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PROMISES, AXIOMS, AND CONSTITUTIONAL THEORY

Sotirios A. Barber*

JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011). Pp. 298. Cloth \$35.00.

HADLEY ARKES, *CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW* (2010). Pp. 280. \$25.99.

1.

In *Constitutional Redemption: Political Faith in an Unjust World*, Jack Balkin has collected and revised previously published essays whose organizing question reflects the present era of institutional decline: Why should Americans follow a constitution that permits (or permitted) and perhaps even requires (or required) evils like chattel slavery and the economic injustices of today?¹ Balkin equivocates. Sometimes he indicates that we in fact do owe fidelity to the parchment constitution, and that we do so because the “Constitution-in-practice” (the American political system of institutions, parties, and social movements) probably will make reasonably steady progress toward redeeming an original constitutional promise of justice for all.² At other times he suggests that our obligation to follow the Constitution remains an open question, one whose answer depends on whether the Constitution-in-practice will eventually work toward justice for all, including economic justice for all.³

To support his answer, whatever its precise formulation, Balkin ranges widely over central problems of constitutional theory. The many rewards that await readers of *Constitutional Redemption* include an extended reflection on both the benefits and the risks of faith in the Constitution and why this faith must ultimately be faith in the intelligence and the character of the American people. Balkin shows why observers who talk of “constitutional aspirations” should eschew constitution worship and acknowledge the Constitution’s inevitable compromises with evil.⁴ A chapter shows how the post-Nixon Supreme Court has rationalized white America’s cancellation of the Warren

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

2. *Id.* at 71.

3. *See id.* at 124–26.

4. *Id.* at 119–23.

Court's promise of equal educational opportunity for all Americans.⁵ A lengthy chapter reviews the recent scholarly debate over *Lochner v. New York*⁶ and concludes that, indeed, the Court did err in that case.⁷ The final chapter outlines Balkin's argument — developed at length in another book⁸ — for a kind of “originalism” that progressives can love: a “framework originalism” that preserves the benefits of the “living Constitution” that right wing jurists decry when constitutional doctrine is not trending their way.⁹

Balkin's book is no exercise in normal science. If taken seriously and developed to the limits of its logic, Balkin's main thesis — that constitutional fidelity depends on faith in constitutional redemption¹⁰ — would revolutionize constitutional theory. Balkin proposes that the value of systemic ideas depends on the value of the real-life state of affairs that prevail under those ideas — that, for example, the value of liberal constitutionalism depends on whether liberal regimes actually secure the well-being of their people.¹¹ Applying this principle to the American Constitution, Balkin concentrates on the “Constitution-in-practice” and assess the value of the document by whether the actual workings of constitutional institutions support reasonable hope of progress toward constitutional aspirations.¹² Where some of us would say that our constitution is okay but our politics are broken, Balkin would say that broken politics indicate constitutional malfunction.¹³ Balkin is in good company. He measures constitutional success or failure as the framers did: by what public policy tends to produce and permit.¹⁴ And since policy in a democracy is more or less responsive to electoral demands, Balkin sees faith in the Constitution ultimately as faith in the American electorate.¹⁵ Balkin thus opens the door to a mode of constitutional theory whose themes reach beyond the doings and sayings of courts, judges, institutions, and even politics generally, to embrace the actual quality of American life and the moral and intellectual character of the American people.

Balkin suggests what these qualities of life and character are in his reflection on *Dred Scott v. Sanford*¹⁶ and *Plessy v. Ferguson*.¹⁷ He claims that scholars generally agree that these cases were wrongly decided not only by present lights, but also in their day, and he explains this alleged consensus by the unwillingness of most Americans to accept “the casual racism” of these cases as typically American.¹⁸ These decisions must have been mistakes of constitutional reasoning, says Balkin, because we cannot admit to ourselves that we are “the type of people whose Constitution would say such . . .

5. *See id.* at 139–73.

6. *Lochner v. New York*, 198 U.S. 45 (1905).

7. BALKIN, *supra* note 1, at 174–225.

8. JACK M. BALKIN, *LIVING ORIGINALISM* 21–34 (2011).

9. BALKIN, *supra* note 1, at 228–50.

10. *Id.* at 2.

11. *See id.* at 65–66.

12. *Id.* at 71–72, 119–23.

13. *See id.* at 177–78.

14. *Id.*

15. *Id.* at 33–35, 247–50.

16. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

17. *Plessy v. Ferguson*, 163 U.S. 537 (1896); *see* BALKIN, *supra* note 1, at 174–89.

18. BALKIN, *supra* note 1, at 210.

thing[s].”¹⁹ These decisions fail to “reflect our nature or who we are.”²⁰ This most remarkable claim is defensible only if “the nature of America”²¹ is found not in the facts of American history, but in what Lincoln called “the better angels of our nature” and if constitutional government is best understood as an instrument for elevating the American character to its better self.²² The revolutionary implications of this assumption for the field of constitutional theory are unmistakable. A “Balkinized” field of constitutional thought — may it soon materialize! — would work out a substantive theory of constitutional commitments and corresponding human virtues. Balkinized thought would then deploy this theory to assess public policy and constitutional decisions by how they served those commitments and fostered those virtues. This could mean exciting stuff. If I may offer an example of my own, the constitutional theorists of a Balkinized future would finally say out loud what everyone now knows: that the color-blind constitutionalism of the Roberts Court is no more than an attempt to deodorize opposition to the central promise of the Civil War Amendments: full participation of black Americans in American life.

To defend contentions of this kind (their content and their tone) from inevitable charges of rank partisanship, Balkinized constitutional thought would have to demonstrate to all within the reach of evidence and logic that: (1) there are moral truths (like “racism is wrong”) and sophistic or coded denials of these truths justify morally indignant responses; (2) people (like the framers of the Civil War Amendments) can have commitments without being fully aware of what those commitments require; (3) at bottom, who or what a people (like the “American people”) is depends on a moral judgment (how to describe their better angels); (4) the crucial function of constitutional government is an educative function, not a coordinating function; and (5) a constitution that makes sense is oriented more to substantive social ends and the cultivation of specific human types than to maintaining process of decision and securing rights (exemptions from public power).

Though Balkin needs these arguments to back up his central thesis — constitutional fidelity requires faith in constitutional redemption²³ — and though these arguments have been available in the literature for some time,²⁴ an inner skepticism stops Balkin from recognizing his true intellectual allies. This skepticism denies the existence of moral truths that are beyond fundamentally arbitrary personal commitments or social conventions, truths to which human commitments and conventions are answerable. Balkin’s skepticism takes the form of what he calls “constitutional historicism,” the second theme of his book.²⁵ Balkin’s “constitutional historicism” holds

19. *Id.* at 210.

20. *Id.*; *see also id.* at 17, 84, 243–46.

21. *Id.* at 210.

22. *Id.* at 250; *see also id.* at 8, 18–19, 51–52, 59–60, 79–82.

23. *Id.* at 2.

24. See the following three works by Michael S. Moore: Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Michael S. Moore, *Moral Reality*, 1982 WIS. L. REV. 1061 (1982). *See also* SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (2007).

25. BALKIN, *supra* note 1, at 12.

that what makes a position reasonable (“on the wall”), or unreasonable (“off the wall”), depends not on eternal verities but on unpredictable “changing times and circumstances.”²⁶ Though he is aware that arguments for liberal constitutionalism assume “a transhistorical standard,” he tries to deny the existence of any such “standard.”²⁷ But without some “transhistorical” notions (with real referents or referents assumed real) like goodness, truth, validity, evidence, coherence, and integrity, we could argue for nothing at all because we would not have the social practice called “argument.” When we argue in good faith, we suppose a truth of the matter in contention. We appeal to evidence assumed shareable by all who can reason rightly. We expect each other to mean what we say. And when we argue about practical matters either in planning for the future or criticizing the present or the past, we assume some transhistorical good. One cannot successfully contend that “slavery is wrong” means the same as either “I dislike slavery” or “we dislike slavery.” “I/we dislike slavery” cannot work as a reason for what anyone else should like. Familiar and ineluctable expectations and assumptions of practical argumentation create an embarrassment for Balkin, a leading constitutional theorist, for the practice of constitutional theorizing is a specific form of argumentation.²⁸ So, not surprisingly, Balkin soon compromises his “historicism,” vitiating it in the process.

Balkin asserts that “[b]ecause [1] constitutional change is inevitable, [2] it is important that citizens have means of nudging the constitutional-system-in-practice closer to their preferred interpretation of the Constitution.”²⁹ Yet proposition [1] of this assertion hardly supports proposition [2]. Nothing of practical import follows from the non-moral proposition that “constitutional change is inevitable.” A premise is missing here, and that premise, as expected, involves democracy. Balkin goes on to make the premise explicit.³⁰ He denies that a regime which gives a central authority like the Supreme Court the final say on constitutional meaning is “a respect-worthy system.”³¹ To “evolve and achieve democratic legitimacy over time,” he says, a regime must honor the rights of communication, access, and representation essential to “[t]he dialectic between a central judicial authority and popular interpretations of the Constitution.”³² Balkin thus treats liberal democracy as the transhistorical standard whose existence he tries to deny.

Balkin ignores his historicism again when he distinguishes his brand of originalism from the variety of originalism that is sometimes avowed by jurists of the American right.³³ Like originalists of all stripes, Balkin holds that parts of the Constitution are “fixed . . . at the time of adoption” and “cannot be altered except through amendment.”³⁴

26. *Id.*

27. *Id.* at 65; *see also id.* at 211–15.

28. *Id.* at 211–13; *see also id.* at 44–45, 216–18.

29. *Id.* at 70.

30. *Id.* at 71 (“This system of feedback between popular interpretations and institutional effects is partially but imperfectly democratic.” (citation omitted)).

31. *Id.* at 70.

32. *Id.* at 71; *see also id.* at 9–10, 63.

33. *Id.* at 228.

34. *Id.*

This fixed meaning applies not only to “hard wired” provisions like the qualifications of principal constitutional officers; it applies also to the abstract standards and principles like “unreasonable” in the Fourth Amendment and “equal protection” in the Fourteenth Amendment.³⁵ “The original meaning” of such terms, says Balkin in a crucial move, “does not include how people at the time of adoption . . . intended or expected the text to be applied,” and originalists of the American right err in confounding meaning with expected application.³⁶ They do so, Balkin says, “fearful that vague standards and abstract principles in the text will give later generations too much discretion,” but they succeed only in making “originalism unworkable . . . [in the] modern state.”³⁷ By contrast, Balkin’s “[framework originalism] distinguishes between the principle of ‘equal protection’ stated in the text of the Constitution and what the generation of 1868 would have assumed was equal treatment.”³⁸ Neither that application nor any other can capture the meaning of equal protection, and just because different generations apply the term to different sets of facts yielding different legal conclusions, there is no reason to believe that the “original semantic meaning”³⁹ of the term differs from the same meaning today. Thus, says Balkin, the text is “a delegation” to each generation “to implement the Constitution’s great promises in changing times and circumstances, while preserving the [Constitution]’s original semantic meaning,” which in the case of the Equal Protection Clause is . . . equal protection.⁴⁰ Balkin’s theory of constitutional meaning raises questions about his right to call himself an originalist and how his theory differs from the theories of Ronald Dworkin,⁴¹ Michael S. Moore,⁴² and other anti-originalists.⁴³ But I leave these questions aside. My present point is that Balkin needs to explain how he can deny transhistorical standards at one point⁴⁴ and declare at another that words that pick out one such standard (“equal protection”) remain fixed in meaning from generation to generation, regardless of changing definitions and applications.⁴⁵

Whatever might be said about Balkin’s theory of meaning, it does comport with his view of the Constitution as a document that the public rightly claims as its own.⁴⁶ Accordingly, says Balkin, the Constitution’s meaning “should be responsive to popular understandings and values.”⁴⁷ This last statement needs clarification. An example of responsiveness to “popular understandings and values” is Balkin’s reason for declaring that *Plessy* was wrongly decided in its day.⁴⁸ If the Equal Protection Clause speaks for

35. *Id.* at 230.

36. *Id.*

37. *Id.* at 230–31.

38. *Id.* at 242.

39. *Id.*

40. *Id.*

41. See, e.g., Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

42. See, e.g., Moore, *A Natural Law Theory of Interpretation*, *supra* note 24.

43. For more on anti-originalism, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

44. See BALKIN, *supra* note 1, at 230.

45. See *id.* at 242.

46. *Id.* at 236–38.

47. *Id.* at 237.

48. *Id.* at 209–10.

“us” today, and if “we” today would be ashamed to be associated with the racism of the majority opinion in *Plessy*, then we today can say that the Court erred in its understanding of equal protection, for equal protection means what our better angels find it means — not necessarily what people thought it meant then or think it means now. Because we know that today is tomorrow’s yesterday, we should realize that today’s conception of equal protection may fall short of that equal protection to which our better angels aspire. Whether cognizant of the fact or not, we cannot really value our mere conceptions of equal protection; if we value equal protection, we value the real thing. Consider what we would give to someone as a reason for doing something controversial (for doing something that calls for a justification). No one would say “Impose (or don’t impose) this racial quota because, even though I may be wrong or my opinion may change, I personally believe at the moment that equal protection requires (or forbids) it.” No one would say or coherently could say “Let’s impose this quota because our era thinks it is right even though some of us think it is wrong, and what is right or wrong changes with the times.” Ronald Dworkin demonstrated forty years ago that to invoke either one’s personal conception as such, or the community’s peculiar conception as such, or the conception peculiar to one’s era as such, would treat not equal protection but one’s will or the will of one’s community or one’s era as the reason for action.⁴⁹ So if we value equal protection, we value the real thing to which our better angels aspire in a spirit of self-critical striving. Balkin’s account of our attitude toward *Plessy* and *Dred Scott* points in this direction, contrary to his avowed “historicism.”⁵⁰ Though he may not realize it, his theory of constitutional redemption assumes that a good constitution fosters a people that is aware of its fallibility and is actively concerned with doing the right thing as distinguished from its own thing — a distinction that historicism cannot admit.

2.

Balkin’s difficulties justify turning to theorists who affirm transhistorical standards. Hadley Arkes is such a theorist, and I comment here on a recent book in which he attacks historicist thought.⁵¹ On balance, however, Arkes offers a defective understanding of transhistorical standards, and while Balkin unsuccessfully denies transhistorical standards, he holds a superior understanding of what the Constitution is — a better view of the Constitution’s basic normative character. In the end, Balkin and Arkes can learn something from each other, and we can learn something from both together.

Arkes describes his entire career, presently in its fourth decade, as part of a project to rescue constitutional law from historicism and legal positivism and restore the tradition of “natural law” in constitutional thinking.⁵² As forerunners and present allies

49. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134–35 (1977). For the moral realist assumptions of every day moral discourse, see DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* 23–25 (1989).

50. See BALKIN, *supra* note 1, at 209–11.

51. HADLEY ARKES, *CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW* (2010).

52. *Id.* at 11.

in this project he mentions Leo Strauss, Harry Jaffa, John Finnis, and Robert George.⁵³ Rather than recognize Ronald Dworkin, Michael S. Moore, and other liberal theorists whose ambitions for moral philosophy overlap his own, he mischaracterizes liberals generally as moral skeptics.⁵⁴ Surprisingly for a natural lawyer, he also finds many “a good word” for moral skeptics like Robert Bork, William Rehnquist, and Antonin Scalia, apparently because he thinks their skepticism is merely avowed and because their instincts bring results that natural lawyers would embrace.⁵⁵

In a chapter that approaches open contempt for liberal opinion, Arkes excuses Rehnquist’s lone dissent in the *Bob Jones* case.⁵⁶ In his “good word” for Rehnquist (not an apology, he says), Arkes ignores the fact that Bob Jones University (“BJU”) is a state-chartered corporation that is maintained partly by tax subsidies. This enables him to label BJU’s former policy against interracial dating as a “matter wholly of private choice.”⁵⁷ Arkes reasons that as a wholly private entity whose membership was voluntary, BJU had as much right to ban interracial dating as individuals who purchase space in the classified section of the New York Review of Books (“NYRB”) have a right to specify the races of prospective mates.⁵⁸ He seems to think that if NYRB could legitimately open its pages to preferences for single white females (“SWFs”), BJU could legitimately close its gates to interracial couples who could always go elsewhere.⁵⁹ Arkes thus assumes no logical or moral difference between banning some race-based personal choices and accommodating all racially relevant personal choices — race-based and race-neutral — leaving no material difference between BJU’s banning interracial couples and NYRB’s admitting both inter- and intra-racial couples.⁶⁰ The lapse in logic here speaks for itself.

In a later chapter Arkes excuses the paranoia that brought Richard Nixon to Watergate.⁶¹ Arkes’s sympathy for Nixon is the reverse side of his contempt for liberals who treated theft of the Pentagon Papers as no big deal while treating the Watergate burglary as a regime-shaking crime.⁶² This suggestion of liberal hypocrisy would be reasonable were it not for facts that Arkes ignores. First, the public did initially treat the Watergate break-in as just another burglary. Watergate became something else only as pixel-like facts gathered into a most anomalous image: the President of the United States of America as just another crook. Second, Arkes offers no reason to believe that the public would have treated the burglary at Watergate as it treated the theft of the Pentagon Papers if the former had turned up facts with similar bearing on the public interest. True, as Arkes proposes in a thought experiment, there might have been something in the files

53. *Id.* at 11, 74–75.

54. *Id.* at 56.

55. *See id.* at 50–51, 81–82, 235.

56. *Id.* at 235, 239–41; *see* *Bob Jones Univ. v. United States*, 461 U.S. 574, 612–23 (1983) (Rehnquist, J., dissenting).

57. ARKES, *supra* note 51, at 245.

58. *Id.*

59. *Id.* at 245–46.

60. *Id.*

61. *Id.* at 255–57.

62. *Id.*

of the Democratic National Committee that would have excused the burglary,⁶³ yet Arkes offers no suggestion that such information actually was in the files. And while Arkes castigates (not unfairly, in my view) the Supreme Court's refusal to delay publication of the Pentagon Papers so that the government could redact information that might endanger American lives,⁶⁴ he never questions the relevance to public policy of what the papers revealed about the origins and the conduct of the Vietnam War.

These lapses in logic and fairness expose Arkes's confusion about the Constitution's basic normative character. As its preamble indicates, the Constitution is basically an instrumental norm, a set of means to goods conceived as intrinsically desirable states of affairs (security, justice, prosperity, and the like).⁶⁵ That Arkes has an awareness of this fact and its implications is evident in his admiration for Abraham Lincoln, whom he treats throughout the book as the model of democratic statesmanship.⁶⁶ Yet, an admirer of Lincoln should see immediately why Nixon's role in the Watergate cover-up deserved more condemnation than Daniel Ellsberg's theft of the Pentagon Papers.⁶⁷ Lincoln's presidency manifests two principles of the logic of action: the means to any complex end are indeterminate, and means are subordinate to ends in value. Lincoln found himself in a situation where he had to violate prescribed constitutional means to secure ends that he was sworn to secure, and Arkes admires Lincoln for doing what he had to do.

From Lincoln's conduct during the spring and summer of 1861, Arkes draws a picture of what Lincoln would have done upon learning of the Pentagon Papers.⁶⁸ This Lincoln would not have found himself asking a federal district judge to delay publication.⁶⁹ Our Lincoln would have acted on his own.⁷⁰ He would have yellow-taped the offices of the Times and the Post, thrown their editors and reporters into "protective custody," and told cheeky judges issuing writs to "stick to their own knitting."⁷¹ Arkes thus admires Lincoln for the character he displayed in acting not within institutional restraints but outside them — outside the self-styled law of the land, a law to be respected as such only so long as it lets a man do what he has to do.⁷² In holding Lincoln as a model of statesmanship, Arkes affirms a teaching of thinkers from Homer and Plato to Locke and the authors of *The Federalist*: because human kind cannot really control nature, man-made rules will inevitably run out, and when they do, hope for the ends that motivated the rules will depend on the arrival of leaders with intelligence, courage, and magnanimity.⁷³ People of any experience sense this truth, and that is why Nixon was

63. *Id.* at 256–57.

64. *Id.* at 121–29.

65. See U.S. CONST. pmbi.

66. See ARKES, *supra* note 51.

67. See *id.* at 254 (describing Ellsberg as "the curious figure who had helped to assemble – and then leak – the Pentagon Papers").

68. *Id.* at 119–21.

69. *Id.*

70. *Id.*

71. *Id.* at 119.

72. *Id.* at 120.

73. See generally CLEMENT FATOVIC, *OUTSIDE THE LAW: EMERGENCY AND EXECUTIVE POWER* (Sanford

more blameworthy than Ellsberg. People expect more from the top man or woman than from those below, and when Nixon offered himself for the presidency, he pretended to be what people expected.

For all his admiration of Lincoln, Arkes's central thesis evokes a different image: action within the law, not above the law, come what may.⁷⁴ Arkes knows that the positive law can run out, as it did for Lincoln, but he feels he can still save the ultimate usefulness of law by appealing to the natural law when the positive law falls short.⁷⁵ By a "natural law," Arkes means a dictate of reason, expressible as an axiom.⁷⁶ And by "axiom" he means a rule of conduct that cannot be coherently denied in the context of its utterance.⁷⁷ His examples include such maxims as there is no right to do wrong, one should not judge one's own case, and racial discrimination and ex post facto laws are wrong per se, regardless of their consequences.⁷⁸ The axiom on which Arkes says Lincoln acted was "government by consent."⁷⁹ Lincoln, it seems, was "equally dedicated to the principle of equality and the principle of consent."⁸⁰ "To insist on more equality than men would consent to . . . would require turning to force or to the arbitrary rule of the few."⁸¹ Here, Arkes must have been thinking about something other than his immediate subject. A maxim of consent-come-what-may could justify the Rehnquist and Roberts Courts' abandonment of the promise of the *Brown* decision. But, we recall, Lincoln was a co-author of the Civil War. The moral of Lincoln's story is that equality is the basis of consent, consent without equality is a lie, and genuine consent as an end can justify force as means.⁸² I will not dwell on Arkes's suggestion that action against consent is arbitrary.⁸³ But one would not expect this from a writer who has devoted his career to restoring a political role for the idea of truth beyond transient opinion. Was it arbitrary for Lincoln to use force against opinion that was itself arbitrary?

An assumed axiom regarding race discrimination is what enables Arkes to deny a difference of moral principle between BJU's exclusion of people who dated across racial lines and NYRB's admission of ads expressing racial preference. The maxim seems to be that race should never enter into a reason for doing anything that affects other people.⁸⁴ What makes race-based choices of any kind morally wrong in any context, regardless of consequences, according to Arkes, is its sheer illogicality.⁸⁵ By linking goodness (or badness) of any kind to race, one implies a racial determinism that would apply to

Levinson & Jeffrey K. Tulis eds., 2009).

74. ARKES, *supra* note 51, at 11–12.

75. *See id.* at 43–48, 77–78.

76. *Id.* at 24.

77. *Id.* at 50–52.

78. *Id.* at 32–33.

79. *Id.* at 59.

80. *Id.* at 232.

81. *Id.* (quoting HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLASS DEBATES* 377 (Univ. of Chic. Press 1982)).

82. For an argument that Lincoln's use of coercion was constitutional, see DANIEL FARBER, *LINCOLN'S CONSTITUTION* 106–43 (2003).

83. ARKES, *supra* note 51, at 232–33.

84. *See id.* at 53–54, 242–46.

85. *Id.* at 53.

everyone, contrary to the presupposition of personal responsibility at work in all contexts of moral relevance.⁸⁶ Without looking too closely into this maxim, we can see its usefulness to those who oppose race-based affirmative action. That race-based pupil assignments may benefit someone in some way is morally beside the point if the decision based on the race of affected persons is always wrong. And, says Arkes, the Supreme Court erred in 1954 when it declared racial segregation was wrong because of its allegedly harmful effects on black children; race discrimination is wrong regardless of the motivation or the effect.⁸⁷ Lincoln apparently disagreed, for to preserve the Union, accommodating evil for a greater good, Lincoln promised the return of fugitive slaves and a constitutional amendment for the further protection of slavery where it existed.⁸⁸ And no member of the Supreme Court presently treats racial classifications as axiomatically wrong, for each would identify persons by race as needed to remedy past racial wrongs by law or under cover of law.⁸⁹ At least four of the Justices presently agree that racial classifications in the law can be the constitutional means to a state of affairs that Lincoln upheld as the “leading object” of the government for which his armies fought: equal opportunity, a species of which is equal educational opportunity.⁹⁰ This is not to settle questions about the effectiveness of affirmative action schemes; some may be effective, some may not be. It is to claim that from an ends-oriented view of the Constitution of the kind represented by Lincoln’s presidency and Balkin’s theory of constitutional redemption, racial classifications can be constitutional.

As it turns out, Arkes compromises his axioms of the natural law and thereby calls into question their status as axioms. Though he applies an axiom against *ex post facto* laws (from which he derives the Contract Clause of Article I, section 10) to criticize the Supreme Court’s upholding of a state’s mortgage moratorium law during the Great Depression, he adds as a reason against the law that moratoria are a bad idea, even in hard times, because they make lenders reluctant to lend when normal times return.⁹¹ This additional reason may be true, but if so, it is only contingently true — an “inductive proposition,” Arkes would say⁹² — not a proposition that is axiomatically true. It would not be rationally impossible to find lenders spooked more by the market effect of too many foreclosures than by laws modifying contractual terms for repayment. For the majority of five, Chief Justice Hughes invoked a principle of his own in resolving the question. He argued that the states are just as obligated to protect their citizens in economic emergencies as in natural emergencies, and that since all would approve moratoria in the latter, they should do so in the former.⁹³ Acknowledging that this obligation could conflict with the obligation to refrain from modifying contracts, he

86. *Id.*

87. *Id.* at 243–44.

88. FARBER, *supra* note 82, at 104–05.

89. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

90. *See ABRAHAM LINCOLN, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 607 (Roy P. Basler ed., 1946).

91. ARKES, *supra* note 51, at 14–17, 27; *see* U.S. CONST. art. I, § 10, cl. 1.

92. ARKES, *supra* note 51, at 57–58.

93. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 441–42 (1934).

concluded that where principles conflict, courts should construe them to harmonize with each other.⁹⁴ Hughes thus echoed Madison's resort in *The Federalist No. 40* to "two rules of construction dictated by plain reason, as well as founded on legal axioms."⁹⁵ The first rule is that each provision of law "ought, if possible, to be allowed some meaning, and be made to conspire to some common end."⁹⁶ The second is that where provisions cannot be reconciled "the less important should give way to the more important part; the means should be sacrificed to the end."⁹⁷ Arkes apparently agrees. For all his references to axioms, he goes on to approve the Court's refusal to let Philadelphia administer a bequest to reserve a school for "poor white male orphans."⁹⁸ He also approves Justice Robert H. Jackson's decision to officiate at the Nuremberg trials.⁹⁹ And in the end, he explains that whether a retroactive law is an *ex post facto* law within the meaning of the constitutional prohibition depends not on the letter of the positive law, but on a case by case commonsense moral judgment.¹⁰⁰

In sum, Arkes says that the framers regarded the *ex post facto* rule as "beyond the need for discussion."¹⁰¹ But he also holds that whether a retroactive sanction counts as an *ex post facto* law turns on a "moral judgment," a judgment reached through an exchange of reasons, if only with oneself.¹⁰² Arkes will have no quarrel with this reader on the role of moral judgment in finding the meaning of the so-called positive law. What is hard to grasp is how a rule can be an axiom if it cannot be axiomatically applied.

3.

By recognizing that the Constitution's legitimacy depends on the redemption of its promise of justice for all, Balkin assumes an essentially ends-oriented view of the Constitution. Yet not unlike Arkes, Balkin confines his thought to what the hard-wired Constitution permits. Though Balkin's notion of constitutional redemption means redeeming constitutional promises — and thus subordinates constitutional institutions to those promises — Balkin accepts an obligation to those institutions. Recognizing something higher than the law — namely, the point of the law itself — he nevertheless stays within the law. The same holds for Arkes, albeit in a different way. By grounding in allegedly unchanging axioms of the natural law the posited constitution, Arkes can claim he stays within the law even when its posited aspect runs out. Perhaps the largest question raised by both works in this time of constitutional dysfunction — constitutional "imbecility," says Sanford Levinson, Balkin's frequent co-author¹⁰³ — perhaps the big question is why confine our thinking to what the Constitution permits? Why talk of

94. *Id.* at 435, 439.

95. THE FEDERALIST NO. 40, at 259 (James Madison) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961).

96. *Id.* at 259–60.

97. *Id.* at 260.

98. *Pennsylvania v. Bd. of Directors of City Trusts of Phila.*, 353 U.S. 230, 231 (1957); ARKES, *supra* note 51, at 32–33.

99. *See* ARKES, *supra* note 51, at 35–36.

100. *See id.* at 36–40.

101. *Id.* at 32.

102. *See id.* at 60–61, 72, 226.

103. Sanford Levinson, Op-Ed., *Our Imbecilic Constitution*, N.Y. TIMES, May 29, 2012, at A23.

following the rules when you can doubt that rules that do not work are real rules or when our great reformers — Lincoln, Jefferson, Washington and other members of the Constitutional Convention — broke the rules? Why deny that the rules we now have are not working and cannot be made to work? Levinson would trust a constitutional convention under Article V.¹⁰⁴ But who can be serious about that? How would “The Market” react? What politician would risk terrifying “The Market” in our era of profound interdependencies, where, for example, less than two percent of the population lives on farms that could provide their subsistence?¹⁰⁵

The only rules that apply in our situation are prudential rules of the kind the framers acted on at the founding and Lincoln acted on in the Civil War. These “rules” amount to “do what you have to do,” even if you have to use force or compromise with evil to do it. Our major problem is that these prudential rules are actually hypothetical norms, not legal or moral norms. They do not issue categorical commands like “do this” or “forbear that.” They say “if you want x, then do y.” They presuppose relationships outside the law: leaders who do not have to lead if they do not want to and followers who do not have to be followers. They apply only where a dominant mass of the public trusts men and women who have the wherewithal to lead and who accept the sacrifices and risks of leadership in critical times — sacrifices and risks that can lead to martyrdom.¹⁰⁶ Who realistically hopes for this leader-follower pattern to materialize again in this country?

This last thought brings us to the task of constitutional theory as an academic discipline: Should constitutional theory seek workable solutions, embracing either silence or palliative myths where no solutions can be found? Or should the field of constitutional theory tell it as it is, in hopes that some people may know what went wrong with old experiments should the country have another chance to make a constitution?

104. Sanford Levinson, *Afterword: Do We Really Believe Any Longer in the Possibility of ‘Government from Reflection and Choice’? A Dour Meditation on Our Present Situation*, 67 MD. L. REV. 281, 287 (2007).

105. See U.S. DEP’T OF AGRIC., NAT’L INST. OF FOOD & AGRIC., *About Us*, <http://www.csrees.usda.gov/qlinks/extension.html> (last updated Apr. 19, 2011) (stating that “[f]ewer than 2 percent of Americans farm for a living today”).

106. See NANNERL O. KEOHANE, THINKING ABOUT LEADERSHIP 155–93 (2010).