Maryland Law Review

Volume 71 | Issue 4 Article 10

Respect and Contempt in Constitutional Law, or, Is Jack Balkin Heartbreaking?

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RESPECT AND CONTEMPT IN CONSTITUTIONAL LAW, OR, IS JACK BALKIN HEARTBREAKING?

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> ELLIE [*raising her head*] Damn!
> MRS HUSHABYE. Splendid! Oh, what a relief! I thought you were going to be broken-hearted. Never mind me. Damn him again.
> ELLIE. I am not damning him: I am damning myself for being such a fool. [*Rising*] How could I let myself be taken in so? [*She begins prowling to and fro, her bloom gone, looking curiously older and harder*].
> MRS HUSHABYE [*cheerfully*] Why not, pettikins? Very few young women can resist Hector. I couldn't when I was your age. He is really rather splendid, you know.
> ELLIE [*turning on her*] Splendid! Yes: splendid looking, of course. But how can you love a liar?
> MRS HUSHABYE. I dont know. But you can, fortunately. Otherwise there wouldn't be much love in the world.[1]

How many constitutions have we? Part of what we hope for from constitutional law is that we be united, despite our political differences, by a unifying political charter. John Rawls speaks for many when he writes that a well-ordered society "is a society all of whose members accept, and know that the others accept, the same principles (the same conception) of justice."[2]

In *Constitutional Redemption*, Jack Balkin argues that we have to give up on the Rawlsian aspiration, and learn to live in a world where, at a fundamental level, our fellow citizens are strange to us.[3] This is bound to try our faith in the regime. Perhaps America is not what I thought it was. Perhaps our marriage has always been a lie. We must

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1. 1 GEORGE BERNARD SHAW, *Heartbreak House*, *in* COMPLETE PLAYS WITH PREFACES 511 (1962).

2. John Rawls, *A Kantian Conception of Equality*, *in* JOHN RAWLS: COLLECTED PAPERS 254, 255 (Samuel Freeman ed., 1999) [hereinafter Rawls, *Kantian Conception*].

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

learn to live with heartbreak.

I.

I begin with a sordid tale of betrayal. When the Supreme Court agreed to take the case of *Bush v. Gore*,[4] I was less concerned about the outcome than many of my friends who had voted for Gore. These Justices are not crazy or evil, I said. They are decent, intelligent people who happen to have different political views than we do. They understand perfectly well that the worst possible outcome is a 5-4 decision, with the majority consisting entirely of Justices nominated by Republican Presidents. Such an outcome would thwart the counting of votes and hand the Presidency to a man who lost the popular vote. The Justices understand that the Constitution provides a detailed procedure for selecting the President, and that procedure does not authorize the Supreme Court to pick the President it likes. That kind of abuse of the judicial office would be so obvious and egregious that the majority Justices would be disgraced, perhaps even impeached. I believed that the Justices were conscientious people doing their best to follow the law.

So much for my good judgment. My sense of betrayal was compounded when many of my fellow law professors whom just happened to be loyal Republicans rushed to devise legitimizing rationales for the Court's decisions.[5] It was obvious what my Republican colleagues (and, for that matter, the Justices in the majority) would have said had the Court engaged in such contortions on behalf of Democrats.

Betrayal presupposes trust. The whole business would have been different had I regarded these judges and their supporters as subhuman or mad. I felt betrayed because I thought that we had shared norms that went beyond our political differences. What's more disheartening is that they actually believe their silly arguments, and continue to believe them to this day, long after the political stakes have dissipated.

Balkin sheds light on this sorry episode. He offers a useful, albeit discouraging, anatomy of how it happens that our fellow citizens, whom we thought had shared common norms, could turn out to have allegiances that are entirely foreign to us. His argument begins with Frank Michelman's revision of Rawls. Michelman does not agree that

4. 531 U.S. 98 (2000).

5. Over the protests of my editors, I decline to name names—not to exculpate the guilty, but because there are so many culpable parties and I don't want to leave anyone out. You know who you are.

legitimacy depends on everyone in society sharing the same conception of justice. On the contrary, Michelman argues that legitimacy is possible even if there is substantial disagreement about constitutional essentials.[6] The American tendency to identify the Constitution with one's own aspirations inevitably produces a multiplicity of readings. Everyone in the political community offers their own interpretation of the Constitution, one that interprets the system as conforming to their own visions of democracy and justice. Those aspects of the regime that do not so conform can be regarded as correctable mistakes. Each member of the community can read the Constitution with interpretive charity, believing or hoping that these mistakes will be corrected in the fullness of time.[7]

Balkin emphasizes the variety that this approach authorizes in a more inflammatory way than Michelman:

> Now, different people in the political community will have different notions of what those mistakes would be. That is because different people will have different notions of the best interpretation of the Constitution and current practices. So one person might regard the Supreme Court's decision in *Roe v. Wade* as a terrible mistake that will someday be corrected, or as a demerit against an otherwise respect-worthy system, and will interpret the scope of the *Roe* decision and the principles announced in it very narrowly so that it does as little harm as possible. Another person will regard *Roe v. Wade* as an important reason why the system is respect-worthy—because it secures equality for women—and will interpret the decision and its principles robustly. As a result, there might be a large number of different portraits of the Constitution and the governmental system.[8]

What unites citizens, then, is "a common commitment to a common object of interpretation whose actual content, in turn, is contested."[9]

Balkin emphasizes that this is not an invitation to anarchy. Rather, constitutional dissensus "may actually help promote and secure social cooperation and the goods of union."[10] Uncertainty about the future means that each of us can construct our own hopeful narrative

6. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 3, at 41.

7. Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345 (2003).

8. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 3, at 42 (footnote omitted).

9. *Id.* at 43. The meaning of the canonical cases of constitutional law is similarly protean. *Id.* at 206.

10. *Id.* at 43.

about the direction of the polity. Our hope is reinforced if there is some way we can imagine that our story about the system's history can prevail. Constitutional politics in America is conducted through a clash of narratives of the American past, in which different social movements compete to make their views canonical. These narratives about national identity certainly do the work that Balkin says they do. Here, as elsewhere,[11] however, the news he is delivering may prove difficult to digest.

It is comforting to know that our faith at least has a common object. But do we know that? Balkin borrows Sanford Levinson's metaphor of constitutional protestantism.[12] Protestantism's model of diversity, however, is hub and spoke: manifold perceptions united by the fact that there really is only one God. All Protestants worship the same God, and they have faith that it's the same God.

The historian Arthur Lovejoy long ago made the disconcerting suggestion that "[t]he term 'Christianity' . . . is not the name for any single unit of the type for which the historian of specific ideas looks."[13] Rather, the history of Christianity is "a series of facts which, taken as a whole, have almost nothing in common except the name."[14] All Christians have held in common "the reverence for a certain person," but Jesus Christ's "nature and teaching . . . have been most variously conceived, so that the unity here too is largely a unity of name."[15] Jaroslav Pelikan responds that there is continuity as well as discontinuity (in a study that emphasizes the discontinuities over two millennia): "Yet Lovejoy would also have been obliged to acknowledge that each of the almost infinite—and infinitely different—ways of construing that name has been able to claim some warrant or other somewhere within the original portrait (or portraits) of Jesus in the Gospels."[16] This, however, is a pretty faint continuity compared with the claim in the Epistle to the Hebrews: "Jesus Christ is the same yesterday and today and for ever. Do not be led away by diverse and

11. *See* Andrew Koppelman, *Why Jack Balkin Is Disgusting*, 27 CONST. COMMENT. 177 (2010).

12. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 29–30 (rev. ed. 2011) (1988) (defining constitutional protestantism to mean that each individual citizen has authority to interpret the meaning of the Constitution).

13. ARTHUR O. LOVEJOY, THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA 6 (1936).

14. *Id.*

15. *Id.*

16. JAROSLAV PELIKAN, JESUS THROUGH THE CENTURIES: HIS PLACE IN THE HISTORY OF CULTURE 4 (1985).

strange teachings."[17]

The news that we have not in fact been worshipping the same God is not minor news. Samuel Freeman observes that the "overriding concern" of all of Rawls's work "is to describe how, if at all, a well-ordered society in which all agree on a public conception of justice is realistically possible."[18] Rawls eventually acknowledged that there is "a family of reasonable though differing liberal political conceptions."[19] Even if Rawls's basic framework is accepted, "there are indefinitely many considerations that may be appealed to in the original position and each alternative conception of justice is favored by some considerations and disfavored by others."[20] Freeman, who knew Rawls well, thinks that this concession "must have been an enormous disappointment to him, for he had worked for nearly forty years trying to show how a well-ordered society where everyone accepts justice as fairness as its public charter is a realistic possibility."[21]

II.

> LADY UTTERWORD. What an extraordinary way to behave! What is the matter with the man?
> ELLIE [*in a strangely calm voice, staring into an imaginary distance*] His heart is breaking: that is all. . . . It is a curious sensation: the sort of pain that goes mercifully beyond our powers of feeling. When your heart is broken, your boats are burned: nothing matters any more. It is the end of happiness and the beginning of peace.[22]

To understand why Rawls was so disappointed, consider some recent work in moral philosophy about the structure of respectful relations between human beings. Stephen Darwall observes that we inevitably make moral claims upon one another and offers a philosophical analysis of this practice.[23] Darwall seeks to address not

17. *Hebrews* 13:8–9 (Revised Standard Version).

18. SAMUEL FREEMAN, JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY 4 (2007).

19. JOHN RAWLS, POLITICAL LIBERALISM xxxvi (expanded ed. 1996) [hereinafter RAWLS, POLITICAL LIBERALISM]; *see also* John Rawls, *The Idea of Public Reason Revisited*, *in* JOHN RAWLS: COLLECTED PAPERS 573, 582 (Samuel Freeman ed., 1999) [hereinafter Rawls, *The Idea of Public Reason Revisited*].

20. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 133 (Erin Kelly ed., 2001).

21. SAMUEL FREEMAN, RAWLS xiii (2007) [hereinafter FREEMAN, RAWLS].

22. SHAW, *supra* note 1, at 561.

23. STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 3, 5 (2006).

the practical problems of a pluralistic society, but some specialized, albeit important, questions of metaethics concerning what kind of entity a moral claim is.[24] In this pursuit, Darwall sheds light on Rawls's problem. We strive for respectful relations, but we cannot achieve them without a specific common object of agreement. The idea of respect is too fluid, and takes too many possible forms, to ground any but the most trivial specific moral claims.

Darwall argues that the foundation of morality is what he calls "the second-person standpoint," meaning "the perspective you and I take up when we make and acknowledge claims on one another's conduct and will."[25] The practice of making claims upon others, a practice that Darwall thinks inseparable from human agency, has other pertinent presuppositions: that persons regard one another as free and rational, that addressees can freely and rationally accept the reasons that are given (and any authority relations in which they are grounded), that legitimate demands are distinct from mere coercion, and that addresser and addressee share a common authority to make claims on one another. The practice of making claims, therefore, also presupposes autonomy of the will and the common basic dignity of persons.[26]

Darwall's account of the pragmatic presuppositions of the making of claims is powerful, but vague. These presuppositions are demanding:

> [W]e hold ourselves morally accountable to others when we impose demands on ourselves that we think it sensible to impose on anyone from a perspective that we can all share as free (second-personally competent) and rational. And we presuppose that anyone we hold thus accountable is someone who can in principle also accept and impose these same demands on himself by taking up this impartial second-person perspective and seeing the sense of imposing them on anyone.[27]

Darwall says little about the content of these demands. They cannot be inconsistent with the common basic dignity of persons, but there are plenty of mutually inconsistent norms that satisfy that minimal requirement. It is satisfied, for example, when I tell the waiter that I

24. These questions surrounding the nature of moral claims are the subject of a symposium on Darwall's *The Second-Person Standpoint* in 118 ETHICS 8, 8–69 (2007).

25. DARWALL, *supra* note 23, at 3.

26. *See id.* at 269–76 (summarizing themes developed throughout the book).

27. *Id.* at 276.

want the eggs Benedict.[28] So long as you and I agree about the norms to which we are bound, and those norms are not inconsistent with the autonomy and dignity of either of us, we can stand in respectful relations with one another regardless of the content of our claims.

The norms in question need not be law-like. They need not be formulable in terms of universal principles.[29] Moreover, "nothing in the idea of moral obligation as involving reciprocal accountability rules out its scope or content extending beyond the needs and interests of free and rational individuals considered as such."[30] Our moral obligations "might include, for example, the protection of cultural treasures, wilderness, and/or the welfare of other sentient beings, quite independently of the relation any of these have to the interests of free and rational persons."[31]

Darwall's argument has important implications for Rawls's aspiration for "a society all of whose members accept, and know that the others accept, the same principles (the same conception) of justice."[32] The principles of justice that Rawls outlines indeed can be the objects of overlapping consensus, and so be the basis of respectful relations that are more than a mere modus vivendi. But so, Darwall has shown, can any other shared normative criteria.

So long as we manage to agree on a standard by which we can legitimately make claims upon one another, the basis of mutual respect could be the norms of well-run restaurants, the divine right of kings, the supreme authority of the Church, or the rules of football. There is probably an infinite number of ways in which the norms that are the basis of respectful relations could be formulated, and an infinite number of ways in which those formulations could be interpreted in

28. *Id.* at 51. The illustration, which is Darwall's, is revealing, since the relationship between waiter and customer is typically one of dramatically asymmetrical power, at least when the tip is not automatically added to the bill. Thanks to Bonnie Honig for this point.

29. They can, for example, be the particularistic judgments that Jonathan Dancy thinks constitute moral reasoning, see JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES (2004), so long as they are able to be publicly articulated and accessible. *See* DARWALL, *supra* note 23, at 156, 313–14. Many particular judgments, not derived from rules, are publicly accessible and verifiable, for example, "the sky is blue."

30. DARWALL, *supra* note 23, at 28.

31. *Id.* There are, concededly, passages in which Darwall appears to have more Kantian aspirations, seeking to ground "principles that we and [others] could will . . . as universal law" or "principles that are acceptable, or not reasonably rejectable, to each as free and rational agents." *Id.* at 300, 308. But these claims sit uneasily beside the concessions to a more contingent ethics cited in the text. Thanks to Sam Fleischacker for pointing out these passages.

32. Rawls, *Kantian Conception*, *supra* note 2, at 255.

specific cases. Respect is, in short, fluid.[33]

The second-person standpoint, Darwall observes, can even be compatible with slavery, so long as the slaveholder believes that his slaves can be expected rationally to endorse his claim of authority over them. Slaveholders have in fact believed this.[34] The implausibility of their reasons for so believing is not deducible from respect as such. When the Athenians tried to explain to the Melians that the strong do what they can and the weak suffer what they must, they manifested respect of the Darwallian sort.[35] Intelligent arguments against democratic government are of ancient vintage, and rebutting them depends on contingent empirical claims.[36]

33. The dictionary definition of "fluid" applies here: "A substance that exists or is regarded as existing as a continuum characterized by low resistance to flow and the tendency to assume the shape of its container." THE AMERICAN HERITAGE DICTIONARY 516 (2d College ed. 1985). I develop a similar point about neutrality in *The Fluidity of Neutrality*, 66 REV. OF POL. 633, 638–39 (2004).

34. DARWALL, *supra* note 23, at 268.

35. *See* THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 400–08 (Rex Warner trans., 1972). There are limits to what can be said in this way without embarrassment. Rudolf Hoess, who was in charge of Auschwitz, did not, when challenged by his victims, attempt to defend his deeds to them, though their reproaches clearly made an impression upon him. RUDOLF HOESS, COMMANDANT OF AUSCHWITZ: THE AUTOBIOGRAPHY OF RUDOLF HOESS 169–70 (Constantine FitzGibbon trans., 1959). Conversely, the following story, recounted by Franz Stangl, the commandant of Treblinka, suggests that some people are incapable of embarrassment:

> There was one day when [Blau, a Jew who was kept alive and used as a cook, whom Stangl described as "the one I talked to most"] knocked at the door of my office about mid-morning and asked permission to speak to me. He looked very worried. I said, "Of course, Blau, come on in. What's worrying you?" He said it was his eighty-year-old father; he'd arrived on that morning's transport. Was there anything I could do. I said, "Really, Blau, you must understand, it's impossible. A man of eighty . . . ." He said quickly that yes, he understood, of course. But could he ask me for permission to take his father to the *Lazarett* [the fake hospital, where the old and sick were shot rather than gassed] rather than the gas chambers. And could he take his father first to the kitchen and give him a meal. I said, "You go and do what you think best, Blau. Officially I don't know anything, but unofficially you can tell the Kapo I said it was all right." In the afternoon, when I came back to my office, he was waiting for me. He had tears in his eyes. He stood to attention and said, "Herr Hauptsturmführer, I want to thank you. I gave my father a meal. And I've just taken him to the *Lazarett*—it's all over. Thank you very much." I said, "Well, Blau, there's no need to thank me, but of course if you *want* to thank me, you may."

GITTA SERENY, INTO THAT DARKNESS: FROM MERCY KILLING TO MASS MURDER 207–08 (1974). The *Lazarett* is described in *id.* at 165. Stangl evidently supposed that he and Blau shared respect of the Darwallian kind. An entire social world supported that supposition. What was off-the-wall, in that context, was the suggestion that Stangl might refrain from murdering the father of a man with whom he was friendly. The real thoughts of Blau, who did not survive the camps, are unknowable. *See id.* at 209.

36. *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 6–9 (1989).

Darwall's analysis implies that the role of shared norms in relations of mutual respect is analogous to the role of the sovereign in Hobbes's *Leviathan*. Hobbes thinks that in a well-functioning state there must be a sovereign and the sovereign must possess supreme authority.[37] But this entails very little about who that sovereign ought to be. Darwall shows that there must be shared norms. But this entails very little about what those norms ought to be.

The fluidity of respect helps to explain why, in a 320-page monograph on moral philosophy, Darwall does not offer a single example of how the standpoint he is defending can help to resolve an actual moral problem. What he does show is the ubiquity of the second-person standpoint. Notably, it dominates "conversations in which participants display their reactions to others' actions and feelings."[38] In such conversations, "people negotiate questions of how it makes sense to respond to what people do and what norms for evaluating conduct it makes most sense to accept."[39] But if "much of what human beings discuss concerns what they and we can warrantedly expect and demand of one another,"[40] then it should be obvious that these discussions go considerably beyond the interests of free and rational persons as such, to an enormous range of other normative considerations. All of this discussion is necessary because the answers are not obvious. Of course, this broadens the range and the stakes of possible disagreement.

Darwall's analysis of respect sheds light on the problem of pluralism that so concerned Rawls. Uncertainty about the specifics of shared norms can give rise to a distinctive form of conflict, and helps account for the intensity of that kind of conflict. In order for you and me to exist in respectful relation to one another, Darwall shows, we must acknowledge a common norm. But if you challenge (or misinterpret) a presently prevailing norm, and it is not apparent to me that you can offer a norm that can adequately replace it, then you are denying (or so it may appear to me) the very possibility of respectful relations between us.[41]

37. THOMAS HOBBES, LEVIATHAN (C.B. MacPherson ed., 1968) (1651).

38. DARWALL, *supra* note 23, at 170.

39. *Id.*

40. *Id.* at 171.

41. Law is often fraught in this way. Clifford Geertz writes:

> Hardly anyone, even a marriage closer or a probate judge, is ready to die for pure procedure. What is at risk, or felt to be, are the conceptions of fact and law themselves and of the relations they bear the one to the other—the sense, without which human beings can hardly live at all, much less adjudicate anything,

III.

> HUNDING: Ich weiss ein wildes Geschlecht,
> nicht heilig ist ihm, was andren hehr:
> verhasst ist es allen und mir.
>
> [I know of a savage race,
> It does not hold holy what others revere:
> It is hated by all and me.][42]

Hunding's logic makes sense. Not holding holy what others revere makes one a savage. It is a kind of treason against the moral order. Hunding's error consists in his thinking that the moral order with which he is familiar is the only possible moral order. As with Hobbes, the sovereign's identity is less important than his undisputed authority.

Darwall observes "that when second-personal reasons are proffered, issues of *respect* are invariably at stake. If the private fails to heed the sergeant's orders, he doesn't simply act contrary to a reason that sheds favorable light; he violates the order and so disrespects the sergeant and her authority."[43] The appropriate reactive attitude is one that demands that the violator acknowledge the authority that he has failed to respect. Obviously, if the private persists in doubting that the sergeant has the authority she claims, they have a problem. Respect between the sergeant and the private demands that they acknowledge a common norm. Yet the idea of respect between free and rational beings cannot tell them whether it is appropriate to designate people as sergeants and privates at all, or who is the sergeant and who is the private, or what demands a sergeant is or is not entitled to make of a private.

In that sense, respect is elusive. But in another sense, it is readily available. All that is needed is some common basis for claims. That does not sound so hard. But the Balkin-Michelman claim about the Constitution as a basis for social unity gives rise to a puzzle: when everyone constructs their own private Constitution, is there any common basis for the claims we make upon one another?

Balkin thinks that what provides the necessary unity, in modern

> that truth, vice, falsehood, and virtue are real, distinguishable, and appropriately aligned.

CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 231 (2000).

42. RICHARD WAGNER, *DIE WALKÜRE* act 1, sc. 2 (author's translation).

43. DARWALL, *supra* note 23, at 60.

America, is fidelity to the Constitution's original meaning. "Protestant constitutionalism needs something that gives people something to rally around; something that is a common object of interpretation even though everyone's interpretations of that object differ. Faith in a process divorced from a central text may be altogether too abstract to serve this function."[44] The Constitution's text provides us with a language for evaluating proposals for social change. "Appeals to return and reform, and to the text as the symbol and site of these appeals, are the standard way of engaging in protestant constitutional argument in America's democratic constitutional culture."[45] The constant generation of new rhetorics of return to the unpolluted source of constitutional authority keeps the regime legitimate because it makes the regime responsive to the needs of the time.

Given the proliferation of interpretations, however, how can a text offer the necessary unity? As long ago as 1856, one newspaper editor observed: "The Constitution threatens to be a subject of infinite sects, like the Bible."[46] Balkin writes that the text symbolizes popular sovereignty precisely because its public character "authorizes people from all walks of life to claim the right to interpret it."[47] This does not produce a Rawlsian social union: "the life of the Constitution has been perpetual disagreement, not pacifying consensus."[48] Hobbes, to the contrary, thinks that we need a sovereign, not a unifying text, precisely because a text is susceptible to too many different interpretations.[49] His fear of chaos has contemporary echoes,[50] nota-

44. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 3, at 246.

45. *Id.* at 234.

46. MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 103 (1986).

47. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 3, at 237.

48. Jack M. Balkin, *Nine Perspectives on* Living Originalism, 2012 U. ILL. L. REV. 101, 147.

49. Thus Hobbes's reflection on the radical Protestant reliance on scripture during the English Civil War:

> [A]fter the Bible was translated into English, every man, nay, every boy and wench, that could read English, thought they spoke with God Almighty, and understood what he said, when by a certain number of chapters a day they had read the Scriptures once or twice over . . . . [T]he reverence and obedience due to the Reformed Church here, and to the bishops and pastors therein, was cast off; and every man became a judge of religion, and an interpreter of the Scriptures to himself. . . . [T]his licence of interpreting the Scripture was the cause of so many several sects, as having lain hid till the beginning of the late King's reign, did then appear to the disturbance of the commonwealth.

THOMAS HOBBES, BEHEMOTH, OR, THE LONG PARLIAMENT 21–22 (Ferdinand Tonnies ed., 1990) (1681). The inevitable fragmentation created by reliance on a written text is, perhaps, the only point of agreement between Hobbes and Levinson. *See* LEVINSON, *supra* note 12, at 17.

bly in many modern originalists' search for the holy grail of an interpretive method that leaves no room for judicial discretion.[51]

The fear of social division also underlies Rawls's idea of public reason as a basis for resolving the bewildering diversity of comprehensive views.[52] The problem Rawls faced, of how to cope with religious diversity, sheds light on our problem of how to cope with the diversity of constitutional interpretations.[53] In his last writings, he conceded that, even with respect to political fundamentals, citizens may present political arguments based on their comprehensive views, "provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support."[54] There is no formula for what the phrase "in due course" means; such matters "must be worked out in practice and cannot feasibly be governed by a clear family of rules given in advance."[55] Rawls's position thus converges with that of Christopher Eberle: The religious citizen (whose reasons, in Rawls,

50. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992) (claiming that Americans' "belief in themselves as . . . [a people who live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals").

51. Many modern originalists have abandoned the quest, though in its popular versions originalism continues to advertise itself as providing this constraint. *See* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011).

52. "[I]n discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious or philosophical doctrines—to what we as individuals or members of associations see as the whole truth . . . ." RAWLS, POLITICAL LIBERALISM, *supra* note 19, at 224–25. "[C]itizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that others can reasonably be expected to endorse." *Id.* at 226. For a fuller exposition of Rawls's idea of public reason, see FREEMAN, RAWLS, *supra* note 21, at 381–415.

> The term public reason was coined by Hobbes, who understood it rather differently:
>
> [W]e are not every one, to make our own private Reason, or Conscience, [the arbiter of moral and religious questions] but the Publique Reason that is, the reason of Gods Supreme Lieutenant, Judge; and indeed we have made him Judge already, if wee have given him a Soveraign power, to doe all that is necessary for our peace and defence.

HOBBES, *supra* note 37, at 477–78. Hobbes thought that public reason could not serve its unifying function if everyone got to interpret it for themselves.

53. The analogy with religion is particularly salient because, in the modern nation-state, the imagined community is the object of quasi-religious veneration. *See* WILLIAM T. CAVANAUGH, THE MYTH OF RELIGIOUS VIOLENCE: SECULAR IDEOLOGY AND THE ROOTS OF MODERN CONFLICT (2009); Jeffrey James Poelvoorde, *The American Civil Religion and the American Constitution*, *in* HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? 141 (Robert A. Goldwin & Art Kaufman eds., 1987); Charles Taylor, *Modes of Secularism*, *in* SECULARISM AND ITS CRITICS 31 (Rajeev Bhargava ed., 1998).

54. RAWLS, POLITICAL LIBERALISM, *supra* note 19, at xlix–l.

55. Rawls, *Idea of Public Reason Revisited*, *supra* note 19, at 592.

are paradigmatically nonpublic) can offer her religiously based political views freely so long as she continues to pursue a search for public reasons and thinks that it will eventually be possible to provide them.[56] Public discourse will thus inevitably include arguments that seem to many citizens to be off-the-wall. But the imperatives of rhetoric will have some disciplining effect: my views may be off-the-wall, but I have a powerful interest in preventing them from seeming so.

Jeffrey Stout argues that when Rawls proposes that social unity be based on principles that no one could reasonably reject, "[Rawls] has drastically underestimated the range of things that socially cooperative individuals can reasonably reject."[57] The same burdens of judgment that make the doctrine of reasonable pluralism plausible also suggest that we will not be able to devise a social contract that fixes the terms of cooperation in advance. Such a social contract would not be accepted by all reasonable persons. Moreover, it is not the only possible basis of cooperation. Cooperation occurs whenever we exchange reasons with one another. This can be done without ever relying on universally acceptable premises. I can try to take seriously the point of view that each of my fellow citizens holds, addressing them one at a time.[58] My discourse inevitably will often be secular, in that I will avoid reliance on religious premises that I know my interlocutors do not accept.[59] But this is a response to a rhetorical imperative, not a moral one.[60] In Stout's version, political discourse is exactly the conflict of irreconcilable moral views with no pre-existing common denominator that Rawls fears.[61] Common ground, the basis of Darwallian respect, gets constructed on an ad hoc basis with each interlocutor as one strives on each political occasion to persuade a majority (at least) to support one's proposal. Constitutional discourse, which imagines a unitary community that continues over gen-

56. CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002). The convergence is noted in Martha Nussbaum, *Rawls's Political Liberalism. A Reassessment*, 24 RATIO JURIS. 1, 16–19 (2011).

57. JEFFREY STOUT, DEMOCRACY AND TRADITION 70 (2004).

58. *Id.* at 72–73.

59. *See id.* at 92–117.

60. Kwame Anthony Appiah similarly suggests that "Rawlsian structures about the ideal of public reason are perhaps best interpreted as debating tips: as rhetorical advice about how best, within a plural polity, to win adherents and influence policies." KWAME A. APPIAH, THE ETHICS OF IDENTITY 81 (2007). Rawls sometimes endorses a similar view. *See* Rawls, *The Idea of Public Reason Revisited*, *supra* note 19, at 592.

61. Clifford Geertz likewise thinks that law does not depend on normative consensus, and that a conception of law that presupposes that it does "leaves law the most powerful where the least needed, a sprinkler system that turns off when the fire gets too hot." GEERTZ, *supra* note 41, at 217.

erations and stands for some very specific shared ideals, is a tool in that enterprise.

IV.

> ELLIE [*staring at her thoughtfully*] Theres something odd about this house, Hesione, and even about you. I dont know why I'm talking to you so calmly. I have a horrible fear that my heart is broken, but that heartbreak is not like what I thought it must be.
> MRS HUSHABYE . . . It's only life educating you, pettikins.[62]

Balkin observes that the boundary between frivolous and serious legal arguments is crucial to sustaining faith in the rule of law. "[T]he lawyer who makes a frivolous legal argument has done more than make a mistake; he or she has disrespected a crucial boundary that undergirds the system of legal faith and faith in the legal system."[63] If that boundary can be moved by politics, "our faith in law might well be shaken."[64]

The faith that is shaken, however, is not in law so much as in our fellow citizens, who are so deluded that they cannot see when an argument is frivolous. We aim to live in respectful relations with them, but their delusions do not inspire respect. It *is* possible to have faith in, or at least to hope for, the possibility that they will improve.[65] In the case of the defenders of *Bush v. Gore*, however, I see no evidence that they are capable of conversion. We never really believed in the same things. Our marriage is a lie. And you should not marry someone intending to change them.

Hilary Putnam, reflecting on the callous minimal-state beliefs of his Harvard colleague Robert Nozick, observed that, while he respected Nozick's mind and character, "I feel contempt (or something in that ballpark) for a certain complex of emotions and judgments in him."[66] There is, Putnam argued, "no contradiction between having a fundamental liking and respect for someone and still regarding some-

62. SHAW, *supra* note 1, at 512.

63. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 3, at 88.

64. *Id.* at 89.

65. As Balkin states:

> When we have faith in others in downtrodden circumstances—a drug addict, a recidivist criminal or an alcoholic—we do not pretend that they are something they are not: physically and spiritually healthy. We must understand them for what they are now, and see the possibilities of what they could be.

Id. at 122.

66. HILARY PUTNAM, REASON, TRUTH AND HISTORY 165 (1981).

thing in him as an intellectual and moral weakness."[67] The proper stance is an "ambivalent attitude of respectful contempt."[68]

Respectful contempt is what constitutional discourse is nearly guaranteed to produce. Law is, of course, open-textured, and occasional disagreement about its content is inevitable.[69] In constitutional law, however, our readings of the texts tend to be closely tied to our most urgent aspirations, so that people with different aspirations will inevitably read the Constitution differently. Americans tend to merge the Constitution with some of our deepest hopes for ourselves and our society, and constitutional language is, in American culture, a conventional way of communicating those hopes. If those hopes imply a constitutional argument that is off-the-wall, then we must do what we can to shift the cultural boundaries of what is off-the-wall.[70] As Balkin observes, we feel bound by the handiwork of the Framers of the Constitution because we in some way identify with them, and feel that their accomplishments are ours.[71] This identification "is always premised on an interpretation of and selective identification with the past," as well as a distinctive imagination of "a continuing political project that extends into the future."[72] Originalism is a claim to base one's argument of the moment on continuity with that past. In that sense, everyone who makes claims about American constitutional law is an originalist. But this originalism is a rhetorical style, not an algorithm for certainty in constitutional meaning.[73]

This problem would go away if we would only demote the Constitution to the status of ordinary law, which has nothing to do with our

67. *Id.*

68. *Id.* at 166. Perhaps it is a hopeful sign that, in the end, Nozick was converted. *See* ROBERT NOZICK, THE EXAMINED LIFE 286–87 (1989) ("The libertarian position I once propounded now seems to me seriously inadequate, in part because it did not fully knit the humane considerations and joint cooperative activities it left room for more closely into its fabric.").

69. H.L.A. HART, THE CONCEPT OF LAW 128–36 (2d ed. 1994).

70. I have attempted to do this myself when I have argued (persuading hardly anyone) that the right to abortion is protected by the Thirteenth Amendment. *See* Andrew Koppelman, *Forced Labor Revisited: The Thirteenth Amendment and Abortion*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 226 (Alexander Tsesis ed., 2010) (noting the barely visible scholarly reaction to Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990)).

71. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 3, at 51–52.

72. *Id.* at 54.

73. *See* Andrew Koppelman, *Originalism, the Thirteenth Amendment, and Abortion*, 112 COLUM. L. REV. (forthcoming 2012).

transcendent aspirations.[74] If that happened, originalism might be more plausible,[75] but it also would not matter so much. We would be having a technical dispute about the sources of law, of interest only to specialists. This would, however, require a radical reimagining of the place of the Constitution in American culture. It is unlikely to happen. And so long as it does not happen, the Constitution will be a site of disrespect and betrayal.

We don't have to be nasty about it. Rawls's political liberalism is first and foremost a response to a problem: "how is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?"[76] That is a different question from how there can be a society where everyone believes the same things. The practice of sharing a social world with those who fundamentally differ from us is part of what social life is always about. As the Putnam-Nozick relationship shows us, academics who worry about the socially destructive power of intractable disagreements routinely enjoy schmoozing with those whom they regard as deeply misguided about morally weighty matters.[77] The delicate combination of respect and contempt that Putnam describes is the normal attitude of citizens toward one another in a democracy.[78] Can't we all just not get along?

We seek by persuasion to respectfully teach our fellow citizens to be less contemptible. The modalities of constitutional law are among the tools of persuasion.[79] The life of constitutional law has not been logic, for there often are no undisputed major premises from which to begin. It has been rhetoric. The aim of the rhetoric is to bind our fragmented polity together into what we can persuade ourselves is an

74. *See* Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189 (2010); Adrian Vermeule, *Ideals and Idols*, NEW REPUBLIC, June 8, 2011 (reviewing JACK BALKIN, CONSTITUTIONAL REDEMPTION (2011)), *available at* http://www.tnr.com/book/review/constitutional-redemption-jack-balkin.

75. Or it might not. *See* Robert Bennett, *Originalism and the Living American Constitution*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 78 (2011); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 13–25 (2001); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

76. RAWLS, POLITICAL LIBERALISM, *supra* note 19, at 4.

77. Jeremy Waldron also points this out in his book, *Law and Disagreement*, at 228 (1999).

78. This is emphasized in Martin Redish's recent work on democratic theory. *See* Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303 (2009).

79. The canonical catalogue of these tools is PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

ancient unity.[80] Balkin observed long ago, anticipating Darwall, that transcendent ideals of justice "seem to spring forth magically from the rhetorical encounter."[81]

My discussion so far has largely neglected the role of hope in the constitutional narrative.[82] That narrative, we have seen, is full of gaps and discontinuities, but gap-closing is precisely what hope does. Jonathan Lear can even write of "radical hope," which "is directed toward a future goodness that transcends the current ability to understand what it is."[83] Hope is a universal sealant that can fill whatever cracks exist in the structure of social solidarity. Charles Taylor observes: "Hope can only exist if you are uncertain about a desired outcome. If it's really a sure thing, your anticipation of it can't be hope."[84]

As Balkin writes, constitutional protestantism "offers a way for individuals and groups to pledge faith in the Constitution's restoration and redemption, even when judges and government officials do not heed their views. It holds out the hope of a Constitution that will someday be redeemed."[85] Hope can take the place of a rule in the structure of Darwallian respect. It is the Hobbesian sovereign.[86] If you betray me today, I can still hope that your future self will learn to accept and conform to the legitimate sources of authority that today you outrageously refuse to acknowledge.[87] (I can even bring some in-

80. The invention of ancient unities is, of course, what the nation-state is all about. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (rev. ed. 2006).

81. J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 149 (1998).

82. As Jack Balkin put it in conversation, after reading an earlier draft of this essay: "Why so sad, dude?"

83. JONATHAN LEAR, RADICAL HOPE: ETHICS IN THE FACE OF CULTURAL DEVASTATION 103 (2006).

84. Taylor is uncertain whether radical hope "can be sustained without some kind of formulated faith in something, whether religious or secular—faith in God, or in History, or in our own resources, or in human resilience." Any formulation, however, will be inadequate to that toward which it points. It is part of our nature that "we long for things that we do not yet fully understand." Charles Taylor, *A Different Kind of Courage*, N.Y. REV. OF BOOKS (Apr. 26, 2007) (reviewing JONATHAN LEAR, RADICAL HOPE (2006)), http://www.nybooks.com/articles/archives/2007/apr/26/a-different-kind-of-courage.

85. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 3, at 234–35. Because hope is a response to uncertainty, Balkin has no argument with which to reject the hopelessness of the more recent work of Sanford Levinson, who now thinks that the Constitution we have inherited is irredeemably dysfunctional. *Id.* at 75–76; LEVINSON, *supra* note 12, at 246–55.

86. Without the inconveniences: Hobbes's sovereign might not act as we hoped. But the Constitution might not either. Hope can be misplaced. You really should not go back to the husband who has been abusing you for years.

87. A similar hope has a similar role in the legal philosophy of Ronald Dworkin, who argues that there are no gaps in the law if one understands the law to be oriented toward moral purposes. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE

terpretive charity to your implausible interpretations.[88] As Aquinas noted, faith and hope beget charity.[89])

When we tell competing histories, for example, about *Bush v. Gore*, we aim to reconstitute what is or is not frivolous and therefore contemptible. Justice Scalia, challenged about the decision, offered the charming advice, "get over it."[90] One reason that it is hard to get over it is that, if this precedent stands as legitimate, then the Court is authorized to do this kind of thing again.[91] The accepted national narrative authorizes future actions. Unless the Court is properly shamed for its bad behavior, it will be able to get away with anything. Perhaps paradoxically, accusations of betrayal can be themselves community-building. They police the boundaries of the frivolous and aim at a new consensus with our unruly, unreliable, contemptible fellow citizens. If we were indifferent to them and their ridiculous beliefs, if we did not care, then indeed constitutional law would be a more placid business.

Only love can break your heart.[92]

AMERICAN CONSTITUTION (1996). This seamlessness, notoriously, is produced at a cost of indeterminacy and enormous judicial discretion. The Darwallian question, whether respectful relations can be maintained when the law is thus indeterminate, is an empirical one: can a society carry on on these terms? The answer is that it had better be able to, because indeterminacy and discretion are endemic to any possible legal system.

88. *See* JACK M. BALKIN, LIVING ORIGINALISM 87 (2011).

89. THOMAS AQUINAS, I–II SUMMA THEOLOGICA q. 65, art. 5 (R.J. Henle, S.J., ed. trans., 1993) (1267–1273).

90. Interview by Lesley Stahl with Antonin Scalia, Associate Justice of the Supreme Court of the United States, on *60 Minutes* (CBS broadcast Apr. 27, 2008), *transcript available at Justice Scalia On the Record* (Feb. 11, 2009, 3:03 PM), http://www.cbsnews.com/stories/2008/04/24/60minutes/main4040290_page3.shtml.

91. By the time this Essay is in print, you will know whether the Court has done it again in the context of health care reform. *See* Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1 (2011), *available at* http://yalelawjournal.org/2011/04/26/koppelman.html.

92. Neil Young, *Only Love Can Break Your Heart*, *on* AFTER THE GOLD RUSH (Reprise Records 1970).