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**CONSTITUTIONAL AND RELIGIOUS REDEMPTION:  
ASSESSING JACK BALKIN’S CALL FOR A  
“CONSTITUTIONAL PROJECT”**

LINDA C. McCLAIN\*

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INTRODUCTION

I begin with a disclaimer: I am not a constitutional theorist. I haven’t even played one on TV. But according to Professor Jack Balkin’s ambitious new book *Living Originalism*, that should not stop me from engaging in what he calls “the constitutional project,” in which I, along with others, attempt to interpret – indeed, to redeem – the U.S. constitution.<sup>1</sup> *Living Originalism* pairs two intriguing ideas: a “constitutional project” and “constitutional redemption.” I am excited by the notion of a *project*, and of a *constitutional* project in particular. In my work for at least a decade I have used the idea of a

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\* Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law; Faculty Fellow, Boston University School of Theology, 2010-2012. This Article grew out of a paper presented at A Symposium on Jack M. Balkin’s *Living Originalism* and David Strauss’s *The Living Constitution*, hosted by the *Boston University Law Review* and held at Boston University School of Law on November 3, 2011. I thank Jack Balkin and David Strauss as well as symposium participants for helpful comments. I thank Mary Elizabeth Moore, Dean of the Boston University School of Theology, for help with sources and for providing me with the Exhibition Catalog for Pamela Chatterton-Purdy’s “Icons of the Civil Rights,” displayed at the Boston University School of Theology in early 2012. Boston University Law student Darian Butcher provided valuable help with research. A summer research grant supported this Article.

<sup>1</sup> JACK M. BALKIN, *LIVING ORIGINALISM* 74-99 (2011).

“formative project” to refer to the task of preparing persons for democratic and personal self-government.<sup>2</sup> I have argued that our constitutional system permits, authorizes, and even calls for such a project, and I have explored the division of labor among families, civil-society institutions, and government for carrying out such a project.<sup>3</sup>

To understand what Balkin means by a constitutional project the reader must understand his concept of redemption, a term he employs in his companion book *Constitutional Redemption*.<sup>4</sup> Redemption is a term heavy with religious meaning. This intrigues me as a student of religion for many years. I also grew up attending Redeemer Lutheran Church in Toledo, Ohio, and was duly confirmed after two years of studying the teachings of Martin Luther. Martin Luther famously argued for “the priesthood of all believers,” contending that each person (not only the Pope) could and should read and interpret the Bible without intermediaries.<sup>5</sup> Secular forms of these notions shape what Balkin (following Sandy Levinson) refers to as “constitutional protestantism.”<sup>6</sup>

In this Article, I will ask how these two ideas – of a constitutional project and of redemption – fit into Balkin’s “living originalism.” What is a “constitutional project”? How do people engage in it? How does redemption feature in this project? How well does the religiously-laden term “redemption” translate into the constitutional project? Further, this religiously-laden term has different meanings in different religious traditions, as I will illustrate by exploring some Christian and Jewish understandings of redemption and of repairing, or restoring, the world. Are these different understandings a stumbling block for embracing a notion of constitutional redemption or a source of support for such a notion? In *Constitutional Redemption*, Balkin explained the intellectual journey by which he came to see the “deeper unity” of originalism and living constitutionalism, rather than view them as “irrevocably in contradiction.”<sup>7</sup> He posited that all these concepts cohere: a protestant constitutionalism, a constitution “that perpetually seeks redemption,” and a form of originalism.<sup>8</sup> In his new book, *Living Originalism*, he emphasizes the responsibility of “[p]eople in each generation” to “figure out what the Constitution’s promises mean for themselves” and to participate in

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<sup>2</sup> LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 10 (2006); Linda McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221, 1225 (2000).

<sup>3</sup> Jim Fleming and I develop this framework further in JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* (forthcoming 2012).

<sup>4</sup> JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* 289 (2011) (describing the book as a prequel to *Living Originalism*).

<sup>5</sup> ROLAND BAINTON, *HERE I STAND: A LIFE OF MARTIN LUTHER* 152-54 (1950).

<sup>6</sup> BALKIN, *supra* note 4, at 61-72 (drawing on Levinson’s notion of “constitutional protestantism”); see SANFORD V. LEVINSON, *CONSTITUTIONAL FAITH* 30 (1988).

<sup>7</sup> BALKIN, *supra* note 4, at 228, 289.

<sup>8</sup> *Id.*

the task of constitutional redemption.<sup>9</sup> This intergenerational project is the focus of my commentary.

I. EXPLAINING THE “CONSTITUTIONAL PROJECT”

A. *What Is the “Constitutional Project”?*

Balkin uses several terms to describe the constitutional project. I recap them briefly here:

1. It is a “*project of self-government*”: The Constitution, as proclaimed in its Preamble, is “a project of self-government with long-term goals to create a ‘more perfect union’ that strives ‘to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.’”<sup>10</sup>
2. It is “*an intergenerational project of politics*”: “The generations of We the People are the participants in the project.”<sup>11</sup> Here the theme of redemption kicks in, for “[t]he Constitution contains commitments that We the People have only partially lived up to, promises that have yet to be fulfilled, and it is the task of each generation to do its part, however great or small, to help fulfill them and to achieve a more perfect union in its own day.”<sup>12</sup> Fittingly, Balkin quotes one of my favorite rabbinic sayings to elaborate on this task, *Pirke Avot* (Sayings of the Fathers) 2:21: “We are not required to complete the Great Work, but neither are we free to refrain from it.”<sup>13</sup>
3. It is a project that takes place “*over time*”: To have “fidelity” or “constitutional faith” requires “faith in the redeemability of an imperfect Constitution over time.”<sup>14</sup> That faith must be threefold: “faith in the possibilities contained in the document, . . . in the institutions that grow up around the document, and finally, . . . in the American people, who will ultimately determine the interpretation and direction of the document and its associated institutions.”<sup>15</sup>

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<sup>9</sup> BALKIN, *supra* note 1, at 17.

<sup>10</sup> *Id.* at 74 (quoting U.S. CONST. pmb.). The numbering and italics in this list are mine, not Professor Balkin’s.

<sup>11</sup> *Id.* at 75.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 360 n.1 (citing *Pirke Avot* 2:21).

<sup>14</sup> *Id.* at 78-79.

<sup>15</sup> *Id.* at 79.

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To sum up this temporal dimension, the constitutional project is “a larger common *political* project.”<sup>16</sup> It extends over time and calls for people to “identify with people in the past, and with their hopes, struggles, principles, and commitments in order to make sense of current controversies and the direction of legal and political change.”<sup>17</sup>

4. It is also a “*creedal*” project: Appeals to a “creedal tradition” are central in the constitutional project.<sup>18</sup> The constitutional text itself, Balkin states, is “perhaps the most conspicuous embodiment of a constitutional project that binds past with present and stretches out into the future.”<sup>19</sup> Political and social movements, thus, often look to text and enduring principles as a ground for a normative critique of present practice.<sup>20</sup>
5. It is a project in which “*popular mobilizations play a crucial role*”: Different kinds of mobilizations, such as political movements and social movements, “make constitutional arguments” in “promoting their favored ideals and policies.”<sup>21</sup> Thus, “their participation in public life can significantly affect constitutional construction and constitutional change.”<sup>22</sup>
6. Finally, it is “*a project that contains resources for its own redemption*”: There are, as Balkin puts it, “redemptive elements in the Constitution’s basic structure and in its text and underlying principles.”<sup>23</sup>

#### B. *Constitutional Interpretation as the Core of This Project*

Interpretation is at the core of the intergenerational constitutional project. For example, social and political movements “have regularly drawn on the constitutional text and its underlying principles to justify social and legal change.”<sup>24</sup> Balkin elaborates, “The American political tradition has featured a

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<sup>16</sup> *Id.* at 85 (emphasis added).

<sup>17</sup> *Id.* Similarly, Balkin writes, “[W]e must be able to see ourselves as part of a project that unites past, present, and future generations.” *Id.* at 96.

<sup>18</sup> *Id.* at 97.

<sup>19</sup> *Id.* at 96.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 81, 83.

<sup>22</sup> *Id.* at 83.

<sup>23</sup> *Id.* at 81.

<sup>24</sup> *Id.* at 83-84.

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strong belief in emancipatory rights consciousness based on foundational texts, including the Declaration of Independence and the U.S. Constitution.”<sup>25</sup>

Here Balkin finds the influence of Protestantism (and I might add, Lutheranism in particular): “ordinary believers have authority to decide what the Bible and other sacred texts mean for themselves.”<sup>26</sup> In the companion book, *Constitutional Redemption*, he speaks of “constitutional protestantism” both as a “theory about who has authority to interpret the Constitution (everyone) and a description of the process through which individual and dissenting constitutional interpretations become widely accepted and promulgated.”<sup>27</sup>

This protestantism leads to multiple readings of texts. As Balkin observes in *Living Originalism*, “[B]oth movements and their opponents – who are often movements themselves – routinely invoke a common rhetoric of text and principles against each other.”<sup>28</sup> In elaborating on “constitutional faith” and “constitutional redemption,” he offers the example of the New Deal: this was not “a contest between an old guard that believed in the Constitution’s textual commitments and New Dealers who did not.”<sup>29</sup> Instead, President Roosevelt argued that his opponents “had badly misconstrued the Constitution.”<sup>30</sup> The constitutional controversy nearly fifty years ago over the Civil Rights Act of 1964 is another example. More contemporary examples to which Balkin refers elsewhere in both books include controversies over abortion rights and access by same-sex couples to civil marriage.<sup>31</sup>

This leads the reader to ask, does Balkin give us a way to figure out who is right and who is wrong in these battles over how best to redeem the constitution? Balkin argues, “The important question is whether we can understand the work of these movements as consistent with constitutional fidelity. To do this we must engage in interpretive charity and a sympathetic reconstruction of their claims.” We should evaluate whether arguments arising from political or social movements “make sense in the terms in which they are offered.”<sup>32</sup>

Balkin envisions a “division of labor” for this sympathetic reconstruction, perhaps letting some hierarchy slip back into the priesthood of all believers. Laypersons “call on the Constitution,” making “claims of constitutional politics.”<sup>33</sup> Lawyers “translate and reconstruct movement and interest group arguments in ways that judges and other legal decisionmakers can recognize as

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<sup>25</sup> *Id.* at 84.

<sup>26</sup> *Id.*

<sup>27</sup> BALKIN, *supra* note 4, at 71.

<sup>28</sup> BALKIN, *supra* note 1, at 87.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See, e.g.*, BALKIN, *supra* note 4, at 64; BALKIN, *supra* note 1, at 412 n.138.

<sup>32</sup> BALKIN, *supra* note 1, at 87.

<sup>33</sup> *Id.* at 88.

legal arguments.”<sup>34</sup> Both lawyers and judges “translate claims of constitutional politics into claims about constitutional law.”<sup>35</sup> He uses the term “horizontal translation” to capture this translation process between citizens and professionals, as distinguished from the “vertical translation” process between past and present, which captures the transgenerational nature of the constitutional project.<sup>36</sup>

Balkin explains that he is making two claims: one positive, one normative. His positive claim “is that social and political mobilizations have shaped the development of our Constitution.”<sup>37</sup> I find this positive claim persuasive. His normative claim is “that some, but not all, of these changes are worthy objects of pride that demonstrate the best features of the American constitutional tradition.”<sup>38</sup> A successful theory of constitutional interpretation, Balkin argues, “should be able to explain why [such] changes are faithful to the Constitution rather than being mistakes or deviations from constitutional fidelity that we must preserve for prudential reasons.”<sup>39</sup> On this normative claim, I need more persuasion. Does Balkin help us discern who is right or wrong or, rather, which claims are worthy and unworthy of our support?

Some mobilizations, Balkin argues, have resulted in “unjust and unconstitutional policies that become widely accepted and part of the Constitution-in-practice.” An example is “the construction of Jim Crow as a constitutional regime that lasted for the better part of a century.”<sup>40</sup> But what provides the critical vantage point from which to determine that this was an unjust and unconstitutional mobilization? Obviously, we can look back now and conclude that Jim Crow was an unjust, wrong exercise in constitutional interpretation, but what would have helped back then? In other words, redemption *over time* contemplates redeeming the Constitution and the country from unjust practices, but is there a way to put Balkin’s ideas to work to achieve better outcomes in the here and now – in current constitutional battles, such as over health care and the rights of gay men and lesbians to marry? Thus, Balkin’s book invites this question: what tools does his model of constitutional interpretation – and redemption – give us for participating in and assessing these current battles?

Constitutional theory, Balkin contends, matters because it helps people make arguments about democratic legitimacy:

[N]ormative theories about constitutional interpretation . . . help participants understand and express claims about the legitimacy or illegitimacy of their current constitutional arrangements. This enables the

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 90.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 94.

Constitution to serve as “our law” – as a common object of fidelity and attachment. Theories about the right way to interpret the Constitution offer people a language to defend and criticize parts of the Constitution-in-practice with the hope of moving it closer to their values and ideals.<sup>41</sup>

Democratic legitimacy of the constitutional system, he continues, “depends on the fact that people can make these claims and seek to persuade others that they are correct.”<sup>42</sup>

Balkin uses the delightfully practical image of a “toolkit” to describe how people can enlist theories of constitutional interpretation.<sup>43</sup> With these tools, citizens can engage in activities – “legitimation, critique, persuasion, dissent, and mobilization” – that are “central parts of our shared (and perpetually contested) constitutional culture.”<sup>44</sup> Citizens, he says, can protest current practices “in the name of the Constitution” and can seek to “restore or redeem the Constitution’s promises.”<sup>45</sup> Here he identifies the shortfall between the “Constitution-in-practice” and what people believe “the Constitution is and should become.”<sup>46</sup>

Balkin also speaks of needing a theory of constitutional interpretation “for dark times . . . when our views of what the Constitution really means have been submerged and disrespected by the dominant forces in society.”<sup>47</sup> He makes the insightful point that, for “somebody’s vision of the Constitution,” it is “always dark times,” and sometimes it is “dark times for both sides of an ongoing national controversy, like abortion or gay rights.”<sup>48</sup> The rhetoric used in these ongoing controversies readily demonstrates this point. The concept of “dark times” is reminiscent of the notion of “the constitution in exile,” the idea that a particular group’s vision of the Constitution’s proper meaning and interpretation is not reflected by those federal judges and Supreme Court Justices currently interpreting it.<sup>49</sup> Given Balkin’s emphasis on constitutional

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<sup>41</sup> *Id.* at 93.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 94.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 95.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Evidently, the origin of this term is a 1995 article in *Regulation* magazine by Judge Douglas Ginsburg. Douglas H. Ginsburg, *Delegation Running Riot*, *REGULATION*, Winter 1995, at 83, 84 (1995), available at <http://www.cato.org/pubs/regulation/regv18n1/v18n1-9.pdf>. Some conservatives challenge the idea that this phrase is one used regularly by “activist conservatives” wishing to revive the “Constitution in exile,” and say that liberals have picked up on this term to criticize originalists. David Bernstein, *Constitution in Exile*, *VOLOKH CONSPIRACY* (Oct. 24, 2008, 4:24 PM), <http://volokh.com/posts/1224879887.shtml> (quoting Jeffrey Rosen).



redemption (to which I will turn in Part II), this notion of a constitution in exile seems particularly evocative.

How does Balkin's toolkit promise to make any progress on these controversies over different visions of the Constitution? Does learning more about what he means by constitutional faith and redemption help? To begin, Balkin's insistence that these battles are not only about the Constitution *as a text* is important to understanding the constitutional project as well as redemption. The American Constitution, he argues, must perform several functions simultaneously: "[1] a basic framework for politics and lawmaking; [2] an honored source of values and aspirations; [3] and a cherished object of fidelity and attachment that symbolically binds different generations together and allows them to identify with each other over time."<sup>50</sup> Generally talk about originalism seems confined to discussions of original meaning. Balkin's "living originalism" offers a thicker description of the Constitution and harbors much more room for openness about the possible direction of the constitutional project, as I will discuss in Part III.

What, then, is constitutional faith? Faith in what? Balkin argues, "We can accept the Constitution as our own if it secures our rights and defends our values sufficiently that it is worthy of our respect and allegiance," and not just "a covenant with death and an agreement with hell."<sup>51</sup> He also counsels that "[t]he Constitution-in-practice will not always respect our most cherished values" or "protect our rights." Nonetheless, "the Constitution is ours if we are able to have faith that over time it will come to respect our rights and our values."<sup>52</sup>

The notion of the Constitution coming to reflect "our rights and values" highlights both the temporal dimension of Balkin's theory and his emphasis upon the shortfall between constitutional promises and constitutional practices. How to address this shortfall leads us to Balkin's idea of the intergenerational project of constitutional redemption.

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<sup>50</sup> BALKIN, *supra* note 1, at 98. Put slightly differently, he says, "The American Constitution is simultaneously a text, a set of political institutions, a source of values and aspirations, a repository of cultural memory, and a transgenerational political project." *Id.*

<sup>51</sup> *Id.* Balkin alludes here to William Lloyd Garrison's famous denunciation of the Constitution for allowing slavery. For elaboration on Garrison's view, see BALKIN, *supra* note 4, at 46-48.

<sup>52</sup> BALKIN, *supra* note 1, at 99.

## II. WHY CONSTITUTIONAL REDEMPTION?

[S]ince all have sinned and fall short of the glory of God, they are justified by his grace as a gift, through the redemption which is in Christ Jesus, whom God put forward as an expiation by his blood, to be received by faith.

—*Romans 3:23*<sup>53</sup>

A stumbling block that I see in using the concept of “redemption” to refer to a broad constitutional project in which all should participate is that, as the above quote from *Romans* indicates, in various Christian traditions, such as Lutheranism, redemption refers to human salvation through a personal redeemer. Related puzzles are how the notion of a fallen Constitution and the proposition that all constitutions are imperfect relate to religious conceptions of fallenness. What is the religious analog to the fallen Constitution? The Bible? The created world? To borrow an idea from John Rawls’s political liberalism, can people with differing comprehensive moral views (or “reasonable comprehensive doctrines”) about such matters as religious redemption reach an overlapping consensus – as cooperating members of well-ordered society – on the idea of constitutional redemption as a political conception?<sup>54</sup> Or, by contrast, are the inevitable religious resonances this idea contains likely to alienate some members of society and divide, rather than unite, us?<sup>55</sup> To answer these questions, I will explicate certain religious understandings of redemption and then elaborate further Balkin’s idea of constitutional redemption. I will then explore points of convergence and divergence between constitutional and religious notions of redemption. In particular, I will highlight the tension between two distinct ideas of redemption, around which different degrees of consensus may be possible: redemption through a personal redeemer and redemption as a broader human project of repairing or restoring the world (or creation).

### A. *Personal Redemption or Repairing the World?*

The idea of the Constitution falling short of its promises and the need for redemption quickly brings to mind the Christian narrative of sin and the logic that just as one man (Adam) brought sin into the world, another man (the Son of God and of man) brought salvation through death and resurrection. Hence my invoking of *Romans 3.23*: “all have sinned and fall short.” The field of Christology examines what it means to talk about Jesus as both God and man. In this part of my Article, I explore why Balkin enlists the concept of

<sup>53</sup> I use the translation of *Romans 3:23* given in THE NEW OXFORD ANNOTATED BIBLE, REVISED STANDARD VERSION (Herbert G. May and Bruce M. Metzger eds., 1973).

<sup>54</sup> See JOHN RAWLS, POLITICAL LIBERALISM 133-72 (1993) (explaining the idea of “overlapping consensus”).

<sup>55</sup> I am grateful to David Strauss for raising this question in discussion of my paper at the live event out of which this book symposium grew.

redemption to explain the interplay between constitutional protestantism and living originalism, as well as some of the tensions over the idea of redemption and how it occurs. For while constitutional protestantism seems an apt coinage to describe the belief that each person may and should read and interpret the Constitution for him or herself, another Protestant tenet, “sole fide,” through faith alone, or “justification by faith” and not good works,<sup>56</sup> seems to undercut the very robust role for human agency in redemptive constitutionalism. Studying Paul’s Epistle to the Romans, Luther came to understand that good works alone did not justify men before God; rather, justification is by faith and God’s grace.<sup>57</sup> Indeed, he came to this understanding after a conclusion that good works would never be enough to save him or ensure “the justice of God”; instead, in his own words, he “grasped that the justice of God is that righteousness by which through grace and sheer mercy God justifies us through faith.”<sup>58</sup> In contrast, it seems that redeeming the Constitution requires ongoing good works – striving to address the shortfall between ideal and practice, to remedy injustice by arguing that the Constitution, properly interpreted, forbids such injustice. Here, perhaps we see a more rabbinic vision at work: each of us has a personal responsibility to take part in the task of constitutional redemption.

Most of *Living Originalism*’s discussion of constitutional redemption is in chapter 5, “Constitutional Faith and Constitutional Redemption.” There, Balkin refers to the “fallen condition” of the Constitution.<sup>59</sup> All constitutions, he argues, are “imperfect,” due in part to the “circumstances of their origin and the compromises necessary to bring them into being and maintain them over time.”<sup>60</sup> The Constitutional project itself is “compromised and flawed”; we must, however, “buy into [it] . . . and make it our own project” so long as the constitution is “good enough.”<sup>61</sup> Constitutional interpretation requires not “blind faith,” Balkin explains, but faith that the constitutional document and “its associated institutions” are good enough “to justify the benefits of political union (and the use of force to compel obedience to the law), and that the

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<sup>56</sup> See John Reumann, *Justification by Faith: The Lutheran-Catholic Convergence*, THE CHRISTIAN CENTURY, OCT. 1997, at 942-46, available at <http://www.religion-online.org/showarticle.asp?title=155> (“The emphasis on justification by faith became common coin among the Reformers and their confessions.”). Interestingly, Reumann, a professor emeritus at the Lutheran Theological Seminary in Philadelphia, reports that, although this doctrine was at the core of Luther’s “challenge to the Roman Catholic Church,” there has been movement by Lutheran and Roman Catholic theologians toward a Joint Declaration on the Doctrine of Justification. *Id.*

<sup>57</sup> See BAINTON, *supra* note 5, at 64-65.

<sup>58</sup> *Id.* at 55, 65 (quoting Luther).

<sup>59</sup> BALKIN, *supra* note 1, at 81.

<sup>60</sup> *Id.* at 78.

<sup>61</sup> *Id.*

system of constitutional government can and will become still better over time.”<sup>62</sup>

The theme of buying into the constitutional project proves quite apt. As Balkin elaborates in his companion book, *Constitutional Redemption*, “The original meaning of redemption, after all, is the payment of a debt, which allowed the owner to recover property.”<sup>63</sup> As applied to constitutional faith and redemption, he suggests, the “trope of the unfulfilled debt appears prominently in the language of the constitutionally faithful.”<sup>64</sup> Balkin gives vivid examples of this trope: he interprets Frederick Douglas’s aspirational reading of the Constitution as “attempting to hold white Americans responsible for the promises they made in the Constitution.” Douglas was “attempting to collect on a moral debt . . . created at the founding.”<sup>65</sup>

Balkin’s other very effective example is Dr. Martin Luther King Jr.’s “I Have a Dream” speech, in which King spoke about the civil rights movement as coming to “cash a check.” With the “magnificent words” of the founding documents, King argued, the “architects of our republic” were “signing a promissory note to which every American was to fall heir. This note was the promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.”<sup>66</sup> King used the language of America defaulting on this promissory note with respect to her “citizens of color” and giving “the Negro people a bad check.”<sup>67</sup>

Balkin argues, then, that “the language of the unpaid debt, or of the promise yet unfulfilled to be kept in the future, is the most natural metaphor of hope for eventual constitutional redemption.”<sup>68</sup> I take it that King’s speech, with its denial of the idea that there are insufficient funds, maps well with Balkin’s contention that the constitutional project has resources – elements in the Constitution – that aid in its redemption.

Here is where I encounter some difficulties in making the translation from religion to constitutionalism. Redemption in the Christian tradition also entails the idea that in dying for mankind’s sins, Jesus paid our debt. In the Christian narrative, it took a Redeemer, the son of God made flesh, to redeem human beings from (as my Lutheran catechism taught) sin, death, and the devil. This is what students of religion would call a high Christology: it does not view Jesus as simply a prophet or great man, but as a uniquely significant, salvific

<sup>62</sup> *Id.*

<sup>63</sup> BALKIN, *supra* note 4, at 122.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 122-23.

<sup>66</sup> *Id.* at 123 (quoting MARTIN LUTHER KING, JR., *I Have a Dream, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 217 (James M. Washington ed., 1986)).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 122.

figure.<sup>69</sup> This is a tenet that, I am reasonably confident, is still a part of the doctrine of many Christian traditions.

Who or what, then, is the constitutional redeemer? Balkin says we all are: We the People over time must redeem the Constitution. Balkin appeals, as I said at the outset, to the rabbinic tradition of each of us being charged with undertaking the work, even though we are not charged with completing it. This model does not look just to one person to engage in the task of redemption. Rather, as the explanatory note in my copy of *Pirke Avot* says, “It may not be given thee to complete the task called for, but that is no reason why it should not be attempted. Be not disheartened by the greatness and difficulty of what is before thee. Do as much as is in thy power.”<sup>70</sup> In contrast to the idea of “sole fide,” by faith alone, We the People cannot rely on a redeemer to do the task. They must have faith in the Constitution, but they must also *work*. So perhaps Balkin’s conception of redemption is more Jewish than Christian.

American thinking about constitutional redemption tends to fix on particular persons as constitutional redeemers rather than to see this broader assignment of responsibility where many persons should undertake the great work. Ken Kersch’s fascinating work details the hero worship in some contemporary conservative visions of “Great Men” or constitutional redeemers, including the perhaps surprising trio of Thomas Jefferson, Abraham Lincoln, and Dr. Martin Luther King, Jr.<sup>71</sup> Moreover, the violent deaths of some of these figures take on a salvific significance. A recent news story reported a distressing deterioration in students’ knowledge of civil rights history, in which individual redeemers feature prominently and the social movements of which they are part disappear. Former congressman Julian Bond, who now teaches college students, observed that “many states have turned Dr. [Martin Luther] King Jr.’s life into a fable.”<sup>72</sup> His students knew that “there used to be segregation until Martin Luther King came along, that he marched and protested, that he was killed, and then everything was all right.”<sup>73</sup> This hagiography about Dr. Martin Luther King, Jr. is quite consistent with the Christian narrative – a holy man dies for our sins and makes redemption possible. A recent report by the Southern Poverty Law Center suggests that what is missing in students’ knowledge (particularly students who do not live in the South) is awareness of

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<sup>69</sup> New Testament scholar Norm Perrin locates the “beginnings of Christology in the early church rather than in the ministry of Jesus”; he explains that “the message or ministry of the historical Jesus” took on “christological significance” only “when they were interpreted in light of the resurrection and when christological emphasis which had developed in early Christianity were read back into them.” NORMAN PERRIN, *A MODERN PILGRIMAGE IN NEW TESTAMENT CHRISTOLOGY* 55-56 (1974).

<sup>70</sup> SAYINGS OF THE FATHERS (PIRKE AVOT) 36 n.21 (Hugo Bergman ed., 1952).

<sup>71</sup> Ken I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229, 231 (2011).

<sup>72</sup> Sam Dillon, *Students’ Knowledge of Civil Rights History Has Deteriorated, Study Finds*, N.Y. TIMES, Sept. 28, 2011, at A13.

<sup>73</sup> *Id.*

the broader civil rights movement that nurtured King and of which he was a leader.<sup>74</sup> That deeper knowledge would in turn expose students to many other examples of civil rights activists (as well as innocent bystanders) harmed or killed while seeking, in Balkin's terms, to redeem the Constitution's promises. The language of martyrdom is by no means unfamiliar in the context of heroic struggles for civil rights. Certain civil rights figures take on iconic status because of their suffering as well as their courage. An astute art teacher, Pamela Chatterton-Purdy, vividly expresses this point in a traveling art exhibit, "Icons of the Civil Rights Movement," in which King, the Freedom Riders, the four girls killed in the Sixteenth Street Baptist Church bombing, civil rights workers Goodman, Chaney, and Schwermer, and many others who died, are depicted as religious icons, framed in gold.<sup>75</sup> Not every icon depicted in Chatterton-Purdy's exhibit was martyred in this extreme way, but most endured some form of mistreatment – arrest, beatings, criminal charges – because of their efforts.<sup>76</sup>

Thus, the notion of a redeemer enduring suffering to bring about salvation resonates with certain historical and contemporary stories of civil protest. I do not, however, interpret Balkin as proposing salvation through a personal redeemer that suffers and dies for us. Instead, he devotes much attention in both books to the role of political and social movements in advancing the constitutional project and the task of redemption. In this respect, his project of constitutional redemption may parallel a religious conception of human responsibility to redeem – or repair or restore – the world. The Jewish notion of *tikkun olam* is one ready example. I have suggested that perhaps Balkin's conception of redemption is more Jewish than Christian. The concept of *tikkun olam*, "repairing the world" or "perfecting the world," originated in the rabbinic period.<sup>77</sup> It has embraced not only the notion that Jews perfect the world by faithfully performing religious rituals and commandments and are "responsible for creating a model Jewish society for themselves" but also, "for many Jews," the idea that they are "responsible for the welfare for the society at large," which "may be understood in religious, social, or political terms."<sup>78</sup>

Rabbi Abraham Joshua Heschel, for example, is among Chatterton-Purdy's "icons." Chatterton-Purdy points out that both King and Heschel "spoke about God's being deeply involved in the affairs of human history" and believed that "social activism was required by people of religious faith."<sup>79</sup> Susannah

<sup>74</sup> *Id.* (describing the results of the report).

<sup>75</sup> I personally viewed this exhibit at Boston University's School of Theology in January and February 2012. See PAMELA CHATTERTON-PURDY, *ICONS OF THE CIVIL RIGHTS* (2012) (exhibition catalog of Boston University School of Theology) (on file with author).

<sup>76</sup> *Id.*

<sup>77</sup> *Tikkun Olam*, BECOMINGJEWISH.ORG, [http://www.becomingjewish.org/theology/tikkun\\_olam.html](http://www.becomingjewish.org/theology/tikkun_olam.html) (last visited Nov. 14, 2011).

<sup>78</sup> *Id.*

<sup>79</sup> CHATTERTON-PURDY, *supra* note 75, at 14.

Heschel, Heschel's daughter and a scholar of Jewish Studies, similarly affirms that for both King and her father, "the theological was intimately intertwined with the political." She recalls Heschel's famous words when he marched with King in the front row at Selma: "I felt my legs were praying."<sup>80</sup> These words and Heschel's joining with King to promote civil rights serve as an inspiring example of *tikkun olam* for contemporary religious congregations.<sup>81</sup>

It would be wrong to suggest that the notion of repairing or redeeming the world is uniquely Jewish. There are important Christian examples of this notion, as King's own work and the broader role of Christian clergy in the civil rights movement indicate. For example, one icon depicted in Chatterton-Purdy's exhibit is the Reverend James Lawson, whom King called "the leading theorist and strategist of nonviolence in the world."<sup>82</sup> In a recent oral history interview at Boston University, Reverend Lawson recalled that King's message was about the redemption of Western civilization – not just the liberation of *a* people, but of all people.<sup>83</sup> Lawson himself (like King) viewed the civil rights movement as a work in progress, with goals that would take years to achieve.<sup>84</sup> Lawson was a Methodist minister and his views about the redemptive work of the civil rights movement resonate with Methodist ideas about the meaning of grace and of how human beings participate in repairing the world.<sup>85</sup> In other words, God's redemptive action includes not only personal salvation but also the efforts of human beings working in the world to transform and redeem it.<sup>86</sup> Indeed, theologian Mary Elizabeth Moore borrows the Hebrew term *tikkun olam* to refer to this Methodist idea of the task of repairing the world.<sup>87</sup> Moore observes that some theologians even argue "that God *needs* human beings to do the work of redemption in this torn apart

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<sup>80</sup> Susannah Heschel, *Praying with Their Feet: Remembering Abraham Joshua Heschel and Martin Luther King*, PEACEWORK, Dec. 2006 - Jan. 2007, at 28, available at <http://www.peaceworkmagazine.org/print/393>.

<sup>81</sup> See, e.g., Gerald L. Zelizer, *Sermon Celebrating Martin Luther King and Rabbi Abraham Heschel*, CONGREGATION NEVE SHALOM (Jan. 14, 2012), <http://neveshalom.net/HeschelAndKing.html> (using the occasion of the birthdays of King and Heschel to observe, "These two lives were connected in the domain of social justice, or what we call today Tikun Olam.").

<sup>82</sup> CHATTERTON-PURDY, *supra* note 75, at 27.

<sup>83</sup> *Oral History Interview with James Lawson*, B.U. SCHOOL OF THEOLOGY (Oct. 26, 2011), <http://www.bu.edu/sth/2011/11/30/oral-history-interview-with-james-lawson>.

<sup>84</sup> *Id.*

<sup>85</sup> I thank Mary Elizabeth Moore, Dean of the B.U. School of Theology, for bringing this to my attention. See Mary Elizabeth Moore, *Prophetic Grace: A Wesleyan Heritage of Repairing the World*, in *A LIVING TRADITION: CRITICAL RECOVERY AND RECONSTRUCTION OF WESLEYAN HERITAGE* (Mary Elizabeth Moore ed., forthcoming 2012) (manuscript at 1) (on file with author).

<sup>86</sup> *Id.* (manuscript at 22-23, 31-32).

<sup>87</sup> *Id.* (manuscript at 3).

world,” because God’s power is limited and “God needs people to exert what powers they have for the good of creation.”<sup>88</sup>

In sum, I have suggested that the notion of constitutional redemption as a task in which we all engage may ring oddly for religious people who view redemption as the work of a personal Savior. I have also argued, however, that it may resonate with religious ideas of human responsibility for repairing the world. Moreover, if part of that repair is recognizing and fighting injustices, it may resonate with the biblical, prophetic tradition of judging religious and political leaders for falling short of what justice and righteousness demand while holding out hope for the restoration of the world.<sup>89</sup>

#### B. *Education for Redemptive Constitutionalism*

If one accepts Balkin’s conception of the unfolding of an intergenerational constitutional project, then it has certain implications for how to educate young people to participate in that project. In a forthcoming book, James Fleming and I elaborate on the role of civic education in a formative project of preparing children for (to borrow *Brown v. Board of Education*’s formulation) success in life and good citizenship and to preserve our constitutional democracy.<sup>90</sup> Two salient points deserve mention. First, the majority of civic educators and parents agree that civics teachers should teach and students should learn America’s ideals and its special significance, as well as the shortfall between ideals and practices. In other words, a “warts and all” approach.<sup>91</sup> The National Standards for Civics and Government, funded in part by the Department of Education, includes as “organizing questions” for guiding civic education “disparities between ideals and reality in American political and social life.”<sup>92</sup> This seems quite compatible with Balkin’s notion of constitutional faith. Helpful here may be Jean Bethke Elstain’s account of the “reflective” political education needed for democracy: civic education should avoid both hagiography, or an “uncritical adulation” of the past that will “brook no criticism of the Founders,” and the view that “nothing good” ever came from the past, given such blemishes as slavery and the

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<sup>88</sup> *Id.* (manuscript at 22) (quoting ISABEL CARTER HEYWARD, *THE REDEMPTION OF GOD: A THEOLOGY OF MUTUAL RELATION* (1982)). Heyward is not expounding Methodist theology, I should note, but her own distinctive vision.

<sup>89</sup> Moore, *supra* note 85 (manuscript at 2-13) (noting parallels between biblical prophets and John Wesley’s frequent criticisms of injustices).

<sup>90</sup> FLEMING & MCCLAIN, *supra* note 3 (manuscript at 118-45).

<sup>91</sup> *See id.* (manuscript at 123); *see also* STEVE FARKAS & ANN M. DUFFETT, FDR GROUP, *HIGH SCHOOLS, CIVICS, AND CITIZENSHIP: WHAT SOCIAL STUDIES TEACHERS THINK AND DO* 5, 11 (2010), *available at* [www.aei.org/files/2010/09/30/High-Schools-Civics-Citizenship-Full-Report.pdf](http://www.aei.org/files/2010/09/30/High-Schools-Civics-Citizenship-Full-Report.pdf).

<sup>92</sup> CENTER FOR CIVIC EDUCATION, *NATIONAL STANDARDS FOR CIVICS AND GOVERNMENT* (1994), *available at* [http://www.civiced.org/index.php?page=stds\\_orgquestions\\_01](http://www.civiced.org/index.php?page=stds_orgquestions_01).



disenfranchisement of women.<sup>93</sup> Students should develop neither an idolatrous regard for the Founders or the Founding, which wholly disregards any imperfections, nor a complete cynicism about the constitutional project.<sup>94</sup>

The second salient point about civic education is that students should learn about the processes that our constitutional order allows for bringing about change or addressing shortfalls – and the role that social and political movements have played and can play in shaping America. Along these lines, I believe that Balkin would find it encouraging that a recent consensus document on civic education, *The Civic Mission of Schools*, states that texts and teachers should cover “the process of political and social change,” including “the constitutional rights that individuals and groups have to promote change.”<sup>95</sup> Further, many prominent accounts of civic education stress the importance of a “teach the conflicts” or “teach the controversies” approach, which encourages young people to analyze conflicts among basic values and apply those values to contemporary issues.<sup>96</sup>

Thus, redemptive constitutionalism, with its emphasis upon We the People actively working to perfect the Constitution, seems to require a particular form of civic education that equips students to recognize and remedy what Balkin calls the shortfall between constitutional ideals and practices. The very diversity of opinion about the nature of that shortfall and the proper remedy, however, will not lead to any easy curriculum. Recent battles over Constitution Day bear this out: Tea Party Patriots flooded school systems with coloring books and other materials, triggering progressives to respond with their own instructional material.<sup>97</sup> A positive development Balkin might see here is that both sides feel a personal stake in the fate of the Constitution and want students to feel they have a stake as well. Balkin refers to citizens’ ability “to take *ownership of their Constitution*” through the processes of democratic constitutionalism.<sup>98</sup> In other words, “from the standpoint of participants in the constitutional project, they allow the Constitution to be ‘our law.’”<sup>99</sup>

### C. *A Translation Problem? Human Agency and Redemption*

I return now to the challenge of translating a religious concept – redemption – into constitutional theory and practice. To reiterate Balkin’s claim,

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<sup>93</sup> JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* 81-84 (1995).

<sup>94</sup> *Id.*

<sup>95</sup> CARNEGIE CORP. OF N.Y. & CTR. FOR INFO. AND RESEARCH ON CIVIC LEARNING AND ENGAGEMENT, *THE CIVIC MISSION OF SCHOOLS* 30 (2003), available at <http://www.civicmissionofschools.org/cmos/site/campaign/documents/CivicMissionofSchools.pdf>.

<sup>96</sup> See FLEMING & MCCLAIN, *supra* note 3 (manuscript at 123) (discussing examples).

<sup>97</sup> Kate Zernike, *The Constitution Has Its Day, and a Struggle for Its Spirit Breaks Out*, N.Y. TIMES, Sept. 17, 2011, at A13.

<sup>98</sup> BALKIN, *supra* note 1, at 280 (emphasis added).

<sup>99</sup> *Id.*

redemptive constitutionalism “starts with the assumption that the Constitution exists, and always has existed, in a fallen condition. It is a collection of moral and political compromises placed in an imperfect document and situated in imperfect political institutions.”<sup>100</sup> But redemptive constitutionalism also maintains that the transgenerational constitutional project “contains *resources for its own redemption*,” such as the “commitments that we have only partially lived up to” and “promises that have yet to be fulfilled.”<sup>101</sup> Here Balkin returns subtly to the theme of unfulfilled debt or promises explained in his earlier book. These resources include elements of the Constitution and in “its associated institutions.”<sup>102</sup> Recall King’s statement, quoted above: “We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation.”<sup>103</sup> In a religious tradition of a personal redeemer, the redeemer pays the debt. In Balkin’s world, everyone should participate in redemption.

Balkin’s emphasis on the personal responsibility of each member of We the People and of each generation drives home that the fate of the Constitution depends on human agency here and now. That agency includes not only individual actions but also, as he amply illustrates, the actions of groups – social movements and political movements. To return to his invocation of *Pirke Avot*, the task may be too great for one person to complete, but that does not excuse the person from doing his or her own part in engaging in the work.

This approach to the role of human agency in achieving redemption differs from religious beliefs that things will work themselves out to a particular end regardless of conscious human effort, whether a narrative of triumph or unfolding purpose or of predestination for salvation.<sup>104</sup> Moreover, while Luther stressed salvation through faith, not “good works,”<sup>105</sup> for Balkin’s approach, faith alone is not enough: constitutional redemption requires that constitutional actors work to realize their constitutional vision. To use a religious analogy, instead of a theology of God’s omnipotence and the unfolding of divine purpose over time, Balkin’s vision is one of the risk of powerlessness, of the risk of evil triumphing over good. In other words, the world can end in more than one way. The end will not just be a matter of how many are caught up in the clouds when the rapture occurs or how many have

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<sup>100</sup> *Id.* at 81.

<sup>101</sup> *Id.* (emphasis added).

<sup>102</sup> *Id.*

<sup>103</sup> BALKIN, *supra* note 4, at 123 (quoting KING, *supra* note 66, at 217).

<sup>104</sup> See ROLAND H. BAINTON, *THE AGE OF THE REFORMATION* 20-21 (1956) (explaining the “subversive” Reformation idea of “predestination, . . . the doctrine that some have been elected by God from before the very foundation of the world and that they are the true Church”). For example, tenets of Calvinism include the notions of “unconditional election” – that some are elected into salvation – and also of “perseverance of the saints” – that a person who is elected for salvation cannot lose his or her salvation. *The Five Points of Calvinism*, CALVINIST CORNER, <http://calvinistcorner.com/tulip> (last visited April 22, 2012).

<sup>105</sup> BAINTON, *supra* note 5, at 228.

been saved by the time of the Last Judgment. Hence the urgency of the task of redemption. The uncertain fate of the constitution brings to mind an analogue that stresses powerlessness and vulnerability of the divine in the world.<sup>106</sup>

D. *Redemption and Creation – Fallen World, Fallen Constitution?*

The notion of a “fallen” constitution, compromised from the time of its very creation, invites the question of whether there are any appropriate analogies in religious understandings of fallenness. Examining meanings of fallenness in Jewish and Christian teaching illuminates some of the challenges posed by such attempted comparisons. I shall suggest that there are no easy parallels between the fallen world and the fallen constitution. I explore these religious meanings to ask whether Balkin would think they had any relevance to his model or whether he would want to distance these understandings of fallenness from his own.

First, how does the fallen constitution relate to the biblical account of the most famous fall of all, that of Adam and Eve? That creation story in *Genesis* posits that there was a time when humans were not in a “fallen condition.” By contrast, Balkin’s account does not posit any time of perfection, any time before exile. The constitutional imperfections are there from the time of creation due to, as he puts it, “the circumstances of their origins and the compromises necessary to bring them into being and maintain them over time.”<sup>107</sup> The *Genesis* creation stories, both the seven day version (in which God “saw everything that he had made, and behold, it was very good”) and the Adam and Eve version, do not include any compromises since they imagine a sole Creator.<sup>108</sup> Nor do they include initial imperfections. What the Adam and Eve story does have is temptation in the form of the serpent, just as Christian tradition posits the Evil One, or Satan, who is active in the world. Although people engaged in interpretive battles over the Constitution may demonize their opponents, I do not believe that Balkin’s theory includes an account of a source of evil active in the world apart from human agency.

The basic human condition after expulsion or exile from the Garden of Eden has been one of needing redemption (at least in the Christian teleological narrative). In the words of Joni Mitchell’s classic song, *Woodstock*, “[W]e’ve got to get ourselves back to the Garden.”<sup>109</sup> In the biblical story, creation precedes the fall. Notions of redemption and exile go hand in hand. In T.S.

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<sup>106</sup> See, e.g., HEYWARD, *supra* note 88, at 181-83 (developing a theology of relation that stresses God’s powerlessness and dependency on human efforts). There may also be some parallels with so-called “death of God” theology.

<sup>107</sup> BALKIN, *supra* note 1, at 78.

<sup>108</sup> *Genesis* 1:1-2:3 is one creation story, in which, after seven days, “God saw everything that he had made, and behold, it was very good,” and God rested on the seventh day. *Genesis* 1:31. The second creation story, of Adam and Eve, is in *Genesis* 2:4-22, which concludes with God driving man out of the Garden of Eden.

<sup>109</sup> JONI MITCHELL, *Woodstock*, on LADIES OF THE CANYON (Reprise Records 1970).

Eliot's poem, *Ash Wednesday*, he writes, "Redeem the time, redeem the dream/ The token of the word unheard, unspoken/ Till the wind shake a thousand whispers from the yew/ And after this our exile."<sup>110</sup> Eliot alludes to the *Salve Regina* prayer: "And after this our exile show unto us the blessed fruit of thy womb, Jesus."<sup>111</sup> Consider also the lyrics of a hymn sung in Christian churches at Christmas, which links exile and its end to paying a debt: "O come, o come Emmanuel, and ransom captive Israel, that mourns in lonely exile here, until the Son of God appear."<sup>112</sup>

Constitutional imperfection is due to human, rather than divine, agency. The imperfection is not due just to bad interpretations or the shortfall between text and principle and practice, but it resides in the original (created) document itself. There is no ready analogue to divine creation, unless, as Balkin acknowledges, one subscribes to a heresy.

As I read Balkin's chapter on redemption, I also thought about certain themes in Jewish mysticism about exile, redemption, and creation. Kabbalistic thought, particularly the thought of sixteenth century mystic Isaac Luria, gave new and complex metaphysical and theological meanings to the idea of *tikkun olam*.<sup>113</sup> As Gershom Scholem explains, in his famous introductions to Jewish mysticism,<sup>114</sup> for Kabbalists, redemption was bound up with creation – to the idea of "retracing the path" to creation and revelation, in order to return to the "unity and purity" of the beginning of the world.<sup>115</sup> Adam was a "microcosm reflecting the life of all the worlds"; he could have removed himself from "all the 'fallen sparks' that were still in exile, and . . . put them in their proper place."<sup>116</sup> But he failed, and thus, "in the symbolism of Adam's banishment from Paradise, human history begins with exile."<sup>117</sup> The sparks of Adam, as well as the sparks of the divine presence, the Shekhinah, are "everywhere, scattered among all the spheres of metaphysical and physical existence."<sup>118</sup>

<sup>110</sup> T.S. ELIOT, *ASH WEDNESDAY*, reprinted in *COLLECTED POEMS 1909-1962*, at 91 (1970).

<sup>111</sup> *The Salve Regina (Hail Holy Queen)*, CATHOLIC ONLINE, <http://www.catholic.org/prayers/prayer.php?p=243> (last visited April 22, 2012). For a recent Lenten meditation on Eliot's *Ash Wednesday* and its use of the *Salve Regina*, see Patrick Comerford, *Poems for Lent (1): 'Ash Wednesday,' T.S. Eliot*, PATRICK COMERFORD, <http://revpatrickcomerford.blogspot.com/2012/02/poems-for-lent-1-ash-wednesday-ts-eliot.html> (last visited April 22, 2012).

<sup>112</sup> *O Come, O Come Emmanuel*, in *MEDIAEVAL HYMNS* (John Mason Neal trans., 1851).

<sup>113</sup> Sanford L. Drob, *Tikkun ha-Olam: The Restoration of the World*, THE NEW KABBALAH, <http://www.newkabbalah.com/tikkun.html> (last visited Nov. 4, 2011).

<sup>114</sup> GERSHOM G. SCHOLEM, *MAJOR TRENDS IN JEWISH MYSTICISM* (1946) [hereinafter SCHOLEM, *MAJOR TRENDS*]; GERSHOM SCHOLEM, *ON THE KABBALAH AND ITS SYMBOLISM* (7th prtg. 1974) [hereinafter SCHOLEM, *ON THE KABBALAH*].

<sup>115</sup> SCHOLEM, *MAJOR TRENDS*, *supra* note 114, at 245.

<sup>116</sup> SCHOLEM, *ON THE KABBALAH*, *supra* note 114, at 115.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

The sparks “fall, and go into exile where they will be dominated by the ‘shells,’ the *kelippoth*.”<sup>119</sup>

The function of the law, both the Noahid law “binding on all men and of the Torah imposed specially upon Israel, is to serve as an instrument of the *tikkun*,” that is, the redemption.<sup>120</sup> When a person acts in accordance with the Law, he brings home “the fallen sparks of the *Shekhinah* and of his own soul as well.”<sup>121</sup> Scholem explains, “[T]hus fundamentally every man and especially every Jew participates in the process of the *tikkun*” (redemption).<sup>122</sup> There is also a notion that man must liberate sparks of light trapped in the world, thus contributing to the redemption of the world. Only “a perfect *Zaddik*,” however, may be able to accomplish this liberation.<sup>123</sup>

I want to avoid any facile comparisons between the Torah as a text and the Constitution as a text. However, it is notable that Kabbalistic teachings distinguish between the Torah as it would have been without the fall of man and the Torah as it is today.<sup>124</sup> Thus, Kabbalists “did not shrink” from exploring questions about what the content of the Torah (“the highest manifestation of divine wisdom”) would have been but for the fall. They also asked, more radically, “If the Torah was pre-existent, if it preceded Creation, what was its nature before the fall?”<sup>125</sup> Moreover, the Kabbalists looked forward in time as well, speculating on “the structure of the Torah in the Messianic Age when man is restored to his pristine state.”<sup>126</sup> Scholem comments, “Essentially the two questions are one, namely, what is the relation of the Torah to the fundamental history of man?”<sup>127</sup> Kabbalists’ ideas on these questions were a “profound influence on the subsequent development of Jewish mysticism, both in its orthodox and in its heretical aspects.”<sup>128</sup> Thus, mystics spoke of the “garment of the Torah,” the outer garment of the presence of God in the world, the *Shekhinah*.<sup>129</sup> This covering would not have been needed “if man had not succumbed to sin.”<sup>130</sup> The author of the *Zohar*, however, claims that through his good deeds and “deeper insight,” a “righteous man illumines the *Shekhinah*, ‘stripping her of the somber garments of literal

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 116.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 117.

<sup>123</sup> *Id.* at 133.

<sup>124</sup> *Id.* at 66-67.

<sup>125</sup> *Id.* at 66.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 67.

<sup>130</sup> *Id.*

meaning and casuistry and adorning her with radiant garments, which are the mysteries of the Torah.”<sup>131</sup>

Delving further into the intricacies of how Jewish mystics distinguished the different manifestations of the Torah would take me too far afield for this Article’s purposes. It will suffice to observe that fall and redemption are crucial categories in these speculations. Thus, returning to the question of the form of the Torah before and after the fall, Scholem observes that some mystics viewed various “restrictions, prohibitions, and delimitations” in the Torah (the Tree of Knowledge of good and evil) as “perfectly legitimate in the world of sin, in the unredeemed world”; indeed, they reflected the only form the Torah could have assumed in such a world.<sup>132</sup> By contrast, the Tree of Life, which represented “freedom” before the fall, came to represent the “spiritual” or “utopian aspect of the Torah.”<sup>133</sup>

Exile is another feature of Kabbalistic thought that might have some relevance to Balkin’s use of the trope of redemption. Some of the most prominent Jewish mystics wrote at a time of the concrete experience of exile – the expulsion of the Jewish people from Spain in 1492. Scholem observes that this catastrophe sparked Messianic calculations.<sup>134</sup> Redemption was a central theme in the thought of Kabbalists of this time, and achieving redemption lay, as noted above, in “retracing the path” to the beginnings of creation and revelation.<sup>135</sup> Scholem observes, “Life was conceived as Existence in Exile and in self-contradiction, and the sufferings of Exile were linked up with the central Kabbalistic doctrines about God and man.”<sup>136</sup> Isaac Luria (as mentioned earlier) is a major figure in the Kabbalistic thought of this period. His complex ideas about exile extended exile to the Divine Being itself. He developed the idea that certain divine sparks of light have fallen from the divine realm into the lower depths in what is known as the “breaking of the vessels.”<sup>137</sup> Luria’s Kabbalism held that the forces of evil developed out of “the scattered fragments of the vessels” sunk into the lower depths.<sup>138</sup> *Tikkun*, or redemption, entailed “restitution” or “re-integration of the original whole,” mending the damage from things breaking apart.<sup>139</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 68-69.

<sup>133</sup> *Id.* at 69.

<sup>134</sup> SCHOLEM, MAJOR TRENDS, *supra* note 114, at 244-86. For more modern Jewish responses to catastrophe, see DAVID G. ROSKIES, AGAINST THE APOCALYPSE: RESPONSES TO CATASTROPHE IN MODERN JEWISH CULTURE (1984).

<sup>135</sup> SCHOLEM, MAJOR TRENDS, *supra* note 114, at 245.

<sup>136</sup> *Id.* at 249.

<sup>137</sup> *Id.* at 265.

<sup>138</sup> *Id.* at 267. Scholem refers to this aspect of Luria’s thought as “Gnostical” in character. *Id.*

<sup>139</sup> *Id.* at 268.

What role can humans play in *tikkun*? Scholem explains that the process of restoration, or redemption, depends on human agency: “Every act of man is related to this final task which God has set for His creatures.” Thus, the Jew who is in close contact with the divine life through the Torah, the fulfillment of the commandments, and through prayer, has it in his power to accelerate . . . this process.”<sup>140</sup> This human effort helps to bring about a restoration of the unity of the Divine Being. The experience of historical exile brought about a renewed focus on the “old idea” that the *Shekhinah* itself (the divine presence, the celestial bride) was in exile. Human action, thus, could have a “mystical function” of reuniting the *Shekhinah* with “the Holy One.”<sup>141</sup> Prayer and worship can facilitate this restoration.

I do not expect Balkin – or his or my readers – to see any obvious or easy links between Balkin’s notion of a redemptive constitutionalism and Kabbalistic ideas of Exile and redemption. Nonetheless, the Kabbalists are consistent with the rabbis in *Pirke Avot* in emphasizing that each person has a responsibility to do his (or her) part. The pertinent question in each case is the same: what is the work that people are responsible for doing?

### III. WHAT LIVING ORIGINALISM CONTRIBUTES TO THE CONSTITUTIONAL PROJECT OF REDEMPTION

So far, I have said nothing about Balkin’s conversion to what he coins “living originalism.” He draws a conscious analogy to “living constitutionalism,” often thought to be in sharp tension with originalism. Balkin refers to his approach as “framework originalism,” by contrast to “skyscraper originalism,” in which future generations have little left to build.<sup>142</sup> This architectural imagery is quite vivid. It is also apt, given his repeated references to “building out,” “building up,” and “building on” the Constitution.<sup>143</sup> We the People across generations have the task of “implementing and applying the Constitution in practice, and building out institutions to perform constitutional functions.”<sup>144</sup>

Some constitutional theorists, critical of originalism, propose a constitutional *constructivism* as an approach distinct from, and superior to, originalism.<sup>145</sup> Balkin, however, uses a different term for his version of originalism: “constitutional *construction*.” Notwithstanding Balkin’s reassurances about constitutional protestantism, I must leave it to those with more expertise to assess whether Balkin’s “living originalism” is “really” originalism – whether it is, to use Balkin’s own terms, “off-the-wall” or “on-

<sup>140</sup> *Id.* at 274.

<sup>141</sup> *Id.* at 275-76.

<sup>142</sup> BALKIN, *supra* note 1, at 31-33, 282.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 282.

<sup>145</sup> See JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY 5 (2006).

the-wall” as a plausible account.<sup>146</sup> I will say that his merging of living constitutionalism with originalism, using the organizing theme of redemptive constitutionalism, strikes me as highly creative. I will also offer a few comments about living originalism, as Balkin presents it.

First, one notable feature likely to cause some originalist critics to question whether he is on-the-wall is that his framework originalism leaves “space for future generations to build out and construct the Constitution-in-practice.”<sup>147</sup> Thus, “living constitutionalism,” he contends, “explains and justifies the process of building on and building out.”<sup>148</sup> There is an openness to the process since certain arguments about the meaning of our constitutional values and principles may be off-the-wall or on-the-wall at a particular time and may shift from one era to another as constitutional culture evolves.<sup>149</sup>

Second, and related to my first observation, until reading Balkin’s book, I did not associate originalism with a theory that explains and justifies progressive constitutional change. Balkin, however, offers us tools to use in order to talk about and critique the shortfall between certain constitutional texts and principles and the “constitution in practice” and to argue for different constitutional interpretations that would close this gap. His capacious view of originalism allows this room for change. At the same time, as he elaborated in *Constitutional Redemption*, efforts better to instantiate constitutional ideals through legal change may still fall short due to such phenomena as “preservation-through-transformation”: even as “law recognizes and outlaws some forms of inequality, it fails to recognize or legitimates others.”<sup>150</sup>

Third, the openness of the process of constitutional interpretation and the active role of all participants in Balkin’s constitutional project strike me as distinct from other accounts of originalism. Indeed, he says, “The proper way to redeem constitutional values cannot be known in advance.”<sup>151</sup> Some of the openness flows from the structure of the Constitution and its many functions itself: framework originalism allows room for We the People over time to build out the constitution, to “do its best” and “fight over the right way.”<sup>152</sup> Of particular interest is Balkin’s discussion of the role of civil society in the process of constitutional change.<sup>153</sup> He offers an interesting model of how courts, legislatures, and civil-society actors work in tandem to create a

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<sup>146</sup> BALKIN, *supra* note 1, at 294 (using terms “off-the-wall” and “on-the-wall” to refer to changing views in constitutional culture and professional legal thought).

<sup>147</sup> *Id.* at 282.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 294.

<sup>150</sup> See BALKIN, *supra* note 4, at 141 (citing Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 83 (2000)).

<sup>151</sup> BALKIN, *supra* note 1, at 76.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 284.



constitutional culture. He highlights the role of civil-society organizations and social and political mobilizations in shaping federal decision making and public opinion, so that constitutional meanings change over time and what was once off-the-wall becomes on-the-wall, thinkable, and within the realm of constitutional possibility.<sup>154</sup> Courts, in turn, “can change the law,” which has an impact on civil-society and political actors, as they “affect people’s understandings of what is politically possible and politically legitimate.”<sup>155</sup>

Some of the openness, that is, the different directions the constitutional project can take, also stems from Balkin’s notions of a fallen constitution and the precariousness of the task of redeeming the constitution. In other words, the stakes are high because there are no guarantees that redemption will occur rather than new episodes of constitutional evil and injustice. Balkin writes, “The same resources that allow for constitutional adaptation and constitutional redemption also allow for the American people to commit great injustices and bring the constitutional project to ruin.”<sup>156</sup> This idea of high stakes, urgency, and even vulnerability is what led me in this Article to examine more closely the analogy between the task of constitutional redemption and that of redemption as it features in various religious traditions.

#### CONCLUSION

In this Article, I have examined two intriguing ideas in Jack Balkin’s *Living Originalism*: a “constitutional project” and “constitutional redemption.” Balkin envisions the former, intergenerational task as entailing the latter. Because redemption is a religiously-laden term, I have explored the relationship between religious and constitutional redemption, pointing out how different religious understandings of redemption may pose challenges to accepting the idea of a project of constitutional redemption. While Balkin, for example, elaborates a notion of the obligation of every person to engage in the “great work” of redeeming the constitution, which we may analogize to *tikkun olam*, repairing or restoring the world, his appeal to notions of paying a debt and of falling short also powerfully connote certain Christian understandings of redemption of sinful humankind through faith in a personal Redeemer, not through human works. I have illuminated some tensions even within particular religious traditions themselves over how the task of redemption takes place, focusing on, for example, the interplay of the divine and of human agency in the task of redemption. I have also suggested some of the challenges in relating the concept of a “fallen” constitution, imperfect even from its creation, to religious ideas of Divine creation preceding human fallenness, imperfection, and exile.

The aim of my exploration is to invite attention to (again, to borrow Rawls’s framework) whether people, drawing on their different comprehensive views,

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<sup>154</sup> *Id.* at 294.

<sup>155</sup> *Id.* at 293.

<sup>156</sup> *Id.* at 281.

could reach an overlapping consensus – as cooperating members of a well-ordered society – on the idea of constitutional redemption as a political conception and as a responsibility incumbent upon them as members of that society or whether the diverse religious ideas of redemption pose a stumbling block to such consensus.<sup>157</sup> In this Article, I have offered merely a preliminary look, focusing on certain understandings of redemption and repairing the world in Jewish and Christian traditions (two of the three Abrahamic traditions, or so-called religions of the book).<sup>158</sup> Given the tremendous religious diversity in the United States, as well as Americans’ tendency to switch religions, a more complete look would require an investigation of whether there are analogous notions of redemption and world repair in the other religious traditions to which Americans adhere, as well as how these notions resonate for the sizeable group of Americans who have no particular religious affiliation.<sup>159</sup> In their recent book, *American Grace: How Religion Divides and Unites Us*, Robert Putnam and David Campbell explore the puzzle of how both religious pluralism and religious polarization can coexist in the United States.<sup>160</sup> An appreciation not only of this puzzle but also of what role the U.S. constitutional framework concerning the separation of church and state plays in mediating the tension between pluralism and polarization also would further inform an analysis of the promise of Balkin’s idea of a project of constitutional redemption.

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<sup>157</sup> See RAWLS, *supra* note 54, at 133-72.

<sup>158</sup> The book refers to the Bible and the third tradition is Islam. Examining relevant teachings within Islam is outside the scope of this Article. However, for an interesting discussion of parallels between contemporary interpretation of the U.S. Constitution and of the Qur’an, in light of recognition of the fallibility of prior human interpreters of both documents and of individual responsibility for interpretation (or re-interpretation) (*idjihad*), see Ali A. Mazrui, *Islam and the United States: Streams of Convergence, Strands of Divergence*, 25 *THIRD WORLD Q.* 793, 811 (2012).

<sup>159</sup> See ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 1-36 (pbk. ed. 2012). The authors note that “the third largest ‘religious’ group in the United States is actually defined by the absence of a religious affiliation – the ‘nones.’” *Id.* at 17. They also observe that America’s “high rate of religious switching” contributes to a “religious fluidity” and “religious mixing” in American’s relationships. *Id.* at 36.

<sup>160</sup> *Id.* at 6.