). Old solutions and ways of doing things no longer meet new problems and threats. Second, "successful coalitions are often the victims of their own past successes. As they achieve policy victories they change the political world around them, but in doing so, they often create new problems for themselves and produce new institutional impediments that make further change difficult" (ibid. at 14). Over time, the dominant party's positions "begin to seem stale" and the party "divides into factions" while "opposition parties regroup and reorganize" (14).

Of the three cycles Balkin describes, this cycle of political regimes draws most directly from his previous work on partisan entrenchment and has the most convincing depiction of mechanisms driving it. Balkin works out a clear account of both political change and recurrence based on exogenous ("times change") as well as endogenous ("victimized by success") mechanisms. But important questions are left unanswered. The exogenous explanation leaves unexplained how the boundary between a political regime and its external social environment is drawn. The demographic, social, economic, and technological changes that eventually challenge the endurance of political regimes are taken as historical events that simply happen, impinging on political regimes from the outside when they do. Changing historical circumstances are at once inevitable, necessary realities of history and contingent, unstructured events left unexplained by the model of political regimes. The endogenous mechanism is also underspecified with essential questions left unanswered. Why should there be a systematic tendency for policy reforms to undermine their own political support? Why should there be limits to how far the principles of a political regime can be implemented and elaborated upon before they lose legitimacy?



Balkin's second cycle is a "very long cycle of polarization and depolarization between the political parties" (Balkin 2020, 30). Polarization, he claims, grew in the years before the Civil War, continued through the Gilded Age, and receded during the Progressive Era, and the New Deal/Civil Rights regime "features a largely depolarized politics" (*ibid.* at 30). Realignment as Southerners moved to the Republican Party instigated repolarization, which became an active project of the Republican Party in the 1990s. Subsequent asymmetric polarization by the Republican Party has left us today at a moment of "peak polarization."

He identifies two factors that drive the dynamics of polarization. Most important is income inequality. Polarization and income inequality "egg each other on" (Balkin 2020, 34). This interaction is modulated by immigration. High immigration brings poorer nonvoters into the country. This makes voters relatively better off and mitigates redistributive demands. Balkin's contention that polarization is cyclical draws from the interplay between two cross-cutting tendencies. On the one hand, the feedback between polarization and inequality pushes toward a "self-perpetuating cycle" of enrichment of the wealthy and oligarchic control over the political system. On the other hand, the same feedback loop increases "hydraulic pressures for income redistribution" (*ibid.* at 37). The former explains heightening polarization; the latter explains why depolarization happens "at some point."

Balkin endeavors not to get swept up by his mechanical metaphors. "Politics is not astronomy, and human affairs do not operate like clockwork" (Balkin 2020, 6). But "hydraulic" effects of inequality on mobilization sound a lot like a sort of political physics, albeit one mediated by human psychology. It is hard to believe that there is a generally valid formula relating relative income, perceived status, and reform mobilization. Perceived relational status is as ideational as it is material and as socially constructed as it is objectively measurable. People's political identities and voting behaviors do not simply reflect their pocketbooks. Material conditions are only experienced through ideology, which shapes in complicated ways the sorts of political mobilization that experiences like status anxiety generate.

Even accepting for the sake of argument that there are hydraulic effects of economics on politics, the model does not explain why the interplay between these two tendencies should result in recurrent cycles. Although Balkin does provide an account of how polarization and inequality mutually reinforce each other *once they both exist*, he does not explain what generates inequality in the first place. Despite being the prime mover of the second cycle—and indeed the entire theory—there is no explanation of why there should be a general and recurring tendency of rising inequality.

The argument that inequality generates both oligarchic enrichment and pressure for redistribution also does not explain why the latter should be expected to triumph over the former. Inequality simultaneously enhances the electoral strength of those demanding redistribution and the countervailing power of oligarchs. Why suppose that the electoral power of movements for redistribution will overwhelm oligarchic power—maintaining inequality? Why shouldn't the oligarchs keep winning—perhaps by permanently locking up the political system?

Instead of offering reasons for expecting the recurrent heightening of polarizing inequality and the depolarizing triumph of redistributors, Balkin relies heavily on generalizing from a single case. In the Gilded Age "income inequality became so pronounced that public opposition eventually overwhelmed the political blockages to redistribution and reform" (Balkin 2020, 36). The "experience of the early twentieth century suggests why polarization eventually cycles into depolarization . . . . Corruption

becomes intolerable and economic inequality unacceptable” (ibid. at 36). What Balkin calls the “one great cycle of polarization” and presents as one incidence of a recurrent logic boils down to two observations: the Gilded Age and the present share high inequality and polarization; and the Gilded Age gave way to depolarized equalization (33). That egalitarian insurgents *did* overcome oligarchic opposition is transmuted into the contention that they *do* triumph.

Balkin’s third cycle is between constitutional rot and renewal. Rot occurs when the government becomes less republican and less democratic. Its republicanism decays when it “loses its connection to the joint pursuit of the public good” (Balkin 2020, 44). Government becomes less democratic when it is “increasingly unresponsive to popular opinion and popular will” (ibid. at 44). Constitutions can “bottom[] out” of a “cycle of rot and begin[] a long process of democratic renewal and government reform” (48). There have been “three central episodes of constitutional rot: the 1850s, dominated by the Slave Power, the Gilded Age, and our own Second Gilded Age” (45).

According to Balkin, constitutional rot has both proximate and ultimate causes. The four proximate causes—the “Four Horsemen of Constitutional Rot”—are political polarization, increasing economic inequality, loss of trust, and policy disasters (Balkin 2020, 49). Ultimately, “[a]ll republics are susceptible to constitutional rot . . . [b]ecause of ambition, because of greed, because of the ever-present lust for power among human beings” (ibid. at 47). Yet Balkin does not connect the ultimate and proximate causes. How do the general human qualities of ambition, greed, and the lust for power lead to very particular political phenomena like polarization, inequality, distrust, and policy disaster? Of all the myriad effects on the viability of republican government that might result from these qualities, why these specific four? If “ambition, wealth, power, and the urge to dominate others” lead so “inevitabl[y]” to constitutional rot, why should we think that a rotted constitutional republic could ever be renewed, let alone expect that it repeatedly will (47)?

Finally, there is the question of how Balkin interrelates his three constitutional cycles. The only direct connection is made between the cycles of polarization and rot. Polarization is one cause of rot, and both polarization and rot are caused by inequality. How these two cycles further interrelate, how the additional factors of loss of trust and policy disasters differentiate them from each other, and why such similar causes have given rise to one long cycle of polarization but three discrete episodes of rot—none of this is explained. Their relative independence is part of the point. Balkin portrays the present as the accidental coincidence of cycles—much like how a solar eclipse results from the alignment of the orbits of the earth around the sun and the moon around the earth. Moons, planets, and suns really are separate objects. The Constitution, parties, polarization, inequality, commitment to the public good, and democratically responsive institutions are not. They are concepts representing different aspects of a single sociopolitical formation. An adequate theory requires some accounting of how a single polity gives rise to discrete and distinct cycles. Why recurrent cycles, why these cycles, why not other cycles?

Balkin’s explicit methodological statement is that the book’s “general approach” entails a “cyclical view of history . . . history doesn’t repeat itself, but it does rhyme” (Balkin 2020, 5). Events are “like the strains of a ballad that repeatedly returns to its refrain, although with many changes and variations along the way” (ibid. at 5). These gnomic metaphors implicitly rely on explaining history in terms of anachronistic accounts of nature. Balkin explicitly grounds himself in the classical tradition of the Greeks, who theorized cycling among the limited possible forms of government in a foreordained path akin to the movements of the stars. Polybius, for instance, attributed “the cycle of political revolution” to “the law of nature according to which constitutions change, are transformed, and finally

revert to their original form” (Polybius 1980, 309). Balkin additionally adverts to human nature to explain constitutional history. “The fragility of republics is a consequence of the fragility of human goodness” (Balkin 2020, 47). “[E]ver-present” human badness is precarious grounding for an empirical theory about patterns of recurrence in American constitutional history, especially as it explains neither the proximate causes of rot nor how renewal is possible. Balkin also implicitly relies on an anachronistic view of what counts as an explanation of natural phenomena to interrelate his three quasi-independent cycles, each operating on a different time scale. Changing times and falling prey to success have limited political regimes to lives of between forty and seventy-five years; there has been a single, 160-year-long cycle of polarization driven primarily by inequality; three discrete episodes of rot have arisen, due ultimately to human nature. Like epicycles, these cycles of constitutional time lack compelling independent rationales and a common theoretical foundation. Balkin seems to have followed Ptolemy in adding ad hoc inventions until, together, they seem to fit empirical patterns identified as salient.

Despite disavowing providentialism, the combination of bold causal assertions and underspecified mechanisms means that Balkin cannot help implicitly depending on it. Nature, not a social logic, structures the direction of history. In his theory of living originalism, Balkin strove to recover constitutional politics from originalism by finding constitutional meaning made by history; but in his theory of constitutional cycles, he relinquishes constitutional politics by finding meaning in (constitutional) history (Löwith 1957). Acknowledgments of human agency and historical contingency end up submerged by optimistic liberal faith in cycles that yield depolarization, civic renewal, and equality. The borrowing of elements from outside conventional legal discourse culminates in a syncretism of “antiquity and Christianity, cyclic motion and eschatological direction,” making Balkin neither an “ancient ancient[] nor [an] ancient Christian[]” but an indecisive modern, whose thinking is “a more or less inconsistent compound of both traditions” (ibid. at 19).

### III. From Liberal Indecision to Capitalist Contradiction

Balkin articulates a liberal faith that the original Constitution promises moral respect for all that democratic politics will progressively redeem. This creed is founded on multiple indecisions—buried admissions of how past choices and entrenched institutional forms foreclose alternative possibilities. The most important thing that this indecisive liberal faith consistently and wholly neglects is capitalism—socially compelled accumulation for the sake of accumulation. Reconstructing a constitutional theory that properly accounts for the systematic constraints of capitalism begins with a fundamental inversion of social ontology. Instead of deriving empirical theories of law, politics, and history from the normative ideal of the free rational will of the individual, constitutional theory must unfold them out of the material reality of existing social relations and the coercive structures of capitalist society. Starting with society rather than the individual shifts the foundation of constitutional theory from the *indecision* of faith in redemption that is also disavowed to the *contradiction* of a society riven between, on the one hand, production to serve the end of meeting human wants and needs and, on the other hand, production for profit, in which the accumulation of an inhuman instrument, capital, becomes the end in itself. Charting the legal, political, and historical consequences of this contradiction internal to capitalist production leads away from unsubstantiated faith in liberal possibilities to analysis of how the delimitations of entrenched social relations and institutions contradict liberal ideals.

The largely Marxist framework developed here builds an alternative constitutional theory that accounts for capitalism by reconsidering: the original Constitution; the politics of moral respect; the historical

patterns of constitutional development; and the ethic of responsibility. Indecision neglects how the core of the original Constitution was the limitation of democracy for the sake of nascent capitalism. The Constitution legally entrenched emerging capitalist social property relations and insulated them from a democratic process it also initiated. Indecision neglects that capitalism is incompatible with realizing the liberal ideal of equal moral respect for all. Capitalism is a politically maintained system of social compulsion that forecloses political neutrality with respect to the good, effective dissent from basic structures of coercion, and consensus on constitutional essentials. Indecision neglects that constitutional legitimacy depends not just on the public recognizing itself in constitutional norms but also on sustained capital accumulation. Constitutional legitimacy in capitalist democracy is entangled in contradictory imperatives to sustain both civic solidarity in which people are acknowledged as ends and accumulation dependent on people being instrumentalized as means. Indecision neglects how capital accumulation imprints itself upon historical development. By undermining regimes of constitutional legitimation, accumulation has yielded cyclical patterns of constitutional development. Finally, indecision neglects how capitalism's constraints ensure contradiction between liberal convictions and political responsibility. Responsible struggle to achieve the liberal ideal of moral respect for all must acknowledge that capitalism forecloses its realization but that no liberal overcoming of capitalism is currently possible.

#### *A. The Constitutional Framework for Capitalism*

If constitutional essentials cannot both be operational and win consent from an overlapping consensus and if citizens can endorse a constitution only if they can envision it conforming to their values in the future, then liberal legitimacy depends on the possibility of constitutional reforms responsive to democratic politics. But liberal legitimacy also depends on the state's neutrality with respect to controversial understandings of the good life. The liberal constitution must therefore protect the right of free and equal citizens to pursue their own conceptions of the good. To do so, the constitution must safeguard a social sphere beyond the reach of politics; the liberal constitution limits the reach of politics by setting fundamental political structures and basic rights apart from transient majorities and insulating them from reform. Liberal political legitimacy thus depends on both constitutional openness to reform and entrenchment beyond reform.

Balkin's theory of the American Constitution endeavors to address this dilemma by identifying a reflexive relationship between the Constitution and politics. He describes the essential constitutional rights and structures as establishing an enduring framework that enables politics but is also sufficiently indeterminate to remain open to ongoing political reinterpretation. This theory of the Constitution—a tradition of decisions that do not decide—does not resolve the dilemma so much as assume it away through faith in future possibilities. Moving past indecisive liberal faith depends on understanding what was foreclosed by the constitutional insulation of society from politics.

Above all, what must be heeded is the Constitution's central role in the formation of the division between the political and economic spheres specific to capitalist society and how this fundamentally delimited the reach of democratic politics (Wood 2016). The institutionalization of a democratic public sphere was simultaneously an ordering of a distinct economic sphere. As Marx put it, the "political emancipation" of abstract legal freedom and equality provided by the revolutionary establishment of republican government was also an emancipation of market society from the political sphere (Marx [1844] 1978, 45). The goal of entrenching private property relations was no less than *the proximate cause of the Constitutional Convention* (Holton 2008). Shay's Rebellion—an agrarian uprising against

property seizures, debt collection, and foreclosure—brought the Framers to Philadelphia. They thought that because the state governments were too democratically responsive, they were overly indulgent to debtors and taxpayers, and threats of farmer rebellion could too easily compel relief. The national government was built to counteract what Hamilton derided as an “excess of democracy” undercutting property rights (ibid. at 5). By protecting bondholders from state legislatures, the Framers sought to encourage loans to the government and private investment, which they understood as necessary public and private conditions of commercial prosperity (Holton 2018, 39–41).

The Constitution’s drafters were committed to establishing a federal system that could halt “wicked projects” common in the states like paper money emission and debt abolition that Madison singled out in *Federalist No. 10*. To this end, the Constitution transferred control of the money supply and the debtor-creditor relation to the national government, denying states the powers to “coin money” or pass laws “impairing the Obligation of Contracts.” By consolidating a national debt and winning authority to charter a national bank, the federal government was empowered to regulate credit and encourage investment. The national government was also given authority to circumvent the states and tax individuals directly. Taxes could support commerce by settling war debts, funding a navy to protect trade routes against mercantilist adversaries, and financing an army that could suppress farmer and slave rebellions as well as prepare Western lands for sale by clearing them of Natives. To safeguard the interests not just of Northern merchants, but also of Southern planters, the tax power was carefully circumscribed—channeled primarily into tariffs—to allay fears about imperiling property in slaves (Einhorn 2008). These tariffs could then be deployed to protect domestic manufacturing from foreign competition.

The federal structure was designed as a stockade to resist pressures from below that might threaten property. Extending the sphere of government would divide and conquer factions. The only directly elected institution, the House of Representatives, had large districts to dilute popular influence. Bicameralism required legislative consent from a Senate ensconced by aristocratic elites. Selection of a powerful president equipped with the veto was mediated by the Electoral College. The three-fifths compromise figured property directly in calculations of political representation. By giving the South disproportionate power in the House and presidency, the compromise ensured that all legislation would require bisectional consent between planter interests and Northern merchants dominant in the Senate.

The most radical departure of American statecraft was the homogenization of federal political power (Wood 1998, 448–53). The theory of the mixed polity, which was to balance among monarchical, aristocratic, and democratic orders of society, was supplanted by the tripartite separation of powers in which all organs equally derived their authority from representing the same popular sovereign. The branches were “functionally but not substantively different” (ibid. at 598). Stability depended not on balancing among qualitatively distinct principles of government, but on partitioning powers that mutually checked each other. Creating the federal system of separated powers divested of any social constituents was the definitive step in the “disembodiment of government from society” (608). Each branch was a limited spokesperson of the people who supervised from outside but had been wholly excluded from government (599, 604). Separating the powers in government also separated the political sphere from the rest of society.

The Constitution broke with the tenet that republican government depended on homogeneity, organic ties of community, and shared devotion to the public good. Regarding society as a matrix of heterogenous and clashing interests inverted the classical republican logic; rather than requiring close

ties between representatives and their communities, the republic now required filtration mechanisms to distance leaders from factional interests (Wood 1998, 499–506). The locus of liberty shifted away from facilitating active participation in public affairs and toward protecting private rights to pursue interests. As a remote, alien apparatus of rationalized administration that had bypassed local governments rooted in diverse political cultures and the personal attachments of their citizens, the unitary national state could treat citizens as abstract, individualized objects of impersonal regulation and taxation (Wolin 1989, 134–35).

The differentiation between economic and political spheres was further consolidated by the construction of a rights regime that insulated property from democratic forces. Federal courts were designed to bridle the states: they were authorized to overturn state legislation and granted diversity jurisdiction to serve as venues for out-of-state plaintiffs (like creditors) to remove their cases from state courts. The principle that individual liberty set limits on legitimate government coalesced into the view that property rights should be enforced by courts as hard constraints on politics. Despite Madison himself initially opposing a bill of rights, judicial review was the “culmination and consolidation of the Federalist conception” of limited government (Nedelsky 1990, 9). Judicial review gave institutional form to the ideology of a sharp boundary between law and politics according to which the apolitical private property rights of common law would be protected by neutral courts from subjective political will. It was not coincidental that this power was first asserted as a direct response to the emergence of political parties and the victory of an anti-elite Jeffersonian democratic movement wielding plebiscitarian authority (Ackerman 2007).

These measures ensured a thorough separation of civic and economic personalities. Mass democracy brought inclusive enfranchisement, but representation made citizenship into passive consent for most except an aristocratic, propertied class with privileged political access (Wood 2016). The barriers of the Constitution established a democracy in which it was almost prohibitively difficult for ordinary people to enact changes that threatened property interests. While formal political equality rejected property qualifications for suffrage and office-holding, it left the rights of citizenship devoid of social content. The abstract freedom and equality guaranteed by the political rights of American democracy were detached from the appropriation of economic value and rendered compatible with social inequality and private exploitation. The power of the government was free to commodify labor by force. Most glaringly, limiting citizenship to white men safeguarded the exercise of political domination to commodify slave laborers as chattel property that could be bought and sold. But the thin rights of modern citizenship also kept space open for the forcible commodification of labor power more generally, by importing the substance of feudal common law into the employment sector. Hierarchical relations of master and servant with status-based duties for employees organized labor markets overseen by the judiciary. Labor was free to enter employment contracts, but once contractually bound, laborers became legal subordinates with involuntary obligations of personal dependency (Orren 1992).

The Constitution facilitated the total defeat of the struggle—punctuated by the Whiskey Rebellion and Fries’s Rebellion—of Northern farmers to resist tax and debt obligations through local political mobilization. These rural rebellions “had the goal of enabling them to preserve their landed property in a form that would relieve them of having to engage in competitive market production” (Post 2017, 190). The “rise of taxation and of landlords’ and creditors’ ability to evict their tenants if they did not pay their rent or their debts forced independent producers into competitive production for the market in order to hold onto their property” (ibid. at 191). Farmers were conscripted into “market-dependence” (Brenner 2007). They were required “to specialize, accumulate capital, and innovate if

they hoped to acquire land, retain it, and ultimately expand their holdings” (Post 2017, 191). Market dependence forced a competitive constraint upon agricultural producers: to be continually able to afford access to the means of production, they had to keep up with productivity-enhancing techniques introduced by competitors. In the ensuing American moment of what Marx called “primitive accumulation,” those who lost out through foreclosure or inability to find land were deprived of ownership of means of production adequate for subsistence. They were instead forced to sell their labor power for a wage, primarily as part of the nascent industrial and manufacturing labor force. American peasant farming’s path of capitalist development “from below” was conditioned on the new federal state’s coercive impositions of market dependence and primitive accumulation “from above.”

Although many of these specific features of the early constitutional order were eventually overcome, its long shadow remains today—and not just in notably antidemocratic institutions like the Senate, the Electoral College, judicial review by lifetime appointees, and the Article V amendment process. The Constitution was central to establishing—and remains fundamental to maintaining—the separation of the political and economic spheres, the social primacy of pecuniary interest, the privatization of appropriation, the dispossession of a working class, the commodification of labor power, and the social necessity of market participation. In short, the Constitution was a decisive step in consolidating the political and economic conditions for the rise of American capitalism, which it anchors to this day. Max Weber highlighted law’s necessity for the advent of continental capitalism in safeguarding a predictable environment for private actors to make long-term decisions to invest and accumulate (Trubek 1972). In the republican United States, an analogous program was effectuated in part by a constitution that cabined the reach of potentially disruptive majorities. While Balkin is not wrong that the American Constitution established an intergenerational democratic conversation enabling, to a certain extent, processes of political self-determination and self-redefinition, it has no less fundamentally done the inverse. It also helped establish a depoliticized economic sphere insulated from democratic interference, securing the conditions of a separate intergenerational process—compulsory capital accumulation for the sake of accumulation.

### B. *Capitalism and the Foreclosure of Liberal Redemption*

Neither the existence of markets nor the division of labor are sufficient conditions for capitalism. Capitalism describes historically specific social property relations where wealth generally appears in the form of commodities produced for exchange, production for profit generally prevails, and people are generally dependent on selling their labor power for a wage to acquire the necessities to reproduce themselves.

At the heart of capitalist society lies the two-sided commodity form. As use values, commodities exist as qualitatively diverse material forms of concrete wealth that satisfy the wants and needs of producers and consumers. But as the form of wealth historically specific to capitalist society, commodities also have value. As the property of “universal exchangeability,” value mediates the basic social relations of capitalism (Smith 2018, 79). It is as bearers of quantities of abstract, homogenous value that commodities are generally related to each other in exchange. These two sides of the commodity form are produced by two different aspects of human labor. As concrete labor, human efforts create objects with use values. As abstract labor, the same commodity-producing activity also produces value, once it is “socially validated” by successful exchange (ibid. at 80). Value is labor for others, whose social character has been abstracted from the concrete activity of the laborer and whose human qualities have been reduced to a single homogenous quantitative magnitude (Clarke 1982, 77–80). The

quantitative substance of value is socially necessary labor time. This is not a naturalistic, technological category measuring the magnitude of actual labor time embodied in a commodity, which could be determined prior to and independent of capitalist social relations. Rather, a commodity's value is determined by the test of market exchange, in which a portion of society's total labor time is attributed to it as socially necessary.

The generalization of commodity exchange requires a socially objective measure of value. As the homogenous universal equivalent, money is the external thing for which all commodities can be exchanged. As the measure and social validation of value, money expresses the social relation between the commodity-producing labor of the individual and the total labor of a society in which wealth appears as a mass of commodities produced for exchange. In a society where wealth generally takes the form of commodities, money is not just a means of organizing production and exchange to meet human wants and needs (Smith 2018, 103–10). Since selling commodities for money is the only means of socially validating their value, it must be the overriding goal of production. Monetary returns are a condition for economic survival. Unceasing competitive market pressures mean that these monetary returns must generally exceed their initial investments; reinvesting them to expand and improve production is necessary to avoid competitive disadvantage. Consumers purchase commodities to meet wants and needs, but they must possess adequate money before they can do so. Production and exchange to further human ends are systematically subordinated to the accumulation of money as an end in itself at the level of society.

Money and commodities become capital within the process of value expanding itself. The source of surplus value—the general basis of profit—lies in production. It is the result of the difference between the cost of purchasing the worker's labor power at its value and the value produced by the worker's performance of labor. This difference is possible because human labor power has the unique characteristic that its consumption as a use value entails the expenditure of labor capable of producing value that exceeds the value spent on its own production as a commodity. The distinction between labor power as a value-bearing commodity and labor as a use value is the result of the historically specific social property relations of capitalism (Clarke 1982, 89). It is the separation of the laborer from ownership of the means of production and subsistence that introduces labor power as a commodity distinct from labor as a universal human capacity. The laborer must now sell their labor power in exchange for a money wage to purchase commodities necessary for their own reproduction. Others who have appropriated or control money capital will generally only employ this labor power if it produces a surplus value that they can appropriate as profit. The generalized separation of workers from ownership of the means of their own subsistence—which underlies the capital/labor class relation—is the necessary social basis for capital accumulation. The social reproduction of workers as wage laborers depends on wages that are adequate to sustain their socially determined level of subsistence but are not enough to relieve the compulsion for them to continue selling their labor power to produce surplus value appropriated by others. The reproduction of a society of generalized commodity production and exchange depends on socially reproducing widespread conditions of scarcity either by restricting wages or inflating socially conditioned needs (*ibid.* at 180).

Rather than a rational instrument for directing social production to meet human needs, capitalist production geared toward profit is an intrinsically irrational system in which capital itself is a barrier to its own reproduction and accumulation is permanently crisis-ridden. The imperative to seek competitive advantage compels capitalists to intensify labor, lengthen the working day, and develop new modes of production to produce at lower costs than their competition and realize surplus profits. Capitalists have individual incentives to expand the forces of production without regard to the overall



limits of the market. This results in intensified competition, which is further heightened once the new methods of production are generalized. Competition drives a tendency toward *unlimited* extension of production in search of profits that can only be realized through adequate consumption. But demand backed by buying power is fundamentally *limited*, most importantly by investment demand governed by individual capitalists' expected profits and their difference from the rate of interest (Heinrich 2012, 169–75). Because expected profits tend to decrease as the mass of commodities produced increases, the determining factors of production and consumption are fundamentally antagonistic. The result is a tendency toward the overproduction of commodities relative to buying power and the overaccumulation of capital that cannot be valorized. This ultimately leads to accumulation crises in which social reproduction stagnates, social wealth is destroyed, and the living conditions of many worsen.<sup>1</sup>

These capitalist social relations preclude achieving the neutrality, consent, and consensus necessary for realizing liberal legitimacy and the ideal of moral respect for all. First, they *foreclose the political neutrality* necessary for liberal legitimacy. Liberal respect for all free and equal individuals stipulates their right to pursue their own conceptions of the good provided that they do not interfere with the right of others to do the same. Any conception of the good maintained at the level of society by constitutional essentials must therefore be very thin. But in a society whose dominant organizing principle is capital, the good of capital accumulation as an end in itself holds at the level of society as a whole (Smith 2018, 116). Individual ends are systematically subordinated to that of capital, and conceptions of the good of the community are either subordinated to or equated with the good of capital. Social property relations that compel a significant fraction of people to sell their labor power to produce surplus value impose profound restrictions on the forms of life they can live. “Ends and conceptions of the good adopted by individuals and groups that further the ends and good of capital are systematically privileged; those that do not, tend to be pushed to the margins of social life or eradicated altogether” (ibid. at 118). Such a society cannot be sufficiently politically neutral with respect to the good. The systematic subordination of human ends to the ends of capitalism cannot realize the ideal of liberal respect for all as ends in themselves (119).

Second, capitalist society *forecloses effective political dissent* to the basic constitutional principles structuring social coercion, which is necessary for liberal legitimation by meaningful consent. By compelling people to produce value, capitalist society entails a historically specific abstract impersonal form of

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<sup>1</sup> Three clarifications of the relation between value and price avert some of the most common misunderstandings of this Marxist theory of capitalism. First, Marx's labor theory of value is not a predictive economic theory of price formation. It is a theory of how capitalist society, in which basic relations are mediated by generalized commodity exchange, is reproduced through the social imperative for people to sell their labor power to produce surplus value. Second, that found objects like natural resources can have prices without value does not refute Marx's labor theory of value. They can only be adequately understood in terms of a social world in which wealth generally takes the form of commodities. “For the gifts of nature to enter the market alongside commodities requires the existence of the market and the system of property relations associated with it” (Kay 2015, 49). Third, commodities do not generally exchange at prices that correspond to their values and there is a fundamental distinction between profit and surplus value (Clarke 1982, 102–08; Heinrich 2012, 142–49). It is the case that money is value's necessary form of appearance and that capitalists draw their profits from the global pool of surplus value produced by living labor. But if commodity prices adequately expressed their values, then commodities produced with different compositions of capital—different ratios between constant capital (the means of production) and value-producing living labor—would have different rates of profit; commodities would be relatively more profitable when produced with more labor power relative to capital. The market-based tendency toward equalization of the rate of profit among branches of the economy instead redistributes the total surplus value, making the profits obtained by individual capitalists on average proportional to the magnitude of the capital they have advanced rather than the surplus value produced with the help of their capital.

structural domination (Postone 1993). This structural domination constitutes and is constituted by the capital/wage labor relationship and the fundamental social division between surplus-producing and surplus-appropriating classes. Socially instituted structures of impersonal domination, intrinsically asymmetric power relations of employment, and the macro-level class relationship cannot be considered nonpolitical in any meaningful sense. The fundamental division between the political and economic spheres in capitalist society institutionalizes the “profound category mistake” of “treating what is inherently political as a private matter” (Smith 2018, 189). This real institutional demarcation entails an illusory “bifurcation of the political” that depoliticizes political power relations, leaving the “‘political’ realm impoverished by the exclusion of inherently political matters” (ibid. at 189). However else politics may regulate economic relations, the capital/wage labor class relationship constitutive of capitalist society cannot itself be wholly politicized or overcome. A society ordered by capital accumulation through appropriating surplus value can relinquish neither the structural compulsions for a significant fraction of people to sell their labor power, nor fundamentally private control over investment decisions, nor the ensuing asymmetries in bargaining power between labor and capital that enable profitable exploitation. The politics/economics bifurcation intrinsic to capitalist society forecloses the possibility of effective political dissent from essentially political relations of abstract domination and asymmetric power between classes. Without the potential for effective dissent, there cannot be the meaningful consent to the basic political structures necessary for the liberal ideal of respect for all.

Third, capitalism *forecloses consensus* on constitutional essentials necessary for liberal legitimacy. Political disagreement is not merely a matter of the burdened free exercise of individual reason and judgment. The divergence of opinion has an independent basis in social property relations: “the various and unequal distribution of property,” Madison admitted in *Federalist No. 10*, is the “most common and durable source of factions.” A society that produces surplus value through compelled antagonistic relations of competition, domination, and exploitation just as systematically produces political dissensus. The institutionalized depoliticization of these roots of antagonism alongside liberalism’s image of a society of abstractly free and equal individuals also refracts, displaces, and splinters the terms of political conflict into and across distributive and cultural modalities. The fundamental social antagonisms intrinsic to capitalist society produce political disagreements that systematically undermine achievement of the overlapping consensus on which liberal legitimacy depends.

The political disagreements produced by the antagonisms of capitalist society necessitate Michelman’s concession that constitutional essentials cannot be an object of consensus. It was precisely this concession that led Balkin to condition liberal legitimacy on indecisive faith in constitutional redemption. But moving past indecisive submergence of the social compulsions and constraints of capitalism reveals Balkin’s faith in the Constitution redeeming moral respect for all to be contradicted by the social order established by the essentials of the Constitution itself. Liberal faith in a society where individuals can choose the good for themselves is contradicted by the Constitution’s enforcement of the social good of accumulation. Liberal faith in legitimation by consent is contradicted by the Constitution’s division between political and economic spheres that safeguards capitalist modes of domination and power from effective political contestation. Liberal faith in achieving consensus is contradicted by the Constitution entrenching social relations that produce and displace political antagonisms. By anchoring capitalism, the American Constitution precludes its own liberal redemption.

### C. *The Contradiction of Constitutional Legitimacy in Capitalist Democracy*

In capitalist societies materially reproduced through the production of commodities for exchange, the market serves as a system of coordinating social activities and integrating society into a coherent order. It does so by harmonizing the aggregate effects of individual activities through prices that impersonally process and transmit information. To remain economically viable, producers must sell their commodities at prices that provide adequate money for reinvestment in production. Because these prices are determined by markets, producers are also obliged to produce at a competitive cost to survive. Competitive markets compel capitalists to constantly develop the forces of production and invest in technical improvements that increase the productivity of labor and maximize profits. The ongoing production of material necessities depends on continuing profits that activate private investment; so too does the distribution of these necessities to most people, who can only acquire the money they need to subsist through employment ultimately dependent on profitability. This makes the viability of the market as a system of social integration and ordering dependent on sustained, ongoing capital accumulation.

Contractual ties among self-interested individuals and the spontaneous orders into which they aggregate are insufficient for the reproduction of social order, which also depends on social integration and coordination through solidarity (Habermas 1985, 115–17). In modern societies, consent to the authority of shared ethical values, moral norms, and legal rules generates the socially bonding force of solidarity necessary to stabilize legitimate orderings of status and community identity. In a democratic political culture, the authority of these values, norms, and rules depends on cooperative validation through processes of public deliberation and agreement. This discursive dimension of solidarity is accompanied by the binding force of cooperative acknowledgment of people as ends in themselves—a “symmetrical esteem” based on common commitments “that allow the abilities and traits of the other to appear significant for shared praxis” (Honneth 1995, 129).

Despite both being necessary for social reproduction, accumulation and solidarity are in perpetual tension with each other. Self-reproducing compulsions to compete, profit, innovate, and accumulate make capitalism an expansionary process that grows inexorably by finding novel sites for moneymaking in new territories, technologies, and patterns of social and cultural life. This process of “real abstraction” keeps up accumulation by ceaselessly converting concrete objects, relations, and phenomena with particular qualities into commodities with quantitative monetary values that can be universally compared and exchanged. Real abstraction tends to undermine the existing values, practices, and institutions through which solidarity is secured because noncommodified solidaristic social relations tend to impede the innovative transformations necessary for valorization.

Real abstraction erodes solidarity by *reifying* social relations. The drive to commodify disembeds market relations oriented toward producing surplus value and profit from intersubjective relations of mutual recognition of personhood. Social relations esteeming other people as ends in themselves are converted into impersonal, instrumentalizing relations of mutual objectification mediated by money and commodities. Especially crucial for accumulation through commodification is “the smashing up of social structures in order to extract the element of labor from them” (Polanyi [1957] 2001, 172).

Real abstraction also *destabilizes* solidarity by disrupting social and cultural patterns securing status and community. The conversion of the qualitative particularity of objects and relations into the abstract sameness of quantitative commodity prices makes social life depend on the volatile and uncertain

fluctuation in the ratios at which commodities exchange. It also sweeps up “[s]ocial mores, forms of material existence, customs and habits, the built environment, [and] standards of right and wrong,” none of which are “secure in a society based upon endless expansion, in which capital is constantly in search of new opportunities for profit” (Sewell 2008, 524).

Even though accumulation undermines solidarity, accumulation and solidarity nevertheless both also depend on each other. When economic stagnation or crises undermine the capacities of people to reproduce their market-dependent existences, they generate strains, antagonisms, and cleavages among them that erode social solidarity. Reciprocally, when capital accumulation subjects life to the “dislocation” of commodification and organization through prices, it “attack[s] the fabric of society,” imperiling its own social preconditions (Polanyi [1957] 2001, 136). “[A]s markets expand they self-destructively eat into and threaten to replace non-market institutions . . . . Even though markets cannot function without solidarity, they undermine and consume it” (Streeck 2010, 680). Capitalist society is “torn by a fundamental contradiction between a ‘need’ functional as well as social, for stability on the one hand and, on the other hand, an internal restlessness that makes stability impossible to achieve for more than short breathing periods” (Streeck 2011, 161). *Accumulation depends on social solidarity that it tends to undermine; social solidarity depends on accumulation that it tends to hinder.*

Law defines and regulates abstract categories and relations like property, contract, and money that are necessary for generalized commodity exchange and the accumulation process. In modern constitutional democracies like the United States, the terms of civic inclusion and the norms characterizing the political community that together secure solidarity are also defined in the first instance by authoritative positive law responsive to ongoing democratic processes. The Constitution is at the basis of both modes of legal ordering, and its legitimacy depends on successful social reproduction and integration. Constitutional legitimacy depends first on sustaining the capital accumulation process necessary for material reproduction and the market-based integration of capitalist society. Its legitimacy also depends on structuring a democratic process of ongoing self-determination that reproduces a civic culture of political solidarity. By providing the solidaristic grammars through which citizens acknowledge each other as members of the political community and deliberate about the fundamental norms that bind them together, the Constitution fosters political identities rooted in constitutional commitment that uphold its legitimacy.

The underlying social contradiction between accumulation and solidarity manifests in contradictory politics of constitutional legitimation. The basic dilemma of constitutional legitimation is not, *pace* the liberal concession of Michelman and Balkin, grounded in the free exercise of rationality and judgment, whose burdens widen disagreement and imperil overlapping consensus. Rather, constitutional legitimation is *internally self-contradictory* because it turns on maintaining a contradictory society dependent on people simultaneously treating each other as ends and means. Legitimacy depends on cultivating solidarity rooted in citizens’ respecting each other as fellow members of a cooperative political community bound by freely assented-to shared values, norms, and purposes. Legitimacy also depends on enabling people to reduce others to nothing but instruments of pecuniary self-interest and compelling people to serve as objects of exploitation.

This internal self-contradiction unfolds as a developmental dynamic. Accumulation tends to be self-undermining, but the orderly reproduction of capitalist society requires that it continue. The imperative of constitutional legitimation constantly calls forth political efforts to *save capitalism from itself*. Doing so requires enabling continued accumulation through real abstraction at the expense of reifying and destabilizing social relations. This constantly imperils the shared norms and reciprocal

esteem through which civic solidarity consolidates and on which legitimacy also depends. *Constitutional legitimacy depends on capital accumulation, which tends to undermine the solidaristic bases of constitutional legitimacy.* Capitalism sets the project of constitutional legitimation against itself.

Balkin's framework of faith in morally redeeming the original Constitution and his providential narrative of the constitutional tradition as a project of progressive moral achievement are inadequate to grasp this self-undermining internal contradiction of constitutional legitimation in a society that is both democratic and capitalist. Better reckoning comes through a reconstruction of the republican understanding of time as a foe of rather than a friend to civic institutions and values. Hannah Arendt instructively based her republicanism on the "the most general conditions of human existence: birth and death, natality and mortality" (Arendt [1958] 1998, 8). All things created by people are "perishable, infected, as it were, by the mortality of their authors" (Arendt [1968] 2006, 43). The modern political age, she contended, was initiated by the American and French Revolutions. The "central idea of revolution" was the "foundation of a body politic," which is "identical with the framing of a constitution" (Arendt [1965] 2006, 116–17). Along the same lines, J.G.A. Pocock explained the republican understanding that, because they are mortal like the humans who create them, constitutional republics "exist[] in time, not eternity" and are "therefore transitory and doomed to impermanence" (Pocock 1975, 53). In what Pocock famously called the "Machiavellian moment," republics must confront their own intrinsic fragility and instability.

A break with Balkin's liberal faith might be guided by an equation that Pocock associated with republicanism's secularized politics: "Providence – faith = fortune" (Pocock 1975, 48). The integrity of civic institutions depends on fortune—the continuation of auspicious circumstances situating republican politics. A link between fortune and commercial society was once well established. Eighteenth-century republicans indebted to Harrington understood that the capacity for republican self-government was conditioned on citizens' economic independence secured foremost, they thought, by ownership of productive property. As commercial society came to be governed increasingly by finance, property depended increasingly on unstable credit. The Goddess Fortuna was recast as the "personification of Credit as an inconstant female figure" who "typifies the instability of secular things" (ibid. at 452–53). The individual engaged in exchange "could exist, even in his own sight, only at the fluctuating value imposed upon him by his fellows." No longer "conscious master of himself," he was instead "activated by nonrational forces—those governing the universe of credit" (464).

The fundamental contradiction of constitutional legitimation based on both civic solidarity and accumulation is a species of the republican confrontation between *virtù* and *fortuna*. What might be called the *Marxist-Machiavellian moment* stages the encounter between the constitutional legitimation project and capitalism. It is Machiavellian because it acknowledges that fragile constitutional institutions and norms endure only thanks to public commitments rooted in democratic processes of self-determination that sustain civic solidarity. It is Marxist in understanding Fortuna as a mythic representation of the reifying and destabilizing effects of the compulsory process of capital accumulation and recognizing that fortune is not suprahuman fate, but an artifact of the contradictions of a historically specific form of human society.

#### D. *Accumulation and Life Cycles of Constitutional Regimes*

Applied to human affairs, Arendt noted, the word “revolution” initially appeared as a “metaphor, carrying over the notion of an eternal, irresistible, ever-recurring motion to the haphazard movements, the ups and downs of human destiny, which have been likened to the rising and setting of sun, moon, and stars since times immemorial” (Arendt 2006 [1965], 32–33). The “strange pathos of novelty,” which Arendt specifically identifies with Galileo’s geocentrism-vanquishing telescopic discoveries, made its way from modern science to modern politics once “men began to be aware that a new beginning could be a political phenomenon” (ibid. at 36–37). The American constitutional project was initiated by the prowess of the revolutionary generation, who enacted something altogether new and brought the hope that “the endless cycles of history could finally be broken” (Pocock 1975, 614). But fortune was reincarnated in a social order based in commerce, which was a “dynamic principle, progressive and at the same time corrupting” (ibid. at 535). By helping to entrench capitalism, this revolutionary new beginning renewed processes of cyclical recurrence—symbolized by fortune’s wheel—at the very moment they appeared to have been overcome.

Accumulation has a characteristic life cycle expressed by the general formula M-C-M', where M is the money form, C is the commodity form, and  $M' > M$ . In this process, M and M' are quantities of fungible money that differ only in magnitude. The end point of each separate cycle is itself the starting point for a new cycle in a ceaseless process of augmentation. In this process of surplus value production, capital must pass through the form of commodities, which are purchased by others for their qualitatively distinct use values. The life cycle of capital passes between the abstract, perpetual sameness of money and the concrete difference and flux of commodities. While money changes are denoted in quantity, commodities production and consumption entail change in quality. In the accumulation cycle, nonstop social upheaval in the concrete use-value dimension is accompanied by perpetual reconstitution of the sameness of money in the abstract value dimension. This “stillness-in-motion” gives rise to the unique temporalities of capitalist society (Sewell 2008, 526). The “extreme abstraction that is a signature of capitalist development enables core processes of capitalism to escape from the irreversibility of time and to sustain a recurrent logic at their core” (ibid. at 517). This recurrent logic “generates a continuous monotonous repetitive pattern” (521). Under capitalism, a timeless logic is intertwined with the historical flow of events, making its temporality “composite and contradictory, simultaneously still and hyper-eventful” (517). Capitalism has a reversible, abstract temporality that always also manifests as the concrete, irreversible temporality of historical events. Rooted in the structure of the commodity form, social life is experienced as both recurrently patterned and contingently eventful. The constant, unyielding imperative to generate profits shapes events into specifically capitalist cyclical patterns. These have often been discerned by economists and approached with ideas like the business cycle, the Kuznets curve, Kondratieff waves, and Giovanni Arrighi’s “long centuries.” The abstract stillness of money and the compulsory pursuit of gain pattern aspects of history in capitalist society as cyclical. *The cyclicity of accumulation generates cyclical patterns in social, political, and legal development.*

Because of capital’s cyclicity, the same fundamental social contradiction is regularly renewed despite continual transformations of the instruments of accumulation and relations of society. The ongoing negotiation of cross-cutting imperative to facilitate socially destabilizing accumulation through market expansion and to reestablish the solidarity that secures social stability and cohesion gives rise to recurrent patterns closely resembling what Karl Polanyi called the “double movement.” The first movement of capitalist society “aim[s] at the establishment of a self-regulating market.” This

“demands nothing less than the institutional separation of society into an economic and political sphere” and the “subordinat[ion of] the substance of society itself to the laws of the market” (Polanyi [1957] 2001, 74–75). But to “allow the market mechanism to be sole director of the fate of human beings” would “result in the demolition of society” (ibid. at 76). Against movements “disembedding” markets from society are “countermovements” of society against markets. Countermovements *reestablish* orders of solidarity to counteract market dislocations. Polanyi mostly limited his own analysis of countermovements sociologically to “measures and policies” that “check the action of the market” and historically to mid-twentieth-century economic regulation (79). But cyclical patterns of movement and countermovement are a wider sociological and historical phenomenon. Countermovements may protect solidarity by reembedding markets in society, but they may also do so by *compensating* for markets while leaving them and their dislocations basically untrammelled. Efforts to dredge islands of solidarity—based on institutions including family, religion, or race—against the relentlessly erosive tides of capitalism have existed since market dependence washed away premarket grounds of subsistence (Sellers 1994).

The cyclical developmental patterns of capitalism have stamped American constitutional development with corollary cyclical patterns. The history of the United States has been exemplary for exhibiting the cyclical dynamics of the project of constitutional legitimation under capitalism because of American exceptionalism both as a capitalist society and as a constitutional republic. For much of its history, the factors of accumulation have been especially free from social restraints: mass immigration brought abundant commodified labor, the West offered bountiful commodified land, and the absence of a feudal rentier class enabled capital’s preeminence in production. It has also had a robust republican political culture founded in revolution and a popularly ratified constitution enabling ongoing political adaption (within the confining delimitations of accumulation). It has been a superlative framework for combining enduring political institutions with ongoing, radical social change. This has made United States constitutional history a palimpsest upon which the underlying cyclical dynamics of political legitimation in capitalist society have become most vividly legible.

This account of the social mechanisms driving cyclical developmental patterns can be the basis for a theory of constitutional regimes that, unlike Balkin’s, is grounded in political economy. Balkin defines constitutional regimes as relatively stable “institutional structures” that shape and delimit political activities in characteristic ways. Constitutional life cycles “arise through the interaction of political will with institutional structures. People cause these cycles through mobilization, organization, and the exercise of political will in a particular institutional environment. The institutions shape the actions, while the effects of the actions slowly remake the institutions” (Balkin 2020, 5–6). An alternate theory that relativizes law not just to politics, but also to economics defines constitutional regimes in terms of their broader functions within capitalist society. Constitutional regimes maintain legitimacy by sustaining characteristic and interrelated patterns of regulating capital accumulation and constituting political solidarity. They do this through relatively stable institutional structures of inclusion and exclusion that delimit feasible political and economic possibilities. The Constitution must respect people as ends by holding open a political sphere in which public processes of justifying and contesting norms forge civic solidarity rooted in commitments to shared values. To do so, it will also selectively privilege certain status groups and identities whose acknowledgment will be at the core of political solidarity. The Constitution must simultaneously confine this sphere, delimit its boundaries, and restrict the norms, institutions, and practices around which solidarity can form to safeguard the economic sphere in which people are instrumentalized for the sake of ongoing capital accumulation. A constitutional regime will also selectively empower certain class interests to shape the terms of accumulation.

Politics within regimes is constantly confronted by the imperative to negotiate the contradictory situation of cross-cutting bases for regime legitimacy. Continuing the legitimacy of a constitutional regime depends on sustaining accumulation through legal facilitation of ongoing market expansion, which eats into existing forms of solidarity. Keeping up the second dimension of constitutional legitimacy depends on countermovements that reestablish compensatory modes of political solidarity in spaces and relations that do not impede existing pathways of accumulation. The structural patterning of constitutional regimes gives the back and forth of movement and countermovement a particular institutional frame and temporal horizon.

Over the course of a constitutional regime's life cycle, the legal institutions maintaining accumulation and political solidarity *tend to diverge from each other*, even though they relate to a single, inseparable social totality. There are limits to how far a regime's institutions regulating accumulation can be extended and how far they can diverge from institutions constituting political solidarity. The very efforts to sustain constitutional regimes ultimately tend to be self-defeating and undermine them. Regimes are thus inherently unstable and temporally bounded. Eventually implementation and extension of their underlying political, institutional, and economic principles become unable to sustain adequate legitimation predicated on accumulation and political solidarity. When a regime's constitutional legitimation project undermines itself, it can pave the way for oppositional economic and ideological forces to gain hegemony through constitutional reconstructions based on novel promises of reviving accumulation and reconciling it with new paradigms of political solidarity. There are the seeds here of an in-depth retelling of American constitutional history, a structural explanation of the politics/economics division at the heart of the "twentieth-century synthesis," and a situating of the current constitutional interregnum in its political economic context (Lebow 2023).

#### *E. The Contradictory Struggle for Liberal Ideals*

This Marxist framework breaks with the indecisions of both liberal faith in future redemption that is simultaneously disavowed and the worship of purportedly unchanging original meaning given content to further situational conservative politics. The former ingenuously discounts unnamed limitations on democratic autonomy; the latter names imaginary limitations to disingenuously forswear democratic autonomy. In lieu of these disorienting myths of past and future, what is called for is an alternative mythological understanding that identifies the sovereignty of capital as the fundamental limitation on democratic autonomy. This is to emulate the earliest myths—names given to threatening and uncontrolled natural forces where naming was the first step toward enlightened understanding and mastery (Horkheimer and Adorno [1944] 2002). The social world governed by capital, its impersonal social compulsions to produce and accumulate, and the institutional accomplices that sustain and protect it have receded from democratic control and—as natural fate did for the ancients—hold sway over human lives. Marx called this commodity fetishism: money and commodities appear as autonomous figures endowed with lives of their own and involved in relations with each other and with people. On the one hand, these mythic forces can be demystified and defetishized. They are not natural entities that exist outside of society and are in fact merely social relations among people. On the other hand, knowing that capital is just a social relation, and that it is only our own social organization that forecloses democratic autonomy and universal respect, does not exorcise this myth. We ourselves constantly reconstitute it as the real, impersonal social power of things through our everyday economic activities. The commodity fetish is *both false and true*.



A political mythology that named capital would be neither a reactionary authoritarian cult of ancestor worship mobilized against outsiders nor devitalizing faith in future consensus. It would rather mobilize political struggle oriented by the antagonistic horizon of *counterimperial insurgency* against impersonal social powers and the alien legal frameworks interposed between them and people. Despite the ideal of equally respecting the freedom of all not being achievable under capitalism, there can be no honest eschatological faith in the revolutionary overthrow of capitalism because a liberal world beyond it is currently not possible. A revolutionary ethic of conviction that does not concede this is irresponsible, but an informed ethic of political responsibility that simply accepts capitalism forsakes the ultimate end of equally respecting the freedom of all. Instead of a politics oriented by unacknowledged indecision and irresponsible faith in the politics of persuasion, this dilemma leads to politics riven by two fundamental contradictions between political responsibility and liberal convictions. First, politics is a struggle to achieve liberal ideals within a capitalist society that forecloses their realization. Second, to realize these ideals would require a liberal overcoming of capitalism, which is currently not possible.

Whereas the myth of future consensus all too easily excuses an irresponsible flight from facing up to the fragility of liberal ideals and the supreme stakes of politics, the myth of insurgency can harden the political resolve required of existential struggle for freedom and equality in a world made hostile by capitalism. One set of political frontiers available in this contradictory struggle against capitalism from within capitalism are defensive proxy battles against capitalism's own pathological symptoms. Insurgency entails struggle to *buy time* for not-yet-possible futures against immediate threats to the future that stem from capitalism itself. This means first struggle against political forces striving for an authoritarian constitutional reconstruction that would foreclose even the delimited democratic openness to new possibilities that the constitutional tradition still offers. This is a fight against those who rely on race, sex, and national hierarchies as alibis for capitalist unfreedom and inequality, and who seek solace from capitalist destabilization through violent assertions of ostensibly fixed truths about family, gender, and religion. Defensive struggles to buy time are also struggles against worsening damage to nature and the possibility of a future environment in which free society is not sustainable. This may entail the contradiction of supporting green capitalism as the only immediately available option despite environmental degradation being driven, above all, by the social compulsion to accumulate for the sake of accumulation and grow for the sake of growth. Today's contradictory intracapitalist struggles for not-yet-possible liberal tomorrows appear as fights to preserve the democratic openness of the antidemocratic Constitution and to mobilize green capital to protect an environment incompatible with capitalism.

Potentially either in tandem or in tension with these defensive struggles to buy time, the fight against capitalism from within capitalism also involves positive efforts to reembed solidaristic acknowledgment of people as ends back into instrumentalizing capitalist social relations of production and exchange reproduced through accumulation. As a matter of reconstructing a new constitutional regime, this means struggling to build an "anti-oligarchy constitution" that retrieves connections between the spheres of the economy and democratic politics (Fishkin and Forbath 2022). This is a program to rekindle the forgotten American idiom of "constitutional political economy" and recover the constitutional idea that political branches have positive regulatory duties to sustain a "democracy of opportunity" by combating oligarchic power, building a middle class, and including marginalized status groups. This is a necessary program—perhaps *the* necessary program in the present conjuncture—and yet it too is a self-contradictory one; it strives to realize a rendition of the liberal ideal of equally respecting the freedom of all from within constitutional forms and capitalist social relations that preclude its realization. To wrestle with these contradictions between liberal ideals and

capitalist realities is what it means today to be politically mature and fortified for the times. Here honest defenders of these ideals must stand; they can do no other.

Much of what this article has envisioned has been made possible by thinking with and against Jack Balkin. Even this especially astute mainstream liberal legal scholar remains enthralled with the separation between economics and politics. Balkin's theories of living originalism and constitutional cycles are flawed because they float unanchored from a social theory of how accumulation delimits and influences constitutional politics. Balkin's relativization of constitutional law to politics but not economics is symptomatic of his intellectual times. It stems from liberalism's unshakable constitutional veneration, the failure of the republican challenge to conservative legal theory, Rawlsian commitment to moral consensus as the lodestar of politics, and recoil from a critical theory of capitalism.

Balkin has broken with the presumption of "homogenous empty time" characteristic of capitalist society that treats every abstract moment as equivalent and empty (Benjamin [1968] 1999). By doing so, he has graced legal scholarship with something invaluable. Nevertheless, he still accepts that basic social relations held together by capital accumulation are what we might call a homogenous empty space—or, rather, a flat ground independent from human affairs. Balkin wrongly takes capitalist society as the natural and fixed *terra firma* upon which the patterned interactions between legal structure and political will have unfolded and always will advance. But it is actually a manmade artifact that remains a stable place for us to stand only so long as we can and do force ourselves to reproduce it. As Galileo is said to have muttered after being compelled by Catholic authorities to recant his heliocentrism and avow that the sun revolves around the earth, "*And yet it moves.*"

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