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WHAT IS “UNITED” ABOUT THE UNITED STATES?

Gary Lawson*

Forthcoming, 101 B.U. L. REV. – (2021)

Abstract

Jack Balkin’s The Cycles of Constitutional Time aims, among other things, to preserve and promote what Jack regards as “democracy and republicanism,” understood as “a joint enterprise by citizens and their representatives to pursue and promote the public good.” My question is whether and how this normative project is possible in a world full of perceptions of social, political, and moral phenomena akin to the white dress/blue dress internet controversy of 2015. Even if Madison had the better of Montesquieu in 1788 (and that is questionable), the United States has grown dramatically since the founding era, in a patchwork, and often violent, fashion that paid little attention to preconditions for republican governance. The kind of basic homogeneity that Montesquieu thought was essential for republicanism – and here we are talking about agreement on things as basic as the nature and purpose of law and the meaning of “the public good” – is absent from the contemporary United States, and there is no good reason to think that anything on the horizon can take its place. As a result, the very concept of “the United States” is dubious, as is any project founded on that idea. Perhaps the one way to salvage such a project would be a massive reduction in the size and scope of government, so that the consequences of battles over essentially contested concepts such as justice and law are not apocalyptic. Put another way: The kind of republican cooperation and trust that Jack desires is probably possible only if the stakes of cooperation and trust are very low. Thus, there may be an additional element for successful republicanism that escaped even Montesquieu’s keen attention: a government of carefully defined and sharply limited powers.

“Go Pick Out a White Dress.” Taylor Swift, *Love Story*, FEARLESS (Big Machine 2008)

“Devil with a Blue Dress, Blue Dress, Blue Dress, Devil with a Blue Dress On.”
Mitch Ryder & the Detroit Wheels, *Devil with a Blue Dress*, BREAKOUT . . . !!!
(Sundazed Music 1966)

“She Was a Long Cool Woman in a Black Dress.” The Hollies, *Long Cool Woman (in a Black Dress)*, DISTANT LIGHT (Parlophone 1971)

In February 2015, Cecilia Bleasdale texted her daughter, Grace, three photographs of dresses that she had considered wearing to Grace’s wedding, reporting that she had bought the

third dress. “Grace said, ‘Oh, the white and gold one?’ ‘No,’ her mother replied. ‘It’s blue and black.’ ‘Mum,’ said her daughter, ‘if you think that’s blue and black you need to go and see the doctor.’”¹ One of Grace’s friends posted the picture of the dress on Tumblr, and the rest is history. The dress became an overnight internet sensation. Was the dress white and gold? Blue and black? Blue and gold?² “When Twitter released its list of the most influential moments of 2015, only big political events, the Women’s World Cup and humanity’s first trip to Pluto were ranked ahead of the dress.”³ The “white dress/blue dress” controversy reportedly broke up friendships, relationships, and even marriages. How, some people wondered, could others fail to see what was so obvious? What is wrong with those others?

“The dress” is hardly the only example of how people process sensory material differently. The famous duck-rabbit puzzle picture⁴ was used by Ludwig Wittgenstein to illustrate his distinction between “seeing” and “seeing that,”⁵ is apparently still a staple of psychology texts, and was recently employed (and discussed at some length, for whoever is interested in the phenomenon) in an article by Cass Sunstein.⁶ In 2018, an audio version of “the dress” surfaced

* Philip S. Beck Professor, Boston University School of Law. Absolutely no one except me should be held responsible for anything in this article, but I am grateful to Jack Balkin, Jim Fleming, Seth Montgomery, and the staff of the *Boston University Law Review* for facilitating it and to Sandy Levinson for just being out there and listening.

¹ <https://www.theguardian.com/fashion/2015/dec/22/thedress-internet-divided-cecilia-bleasdale-black-blue-white-gold>.

² I saw it as blue and gold.

³ *Id.*

⁴ See https://en.wikipedia.org/wiki/Rabbit%E2%80%93duck_illusion.

⁵ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 165 (1953).

⁶ Cass R. Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 CALIF. L. REV. ONLINE 463 (Nov. 2020), <https://www.californialawreview.org/textualism-duck-rabbit-illusion>.

on the internet, in the form of the “Laurel/Yanny” controversy,⁷ which illustrated how people process, and therefore “hear,” the same sound differently.⁸ I have no doubt that there are also tactile, taste, and smell equivalents to “the dress” and “Laurel/Yanny.” Indeed, philosophers for several millennia have misused these commonplace variations in human sensory processing to dispute the objectivity of reality.⁹

“Said the Night Wind to the Little Lamb, Do You See What I See?” *Do You Hear What I Hear* (1962) (written by Noel Regney & Gloria Shayne Baker)

If people perceive basic sensory data differently because that data gets processed through individualized cognitive mechanisms in individualized contexts, one would surely expect the same to be true of more complex phenomena that get processed through conceptual filters, which we call “ideologies” or “worldviews.” Different people can observe exactly the same objective social phenomena and perceive them in wildly divergent ways – at least as dramatically divergent as the white dress/blue dress or Laurel/Yanny examples. This idea is familiar to the point of triteness. In many instances, these differences in worldviews are what makes life interesting. If everyone thought about, experienced, and evaluated the world in precisely the same way, the world would be a very boring place – and the advancement of knowledge would surely suffer from the absence of differing viewpoints. In other instances, of course, different perceptions of the world generate sometimes violent conflict. Where some people see superstition or heresy, others see metaphysical

⁷ See <https://www.nbcnews.com/news/weird-news/yanny-or-laurel-science-explains-why-you-re-hearing-one-n874676>.

⁸ I was on “team Yanny.”

⁹ For a critical review, which explains at length how variations in sensory experience do not call into question metaphysical objectivity or the possibility of knowledge, see DAVID KELLEY, *THE EVIDENCE OF THE SENSES: A REALIST THEORY OF PERCEPTION* (1986).

truth and fundamental human purpose. Sometimes one person's justice is another's injustice, one person's racism is another's anti-racism, and one person's villain is another's hero. And for some people, the presence of divergent views is a welcome challenge to their own perspectives while for others, it is a threat to be stifled, silenced, or cancelled. The world of complex social phenomena is full of white dress/blue dress analogues.

“There Ain't No Good Guys, There Ain't No Bad Guys. There's Only You and Me, and We Just Disagree.” Dave Mason, *We Just Disagree*, LET IT FLOW (Columbia 1977)

As a libertarian who has spent most of his adult life in an orthodox left academy, where he has consistently perceived a social and political world full of blue dresses when almost everyone around him is fervently talking about white ones, it is not surprising that when I read Jack Balkin's characteristically thought-provoking book *The Cycles of Constitutional Time*,¹⁰ I had flashbacks to “the dress” and “Laurel/Yanny” – a lot of flashbacks. I am not talking about finding things in the book on which Jack and I disagree. That is no challenge and no fun; I can pick up works that *I wrote* and find things in them with which to disagree, and Jack and I would both probably be worried if I agreed with too high a percentage of what he wrote about anything. Instead, I am talking about accounts of events so wildly divergent that at least one of us (and possibly both) has to be living in the shadow world of *Stranger Things*. We are not observing the same world.

In the first chapter of *The Cycles of Constitutional Time* alone, spanning a mere sixty-three pages, I wrote down twenty-two (22) distinct places where Jack describes the equivalent of a white dress that to me is obviously blue – or at least is a color quite different from white, and in many

¹⁰ JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2020).

cases is not even remotely a dress. It would be tedious and unproductive to list them all, and a few examples will suffice to illustrate the magnitude of our differing accounts of reality:¹¹ “Democrats moved a little to the left . . . , while the Republican base moved far to the right.”¹² “[T]he [Republican] regime’s strategy of polarization, opposition, and obstruction, which helped Republicans gain control of Congress and stymie Barack Obama’s administration, eventually encouraged internal factionalism, radicalism, and hostility to compromise.”¹³ “For many years the Republican base had been fed a news diet created by conservative talk-radio, cable, and digital media that stoked grievances, fabricated conspiracy theories, and encouraged deep distrust of the mainstream media, educational institutions, and the American political system.”¹⁴ There are at least another nineteen comparable examples waiting in the wings. And that is just in Chapter One.

For purposes of this article, it does not matter whether I, Jack, or neither of us has an accurate, or even a better, account of objective political, social, or moral reality. The mere fact of

¹¹ For the reader with nothing much to do some afternoon who wants to play a guessing game, the twenty-two “WTF!” moments are on pages 3, 9, 13, 17, 17, 18, 18, 18-19, 19, 27, 27-28, 31, 32, 34, 45, 46, 52-53, 54, 57, 57, 58-59, and 61. And there is no real rhyme or reason to the choice of examples that follows, so there is not much point in looking for one. I just picked three examples that seemed to provide a good spread of issues and to which I could immediately offer pithy responses.

¹² *Id.* at 31. “[A] *little* to the left?????!!!!” A *little* to the left?????!!!!. To paraphrase Arthur Dent: Ah, this is obviously some strange usage of the word “little” that I wasn’t previously aware of.

¹³ *Id.* at 18. You mean in contrast to the generous spirit of bipartisan cooperation that greeted Donald Trump’s (or, for that matter, George W. Bush’s) administration? And I suppose one can describe as “polarization, opposition, and obstruction” and “hostility to compromise” not meekly going along with the Obama Administration’s crackpot, destructive, and partisan leftist agenda, but I would instead call it “not meekly going along with the Obama Administration’s crackpot, destructive, and partisan leftist agenda.”

¹⁴ *Id.* at 61. This one sentence would require a book to unpack. I will leave things here with just two of many possible questions for Jack: (1) How many members of the “Republican base” does Jack know on a close enough personal level to form an adequate basis for this kind of claim? (2) Does Jack honestly, really, truly believe that “deep distrust of the mainstream media, educational institutions, and the American political system” comes from conspiracy theories stoked by evil right-wing media? I don’t trust the mainstream media, educational institutions, or the American political system, not because I have been brainwashed by Tucker Carlson, but *because these institutions are all truly awful*. They earned distrust entirely on their own (vanishingly small) merits. One does not need reportage from the tiny non-leftist sliver of the country’s vast media complex to recognize any of this.

disagreement is enough for present purposes – at least where that disagreement spans tens of millions of people on all relevant sides. The question for this article is: What does a set of white dress/blue dress disagreements of this magnitude, spread across the contemporary United States, mean for the projects in Jack’s book? And there are multiple projects to consider. Jack’s analysis in *The Cycles of Constitutional Time* is partly descriptive, partly predictive, and partly normative; and the effects, if any, of the white dress/blue dress phenomenon in the context of competing worldviews could vary widely across those different projects.

My focus here is on Jack’s normative project, which aims to preserve and promote what he regards as “democracy and republicanism,”¹⁵ understood as “a joint enterprise by citizens and their representatives to pursue and promote the public good.”¹⁶

“That’s the Way of the World.” Earth, Wind & Fire, *That’s the Way of The World*,
THAT’S THE WAY OF THE WORLD (Columbia 1975)

My question is whether and how this normative project is possible in a world full of blue dress/white dress experiences of complex social, political, and moral phenomena. Much of Jack’s book is oriented around the concept of “constitutional rot,”¹⁷ about which I will have more to say shortly. But which phenomenon truly calls for explanation: the existence of what Jack calls “constitutional rot” or the relatively brief periods of apparent -- and quite possibly *only* apparent, and quite possibly purely fortuitous -- tranquility over the course of United States history? Is the

¹⁵ *Id.* at 45.

¹⁶ *Id.* at 44.

¹⁷ *Id.* at 44.

polarization, and often open hatred, that often characterizes much of modern American political and social life (including, and even especially, in supposed institutions of higher learning) a sign of some kind of rot, or is it an inevitable result of the natural aging process of a fundamentally misconceived enterprise?¹⁸ Put another way, is the very idea of the “United States” as a political entity a profound mistake that is not worth preserving?

“I’d Love to Change the World, but I Don’t Know What to Do, So I’ll Leave It Up to You.” Ten Years After, *I’d Love to Change the World*, A SPACE IN TIME (Columbia 1971)

The last question, as phrased, presents problems of political science, political theory, and moral theory. That effectively takes me out of the picture, as I am not a political scientist, a political theorist, or a moral theorist, nor do I aspire to be any of those things. I am barely a lawyer,¹⁹ and it takes pretty much all that I have to manage the modest tasks of legal scholarship and teaching that I have taken on. As it happens, however, some accomplished and talented people from earlier times who aspired to those other roles have taken on the question, and I use their wisdom as my jumping-off point.

Jack is very much aware of those accomplished and talented people from earlier times, as were members of the founding generation. As Jack pointedly describes a widely held founding-era position:

¹⁸ And is the polarization today really any more intense than in, say, the late eighteenth and early nineteenth centuries, when the Federalists and Democratic Republicans had at it? Cancel culture is hardly a novel invention; the Federalists tried it big time with the Sedition Act. Speech codes have a long and sordid history.

¹⁹ J.D., 1983, Yale Law(???) School.

Many of the Framers had read the classics of ancient history, and they understood that republics are very difficult to keep going All republics eventually become corrupted. And up to that point in history, all republics had eventually fallen, turning into despotisms, tyrannies, or rule by the mob. The Framers had read Aristotle and Polybius, and they knew that ancient writers believed that this is how things usually ended up.²⁰

Was there anything in the makeup of the (as of 1788) new United States to suggest that history might turn out differently this time?

There were good reasons in 1788 to think not. A mere forty years earlier, Charles Louis de Secondat, perhaps better known as Baron de Montesquieu, and by any name one of the most esteemed political theorists of that (or any) era, had written that “[i]t is natural for a republic to have only a small territory; otherwise it cannot long subsist.”²¹ As Anti-Federalists repeatedly pointed out,²² the United States of 1788 was most assuredly anything but a “small territory” by these standards, running from present-day Maine down to Georgia and from the Atlantic Ocean to the Mississippi River. Today’s conventional wisdom is that James Madison decisively refuted Montesquieu in *The Federalist* through his vision of an extended republic,²³ but “[p]erhaps we should really be debating whether Madison was actually correct in Federalist Nos. 10 and 14 in defending the possibility of an ‘extended republic,’ as against the far smaller (and more

²⁰ BALKIN, *supra* note 10, at 47 I (footnote omitted). On the Framers’ immersion in classic learning, see CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* (1994).

²¹ 1 M DE SECONDAT, *BARON DE MONTESQUIEU, THE SPIRIT OF LAWS* 130 (J.V. Prichard ed. 1894).

²² See M.N.S. SELLERS, *AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION* 163 (1994).

²³ See *The Federalist* No. 10 (James Madison).

homogeneous) vision of republican government held by such eminent political theorists as Montesquieu.”²⁴

“Montesquieu's influential theory that a republican form of government could survive only in a small, socially homogeneous territory”²⁵ expresses two societal preconditions for successful republicanism: “small” and “socially homogeneous.” In a previous article in this law review, I addressed the “small” part of Montesquieu’s formula, exploring whether the United States – either in 1788 or today – exceeds a plausible, never mind an optimal, size for a republic.²⁶ (Spoiler alert: “Yes.”) Jack’s book prompts exploration of the other half of Montesquieu’s formula: Is the United States insufficiently homogeneous to make for a successful or healthy republic? That, in turn, breaks down into two distinct sets of questions: (1) what does it mean for a republic to be healthy? and (2) what kind of homogeneity does the Montesquieuvian account of republics require, and is there any good reason to think that the United States of 2021 can approximate that kind and degree of homogeneity?

“The State of the National Health.” The Kinks, *National Health*, LOW BUDGET (Arista 1979)

Let us start with the concept of republican health and its absence. Jack believes that the United States is experiencing a period of “constitutional rot,” meaning roughly “the process

²⁴ Ilya Somin & Sanford Levinson, *Democracy, Political Ignorance, and Constitutional Reform*, 157 U. PENN L. REV. PENNUMBRA 239, 257 (2009).

²⁵ Aaron T. Knapp, *Law’s Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J. L. & POL. 289, 211 (2014).

²⁶ See Gary Lawson, *One(?) Nation Overextended*, 94 B.U. L. REV. 1109 (2014).

through which a constitutional system becomes less democratic and less republican over time.”²⁷ If that sounds a bit vague, it is because it is a bit vague. Jack never precisely articulates what a non-rotten, or healthy, constitutional system entails, beyond fuzzy references to “the joint pursuit of the public good.”²⁸ But by reverse-engineering his conception of constitutional rot, we can infer something about his conception of constitutional health.

For Jack, constitutional rot has three dimensions: (1) “a period of backsliding in democratic and republican norms and institutions, after a period of increasing democratization, or, at least, relative stability”²⁹; (2) “the gradual destruction of political norms and mutual forbearance and fair political competition that make it possible for people who disagree with each other to jointly pursue the public good”³⁰; and (3) “the gradual loss of the kinds of trust that are necessary for republics to function properly.”³¹ He identifies four causes of this rot -- which he calls the “The Four Horsemen of Constitutional Rot”³² – that can roughly be summarized as deep polarization, economic inequality, loss of trust among citizens³³ and government, and really bad policymaking. Collectively, these considerations establish what Jack evidently believes are preconditions for effective republican governance.

The ghost of Montesquieu asks whether there is an even more basic precondition that grounds all of the others: a kind of homogeneity regarding whether, on matters that define such

²⁷ BALKIN, *supra* note 10, at 45.

²⁸ *Id.* at 44.

²⁹ *Id.* at 45.

³⁰ *Id.*

³¹ *Id.* at 46.

³² *Id.* at 49.

³³ Just curious: By limiting his analysis to “citizens,” is Jack risking getting cancelled by the outrage mob?

core ideas as fair political competition and the public good, the dress is blue or white. Put in technical rather than colloquial terms: If “fair political competition” and “the public good” are essentially contested concepts,³⁴ what then for republican projects?

That last plaintive-sounding question is especially pertinent because of the way that the United States came into being and expanded over time. Put as simply as possible: The United States does not make very much sense as a political entity. It never made very much sense as a political entity. As a result, the blue dress/white dress problem has always been lurking in the DNA of the nation. Perhaps the intellectually interesting fact is not the existence of constitutional rot, as Jack defines it, but relatively brief flashes of what appears (perhaps misleadingly on careful examination) to be constitutional health.

“I’ll Build It One Piece at a Time.” Johnny Cash, *One Piece at a Time*, ONE
PIECE AT A TIME (Columbia 1976)

The United States in 1788 was something of a Frankenstein’s monster. Thirteen newly independent nation-states thought they needed to band together in a kind of mutual defense pact to fend off voracious and aggressive European powers. It was an open question how closely they could band together and over what range of issues they could cooperate beyond the immediate needs of joint defense. They had some things in common: the English legal tradition, the English language (mostly), and some form of Christianity (mostly). But the differences among, and within, those nation-states were profound. There were differences in religious orientation, from Puritan-

³⁴ Essentially contested concepts are “concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.” W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y, NEW SERIES 167, 169 (1956). In other words, they are concepts that are like the white dress/blue dress and Laurel/Yanny phenomena.

based Massachusetts to Catholic Maryland to ecumenical Rhode Island to anti-Catholic Georgia. There were differences in culture. There were even differences over something as basic as whether human beings could own other human beings. This was not a promising start – nor *should* it necessarily have been a promising start, given the latter disagreement -- for a vibrant culture of cooperation.

James Madison’s arguments about the virtues of an “extended republic” -- essentially that if you have a large enough territory, there will so many different groups of people that hate or envy each other that maybe they will have a hard time working closely enough together to take over the government -- did not convince everyone. One key event from the drafting of the Constitution starkly framed the problem. The Committee of Detail’s August 6, 1787 draft of the Constitution included a provision capping at 40,000 the number of people that any member of Congress could represent.³⁵ Two days later, Madison objected to this provision because “[t]he future increase of population if the Union sh[ould] be permanent, will render the number of Representatives excessive.”³⁶ Nathaniel Gorham, who was a member of the Committee of Detail,³⁷ countered that there was no good reason to expect the Union to be permanent: “It is not to be supposed that the Gov[ernment] will last so long as to produce this effect. Can it be supposed that this vast Country

³⁵ See JOURNAL OF THE FEDERAL CONVENTION, *reprinted in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 120, 224 (Jonathan Elliot ed., Washington, 2d ed. 1836) (“As the proportions of numbers in the different states will alter from time to time; as some of the states may hereafter be divided; as others may be enlarged by addition of territory; as two or more states may be united; as new states will be erected within the limits of the United States, - the legislature shall, in each of these cases, regulate the number of representatives by the number of inhabitants, according to the provisions hereinafter made, at the rate of one for every forty thousand.”).

³⁶ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 410 (Adrienne Koch ed., 1966). For a country of 330 million people, that would mean a Congress with more than 8,000 members.

³⁷ For those unfamiliar with the crucial role of the Committee of Detail in framing the Constitution, see William Ewald, *The Committee of Detail*, 28 CONST. COMMENTARY 197 (2012).

including the Western territory will 150 years hence remain one nation?”³⁸ “And keep in mind that in 1787 the ‘Western territory’ part of this ‘vast Country’ ended at the Mississippi River. Gorham was not contemplating Wyoming or California, much less Alaska or Hawaii.”³⁹

James Madison was a smart guy, but so was Nathaniel Gorham. If Gorham had a valid point about the United States in 1787, consider what happened in the ensuing years to construct the current version of the United States.⁴⁰ The United States acquired the Louisiana Territory under the looming threat of war; Florida in something of a quasi-war; the Oregon Territory under the looming threat of war; Texas after something of a quasi-war; the southwest as the spoils of a formal war; Alaska in (for once) a fair-and-square purchase; Hawaii with gunboats in the harbor; Puerto Rico and Guam as the spoils of a formal war; American Samoa in a deal cut among the United States, Great Britain, and Germany; and the Virgin Islands in (for twice) a straight purchase. In almost all of these transactions, territory, sometimes in vast amounts, was thrust into the United States without much consideration of how it would play into Montesquieu’s criteria for a successful republic (and never mind the wishes of the native inhabitants, who had no say in these United States/European dealings). The result is a patchwork territory stretched across a continent and two oceans. If the United States as of 1788 was straining the boundaries of classical republican theory, the country as of 2021 has long passed through those boundaries into another dimension.

But, a Madisonian will point out, the country is still here. Just check the index of any reputable atlas. Yes, the United States obviously exists today as a political entity and is firmly recognized as such as a matter of international law. But one can be a political entity, complete

³⁸ *Id.*

³⁹ Lawson, *supra* note --, at 1110.

⁴⁰ For a detailed study of post-1788 acquisitions of territory by the United States, see GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* (2004).

with index entries in an atlas and international law recognition, and still be a hot mess. Just ask the former Yugoslavia, Czechoslovakia, or Soviet Union, all of which enjoyed prominent atlas entries at various points in time.

“I’m Proud to Be an American Where at Least I Know I’m Free.” Lee Greenwood, *God Bless the U.S.A., YOU’VE GOT A GOOD LOVE COMIN’* (MCA 1984)

One possible explanation for the continued existence of the United States, and a possible recipe for its future success, is to say that the United States was not constructed around geography, religion, culture, or even language, but around a set of *ideas*. What makes the United States a potentially successful political unit, one might think, is a distinctively American ideology that serves as the essential glue to hold together the otherwise unmanageably heterogeneous population.

It is certainly possible in principle for ideology to constitute the element of homogeneity necessary for a successful Montesquieuevan republic. Perhaps that is even the element that explains the periods of minimal constitutional rot over the past two-plus centuries. Perhaps there have been times when that kind of homogeneity was present to a sufficient degree to make the idea of the United States meaningful. I rather doubt it, especially if one looks beyond a narrow band of self-described elites and takes a broad perspective on whose views count (and whose views are often uncounted) for purposes of consensus, but I am no more an historian or sociologist than I am a political scientist, political theorist, or moral theorist, so the less I say on this point, the better. The key question, in any event, is whether that kind of ideological homogeneity is present today.

Here one does not need any kind of advanced degree to give an answer: Of course not. People are splintered in blue dress/white dress fashion over what set of ideas could plausibly be taken to define America. Some people think it is the 1776 Project. Others think it is the 1619 Project. Jim Fleming and Linda McClain, in their comment on Jack's book, propose a revival of civic education more along the latter lines than the former.⁴¹ If they succeed, it will prompt a mass exodus from government-run schools, as people who think that Jim and Linda are out of their minds try to prevent their children from being inculcated with leftist orthodoxy. (As a big fan of home schooling who would welcome a mass exodus from government-run schools, I therefore genuinely wish Jim and Linda every success in their venture.) Civic education as a tool for unity works in one of two ways: As a form of indoctrination or brainwashing or as reinforcement of a widely agreed-upon core of facts and values. The former is totalitarianism, while the latter depends on precisely the agreement about whether the dress is blue or white that I posit is lacking. What if one person thinks that the basic ideas of the American social fabric are individual freedom and individual responsibility and someone else thinks those ideas are really icky? What if one person (me) thinks that the fundamental principles of social organization are that law should help you stop other people from taking your stuff or telling you what to do, while someone else (pretty much everyone else at this law school) thinks that the fundamental principles of social organization are that laws should help you take other people's stuff and tell them what to do? This does not leave a lot of room for the kind of political compromise that Jack seems to prize. Am I supposed to agree to have someone take, let us say, half my stuff and tell me what to do half the time and call that a draw? That is not a viable compromise. That is "A Piece of the Action," from the second season of *Star Trek*, in which Chicago-style gangs fight for control of territory. If people disagree

⁴¹ CITE JIM AND LINDA

about something as basic as what law is about, and what the United States is about, it is hard to see how Jack's "democratization" is anything other than organized gang warfare, with polling booths taking the place of alleys.⁴²

"I Must of Got Lost, I Must of Got Lost, I Must of Got Lost Somewhere Down the Line." J. Geils Band, *Must of Got Lost*, NIGHTMARES . . . AND OTHER TALES FROM THE VINYL JUNGLE (Atlantic 1974)

To be sure, Madison and his cohorts were acutely aware of these issues and had something of an answer for them: The principle of enumerated national institutional powers, with its corollary principles of federalism and separation of powers. If no federal institutions, either individually or collectively, have enough power effectively to loot the nation, then the payoffs from organizing coalitions to seize control of the machinery of government may not justify the costs. A limited national government – limited in what it can do in its totality (federalism) and limited in the structural manner by which it can do it (separation of powers) – conceivably could lower the stakes enough to make some kind of republican political entity the size of the United States feasible. In a world in which it matters more to your everyday life who is mayor of your town than who is President of the United States, an extended republic along Madisonian lines has a fighting chance.

It is doubtful whether that model ever had staying power. The logic of governments is to grow, and once one reaches a critical mass of governmental power, and the payoffs from assembling the necessary coalitions exceed the Madisonian costs of organizing them, people are

⁴² See Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1567 n.51 (2012).

forced to focus on the national government in sheer self defense. At that point, the blue dress/white dress problem becomes intractable.

Put another way: The kind of republican cooperation and trust that Jack desires is probably possible only if the stakes of cooperation and trust are very low. It is one thing for a law faculty to compromise on the academic calendar. It is another thing for people to compromise on abortion, racial preferences, taxes, or ballot security measures. Thus, there may be an additional element for successful republicanism that escaped even Montesquieu's keen attention: a government of carefully defined and sharply limited powers.

If that element of limited national power was ever really part of the United States, it dropped out of the picture long ago. Whether one dates the demise of that notion of limited national powers to the Bank of the United States, the Progressive Era, the New Deal, the Great Society, or anything in between, the key term is "demise." Any stakes-lowering limitations on national power that might have been either existent or possible at some point in time have been lost. The stakes of control over the national government are now astronomical – more than enough to give fallible humans incentive to lie, cheat, and steal in order to get it. If Jack really wants a republican culture of compromise and cooperation, perhaps he should consider pushing for a massive cutback in the size and power of the national government, so that politics looks more like decisions about academic calendars and less like decisions over life, death, and essentially contested conceptions of human flourishing.

“Why Do We Never Get an Answer When We’re Knocking at the Door,
With a Thousand Million Questions about Hate and Death and War?” The
Moody Blues, *Question*, A QUESTION OF BALANCE (Threshold 1970)

Yet more questions: How does one orient political life around the “public good” where some people see justice and others see theft in the same acts? Where some people see the emancipation of women (and of men who don’t want to worry about being fathers) and others see slaughter of babies? Of course, if Jack is talking only to people who all think “the public good” is approximated by the platform-of-the-moment of the contemporary Democratic Party, these questions probably do not much arise. No doubt there are people who are unhappy that I am around to raise them. But the questions are there whether or not they are acknowledged.

So, am I advocating or predicting the break-up of the United States? Should Texas secede? Any such claims, pro or con, would be in the domain of moral or political theory, and those domains are beyond my pay grade. Instead of answers, I only offer in conclusion two observations and three more sets of questions.

Observation #1: As a matter of positive law, secession by any State would be unconstitutional. I have so argued elsewhere,⁴³ and I still think I was right.⁴⁴ That does not say anything about whether it is likely to happen or would be a good or bad thing if it did happen, but since it is a proposition of law, it is something on which I can say something potentially useful, so here it is.

Observation #2: As a matter of policy, breaking up the United States is only a good move if what follows the break-up is better than what came before. Replacing a national tyranny with lots of localized tyrannies is not necessarily a great leap forward (though in principle it might be).

⁴³ See Lawson, *supra* note --, at 1122-23.

⁴⁴ More precisely, I think Akhil Amar was right, *see* AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 33-39 (2005), and I think I was right to agree with Akhil Amar.

The world of second best, which is the world in pretty much all its manifestations, is a messy place that makes judgments of this kind extremely difficult.

My three concluding sets of questions for Jack are: (1) What exactly is the “public good” for a mass of 330 million people spread across a continent and several oceans, half of whom see a blue and black dress while the others see a white and gold dress? Is the “public good” the product of some kind of utilitarian calculus? Is there some underlying natural law foundation for the concept? Is the “public good” defined by majority vote? Inquiring minds want to know. (2) What is the purpose of trying to hold the United States together as an entity? For whom is that good? For everyone? For some people who count more than other people? (3) Does the United States today make any more sense than did Yugoslavia, Czechoslovakia, or the Soviet Union thirty years ago? If there was ever a time that the United States made sense, has that time long since passed, so that Jack’s normative project is “just holdin’ on to yesterday”?⁴⁵

We now return to our regularly scheduled law classes and legal scholarship.

⁴⁵ Ambrosia, *Holdin’ on to Yesterday*, Ambrosia (20th Century Fox 1975).