



JACK M. BALKIN

CONSTITUTIONAL REDEMPTION

POLITICAL FAITH IN AN UNJUST WORLD

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For Sanford Levinson

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1

FAITH AND STORY IN AMERICAN CONSTITUTIONAL LAW

This is a book about faith, narrative, and constitutional change. For many years American constitutional theory has counted as its central questions the power of judicial review in a democracy and the appropriate behavior of judges and Supreme Court justices. In response many scholars, myself included, have focused on other constitutional actors: social movements, political parties, ordinary citizens, and their interpretations of the Constitution.

This book, however, looks at different issues. I am interested in the question of what attitude members of the public must have toward the constitutional project in order for it to be legitimate, and the dangers inherent in that very attitude. I am interested in the stories that Americans tell each other about what their Constitution means and how they use these stories to justify their actions, both to themselves and to others. I am interested in how Americans continue their constitutional project with an ancient Constitution that is only sometimes just, often very unjust, and always in the process of changing.

In focusing on these issues, I am not calling for abandoning the familiar questions of American constitutional theory; rather, I hope to bring new ones to attention. I do not claim that there is nothing else to constitutional theory than what I offer here. I only claim that there is this too.

Heraclitus said that one cannot step into the same river twice; it is equally clear, from studying American history, that one cannot participate in the same Constitution twice. Opinions and views that were once “off-the-wall” later become orthodox, and the settled assumptions of one era become the canonical examples of bad interpretation in another. Canonical cases, ideas, and doctrines soon become anti-canonical, completely reinterpreted, or merely forgotten. Whether we are originalists or living constitutionalists (or, as in my case, both), we cannot deny the fact of enormous

change in the doctrines of constitutional law and in the institutions and operations of constitutional government, what I call the Constitution-in-practice. What attitude must we have toward this ever-changing enterprise for it to be legitimate in our eyes? And how do we square our attitude with a Constitution-in-practice that may be very unjust in practice?

My answer to this question is orthogonal to the answers that most constitutional theorists have offered. The legitimacy of our Constitution depends, I believe, on our faith in the constitutional project and its future trajectory.¹ For if we lack faith in the Constitution, there is no point in being faithful to it. Fidelity *to* the Constitution requires faith *in* the Constitution. And our faith in the Constitution, in turn, depends on the story that we tell ourselves about our country, about our constitutional project, and about our place within them.

To believe in the constitutional project is to believe in a story.² At the heart of constitutions are stories: stories about foundings, to be sure, but also stories about people: the people who create the constitution and the people who continue it, the people who fight for it and the people who fight over it, the people who live under it and the people to whom it belongs. These are constitutional *stories* because they are stories about the constitution as a project of human politics and human action. They are *constitutional* stories, because they constitute a people as a people to whom the constitution belongs, who carry the project forward over time.

Constitutional stories construct a collective subject existing over many generations, whose constitution the Constitution is. The constitutional story is based on imagination, on the fiction of a collective subject that extends back into the past and forward into the future.³ In the story, the people are engaged in a project of governance extended over time in which successive generations participate. That is what makes the Constitution of 1787 still the Constitution of We the People today, even though there is not a single person living today who framed its words, and relatively few of us are the lineal descendants of that founding generation. The story of the Constitution of We the People is a constitution of We the People, bound not by blood but by a story, and by faith in a constitutional project.

But if constitutions are always backed by narratives, there are many different kinds of narratives: narratives of progress and narratives of decline, narratives of stasis and narratives of injustices unremedied, narratives of loss and narratives of restoration, narratives of corruption and narratives of redemption.

There are not only stories behind constitutions; there are also stories behind individual decisions and practices of constitutional interpretation. It may well be that behind every constitutional interpretation there lies a narrative, sometimes hidden and sometimes overt, a story about how things came to be, injustices fought or still to be rectified, things “we” (the People) did before, things we still have to do, things that we learned from past experience, things that we will never let happen again.

Often constitutional principles and doctrines are justified by stories about decisions and actions taken (or not taken) in the past. We do this now because we did that then; we do not do this now because we promised ourselves we would never do that again or let it be done to us again. We respect religious conscience because our Pilgrim forefathers left persecution in Europe.⁴ We guarantee racial equality because of Lincoln, the Civil War, Martin Luther King, the March on Washington, and the police riot at the Edmund Pettus Bridge. We guarantee rights of criminal defendants because of the actions of King George and his imperial government. Unpack a constitutional doctrine and you will usually find a story about the past, about a people, about its commitments, about its promises to itself, about what it has taken proudly from its past and what it has scornfully rejected, about its hopes, about its goals, about its fears. Unpack a disagreement about the Constitution and you will find a disagreement about stories, about what was done to whom by whom, what it means, and whether and why it is worth remembering.⁵

Americans, like most people, like a good story. They especially like a good story about themselves and their Constitution. Stories are the way they understand their Constitution, and the way in which they believe in it. One of their favorite stories is the Great Progressive Narrative. The Great Progressive Narrative tells us that America began with a break from tyranny, established a free government under a wise Constitution, and ever since then has been getting better and better, more just and more free. We have made mistakes, yes, we have been unjust in the past, to be sure, but the story of America is a story of progress: more rights for more people, more inclusion, more liberty, more justice for all.

Such stories, attractive as they are, are always partial and incomplete. They are myths that conceal as much as they illuminate. They are less attempts at accurate description of the past than justifications of the present and articulations of hopes for the future.

Moreover, stories like the Great Progressive Narrative have ideological effects. They frame the situation for us. They tell us how we got where we

are today and where we are going. They tell us the situation that we face and how we should proceed. They tell us that the present is like the past in this way (and not that), and what to expect from the future. They explain who we are and our place in the story. They assign roles to individuals and groups as heroes and villains. They give us a sense of how to go forward, what to watch out for, what actions were errors and what actions were praiseworthy, what dangers to guard against, and what actions never, ever to repeat.

And there is not just one story. There are many stories. There are stories of icons (the Minutemen, the Pioneers, Rosa Parks), of events (the Revolution, the Civil War, the New Deal), of persons (Abraham Lincoln, Susan B. Anthony, Martin Luther King), of achievements (the Voting Rights Act, Social Security, the “Winning” of the West). Many different versions exist at one time. They are told and retold, and in the telling, proliferate and mutate.⁶

Stories can offer partial and even distorted pictures of the world; they can be the vehicles for values, agendas, and other normative assumptions. But stories are more than simply true or false descriptions of the world, or simply sets of embedded values or agendas. They are also ways of making things true and false in practice. By having a story about the direction of the country, and believing in that story, people can help make the story true over time. Their prophecy can be a self-fulfilling prophecy. Narratives are also scripts, and scripts are made to be followed. We see this all the time in human relationships: Believe that others are out to get you and you will provoke them into hostility; believe that others are part of you and you will bring them into your world. Believe that you are in a state of decline and you will find a way to fall further. Believe that you have a great destiny and you may find a way to fulfill it.

The Great Progressive Narrative may be a distortion. It may be amnesia. It may be apologia for manifold injustices. But it may also be a spur to improvement. For if Americans believe that what Americans do—that what it means to be American—is to fight for an ever freer, more inclusive, more just society, they may interact with each other and with the world to cause it to become true. Or perhaps not. Perhaps they will just conveniently forget whatever conflicts with that happy story. There are no guarantees. Wishing will not always make it so. But without a sense of a common project, the project will likely fail.

Even so, I do not accept the Great Progressive Narrative. It is self-congratulatory. It views the history of the nation as one great escalator

ride toward freedom, equality, and justice. That is not the history of the nation. But I also do not accept a narrative of decline—that things have gotten worse and we must return to the wisdom of our framers. Nor do I accept a narrative of stasis and futility—that no matter how much we strive, justice never arrives, that reform is always poisoned and compromised, that improvement is an illusion, that the haves find ever-new ways to oppress the have-nots, and that the new boss is always the same as the old boss.

The abolitionist William Lloyd Garrison argued that the United States Constitution was “a covenant with death, and an agreement with hell” because it countenanced slavery.⁷ The expression originally comes from the Bible, in which the prophet Isaiah predicts that political compromises with evil are doomed to failure: “your covenant with death shall be disannulled, and your agreement with hell shall not stand.”⁸ I will return to Garrison and his accusations repeatedly throughout this book. Unlike most Americans, Garrison believed that the Constitution was born in sin and incorrigible, and that therefore, as the prophet foretold, it would eventually come to ruin. During the period before the Civil War the slaveholding South repeatedly threatened secession because the North mistreated it; Garrison responded that the free Northern states should secede from the South the better to rid themselves of complicity in a slaveholding republic.

Garrison is a useful corrective to the Great Progressive Narrative and to the almost instinctual veneration that surrounds our ancient Constitution. But the angry abolitionist was only half right. The Constitution begins, as Garrison said, as an agreement with hell. But that is the beginning of the story, not its end. The question is whether the Constitution can improve over time, whether it contains the resources for its own redemption, and whether the people who live under it and pledge fidelity to it can “form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” The Preamble to the Constitution sets a purpose that has never been fully achieved but is our duty to achieve. As the Talmud tells us: you are not required to complete the Great Work; but neither are you free to refrain from it.⁹

I argue not for a narrative of progress or decline, of futility or stasis; instead, I argue for a narrative of redemption. Redemption is not simply reform, but change that fulfills a promise of the past. Redemption does not mean discarding the existing Constitution and substituting a different

one, but returning the Constitution we have to its correct path, pushing it closer to what we take to be its true nature, and discarding the dross of past moral compromise. Through constitutional redemption, the Constitution becomes what it always promised it would be but never was; it changes in the direction of its correct interpretation and application; it responds appropriately to alterations in time and circumstance.

Redemption does not conform our practices to a preestablished template. It does not realize a nature that was foreordained, like an acorn naturally turning into an oak. It is inevitably an exercise in imagination—envisioning what the Constitution always should have meant in an alien time for which it was not prepared. No wonder, then, that at any point in history different people want to redeem the Constitution in remarkably different ways, and that the growth of our institutions is not easily predictable, but often contingent and unexpected.

We need a narrative of redemption because all constitutions are agreements with hell, flawed, imperfect compromises with the political constellation of the moment. All constitutions exist in a fallen condition, no matter how good people think they are. They make promises they cannot keep at the time they are enacted, commitments only imperfectly realized, guarantees that often are not guaranteed in practice and that may never be realized at all.

Constitutions are monuments both to liberty and license, equality and exploitation, hope and hypocrisy. The question is whether such a compromise, such a Constitution, can eventually be redeemed over time. Can its people live up to the promises they give themselves? Can they construct a Constitution worthy of respect? Can they repair what is broken without surreptitiously abandoning the system? Can they adapt to new circumstances and still remain faithful to the constitutional project, or must they finally give it up and start a new one?

To answer that the Constitution can be redeemed is to have faith in a transgenerational project of politics. This faith is essential to the Constitution's legitimacy. It can be argued for, but it cannot be proven. It is a leap of faith. A well-designed constitution can fall apart in months without public attachment and support; an imperfect constitution can last for centuries. Good design is important, even crucial, to generate legitimacy and hold off calamity, but it cannot do everything. Belief and commitment are also necessary.

Committed secularists may object to the language of faith and redemption that I use in this book, and even more to describing the Constitution

as fallen. Why use such religious imagery when the project is clearly secular? The reason is that constitutional traditions have much in common with religious traditions, and especially religious traditions that feature a central organizing text that states the tradition's core beliefs. We must have a way to talk about the commitments of a people in a creedal tradition spanning many years, involving the work of many generations, constantly subject to change and circumstances that are sometimes recognized and sometimes not, and organized around the maintenance and interpretation of an ancient creedal text. Many religions have faced the same problems of community and continuity and so have developed languages and concepts to deal with precisely these questions. Faith, hope, commitment, and redemption are universal human concerns. That is why the language of religion is particularly useful in understanding the path of the American Constitution, even if the constitutional project itself is secular.

Two problems haunt us and threaten our constitutional faith. The first is the problem of constitutional evil. The second is the problem of constitutional tragedy. The problem of constitutional evil is the possibility that the Constitution, as it operates in practice, permits or even requires great injustices. Just as the problem of evil tests our faith in a good and just Creator, it tests our faith in a Constitution that is far less divine and far more imperfect, depending as it does on the actions of past, present, and future generations. We can tell ourselves that the Constitution correctly interpreted would never succumb to evil. Hence we might put our faith in a "shadow Constitution," the Constitution that would come into being if only the right people were at the helm. But no matter how much we may believe in an ideal Constitution, we still must live with the actual trajectory of things said and done in its name, the Constitution-in-practice.

The problem of constitutional tragedy is the possibility that the American people, working through the forms and practices of the Constitution, will produce great evils or engage in self-destructive behaviors that are their undoing. The American Civil War emerged from constitutional evil—the Constitution's surreptitious embrace of slavery. Slavery and the fight to extend it into new territories, in turn, led to constitutional tragedy—the death of half a million Americans.

The Civil War is over. But the problem of constitutional evil and the possibility of constitutional tragedy are not. Even today our Constitution permits or requires great injustices that future generations will mark,

even though we disagree now about what they are and whether they even exist. And it is still entirely possible that the way we continue our constitutional project today will lead to a new constitutional tragedy in the days to come.

We cannot avoid the reality of constitutional evil or the possibility of constitutional tragedy. That is why the legitimacy of the Constitution requires faith in the redemption of the constitutional project over time. This faith is simultaneously faith in a text, an institution, and a people. When tragedy occurs, it is not simply because the text was bad or because the institutions were inadequate, although both of these may be the case. When tragedy occurs, it is also because the narrow-mindedness, selfishness, flaws, and misjudgments of a people led them to their undoing. Americans like to excoriate judges for interpreting their Constitution badly, and they like to claim that their judges are tyrants, unelected and therefore unaccountable. Criticizing judges and mobilizing on behalf of one's beliefs is how Americans make the judiciary ultimately responsive to their views, and the Constitution their Constitution. Listening to these attacks, you might think that constitutional tragedy is the result of bad decisions by unelected judges that drive an unwilling public toward disaster. But it is not so. Constitutional doctrines do not take the American public anywhere the American public does not want to go. Constitutional tragedy is not the tragedy of unrestrained judges on a rampage; it is the tragedy of a people who fail to live up to their own ideals.

The progress of the Constitution is not guaranteed, either by its texts, by its institutions, or by the inherent goodness and intelligence of its people. There is no escalator ride to progress and justice. The nature and scope of the future Constitution-in-practice is unsecured; it may be as unexpected to us as the Constitution today is to the generation of 1787. Perhaps they would be proud of what we have done in their name; perhaps they would be horrified. Perhaps, more likely, they would simply be bewildered and uncomprehending. In the same way, we might find the Constitution a century from now just as strange and implausible—assuming, that is, that our Republic lasts that long. Our Constitution's redemption may never arrive. Therefore we can only have faith.

No matter how often we point to the fixed features of our Constitution, set forth in clear determinate rules, much of the Constitution is not fixed, but changing, and even the parts that are fixed endure against a world that is constantly changing, turning the adept compromise of one era into the antiquated conception of another. The Constitution is not a

finished building; it is a framework that invites further construction. It is a project whose contours must be filled out over time. The persons who framed the Constitution understood that they could not fully control what others would do with it; and each generation eventually understands that it, too, cannot control what the next generation will do.

The idea that Constitutions serve primarily to secure liberty by constraining the future is a hopeful illusion. Good constitutions enable as much as they constrain. They create channels for politics, both good and bad. At best they create flexible frameworks in which others will build fruitfully, meeting the challenges of the future; at worst they create problems and obstacles to overcome, sometimes leading to blind alleys and dead ends, sometimes to the replacement of old constitutions with new ones. France has gone through Four Republics and is now on its Fifth; we are still officially on our first. This is not because our Constitution is so fixed but because it has proved so flexible.

The Constitution does contain fixed rules, to be sure, which can propel, direct, and hamper politics. But it also contains standards, principles, and vast silences. That is as it should be. There are not enough rules in the world adequate to navigate centuries of change and crisis. A Constitution, like Rome, was not built in a day. A constitutional project is developed over time, and there are inevitably course corrections. We only learn later on what we feel we always believed.

If the past cannot fully control the future, the Constitution cannot establish its legitimacy by setting down a fixed set of rules that we can agree on in advance and that are fair to all. Its legitimacy must come, perhaps paradoxically, from its openness to the future, and from the fact that people in the past, in the present, and in the future can and will disagree about its meaning.

What makes a constitution legitimate is not that it settles everything in advance in a way that is currently fair and just to the people who live under it. The basic framework is too limited to deal with every circumstance, and constructions are repeatedly built up, modified, and torn down over time. Moreover, the Constitution-in-practice may be deeply unjust with respect to many of the people who live under it.

Rather, what makes an imperfect constitutional system democratically legitimate is that people have the ability to persuade their fellow citizens about the right way to interpret the Constitution and to continue the constitutional project. What makes this legitimacy democratic is that constitutional redemption is not the product of isolated individuals but

the work of the entire public. Taken together, citizens have the resources to move the Constitution closer to their ideal of what their Constitution means and should mean.

The possibility that constitutional government will ultimately be responsive to public mobilization and public opinion gives ordinary people reason to hope that in time the Constitution can be redeemed, perhaps not in their day but in the days to come. Conversely, the constitutional system loses legitimacy not merely when it is unjust—for it is always unjust to somebody—but when its injustice is both substantial and incorrigible. For if public efforts cannot redeem an incorrigible Constitution, why should the public accept it?

For this reason, constitutional legitimacy depends on what Sanford Levinson has called constitutional protestantism—the idea that no institution of government, and especially not the Supreme Court, has a monopoly on the meaning of the Constitution. Just as people may read the Bible for themselves and decide what they believe it means to them, so too citizens may decide what the Constitution means to them and argue for it in public life. For the constitutional project to succeed, it is not enough that people support the project. They also must be able to criticize the project as it has been developed so far. People must be able to disagree with, denounce, and protest the Constitution-in-practice, including especially the decisions of the courts, and claim the Constitution as their Constitution, so that they can help move the Constitution-in-practice toward arrangements that are closer to their ideals. Only under these conditions can people plausibly maintain their constitutional faith.

But things are more complicated still. People's views about the content of an ideal Constitution conflict. People disagree with each other about the best way to go forward, and the best way to redeem the Constitution. Your improvement is my regress; your vision of redemption is my nightmare. We do not know whose version of the Constitution will prevail. Perhaps neither of us will win out: perhaps some combination will emerge that nobody likes. Perhaps through constitutional politics our agreement with hell will become some ghastly, unexpected compromise with hell.

Again, for this reason, democratic legitimacy requires faith in the processes of constitutional construction over time. We must have faith that through the thrust and parry of constitutional politics, through waves of mobilizations and countermobilizations speaking in the name of the Constitution, our Constitution can be restored or redeemed over time to better approach our ideals.

Constitutional faith may be necessary, but it is not necessarily benign. Constitutions in practice produce winners and losers. The winners proclaim its goodness; the losers are marginalized, demonized, or forgotten. For these losers, constitutions remain agreements with hell.

The danger in constitutional faith is constitutional idolatry. Idolatry treats an imperfect object made by people as superhuman or divine; it distracts and confuses, drawing us away from true objects of understanding and contemplation. Constitutional idolatry is the confusion of a morally compromised Constitution with justice and good government.

There are many forms of constitutional idolatry. One is forgetting that the Constitution is an imperfect, flawed thing made by people and administered by them, and treating it as an object of unjustified adoration, as the finest product of human civilization. A second form of constitutional idolatry is allowing debates over the constitution to limit our moral imagination. A constitution like America's also serves as a kind of higher law—it states ideals of liberty, equality, and democracy that people seek to live up to over time. The danger is that people will confuse what is just with what is constitutional. Their language of justice becomes too closely linked with the ways that they reason about the Constitution. As a result, they find it difficult to think about rights, or reform, or justice except in the ways that the Constitution-in-practice permits.

A final form of constitutional idolatry is complacency and the reflexive conformity of our moral beliefs to the status quo. Constitutional faith has ideological effects on the people who possess it. The cognitive dissonance of living under an unjust constitution can lead us to downplay its deficiencies, or perhaps project them onto other things or persons. We may assume that the system is basically just because it is *our* system. Constitutional faith can lead to constitutional apology. Moreover, because we are socialized and live in a world of public opinion, our very notion of what an ideal Constitution would look like, our very image of constitutional redemption, is not wholly our own but is affected by the views of those around us. The center of public opinion, as we understand it, shapes our view of what is constitutionally possible, and even our views of constitutional utopianism.

That is why social and political movements are so important. 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.

Constitutional hope is the first theme of this book. Constitutional historicism is the second. As Americans proceed through history in their great constitutional experiment, judgments about what positions are plausible or implausible, and the criteria for what makes a constitutional argument reasonable or unreasonable, change. To be sure, these changes are partly due to changes in positive law. But even changes in constitutional doctrine have deeper causes: social, economic, and technological changes, and the rise of new protestant interpretations of the Constitution by social movements, political parties, and ordinary citizens. Through these sources arguments move from “off-the-wall” to “on-the-wall,” from unreasonable to plausible to persuasive to orthodoxy, and, in the other direction, from reasonable to reactionary.

The recognition of these changes in our notions of professional reasonableness and constitutional common sense is constitutional historicism. The constitutional historicist understands that what makes a constitutional claim reasonable or unreasonable is influenced by changing times and circumstances, by the people who support the claim and are willing to stand up for it and attempt to persuade others.

Constitutional argument relies on professional judgment, but professional judgment relies on assumptions about what both professionals and nonprofessionals think is reasonable at any point in history. The self-image of professionals is that of reasonable people who proceed through reasoned arguments; therefore professionals often care deeply about what others think is reasonable or beyond the pale. That is, they care about reasonableness as a social product. But what is reasonable in this sense of the word depends on the practice of persuasion in public life, the institutions of public thought and expression, and the gradual development of public values and public opinions. Hence legal professionals’ sense of reasonableness depends indirectly on the success or failure of the mobilizations and countermobilizations that shape and influence public values and public opinion.

What legal professionals think is reasonable in constitutional argument does not stand apart from politics and public opinion. Quite the contrary: the history of our Constitution teaches us that there is a politics of “the reasonable”: through acts of persuasion, norm contestation, and social movement activism, people can eventually move ideas and positions from off-the-wall to on-the-wall. Today no one who publicly stated that the Constitution does not guarantee sex equality or who insisted

that states could prevent blacks and whites from marrying could be appointed to the federal judiciary. That person would not be reasonable, but crazy. But it was not always so. Those positions *became* reasonable—and their opposites unreasonable—through persuasion, through mobilization, through politics.

One might object that this makes reasonableness nothing more than a function of successful rhetoric. But there are two conceptions of rhetoric, which we see reflected in the ancient world and today.¹⁰ One conception of rhetoric is mere flattery, where we tell the audience what we think they want to hear, with the idea of manipulating them or hoodwinking them. We deliberately lead our audience away from truth. We are so concerned with winning that we do not care whether what we say is true or false, or perhaps we do not believe there is any truth or falsity to the matters we discuss. If this is what is meant by rhetoric, I reject it.

The other conception of rhetoric, which I embrace, views rhetoric as a means of helping others to see what is true and false by explaining matters in terms they can understand, meeting them halfway, and trying to argue from common values and common understandings. The goal of such a rhetoric is not to mislead but to assist: to help others in one's community see and eventually agree with what we earnestly believe to be the case. Reason in a political community is not opposed to this form of rhetoric; indeed, it depends on it. Moreover, if the legitimacy of an admittedly imperfect Constitution depends on people's ability to persuade others about the proper continuation of the constitutional project, its legitimacy actually depends on this form of rhetoric. Persuasion is not the enemy of constitutional legitimacy but its source.

The constitutional historicist sees this, understands this, accepts this, without giving up his or her own opinions about the just and the unjust, the reasonable and the unreasonable, yet understanding that those very same opinions are inevitably shaped and conditioned by the times he or she lives in.

The constitutional law of equality is a good example. It moved from one set of conceptual categories to another one over a course of a century. These categories are not permanent; they have been different before and they will be different again. They are ways of conceptualizing and cashing out the Constitution's commitment to the basic rights of citizenship and equality before the law. They articulate principles and distinctions and offer rules and doctrinal tests. These doctrines, categories, and