

Symposium - Constitutional Redemption & Constitutional Faith - Introduction

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Symposium

Constitutional Redemption & Constitutional Faith

INTRODUCTION

In the first issue of this volume, the *Maryland Law Review* published a symposium exploring the history, interpretation, and modern implications of the Thirteenth Amendment. This Amendment unequivocally ended the most abhorrent and inhumane institution in American history along with its “badges and incidents.” Several articles in that symposium suggested that the language of the Thirteenth Amendment could also eradicate certain contemporary injustices.¹ In this final issue of the volume, the *Maryland Law Review* features a symposium building upon that theme by asking whether social and political injustice that is either furthered or tolerated under the current Constitution can be eradicated by that same Constitution, or if such injustice renders the Constitution an “agreement with hell.”²

Professor Jack M. Balkin believes that the Constitution can be redeemed in its current iteration. This is the premise of Professor Balkin’s recent book, and impetus for this symposium, *Constitutional Re-*

1. Linda C. McClain, *Involuntary Servitude, Public Accommodations Laws, and the Legacy of Heart of Atlanta Motel, Inc. v. United States*, 71 MD. L. REV. 83 (2011); Julie Novkov, *The Thirteenth Amendment and the Meaning of Familial Bonds*, 71 MD. L. REV. 203 (2011); James Pope, *What’s Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189 (2011).

2. See WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 205 (1963) (quoting William Lloyd Garrison).

*demption: Political Faith in an Unjust World.*³ There is a qualified hope in *Constitutional Redemption*: We redeemed the Constitution in the past, and we can do it again.⁴ But what if the Constitution cannot be redeemed and really is an “agreement with hell?” Professor Sanford Levinson believes that a constitutional convention needs to be called for a substantial revision or redrafting of the Constitution. At one time, Professor Levinson had faith that the Constitution could remedy the injustices and inequities that it perpetrates and permits. He no longer shares Professor Balkin’s optimism, as the revised edition of Levinson’s *Constitutional Faith* makes clear.⁵ In his contribution to this Symposium, Professor Levinson writes, “I believe that the Constitution has saddled us with a fundamentally defective political system.”⁶

The articles in this Symposium were written for a conference celebrating the publication of Balkin’s *Constitutional Redemption* and the republication of Levinson’s *Constitutional Faith* at the University of Texas School of Law on October 21–22, 2011. While none of the authors unequivocally subscribe to either Balkin’s or Levinson’s viewpoints on the Constitution, all fall somewhere along the spectrum spanning the hope of constitutional redemption and the dismay of a failed promise. These articles provide insightful commentary on modern constitutional theory, political power, and how the American public interprets the Constitution.

Professor Aziz Rana cautions that adherence to constitutional continuity can foster injustices just as easily as constitutional rupture, and that on certain occasions breaking with constitutional continuity may be more beneficial to progressive causes.⁷ Rana suggests that after the Civil War a break with constitutional continuity may have jettisoned remnants of colonialism that persist in the Constitution today.⁸ Professor Jamal Greene questions the merit of constitutional continuity by identifying recurring inconsistencies in originalist constitutional interpretation, notably originalists’ curious neglect of the Fourteenth Amendment and the intentions of its framers.⁹

3. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

4. See Jack M. Balkin, *The Distribution of Political Faith*, 71 MD. L. REV. 1144 (2012).

5. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (rev. ed. 2011) (1988); Sanford Levinson, *How I Lost My Constitutional Faith*, 71 MD. L. REV. 956 (2012).

6. Levinson, *How I Lost My Constitutional Faith*, *supra* note 5, at 976.

7. Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity*, 71 MD. L. REV. 1015, 1019–20 (2012).

8. *Id.* at 1020.

9. Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 980–81 (2012).

Focusing on democratic social movements, Professors Gerald Torres and Lani Guinier argue that Balkin's theory of constitutional redemption underestimates the importance of the common people (as opposed to political elites) as sources of constitutional change and constitutional legitimacy.¹⁰ Torres and Guinier elaborate on their concept of "demosprudence" in order to illustrate how social movements influence the law and governing institutions, especially in times of social crisis.¹¹

Perhaps the most centrist views on constitutional redemption belong to Professor Mark Graber. Graber pragmatically states that some compromises in the Constitution may lead to less than ideal outcomes, but in the end, those mediocre outcomes may be better than no compromise at all.¹² For Graber, this tradeoff is acceptable so long as the compromise does not benefit one group to the exclusion of another group absent from the bargaining process, something Graber describes as a "really rotten deal."¹³ The nature of compromises within the Constitution does not trouble Professor H.W. Perry, Jr., who agrees with much of Balkin's theory of constitutional redemption, but is less hopeful that we can achieve it. Perry argues there are more obstacles to change today than ever before, with the public and politicians less willing to challenge the Supreme Court's authority.¹⁴ Andrew Koppelman, whose contribution to the symposium continues his tradition of insulting Jack Balkin in the titles of his work, considers what moral philosophy can teach us about respect for each other's conceptions of a common Constitution—if we can agree such a document exists at all.¹⁵

The *Maryland Law Review* thanks the authors for contributing to this Symposium. We also thank Professor Jack Balkin and Professor Sanford Levinson for allowing us to participate in and publish the articles from the conference on *Constitutional Redemption* and *Constitutional Faith*.

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10. Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories About We the People*, 71 MD. L. REV. 1052, 1064–66 (2012).

11. *Id.* at 1068.

12. Mark A. Graber, *Redeeming and Living with Evil*, 71 MD. L. REV. 1073, 1085–89 (2012).

13. *Id.* at 1081.

14. H.W. Perry, Jr., *Constitutional Faith, Constitutional Redemption, and Political Science: Can Faith and Political Science Coexist?*, 71 MD. L. REV. 1098, 1107–20 (2012).

15. Andrew Koppelman, *Respect and Contempt in Constitutional Law, or, Is Jack Balkin Heartbreaking?*, 71 MD. L. REV. 1126, 1130–34 (2012).

