

University of Pennsylvania Carey Law School

## Penn Law: Legal Scholarship Repository

---

Faculty Scholarship at Penn Law

---

11-1-2012

### Reconstruction and Resistance

Kermit Roosevelt III

*University of Pennsylvania Carey Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty\\_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Other Philosophy Commons](#), and the [Public Law and Legal Theory Commons](#)

---

#### Repository Citation

Roosevelt, Kermit III, "Reconstruction and Resistance" (2012). *Faculty Scholarship at Penn Law*. 440. [https://scholarship.law.upenn.edu/faculty\\_scholarship/440](https://scholarship.law.upenn.edu/faculty_scholarship/440)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

## Reconstruction and Resistance

CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD.

By Jack M. Balkin. Cambridge, Massachusetts: Harvard University Press, 2011. 304 pages. \$35.00.

LIVING ORIGINALISM. By Jack M. Balkin. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2011. 480 pages. \$35.00.

### Reviewed by Kermit Roosevelt III\*

#### Introduction

Jack Balkin defies categorization. More precisely, he defies categories. His most recent books, *Living Originalism*<sup>1</sup> and *Constitutional Redemption*,<sup>2</sup> transcend the dichotomies of constitutional theory. Repeatedly, they show that what conventional wisdom views as a strict opposition (originalism versus the living constitution, for instance) is in fact not an opposition at all, or that a traditional taxonomic dyad (constitutional law and ordinary politics, for instance) is incomplete. His arguments are forceful, elegant, and, I believe, generally correct. Frequently, in fact, they bear the hallmark of truly deep insights: they seem obvious in retrospect. It is possible that these two books will mark a real advance in constitutional theory.

But it is also possible that they will not. There are reasons that people cling to the theories and conceptual structures that Balkin undermines, and those reasons are not purely intellectual. There is a political element to constitutional law, of course; there is also a political element to constitutional theory. The presence of political considerations complicates the reception of any constitutional theory.

Politics also complicates the theory itself. To Balkin's credit, he acknowledges this. The books spend a substantial amount of time discussing how moral and political visions inform constitutional theory and become constitutional law. But they also argue for particular constitutional results, and this creates some tension within the enterprise. It is difficult for a single project, even one contained in two books, to employ both an internal and an external perspective—to explain how constitutional entrepreneurs succeed in making their views law and also to engage in the entrepreneurial venture. As

---

\* Professor of Law, University of Pennsylvania Law School. Thanks to Alisa Melekhina for excellent research assistance.

1. JACK M. BALKIN, *LIVING ORIGINALISM* (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*].

2. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) [hereinafter BALKIN, *CONSTITUTIONAL REDEMPTION*].

when a magician reveals how the trick is done and then performs it, some of the conviction is lost.

The tension between the internal and external perspectives, I believe, is not fully resolved within these books. Balkin's external perspective, historicism, seems to offer scant normative footing for his internal arguments, and his account of constitutional change, partisan entrenchment, does not make up for this lack. He turns, then, to the idea of redemption, but I will suggest that this is theoretically not fully satisfactory. Nor, however, is it necessary. Properly understood—understood as Balkin understands it—the Constitution itself supplies the magic that seemed to be missing. In what follows, I will try to demonstrate this. Part I of this review describes the state of constitutional theory into which *Living Originalism* and *Constitutional Redemption* come. Part II discusses the possibilities they offer, considering in particular Balkin's distinction between the meaning of a constitutional provision, which is fixed, and the applications of that meaning, which may change over time. I will offer a slightly different way of thinking about which constitutional provisions are intended to have fixed applications (I will distinguish between forward-looking and backward-looking provisions, rather than rules and principles), but I believe that the distinction is both correct and crucially important to constitutional theory. Part III draws out some implications of the distinction for the process of constitutional change. I believe that my account here is broadly consistent with Balkin's views, although it also differs in some ways. I talk about constitutional politics, rather than constitutional construction, and I suggest that my version offers greater normative purchase. Part IV takes a more critical turn. It examines the idea of redemption—the stance Balkin suggests we should take towards the Constitution. While I have some reservations about the idea in general, my chief concern is that Balkin has chosen the wrong text to redeem.

## I. The Players and the Stakes

For approximately the past thirty years, conventional wisdom has divided constitutional theory into two camps.<sup>3</sup> On one side stand the originalists, who defend the original understanding of the Constitution and insist that constitutional change can come about only through the amendment process specified in Article V.<sup>4</sup> On the other are the living constitutionalists, who believe that the Constitution must be flexible enough to adapt to changing times and circumstances even without formal amendment, typically through judicial interpretation.<sup>5</sup>

---

3. DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 24, 55 (2005).

4. *Id.* at 55, 138.

5. *Id.* at 55.

Conventional wisdom also holds that originalists were political conservatives and living constitutionalists liberals.<sup>6</sup> It is possible to dress up the debate in more theoretical terms. Originalists distrust judges and want to bind them, one might say, while living constitutionalists trust them and want to empower them.<sup>7</sup> Originalists believe judicial decisions about values are legitimate if they can be traced back to the framers and ratifiers;<sup>8</sup> living constitutionalists believe legitimacy comes from current popular opinion.<sup>9</sup> Originalists want to say that constitutional outcomes are not our responsibility, while living constitutionalists insist that they are.<sup>10</sup>

But as a matter of actual historical fact, the political description, reductionist though it may be, is largely correct. Originalism did not come to prominence solely because of theoretical considerations. Arguments that sound in some variant of originalism have, of course, been around since the Founding. Madison, arguing against the First Bank of the United States, appealed to the expectations of the ratifiers;<sup>11</sup> more notoriously, Chief Justice Roger Taney defended his decision in *Dred Scott v. Sandford*<sup>12</sup> in strongly originalist terms.<sup>13</sup> In recent history, however, originalism received a substantial boost from the Reagan Justice Department, and in particular from Attorney General Edwin Meese.<sup>14</sup> Reagan and Meese were not abstract constitutional scholars; they were interested in political results like reining in judges and correcting the perceived excesses of the Warren Court.<sup>15</sup>

Originalism achieved this result, or at least contributed to it. In part it may have done so by changing minds. It is possible that there were some people, maybe even some judges, who thought about the Constitution differently because they had been exposed to originalist arguments. But primarily it achieved its goals by changing personnel.

---

6. *Id.*

7. *See id.* at 20–24 (discussing the political climate in which originalism became prominent).

8. *Id.* at 33–35.

9. *Id.* at 59–61.

10. Though diametrically opposed, these aspirations are both fatal to the success of the respective theories, according to Balkin. A successful constitutional theory, he claims, must allow us to see the Constitution as basic law (which creates a stable structure of government), as higher law (which embodies values and principles), and as our law (which embodies our values and principles). BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 59–60. Originalism, with its insistence on tracing value choices back to the ratifiers, fails to make the Constitution our law or higher law, while living constitutionalism imperils its status as basic law. *Id.* at 61–63, 279.

11. ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 73 (1992).

12. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

13. Austin Allen, *An Exaggerated Legacy: Dred Scott and Substantive Due Process*, in *THE DRED SCOTT CASE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON RACE AND LAW* 83, 91–92 (David Thomas Konig et al. eds., 2010).

14. Jamal Greene, *Selling Originalism*, 97 *GEO. L.J.* 657, 680 (2009).

15. *See id.* at 680–81 (explaining that Reagan and Meese wanted to promote democratic self-government).

Liberal academic theory responded to originalism largely by coming up with explanations of why judges were justified in doing what they were doing. Judges were good at handling matters of principle, suggested Alex Bickel;<sup>16</sup> they could aspire to be philosophers, proposed Ronald Dworkin;<sup>17</sup> they could assert themselves when the democratic process was likely to fail, said John Hart Ely.<sup>18</sup>

Whatever one thinks of these responses, they are directed to judges. And while liberals were talking to the judges, telling them to keep on doing what they were doing, conservatives were talking to the people. They were warning them of judicial activism, telling them that they were ruled by unaccountable elites, and urging them to keep faith with the Founding Fathers.<sup>19</sup> Originalism helped conservative candidates run against the courts in the name of the Constitution. When these conservatives won, they appointed conservative judges. Naturally, the courts changed course, and when in 1997 Ronald Dworkin and a dream team of philosophers set out to explain to the Court why the Constitution protected physician-assisted suicide,<sup>20</sup> it should have surprised no one that the opinion did not dignify their amicus brief with so much as a mention.<sup>21</sup>

In the academy, originalism did not fare so well. Various deficiencies were pointed out.<sup>22</sup> But liberal academic thinking did not coalesce around a plausible or easily summarized alternative. As Justice Scalia argued, “it takes a theory to beat a theory,”<sup>23</sup> and the result appeared to be largely stalemate, sniping, and trench warfare.<sup>24</sup>

16. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 23–28 (1962).

17. RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7–12 (1996) [hereinafter DWORIN, *FREEDOM’S LAW*]; see also RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 149 (1978) (calling for “a fusion of constitutional law and moral theory” and claiming that philosophy is as much a part of law as sociology and economics).

18. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101–04 (1980).

19. For a canonical early statement of this view, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 417 (1977). For a debased descendant, see MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* 11–12 (2005).

20. Brief for Ronald Dworkin et al. as Amici Curiae in support of Respondents at 3, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 95-1858, 96-110), 1996 WL 708956.

21. See generally *Glucksberg*, 521 U.S. 702.

22. For a brief summary describing the weaknesses of “Old Originalism,” see Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 716–37 (2011).

23. See James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 *VA. L. REV.* 1523, 1536 (2011) (citing Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CINN. L. REV.* 849, 855 (1989)) (characterizing Justice Scalia’s position as “essentially . . . it takes a theory to beat a theory”).

24. As recently as 2009, Jamal Greene commented that “[n]onoriginalists have been on the defensive of late.” Jamal Greene, *On the Origins of Originalism*, 88 *TEXAS L. REV.* 1, 86 (2009). Originalism faces difficulties too, however. See generally Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1 (2009) (underlining the fact that originalists disagree amongst

## II. Text and Principle

The main theoretical move that Balkin makes is to reject the supposed dichotomy between originalism and the living constitution. He calls them “two sides of the same coin,”<sup>25</sup> which is perhaps overly charitable. As described, the coin is of no value. What Balkin actually shows is that they are, as conventionally understood, both obviously defective theories that no sensible person would hold. Classic living constitutionalism is silly for all the reasons conservatives point out. The idea that judges must sometimes, somehow, “update” the Constitution to keep it in step with the times is neither helpful to a judge trying in good faith to discharge her role, nor encouraging to a citizen wanting to see himself as a participant in the ongoing project of constitutional self-governance.

Classic originalism is no better, however. It makes a profound error in supposing that fidelity to the original meaning of the Constitution requires that cases be decided, to the extent possible, as if they had been brought immediately after the ratification of the relevant constitutional provision.<sup>26</sup> If the courts of 1868 would not have held a particular state practice unconstitutional under the Fourteenth Amendment, that is, classic originalism holds that a modern court should not do so either. Constitutional provisions, on this view, are designed to fix certain outcomes for all time, or at least until amended.

This view is obviously mistaken because while some constitutional provisions might be intended to fix outcomes in that way, others might not. Classic originalism fails to distinguish between different types of provisions. Balkin’s taxonomy includes rules, standards, principles, and silences.<sup>27</sup> Determinate rules, such as those setting age-based qualifications for office, dictate particular results regardless of time and circumstance.<sup>28</sup> Standards, such as the Fourth Amendment’s prohibition on “unreasonable” searches, may direct different results as times and circumstances change.<sup>29</sup> General principles, like the requirement of equal protection, require elaboration (what Balkin calls “construction”<sup>30</sup>) by future generations.

---

themselves over several aspects of their creed and criticizing originalism (hard and soft) as being based on faulty logic and ultimately impractical).

25. BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 20.

26. *See* GOLDFORD, *supra* note 3, at 9 (“[O]riginalism at its simplest holds that a constitutional provision means precisely what it meant to the generation that wrote and ratified it, and not, as nonoriginalism would contend, what it might mean differently to any subsequent generation.”).

27. BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 2, at 229.

28. BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 6.

29. *See id.* at 6–7 (“Adopters use fixed rules because they want to limit discretion; they use standards or principles because they want to channel politics through certain key concepts but delegate the details to future generations.”).

30. *See id.* at 44 (“[V]ague and abstract clauses [such as ‘equal protection of the laws’] will likely reflect contemporary understandings rather than original understandings.”).

One might also describe this taxonomy in a slightly different way, focusing on the purpose of the constitutional provision. Some provisions, like the age requirements<sup>31</sup> and the division of Congress into House and Senate,<sup>32</sup> are structural. They create the institutions of government and the means by which ordinary politics will be conducted. Absent a strong indication to the contrary, it is reasonable to expect that these provisions are intended to be dead, as Justice Scalia puts it when being puckish, or enduring, as he puts it when not.<sup>33</sup> Other provisions are what Richard Primus calls “concrete negation[s],”<sup>34</sup> designed to take off the table certain policies and practices which have been judged categorically undesirable. These provisions—such as the Third Amendment’s ban on peacetime quartering of troops in houses<sup>35</sup> or the Thirteenth Amendment’s ban on slavery<sup>36</sup>—are backward looking. They focus on a well-defined practice and say “never again.”<sup>37</sup> Many of these are rights provisions, but not all—one could also point to the creation of life tenure for federal judges and the prohibition of salary reductions as concrete negations of practices complained of in the Declaration of Independence, namely King George’s making “Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”<sup>38</sup> Backward-looking provisions, like structural ones, should ordinarily be understood to have a fixed and determinate set of applications.

Forward-looking provisions are different. A forward-looking provision has a fixed meaning: it might require states to avoid invidious discrimination, as our Equal Protection Clause essentially does,<sup>39</sup> or it might (to use an imaginary example) require Senators to wear the latest fashions while engaged in debate.<sup>40</sup> But it does not contemplate a static range of

31. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years . . .”).

32. U.S. CONST. art. I, § 1.

33. Antonin Scalia, Assoc. Justice, Supreme Court of the U.S., Wriston Lecture at the Manhattan Institute for Policy Research: On Interpreting the Constitution (Nov. 17, 1997), *available at* <http://www.manhattan-institute.org/html/wl1997.htm> (“Come along with me and admire the Dead Constitution. I have to get a new term for it . . . [M]aybe the Enduring Constitution. That’s a little better.”).

34. RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 7 (1999).

35. U.S. CONST. amend. III.

36. *Id.* amend. XIII, § 1.

37. They could just say “never,” but typically such provisions arise from experience with the prohibited practice. The suggested federal marriage amendment, S.J. Res. 1, 109th Cong. (2005), which would have preemptively banned same-sex marriage, is a notable counterexample. But perhaps precisely because there was no experience to demonstrate the evils of same-sex marriage, the amendment failed to gain traction. *See* Carl Hulse, *Senate Rebuffs Same-Sex Marriage Ban*, N.Y. TIMES, June 8, 2006, <http://www.nytimes.com/2006/06/08/washington/08cong.html> (explaining the Senate vote striking down the bill).

38. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

39. U.S. CONST. amend. XIV, § 1.

40. KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 51 (2006).

applications. Conduct that might have complied with its requirement at one point (racially segregating public schools in 1868, say, or wearing a powdered wig in 1789) will violate that requirement later.

It is reasonable to debate whether particular constitutional provisions are forward looking or backward looking. It is not reasonable to deny the possibility of a forward-looking provision, which classic originalism seems to do, at least implicitly. To make an explicit argument, one might claim that constitution drafters are very unlikely to write forward-looking provisions. Justice Scalia has suggested as much, arguing that the whole point of a constitution is to prevent backsliding—to ensure a set of minimum standards that the future must respect.<sup>41</sup>

But that is not the whole point of a constitution, as Balkin notes.<sup>42</sup> That is the point of a backward-looking provision. The point of a forward-looking provision is not to remove or require certain identified practices; it is to delegate the application of a principle to future generations.<sup>43</sup> Drafters might do this for several reasons. They might hope that future generations will be similar to them, while knowing that future circumstances will change, so that a delegation is the best way of achieving the outcomes they would have desired had they been able to predict the future. (I would guess that the Fourth Amendment reasonableness requirement<sup>44</sup> was supposed to work this way.) Drafters might anticipate that future generations will be different and intend to let the future's views prevail within the framework they have set out. (This would be the purpose of my fictitious “latest fashions” clause; it might also be the purpose of the Equal Protection Clause.) Or they might be aiming to promote national unity and uniformity, rather than particular substantive values. At the Founding, they might want to constrain the practices of the federal government by reference to those of the states, prohibiting the federal government from imposing punishments that most states rejected as too cruel. (This is the evolving view of the Cruel and Unusual Punishment Clause.<sup>45</sup>) After the Civil War, they might have wanted to use national opinion as to the fairness of certain kinds of discrimination to

---

41. Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 145 (1997); see also, John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 *CONST. COMMENT.* 371, 372 (2007) (offering the theory that constitution drafters are risk averse and would therefore avoid delegations). The logic behind this is not clear to me.

42. BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 28–29.

43. As Balkin puts it, the Constitution is intended also to “channel and discipline future political judgment.” *Id.* at 29.

44. U.S. CONST. amend. IV.

45. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”); see also *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (affirming the necessity of referring to society’s “evolving standards of decency” when determining which punishments are so disproportionate as to be cruel and unusual).



rein in outlier states. (This seems a reasonable purpose for the Equal Protection Clause and is historically the role it has played.<sup>46</sup>)

In short, the idea of a forward-looking provision cannot be dismissed out of hand. It is plausible that this is how some of our constitutional provisions are designed to function; it is undeniable that it is how some have functioned. In fact, there is a reasonable argument that enforcing the will of a national majority against outlier states is what the Supreme Court does best. Its race equality cases such as *Brown v. Board of Education*<sup>47</sup> and *Loving v. Virginia*<sup>48</sup> fit this pattern and have been relatively unqualified successes. They are accepted by the legal community and the public to such an extent that constitutional theories are deemed failures and Supreme Court nominees rejected if they suggest those cases are wrongly decided. When the Court takes on states without the support of a national majority and the federal government, it produces decisions more like *Lochner v. New York*<sup>49</sup> and *Roe v. Wade*.<sup>50</sup> These decisions, particularly *Roe*, have their supporters, but for substantial segments of the legal community they serve as the opposite kind of litmus test: nominees and theories must reject them. Last, when the Court takes on the other branches of the federal government, its results are mixed at best. A case like *Boumediene v. Bush*<sup>51</sup> is a good example: the Court announced grand principles, but in the face of opposition from the political branches (and a notable lack of enthusiasm from the D.C. Circuit) the practical significance has been very slight.<sup>52</sup>

Thus, the distinction between original meaning and original expected application makes obvious theoretical sense and is also a good fit with our actual constitutional practice. It allows for a reconciliation of sorts between

---

46. See Kermit Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 HARV. J.L. & PUB. POL'Y 99, 102–03 (2011) (arguing that courts have used the Equal Protection Clause to end discrimination that was supported by only a minority of states).

47. 347 U.S. 483 (1954).

48. 388 U.S. 1 (1967).

49. 198 U.S. 45 (1905).

50. 410 U.S. 113 (1973). On pushback from the states and negative popular reaction to these two cases, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 175–77, 298–99 (2009).

51. 553 U.S. 723 (2008).

52. See generally Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011) (outlining the D.C. Circuit's efforts to limit the effect of *Boumediene*). One might also look for examples to the World War II cases about the rights of Japanese Americans. *E.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). In these cases, the Court offered no real resistance to federal mistreatment of a vulnerable group, though it did at least try to articulate the principle that detention required individualized proof of disloyalty. See Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1951–52 (2003) (indicating the Court's discomfort with detention when it has no relationship to the loyalty of Japanese Americans or the war effort). Less charitably, one might point to the cases in which the Supreme Court sought to hold back the New Deal, cases like *United States v. Butler*, 297 U.S. 1 (1936) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). There the Court gave ground and backed down in later decisions such as *United States v. Darby*, 312 U.S. 100 (1941) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

originalism and the living constitution; there is one dichotomy transcended. It also, we shall see, allows for a different understanding of the relation of social and political movements to the Constitution.

### III. Constitutional Politics, Constitutional Change

The conventional view of the relation between the Constitution and ordinary politics is that the two together exhaust the field. Some issues the Constitution decides; the rest are left up to the political process.<sup>53</sup> But like the dichotomy between originalism and the living constitution, this is a false choice: there is a third way.

The third possibility is what we could call constitutional politics. (It is roughly what I think Balkin has in mind by “constitutional construction,”<sup>54</sup> though I do not claim that my exposition here tracks his precisely.) Constitutional politics determines how courts apply forward-looking provisions.

Suppose for the moment that the Equal Protection Clause is such a provision. It prohibits, let us say, unjustified or oppressive discrimination, of the sort the Court has sometimes called “invidious.”<sup>55</sup> An individual comes to court complaining that a state has engaged in such discrimination by, for instance, prohibiting interracial marriages or excluding women from the practice of law. How should the court decide whether this claim is sound?

Classic originalism would tell us to look at what the drafters and ratifiers of the Equal Protection Clause would have said, and the historical evidence is relatively clear that they would have viewed these state law classifications as acceptable.<sup>56</sup> Living constitutionalism, in its undertheorized form, would have judges somehow decide on their own, based perhaps on their best philosophical understanding of the idea of equality.<sup>57</sup> But neither of these approaches, according to the account I have developed, is the correct way to apply a forward-looking provision. Instead, courts should look to national sentiment, ideally as reflected in objective

---

53. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 557 (2009) (describing the view that “absent the use of the amendment process . . . political decisions do not add anything significant to the constitutional plan [but] occur as permissible activity within the plan”).

54. BALKIN, LIVING ORIGINALISM, *supra* note 1, at 5 (explaining Balkin’s definition of the term “constitutional construction”).

55. *E.g.*, *Levy v. Louisiana*, 391 U.S. 68, 71 (1968); *Loving v. Virginia*, 388 U.S. 1, 8 (1967); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

56. See BALKIN, LIVING ORIGINALISM, *supra* note 1, at 8 (arguing that applying the original expected application of the Constitution would be “inconsistent with constitutional guarantees of sex equality for married women, with constitutional protection of interracial marriage, with the constitutional right to use contraceptives, and with the modern scope of free-speech rights under the First Amendment” (footnotes omitted)).

57. *Id.* at 278.

indicia such as state laws and state court decisions, to guide their application of the federal constitutional principle.<sup>58</sup>

If the Equal Protection Clause is a forward-looking provision, then, there is a correct answer to the question whether some form of discrimination is unconstitutional. But the answer depends on what the nation thinks is invidious discrimination and what it thinks is reasonable. The correct outcome is not determined by the Framers, as classic originalism would have it, nor by judges, as living constitutionalism suggests. Instead, it is determined by social movements and political mobilizations. Forces such as the civil rights and feminist movements change society's views about the appropriate treatment of blacks and women, and in so doing they change the requirements of the Constitution—though not its meaning.

Forward-looking provisions thus give us one explanation for how constitutional outcomes can change, how a practice that was accepted at the ratification of the Equal Protection Clause can be unconstitutional some years later without an intervening amendment. The operation of constitutional politics makes arguments that seem “merely” political or moral—arguments about fairness and hierarchy—of constitutional stature.

Another explanation, which is related, is that it may be that what has changed is not the constitutional requirement but the judicially created doctrine that implements it. Courts may start out thinking that they should be very deferential to legislatures with respect to the question of whether some state act is consistent with a constitutional principle, but later become more suspicious or the reverse. This shift in the level of deference gives a fairly straightforward explanation of whether, and how, *Plessy* and *Lochner* were wrong when decided, the subject of one chapter of *Constitutional Redemption*.<sup>59</sup>

The answer is that both *Plessy* and *Lochner* were correct in their exposition of constitutional principles, at least in the sense that we still adhere to similar views. *Plessy* explained that the Equal Protection Clause prohibited classifications designed “for the annoyance or oppression of a particular class,”<sup>60</sup> and the *Lochner* Court understood the Due Process Clause to require that state laws promote the public interest.<sup>61</sup> We still hold those principles. What has changed since *Plessy* and *Lochner* is not the Court's

---

58. Again, this is a description that fits the practice of the Supreme Court. *Loving*, for instance, followed a pattern of judicial and legislative actions striking down antimiscegenation laws at the state level: In the fifteen years preceding *Loving*, fourteen states had repealed their antimiscegenation laws through legislative action. *Loving*, 388 U.S. at 6 n.5. And in 1948, California's Supreme Court held that the state's antimiscegenation statute was unconstitutional in the case *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

59. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 2, at ch. 7.

60. *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896).

61. See Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 986–87 (2006) (stating that one theme of substantive due process jurisprudence was that government action must serve a public purpose).

reading of the Constitution's principles, but rather its view about how deferential it should be to state legislatures in deciding whether laws are consistent with them. The *Plessy* Court was very deferential, but a modern Court would be highly suspicious of a racial classification. The *Lochner* Court was not deferential for it believed it had bright-line rules that would let judges draw the required boundaries.<sup>62</sup> A modern court would declare itself incapable of second-guessing legislative assessments: "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."<sup>63</sup>

Once we distinguish between underlying principles and implementing doctrine, the question of correctness looks a bit different. As far as the level of deference is concerned, there is no clear standard by which to call a decision right or wrong. We can, however, ask whether there is a good explanation for the choice of a particular level. On that question, *Plessy*'s choice to defer seems extremely dubious. The Louisiana legislature in the 1890s should not have been given a great deal of latitude to weigh the interests of its black citizens against those of its whites; it was predictable that it would make bad decisions.<sup>64</sup> *Lochner*'s refusal to defer is a bit more defensible; in the intellectual environment in which the Court operated, it believed it had tools that allowed it to patrol the boundaries of the public interest.<sup>65</sup> When those tools broke, under the influence of Legal Realism and the Great Depression, the Court appropriately backed down.<sup>66</sup>

Balkin does not explicitly discuss the role of shifting doctrine, but it is related to what I have called constitutional politics in that changed views about what is reasonable often drive changes in the level of deference. If certain kinds of discrimination are generally viewed as reasonable, courts tend to evaluate challenges to them deferentially; if they are generally viewed

---

62. See *id.* at 991 (explaining that *Lochner*-era judicial review came to be seen as illegitimate when the categorical lines the Court sought to create broke down).

63. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

64. See THOMAS J. DAVIS, *PLESSY V. FERGUSON: LANDMARKS OF THE AMERICAN MOSAIC* 135 (2012) (stating that white Democrats had captured most of Louisiana's state legislature by the late 1870s, allowing them to adopt a new state constitution that shifted away from equal rights, eliminated bans on racially segregated schools, and added an annual poll tax that was onerous on blacks and Creoles).

65. See Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 687-88 (2005) (claiming that the jurisprudence of the late nineteenth and early twentieth centuries "represented a fairly sophisticated police power theory of limited government" and reflected the idea that "the [Fourteenth] Amendment was designed to prevent so-called 'class legislation' that favored one group over another"); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 45-46 (2003) (suggesting that the Court saw the Fourteenth Amendment as preserving the common law and natural rights tradition which limited freedom for the social good).

66. Bernstein, *supra* note 65, at 50-51 (claiming that the Court's commitment to established constitutional limitations on government, along with its libertarian views and *Lochnerian* jurisprudence, were weakened through legal realism and the Great Depression).

as invidious, courts are more likely to use heightened scrutiny. And changes in doctrine and constitutional politics alike fit within what Balkin describes as historicism, the view that “the conventions determining what is a good or bad legal argument about the Constitution, what is a plausible legal claim, and what is ‘off-the-wall’ change over time in response to changing social, political, and historical conditions.”<sup>67</sup>

Historicism as Balkin describes it is consistent with the idea that the meaning of the Constitution changes, and he sometimes seems to suggest that this happens, at least with respect to the meaning of the constructed Constitution.<sup>68</sup> I prefer to draw the lines somewhat differently; I believe it is sensible to say that meaning remains fixed, while both applications of forward-looking provisions and implementing doctrine may change. But whether you consider Balkin’s theory exactly as presented in the book, or with the slight modifications I have suggested here, it is substantially superior to both classic originalism and classic living constitutionalism. It offers a vision of constitutional practice that fits with our actual history and explains why originalists can view departures from original expected applications, like *Brown* or *Loving*, not as errors to be cabined but as correct as a matter of constitutional law. I think it is correct, and, like Balkin, I consider myself an originalist.<sup>69</sup>

#### IV. Beyond Redemption

So where does this leave us? What happens when everyone accepts Balkin’s theory of text and principle, as they should? Having discussed the argument of *Living Originalism*, I turn now to *Constitutional Redemption*. (Balkin suggests the books be read in the opposite order, but I disagree, as I will explain below.)

It leaves us, Balkin suggests, with an attitude towards the Constitution that can best be described in terms of faith and redemption.<sup>70</sup> The Constitution is imperfect. Not just because something better could be imagined; the Constitution is imperfect on its own terms.<sup>71</sup> It fails to live up to its promises. It is fallen.

---

67. Balkin, *supra* note 65, at 679.

68. He suggests, for instance, that if we do not agree that *Lochner* was wrong when decided, we must explain how the Constitution changed. *See id.* at 696–98. I disagree; as the text explains, I think it is easy to see, according to Balkin’s own theory, how outcomes change while the Constitution does not.

69. *But see* Tara Smith, *Originalism’s Misplaced Fidelity: “Original” Meaning Is Not Objective*, 26 CONST. COMMENT. 1, 5 n.21 (2009) (disagreeing with Balkin’s characterization of me as an originalist). More precisely, I am an originalist with respect to the meaning of the Constitution. How a judge should decide a case is a different question.

70. *See* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 2, at 2, 5 (arguing that “[t]he legitimacy of our Constitution depends . . . on our faith in the constitutional project” and that we should embrace a redemptive narrative of our Constitution).

71. *See id.* at 249 (“The Constitution, and therefore the Constitution-in-practice, always exists in a fallen condition.”).

But it may be redeemed. Through the processes of constitutional change described above, it might better fulfill its promises.<sup>72</sup> It will never do so perfectly—it will always be fallen, always in need of redemption.<sup>73</sup> But we may hope that we will leave it better than we found it. We may—we must—have faith that our faith is not in vain.

This is a nice vision. It fits in well with the American mythology that we are a people always striving to realize the promise of America.<sup>74</sup> And it puts the best possible gloss on the fact that people have different views of that promise. That is why the Constitution is always fallen—there will always be people who disagree as to how forward-looking provisions should be applied.<sup>75</sup> Balkin's idea of redemption explains how people can think the Constitution should mean different things but still all believe in the same Constitution—it explains how the Constitution can play a centralizing and legitimating role in American political discourse, why different movements all make their claims in the terms of the Constitution, and why the Constitution is not just a monument to past struggles but a battleground for present ones.<sup>76</sup>

Yet I think Balkin's argument is mistaken in some fundamental ways. This is not the vision of constitutional practice that people are likely to have or in fact should.

First, what will happen in practice? It seems quite likely that some originalists will, at least for a while, continue to try to defend the position that fidelity to the Constitution requires consistency with original expected applications—that is, they will continue to refuse to acknowledge forward-looking propositions. It seems likely because the point about the distinction between meaning and application has been made before, yet classic originalism persists. In the academic context, the distinction has perhaps gained currency: Mitch Berman claims that all serious originalists accept it.<sup>77</sup> And though that may be an overstatement, even Justice Scalia has acknowledged the point in his extrajudicial writings.<sup>78</sup>

When acting as a judge, however, Scalia consistently ignores the possibility, arguing to the contrary that a practice accepted at the time a

72. *See id.* at 27 (arguing that his account of the Constitution is the “story about the eventual fulfillment of promises made long ago”).

73. *See id.* at 249 (“[The Constitution] is an unfinished building, and perpetually in need of repair and renovation.”).

74. *See* Daniel Bell, “*American Exceptionalism*” Revisited: *The Role of Civil Society*, PUB. INT., Spring 1989, at 38, 46 (describing the conviction that America was to be dedicated to the liberty and dignity of the individual in realizing a better world and characterizing the American Revolution as having left the people in control of their social order).

75. *See* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 2, at 10 (“People disagree with each other about the best way to go forward, and the best way to redeem the Constitution.”).

76. *See id.* (describing the ways that Americans disagree over the proper interpretation of the Constitution and noting that “[w]e do not know whose version of the Constitution will prevail”).

77. Berman, *supra* note 24, at 28.

78. Scalia, *supra* note 41, at 144–45.

particular constitutional provision was ratified cannot subsequently become unconstitutional by reason of changed societal attitudes.<sup>79</sup> Why his practice is inconsistent with his more academic writings is not clear, but it is hard to avoid suspecting that he clings to original expected applications because classic originalism was developed and marketed precisely in order to promote those applications and delegitimize the contrary Warren Court decisions.<sup>80</sup> Originalism cannot assimilate Balkin's insights and still do the political work its early proponents hoped for.

So political factors may prevent people from accepting the distinction between meaning and application that Balkin proposes. There may be psychological factors at work as well. Classic originalism, at least as practiced by Scalia, allows its wielder to avoid responsibility for hard decisions (all the value choices were made by the ratifiers) and to accuse anyone who disagrees of willful infidelity to the Constitution.<sup>81</sup> That is an easier worldview to have than one in which judges are required to pay attention to the current sociopolitical climate and try to implement fixed principles in changing circumstances.

But even if people were to accept the distinction, as I do, I do not think that the attitude of faith in redemption that Balkin describes is the proper consequence. One problem is that the idea of redemption makes sense primarily with respect to the application of forward-looking provisions. If I think the Constitution is defective because of its structural provisions—giving equal Senate representation to California and Wyoming, for instance, or the operation of the electoral college—redemption through construction will not do much for me. Ditto if I think that the structure, while perhaps adequate as conceived, fails when political parties enter the picture.<sup>82</sup>

Even with respect to the forward-looking provisions, though, I am disinclined to accept the image of a fallen Constitution in need of redemption. Something *is* fallen because it *has* fallen, and it must have fallen from somewhere. Balkin's account seems to require a prelapsarian moment, a constitutional Eden. But that never existed. Nor is it entirely sensible to regard the Constitution as fallen just because the Court's interpretation of a

---

79. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).

80. *See* Greene, *supra* note 14, at 679–82 (discussing the early promotion of originalism and its goal of popularizing judicial restraint as a way of undermining the criminal procedure, First Amendment, and substantive due process decisions of the Warren Court).

81. *See, e.g., United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (accusing “this most illiberal Court” of “writ[ing] into the Constitution” the “smug assurances of [the] age”).

82. For instance, political parties play havoc with the Framers' notion of separation of powers. The Framers envisioned government officials feeling institutional loyalty to their offices, so that each branch would naturally act to protect its power and restrain the others. But party loyalty clearly trumps institutional loyalty, so that a Congress controlled by the President's party may not check him much, and one controlled by the opposition party may try to make him fail rather than cooperate in governance. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312–16 (2006).

forward-looking provision does not embody my views. If I lose out in this argument—perhaps I believe that the Equal Protection Clause guarantees same-sex marriage, but the Court disagrees—the Constitution has not failed to live up to its promise. According to the account of constitutional change developed above, the Constitution surely could have accommodated my vision. (It contains multitudes.) The failure lies with the Court and the American people; they are the ones who have not accepted it. And perhaps that should not be counted a failure. In constitutional politics, like ordinary politics, there are winners and losers, by design. If I believe that the point of the Equal Protection Clause is to enforce the will of a national majority,<sup>83</sup> I can hardly complain just because the majority does not share my views.

Just as failure to prevail with respect to the application of a forward-looking provision does not mean the Constitution is fallen, success does not mean it is redeemed. To say that a particular decision (take *Loving* as an example) redeems the promise of the Equal Protection Clause suggests that *Loving* was somehow present in the drafting or ratifying.<sup>84</sup> But it seems very unlikely that many of the drafters or ratifiers believed that the Clause would require states to permit interracial marriages.<sup>85</sup> Those who did were outliers and extremists. To suggest that their views are and were the true meaning of the Clause makes it into a Trojan Horse, whose real contents were hidden from the ratifiers until judges, like Sinon, released them on an unsuspecting nation.<sup>86</sup> This is one view of constitutional change—it seems to be Ronald Dworkin's, for instance<sup>87</sup>—but it does not sound to me like legitimate change.

Nor is it actually consistent with the theory behind forward-looking provisions. The point of a delegation, as I have described it, is not that the drafters and ratifiers had secret hopes about the true meaning of the principles they enacted that might someday be realized, nor that they enacted a principle about whose content they were ignorant, awaiting explanation from philosopher-judges. It is that they actually *wanted the future to decide*. The ratifiers agreed that equality was important, and they deserve credit for that.<sup>88</sup> But *Loving* is the work of the Warren Court and the political and

---

83. Roosevelt, *supra* note 46, at 102–04.

84. I have some difficulty making out Balkin's view on this point. He persistently denies that redemption means "the unfolding of preordained events, or returning to a determinate path already marked out." BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 76. But if not, why call it redemption rather than simply delegation?

85. BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 183.

86. VIRGIL, *THE AENEID* 30–31 (Ernest Rhys ed., E. Fairfax Taylor trans., E.P. Dutton & Co. 1907).

87. DWORKIN, *FREEDOM'S LAW*, *supra* note 17, at 7–12.

88. See generally Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 *TEXAS L. REV.* 1 (2011) (arguing in favor of an anticaste original public meaning of the Fourteenth Amendment).



social movements that made that decision possible.<sup>89</sup> It is not the work of the Reconstruction Congress or the ratifiers of the Fourteenth Amendment.<sup>90</sup> Classic originalists, I have said, seem to want to attribute all constitutional outcomes to the ratifiers, while living constitutionalists want to give responsibility to the present. Redemption seems to transcend this dichotomy as well, imagining an intemporal partnership, but it gives too much credit to the past and too little to the present.

If the idea of redemption has as many problems as I suggest, why does Balkin introduce it? I suspect it is for the reason that social movements, as Balkin notes, frequently cast their arguments as redemptive: enlisting the authority of the Framers gives greater normative purchase.

Normative purchase is something that *Living Originalism* struggles with.<sup>91</sup> The book does two very different things. It describes how constitutional law is practiced, and it argues for particular understandings of provisions such as the Commerce Clause<sup>92</sup> and Section Five of the Fourteenth Amendment.<sup>93</sup> The arguments are not presented just as models of constitutional construction; they are meant to persuade. But since Balkin simultaneously tells us that many different constructions are possible,<sup>94</sup> it

89. See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7–18 (1996) (discussing the political history underlying Warren Court jurisprudence).

90. Perhaps especially not the ratifiers, given the coercion involved in obtaining ratification. As Michael W. McConnell has explained:

The state ratification debates did not dwell on the details of the proposed Amendment, and—an important point—the margin of victory for the Amendment was attained by coercion of the Southern states rather than by winning the support of the electorate in three-fourths of the States. When an Amendment obtains its supermajority through congressional exercise of its power to condition readmission of states to the Union, it is a fiction to treat the opinions of the people of the various states as controlling; it is Congress that effectively exercised the amendatory power.

Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1109 (1995).

The fact that the Reconstruction Amendments were forced on an unwilling South explains why they have had such an unusual career, with an early eclipse as Reconstruction was abandoned and then a return in what has been called the Second Reconstruction. For the forced nature of the Reconstruction Amendments, see *id.* For a discussion of the demise of the era of Reconstruction with the rise of white supremacy, see ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 585–87 (1988). For the Second Reconstruction, see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 6–10, 122–47 (3d rev. ed. 2002). The Civil War and its aftermath make the American constitutional experience quite unusual, which is one reason it might not hold many lessons for other countries. Our federalist structure is another. Given that the Supreme Court's great successes came in imposing the national will on outlier states, it may not be reasonable to expect other countries' high courts to achieve similar successes if they do not have a similar federal structure with regional variance.

91. Indeed, at the end of *Constitutional Redemption* Balkin tells us that he became an originalist because he wanted greater normativity. See BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 2, at 247–50.

92. U.S. CONST. art. I, § 8, cl. 3.

93. *Id.* amend. XIV, § 5.

94. See, e.g., BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 2, at 39 (“[R]easonable people disagree, and often quite strongly, about the best interpretation of the Constitution, how to

becomes harder to be forceful about the correctness of these ones. (It is, as I said, like a magician who explains the trick and then performs it, and it is perhaps in order to place the performance before the explanation that Balkin suggests that *Constitutional Redemption* be considered a prequel to *Living Originalism*.<sup>95</sup>)

To put the point generally, Balkin's historicism saps normativity. He is not a relativist—he rejects explicitly the idea that every dominant opinion is correct relative to its time—but he does not have much in the way of a transtemporal criterion of correctness. His theory of constitutional change, partisan entrenchment, is almost entirely nonnormative: win elections, put in your judges, and the Constitution will reflect your views.<sup>96</sup> He argues that his constructions are superior according to the traditional modalities of constitutional argument—text, structure, history, prudence, and so on—but this is not a particularly inspiring set of criteria.

It is not as inspiring, certainly, as the idea of keeping faith with the Founders and redeeming the fallen Constitution. None of Balkin's doctrinal arguments packs the emotional punch of his story about how all of American constitutional history is the struggle to fulfill the promise of the Declaration of Independence.<sup>97</sup> The idea of redemption allows Balkin to give his arguments a moral dimension, to sound more like someone struggling over constitutional meaning at the ground level than an observer hovering above the fray.<sup>98</sup>

---

apply it to new situations going forward, and whether to rethink old constructions in light of changed circumstances.”).

95. *Id.* at 289.

96. *Id.* at 201; Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 490 (2006); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *VA. L. REV.* 1045, 1066–83 (2001) [hereinafter Balkin & Levinson, *Understanding the Constitutional Revolution*]. As I tell my students, in the long run, we get the Constitution we deserve.

97. BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 2, at ch. 2.

98. Balkin is certainly not above the fray. He has his own views, which he argues for in *Living Originalism*. He participated in the litigation over the Patient Protection and Affordable Care Act (ACA), filing a brief arguing that the act could be supported as an exercise of the taxing power. Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners (Minimum Coverage Provision), *Nat'l Fed'n of Indep. Bus. v. Sebelius*, No. 11-393 (Jan. 13, 2012), 2012 WL 135050. But even in these contexts, his historicism gives him a different perspective. The Supreme Court's acceptance of the arguments against the ACA as Commerce Clause legislation, in Balkin's view, is a success for constitutional entrepreneurs such as Randy Barnett. It is an example of how political movements and political parties can change the terms of constitutional debate, and though it happened surprisingly quickly, it is not different in kind from the way in which arguments in favor of constitutional protection for same-sex marriage gained acceptance. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, *ATLANTIC* (June 4, 2012, 2:55 PM), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>. Other constitutional law professors, by contrast, view the Court's acceptance as an abandonment of legal principle. See, e.g., Ezra Klein, *Of Course the Supreme Court Is Political*, *EZRA KLEIN'S WONKBLOG*, *WASH. POST* (June 21, 2012, 12:42 PM), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/06/21/of-course-the-supreme-court-is-political/> (quoting Yale Law Professor Akhil Amar, “If they decide this

But there are two problems with this move. First, it is unnecessary. Constitutional arguments with respect to the application of forward-looking provisions can have moral weight quite apart from the idea of redemption. Here are some constitutional arguments whose success or failure has determined the outcome of constitutional cases. Women are not too timid and delicate to practice law.<sup>99</sup> Interracial marriage is not against God's plan.<sup>100</sup> Same-sex relationships are not deviant expressions of mental illness.<sup>101</sup> These are not part of the traditional modalities of arguing about meaning—they are not in Philip Bobbitt's taxonomy.<sup>102</sup> But they are constitutional arguments, and they are also the sort of claims that people are inspired to rally around or rally against. The magic of the Constitution is that through delegations, through the possibility of constitutional politics, it can achieve its own transubstantiation. It can make our moral discourse—it can make our everyday lives—into matters of constitutional significance. (The last thing I tell my students is that the Constitution is their responsibility.) There is no need to add that pursuing such causes will redeem the promises of the Declaration.

And will it? The second problem with the idea of redemption is that it is not entirely persuasive. The story Balkin tells in *Constitutional Redemption* describes the Declaration as fundamentally concerned with equality and American constitutional history as an attempt to fulfill that promise. But this is not so clear. Equality is the first great principle mentioned in the Declaration, of course, but to say that all men are created equal is to describe their starting point, the consequence of divine action. As far as the responsibilities of human government go, the Declaration does not proclaim equality to be an inalienable right, and it does not state that government has any obligation to protect or promote it.

Even if the Declaration were centrally concerned with equality, it is hard to make a case that this principle made it into the Founders' Constitution.<sup>103</sup> The Founders' Constitution does not explicitly require the

---

by 5-4, then yes, it's disheartening to me, because my life was a fraud. Here I was, in my silly little office, thinking law mattered, and it really didn't. What mattered was politics, money, party, and party loyalty.”).

99. *Bradwell v. Illinois*, 83 U.S. 130, 131 (1872).

100. *Loving v. Virginia*, 388 U.S. 1, 3–12 (1967).

101. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

102. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3–8 (1982).

103. Pauline Maier and David Armitage have suggested that there is little evidence the Declaration had influence on the drafting of the Constitution. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 165–67 (1997); DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 92 (2007). Given this lack of connection, the idea of redeeming the Declaration via the Constitution is a little odd. The Declaration was never ratified by the American people, and using the Constitution to realize its values is only marginally more sensible than using the Constitution to redeem the French Declaration of the Rights of Man and Citizen or the United Nations' Universal Declaration of Human Rights.

government to treat people equally, and even if we suppose that the Due Process Clause contained some equality principle,<sup>104</sup> that clause bound the federal government and not the states. The issue of states discriminating among their own citizens was not one to which the Founders' Constitution gave much thought. Consistent with the revolutionary paradigm, it saw the distant general government as the threat and the states as the natural protectors of liberty.<sup>105</sup>

Balkin's story about the role of the Declaration in American life relies on one main authority: Abraham Lincoln.<sup>106</sup> Lincoln is a hugely important figure in American constitutional history, and his embrace of the Declaration matters. In describing America as a nation "dedicated to the proposition that all men are created equal,"<sup>107</sup> Lincoln sought to change our self-conception, to elevate equality above liberty as the fundamental American value. He sought to locate this value in the past for the same reason that Balkin and other constitutional entrepreneurs do today: arguments are always more powerful when they call on us to redeem our commitments, to keep faith with the revered figures of our history. And he chose the Declaration rather than the Constitution because the Founders' Constitution is plainly more concerned with liberty. The Declaration was all he had.

The Gettysburg Address is a beautiful piece of rhetoric, and it is justly considered one of America's constitutive documents. All the same, I do not find Lincoln's claim entirely persuasive on its own terms. As far as the Declaration goes, the Southern secessionists had the more obvious claim to stand in the shoes of the signers. They were the ones asserting the right to alter or amend a form of government they feared had become destructive of their rights.<sup>108</sup> They were concerned in very large part about the right to own slaves, of course,<sup>109</sup> but that simply reinforces the parallel. The secession of

104. It does now, of course. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (noting that serious "discrimination[s] may be so unjustifiable as to be violative of due process"). And there is a plausible argument that the drafters and ratifiers of the Fourteenth Amendment understood "due process" to have a substantive egalitarian component. The case is weaker for the Fifth Amendment, however. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 454 (2010) (concluding that, based on a variety of historical evidence, the ratifiers of the Fifth Amendment had, at most, a limited conception of substantive due process).

105. Kermit Roosevelt III, *What if Slaughter-House Had Been Decided Differently*, 45 IND. L. REV. 61, 65–66 (2011).

106. Lincoln is not alone, of course. For discussions of the Declaration's role in American political and constitutional history, see generally SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995) and ALEXANDER TESIS, *FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE* (2012).

107. Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg*, in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 22–23 (Roy P. Bassler ed., 1953), available at <http://quod.lib.umich.edu/l/lincoln/>.

108. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 56–57 (1988).

109. The Mississippi Secession Declaration, for instance, opens by stating: "Our position is thoroughly identified with the institution of slavery—the greatest material interest of the world." A DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF THE

slaveholding states from a nation that had banned the practice is a description that fits the American Revolution as well as, if not better than, the Civil War.<sup>110</sup> Indeed, the first American slaves who fled their masters to join an army that promised them freedom were not southern slaves heading North in the Civil War; they were colonial slaves joining the British.<sup>111</sup> The Confederates certainly saw themselves as the true heirs of the signers. The South Carolina Secession letter, for instance, repeatedly echoes the Declaration and places it above the Constitution, not because it champions equality but because it affirms the right of the people to alter or amend their form of government.<sup>112</sup>

So I do not think that Lincoln was correct in identifying equality as the core American value in 1863. But Lincoln was a constitutional entrepreneur, and much of the point of such claims is that they become correct if people accept them. Lincoln's claim did prevail. Equality has taken its place in the pantheon of American values. Is Balkin then right to invoke the Declaration, as Lincoln did?

I don't think so. Lincoln's claim remains unpersuasive with respect to the Declaration, the Founders' Constitution, and pre-Civil War America. When his vision prevailed, it was through the force of Union steel and the strong-arm tactics of the Reconstruction Congress. America, though not Lincoln himself, saw the new birth of freedom that he prophesied; we had Reconstruction and the Reconstruction Amendments. That is where equality entered our higher law, and that is when.

Of course, it was a promise initially unfulfilled. Here Balkin's account of redemption actually makes much more sense. Why, one might ask, would a constitutional provision ever fail to achieve its full purpose? The supermajority that enacts it surely has power to enforce its desires. (This is why talk of aspirational provisions so often makes them into Trojan Horses: the "aspirations" tend to belong to a small subgroup.) But not with the Reconstruction Amendments. Those Amendments were forced on the defeated South by a Congress that knew it would soon be reseating Members

---

STATE OF MISSISSIPPI FROM THE FEDERAL UNION para. 2 (1860), available at [http://avalon.law.yale.edu/19th century/csa\\_missec.asp](http://avalon.law.yale.edu/19th%20century/csa_missec.asp).

110. British courts consistently held that no master-slave relationship could exist in England; any slave who set foot in England became free. *E.g.*, *Somerset v. Stewart*, [1772] 98 Eng. Rep. 499 (K.B.) 499-501. The British banned the African slave trade in 1807 and emancipated existing slaves in 1833. U. O. Umozurike, *The African Slave Trade and the Attitudes of International Law Toward It*, 16 *HOW. L.J.* 334, 339 (1971). By contrast, among the Union states at the time of the Civil War, Delaware, Kentucky, Maryland, Missouri, and the newly created West Virginia all recognized slavery. Mark A. Lause, *Border States*, in *ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY* 252, 252-54 (David S. Heidler & Jeanne T. Heidler eds., 2000).

111. Henry J. Richardson III, *The Black International Tradition and African American Business in Africa*, 34 *N.C. CENT. L. REV.* 170, 175 (2012).

112. *DECLARATION OF IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION* (1860), available at [http://avalon.law.yale.edu/19th century/csa\\_scarsec.asp](http://avalon.law.yale.edu/19th%20century/csa_scarsec.asp).

deeply opposed to Reconstruction. Indeed, the Reconstruction Congress faced fierce opposition from the President and the Supreme Court, and the venture was largely abandoned with the Compromise of 1877. With the Reconstruction Amendments, we do indeed have a situation where the framers of the amendments could not achieve their goals. Redemption occurred through later constitutional construction, driven and assisted by social movements, in what C. Vann Woodward called the Second Reconstruction of the Warren Court.<sup>113</sup>

So there is something doubly odd about Balkin's appeal to the Declaration. Not only does he choose a less than fully convincing object of devotion, but he ignores one that more obviously fits his purposes, a situation where the value he champions—equality—did enter our Constitution, only to be rebuffed. Lincoln had no choice, no text other than the Declaration, but Balkin does. The Constitution has changed since the Founders' days, not through construction but through amendment. There are words about equality; there was a war about it, and we won.

Or did we? There's the rub. Who won the Civil War? Ask an American who won the Revolution, or World War II, and the answer is clear: we did, we the Americans, we the United States. But ask about the Civil War, and the answer will usually be "the North," with a "we" only if the respondent hails from above the Mason–Dixon line. The Civil War remains intensely divisive, as does Reconstruction. The project of keeping faith with the Founders appeals to everyone; keeping faith with the Reconstruction Congress does not. That is why our civic religion of the Constitution is so Founding centered, and that is why Balkin looks back to the Declaration: to find consensus.

Consensus is nice, of course, and if we believe that the value of equality can be found there, it may be possible, to some extent, to use the Declaration as a placeholder or euphemism for Reconstruction. But there are also real costs to trying to maintain continuity with the Founding.<sup>114</sup> For while Balkin engages in his heroic reconceptualization of the Declaration (it reminds me of Michael McConnell's struggle to make the classic originalist case for *Brown*<sup>115</sup>), other people appeal to the Founding for other purposes.

One way to understand American constitutional history is as a constant struggle between the values of the Founding and the values of Reconstruction. The Founding, put broadly, stands for individual liberty, for

---

113. For the first use of the term "Second Reconstruction," see C. Vann Woodward, *The Political Legacy of Reconstruction*, 26 J. NEGRO EDUC. 231, 240 (1957). For further explication of the concept of the Second Reconstruction, see RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 149–98 (2004) and WOODWARD, *supra* note 90, at 6–10, 122–47.

114. See Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity*, 71 MD. L. REV. 1015, 1019 (2012) (arguing that "the American failure to similarly embrace rupture and to break from constitutional faith played a critical role in sustaining practices of subordination").

115. McConnell, *supra* note 90, at 953.

limited federal power, for the ability of states to run their internal affairs as they see fit.<sup>116</sup> Reconstruction stands for equality, for broader federal authority, for federal rights and federal laws protecting individuals from their own states. The contest between the nation and the states erupts with the Civil War, and the Reconstruction vision enters our Constitution afterwards. But it is quite quickly pushed back by the Redeemers and the Klan.<sup>117</sup> The Second Reconstruction of the Warren Court restores the values of Reconstruction, but it too meets opposition. In part, this opposition focuses on specific doctrines: affirmative action, school desegregation, voting rights.<sup>118</sup> But in part it takes the form of a more comprehensive theoretical attempt to delegitimize the decisions of the Second Reconstruction. It takes the form of classic originalism, which seeks to elevate the Founding above Reconstruction. Classic originalism is the legal theory of the Second Redemption.<sup>119</sup>

Balkin takes this theory on, and I think he demonstrates quite plainly that it is mistaken: some constitutional provisions may be designed to have applications that change over time. But there is another problem with the attempt to decide cases based on Founding-era values, to which he gives less attention. We like to think that our constitutional history is a success story, that the wisdom of our Founders has served us well for over two hundred years. But the truth is that the Founders' Constitution was a failure. It lasted seventy years and then came apart in what we must hope is the costliest war America will ever suffer. If the Constitution had any goal, it was to avert that war, to prevent the mass slaughter of Americans by Americans. (Three-quarters of a million dead<sup>120</sup>—how's that for "domestic Tranquility" and the "blessings of Liberty"?) To talk about the success of our Constitution without considering the Civil War brings to mind the old joke: apart from that, Mrs. Lincoln, how did you like the play?

Balkin tends to glide over the discontinuity. His attempt to avoid this unpleasantness is laudable in some ways. But by looking back to the

---

116. At least, this is the Founding as compared to Reconstruction. Compared to the Articles of Confederation, the Founding Constitution stands for strong national power. The tension between the nation and the states goes back to the very beginning; it is there in the Declaration itself, in the question whether the Declaration produced fully independent states or whether it called into being a single American nation, as Lincoln argued. (The Gettysburg Address dates the founding of the nation to 1776, not 1789.) I think it is telling that the Declaration's final paragraph talks of "united States" rather than the "United States" of the Constitution.

117. For background information on The Redeemers, see C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877–1913*, at 1–22 (1951).

118. For a discussion of the Second Redemption, see, for example, Jamie B. Raskin, *Affirmative Action and Racial Reaction*, 38 *HOW. L.J.* 521 (1995).

119. Except, ironically, in the area of affirmative action, where the conservative Justices seem entirely indifferent to both history and text, consistently reading the Equal Protection Clause as if it said "No state shall engage in racial classification."

120. See J. David Hacker, *Recounting the Dead*, *OPINIONATOR*, *N.Y. TIMES* (Sept. 20, 2011, 9:38 PM), <http://opinionator.blogs.nytimes.com/2011/09/20/recounting-the-dead/#more-105317> (discussing new estimates that Civil War deaths numbered approximately 750,000).

Declaration, he accepts the legitimacy of Founding-centered constitutionalism, which has significant costs. It suggests that the Founding provides the appropriate lens through which to view issues of federal–state relations, which is simply not the case. When we talk about the federal–state balance, we should be thinking not about Philadelphia but Gettysburg, not about the Federalist Papers but the Reconstruction Amendments. Yet the Supreme Court persistently appeals to the Founding in its attempts to draw federal–state boundaries, most recently in the Patient Protection Affordable Care Act decision, where Chief Justice Roberts wrote movingly about the nation our Framers dreamed of.<sup>121</sup> Balkin rejects classic originalism, but by looking back to the Declaration he accedes to the decisive move in the conjuring trick of the Second Redemption: the suggestion that we still live under the Founders’ Constitution.

### Conclusion

Balkin’s theoretical analysis is spot on and devastating to classic originalism. It may finally drive a stake through the heart of that doctrine. Or it may not. But if it does, is the next step to redeem the Declaration? I am not so sure. Balkin’s story about the Declaration is beautiful and inspiring, and if we all wanted to take the same principles from the Founding era, it might give us a way to go forward together. But not everyone wants what he wants, and I can tell a different story about America. Here it is:

America was born in sin, conceived from a deal with the Devil. Maintaining slavery was the price of independence and of union, for neither could have been achieved without the support of the slaveholding states. Though many Founders opposed slavery personally, they accepted it. They elided it in the Declaration; they protected it in the Constitution. And they brought forth a new nation.

But the Devil will have his due. America paid; she paid with her children. For her posterity, the Founders’ Constitution brought not the blessings of liberty, but the curse of war.

Lincoln knew this. He elevated the Declaration because he knew that the Founders’ Constitution was a “covenant with death” and “an agreement with Hell.”<sup>122</sup> He knew that the Civil War was a judgment upon us, that “every drop of blood drawn with the lash, shall be paid by another drawn

---

121. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, No. 11-393, slip op. at 3–4 (June 28, 2012). Justice White once provided a rare reminder that this is the wrong history. *New York v. United States*, 505 U.S. 144, 207 n.3 (1992) (White, J., concurring in part and dissenting in part) (pointing out that Founding-era historical analysis is inappropriate since “the nature of federal-state relations changed fundamentally after the Civil War”).

122. These words belong not to Lincoln but to his abolitionist contemporary William Lloyd Garrison. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 3 (2d ed. 2001).



with the sword.”<sup>123</sup> America paid the heaviest price she has ever suffered. And then she rebuilt herself. From the ruin of the first sin, she was born again. The Reconstruction Amendments turned the Founders’ Constitution inside out and upside down. The federal government interposed itself between the states and their citizens; the nation committed to protecting her people. Reconstruction redeemed America and gave us a Constitution worthy of our faith.

But then we struck another bargain. The Compromise of 1877, the end of Reconstruction, the redemption of the South: we purchased national reconciliation at the cost of racial justice. We healed the wounds of the Civil War on the backs of the freedmen.

Almost a hundred years later, a Second Reconstruction came to restore the promise of the first. And as night follows day, there came a Second Redemption as well, a new generation to raise the old banner. The party of Lincoln adopted the Southern Strategy. Ronald Reagan launched his 1980 campaign by praising states’ rights before a crowd in Philadelphia, Mississippi, where civil rights workers were murdered sixteen years before.<sup>124</sup> When he won, his Justice Department adopted a strategy of constitutional interpretation designed to undermine the decisions of the Second Reconstruction.

Time and again we have done this. American history repeats the bargain over and over, *diminuendo*; the first fall echoes down the years, growing fainter but never entirely still. The struggle continues, and each generation must decide anew which version of America will prevail: the Founding or Reconstruction, liberty or equality, the nation or the states.

Like Balkin’s, this is just a story. Like Balkin’s, it leaves some things out and emphasizes others. But I think it has some truth too. The difference is that it is less conciliatory. Balkin tries to avoid the tension between Reconstruction and the Founding by locating the values of Reconstruction in the Declaration, which allows him to say that America has always struggled to realize the value of equality. My story is less about the struggle *of* America, in which all can participate, and more about the struggle *for* America, in which we must choose sides. It identifies villains, which Balkin’s generally does not.

Maybe Balkin’s story is more effective; maybe it is all our fallen time can accept.<sup>125</sup> But we should remember that in the past we purchased

---

123. Abraham Lincoln, *Second Inaugural Address*, in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859–1865, at 687 (1989).

124. Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431, 458–62 (2009).

125. People can repent, however. In 2005, Ken Mehlman, the head of the Republican National Committee, told the NAACP that the Southern Strategy was wrong. Rudolph Alexander, Jr., *Differential Laws for African Americans: Inequality from the Past Continues to the Present*, 25 T.M. COOLEY L. REV. 27, 46 (2008) (“Chairman Mehlman acknowledged and admitted that the Republican Party was wrong in playing the race card . . .”).

reconciliation at the price of justice. We should remember that Chief Justice Warren wrote an opinion in *Brown* that was “above all, non-accusatory,”<sup>126</sup> and that is why, half a century later, a different Chief Justice could claim that *Brown* prohibited state attempts to avoid de facto segregation, that it identified simple racial integration as a forbidden state purpose.<sup>127</sup> The ghost will not rest, the past will not be past, until we can call it by its proper name. Until we can all say that we won the Civil War. We the People of the United States.

---

126. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 699 (rev. ed. 2004).

127. *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007) (describing “racial balance” as “an objective this Court has repeatedly condemned as illegitimate”); *id.* at 746–47 (describing the school district’s use of racial classifications to eliminate de facto segregation as “once again” telling schoolchildren “where they could and could not go to school based on the color of their skin” as in *Brown*).