

## Redeeming and Living with Evil

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## REDEEMING AND LIVING WITH EVIL

MARK A. GRABER\*

Self-centered scholars and fading actresses declare, “Enough about me. Let’s talk about you. What do you think of me?” This symposium is dedicated to talking about Sanford Levinson’s *Constitutional Faith*<sup>1</sup> and Jack Balkin’s *Constitutional Redemption: Political Faith in an Unjust World*.<sup>2</sup> The first is a time-honored classic. The second is what ESPN calls an instant classic. The essays in this collection justly celebrate each work for its distinctive contributions to the American constitutional enterprise. This more selfish essay explores what Balkin and Levinson think of me in general and *Dred Scott and the Problem of Constitutional Evil* in particular.<sup>3</sup>

The justification/rationalization for this pathetic display of ego is that all three works emphasize the problem of constitutional evil. Constitutional evil provides the central challenge to both constitutional redemption and constitutional faith. Balkin declares, “The problem of constitutional evil is the possibility that the Constitution, as it operates in practice, permits or even requires great injustice.” This problem, he writes, “haunts us and threatens our constitutional faith.”<sup>4</sup> Levinson, while not using the phrase “constitutional evil,” meditates on how the Constitution can be an object of faith given the perceived injustices constantly justified in the name of the Constitution. His constitutional faith requires “a renewed dedication to . . . the Constitution as an ever-living presence encouraging the establishment of a more perfect Union committed above all to the realization of justice and the blessings of liberty.”<sup>5</sup> He unsurprisingly regards the “constitutionally legitimized presence in American history” of chattel slavery as “the most difficult problem presented those who

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1. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (rev. ed. 2011) (1988) [hereinafter LEVINSON, *CONSTITUTIONAL FAITH*].

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

3. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

4. BALKIN, *supra* note 2, at 7.

5. LEVINSON, *CONSTITUTIONAL FAITH*, *supra* note 1, at 180.

would celebrate the Constitution.”<sup>6</sup> Just as Grant is buried in Grant’s tomb, so *Dred Scott and the Problem of Constitutional Evil* elaborates on the problem of constitutional evil. This problem, the introduction states, “concerns the practice and theory of sharing civic space with people committed to evil practices or pledging allegiance to a constitutional text and tradition saturated with concessions to evil.”<sup>7</sup> All three works regard slavery as the quintessential constitutional evil, although each recognizes the omnipresence of different constitutional evils in the contemporary constitutional regime.

*Constitutional Redemption* and *Constitutional Faith* understand the problem of constitutional evil quite differently than *Dred Scott and the Problem of Constitutional Evil*. Balkin and Levinson regard constitutional redemption and faith as rooted in the possibility that Americans will eventually defeat evil. *Constitutional Evil* takes the far more pessimistic view that evil will never be defeated. Constitutional faith and redemption in our permanently fallen state is rooted in the possibility that Americans will find ways of living with each other peaceably knowing that the price of union is the continual obligation to make what the abolitionist William Lloyd Garrison described as “a covenant with death, and an agreement with hell.”<sup>8</sup>

These different perspectives on constitutional evil can be exaggerated. Balkin and Levinson recognize that the official Constitution sanctions a good many unjust practices. Our constitutional faith requires us to live with these evils at present in the unproven hope that such injustices are on what Lincoln maintained was “a course of ultimate extinction.”<sup>9</sup> *Constitutional Evil* would not have Americans abandon aspirationalist perspectives on the constitutional order. “As long as constitutional institutions yield policies that protect vital interests,” the book asserts, “citizens are free to use all constitutional means to make the Constitution ‘the best it can be.’”<sup>10</sup>

Nevertheless, as the very titles suggest, *Constitutional Faith* and *Constitutional Redemption* have a fundamentally different perspective on the American constitutional project than *Constitutional Evil*. Balkin and Levinson see that constitutional project as committed to redeeming us from evil, either through constitutional interpretation or consti-

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6. *Id.* at 186.

7. GRABER, *supra* note 3, at 1.

8. See WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 205 (1963).

9. Abraham Lincoln, Speech at Cincinnati, Ohio (Sept. 17, 1859), in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 454–55 (Roy P. Basler ed., 1953).

10. GRABER, *supra* note 3, at 251.

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tutional change. *Constitutional Evil* sees that constitutional project as committed to finding ways of learning to live with evil, either because we are unlikely ever to be redeemed from evil or because redemption is too distant in the future to make the Balkin/Levinson project of overwhelming interest to the living.

Part I of this Essay elaborates and strengthens the case Balkin, in particular, makes for constitutional redemption. *Constitutional Redemption* offers the best and most sober perspective on how the Constitution promotes complicity with perceived injustice and blinds citizens to the degree of constitutional evil in the United States. Worse, constitutional evils in the United States are almost always the consequences of “really rotten bargains.” Unlike rotten bargains, which merely deny fundamental human rights, really rotten bargains are agreements between *A* and *B* to deprive *C* of fundamental rights. Such agreements are “really rotten” because *A* derives benefits from the bargain, even though *A* (although perhaps not *B*) acknowledges that *C* is being deprived of fundamental rights. The case for redeeming a constitutional order from these kinds of constitutional evils is far greater than the need to purify a constitutional order in which each party imposes a constitutional evil on the other in return for benefits that the other party believes unjust.

Part II explains why constitutional faith and redemption may nevertheless entail enduring accommodations for constitutional evils. Faith and redemption are more complicated than *Constitutional Redemption* suggests. The fans of very bad baseball teams are often described as faithful, even though they recognize their team is unlikely to improve. What marriage partners do when they pledge faith to each other has changed over time. Constitutional faith and redemption similarly depend on the point of the constitutional project. The Preamble to the Constitution makes clear that the constitutional project has multiple purposes. The constitutional commitment to “establish justice” commits Americans to eradicating constitutional evil. The constitutional commitment to “provide for the common defense” may commit Americans to accommodate constitutional evil. The constitutional commitment to “secure the Blessings of Liberty to ourselves and our Posterity” may even compel Americans to make evil constitutional discriminations.

The constitutional commitments set out in the Preamble are not ordered. Americans are as constitutionally obligated to “provide for the common defense” as they are to “establish justice.” Contemporary constitutional theory has been too obsessed with the latter at the expense of the former. One problem with this constitutional obsession

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with justice is the refusal to treat as constitutional the compromises necessary to achieve other constitutional purposes. The more serious problem, which has become a central theme in Levinson's most recent work, is a failure to do any serious analysis of whether constitutional institutions remain good vehicles for achieving such constitutional purposes as the common defense.<sup>11</sup>

## I. REDEEMING THE CONSTITUTION

### A. *Redeeming Constitutional Evils*

Chapter 5 of *Constitutional Redemption* offers a profound meditation on constitutional evil. Balkin's specific concern is the possibility that "fidelity" to the Constitution "is undesirable because it co-opts us into the maintenance of an unjust order."<sup>12</sup> "If the Constitution, or parts of it, permits or even requires great evils," he asks, "why does it deserve our fidelity, and what does the practice of pledging faith in it do to us."<sup>13</sup> This emphasis on "what the practice of pledging faith in it do[es] to us" highlights the ethical dimension of constitutional faith. The religious problem of evil is ontological. How can we believe a just, all-powerful God exists in the face of apparent injustice. Religious leaders frequently insist that we may not fully understand divine ways and means, but few claim that adherents must do what is really evil should God command injustice. A deity who commanded injustice would not be worthy of worship and obedience. The problem of constitutional evil is normative. No one questions that the Constitution of the United States exists. The concern is the grounds on which we can pledge allegiance and obedience to a constitution when doing so compels us to participate in various constitutional evils. If we do not obey Baal's command for human sacrifice, why should opponents of capital punishment regard as binding the Eighth Amendment if that provision sanctions the death penalty?

Balkin's analysis begins with the possibility that theories of constitutional interpretation provide an adequate remedy for the problem of constitutional evil. *Constitutional Redemption* notes the common

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11. See, e.g., SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012) [hereinafter *LEVINSON, FRAMED*]; SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006) [hereinafter *LEVINSON, OUR UNDEMOCRATIC CONSTITUTION*]; Sanford Levinson, *How I Lost My Constitutional Faith*, 71 MD. L. REV. 956 (2012).

12. BALKIN, *supra* note 2, at 107.

13. *Id.* at 109.

tendency to deny constitutional injustice by propounding what Balkin aptly calls “the shadow Constitution.” This is “the Constitution that would exist if it were rightly interpreted, a Constitution that strips and purifies existing constitutional law of its defects and shortsightedness.”<sup>14</sup> Religious adherents claim that apparent divine injustices in sacred texts are only metaphors. Constitutional adherents explain that apparent constitutional evils stem from misreading constitutional scripture. Properly interpreted, Baal does not command human sacrifice and the Eighth Amendment does not sanction the death penalty. The liberal shadow Constitution prohibits capital punishment, mandates same-sex marriage, and gives Congress the power to pass the Affordable Care Act. The conservative shadow Constitution gives states the power to ban abortion, prohibits all affirmative action, and denies congressional power to pass the Affordable Care Act. Both the contemporary liberal and the contemporary conservative shadow Constitutions provided little or no protection to slaveholders during the 1840s and 1850s. The slaveholder shadow Constitution of 1850, of course, provided greater protections to human bondage than Jacksonian constitutional authorities.<sup>15</sup> Evil, these proponents of religious and constitutional orthodoxy agree, results from persons being unfaithful to the true text and not from inherent flaws in their religion or the Constitution of the United States.

The problem with this solution to the problem of constitutional evil, Balkin understands, is that Americans may evade their complicity in constitutional evil by misidentifying “the real or true Constitution with a shadow Constitution that has never existed.”<sup>16</sup> Participation in a faith community entails responsibility for what that community has done and is presently doing. Baal worshippers are part of a community that practices human sacrifice, even if some believe that Baal does not actually command that ritual. Persons who profess constitutional faith are part of a community that has sanctioned slavery, engaged in racial apartheid, silenced political dissenters, and justified numerous other injustices in the name of the Constitution. Balkin correctly notes, “The practice of fidelity to the Constitution . . . cannot be fully separated from what the Constitution has been used to justify or per-

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14. *Id.* at 113.

15. See CONG. GLOBE, 36th Cong., 1st Sess. 658–59 (1860) (speech of Jefferson Davis) (claiming Congress had a constitutional obligation to pass a slave code for the territories); *United States v. Haun*, 26 F. Cas. 227 (C.C.S.D. Ala. 1860) (No. 15,329) (rejecting slaveholding claims that congressional power over the importation of slaves be narrowly interpreted).

16. BALKIN, *supra* note 2, at 119.

mit in the past and what it is currently used to justify or permit.”<sup>17</sup> Contemporary liberals pledge allegiance to a Constitution that presently sanctions the death penalty. Contemporary conservatives pledge allegiance to a Constitution that presently sanctions abortion. The problem of constitutional evil concerns the justification for complicity in these putative, unjust practices.

Constitutional fidelity is particularly troublesome when Americans consciously or subconsciously judge best political practices in light of constitutional standards. If proponents of the shadow Constitution are guilty of adjusting the meaning of constitutional provisions to fit some desirable conception of justice, many of their fellow citizens stand accused of adjusting conceptions of justice to fit the Constitution. Felix Frankfurter identified this problem when he described as “a great enemy of liberalism” the American “tendency . . . to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional.”<sup>18</sup> Balkin elaborates on this theme:

Fidelity to the Constitution combined with the general recognition that the Constitution protected slavery during the antebellum period probably led many to believe that slavery, although an evil, was not so great an evil that it had to be abolished immediately, and that a compromise of some sort could be struck with the South and its “peculiar institution.”<sup>19</sup>

If the Supreme Court does not interpret the Constitution as protecting basic necessities,<sup>20</sup> then maybe persons have no fundamental human right to adequate food, clothing, and shelter.<sup>21</sup>

Constitutions distort American conceptions of good governing institutions as well as American ideals of justice. Levinson points out that one consequence of constitutional faith is that Americans instinctively regard such constitutional processes as the Electoral College and equal state representation in the Senate as having virtues that are discerned by no other constitutional regime.<sup>22</sup> The new edition of *Constitutional Faith* concludes:

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17. *Id.* at 118.

18. *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 670 (1943) (Frankfurter, J., dissenting).

19. BALKIN, *supra* note 2, at 134.

20. *See Dandridge v. Williams*, 397 U.S. 471 (1970).

21. *See, e.g.,* Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731 (1997).

22. *See* LEVINSON, *FRAMED*, *supra* note 11; LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*, *supra* note 11.

It is impossible . . . for me not to believe that this move toward “fundamentalist inerrancy” on the part of many of those with excess “constitutional faith” is both intellectually indefensible and, more importantly, a potential threat to our future as a nation in that it stifles the possibility of necessary *forward-looking* reforms that are self-consciously willing to jettison many aspects of our constitutional past.<sup>23</sup>

This constitutional complacency, Levinson and Balkin agree, facilitates unnecessary constitutional accommodations for evil and, worse, blinds Americans to the extent of contemporary constitutional evil (or stupidity).<sup>24</sup>

Constitutional fidelity may nevertheless be justified because of what the Constitution might someday become. Levinson famously adopted this position when deciding to affix his name to the Constitution displayed in Philadelphia during the Bicentennial Celebration. After a wonderful discourse on what signing entails, Levinson concludes, “I was ultimately compelled to add my signature by the memory of Frederick Douglass and *his* willingness to embrace the Constitution.”<sup>25</sup> In sharp contrast to most abolitionists, Douglass insisted the Constitution condemned slavery. “The Constitution, as well as the Declaration of Independence, and the sentiments of the founders of the Republic,” Douglass declared when responding to the Supreme Court’s decision in *Dred Scott v. Sandford*,<sup>26</sup> “give us a platform broad enough, and strong enough, to support the most comprehensive plans for the freedom and elevation of all the people of this country, without regard to color, class, or clime.”<sup>27</sup> Douglass’s “ability to speak in terms of the Constitution—and to stretch the sense of constitutional possibility,” Levinson writes, “helped to overcome my genuine doubts.”<sup>28</sup>

Famously, Levinson has partly recanted that signature because he no longer believes the Constitution is an adequate instrument for securing the blessings of liberty.<sup>29</sup> While Levinson remains confident that the rights provisions in what he calls the “Constitution of Conver-

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23. LEVINSON, CONSTITUTIONAL FAITH, *supra* note 1, at 254–55.

24. *See generally* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

25. LEVINSON, CONSTITUTIONAL FAITH, *supra* note 1, at 192.

26. 60 U.S. 393 (1857).

27. FREDERICK DOUGLASS, SELECTED SPEECHES AND WRITINGS 344, 350 (Philip S. Foner ed., 1999).

28. LEVINSON, CONSTITUTIONAL FAITH, *supra* note 1, at 192.

29. LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 11, at 5.

sation” can be interpreted to protect such fundamental rights as the right to same-sex marriage, he vigorously maintains that the provisions describing the institutions in the “Constitution of Settlement” are both “indisputable” and anachronistic.<sup>30</sup> American constitutional institutions, he maintains, have lost their capacity to establish justice and facilitate other worthy constitutional goals.<sup>31</sup> Levinson’s afterword to the new edition of *Constitutional Faith* states, “the Constitution of Settlement serves to make difficult, if not impossible, the achievement of the magnificent vision in the altogether commendable Preamble.”<sup>32</sup>

Balkin is more optimistic. Both he and Levinson agree that constitutional faith must be rooted in future possibilities rather than present realities. Balkin declares, “Fidelity is activity, process, coming into being.”<sup>33</sup> Balkin’s constitutional commitment is to a more just future constitutional order and to the possibility that the present Constitution contains the means necessary for challenging and eventually eradicating existing constitutional evils. In sharp contrast to the proponent of a shadow Constitution, who merely believes that the Constitution might be better interpreted, Balkin insists that constitutional faith requires Americans to believe that the Constitution will be interpreted more justly over time. *Constitutional Redemption* states:

[A]spirationalism begins with the problem of constitutional evil, viewing it as a basic condition of politics that must perpetually be overcome, often at great cost. At the same time, aspirationalism holds that despite constitutional evil, adequate resources for constitutional redemption exist: in the text of the Constitution, in the multiple layers of the constitutional tradition, and in the moral aspirations and commitments of the people who live under the Constitution and carry the project of self-governance forward through time.<sup>34</sup>

Unlike Levinson, Balkin retains the faith in a just constitutional future. He ends his meditation on constitutional evil, appropriately, with a sermon on constitutional possibilities and risks:

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30. LEVINSON, FRAMED, *supra* note 11, at 19.

31. See Sanford Levinson, *How I Lost My Constitutional Faith*, 71 MD. L. REV. 956, 966 (2012) (stating that the “structural provisions of the Constitution, for better and, I believe, very much for worse, make it nearly impossible to pass legislation that truly addresses the major problems of our time”).

32. LEVINSON, CONSTITUTIONAL FAITH, *supra* note 1, at 251.

33. BALKIN, *supra* note 2, at 119.

34. *Id.* at 120–21.

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I . . . want to believe in the Constitution. I want to remain faithful to it, and I want others in the legal profession, government administrators, legislators, and judges to remain faithful to it as well. I am deeply saddened and troubled when they betray it and its promises, when they trample on its letter and its spirit for political advantage and personal gain. I believe, moreover, that the Constitution is more than its positive law, that the Constitution has not yet been redeemed, and I hope every day for its eventual redemption. I know that many who read these words join me in this hope. But as you, and I, and all of us expound our faith in the Constitution, we must also understand what our faith does to us. We must recognize that fidelity to the Constitution has a power over us, that fidelity is not only legitimate but that it also legitimates. When we discuss fidelity, we are not discussing a property of interpretation but a predicament of human existence. To be faithful is to gamble, and the stakes we offer are not our property, but our integrity, not only our lives and fortunes, but our sacred honor. Let us have faith then, but let us have faith that our faith is not in vain.<sup>35</sup>

Amen.

*B. Redeeming Really Rotten Constitutional Bargains*

Amen is particularly appropriate because most constitutional evils are the product of “really rotten compromises.” Rotten compromises are conventionally understood as agreements “to establish or maintain an inhuman regime, a regime of cruelty and humiliation, that is a regime that does not treat humans as humans.”<sup>36</sup> Really rotten compromises have a second characteristic. They are compromises in which the crucial parties to the constitutional bargain agree that the price of union will be the sacrifice of what at least some parties recognize to be the fundamental rights of non-participants in the negotiating process. Rotten constitutional bargains occur when *A* and *B* agree that *B* will make some concessions to *A* in return for being constitutionally permitted to deny *A* what *A* regards as fundamental rights. Really rotten constitutional bargains occur when *A* and *B* agree that *B* will be permitted to deny what *A* regards as some of *C*'s fundamental rights if *B* makes other concessions to *A*. The Constitution of 1787 was a really rotten constitutional compromise. Many

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35. *Id.* at 138

36. AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 2 (2009).

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Americans who recognized that slavery was an inhuman practice nevertheless agreed to tolerate African-American slavery in order to secure the “blessings” of union and, with respect to the free states, certain constitutional provisions that favored commercial enterprises.

The common assertion that “rotten compromises are not allowed, even for the sake of peace”<sup>37</sup> seems mistaken when the compromise in question is not “really” rotten. For historical or other reasons, people may find themselves in circumstances in which they have very good reasons to make constitutional bargains with others they believe are committed to “an inhuman regime.” Iraq may be a good example. If neither Shiite nor Sunni nor Kurd is permitted to pledge allegiance to a constitution that contains what each believes is a fair degree of constitutional evil, then a fair probability exists that no Iraqi Constitution will likely survive for any period of time. Persons in this awful situation should be allowed to bargain with their rights, agreeing to be treated in ways they may think of as inhuman in return for being permitted to treat others in ways that the others regard as inhuman.

The 2005 Constitution of Iraq is a good example of a rotten bargain that is not a really rotten bargain, particularly with respect to provisions on the rights of women. Women, women’s rights groups, and various forces committed to gender equality participated in drafting the most recent Constitution of Iraq. Their efforts helped secure provisions recognizing gender equality and mandating an electoral system likely to result in women holding one-quarter of all seats in the national legislature. Religious fundamentalists committed to traditional gender roles were also crucial parties during the constitutional bargaining. They secured constitutional provisions that recognized both the authority of Sharia and the authority of local clerics to interpret Sharia on most matters of family law.<sup>38</sup> Each side to the constitutional bargain believes their rights were damaged by provisions the other side regarded as securing their fundamental interests.

The really rotten bargain Americans reached in 1787–1789 is quite different than the merely rotten bargain Iraqis reached in 2005. The American bargain was rotten in the obvious sense that slavery is an “inhuman regime . . . that does not treat humans as humans.”<sup>39</sup> As

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37. *Id.* at 1.

38. This paragraph relies heavily on Olivia St. Clair, *Building Backwards: Helping Heal Iraq Through Women’s Rights*, 19 TEX. J. WOMEN & L. 81, 81–85 (2010); Shiva Falsafi, *Civil Society and Democracy in Japan, Iran, Iraq and Beyond*, 43 VAND. J. TRANSNAT’L L. 357, 428–33 (2010).

39. MARGALIT, *supra* note 36, at 2.

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important, American slaves were not represented when constitutional protections for slavery were negotiated. At least some prominent Iraqi women appear to have concluded that women were better off under the Iraqi Constitution of 2005 than under other politically feasible alternatives, including an Iraq in which agreement on a constitution could not be reached. No African-American representative concluded, rotten as the constitutional bargain was, that slaves were better off “in” a Union in which slavery was no longer legal in some states than in a regime in which few questioned the legality or morality of slavery.

Really rotten constitutional bargains produce more troubling constitutional evils than merely rotten constitutional bargains. Jeremy Waldron’s analysis of “the circumstances of politics” suggests that merely rotten constitutional bargains are sometimes an inevitable feature of the human condition. The circumstances of politics occur when there is a “felt need among members of a certain group for a common decision or course of action on some matter, even in the face of disagreement about what that framework, decision, or action should be.”<sup>40</sup> The principle that no one should obey an unjust bargain, under these conditions, may prevent an agreement that all parties agree guarantees more rights than the status quo. By comparison, people are rarely if ever forced into circumstances in which they must make really rotten bargains, bargains between *A* and *B* that deprive what *A* and *C* agree are *C*’s fundamental rights. Even if *B* will not bargain with *C*, *A* will usually retain the option of consulting with *C* before reaching agreement with *B*. Put differently, neither party to a merely rotten bargain may self-consciously demand constitutional evil. The constitutional evils that occur are simply consequences of severe disputes over justice. By comparison, at least one party to a really rotten bargain is self-consciously agreeing to impose a constitutional evil on a non-participant.

Really rotten constitutional bargains are likely to be more unjust than merely rotten constitutional bargains made in the circumstances of politics. The participants in merely rotten constitutional bargains have self-interested reasons for minimizing the extent of constitutional evil they will suffer when the constitution is ratified and maximizing the benefits obtained for those concessions. Fundamentalist clerics in Iraq unduly influence family law at present, but their authority may be weakened in the long run if the constitutional price for that accommodation, substantial female representation in the national legisla-

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40. JEREMY WALDRON, *LAW AND DISAGREEMENT* 102 (1999).

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ture, is paid in full. Self-interest does not, however, mitigate the constitutional evils sanctioned by really rotten bargains. Because *A* is not personally affected by the constitutional evil to be inflicted on *C*, *A* may be unlikely to minimize the nature of that evil, be unduly resigned to the intractability of that evil, or trade away that evil too lightly. Even if abolishing slavery in 1787 was impossible, Framers who had every incentive to avoid the overseer's lash would likely have reached a better constitutional bargain than northern delegates all too willing to look the other way in order to secure different blessings of union.

Really rotten bargains that permit *A* and *B* to do what *A* and *C* believe is an injustice to *C* are a particular concern for contemporary constitutionalism. American constitutional evils in the present do not appear to be as heinous as the constitutional evils of the past. Putting aside the case of abortion, which may be genocide if the unborn have the same right to life as the born,<sup>41</sup> most contested contemporary constitutional practices in the United States and other constitutional democracies<sup>42</sup> do not seem as vicious as slavery, even to their opponents. Gay and lesbian citizens lead far more human lives than most slaves, even when they are not permitted to marry. Forcing people to endure public prayer in schools or refusing to allow public prayer in public schools is a quite different violation of religious freedom than throwing people in gas ovens because they worship the wrong rock or the right rock in the wrong way. Rather, what may concern many progressive constitutionalists is how perceived power discrepancies influence constitutional and political bargaining. When rich Democrats compromise with rich Republicans on a series of tax and spending cuts that deprive the poor of vital resources that most rich Democrats believe to be an injustice to the poor, the problem is less that the present tax code is an inhuman system, but the ways in which the campaign finance system may limit the capacity of poorer Americans to participate in budgetary processes.

These ruminations on really rotten constitutional bargains buttress Balkin's call to be hypersensitive to the both the duty and risks of constitutional fidelity and redemption. The legal elites who read articles in the *Maryland Law Review* have a special constitutional obliga-

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41. Many pro-life advocates insist abortion is a form of genocide. See Michael Stokes Paulsen, *Paulsen, J., Dissenting*, in *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS RELATE AMERICA'S MOST CONTROVERSIAL DECISION* 196, 211–14 (Jack M. Balkin ed., 2005).

42. Constitutional theocracies present different problems. See RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010).

tion to minimize constitutional evil because, in large part, constitutional evils are injuries we impose on others in order to obtain benefits for ourselves. Convinced that we cannot end slavery, we agree to provide some accommodation for human bondage in order to increase our commercial prosperity. Recognizing that the Supreme Court will not guarantee rights to basic necessities, our constitutional theories begin to focus more on the reproductive and intimacy rights favored by affluent citizens than providing the less fortunate the resources they need to survive.<sup>43</sup> The free speech law we celebrate provides far greater protections for those who use private resources to speak than persons who require public spaces or funds to gain access to the marketplace of ideas.<sup>44</sup> *Constitutional Redemption* makes us alert to both of these possibilities and provides resources for championing a more just constitutional order.

## II. FAITH AND REDEMPTION

Rotten constitutional bargains challenge the project of constitutional redemption. Persons who make rotten constitutional bargains make pledges to accommodate injustice. A strong case can be made that such agreements should be revised, renegotiated, or repudiated, not redeemed. Rather than redeem the promises the Framers made to slaveholders in 1787, Americans should have striven for the “new birth of freedom” Abraham Lincoln promised in the Gettysburg Address.<sup>45</sup> Contemporary proponents of gender equality are best described as committed to interpreting narrowly rather than redeeming in full the promises Iraqis made to religious fundamentalists in 2005.

The way in which Balkin and Levinson tie faith and redemption suggests that constitutions, at least the Constitution of the United States, have internal resources that permit adherents to transform the constitutional order without abandoning the central commitments of the original constitutional bargain. To have faith in the Constitution or in a religious tradition, in their view, is to believe the object of that

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43. See Graber, *supra* note 21, at 58.

44. See DAVID KAIRYS, “FREEDOM OF SPEECH,” *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., Basic Books 3d ed. 1998); Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 *HARV. L. REV.* 32, 109–16 (1993).

45. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), in *THE SPEECHES OF ABRAHAM LINCOLN: INCLUDING INAUGURALS AND PROCLAMATIONS* 368, 368 (G. Mercer Adam ed., 1906). The Gettysburg Address was given at the dedication of the Gettysburg National Cemetery four months after the Battle of Gettysburg.

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faith is the path or a path to the good, the true, and the beautiful, or at least the significantly better. "One must believe," Balkin writes,

that, on the whole, the institute is a good thing, and not a bad thing, and that to further its purposes is also, on the whole, a good thing, and not a bad thing. Even if particular actions one does on behalf of the institution are personally troubling, one must believe that, in the long run, hewing to one's institutional role means that thing will work out for the best.<sup>46</sup>

Balkin has faith in the Constitution of the United States because he believes social movements can successfully invoke constitutional principles to keep abortion legal, grant same-sex couples the right to marry, and provide all Americans with adequate health care. Levinson signed the Constitution in 1988 because Frederick Douglass believed that the text could be interpreted as mandating the abolition of slavery. He lost faith in the constitutional order when he perceived unredeemable internal deficiencies in constitutional institutions that he regards as more likely to lead the nation off a cliff than to the promised land.

This perfectionist interpretation of constitutional faith and redemption seems false to several crucial components of the constitutional experience, in particular the constitutional experience with rotten bargains. First, persons who make rotten constitutional bargains may be primarily concerned with improving their situation in the present, not achieving some distant goal in the future. Rotten constitutional bargains enable persons who disagree on some matters to cooperate on others. Constitutional redemption is, therefore, best measured by whether accommodating the constitutional evil enables persons to successfully cooperate on matters in which an agreement can be reached. Second, constitutions are joint enterprises between actual people. The Constitution of the United States could not have been ratified if crucial participants in the United States announced that the text was best interpreted as compelling emancipation. The crucial constitutional issue is whether a constitution establishes a regime that most persons find tolerable, particularly in light of feasible alternatives, than one they find perfect.<sup>47</sup>

Whether faith and redemption require the possibility of perfection or substantial improvement is contestable. People often have

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46. BALKIN, *supra* note 2, at 124.

47. See generally Mark A. Graber, *Our (Im)Perfect Constitution*, 51 REV. POLITICS 86 (1989).

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faith in very imperfect things. We speak of the faithful fans of very bad sports teams. The participants in royal weddings during the Middle Ages did not expect modern forms of marital bliss when they pledged faith to each other. By understanding how many sports fans and medieval queens experienced faith and redemption, we may gain a broader perspective on constitutional faith and redemption in our time.

A. *Redeeming the Kansas City Royals and Medieval Marriages*

Baseball fans in Balkin's native Kansas City experience faith and fidelity without the possibility of redemption, at least as redemption is understood in *Constitutional Redemption*. The faithful fans of the Kansas City Royals have witnessed years of futility without any realistic chance of winning the World Series.<sup>48</sup> They nevertheless demonstrate their fidelity by enduring near-freezing weather every September to see their team compete against another squad, both of whom were mathematically eliminated from the pennant race weeks ago, knowing that any good young player they might see will in the near future either be traded to the Boston Red Sox or purchased as a free agent by the New York Yankees. Perhaps such fans hope that, one day, the Royals will indeed win the World Series or at least win more games than they lose. Still, hardly any would say that most Kansas Royal fans have faith in a future in which the Royals are consistently one of the better teams in baseball. Nor do most fans of perennially bad athletic teams justify their faith and fidelity by pointing to the moral virtues of either the players or management on the hapless nine.

Baseball fans are considered faithful only when they remain loyal to the team when redemption seems impossible. They do not leave in the fifth inning when the team is already down nine runs. They are critical of those who give away tickets to "meaningless" games. While they sometimes talk about that star third baseman deep in the Royals minor league system, their faith and fidelity is unrelated to any confidence that the Royals will in the future be much better. Indeed, sports fans are considered to be faithful to the extent that their behavior is completely unrelated to the present and future prospects of the object of their faith.

Marriage provides another perspective on the complex relationship between objects of faith and redemption. Pledging faith in a

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48. See Kansas City Royals, Team History & Encyclopedia, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/teams/KCR/> (showing that the Royals have had only three winning seasons in the last twenty years, and none since 2003).

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marriage partner is far more presentist than Balkin or Levinson's constitutional faith. Actresses in the musical comedy "Guys and Dolls" may sing, "marry the man today, and change his ways tomorrow," but marriage counselors consistently maintain that one should not walk down the aisle expecting one's spouse to become a completely different person in the foreseeable future. Of course, marriage partners expect their spouses to change as they age for the simple reason that people change when they age. Nevertheless, unless one is a character in an English romance novel, one should only get married to a person one believes is a decent person, not a person one believes over time might become a decent person.

What constitutes redemption in marriage has changed. When Eleanor of Aquitaine pledged faith to Louis VII of France and, later, Henry Plantagenet, she was making a very different set of commitments than most contemporary American couples do when they pledge faith to each other.<sup>49</sup> The faith medieval queens had in their marriages was not tested when the king had a mistress. This, one suspects, was to be expected. Rather that faith was redeemed when their eldest surviving son, not a son of those other women, took the throne upon the king's death. By comparison, contemporary couples emphasize sexual fidelity and love far more than the participants in past-arranged royal marriages.

The examples of baseball and marriage suggest that faith and redemption are linked to the purpose of an enterprise, that the purposes of various enterprises may be contested, and that those purposes often change over time. Some baseball fans retain their faith only when they can truly say "wait 'til next year." Others find their faith redeemed, perversely, by a lifetime of near and spectacular misses. Some persons' faith in their marriage partner is redeemed when they or their children obtain a certain status. For others, faith is redeemed by a lifetime of love. Faith may be rooted in present realities or future prospects. One may pledge faith to the handsome or beautiful person before them or to the person who has the prospect of being the ruler of England or a senior partner at a prominent law firm. Faith may or may not have an element of perfection. One may cheer for a team because they have particularly promising young players or simply because that is the hometown team.

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49. For a good biography of Eleanor of Aquitaine, see MARION MEADE, *ELEANOR OF ACQUITAINE: A BIOGRAPHY* (1991). For a good account of the changing status of love and sexual fidelity in marriage, see STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE* (2005).

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A constitutional faith that resembled the faith of Kansas City Royal baseball fans, medieval queens, or contemporary newlyweds would be redeemed quite differently than what Balkin and Levinson consider constitutional redemption. A constitutional faith inspired by faithful Kansas City Royal fans would simply accept the Constitution as is, with all the warts. Redemption would simply come with the sense of belonging experienced by those persons who say, “my country, right or wrong.” A constitutional faith inspired by medieval queens would be experienced more as a duty, with a possible payoff, than an aspiration to a more perfect marriage. A constitutional faith inspired by newlyweds would focus more on present virtues than future possibilities.

*B. Redeeming the Entire Preamble*

The examples of baseball and marriage suggest that whether constitutional faith involves the eventual redemption of really rotten bargains depends on the point of the constitutional enterprise. Balkin agrees. He is “interested in the question of what attitude members of the public must have toward the constitutional project in order for it to be legitimate.”<sup>50</sup> For Balkin, the point of the constitutional enterprise is justice. “Citizens,” he claims, must “have the resources necessary to move the Constitution closer to their idea of what their Constitution means and should mean.”<sup>51</sup> Redemption occurs when the rotten constitutional bargains of the past are undone, either by interpretation or amendment. From the perspective offered by *Constitutional Evil*, the point of the constitutional enterprise is to enable people who disagree over fundamental political principles to nevertheless share civic space.<sup>52</sup> The constitutional challenge is getting people who disagree on the nature of the just society to cooperate for other constitutional purposes. Redemption occurs when people who disagree on certain basic questions are nevertheless able to provide for the common defense, insure domestic tranquility, and achieve other constitutional goals.

The constitutional obligation to live with evil can be derived from basic purposes of the constitutional enterprise. Constitutions serve many purposes. Constitutions provide government officials with necessary power and organize politics, enable governments to make credible commitments to investors and foreign powers, prevent gov-

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50. BALKIN, *supra* note 2, at 1.

51. *Id.* at 10.

52. *See* GRABER, *supra* note 3, at 9.

ernment officials from enriching and entrenching themselves, promote deliberation on the public interest, enable a society to realize national aspirations, and facilitate compromises among persons who disagree on national aspirations.<sup>53</sup> Some of these constitutional purposes are closely related to justice. Others are not. Constitutional faith and redemption must incorporate those constitutional commitments unrelated to justice, many of which require accommodations for injustice.

Consider the important role constitutions play in organizing politics. All political rules require some preexisting rules that enable people to identify the laws and who gets to make the law. One cannot have an election without having rules for how the election is to be conducted.<sup>54</sup> The Constitution of the United States from this perspective is redeemed to the extent people believe the rules for electing the president usually identify clear presidential winners. Judged by this standard, constitutional faith has typically been rewarded. The constitutional rules for determining the winner of presidential elections generated a clear winner in fifty-one of the fifty-five elections held between 1788 and the present. One can make a good case for including the 1800 and 1824 elections, since both were resolved by a straightforward application of the provisions governing what happens when no candidate gains a majority of the Electoral College. Only the 1876 and 2000 elections raised constitutional issues that could not be clearly resolved by reference to consensus readings of the constitutional text.<sup>55</sup>

Claims that the constitutional rules for presidential elections are unfair, undemocratic, or do not promote the election of particularly good presidents<sup>56</sup> are both fair and potentially beside the point. The Electoral College is clearly inconsistent with a putative constitutional commitment to democracy, but not a putative constitutional commitment to rule by law. If the only constitutional goal is to have minimally democratic rules that consistently generate clear winners in presidential elections, then the Constitution of the United States has been redeemed.

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53. This paragraph relies heavily on HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, 1 *AMERICAN CONSTITUTIONALISM* 7–10 (2013). For a fuller development, see MARK A. GRABER, *AMERICAN CONSTITUTIONALISM: A NEW INTRODUCTION* (forthcoming 2013).

54. See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195 (Jon Elster & Rune Slagstad eds., 1988).

55. See ARTHUR MEIER SCHLESINGER, JR., GIL TROY & FRED L. ISRAEL, *HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, 1789–2008* (2011).

56. See LEVINSON, *FRAMED*, *supra* note 11, at 186–90.

Balkin and Levinson both regard fundamental constitutional purposes as set out in the Preamble to the Constitution. The Preamble asserts:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>57</sup>

Balkin maintains, “The Preamble to the Constitution sets a purpose that has never been fully achieved but is our duty to achieve.”<sup>58</sup> “[T]he Preamble,” he later asserts, “announces a political project of self-government that spans generations.”<sup>59</sup> Levinson agrees that the Preamble is the best guide to the point of the constitutional enterprise. He writes, “the best way to address the Constitution of Settlement is to ask how well it does (or does not) work to achieve the constitution’s purposes, and preambles are the first place one would look to find out what the ostensible purposes are.”<sup>60</sup> The Preamble is one of the few constitutional provisions Levinson celebrates. The most recent edition of *Constitutional Faith* concludes, “I believe we can achieve the promise of American constitutionalism as set out in the Preamble, which *does* deserve our commitment, only by substantially changing the institutions that systematically work against the possibility of actually achieving the goals the Preamble sets out.”<sup>61</sup>

Balkin and, to a lesser extent, Levinson celebrate an edited version of the actual Preamble. *Constitutional Redemption* talks a good deal about the constitutional commitment to “establish justice,” but very little about constitutional commitments to “a more perfect Union,” “domestic Tranquility,” “the common defence,” and the “general Welfare.” The clause, “secure the Blessings of Liberty to ourselves and our Posterity,” seems to be truncated to “secure the Blessings of Liberty.” Balkin’s primary concern is with justice, with “whether [constitutional] fidelity is undesirable because it co-opts us into the maintenance of an unjust order.”<sup>62</sup> Levinson’s most recent work, *Framed*, spends more energy elaborating the constitutional commitment to justice than other constitutional purposes announced by the Pream-

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57. U.S. CONST. pmb.

58. BALKIN, *supra* note 2, at 5.

59. *Id.* at 51.

60. LEVINSON, *FRAMED*, *supra* note 11, at 55.

61. LEVINSON, *CONSTITUTIONAL FAITH*, *supra* note 1, at 252.

62. BALKIN, *supra* note 2, at 107.

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ble. He notes that preambles “often use abstract, even grandiose words articulating value commitments like justice and liberty.”<sup>63</sup> We do not learn much about the consequences of constitutional fidelity for the “common defence” or the other goals stated in the Preamble, at least to the extent those goals are not mere rephrasing of the constitutional commitment to justice.

Faith in the constitutional commitment to “the common defence” differs in numerous ways from faith in the constitutional commitments to establish justice. General agreement exists on what constitutes providing for the common defense. The Constitution of the United States provides for the common defense to the extent that the government is able to prevent foreign invasion, protect Americans abroad, and, perhaps, prevent domestic crime, although that latter goal may be an element of “the general Welfare” or “domestic Tranquility.” Disagreements are confined to the best means for achieving these consensual ends. What constitutes establishing justice is more contested. Americans largely agree on how elected officials might go about recognizing same-sex marriage. They dispute whether a statute recognizing same-sex marriage is just. Unlike establishing justice, providing for the common defense is not an aspirational goal, a purpose the Constitution hopes to achieve gradually over time. A constitution must provide for the common defense immediately upon ratification. Constitutional orders collapse when the regime is overrun by a foreign invader.<sup>64</sup> Faith in the constitutional capacity for providing for the common defense in the United States is far better described as a hope that past constitutional successes will be maintained than, as with the case with the constitutional commitment to establish justice, that past failings will be overcome.

The constitutional commitment to the common defense often conflicts with the constitutional commitment to establish justice. Abraham Lincoln articulated this tension at the beginning of the Civil War when he justified the suspension of habeas corpus, in part, by asserting that military necessity outweighed individual rights. His July 4, 1861, address to Congress asserted:

The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the

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63. LEVINSON, FRAMED, *supra* note 11, at 55.

64. See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 118 (2009).

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use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?<sup>65</sup>

Justice Robert Jackson spoke on this tension between constitutional purposes when, in *Terminello v. City of Chicago*, he bluntly criticized the Supreme Court for making decisions that threatened to “convert the constitutional Bill of Rights into a suicide pact.”<sup>66</sup>

Faith in the constitutional commitment to “domestic Tranquility” seems more like faith in the constitutional commitment to the common defense than faith in the constitutional commitment to establish justice. General agreement exists on the basic parameters of domestic tranquility. Societies experience civic peace when all crucial factions in the regime have no desire to disrupt a normal politics that serves their diverse interests and values to a fair degree. Constitutions function only when they secure or improve domestic tranquility almost immediately after ratification. Compared to other constitutions, the Constitution of the United States has successfully insured domestic tranquility in the past, with the Civil War and massive resistance to the civil rights movement being important exceptions. Polarization may challenge American constitutional faith because the intensity of partisan divisions threatens the loss of constitutional benefits previously enjoyed rather than the possibility of constitutional benefits yet to be experienced.

Efforts to redeem faith in a constitution that insures domestic tranquility are likely to conflict with efforts to redeem faith in a constitution that establishes justice. Crucial factions will not secede or disrupt normal politics only when their vital interests are satisfied to a fair degree. Americans with very bad values will risk the stability of the regime when they perceive their political rivals are too intent on establishing justice at the cost of other constitutional goods. Slaveholders threatened not to form union and later seceded when they

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65. Abraham Lincoln, Message to Congress in Special Session, in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 430 (1951).

66. *Terminello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

felt property in human beings unduly threatened. Racists disrupted southern and local politics after *Brown v. Board of Education*<sup>67</sup> undermined Jim Crow.

The “privileged position of business”<sup>68</sup> in American constitutional politics illustrates various tensions in American constitutional purposes. According to Charles Lindblom, who coined the phrase, government must “take action to secure the profitability and prosperity of the private sector” because national prosperity in a market economy is “dependent upon the profitability and prosperity of the private section.”<sup>69</sup> The resulting commercial prosperity is one of the blessings of liberty that is a core purpose of American constitutionalism.<sup>70</sup> Commercial prosperity can be realized, however, only at the cost of political equality, another core purpose of American constitutionalism.<sup>71</sup> Steven Elkin asserts, “Controllers of large-scale productive assets will, must, and ought to have substantial discretion in how these assets are to be employed . . . . The result of this discretion is also inevitable: the privileged political voice of large-scale controllers of capital.”<sup>72</sup> If this analysis is correct, then one’s faith in a constitution that promotes economic well-being can be redeemed in the foreseeable future only by postponing or relaxing efforts to redeem faith in the democratic commitments of American constitutionalism.

William Lloyd Garrison asserted a more general truth when he claimed the Constitution of the United States was “a covenant with death, and an agreement with hell.”<sup>73</sup> The constitutions of commercial republicans are consequences of rotten constitutional bargains. Citizens sacrifice fundamental values when forming constitutional regimes because constitutions are at least as much instruments for enabling people with very different understandings of justice to obtain ordinary political goods as they are vehicles for achieving the just society. People adopt constitutions because they have faith that the government they establish will protect them from foreign invaders, grow the economy, deter and punish criminals, offer basic education,

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67. 347 U.S. 483 (1954).

68. CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD’S POLITICAL ECONOMIC SYSTEMS* 173 (1977).

69. *Id.* at 175.

70. *See* ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 18–35 (1980).

71. *See* GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 38 (1992).

72. STEPHEN L. ELKIN, *RECONSTRUCTING THE COMMERCIAL REPUBLIC: CONSTITUTIONAL DESIGN AFTER MADISON* 58–59 (2006).

73. *See supra* note 8.

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and prevent potentially hostile factions from killing each other in street. In order to secure all of these mundane political goals in the circumstances of politics, governments must inevitably adopt policies that many, perhaps, most citizens think unjust. Business must be accommodated to some degree. Regional interests must be satisfied. When making these agreements with hell, the only question for ordinary citizens is which demon they must bargain with and how much those devils are due.

This rumination on the Preamble to the Constitution highlights how constitutional faith and redemption require fidelity to and realization of numerous constitutional purposes. Americans do not demonstrate constitutionality fidelity when the single-minded seek to establish justice at the expense of such other constitutional purposes as the common defense and domestic tranquility. The single-minded pursuit of the common defense or domestic tranquility is for the same reason antithetical to constitutional fidelity and redemption. Rather, Americans must delicately balance constitutional purposes as they seek to perfect the regime announced in the Preamble. At times, the constitutional faithful will actively seek to redeem evil. Moreover, constitutional faith and fidelity require finding ways to accommodate and live with those citizens whose practices we find abhorrent.

### III. PROPHETS AND POLITICIANS

Prophets and politicians enjoy uneasy relationships. Prophets committed to establishing justice regularly condemn politicians who routinely make rotten and really rotten bargains. Politicians committed to insuring domestic tranquility regularly condemn prophets for disturbing the peace. Socrates is the most famous example of a prophet executed by politicians. The secular prophets who led the French Revolution returned the favor by executing numerous politicians.

The prophets who lead social movements are the heroes of *Constitutional Faith* and *Constitutional Redemption*. As noted above, Levinson was initially willing to sign the Constitution because Frederick Douglass was willing to sign the Constitution. Douglass's prophetic claim that the Constitution of 1787 was anti-slavery, Levinson states, "is an excellent example of how the principle of charity operates," for the "point of American constitutionalism, if we are indeed to have any 'faith' in its goodness, must be to achieve a political order worthy of respect."<sup>74</sup> Balkin celebrates Douglass and Martin Luther King, Jr.,

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74. LEVINSON, CONSTITUTIONAL FAITH, *supra* note 1, at 77.

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for “attempting to hold white Americans responsible for the promises they made in the Constitution.” Both prophets were “attempting to collect on a moral debt . . . created at the founding of the United States.”<sup>75</sup> Unsurprisingly, Balkin regards the social movements that such persons as Douglass and King led as the crucial engines of constitutional redemption. “This is why social and political movements are so important,” he writes.

By shifting the boundaries of the reasonable and the plausible, they open up space for new forms of constitutional imagination and new forms of constitutional utopianism, both for good and for ill. They change both the sense of what is practically possible and the sense of what it is possible to imagine.<sup>76</sup>

Politicians are the (tragic) heroes in *Dred Scott and the Problem of Constitutional Evil*. The book details how constitutional institutions were structured in ways that prevented political centrists with workable programs for accommodating constitutional evil, most notably Millard Fillmore, from capturing the presidency.<sup>77</sup> The infamous last chapter suggests that Americans in the national election of 1860 should have voted for John Bell, the ordinary politician who made rotten and really rotten constitutional bargains in an effort to preserve a constitutional regime, over Abraham Lincoln, the secular prophet who led a social movement committed to redeeming the Constitution from injustice. In sharp contrast to contemporary “Lincoln voters” who “promise Americans a ‘justice-seeking’ constitutionalism,” contemporary “Bell voters” treat “constitutions primarily as vehicles for preserving the peace among persons who have very different visions of the good society, a robust democracy, and the rule of law.”<sup>78</sup>

Frederick Douglass and John Bell reflect, respectively, the prophetic and political understandings of constitutional faith and redemption. Douglass and the prophets who lead or aspire to lead social movements are on a quest to make their vision of the just society the official goal of the land. Convinced of their rectitude, prophets seek to convince enough fellow citizens of the goodness of their vision to gain the political power necessary to rid the polity of constitutional evil. This prophetic constitution, like Balkin’s and most contemporary constitutional theorists, is primarily committed to establishing justice. John Bell and the ordinary politicians regularly make rotten

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75. BALKIN, *supra* note 2, at 122–23.

76. *Id.* at 11.

77. GRABER, *supra* note 3, at 164–65.

78. *Id.* at 252–53.

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and really rotten constitutional bargains because they work in an environment in which no prophet or social movement has successfully established the political consensus necessary to make any particular vision of the just society the law of the land. Their political task is to convince rival factions to accept half a loaf, often much less, in order that citizens can continue to enjoy the blessings of a stable political order. The political constitution places as much if not more emphasis on the constitutional commitments to establish a more perfect union, provide for the common defense, and insure domestic tranquility as the constitutional commitment to establish justice.

Some harmonic convergence may nevertheless be possible. Balkin, Levinson, and I are happy exceptions to the historically difficult relationship between prophets and politicians. We have enjoyed a rewarding friendship for decades, even though Balkin and Levinson speak in the prophetic voice, while I prefer the voice of the ordinary politician. *Constitutional Redemption* recognizes that the redemptive process in the United States is political. Prophets change the constitutional culture “through political activism and legal advocacy.”<sup>79</sup> *Dred Scott and the Problem of Constitutional Evil* maintains that good politicians clear vital spaces for prophecy. The choices people make in a society that insures domestic tranquility and provides for the common defense, that work concludes, “are likely to promote justice in the long run.”<sup>80</sup>

Society needs both prophets and politicians. A society without prophets is blind to injustice and indifferent to improvement. A society without politicians lacks the stability necessary to achieve any vision of the good regime. Contemporary constitutional theory has done a wonderful job illuminating how Americans might achieve the prophetic constitutional commitment to establish justice and is beginning to explore how Americans may achieve more mundane constitutional commitments to provide for the common defense and insure domestic tranquility. The challenge for the next generation of constitutional thinkers inspired by *Constitutional Faith* and *Constitutional Redemption* is to offer Americans better guidance on how they might simultaneously realize constitutional commitments that require them to both live with and redeem constitutional evil.

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79. BALKIN, *supra* note 2, at 181.

80. GRABER, *supra* note 3, at 253.