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**CONSTITUTIONAL FAITH, CONSTITUTIONAL
REDEMPTION, AND POLITICAL SCIENCE:
CAN FAITH AND POLITICAL SCIENCE COEXIST?**

H.W. PERRY, JR.*

I. INTRODUCTION

Jack Balkin's *Constitutional Redemption* is a terrific book.¹ I admire it for many different reasons. Like many great books, movies, or Bugs Bunny cartoons, it can be enjoyed on many different levels by many different audiences. I know, because I teach about the Constitution in many different contexts. As a law professor, I teach constitutional law to law students. As a government professor, I teach constitutional interpretation, civil liberties, and the American political system to undergraduates. I teach graduate research courses in public law to Ph.D. students. I also work with high school and middle school teachers on teaching the Constitution and the Bill of Rights. *Constitutional Redemption* is a valuable book for all of these audiences. It conveys profound and provocative ideas in very accessible ways that are, at once, intriguing to professors of constitutional law as well as to students and citizens.

One reason the book is such a great teaching tool and so persuasive on many accounts is its conceit. Balkin uses metaphors about religion and the device of storytelling to help explain much about our Constitution and our constitutional order. Meanwhile, he makes his own arguments. For the faithful, or those who have grown up around religion, the metaphors and analogies are clever and helpful.² Equal-

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

2. Balkin, of course, is not the first to go down this path. There have been analogies to religion and our Constitution and constitutional order from the very beginning. It is Balkin's long-time collaborator and friend, Sandy Levinson, who ranks the very first footnote in *Constitutional Redemption*. Balkin writes, "I draw on Sanford Levinson's famous comparison between American constitutional law and communities of faith in Sanford V. Levinson, *Constitutional Faith* (Princeton University Press 1989)." Balkin's work is so informed by Levinson's work that as I address the use of religious analogies in this Article, I am often referring to Levinson as much as Balkin. In fact, what inspires this Article is a

ly instructive is his teaching about the importance of storytelling. Since the beginning of time, stories have been a way to grasp truths, convey understandings, and serve as framing mechanisms.³

I buy the redemption and faith metaphors, and I agree with him that much of our understanding of our past, present, and future depends upon the stories we tell. I also agree with much of his story. As with any metaphor or analogy, however, his are not perfect and there is one portion of his story that I find particularly problematic. I have already described some of the different hats I wear: legal scholar, political scientist, teacher. One thing I am not is a theologian, nor am I a particularly well-educated student of religion, including my own. Balkin's knowledge of religion is so impressive that one wonders if he spent time in a seminary. I am certain that he knows more about religion than I. Modesty, however, never stops an academic. I will suggest some problems with his analogies to religion that might lead to some misunderstandings. It is when I shed my borrowed theological robes and put on my political science hat (speaking of problematic metaphors) that I see more serious problems. Balkin's stories about political behavior and political mechanisms offered to justify a hope in redemption give me pause.

II. BALKIN'S GENERAL ARGUMENTS

It is necessary to begin with a bare outline of Balkin's arguments in order to make my own.⁴ Balkin begins his book by saying that it "is a book about faith, narrative, and constitutional change."⁵ He is "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."⁶ Of particular concern is

conference in which Balkin's book and the reissuance of Levinson's book were jointly celebrated.

Another example of using a religious analogy to help understand constitutional interpretation is Sanford Levinson, *On Interpretation: The Adultery Clause of the Ten Commandments*, 58 S. CAL. L. REV. 719, 719–25 (1985). Levinson's article provides a wonderful pedagogical device that I use every year in my constitutional law classes. I use it with equal profit with undergraduates and even for some public lectures.

3. Balkin does not claim credit for the idea of the importance of stories. He says in a footnote that "[t]he most famous statement of this idea appears in Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983)." BALKIN, *supra* note 1, at 253 n.2. Nevertheless, Balkin develops the idea in impressive ways that are particularly instructive and accessible.

4. Balkin's arguments are much more nuanced and subtle than I can convey here. Moreover, I am only addressing a small portion of his argument.

5. BALKIN, *supra* note 1, at 1.

6. *Id.*

“how do we square our attitude with a Constitution-in-practice that may be very unjust in practice?”⁷ He answers:

The legitimacy of our Constitution depends, I believe, on our faith in the constitutional project and its future trajectory. 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.⁸

He goes on to argue that:

To believe in the constitutional project is to believe in a story. 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 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.⁹

Balkin suggests different stories that might justify constitutional faith. A prominent example is the “Great Progressive Narrative,” which argues that despite some mistakes America is “getting better and better, more just and more free.”¹⁰ He rejects this story especially to the extent that it conveys inevitability. He also rejects a narrative of decline that suggests things have gotten worse and calls for a return to the wisdom of the Framers.¹¹ However, not all stories justify faith in the Constitution. One such story he confronts several times in the book is William Lloyd Garrison’s famous claim that the Constitution was “born in sin” because it accommodated slavery. As such it was a “covenant with death, and an agreement with hell.” Garrison’s idea is taken from a quotation from the prophet Isaiah who suggests “that political compromises with evil are doomed to failure.”¹² Balkin believes that “Garrison is a useful corrective to the Great Progressive Narrative . . . [but] only half right. The Constitution begins, as Garri-

7. *Id.* at 2.

8. *Id.* (footnote omitted).

9. *Id.* (footnote omitted).

10. *Id.* at 3.

11. *Id.* at 5.

12. *Id.*

son said, as an agreement with hell. But that is the beginning of its story, not its end.”¹³ Balkin argues:

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 The Preamble to the Constitution sets a purpose that has never been fully achieved but is our duty to achieve.¹⁴

With this corrective to Garrison, Balkin begins to give his own story. “We need a narrative of redemption because all constitutions are agreements with hell, flawed, . . . [and] exist in a fallen condition.”¹⁵ For anyone who has been to a tent revival, the words sound very familiar. One expects him to go on to say, “But brothers and sisters, despite our fallen condition, I am here to tell you tonight that the Constitution can be redeemed, but to believe in redemption requires faith.” Then we would hear the request for affirmation, “and the people shall say, Amen.” What he actually writes is, “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.”¹⁶ He also references the Talmud, not so often heard at revivals, which “tells us: you are not required to complete the Great Work; but neither are you free to refrain from it.”¹⁷ Balkin’s story is one of faith, good works, redemption, and yes, proselytizing. Anticipating critics for his use of religious imagery, Balkin writes:

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 re-

13. *Id.*

14. *Id.* (internal quotation marks omitted).

15. *Id.* at 6.

16. *Id.*

17. *Id.* I might have preferred the passage from the Passover ritual found in the Haggadah:

The struggle for freedom is a continuous struggle, for never does mankind reach total liberty and opportunity. In every age, some new freedom is won and established, adding to the advancement of human happiness and security. Yet each age uncovers a formerly unrecognized servitude, requiring new liberation to set the human soul free. In every age the concept of freedom grows broader, widening horizons for finer and nobler living. Each generation is duty-bound to contribute to this growth, else our ideals become stagnant and stationary.

See Haggadah for Passover (David Schwartz ed., 2011), available at <http://www.whitebearunitarian.org/wbuuc/images/haggadah%202011%20one-up.pdf>

ligious 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 . . . 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 Constitution¹⁸

I fundamentally agree with the analogy thus far and accept its usefulness generally. But, of course, the devil is in the details.

III. UPON THIS ROCK: LEVINSON'S CONSTITUTIONAL PROTESTANTISM AND CATHOLICISM

It is at this point that I must turn to Sandy Levinson's *Constitutional Faith* because Balkin has built his argument upon Levinson's religious analogies. Levinson famously argued in *Constitutional Faith* that we can think about interpreting the Constitution in terms of Protestantism versus Catholicism. He gives a wonderfully concise and understandable discussion of these two strains of Christianity, which also includes some interesting analogs to other faiths. Levinson writes: "It is well known that the Protestant reformers, especially the followers of Martin Luther, emphasized the centrality of Scripture to Christianity. *Sola scriptura* were the great watchwords; an authentic Christianity must be based on the Scriptures alone."¹⁹ This is juxtaposed to Catholic theology that "supplemented reliance on Scripture with the independent authority of oral tradition as mediated through the *magisterium*—the teaching authority—of the Church."²⁰ Levinson writes:

As declared at the Council of Trent—the 1546 counterattack against Protestant heresies—unwritten traditions were coequal in stature to Scripture, and these traditions were stated to be those "which were received by the apostles from the lips of Christ himself, or by the same apostles at the dictation of the Holy Spirit and were handed down and have come

18. BALKIN, *supra* note 1, at 7.

19. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 18 (rev. ed. 2011) (1988).

20. *Id.*

down to us.” The key to the authoritativeness of tradition was its preservation “by unbroken succession in the Church.”²¹

To help further explain the theological divide, Levinson refers to an argument made by Cardinal Bellarmine in his treatise *The Word of God*:

Lutherans were mistaken in asserting that “everything necessary for faith and behavior is contained in the scriptures,” for “as well as the written word of God we require the unwritten word, that is the divine and apostolic traditions.” Because Scripture is often “ambiguous and perplexing,” said Bellarmine, there are “many places in which we shall be unable to reach certainty” unless the text is supplemented “by accepting the traditions of the Church.”²²

Levinson proceeds to analogize the Protestant/Catholic theological divide to contending theories of constitutional interpretation. There are two components to the analogy. First, there is the question of what the Constitution is and how to interpret it. One can have a protestant or catholic approach to that. Second, there is the question of who has the ultimate authority to declare the meaning of the Constitution? One can be protestant or catholic on that question as well. Importantly, one need not be uniformly catholic or protestant in answering the two questions. Though Levinson has a more subtle discussion, essentially, a protestant’s answer to the first question involves simply looking at the text of the Constitution to resolve constitutional questions. Levinson quotes, of all people, Frederick Douglass as an example:

[One must] ascertain what the Constitution itself is. . . . The American Constitution is a written instrument full and complete in itself. No Court in America, no Congress, no President can add a single word thereto, or take a single word there from . . . that the mere text, and only the text, and not any commentaries or creeds written by those who wished to give the text a meaning apart from its plain reading was

21. *Id.* (quoting 3 CAMBRIDGE HISTORY OF THE BIBLE: THE WEST FROM THE REFORMATION TO THE PRESENT DAY 193–94 (S.L. Greenslade ed., 1963)).

22. *Id.* at 19 (quoting QUENTIN SKINNER, 2 THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE AGE OF REFORMATION 146 (1978)). Levinson points out that this difference of relying solely on text as compared to other sources of authority is found in many religions including Islam and Judaism. *Id.* at 19–21.

adopted as the Constitution of the United States.²³

Think Hugo Black as the best modern expositor of this idea.

A catholic interpretation suggests that the written Constitution is supplemented by an unwritten constitution.²⁴ Adherents are exemplified by Justice Felix Frankfurter (the Constitution “is most significantly not a document but a stream of history”) and Justice John Marshall Harlan, who is “perhaps the greatest exemplar of ‘catholicism,’” according to Levinson.²⁵ Thinking of Justice Harlan’s opinion in *Poe v. Ullman*,²⁶ Levinson notes that Justice Harlan rejected the idea that the words of the Constitution alone were sufficient to understand the meaning of due process and saw tradition as necessary to give it meaning.²⁷

The second issue involves who has the ultimate authority to decide what the Constitution means. Here the protestant/catholic analogy is even clearer. A catholic perspective suggests that, like the Pope for Catholics, the United States Supreme Court is the final, infallible authority on the meaning of the Constitution. Non-Catholics often misunderstand the doctrine of papal infallibility, thinking that it is a claim that a pope cannot err. That is not the claim. Infallibility means that, when invoked, the Pope’s word is final. The constitutional analog is epitomized in Justice Jackson’s famous statement that, “We are not final because we are infallible, but we are infallible only because we are final.”²⁸ At least since the time of *Cooper v. Aaron*,²⁹ there has been little doubt about how catholic and how papal the view of the Supreme Court is, particularly in the eyes of the Justices themselves. In *Cooper*, Chief Justice Warren wrote:

[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution and that principle has ever since been respected by this Court and the Country as a permanent and

23. *Id.* at 31 (quoting Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery*, in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467, 467–80 (Philip Sheldon Foner ed., 1950)) (internal quotation marks omitted).

24. There are volumes written on the idea of an “unwritten Constitution.” For a classic recounting of the issue, see Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

25. LEVINSON, *supra* note 19, at 34.

26. 367 U.S. 497 (1961).

27. LEVINSON, *supra* note 19, at 34.

28. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

29. *Cooper v. Aaron*, 358 U.S. 1 (1958).

indispensable feature of our constitutional system.³⁰

Scholars debate who handed the keys to the Justices—the Constitution properly understood, John Marshall, the Warren Court—but secular papists the Justices have become. A catholic understanding of the Court’s authority is not limited to the Justices. There is little tolerance in the United States generally for a protestant “priesthood of all believers” approach.³¹ The Supreme Court’s interpretation is authoritative and binding. Levinson points out that when Ronald Reagan’s Attorney General Edwin Meese suggested that there was a distinction between the Constitution and constitutional law as promulgated by the Court and that perhaps the Supreme Court’s interpretation was only binding upon the parties to the case, the blowback was swift and fierce. Of course, Meese’s interpretation was not new. Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt, to name a few prominent examples, made essentially the same argument. But in recent history, and particularly at the time Levinson wrote his book, Meese’s interpretation was seen as heretical and as justification for intellectual excommunication. Nevertheless, Levinson notes that there still are some who support a protestant perspective on interpretational authority. Most notable are Ronald Dworkin and Levinson himself.³² (Who is excommunicated in religion and the academy has always seemed a bit arbitrary.) Still, few in America today would find acceptable the proposition that after the Supreme Court declares that the Constitution means X, that the people, or Congress, or Presidents should feel free to disregard the authority of the Court to have the final say on constitutionality. That of course does not mean that people have to agree with the Court, but it does mean that they have acceded to the idea that it is the final authority and expositor of constitutionality.

Balkin basically adopts Levinson’s characterizations of constitutional protestantism and catholicism, although he will qualify them. The fact that America is constitutionally protestant is fundamentally

30. *Id.* at 18.

31. As with most theological positions there is not universal agreement about what the term “priesthood of all believers” or “priesthood of the believer” means even within denominations. As commonly used, however, it suggests that every individual believer is in a relationship with God that is unmediated by others and that individuals can read (and interpret) Scripture for themselves.

32. Since the time of Levinson’s initial writing, there are rumblings of a Protestant reformation with regard to the Supreme Court, see, e.g., MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). I think it is fair to say that the Reformation has not yet arrived, and it is unlikely that it will for reasons that are detailed below.

what allows Balkin to believe in the possibility of constitutional redemption. As he writes:

[C]onstitutional legitimacy depends in part on protestant constitutionalism—the ability of ordinary citizens to claim the Constitution as their Constitution, to assert in public what they believe it truly means, to organize in civil society and in politics and persuade others of their views. Constitutional change occurs because Americans attempt to persuade each other about the best meaning of constitutional text and principle in their own time. By making protestant constitutional arguments, individuals and groups can turn claims that were once marginal or off-the-wall into accepted views, or at the very least influence future constitutional development.³³

Not just any old Protestantism works. Balkin is certainly not a Calvinist. Individuals are in charge of their own and the republic's destiny. Balkin does not believe that there is an inevitability of redemption. Free will and constitutional protestantism need not necessarily lead to a just constitutional order in the end, but it provides Balkin with enough faith to stay in the fold.

There is one more important tenet to Balkin's faith. He claims to have had a conversion experience. He has become an originalist. It is a decision made by an adult who has been born again and apparently has undergone a believer's baptism. This is a conversion that evidently requires a personal testimony and a profession of faith.³⁴ His new faith is in a particular type of originalism that he calls "framework originalism." To the outsider, the qualifier "framework" makes it seem unlikely that he needs to reject many of his prior beliefs, which raises questions about the true nature of the conversion. But that is for him to declare. He apparently believes that it is enough of a conversion to require being rebaptized.³⁵ This is not to say that his position is incorrect, but it is not generally what is meant by originalism. In any event, Balkin as an originalist is not the topic

33. BALKIN, *supra* note 1, at 235.

34. *See id.* at 226–50 (Chapter 8, "How I Became and Originalist"); *see also* JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (Balkin's most recent book that followed shortly after *Constitutional Redemption*).

35. When Balkin responds to the question of whether one believes in constitutional protestantism, he refers to an old joke about believing in baptism. Maybe the joke also applies to whether one can believe in framework originalism. After Balkin's conversion, one can say, "I not only believe in it, I've seen it done." BALKIN, *supra* note 1, at 99. It sounds like Balkin has chosen sprinkling as opposed to immersion; but Balkin, like all non-immersionists, presumably would say a baptism is a baptism.

here. His understanding of the Constitution as a framework is relevant, however, because it requires constitutional protestantism, and for true reform that justifies redemption, evangelical fervor.

IV. THE DETAILS OF THE STORY BUT MISSING FROM THE PLOT: RESPONSIVENESS, AUTHORITY, AND POLITICAL SCIENCE

Now to the particular story that Balkin chooses to tell and my qualms about the plot. Balkin tells us that all faith stories are both aspirational and descriptive. Fair enough, but his story seems so much more aspirational than descriptive that it troubles me, especially when wearing my political scientist vestments (or is it my hat?). Even as a social scientist, I believe that stories and anecdotal observations are important and that change can occur against all odds. But I also accept the need for more data before being comfortable with drawing systemic conclusions or making predictions. Balkin's story often does not mirror reality, or more precisely, examples seem to be more anecdotal than evidence of systematic and systemic behavior. This is of even more concern when looking to the future and trying to predict it, which, after all, is when redemption shall occur justifying continued faith.

Balkin understands how the American political system works as well as any political scientist. His story does not spring from naiveté. He does have some evidence and could find more to counter some of my claims. It is just that he and I are reading the evidence and the tea leaves differently. Or for another metaphor, maybe he sees a glass half full and I, five-eighths empty and leaking. His story does not sufficiently account for systemic and behavioral features that exist and are growing that thwart protestant constitutionalism in the American political system. I suspect that he would say that even if I were right in my descriptions, the anecdotes or exceptions are enough to justify faith. But it is the faith of a mustard seed. His descriptions that strengthen his faith are too rosy. I hope I am wrong, and I should confess that I am not convinced that he is wrong in terms of the possibility that his aspirational story will come true. I am not saying I have lost faith, but were my faith wholly dependent upon Balkin's story, I would be having a crisis of faith.³⁶

Balkin argues that because of our protestant constitutionalism and our written text Constitution, individual citizens can read the

36. I am not here to confess my own constitutional faith or offer my own theology; that would be too difficult. I take the easy road of critic to evaluate Balkin's faith and redemption story on its own terms.

Constitution for themselves (as individuals are free to read the scriptures) and in doing so, they make the Constitution their own and feel free to assert their own understanding of the Constitution. Because of this, they feel free to disagree with that most catholic and papal of institutions, the Supreme Court, and assert another constitutional vision. He writes:

The constitutional culture of the United States is democratic and participatory [The Constitution] belongs to them, and it is not the exclusive province of a set of professional elites. Although the public relies on lawyers and judges to expound and enforce the law in everyday situations . . . [the public has] the right to pronounce on the meaning of the Constitution whenever it feels that its values have not been respected.³⁷

Balkin parts company with Levinson about the protestant/catholic divide in an important way. He suggests that Levinson treats them as ideal types “representing an opposition between individual conscience and institutional authority.” Balkin suggests “in practice each incorporates elements of the other and depends on the other. This interrelation is hidden when we think about the Constitution statically. It becomes apparent when we view the Constitution-in-practice as a dynamic system.”³⁸ He argues:

Despite the Supreme Court’s pronouncement, we live, as we always have, in a world of constitutional dissensus—a world in which many people believe that the Supreme Court has gotten it wrong and that their own view is the right one. These people gather and form social movements; they influence political parties or take them over. Eventually some of them change the norms of society, and they or their allies succeed in appointing judges and justices who interpret the Constitution in new and different ways.³⁹

No one can deny in theory that the system can work this way, and there is evidence to prove that it has. Balkin recites familiar changes over history such as the ending of slavery and the 1937 New Deal revolution, the latter being a paradigmatic example of his point.⁴⁰ Of

37. BALKIN, *supra* note 1, at 236 (footnotes omitted).

38. *Id.* at 96.

39. *Id.*

40. He describes these changes, however, in terms that are different from the explanations of other constitutional theorists such as Bruce Ackerman. This is one example of why his book is interesting for constitutional theorists and is not simply for the lay person.

course, ending slavery required a civil war, and we still have not eliminated its lingering effects. Nevertheless, one cannot deny his basic point that things such as social movements can effect constitutional change. Balkin points out that this is not solely a historical phenomenon. He directs us to the gay rights movement and its progress or the conservative takeover of the judiciary in recent decades. But all political systems—even the most authoritarian—respond to public pressure and social movements over time in some ways. Surely more than that is required for a profession of faith.

The question is not so much the existence of constitutional dissensus but what happens or can happen as a result. Balkin anticipates this criticism particularly in the context of distinguishing himself from Levinson. He suggests that the criticism takes the form of arguing that the real question is the question of authority. Such criticism should be expected, of course, from political scientists like Levinson and me. Politics, constitutional or otherwise, *is* largely about power and authority.⁴¹ Balkin tries to answer this by suggesting that we must understand the concept of authority and how it changes. The critics, he says, are asking the wrong question: “By reducing the debate between constitutional catholicism and protestantism to a simple normative question about who has authority at a particular moment, one makes it impossible to discuss the mechanisms for constitutional change that produce authority.”⁴² But Balkin’s response seems equally reductive. All political systems are responsive and have mechanisms for change that produce authority. The relevant question is *how responsive* is the system to the protestant-inspired constitutional dissensus, or is it *sufficiently responsive*. An important aspect of responsiveness is the time it takes to change. This has to be part of the equation. The fact that things eventually may change is surely not enough.⁴³ As the old quip goes, eventually, we all will die.

Who has the authority, the extent of the authority, and how easily it can be changed does matter; it matters a lot. Political scientists, starting with Aristotle, classify political systems based on their responsiveness, and the nature of the responsiveness is the source of normative and empirical arguments about those systems. Moreover, shrewd

41. Probably the most famous modern definition of politics is David Easton’s: “Politics is the *authoritative* allocation of values.” A FRAMEWORK FOR POLITICAL ANALYSIS 50 (1965).

42. BALKIN, *supra* note 1, at 100.

43. I am reminded of Thurgood Marshall’s response to a reporter when asked about the suggestion of some people that there are problems if you try to go too far too fast on a topic like civil rights. “I’m the world’s original gradualist. I just think ninety-odd years is gradual enough!” THE I. F. STONE’S WEEKLY READER (May 19, 1958).

political leaders, religious or otherwise, do not remain passive in the face of dissensus. I suspect that the current pope and his predecessor have put in mechanisms that will thwart changes that might be contemplated because of rather robust dissensus of the past decades. This is just a guess as I am not a student of Vatican politics.⁴⁴ As a student of politics, I am certain that political leaders erect barriers to protect against responsiveness. Cynical, smart, authoritarian political regimes often allow and encourage political dissensus, but sophisticated observers do not believe that it suggests any hope for real political change. Sometimes it gets out of control and some change happens, but more often than not, it takes a real revolution to bring about the change. Within democratic polities, the story is not wholly different. Like authoritarian rulers, democratic leaders have also read Machiavelli. The way to thwart change is to try to hinder those mechanisms that might facilitate change.

My basic argument is that the mechanisms for constitutional change that Balkin touts are a cause for less optimism than he implies. Even if one is persuaded that they have worked historically, there are many more obstacles today. The questions are whether the current obstacles undermine Balkin's story, and are the obstacles relatively permanent—a one-way ratchet such that popular movements will find resistance to them increasingly difficult to overcome.

V. THE CATHOLIC SUPREME COURT AND THE FAITHFUL

At the end of his book, when Balkin turns to his argument for framework originalism, he returns to the concept of a protestant constitutional culture. He continues his earlier argument for the ability of Americans to interpret the Constitution on their own and to feel free to disagree with Justices as to its meaning. He says:

In American constitutional culture ordinary individuals, as well as groups in civil society, expect that they have the right to say what the Constitution means. They expect that the meaning of the Constitution (and thus of the country itself) is not merely a matter of elite opinion or professional knowledge but should be responsive to popular understanding

44. One well-known scholar was committed to being a political scientist and a devout Catholic. Walter Murphy thoroughly understood the politics of the Catholic Church and loved to discuss it as only a political scientist could. Those of us who had the privilege of hearing Walter expound on it over and beyond his writings were lucky to sit in great tutorials. He is sorely missed for many reasons, but his capacious understanding of politics is unsurpassed.

and values. Indeed, people may resist the notion that judges or professional elites know better than they do what the Constitution means. . . .

For the Constitution to be “our Constitution,” members of the public must feel that they are able to participate in its interpretation and constructions. It is not enough that lawyers can talk among themselves. . . .

Because We the People have ordained and established the Constitution, it is ours. Its fate is in the hand of the citizenry and not just the courts. . . . Democratic authorship is democratic authorization to say what the Constitution means.⁴⁵

Does any of that sound even remotely close to the way our system currently works or is likely to work? These quotes are arguably aspirational for a world in which framework originalism exists, but Balkin seems to suggest that they describe American protestantism as it exists today. If we were to accept framework originalism as the right constitutional philosophy, such protestantism, he suggests, would only expand. I neither see much evidence of this now, nor do I see any evidence that it is likely for the future. In fact, I see just the opposite.

Crucial to Balkin’s argument is the relationship between the Supreme Court and relevant publics. No matter how protestant are his and our views of the Constitution, for reasons argued above, he must confront a catholic Court—a very catholic Court.⁴⁶ More importantly, he must confront a very catholic public when it comes to the authority of the Supreme Court. Balkin is not so troubled by this because he claims that potential critics ignore interrelatedness and feedback mechanisms. It is always a good social science move to point out the existence of some feedback mechanism or interrelatedness, but existence does not equal efficacy. The Vatican has to deal with much dissensus and protestant behavior within the church—those pesky nuns, those Georgetown theologians, that American church. Feedback mechanisms exist within the church. But few would place much hope in the dissensus and feedback mechanisms causing a change in enunciated papal policy. Nor would many see much hope that when they next saw a puff of white smoke that their dissensus and feedback

45. BALKIN, *supra* note 1, at 237.

46. It goes without saying that labeling this as a Catholic Supreme Court has nothing to do with the religion of the Justices. Certainly, Levinson, Balkin, and I are not claiming that their religious affiliation has anything to do with the claims about the authority of the Supreme Court. There have, however, been some who argue that the religion of the Justices might be important in other contexts. See e.g., William Blake, *God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences*, POL. RES. Q. (forthcoming 2012).

would have mattered much. To do so would be to turn Catholicism into Protestantism or simply to see it as differences of degree rather than kind. No committed Protestant would be persuaded to convert because some feedback mechanisms exist.

Balkin acknowledges a catholic Supreme Court. So how does all this protestant dissensus work with a catholic Supreme Court? Apparently, discussion and dissensus will spur constitutional change largely by keeping ideas alive with the ultimate hope of trying to take over the Court in the future. This is done by electing politicians who will appoint Justices with their vision. This is truly a house that *Jack* built argument. Evidence, however, suggests that we have come to believe in the interpretations of the secular holy fathers and mothers on the Court for constitutional wisdom, and their pronouncements increasingly end rather than generate debate. This is so not only among the public, but also among elites and office holders as well. Gordon Silverstein has referred to this as how law kills politics.⁴⁷

Of course there are counter examples that Balkin can use to support his story. *Roe v. Wade*⁴⁸ did not stop the constitutional debate about abortion. *Bowers v. Hardwick*⁴⁹ did not stop the debate about gay rights. But in some ways, Balkin is, as empirical researchers would say, “selecting on the dependent variable.” Another way of saying it is that the exceptions prove the rule. To a political scientist, the question is not *can* the system be responsive, it is how responsive is it. What are the significant impediments to responsiveness? The trend seems to be going opposite of what Balkin argues, and there are structural reasons to think the trend will continue. This is not simply the argument that Levinson brought up about the reaction to Ed Meese. Criticism of Meese focused mostly on obeying judgments of a court. The trend I am suggesting is that increasingly the Supreme Court tends to hijack robust constitutional discussion.

A. *Controlling the Court Through Elections*

Let us examine Balkin’s hope about electing officials to effect change by their judicial appointments. Despite heated rhetoric by political candidates about the next president making appointments to the Supreme Court, there is little evidence to support that this ranks very high as a determining factor when casting a vote. Given what po-

47. GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* (2009).

48. 410 U.S. 113 (1973).

49. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

litical science has taught us about voting behavior, we know that voting is rarely driven by single issues, particularly something as complicated as the meaning of some aspect of the Constitution. Abortion might be the best example in favor of such a single issue vote, but even that usually does not explain a vote, especially at the national level. It is very hard to link voter beliefs about what the Constitution means to voting behavior, and even if it is done indirectly, it is unlikely to represent a very robust translation of public understandings and visions of the Constitution. Even so, Balkin's argument still might have legs. One might say, as most political scientists do, what drives votes is mostly partisan identification, and parties do represent constitutional visions. L.A. (Scot) Powe and I have argued as much and claim that over the past two generations, the Democratic and Republican parties have come to fundamentally different conceptions of the Constitution.⁵⁰ Given that party is a significant explainer of votes, both of voters and legislators, this offers potential support for the Balkin argument. However, we also argue that the constitutional visions of the parties have differed from the Constitution as interpreted by the Supreme Court. The trend of the Court going its own way undercuts the electoral accountability tie. Who is seated on this secular Congregation for the Doctrine of the Faith (a.k.a. the Supreme Court) will matter of course, and it will have some ties to parties and the electorate, but it is not a very responsive body.

The Court was always designed to be somewhat unresponsive, but mechanisms have changed to make it even more so. First there is the problem surrounding the appointment of judges. I am not as worried here about the current gridlock that has prevented the Senate from confirming people to fill vacancies. That could change with large majorities. There is every reason to suspect, however, that given the filibuster rule, we are in for effectively divided government and gridlock within the Senate for a long time. Who gets to appoint the Justices still matters, and Democrats and Republicans will be somewhat different from one another. But the divided Senate tempers the type of appointments that can be made. Confirmation requires walking a tightrope. Nominees who can walk the tightrope and make it through the appointment process are not likely to be ones who will respond to calls for a new constitutional vision. What concerns me most, however, is that it has become acceptable, indeed advisable, for judicial nominees to say virtually nothing about their constitutional

50. H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641, 641-96 (2004).

philosophy. Hiding under the “there may someday be a case that will come before the Court, therefore, I cannot answer” dodge has become the rule. There is so much wrong about this from a democratic theory perspective that another article could be written about it. As just one example, the confirmation is effectively the only moment of political accountability for an official who will be a lifetime appointee subject to virtually no subsequent democratic accountability or constraints. Indeed, these days even Presidents claim not to know the appointee’s position on important constitutional questions. This new norm for the judicial confirmation process seems unlikely to change, and it definitely poses problems for the linkage story Balkin tells.

There is a related problem that appears to be another new norm that is unlikely to change. It, too, raises questions about the story of how the people’s understanding of the Constitution will make it onto the Court via judicial appointments. These days the only people seen as being qualified for Supreme Court appointment appear to be judges, and federal judges at that. (Well, apparently being U.S. Solicitor General counts, too.) Powe and I have argued that this might help account for the fact that the Supreme Court has been instituting its own vision of the Constitution rather than the constitutional view of the parties. Federal judges do not seem to be the most likely candidates to be responsive to constitutional protestantism. Were we to return to an earlier era when governors, senators, and others closer to the people were legitimate nominees who made it to the Court with some frequency, there might be better support for Balkin. But there is no evidence to suggest that will occur. In fact in recent nominations, not having been a federal judge was argued as a reason for disqualification.

B. Controlling the Court and Constitutional Change by Elites

One might say that even if Balkin is a bit too optimistic about citizen constitutional discussion and its ability to influence the Court through electoral mechanisms, the relevant Constitution-debating public involves other elites, notably elected officials. But the trend is not very promising there either. Governing officials have increasingly put aside serious discussions of constitutionality. There have been different explanations for this. Officials increasingly see their decisions as only penultimate, especially if it involves an important constitutional question. Some members of Congress have even come to suggest that it might not be Congress’s responsibility to make constitutional judgments. It is hard to see how they could conclude that given the oath they take; but with the modern understanding of Su-

preme Court supremacy, it has become easier to say that constitutionality is the responsibility of a judge, not a member of Congress. Whatever they believe about their role, there are strong incentives for them not to wrestle with the issue of constitutionality and to pass the buck.⁵¹ Even when legislators take seriously their responsibility to debate the constitutionality of legislation, once the Court has ruled, it seems to stop them dead in their tracks. There have been virtually no serious attempts to “punish” the Court for many years by things such as impeachment, changing the size of the Court, jurisdiction stripping, or even budget reduction.⁵²

There can be little doubt that the Court has done little to foster the idea that anyone other than it should be the constitutional oracle. Scot Powe in his very important book on the Supreme Court has put it more bluntly.⁵³ He refers to the Court as an “Imperial Court.” Interestingly, he has his most biting comments in this regard not for the typical suspects, but for Justices O’Connor, Souter, and Kennedy, whom he labels the “troika.” He writes:

Equally important as *Planned Parenthood v. Casey*’s refusal to overrule *Roe v. Wade* was what the opinion by Sandra Day O’Connor, Anthony Kennedy, and David Souter said about the role of the Court in American society.⁵⁴

He continues:

The troika’s opinion in *Casey* is the most pretentious in the *United States Reports*. It asserted that the belief Americans hold of themselves as a people who live according to the rule of law “was not readily separable from their understanding of the Court . . . [as] speak[ing] before all others for their constitutional ideals.” . . . “Before” meant way above. Thus “[i]f the Court’s legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court’s concern with legitima-

51. See, e.g., Neal Devins, *Congress as Culprit*, 51 DUKE L.J. 435 (2001); Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

52. James L. Gibson, *Public Reverence for the U.S. Supreme Court: Is the Court Invincible* (Feb. 27, 2012) (working paper version at 35) (paper was presented at the Countermajoritarian Conference hosted by The University of Texas Law School on March 29–30, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=1898485.

53. LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE 1789–2008* (2009).

54. *Id.* at 312.

cy is not for the sake of the Court, but for the sake of the Nation.”⁵⁵

In the few instances where Congress has pushed back substantively on a ruling, the Court has shut it down, and Congress accepts the smackdown without retribution. Most notable was the brouhaha over the Free Exercise Clause started by the Court’s ruling in *Employment Division v. Smith*.⁵⁶ In *Smith*, the Court overturned its longstanding requirement that strict scrutiny be the standard employed in certain free exercise claims. *Smith* removed that requirement when a law did not target religion. In response, Congress quickly passed the Religious Freedom Restoration Act (RFRA),⁵⁷ which said that the standard should go back to the pre-*Smith* requirement triggering strict scrutiny, thereby necessitating a compelling interest demonstration on the part of the government. Congress passed the Act under its Section 5 authority under the Fourteenth Amendment. Particularly remarkable was that the law passed the House unanimously, and it passed the Senate by a vote of 97-3. None of this mattered. The Court in *City of Boerne v. Flores* struck down the Act and chided Congress to boot.⁵⁸ If in such an instance—where congressional understanding of the Constitution was almost unanimous and where the Court was not protecting an individual liberty—the Court can rule as it did and suffer little public or elite pushback, then protestant constitutionalism seems a bit feeble.

Concern for judicial supremacy arguably governed the Supreme Court’s refusal to overturn a congressional statute that was designed to undo the requirement for Miranda warnings. Powe argues, “Rehnquist, O’Connor, and Kennedy didn’t like Miranda one bit, but they liked the thought of Congress gutting a Supreme Court decision far less. Thus Miranda went from 5-4 at the height of the Warren court to 7-2 on the Rehnquist Court. If it wasn’t for judicial imperialism, such a result simply could not be possible.”⁵⁹ Presidents have been more willing than Congress to assert their constitutional interpreting responsibilities, but modern Presidents have been no more willing than Congress to seriously challenge the Court after it has ruled.⁶⁰

55. *Id.* at 314 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992)).

56. 494 U.S. 872 (1990).

57. 42 U.S.C. §§ 2000bb *et seq.*

58. 521 U.S. 507 (1997).

59. POWE, *supra* note 54, at 316.

60. President Obama did famously tweak the Justices about their decision in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), but he was roundly criticized by

C. *Controlling the Court by Its Legitimacy*

Balkin would argue, I think, that the fact that the Court seems to be getting ever more powerful and willing to resist any effort by others to engage in serious constitutional interpretation need not mean that it will be ever thus. One thing that might humble and constrain the Court and make it willing to entertain the constitutional vision of others would be if it were to have to worry about losing its legitimacy. Robert McCloskey in his classic *The American Supreme Court* thought that the Court needed to pay particular heed to this concern. If that were ever the case, it seems not to be so now. Research in political science has focused on the legitimacy question at least since McCloskey's book. With the advent of empirical behavioral research, the topic became even more studied. The lead behavioral researchers on this topic are James Gibson and Gregory Caldeira. Gibson recently had the opportunity to present a paper that summarizes the behavioral research on this topic and also reports new findings. He writes that "[p]olitical scientists have been studying the legitimacy of the Supreme Court for decades now, and several well established empirical findings have emerged."⁶¹ Some of the findings are as follows:

The Supreme Court is the most legitimate political institution within the contemporary United States. . . . [T]he . . . American mass public extends great legitimacy to the Court [S]ome have gone so far as to describe the Supreme Court as "bullet-proof," and therefore able to get

many for doing so. Likewise, when he suggested that it would be unprecedented for the Supreme Court to overturn the Affordable Care Act, he was criticized not only by Republicans but even by some of his allies. As reported in the *Washington Post*:

Many conservatives charged that Obama's words amounted to a stark warning that he intends to campaign against the court if the law or its key elements are struck down, while some speculated that he was trying to bully the justices. One Texas judge, outraged that Obama seemed to question the court's very right to review laws, ordered the Justice Department to submit a three-page explanation of what role the administration believes the courts have.

Even some legal scholars sympathetic to Obama and the health-care law are saying that the president might have been better off keeping quiet. "Presidents should generally refrain from commenting on pending cases during the process of judicial deliberation," said Harvard Law professor Laurence Tribe, a close Obama ally. "Even if such comments won't affect the justices a bit, they can contribute to an atmosphere of public cynicism that I know this president laments."

Peter Wallsten & Robert Barnes, *Obama's Supreme Court Comments Lead Some to Question His Strategy*, WASH. POST, Apr. 4, 2012, available at http://www.washingtonpost.com/politics/obamas-supreme-court-comments-stir-debate/2012/04/04/gIQAtI8EwS_story.html.

My point is not that presidents or members of Congress never criticize rulings, but usually there is little pushback; they tend to accept it and move on—just like citizens.

61. Gibson, *supra* note 52, at 2.

away with just about any ruling no matter how unpopular

The degree of legitimacy of political institutions is extremely consequential. For better or for worse, the decisions of legitimate institutions tend to “stick”—to draw the acquiescence of citizens, even those citizens who disagree with the institution’s policy decisions. . . .

...

Many of the rulings of the Court are unpopular The puzzle, however, is that dissatisfaction with the policy decisions has not morphed into threats to the legitimacy of the institution itself.

....

Democrats and Republicans love the Supreme Court at roughly equal levels, as do liberals and conservatives. . . .

[S]upport for the Supreme Court has been obdurate. Very small peaks and valleys can be found, although they are both quite shallow Some wonder whether anything the Court might do would imperil its basic support among the American people.⁶²

The public feelings of institutional legitimacy are not based upon a misperception that the Court agrees with them. Gibson found that roughly 15 percent of respondents place the Court in very close ideological proximity to themselves. About 28 percent see the Court as quite a bit more liberal than themselves, and 21 percent see the Court as quite a bit more conservative.⁶³ Public support does not waver for the institution even when there are extremely polarizing decisions. So for example, after *Bush v. Gore*,⁶⁴ popular support for the Court did not diminish,⁶⁵ and some actually claim that it was enhanced.⁶⁶ Even more remarkable, given the Court’s decided turn to the right in the period between 1987 and 2001 (which included *Bush v. Gore*), there was no decrease in loyalty toward the Court among Democrats or African-Americans.⁶⁷

62. *Id.* at 2–3.

63. *Id.* at 10.

64. 531 U.S. 98 (2000).

65. See, e.g., Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 35–36 (2001).

66. James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 520 (2007).

67. James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the U. S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 541–45, 553–54 (2003).

For those not familiar with the institutional legitimacy literature, it should be pointed out that all of these findings are quite remarkable. It is not the case that simple disagreement with the policies of an institution results in an immediate decline in its perceived legitimacy; but when disagreement exists, there does tend to be much more movement in perceptions of legitimacy over time, and it is often related to happiness with the output. The concept of expertise is a particularly important component in evaluating legitimacy. Judges are viewed as “experts” in the law.⁶⁸ Law is seen as requiring technical expertise and mere mortals or citizens are wary of contradicting the judgment of experts. Such deference is not limited to citizens. One can hear the same thing said by members of Congress after the Court has told us what the Constitution means.

Balkin is certainly correct in that good protestant citizens feel free to disagree after the Court rules on contentious issues. He underestimates, however, how much deference there is to the expertise of the Justices. And the longer the “expert” judgment of the Court stays in place and is not overturned, the more difficult it becomes not to see the Court’s position as what the Constitution means. This is true even when the Court’s position has implications for highly controversial issues of public policy where public dissensus is aroused. For example, to argue today with any hope of success that commercial speech should not receive any First Amendment protection would be very hard to do. Or, challenging the concept that corporations are “persons” for purposes of having some constitutional protections would be very hard to do even if that idea could capture the imagination of the public. Think again about the opinions in *Casey* (upholding the central holding of *Roe*) or *Dickerson* (upholding the Miranda rule). Despite serious disagreement in society and by many of the Justices, the Court’s original rulings must be upheld, so we are told, for the good of the Constitution and stability in law. There are obvious exceptions, thankfully *Brown* overturned *Plessy*, but overturning precedent is not a frequent occurrence. Of course, “distinguishing” precedent is fairly common, but the first mover creates path dependence, and it is rare to go all the way back to square one.

We could have a test of Balkin’s premise soon. Let us assume that the Court throws out the Affordable Care Act⁶⁹ or at least the individual mandate part of it. And let us assume (against all political

68. Gibson, *supra* note 52, at 6. Every law professor experiences first-year students who are willing to assume that something must be correct because a judge said it.

69. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

science predictions to the contrary) the 2012 elections produced the following scenario: a Democratically controlled filibuster-proof Senate, a Democratic House, and a second-term President Obama. And let us also assume that Obama got to replace some of the conservative Justices with liberals. Would Congress re-pass the individual mandate and send it back to the Court? Maybe, but I think it is doubtful. More likely, Congress would accept the Court's ruling of unconstitutionality and would probably try to find another route. One might suggest that this proves Balkin's point, but finding another route would be exceedingly difficult, which is why Congress came up with the individual mandate scheme in the first place. If the Court overturns the mandate, I suspect that we will go a very long time without a national health care plan irrespective of electoral outcomes. And I suspect that the use of individual mandates as a tool to make public policy under the Commerce Clause would be foreclosed despite the makeup of future Congresses and Courts. Conversely, I predict that if we are told by the current Justices that the individual mandate is constitutional, then many will come to believe that they were incorrect about the constitutional issue, if not the policy issue. And the longer that opinion stands the harder it would be to dislodge.

In any event, that is my story at least with respect to a catholic Court and an observant public. I just do not think that Balkin, in his story, sufficiently accounts for the faith that Americans have in the catholic vision of the U.S. Supreme Court and for the difficulty in making the institution democratically responsive. More importantly, there is every indication that this faith continues to grow stronger despite profound disappointments and disagreements. Even the Vatican must be impressed.

VI. STRUCTURAL OBSTACLES TO REDEMPTIVE CHANGE

Sandy Levinson, with whom Balkin is a frequent partner in crime, poses a particularly tough challenge to Balkin's story. Levinson in much of his later work has become known for his focus on the structural problems of our political system. I cannot imagine that anyone who knows Levinson or has heard him speak has not heard about the following problems: the mal-apportioned, democracy-thwarting Senate; the time between Election Day and the inauguration; the inability to have a no-confidence vote to remove the President; the misguided belief that the American constitutional tradition believes in the unitary executive (forty-eight states do not have unitary

executives), and the list goes on.⁷⁰ In fact, Levinson believes that the system is so broken and so unable to be fixed by normal politics that there is a need for a constitutional convention.⁷¹ Though I certainly do not share in his desire for a constitutional convention, and I disagree about whether some things on balance are good or bad, I usually find his description and analysis of political structures persuasive. The hard-wiring of structures and incentives matter much more than most legal scholars seem to acknowledge if the amount of attention they give to it is an indication of perceived importance. More importantly, structures and incentives make the ability to make profound changes very difficult. Levinson's focus (as has some of Balkin's) has increasingly been to think about the Constitution outside the courts, and to think about the structural and unlitigated parts of the Constitution. I raise Levinson's (and Balkin's) work here to bolster one of my critiques of Balkin.

Ironically, Balkin's book is too Court- and Constitution-focused. I say ironically because precisely what he is trying to do is make the Constitution and the constitutional order about something much larger than what the Supreme Court does or what is only within the four corners of the written document. For Balkin, the Constitution is a framework under which political institutions should be free to govern and try to make a more just system. For most political scientists, trying to understand how to make the United States a more just society living up to its promises would not begin with a focus on the Constitution. Politics is about power. Governing is about power. It is also about institutions and structures, but these have to be understood in terms of power. Political scientists would focus on who has the power, how it can be used, who can achieve it, and who cannot. What can thwart power? A roused public is always a source of power, but structures and incentives can do much to divert or drain it. Balkin talks about social movements, deliberation, feedback mechanisms, and so on, but all of this has to be thought about in terms of the bigger picture of other political structures, incentives, and power. Modern

70. SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* (William N. Eskridge & Sanford Levinson eds., 1998); *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995).

71. Levinson claims that he has come to many of these positions largely by returning to his roots as a political scientist. Frankly, I do not think he ever really abandoned them; it is just that it has come to play a greater role in his teaching.

structures and incentives are increasingly not responsive to the type of change mechanisms that Balkin proffers.

This is an unfair critique of Balkin. It is the typical “you should have written the book that I would write.” Even more unfair, it seems to suggest that Balkin needed to analyze the entire political system in order to have something to say and before he could declare his faith. That is not really my point. My point is that even if we were to adopt a theory of framework originalism, and even if there was much protestant constitutional deliberation and dissensus that called for change, and even if liberal Democratic judges were appointed to the Court (something I assume would be Balkin’s hope), there would still be other institutional barriers such as many of those discussed by Levinson and others that would make Balkin’s strategy for constitutional redemption very difficult.

Sure, the Constitution can be amended in theory; reality is another thing. Sure, political and social movements can form among the people to bring about change. But constitutionally hard-wired structures have made significant change very difficult no matter how intense the feelings are of a majority of citizens—structures such as the Senate, the Electoral College, federalism, separation of powers, single member districts, and Article V of the Constitution. These hard-wired provisions have, in turn, developed structures and institutions that are pretty calcified if not technically unchangeable: political parties, the filibuster, the decline in competitive electoral districts, extraordinary protection for incumbents, polarization, the unstoppable rise of presidential power, the extraordinary role of money in politics, the extraordinary proliferation of undigested information, segmentation of how citizens receive information that encourages people to have their own biases go unchallenged, the decline in structures that encourage civic engagement, and the list goes on.

In theory, all of these things could be changed, but there are huge barriers to accomplishing this that are structural, political, economic, psychological, and legal. Constitutional law has aided and abetted, indeed at times created the barriers to change, which makes it even more difficult to change them. As one example, campaign contributions are protected speech which privileges those with money. Another example is the extraordinary rise in presidential power and the diminution of other institutions of government. Political scientists have been talking about this for decades. Belatedly it has drawn

the attention of law professors.⁷² Relevant here is that many argue that the rise in presidential power seriously diminishes the opportunities for meaningful linkages between the people and the government which can effect change.

Change has always been difficult in the American political system, but I would argue, bolstered by much research in political science, that change has become exceedingly more difficult. Balkin understands the barriers to change as well as anyone, but he evidently is not so troubled by them, or he puts a great deal of faith in the ability to overcome them because of protestant constitutionalism. I am far more troubled by the barriers to change. It is why after his powerful sermon and invitation, I am not quite prepared to walk down the aisle and make a personal profession of faith based on Balkin's theology.

VII. RELIGIOUS METAPHORS

Another hat, now as a professor. I worry about students making more of analogies and metaphors than they should, or at times not quite getting the metaphor. Anyone who teaches or thinks about the First Amendment knows the value and pitfalls of the "marketplace of ideas" metaphor. Balkin acknowledges that his descriptions of religion are oversimplified and that one can only take a metaphor so far. I began this Article by saying that I like Balkin's (and Levinson's) religious metaphors and find them very useful and instructive. But as with any metaphor, they can be misunderstood or not convey precisely what the user wants them to convey. The protestantism that Balkin and Levinson describe is protestantism in theory, but not so much in reality, especially these days. I see two potential problems that may pose some confusion in terms of instructiveness. First, unlike Catholicism where there is only one true and apostolic church, describing what it means to be Protestant, both in theory and in practice, is far more difficult. Different sects of Protestantism are so different that they are almost separate religions.⁷³ Indeed today, many Protestant denominations are much closer to Catholicism than they are to other Protestant sects. Second, to the extent that Balkin and Levinson describe Protestantism, it is largely a description of "mainline protestant-

72. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010).

73. Balkin and Levinson both acknowledge that there are many differences among Protestants. The classic distinction with Catholicism that they make was historically true and is still true enough for their purposes.

ism,” and that has become an endangered species. Most of my students would have no clue as to what it means to be Protestant. What they know is what is taught in their particular non-denominational church.

For the most part, the crucial difference between Protestantism and Catholicism is not *sola scriptura* versus the magisterium; rather it is the priesthood of the believer. It is true that scripture has been and remains important to Protestants, and it underpins the concept of the priesthood of all believers, but the “sola” part of “*sola scriptura*” is problematic. As one example, systematic theology plays a major role in much Protestant theology and that often requires looking to far more than scripture. All interpretations are not acceptable. Systematic theology, among other things, is an argument against that. One thing that separates many Protestant sects is whether or not they are creedal. Some Protestant churches recite and subscribe to creeds such as the Apostles’ Creed. Others are adamantly non-creedal, the most prominent example being Baptists—at least that used to be the case. Subscribing to a creed is much like accepting the magisterium, although most historical creeds are more scripturally based. The point here is that, even to mainline Protestants, hearing Protestantism described in the terms of the early reformers or solely in terms of *sola scriptura* would not quite match their understanding.

More problematic for the metaphor in terms of its teaching value is the decline of mainline Protestantism and denominationalism, which is being replaced largely with non-denominational churches. Related to this is that many such churches are fundamentalist or very conservative. Even within denominations, the rise of fundamentalism has fundamentally changed the nature of the denomination—the most prominent example is undoubtedly the Southern Baptists—or it has caused a schism. Much has been written about all of this. I mention these things only to demonstrate how for some people the metaphors may not quite ring true or they may not be understood. Particularly within fundamentalist churches, there is little tolerance for interpretations of scripture that are not consonant with the belief of their fundamentalist leaders. Even in historically non-creedal churches, seminary professors are being required to subscribe to certain statements of beliefs. They may not be able to be excommunicated from their church, but they are excommunicated from their jobs. Likewise, in some independent churches, congregants can be shunned for beliefs contrary to the teachings of their church. Such practices have always been a part of Protestantism, but they tended to reside in minor sects or those denominations at the extreme. Such

churches are now a significant part of Protestantism and are growing. A related phenomenon is the increasing authority of individual pastors. Many wield extraordinary power. Democratic structures are being replaced by more authoritarian hierarchies with a powerful pastor sitting at the top. He, and they are almost always “he’s,” now has powers and governs in ways that would make the Pope jealous. The Pope can have the final and infallible word on doctrine, but popes tend to use this power sparingly. The new protestant popes, as some call them, countenance little disobedience either as it relates to theology or church governance. By contrast, until the present Pope (and some say his predecessor) began to tighten the reins, theological dissensus was far more robust in Catholicism than it was in non-mainline Protestantism.

Balkin and Levinson were not writing books on religion, and for all my quibbles, I think the religious analogies worked for their purposes and for readers of my generation. I am just not sure they will be so clear to younger readers.

VIII. CONCLUSION

Oh ye of little faith. The disciples had reason to be fearful of the storm on the Sea of Galilee, but Jesus not only rebuked the storm, he rebuked the disciples for their lack of faith with the famous line. He had to do this a lot. In a way, Balkin does the same to us. Balkin is clear-eyed about the need for constitutional redemption and the fact that it is not inevitable. Yet he is unapologetic in his faith. His call to faith is thoughtful, inspiring, and relatively novel these days, at least among those who do not have blind faith. It actually feels kind of good to be rebuked in the way he does it. We are told that faith can move mountains. I see a lot more mountains than does Balkin, and we differ some in what it will take to move them. For all the talk about Protestantism and Catholicism, Balkin really sounds Jewish in his call for a continual striving to achieve a just society. The Jewish religion is not known for proselytizing, but constitutional Judaism has a compelling story for attracting converts of many types, and it may be the only one true way to redemption.