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THE CONSTITUTIONAL IMAGINARY: JUST STORIES ABOUT WE THE PEOPLE

GERALD TORRES* & LANI GUINIER**

To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the 'is' and the 'ought,' but the 'is,' the 'ought,' and the 'what might be.'[1]

I. INTRODUCTION

In his new book, *Constitutional Redemption: Political Faith in an Unjust World*, Jack Balkin suggests that the continued vitality of the American project relies on redeeming our constitutional faith.[2] To have constitutional faith is, for Professor Balkin, to have faith in the possibility of a just constitutional politics in an obdurately unjust world.[3] He tells stories about how we constitute ourselves and about the struggle over constitutional meaning.[4] The tug and pull of those stories is reminiscent of the exchange between Rousseau ("Man is born free; and everywhere he is in chains"[5]) and de Maistre ("Fish were born to fly, but everywhere they swim"[6]). Balkin is firmly with Rousseau both in spirit and in understanding that the basic task of every political system is to legitimate the exercise of power.[7]

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1. Robert M. Cover, *The Supreme Court 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 10 (1983).

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

3. *Id.* at 16.

4. *Id.* at 17–32.

5. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 3 (G. D. H. Cole trans., 1950).

6. This was Joseph de Maistre's response to the first sentence of Rousseau's *Social Contract* and was famously quoted by Alexander Herzen. ALEXANDER HERZEN, FROM THE OTHER SHORE AND THE RUSSIAN PEOPLE AND SOCIALISM 108 (M. Budberg & R. Wollheim trans., 1956); Aileen Kelly, *The Destruction of Idols: Alexander Herzen and Francis Bacon*, 41 J. HIST. IDEAS 635, 652 & n.20 (1980).

7. BALKIN, *supra* note 2, at 34–35.

Professor Balkin wants to redeem originalism by yoking the task of interpreting the Constitution to a framework that (1) compels fealty to rules at the same time it (2) looks to the past for a vision of the future.[8] But, like others before him, Balkin has to provide a view that is faithful to the constitutional vision that is not dictated by rules as well as to the part of our original Constitution that denied women the right to vote and counted blacks as only three-fifths of a person.[9] He has to tell a story of constitutional conflict that is consistent with the original governing vision but in which the conflict is really about what type of future governing people want.[10] Like Professor Charles L. Black, Jr., Professor Balkin locates our founding legal document not in the Constitution of 1789 but in the Declaration of Independence of 1776.[11] There are, of course, other constituting documents, the Northwest Ordinance[12] and the Trade and Intercourse Act,[13] for example, but those statutes merely highlight the importance of the Declaration of Independence. The formal Constitution and the other constituting statutes form the operating system for governance, but

8. *Id.* at 228–35. Originalism is generally understood as a commitment to interpret the text of the Constitution based on its meaning at the time the document was written and ratified. The source of that commitment (for example, of finding the original meaning of the Constitution and interpreting it consistent with the views of those who drafted and ratified it) is the belief that the duty of the judiciary is to uphold the existing law, not to amend or repeal it unless it is clearly wrong and the standards for judging rightness or wrongness come from the original documents. This understanding of fidelity to the original meaning is generally associated with conservative judges such as Justices Antonin Scalia and Clarence Thomas. It is the conservative counternarrative to the liberal idea of a "living Constitution," meaning a document whose meaning evolves over time. *Id.* at 226–28.

9. *See id.* at 227–28 (noting the difficulties of adhering to a pure originalist viewpoint).

10. *See id.* at 228–35 (discussing "framework originalism," which argues that the Constitution's framework is fixed in place).

11. *See id.* at 18 ("It is the eventual redemption in history of the principles of our founding document. I do not mean the written Constitution of 1787. I mean the Declaration of Independence of 1776."); CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED, at x (1997) ("[O]nce one takes courage from [Lincoln's] recognition of the primacy of the Declaration of Independence, the rest falls easily into place."). *See also* J. DAVID GREENSTONE, THE LINCOLN PERSUASION, REMAKING AMERICAN LIBERALISM 282 (1993) ("For [Lincoln], the declaration was not simply a rational statement of universal truths about the natural rights of particular individuals—it also proclaimed his nation's covenantal status as a special people"); Ken I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229, 229–30 (2011) (describing the uses of Declarationism, which holds that the Constitution can only be understood in light of the principles announced in the Declaration, within the modern conservative movement).

12. Northwest Ordinance (July 13, 1787), ch. 8, 1 Stat. 50, 51 n.(a) (1789).

13. Trade and Intercourse Act, ch. 33, 1 Stat. 137, 137–38 (1790).

the values and principles contained in the Declaration of Independence tell us whether governance is legitimate.[14]

Professor Balkin sketches out a constitutional imaginary by telling stories about how we came to be a people.[15] By a people he means that we are bound together in ways that inform our understanding of the goals of constitutional law and politics.[16] The constitutional imaginary is composed of those sets of values and institutions comprising the empirical and symbolic aspects of our social life.[17] This imaginary gives us a way of understanding the social world and our place in it.[18] Our collective life is governed in important ways through this process.[19] As John Searle put it, "[T]he complex structure of social reality is, so to speak, weightless and invisible. The child is brought up in a culture where he or she simply takes social reality for granted. . . . The complex ontology seems simple . . . ."[20]

What Professor Balkin attempts to do is to make the invisible visible in order to make the contests over meaning plain and to locate constitutional doctrine within this conflict-ridden domain.[21] He concedes that this is not the normal territory of constitutional theory, but he suggests it is necessary to illuminate the work that theory does.[22]

For Balkin, the critical work that his theory does is to "bridge[] the gap between laypersons and legal professionals."[23] His theory, what he calls "framework originalism," is thus a leveling device that opens the playing field equally to ordinary citizens and the legal elite.[24] Each group, in Balkin's view, should have equal access to "the Constitution's text and principles."[25] Laypersons as well as legal professionals should enjoy the same opportunity to make appeals by returning to the actual language of the Constitution, but also by reinterpreting its larger constitutive meaning.[26]

14. *See* BALKIN, *supra* note 2, at 19 ("Without [the Declaration of Independence's] ideals our written Constitution would be an empty shell . . . .").

15. *Id.* at 3.

16. *Id.*

17. *Id.* at 3, 239.

18. *Id.* at 3–4, 239.

19. *Id.* at 3–4.

20. JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 4 (1995).

21. BALKIN, *supra* note 2, at 3–4.

22. *Id.*

23. *Id.* at 238.

24. *Id.*

25. *Id.*

26. *Id.* at 237–40.

We admire Professor Balkin's project to create a "redemptive narrative framework" and his effort to encourage popular ownership of the Constitution's text.[27] It is as important to us, as it is to Balkin, that *We the People* see the Constitution as "our Constitution."[28] Indeed, our own writings on "demosprudence" suggest the importance of acknowledging the interpretive function of social movements and other lay actors in developing constitutional jurisprudence.[29] Like Mark Tushnet's defense of popular constitutionalism,[30] or Reva Siegel and Robert Post's "democratic constitutionalism,"[31] the goal of demosprudence is to engage the members of the polity "to consider, critique, and even take action in response to decisions with which they disagree."[32] While the legislature is the formal representative body, demosprudence reminds us that it is the people themselves who give democracy its legitimacy.[33]

We also agree with Balkin's effort to expand the universe of what constitutes the "framework" of our Constitution. We would, however, include Lincoln's First Inaugural,[34] not just his Second Inaugural and the Civil War Amendments, as redemptive documents in the constitutional canon.[35] In the Civil War, the sacrifice was real and the concep-

27. *See* Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity*, 71 MD. L. REV. 1015, 1020 (2012).

28. BALKIN, *supra* note 2, at 237.

29. *See, e.g.*, Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 115–22 (2008) (noting the power of the public when it is encouraged to discuss and critique Supreme Court decisions and other issues relevant to the democratic process and providing several case studies); Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535, 559 (2009) (suggesting that social movements, such as those during the era of desegregation, contributed to the changing of people's understanding of the role of government).

30. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181 (1999). In Tushnet's words, "the Constitution belongs to us collectively, *as we act together*." *Id.* (emphasis added).

31. *See, e.g.*, Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007) (noting that "democratic constitutionalism" recognizes the importance of the public in "guiding" judicial review); Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 193–94 (2008) (noting that "democratic constitutionalism" is when "[t]he effort to persuade—and to capture institutions that can authoritatively pronounce law—can prompt mobilization, countermobilization, coalition, and compromise, a process that can forge and discipline new understandings that courts engaged in responsive interpretation recognize as the Constitution").

32. Guinier, *supra* note 29, at 115.

33. *Id.*

34. "This country, with its institutions, belongs to the people who inhabit it." Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 5, 10 (James D. Richardson ed., 1908).

35. Lincoln concluded his Second Inaugural by stating:

tual seal that held back the full truths of the Declaration of Independence's promise was broken.[36]

At the same time, we question Balkin's idea that redemption is ultimately what is at stake. Balkin seems to presuppose a story about our founding that we think is ultimately more problematic than sustainable, especially given Balkin's larger goals.[37] The need, in our view, is not for a redemptive cleansing. What is required is a promise of redistribution that the Civil War-era documents called for in order to bring the ringing statements in the Declaration of Independence up to date.[38]

Our argument proceeds as follows: In Part II we discuss the Constitution as the Story of Us. In Part III.A we question Balkin's claim that the Story of Us is about redemption. The religious content of the ideas of redemption and faith is somewhat misleading because it is not religion that we need. It is politics. Professor Balkin knows this,[39] but the confusion—about what kind of hermeneutics is necessary—shifts the focus in important ways. One of the most important ways in which it shifts is the subject of Part III.B, where we focus on the important role that social movement activism plays as a source of law and as an important locus of political legitimacy.

> Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether."
>
> With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves, and with all nations.

Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865) *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 276–77 (James D. Richardson ed., 1908).

36. *See* Torres, *supra* note 29, at 542–43 (observing that the Civil War Amendments, which were codified as a result of social changes after the Civil War, altered the impact of the Constitution on society).

37. *See, e.g.*, Rana, *supra* note 27, at 1051.

38. *See* William E. Forbath, *The Distributive Constitution*, 22 DEMOCRACY J. 72, 76 (2011), *available at* http://www.democracyjournal.org/22/the-distributive-constitution.php (noting that since the Civil War, the Constitution has "promise[d] real equality of opportunity" for all citizens and "calls on all three branches of the national government to ensure that *all* Americans enjoy a decent education and livelihood").

39. *See* BALKIN, *supra* note 2, at 33 (acknowledging that the state's legitimacy is "a property of an entire political and legal system").

II. THE CONSTITUTIONAL IMAGINARY: THE CONSTITUTION AS THE STORY OF US

In his work on political organizing, sociologist Marshall Ganz stresses the importance of storytelling in mobilizing people to take risks in the service of a collective struggle.[40] There is no larger collective struggle than the making of a nation. Ganz supplies the sociological support for Balkin's propositions by locating the importance of storytelling in the tradition of organizing.[41] In his work on public narrative, Ganz identifies three key moments in building a mobilizing story. Those moments are establishing a "story of self," when that story of self becomes the "story of us," and when the story of us is linked to the "story of now."[42]

The "story of self" is the account of your life that enables you to identify the sources of your own purpose.[43] The questions that this inquiry asks are: Why are you committed to the things you are? What are the foundations of that commitment? What were the important decisions you made that got you to where you are? And why did you experience them as necessary moments of action or decision?[44] While this process may seem like an excuse for self-absorption, this exercise in the context of organizing is not just navel-gazing. Its function is to create a way to form links to others in the service of creating a constituency, a group, a community.[45] This self-reflection enables you to identify common sources of meaning which facilitate your identification with others and them with you.[46] This is especially true in those situations where the risks of linking fates together may be substantial.

The mutuality embedded in the telling of a story of self is found in the convergence of those stories into what Professor Ganz calls the "story of us,"[47] what Professor Balkin calls *constitutive narratives*, or stories of persuasion that locate the self in a complex network of social,

40. *See* Marshall Ganz, *Leading Change: Leadership, Organization, and Social Movements*, *in* HANDBOOK OF LEADERSHIP THEORY AND PRACTICE 515–17 (Nitrin Nohria & Rakesh Khurana eds., 2010).

41. *See id.* at 519–22.

42. *See id.* at 522–27.

43. *See id.* at 523–25.

44. *See id.*

45. *See id.* at 524 ("In the Civil Rights movement, blacks living in the Deep South who feared claiming the right to vote had to encourage one another to find the courage to make the claim—which, once made, began to alter how they thought of themselves and how they could interact with their children, as well as with white people, and each other." (footnote omitted)).

46. *See id.*

47. *Id.* at 525–26.

political, and cultural relationships.[48] Because constitutive stories, in the way that Professor Balkin uses the concept, help define the meaning of "we the people,"[49] moving from a *micro* account—like Ganz's story of self[50]—to a *macro* account—like Balkin's story of we the people[51]—presents troubling analytic problems. Remember that Ganz is only trying to explain how a group can be formed and cohere. Balkin is asking a larger question: How do we move from a story of self to a story of us that is big enough to constitute a nation? In a deeply pluralist culture there are many stories of us, and weaving them into a coherent whole that does not do violence to the constituent parts is where the political action is. The meta-story cannot rely simply on the rhetorical devices of ethnic solidarity or ethnic or racial nationalism that builds on a pre-existing cultural basis for intersubjective identification.

Law, and especially the Constitution, are the institutions that Balkin recurs to in order to resolve this tension. Yet for legal purposes there is only one story of us that matters doctrinally, even if doctrine is constantly under stress from explanations that are exogenous to the formal institutions of law and lawmaking. The meta-narrative driving doctrine is the view that the political and the social are distinct realms separated by the institutions of civil society that police the limits of legitimate state power. Professor Ganz is aiming at organizing to challenge the public use of private power. What Professor Balkin is describing is competition over the meta-narrative of the culture.[52] Both are deeply political moments in the evolution of our culture. Both rely on the technology of storytelling, but Balkin reveals a far deeper faith in the possibility of meta-stories to drive individual constructions of the self into a coherent story of the nation.

A. *Just Stories*

When narrating the story of us that justifies political faith in the Constitution, Professor Balkin is clear that he is not just telling contestable stories about our history; he is endeavoring to tell *just* sto-

48. *See* BALKIN, *supra* note 2, at 30–31 (suggesting that "constitutional narratives" allow Americans to identify themselves as one people with a shared destiny).

49. *See id.* at 31.

50. *See* Ganz, *supra* note 40, at 523–27.

51. *See* BALKIN, *supra* note 2, at 31 ("The story of America's rebellion against monarchy is our constitutional story. It shapes our collective memory. It tells us who we are. It defines us as We the People of the United States.").

52. *See id.* (arguing that constitutional narratives allow Americans to conceive of themselves "as part of a greater whole, collectively working toward the fulfillment of the principles of the Declaration").

ries.[53] The path to redemption, after all, is toward the reclamation of the promise of justice even if the horizon of its final realization is constantly receding.[54] The unavoidable problem of telling just stories is that the issue of what constitutes justice, whether as an untethered normative commitment or as a limited legal construct called "constitutional justice," remains a contested idea in either case. The difference arises in what constitutes legitimate objections to claims of justice. So long as constitutional doctrine remains the anchor for these discussions and the operating system for governance, the grounds for legitimate political contestation remains highly constrained. The important point to remember here is that it remains constrained by the normative visions of elites.

According to Professor Balkin's account, the normative vision of the social and political elite determines what the legal elite might assert as plausible formal doctrinal arguments.[55] Of course, he does not suggest that it is a one-way relationship, since a rupture in an understanding of the meaning of a particular line of legal doctrine reverberates through the culture and produces conflict that is both horizontal and vertical. At the same time, such a normative fracturing can shape new narratives of who *we* are.[56] It results even in changes in our understanding of the province of institutions like the *social*, the *legal*, the *public*, or the *private*. The inherently political nature of that struggle has a cultural dimension, but that is only because we are a culture that is rooted, according to Balkin, in legality.[57]

The path to redemption is defined by the process of arguments that once were, as Balkin puts it, "off-the-wall," and, as documented by Ganz, can, through the work of social movements, be put back "on

53. *See id.* at 57–59 ("Americans tell their story of progress by identifying who was on the right path to progress . . . and who strayed or tried to hold us back.").

54. *See id.* at 142 (recognizing that the promise of constitutional redemption can never be fully realized).

55. *See id.* at 223 (arguing that constitutional doctrine is often determined by "whether . . . influential persons and groups get behind a particular interpretation of the Constitution and use their power to push it into public acceptance").

56. *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429 (1960) (arguing that the segregation cases were justified by new normative arguments that were powerful enough to "reconcile the white South to" the "mighty diastrophic change" of mandatory desegregation).

57. *See* BALKIN, *supra* note 2, at 23–25 (arguing that the goal of America's constitutional order is to produce a democratic legal order which "inheres not only in procedural mechanisms like universal suffrage but in cultural modes like dress, language, manners, and behavior"). Professor Balkin's observation dates back at least to Alexis de Tocqueville. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275–77 (Arthur Goldhammer trans., Library of America 2004) (1835) (discussing the deeply rooted respect and affection for law in America).

the wall." But, for Balkin, these arguments become "on-the-wall"[58] without turning away from the reality of the possibility of constitutional evil.[59] Constitutional faith resides in the belief that this process redeems the promise of justice that is located in our founding legal documents.[60] Those documents outlined the political project that is America. Thus a clear-eyed assessment of the possibilities contained within those documents forms the grounds on which the constitutive stories of *us* are constructed.[61] The faith resides in the belief that resolution of conflicts over the evolving meaning of contested abstractions is always temporary. Or said more plainly, despite current understandings, the future can always be remade.

B. Imagined Redemption: Confronting Constitutional Evil

Here is another story:

> The disease that Reagan brought into the American mind was like the terrifying shadow the patient sees in X-rays clipped to a light box. It came from nowhere and appeared in the body of the country. There is a magic quality to the decline of men and democracies. Historians . . . study the tissue, identify markers, but only after the decline has begun can they do their work. No doctor, for all that she might wish to heal the heart or soul, can predict the onset of the fouling of the tiniest part. One cell must be the first to sicken and then sicken another. The beginning is the magic . . . .
>
> Aristotle said that the political body is nourished by ethics, but he did not persuade me that a lack of ethics would bring down the darkness over the grand American experiment. I thought that a democracy so blessed, so brilliant, could survive without ethics . . . .
>
> I have wished for many years to be a physician to my beloved country. The means to care for it is clear. I was revived by love and ethics. And I am not unique: no man, no woman is a metaphor; that is the place of gods. I do not know who will take America in their arms to revive her.

58. *See* BALKIN, *supra* note 2, at 179–82 (describing the "on-the-wall" and "off-the-wall" concepts).

59. *Id.*

60. *See id.* at 79–80, 101–02 (discussing constitutional faith).

61. *Id.* at 30–32 (describing the constitutional stories of "the people").

No nation is forever.[62]

A despairing story to be sure, but one rooted not just in the recollections of a dying man in 2011, old and at the end of his life, but in Ronald Reagan's presidential campaign kickoff at the Neshoba County Fair in Mississippi some thirty years earlier.[63] Reagan's casual insult to the memory of Michael Schwerner, Andrew Goodman, and James Chaney—failing to mention their sacrifice in a speech so close to the site of their killing—could hardly have been unintentional.[64] Instead, it was part of the discourse of the end of the second reconstruction. Or as Jacquelyn Dowd Hall argues in her essay *The Long Civil Rights Movement*, "The civil rights movement circulates through American memory in forms and through channels that are at once powerful, dangerous, and hotly contested. Civil rights memorials [continue to] jostle with the South's ubiquitous monuments to its Confederate past."[65] Thus, just as the end of the original Reconstruction gave a long and painful birth to the second, the question of redemption is a question about the possibility of American political culture giving birth to the third reconstruction.

There are reasons to be hopeful, but reasons, as well, to credit the story Earl Shorris tells. If the struggle is over the narrative of the course of our history, then the nature of the political conflicts within which that narrative has to make sense is critical. The conflicts can be over local struggles for power and control within the structure of political authority (and the monopoly over legitimate violence) or they

62. Earl Shorris, *American Vespers: The Ebbing of the Body Politic*, 323 HARPER'S MAGAZINE 62, 67 (December 2011).

63. *See* Ronald Reagan, Presidential Candidate, Neshoba County Fair Speech (Aug. 3, 1980) (transcript available at http://neshobademocrat.com/main.asp?SectionID=2&SubSectionID=297&ArticleID=15599&TM=60417.67). Ronald Reagan's speech on August 3, 1980, at the Neshoba County Fair in Mississippi was his first public address after the Republican National Convention chose him as its presidential nominee. That Reagan was still using the language of "state's rights" in 1980 reinforces Jacquelyn Dowd Hall's argument in *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005). Hall argues that the civil rights movement's trajectory stretched well before and then well beyond the decade of the 1960s. *Id.* at 1236 & n.8. "By confining the civil rights struggle to the South . . . to a single halcyon decade, and to limited, noneconomic objectives, the master narrative simultaneously elevates and diminishes the movement[.]" *Id.* at 1234. Hall continues, "It ensures the status of the classical phase as a triumphal moment in a larger American progress narrative, yet it undermines its *gravitas*. It prevents one of the most remarkable mass movements in American history from speaking effectively to the challenges of our time." *Id.*

64. *See* Shorris, *supra* note 62, at 67 (critiquing how then-presidential candidate Reagan did not mention the murders of three civil rights activists in his Neshoba County, Mississippi, speech, which took place near where the murders occurred).

65. Hall, *supra* note 63, at 1233.

can be more fundamental, like the meaning or history of the nature of human society. For faith to be warranted, Balkin has to reconcile two different belief systems. On the one hand, there is the belief of traditional conservatives in the priority of society (the received tradition within which we construct our lives) and with it the need to preserve traditional institutions which we hold as trustees.[66] On the other hand, there is the classical liberal belief in the priority of the individual and with it the belief in our ability to remake any institution that inhibits the flowering of human freedom.[67]

In some sense everyone is a "liberal" today. The difference lies in the ideas about what the government may legitimately do. To conservatives, to restructure social institutions in a way that does violence to received tradition can be no guarantee of individual flourishing.[68] The contemporary liberal position suggests that obeisance to tradition is not a value in itself, but only justified in the service of greater individual freedom.[69] That our constituting documents put us in the middle of that intellectual and ideological conflict is exactly what Balkin suggests, and his turn to originalism can be understood as a way to redeem both traditions: the conservative obligation to preserve that which we have inherited and the liberal obligation to demand transcendent principles before individual liberty can be abridged.[70] Liberalism contains the correlative moral obligation to change those institutions that restrain our individual capacity to define and live the good as we see it.[71]

66. *See, e.g.*, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 107 (London, MacMillan & Co. 1890) ("Society is indeed a contract. Subordinate contracts, for objects of mere occasional interest, may be dissolved at pleasure; but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties.").

67. *See* WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE 13 (1991) (noting the "traditional liberal concern for civil and personal liberties").

68. *See generally* THOMAS SOWELL, THE VISION OF THE ANOINTED (1995) (critiquing social policies from the 1960s through the 1990s).

69. *Cf.* KYMLICKA, *supra* note 67, at 254 ("Liberal individualism is grounded in this irreducible commitment to the role of individual self-direction and responsibility in a just community, and to the principle of moral equality which underlies both.").

70. *See* BALKIN, *supra* note 2, at 226–28 (comparing the two schools of thought for American constitutional interpretation—"living constitutionalism" and "originalism"—and their central themes).

71. *See* KYMLICKA, *supra* note 67, at 2–3 ("The individualism that underlies liberalism isn't valued at the expense of our social nature or shared community. It is an individualism that accords with, rather than opposes, the undeniable importance to us of our social world.").

The breakdown in our politics, and its consequences for the law that Balkin is responding to, does reflect a loss of faith in both the broadly liberal project to maximize individual freedom and our capacity to reconstitute those social institutions which constrain that capacity for liberty. What Balkin is trying to map is the relationship between an operating system of governance that located democratic legitimacy in the free expression of individual actors to choose their own government and an obdurate network of social institutions that declared some and perhaps the most important constraints on individual liberty as politically off-limits.[72]

Like a cartographer looking through old maps, Balkin sees landmarks are changed; new cities and roads appear, but the basic topography remains the same. His originalism is recognition that while we must make new maps, all of the changes are based on new information and new formations that are fundamentally social, but they are only written on the slowly changing land. Over time we understand the landscape as natural, but, of course, it would be unintelligible without our knowledge of each other. Balkin's rules, standards, and principles are the measures and directions the cartographers use. Some features are fixed, but all of the rest are contingent.[73] At the same time, the map that the contemporary cartographer draws must not be one-dimensional. The Constitution, in other words, has to be understood as both a text *and* a practice.[74] As we shall argue in the next Part, faith in the Constitution has to be faith in the possibility of citizen participation in an ongoing set of institutions.

72. *See* BALKIN, *supra* note 2, at 36 ("[W]hat makes the American constitutional order respect-worthy is its substantive content: the procedures it offers for political decisionmaking, the rights it recognizes, the limits on government action it imposes, and so on. A constitutional order is worthy of respect because it has the right content and reasonable people can agree to live under it because of that content.").

73. *See id.* at 226, 228 (explaining that to an originalist "some aspect or feature of the Constitution is fixed when the Constitution is adopted" but that, under the author's view of the "best form of originalism," the theory "complements the processes of growth and adaptation" embraced by the "living constitutionalism" school of thought).

74. *See id.* at 40 ("[W]e cannot really model the legitimacy of the Constitution (and the related practice of judicial review) on a simple version of a contract . . . . Although the Constitution may look like an agreement among We the People, it does not actually operate as a quid pro quo . . . . We find out what the Constitution-in-practice means only later on after we are already in the game.").

III. SOCIAL MOVEMENTS AND CONSTITUTIONAL UNDERSTANDING

A. It Is Not Religion That We Need. It Is Politics.

The hope of Professor Balkin's intervention is that "framework originalism" will open up contested space, and thus offer the possibility of "constitutional redemption."[75] Redemption comes because the text in framework originalism "provides a common [interpretative] framework," one that is tied to "protestant constitutionalism."[76] In protestant constitutionalism, the Constitution itself, not the interpretations given it by judges or lawyers, is the primary source of governing authority.[77] Thus, all members of the polity, not just judges and lawyers, share in the capacity to interpret its meaning.[78] Whether it is atonement or deliverance that needs to happen, Balkin's theory of change makes protestant constitutionalism a weapon of dissent, a pledge of faith, and a tool of redemption.[79]

At the same time, Balkin's use of religious iconography, relying heavily on words such as redemption and faith, suggests that the Constitution and what it means is a function of belief.[80] Belief alone, however, does not assure change. We can all speak constitutional truth, but the only constitutional truth that matters is that which is backed by power. For example, Aziz Rana examines judicial interpretation of constitutional power during the Civil War.[81] Rana, too, is skeptical of redemptive constitutionalism "as *the* privileged path to redemption."[82] Rana's post-Civil War case studies show that the "politi-

75. *Id.* at 232.

76. *Id.*

77. *See id.* at 235 (describing protestant constitutionalism as "the ability of ordinary citizens to claim the Constitution as their Constitution, to assert in public what they believe it truly means, to organize in civil society and in politics and persuade others of their views").

78. *See id.* ("Living constitutionalism depends heavily on these forms of protestant constitutionalism: the Constitution adapts to changing circumstances not simply through adjustments by bureaucrats and professional elites but also through successive waves of constitutional dissent and disagreement in politics and civil society.").

79. *See id.* at 232 (suggesting that when originalism and protestant constitutionalism are combined, the resulting theory can become a "weapon of dissent . . . pledg[ing] faith in the future redemption of the Constitution"); *see also id.* at 235 ("By making protestant constitutional arguments, individuals and groups can turn claims that were once marginal or off-the-wall into accepted views, or at the very least influence future constitutional development.").

80. *See id.* at 237 ("Because We the People have ordained and established the Constitution, it is ours.").

81. Rana, *supra* note 27, at 1026–45.

82. *See id.* at 1026 ("Indeed, the lesson for progressives might be to deemphasize constitutional faith and to develop more politically instrumental approaches to the value of constitutionalism.").

cal effect" during Reconstruction of maintaining faith in the "discursive capacity" of the Constitution was not liberatory.[83] Rather, in Rana's words, the Constitution was used to "provide a straitjacket for social transformation."[84] Rana concludes that after the Civil War "the best—and perhaps only—means to redemption was through discretionary and, if need be, extra-legal political action."[85]

Balkin understands the importance of power and the role social movements play in developing new sources of power.[86] Yet he never really tells us how protestant constitutionalism—his democratizing theory of constitutional faith—will generate a durable source of power, a power strong enough to overcome the views of the ruling elite.[87] He acknowledges that how the interpretive space is occupied and contested, by whom, and for what purpose, makes all the difference.[88] And his iconography depends on a constitutional politic that is not the sole province of a professional legal elite.[89] But what he never really develops is the process by which political mobilization makes constitutional change happen.

For Balkin, constitutional faith becomes a redemptive force that will somehow be backed by a more robust form of constitutional politics.[90] What he fails to explain, however, is how faith alone will accomplish such a power shift—a shift that is essential to ensure that constitutional interpretation becomes a project shaped by ordinary citizens. Balkin leaves unsaid the mechanism by which his constitu-

83. *Id.* at 1030.

84. *Id.* at 1045.

85. *Id.*

86. *See* BALKIN, *supra* note 2, at 63 ("[S]ocial movement contestation . . . attempts to change attitudes (especially elite attitudes) about what the Constitution means, and hence influences judicial decisionmaking, because judges are largely drawn from elites.").

87. *See id.* at 102 (stating that "the most basic problem of jurisprudence is the problem of faith in law; and the most basic question in jurisprudence is the question to what extent our faith in law is justified. At the heart of law, and the philosophy of law, lies the problem of faith and idolatry."); *see also id.* at 63 (expressing concern that "[i]n real life, some persons [such as Supreme Court Justices] have disproportionate influence on the development of constitutional norms, while most people have far less").

88. *See id.* at 10 ("People must be able to disagree with, denounce, and protest the Constitution-in-practice . . . so that they can help move the Constitution-in-practice toward arrangements that are closer to their ideals.").

89. *See supra* notes 78–79 and accompanying text.

90. *See* BALKIN, *supra* note 2, at 10 ("We must have faith that through the thrust and parry of constitutional politics, through waves of mobilizations and countermobilizations speaking in the name of the Constitution, our Constitution can be restored or redeemed over time to better approach our ideals.").

tional protestantism will guarantee that those other than legal elites will enjoy the ability to interpret and reimagine the Constitution.[91]

Balkin's description of constitutional faith is compelling, but in our view what is most important is faith in the capacity of political struggle to lead us to imagine and construct a future into which the liberatory ideals of our framework documents can be rooted. As Frederick Douglass famously said, "If there is no struggle there is no progress" because "[p]ower concedes nothing without a demand."[92] But, for Douglass, progress meant looking to the future, not to the past, by bridging the gap between lay persons and elites in the wielding of power.

B. Social Movement Activism as a Source of Law: The "Is," the "Ought," and the "What Might Be"

For us, what is missing from Balkin's protestant constitutionalism is a convincing account of where social movement power is located, and thus how social movements become a source of law. Balkin identifies the important role that "we the people" play in constitutional meaning-making,[93] but rarely do we hear the ideas or the voices of the people speaking for themselves. Members of what Balkin calls the political community participate in the construction of the "constitutional imaginary," but surely the elite who dominate that community cannot be the sole source of the muscle and connective tissue that binds the body politic together.

Instead of extracting his vision from a mix of concrete case studies, Balkin resorts to a list of competing forces that help create and recreate what Robert Post would call "constitutional culture," that is, the beliefs and constitutional values of nonjudicial actors.[94] Included

91. *Cf.* Rana, *supra* note 27, at 1051 ("A tragic sensibility demands of progressives both that they aggressively assert emancipatory commitments and that they embrace a judicious political ethics. Ultimately, it imagines an orientation to collective life animated by justice but tempered by the recognition of indissoluble paradox.").

92. Frederick Douglass, Speech Before the West Indian Emancipation Society (Aug. 4, 1857), *in* 2 PHILIP S. FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 437 (1950).

93. *See supra* note 80.

94. BALKIN, *supra* note 2, at 178–79, 272 n.27 (citing Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003)). Balkin notes that Robert Post "distinguishes between the views of authoritative interpreters [of the law], which [Post] calls constitutional law, and the views of nonjudicial actors (including both professionals and nonprofessional), which he calls constitutional culture." *Id.* Post also asserted that "the legitimacy of constitutional law depends in part upon what extrajudicial actors explicitly believe about the Constitution." Post, *supra*, at 9. But Balkin does not adopt Post's definition in its entirety; instead, he crafts his own definition. *See* BALKIN, *supra* note 2, at 178 ("A constitutional culture . . . is a

in Balkin's list of what sustains—and potentially perturbs—a constitutional culture are those who by virtue of their social networks, associations, and important institutional affiliations "produce a new equilibrium featuring a new constitutional common sense."[95] While the lawyers and judges formally construct the law, lay actors can also influence how the law is interpreted, enforced, or in fact popularly understood through their participation in the creation of our constitutional culture.[96]

Unlike Post, Balkin melds the constitutional culture with the constitutional canon. Because of this conflation, it is unclear what makes constitutional law—as opposed to constitutional culture—open to the influence of lay persons. Nor does Balkin specify what allows constitutional law to be "disturbed by social movement activism and day-to-day politics" in the production of a new constitutional common sense.[97] As a result, Balkin's theory of framework originalism,[98] even as reinforced by Sandy Levinson's "protestant constitutionalism,"[99] seems to focus primarily on the subculture of legal professionals (including judges, lawyers, and legal scholars). While social movement activists who seek to influence and remake the constitutional culture are given a place, we do not get to hear their voices as they tell their own stories.

Balkin certainly attempts to incorporate lay judgments in the mix in a way that explains their force. However, why one movement or one set of actors might have more impact than others is unclear. We recognize that he is not talking about the kinds of influence that are justified by rational choice theory, but the mechanism of influence is subsumed within his definition of culture. He acknowledges the potential diversity within a constitutional culture, but he asserts rather than explains the nature of the dynamism he has in mind.[100]

distribution of different views . . . . It is dynamic . . . [and] [i]t features many different subcultures, including professional and lay opinion, and the views of people both in and out of the mainstream of public life.").

95. BALKIN, *supra* note 2, at 178.

96. *See, e.g.*, *id.* at 23–24 (noting that democracy involves social input, rather than simply a "fair legal process," and that Balkin's idea of culture "include[s] both legal rights and institutions as well as cultural predicates for the exercise of those rights and institutions").

97. *Id.* at 178.

98. *See supra* Part I.

99. *See supra* note 77 and accompanying text (describing the theory of "protestant constitutionalism"); *see also* SANFORD LEVINSON, CONSTITUTIONAL FAITH 29 (1988) (explaining that a protestant approach to interpreting the Constitution is based on "the legitimacy of individualized (or at least nonhierarchical communal) interpretation").

100. *See, e.g.*, BALKIN, *supra* note 2, at 179 ("[P]rofessional judgments about constitutional law are usually affected—sometimes quite strongly—by lay judgments about what

It was in an effort to put "we the people" back into the conversation that we developed the idea of "demosprudence."[101] We coined the term as a critique of lawmaking that is historically preoccupied with moments of social change as if they occur primarily within an elite enterprise. Demosprudence—like Post and Siegel's democratic constitutionalism—seeks to provide a much thicker account of how social movements influence law, especially in times of social crisis.[102]

Demosprudence is a philosophy, a methodology, and a practice that views lawmaking from the perspective of informal democratic mobilizations and disruptive social movements that serve to make formal institutions, including those that regulate legal culture, more democratic. Although democratic accountability as a normative matter includes citizen mobilizations organized to influence a single election, a discrete piece of legislation, or a judicial opinion, demosprudence focuses on popular, purposive mobilizations that seek significant and sustainable social, economic, and/or political change. In short, we use the term demosprudence to mean the jurisprudence of social movements.[103]

By social movements we mean an organized effort to make moral claims based on a constructed collective identity and public action. Social movements are different than interest groups or political organizations because they usually make their claims in ways that are more dynamic, contentious, and participatory than the usual interest group or civic association. As Balkin notes, social movements are important because they shift "the boundaries of the reasonable, and the plausible" and thus "open up space for new forms of constitutional imagination and new forms of constitutional utopianism, both for good and for ill."[104] The most important thing that social movements do, therefore, is to alter "the sense of what is practically possible and

the Constitution means or should mean . . . because what legal professionals consider reasonable or unreasonable in legal argument is inevitably influenced by what the nonlawyers whom they live and interact with think about morals, politics, and the meaning of America.").

101. *See supra* notes 29–33 and accompanying text (discussing the concept of "demosprudence").

102. *See* Post & Siegel, *supra* note 31, at 379–80 (discussing "democratic constitutionalism" and its consideration of social crises).

103. *See, e.g.*, Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 545 n.39 (2009) (quoting LANI GUINIER & GERALD TORRES, CHANGING THE WIND: THE DEMOSPRUDENCE OF LAW AND SOCIAL MOVEMENTS (forthcoming) (manuscript on file with the authors)).

104. BALKIN, *supra* note 2, at 11. Balkin includes political movements, not just social movements, in his analysis. *Id.*

the sense of what it is possible to imagine."[105] Building on the Robert Cover observation with which we began this Essay, we would modify Balkin's effort to reflect the important role that social movements play in constructing the constitutional imaginary. It is the energy and the optimism of social movement activists, including lay people as well as legal professionals, who show us that the "what might be" is as important as the "is" and the "ought."[106]

Demosprudence seeks to put the "popular" back into popular constitutionalism. Balkin's "framework originalism," for example, might be more persuasive if it were more closely linked to on-the-ground narrative construals of social movement actors reclaiming or reconstructing the "constitutional imaginary." Social movement "jurisprudence," or what we call "demosprudence," is thus, in our view, crucial to Balkin's argument. Demosprudence helps Balkin's argument by explaining how the actions of otherwise disenfranchised members of the political community, such as black people living in the rural South during the 1960s, for instance, make it impossible for doctrines such as "interposition" to be taken seriously as a statement of constitutional argument.[107]

We agree with Elizabeth Beaumont, for example, when she says that the voices of political activists and the arguments of engaged citizens are too often edited out, and the constitutional arguments emerging from social movements are either commonly misappropriated or ignored because of a thin understanding of the idea of popular sovereignty.[108] As Beaumont writes, "If popular constitutio-

105. *Id.*

106. Cover, *supra* note 1, at 10.

107. *Compare* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 109 (1994) ("[L]egislators from various southern states traveled to Virginia to learn about interposition and school closure techniques"), *with* Dr. Martin Luther King, Jr., I Have a Dream, Address at the March on Washington for Jobs and Freedom (August 28, 1963) ("I have a dream that one day down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of 'interposition' . . . little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers."). We see this claim being raised in the current iteration of "our federalism," which suggests that states should be able to declare federal laws and judicial decisions unconstitutional. *See, e.g.*, Torres, *supra* note 29, at 546 (stating that the obligations of the government to the people are expressed through discussions of federalism as "fundamental limitations on the powers of the states that continue to animate current constitutional discourse").

108. Elizabeth Beaumont, *Reviving the Public Face of Constitutional Rights: Abolition as a Constitutional Project*, at 7 (2008) (unpublished manuscript), *available at* http://www.polisci.umn.edu/assets/pdf/Beaumont-PTColloq10-08.pdf ("We rarely hear the ideas, voices, or competing constitutional claims emerging from engaged citizens or those participating in social movements. There has been inadequate attention to the constitutional arguments, deliberations, and actions in which many aroused citizens participate.").

nalism is to be more than a mirage that flickers and disappears on approach, we need a thicker account of the role of the People in shaping constitutional meaning and practice."[109]

IV. CONCLUSION

For Balkin, constitutional faith becomes a redemptive force that will somehow be backed by a more robust form of constitutional politics.[110] Progressive activists, such as Martin Luther King, Jr., completely agree with Balkin. In his speech at the March on Washington in 1963, Dr. King declared: "When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir . . . . Now is the time . . . to make justice a reality for all of God's children."[111] Here, Dr. King directly invoked both our common heritage and the language of religion to bind us together.[112] Additionally, it is important to remember that the famous "I Have a Dream" speech was delivered at the culmination of one stage of the struggle to give meaning to the Civil War Amendments and at the uncertain beginning of its next phase.[113]

In our view, it is not the iconography but rather the blood and guts of political struggle that make Dr. King's dream now *seem* as though it were an inevitable reality. That the mechanism necessary to produce such a power shift in constitutional interpretation is a project

109. *Id.* at 8.

110. BALKIN, *supra* note 2, at 10–11 (stating that the Constitution may only succeed and "be redeemed" if the people and political movement support its advancement and have "faith in the processes of constitutional construction over time").

111. King, *supra* note 107.

112. Dr. King consistently fused religious metaphor with legal claims. For example, in his first speech at the Holt Street Baptist Church regarding the Montgomery bus boycott, Dr. King said:

> [Y]ou know, my friends, there comes a time when people get tired of being trampled over by the iron feet of oppression . . . . If we are wrong, the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong. If we are wrong, Jesus of Nazareth was merely a utopian dreamer that never came down to Earth. If we are wrong, justice is a lie. Love has no meaning. And we are determined here in Montgomery to work and fight until justice runs down like water, and righteousness like a mighty stream.

Dr. Martin Luther King, Jr., Address to MIA Mass Meeting at Holt Street Baptist Church (Dec. 5, 1955).

113. *See* Dr. Martin Luther King, Jr., I've Been to the Mountain Top, Address at Bishop Charles Mason Temple (April 3, 1968) (supporting the idea that the Poor People's Movement included more than just black people). This was Dr. King's last speech, in Memphis, Tennessee, the day before he was assassinated.

shaped by ordinary citizens is less clear in Balkin's account, yet evidence for this truth is everywhere to be seen.[114] A cardinal example of movement activism, demonstrating the indissoluble nature of social, political, and legal influences, occurred when 50,000 black citizens of Montgomery, Alabama, refused to ride city buses for over a year to eliminate the indignity of privately enforced public rules governing segregation.[115]

We suggest, therefore, that progressives might do better deemphasizing constitutional faith and, instead, developing more politically instrumental approaches to changing the way the Constitution's text is interpreted. In other words, members of a democratic political community should, of course, be free to interpret the constitutional scripture without formal guidance from an infallible oracle, but it is in their actions that they will find their meaning.

There is a semi-permeable membrane between elite actors and non-elite actors, and between the judiciary and non-judicial actors. All of the action, in our view, is contained in the tension between those parts of our broader culture and the constitutional culture. Many important constitutional moments occur when the judiciary effectively assimilates social movement interpretation by converting it to a doctrinal form.[116] Greater elaboration of the interpretive process would reveal both the power of ordinary people to change constitutional meaning and the mechanism by which elites domesticate threatening popular interpretations. When social movement activism is defanged by virtue of its co-optation by elites, the movement energy is redirected not because the movement activists may have prevailed but because of the widely held belief that politics, especially fundamental political struggle, can be reduced to questions that law can resolve.[117]

114. *See, e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064–65 (2002) (identifying the civil rights, women's rights, and gay rights movements as three key examples of ordinary citizens shaping constitutional interpretation).

115. MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 58 (1967) (stating that "[t]he 1956 bus boycott in Montgomery, Alabama, ended segregation on the buses not only of that city but in practically every city of the South").

116. *See* Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 28 (2005) (stating that over time, many social movement interpretations have "become part of constitutional doctrine, after being filtered, reshaped, and recharacterized by judges").

117. *Id.* at 30 (identifying altering "elite public opinion" as one key mechanism through which social movements influence constitutional interpretation); DE TOCQUEVILLE, *supra* note 57, at 310 (recognizing the general perception of the American public that there is no political question that does not inevitably "resolve itself into a judicial question");

In the end, we urge legal scholars to expand Professor Balkin's argument by rooting it in Robert Cover's constitutional imaginary. Balkin has helped open the door to the role of "We the People" in making and changing law.[118] Robert Cover is right, however, that in this process those who rely only on the "is" or the "ought" are forgetting the fundamental importance of keeping in view the "what might be." What is missing in Balkin's argument, therefore, is a more grounded account of popular sovereignty and a thicker description of how "We the People," not just lawyers, judges, and conventional political elites, but ordinary people, can work together to shape constitutional meaning and practice. Thus, to recapture the distributive constitutional tradition, a new interpretive space is necessary, one that will mobilize rather than redeem "We the People" in the service of the better angels of our constitutional tradition.

TUSHNET, *supra* note 30, at 145 (stating that "[b]y 1954 segregation was an embarrassment to a national political elite concerned about how the United States looked to the rest of the world").

118. *See* BALKIN, *supra* note 2, at 28 ("[T]he Constitution means what it means because We the People made a promise in the past to ourselves that we strive to fulfill.").