

THE GREAT REFUSAL: LIBERALS AND GRAND CONSTITUTIONAL NARRATIVE

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Is it time to rewrite the Constitution? Unlike the more delimited question of whether amendments are in order,¹ this one suggests systemic failure, foundational mal/misadjustment to core purposes or objectives, or perhaps, less desperately, a simple conviction that, under a different framework of fundamental law, we could do better. It also suggests that the Constitution as currently written is the chief barrier to achieving our most important objectives—what Larry Solum calls “constitutional fatalism.”² I question this fatalism.

We have been here before, at some well-known junctures of American constitutional development. Abolitionists split between Garrisonians holding the Constitution to be a hopelessly pro-slavery “covenant with death” and an “agreement with hell”³ and anti-slavery constitutionalists like Frederick Douglass and Abraham Lincoln who either held to its promise, when read, necessarily, in conjunction with the more foundational commitment of the Declaration of Independence to the equality of natural rights,⁴ or, like Salmon P. Chase, held that, even

* Professor of Political Science, Boston College. kersch@bc.edu. My brief reflections here, extending an argument I made in a recent *BU Law Review* article (cited below), were stimulated by student and faculty questions and conversations during a recent lecture I delivered at Bates College (including conversations with Steve Engel and Jeff Selinger), by forthcoming work by my colleague Dave Hopkins, and by the probing—and enjoyable—discussions at the University of Wisconsin-Madison under the auspices of the Wisconsin Center for the Study of Constitutional Democracy.

1. Amendments have been advocated recently by liberals and conservatives alike. For example, see JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* (2014) and MARK R. LEVIN, *THE LIBERTY AMENDMENTS: RESTORING THE AMERICAN REPUBLIC* (2013), respectively. Akhil Amar has emphasized the role of groups/clusters of amendments as transformative, inaugurating a new, presumably more desirable/effective constitutional regime. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005).

2. Lawrence B. Solum, *Constitutional Time* (Nov. 4, 2014) (unpublished manuscript), available at https://www.academia.edu/9140990/Lawrence_B._Solum_-_Constitutional_Time; see also SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012).

3. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 66 (1988).

4. See, e.g., GARY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992). Quoting Proverbs 25:11 (“A word fitly spoken is like apples of gold in pictures of silver.”), Lincoln characterized the principles of the Declaration as the apple of gold within the Constitution’s picture of silver. *Proverbs* 25:11; see, e.g., HARRY V. JAFFA,

without reference to the Declaration, the Constitution was inherently antislavery.⁵ Subsequently, early twentieth century Progressivism was divided between those who, frustrated with the Constitution's putatively hobbling structural provisions concerning federalism and the separation of powers and the negations of a robust, rights-wielding judiciary, would have scrapped this "un-democratic" system for one more hospitable to popular, policy-making, problem-solving government. While some progressives insisted we move beyond constitutionalism altogether, the early Woodrow Wilson instead advocated, first, that the U.S. adopt a parliamentary system before later arguing (along with James Bradley Thayer, Charles Beard, and others)⁶ that the Constitution's broad outlines and ambiguous provisions provided more than enough interpretive leeway for government to meet the most challenging exigencies of the present.⁷

In a recent article in the *BU Law Review*, without taking the position against either the desirability or potential effectiveness of Article V amendments to remedy current constitutional deficiencies, I argued that the Constitution, as currently written, provides much greater opportunities for liberals to achieve their political objectives than many of them seem to realize—that, using Solum's terminology, the "actual" (i.e., currently existing) and "possible" constitutions are not identical.⁸ I argued, moreover, that many of the successes of the conservatives in contemporary politics have stemmed from their enthusiasm for and talents in mobilizing constitutional arguments in the service contemporary political agendas and causes—in a concerted bid for instituting a "gestalt shift" or

CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES (1959); GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* (1993); GARY J. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* (1986).

5. See Randy E. Barnett, *From Antislavery Lawyer to Chief Justice: The Remarkable But Forgotten Career of Salmon P. Chase*, 63 *CASE W. RES. L. REV.* 653 (2013).

6. JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* (1893); Charles A. Beard, *The Living Constitution*, 185 *ANNALS AM. ACAD. POL. & SOC. SCI.* 29 (1936); see Aziz Rana, *Progressivism and the Disenchanted Constitution*, in *THE PROGRESSIVES' CENTURY: DEMOCRATIC REFORM AND CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (Stephen Skowronek, Stephen Engel & Bruce Ackerman eds., forthcoming 2016). The Progressive case for broad construction and implied powers, although more elaborately theorized by drafting into service the era's biggest ideas concerning Darwinian evolution and philosophical pragmatism, echoed earlier Hamiltonian approaches.

7. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* (1885); WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (Columbia Paperback 1961 ed. 1908).

8. Ken I. Kersch, *The Talking Cure: How Constitutional Argument Drives Constitutional Development*, 94 *B.U. L. REV.* 1083 (2014); Solum, *supra* note 2.

“constitutional reinscription.”⁹ While liberals certainly are forced to make constitutional arguments in courts, and make them on an *ad hoc* basis in politics, they seem uncomfortable with constitutional argument in the public sphere.¹⁰ Before fatalistically hoisting the banner for rewriting the Constitution, they might reflect on their singular debilities/ineptitude in this area.

In this short Essay, I’d like to go beyond my *BU Law Review* article, which detailed the mechanisms of conservative successes in marshaling constitutional arguments in the public sphere, to reflect upon the wellsprings of liberal failures. I emphasized in the *BU Law Review* that conservatives have been energetic and creative not simply in advancing theories of constitutional interpretation—most famously, originalism—but in embedding those theories within compelling narrative or stories about the nature and trajectory of U.S. constitutional development, and, indeed, of the history of the country itself.¹¹ Liberals have, in recent years, failed miserably in this regard, and it is worth asking why.¹²

9. Kersch, *supra* note 8, at 1087–88; *see* Solum, *supra* note 2.

10. See the developing “canon of distancing,” which includes Democratic House Speaker Nancy Pelosi’s expression of shock that anyone would even raise the questions of the constitutionality of the Affordable (Health) Care Act as a legitimate issue, the failure of the Democrats to raise readily available constitutional objections to a government shut-down engineered by constitution-wielding conservatives (pursuant to the Fourteenth Amendment’s express articulation of a duty of Congress to honor the national debt), President Obama’s refusal to even articulate a boilerplate constitutional argument justifying his military actions combatting ISIS in Syria/Iraq and to reverse his longstanding, firmly, and often publicly, articulated position that major changes to the nation’s immigration policy through executive action would be plainly unconstitutional and illegal. Bruce Ackerman, *Obama’s Betrayal of the Constitution*, N.Y. TIMES (Sept. 11, 2014), <http://www.nytimes.com/2014/09/12/opinion/obamas-betrayal-of-the-constitution.html>; Doug Bandow, *Constitutional Death for Obamacare? The Left Threatens John Roberts and the Supreme Court*, FORBES (May 28, 2012, 10:46 AM), <http://www.forbes.com/sites/dougbandow/2012/05/28/constitutional-death-for-obamacare-the-left-threatens-john-roberts-and-the-supreme-court>; Peter Schuck, *Why Congress Can Impeach Obama*, N.Y. TIMES (Nov. 21, 2014), <http://www.nytimes.com/2014/11/22/opinion/the-impeachment-of-obama-on-immigration-may-be-legal-but-its-wrong.html>; Sean Wilentz, *Obama and the Debt*, N.Y. TIMES (Oct. 7, 2013), http://www.nytimes.com/2013/10/08/opinion/obamas-options.html?_r=0. This pattern of liberal constitutional indifference has troubled not only conservatives but an increasing number of constitutionalist liberal/left academics. *See* Ackerman, *supra*; Bandow, *supra*; Schuck, *supra*; Wilentz, *supra*.

11. Kersch, *supra* note 8.

12. On the importance of embedding interpretations/readings of the Constitution in larger stories about the nation’s history and historical trajectory, *see* Solum, *supra* note 2 (e.g., “The current constitutional regime incorporates elements of the constitutional past and anticipates the constitutional future.”); Lawrence B. Solum, *Narrative, Normativity, and Causation*, 2010 MICH. ST. L. REV. 597, 599–603, 610–11 (2010). Arguably, doing this is necessary to the establishment—and maintenance—of a successful constitutional “regime.” *See* WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND

To be sure, some on the liberal-left have embraced the call for telling compelling constitutional stories in the form of grand narratives: the conference's keynote speaker, Jack Balkin, recently paired two major books, one setting out a theory of interpretation and one calling for the embedding of that interpretative theory within narratives involving constitutional "redemption."¹³ Others—particularly Yale Law School scholars emphasizing regime theories of U.S. constitutional development and linking those to social movements—have been friendly to such projects. Many original Progressives, moreover, also told such stories.¹⁴ But these stories do not seem to have much traction today within the contemporary liberal Democratic Party. In thinking about why, I would like to reference two recent studies, one by political scientists Matt Grossmann and David Hopkins on "the asymmetry of American party politics"¹⁵ and one by Gerald Torres and Lani Guinier entitled *The Constitutional Imaginary: Just Stories About We the People*.¹⁶

Grossmann and Hopkins demonstrate the degree to which contemporary Republican Party leaders speak "ideologically," whereas Democratic leaders speak for "a coalition of social groups seeking public policies that favor their particular interests."¹⁷ "Democrats are more

MAINTAINING A JUST POLITICAL ORDER 460–96 (2007). I have come to believe that the different forms of originalism, old and new, were each attached to different historical pivot points and the purported lessons of each of those. The "old," "reactive" originalism focused on questions of the lessons of politicized, activist judging and reacting against the Warren Court, pivoted on the lessons of 1937 and the perils of Lochnerism in the face of democratic majorities, whereas the "new," "proactive" originalism, which focuses on foundational, substantive matters of structures and rights, with no particular concern for judicial activism or restraint as such (defined in terms of deference to majorities, as opposed to right results) pivots on the Progressive Era, and its more elaborately substantive constitutional theories implicating fundamental questions of the nature and structure of government. *See* Kersch, *supra* note 8, at 1098–99.

13. JACK M. BALKIN, *LIVING ORIGINALISM* (2011); JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) [hereinafter BALKIN, *CONSTITUTIONAL REDEMPTION*].

14. *See, e.g.*, HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* (1909).

15. Matt Grossmann & David Hopkins, *Ideological Republicans and Group Interest Democrats: The Asymmetry of American Party Politics*, 13 *PERSP. ON POL.* 119 (2015). A preliminary discussion can be found in Matt Grossmann & David A. Hopkins, *Policymaking in Red and Blue: Asymmetric Partisan Politics and American Governance* (2014) (unpublished manuscript), available at matthewg.org/papers/policyredblue3.pdf [hereinafter Grossmann & Hopkins, *Red and Blue*] (discussed by Ezra Klein, *Why Democrats and Republicans Don't Understand Each Other*, *VOX* (Sept. 15, 2014, 8:30 AM), <http://www.vox.com/2014/9/15/6131919/democrats-and-republicans-really-are-different>).

16. Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories About We the People*, 71 *MD. L. REV.* 1052 (2012).

17. Grossmann & Hopkins, *Red and Blue*, *supra* note 15, at 2.

focused on making policy to appease their various interest groups and Republicans are more focused on proving their commitment to the small-government philosophy that unites their base,” they observe.¹⁸ From here, Grossmann and Hopkins complicate their account by noting that more Americans identify as conservatives than as liberals, and as Democrats than as Republicans.¹⁹ As such, “while voters tend to agree with Republicans on the philosophical questions in American politics . . . they tend to agree with Democrats on the policy questions”²⁰ Democrats, moreover, “consistently prefer politicians who compromise and Republicans consistently prefer politicians who stick to their principles.”²¹

Torres and Guinier oppose Balkin’s call for the contemporary liberal/left to proudly marshal constitutional appeals in contemporary democratic politics, under the guise redeeming the Constitution. Noting that Balkin’s approach “compels fealty to rules at the same time it . . . looks to the past for a vision of the future,” Torres and Guinier “question Balkin’s idea that redemption is ultimately what is at stake.”²² Redemption suggests “cleansing,” whereas the essential task is to realize “a promise of redistribution that . . . Civil War-era documents called for in order to bring the ringing statements in the Declaration of Independence up to date.”²³

This argument, however, is brought up short upon the horns of the dilemma presented by the contemporary Democratic Party limned by Grossmann and Hopkins. Balkin, Torres, and Guinier say, implicitly raises the question of “How do we move from a story of self to a story of us that is big enough to constitute a nation?” But the contemporary liberal/left, as it lives within today’s Democratic Party, has serious reservations about the very possibility of any such narrative. “In a deeply pluralist culture,” Torres and Guinier note:

[T]here are many stories of us, and weaving them into a coherent whole that does not do violence to the constituent parts is where the political action is. The meta-story cannot rely simply on the rhetorical devices of ethnic solidarity or ethnic or racial nationalism that builds on a pre-existing cultural basis for intersubjective identification.²⁴

18. Klein, *supra* note 15.

19. *Id.*

20. *Id.*

21. *Id.*

22. Torres & Guinier, *supra* note 16, at 1053, 1056.

23. *Id.* at 1056.

24. *Id.* at 1058.

They criticize Balkin's faith in the potential for meta-stories about the Constitution, which involve, at base, the policing of the boundaries of state power, "to drive individual constructions of the self into a coherent story of the nation."²⁵ As such, Torres and Guinier say, Balkin's approach would sharply constrain "the grounds for legitimate political contestation."²⁶

Torres and Guinier do not reject the possibility that constitutional appeals could play a role in forging a just politics that could unite a pluralistic coalition of the liberal/left. But they emphasize that, in making such appeals, "The Constitution . . . has to be understood as both a text *and* a practice. . . . [F]aith in the Constitution has to be faith in the possibility of citizen participation in an ongoing set of institutions."²⁷ That is, it must show how the Constitution can be a path to true political power for those treated and excluded unjustly from the current political order. The problem with Balkin is that "he never really tells us how protestant constitutionalism—his democratizing theory of constitutional faith—will generate a durable source of power, a power strong enough to overcome the views of the ruling elite."²⁸ They conclude that "Balkin's description of constitutional faith is compelling, but in our view what is most important is faith in the capacity of political struggle to lead us to imagine and construct a future into which the liberatory ideals of our framework documents can be rooted."²⁹ They emphasize that this must take place outside the precincts of the political/legal elites and professionals, in on-the-ground social movement politics and corporeal "blood and guts" democratic mobilizations, of the sort Balkin never really describes.³⁰

25. *Id.*

26. *Id.* at 1059; *see also* Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity*, 71 MD. L. REV. 1015 (2012); Robin West, *The Constitution's Political Deficit*, HARV. L. & POL'Y REV. ONLINE (2006); Robin West, *Re-Imagining Justice*, 14 YALE J.L. & FEMINISM 333 (2002).

27. Torres & Guinier, *supra* note 16, at 1063.

28. *Id.* at 1065. On this, I would look to works like Robert Michels on the iron law of oligarchy and James Morone's on the opposed communal yearnings and hostility to government power in the U.S., a political science/sociology literature not referenced by Torres and Guinier. ROBERT MICHELS, *POLITICAL PARTIES* (1915); JAMES A. MORONE, *THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT* (rev. ed. 1998). This is a major issue for those concerned with the trajectories of social movements and cycles of reform and the difficulties of transformative politics, generally and in the U.S. On "protestant [v. Catholic] constitutionalism," *see* LEVINSON, *supra* note 3.

29. Torres & Guinier, *supra* note 16, at 1066.

30. *Id.* at 1070; *see* ELIZABETH BEAUMONT, *THE CIVIC CONSTITUTION: CIVIC VISIONS AND STRUGGLES IN THE PATH TOWARD CONSTITUTIONAL DEMOCRACY* (2014). *Compare, e.g.*, 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014), with Sidney Tarrow, *The People Maybe? Opening the Civil Rights Revolution to Social Movements*, 50 TULSA L. REV. 415 (2015).

ASSESSMENT

Grossmann and Hopkins's diagnosis is hardly surprising. Their evidence restates/demonstrates what we have known for a long time about the developmental trajectory of the nation's major political parties: for much of the middle of the twentieth century both were ideologically diverse groups, with liberal and conservative wings. With antecedents as far back as the 1950s through the Goldwater nomination and culminating in Reagan's election, the Republicans became the party of movement conservatism, defined by a philosophical/ideological/principled commitment to limited government, as embodied (purportedly) in the framework and principles of the U.S. Constitution.³¹ With antecedents tracing as far back as the New Deal's "interest group liberalism," as consolidated in Lyndon Johnson's Great Society, and in the reshaping of the Party's structure itself in the early 1970s McGovern reforms, the Democrats became the party of a diverse coalition of advocacy and interests whose primary *modus operandi* became the brokering of deals, and whose core idiom was not constitutional principle but good public policy.³² Today, partisan polarization notwithstanding, the center of gravity in the populace falls betwixt and between: Americans insist both upon their constitutional principles and their preferred public policies. In such a context, it is not surprising that Republicans appeal frequently and enthusiastically to the Constitution in popular politics and that the Democrats do so relatively rarely and uneasily.

Constitutional argument in the public sphere is a means of identifying one's underlying substantive political vision with the principles of the nation. Recourse to this idiom, which, until relatively recently, predominated across the political spectrum is important, has always been important to the mass of the American people in a nation famous—if not defined by—its "constitutional patriotism" and "constitutional nationalism" ("patriotism" and "nationalism" are dirty words on the

31. See, e.g., BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* (1960). See generally Ken I. Kersch, *Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in National Review, 1955-1980*, 25 *STUD. IN AM. POL. DEV.* 86 (2011).

32. THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979); BRUCE MIROFF, *THE LIBERALS' MOMENT: THE MCGOVERN INSURGENCY AND THE IDENTITY CRISIS OF THE DEMOCRATIC PARTY* (2007); RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* (2004); see also David R. Mayhew, *Lawmaking as a Cognitive Enterprise*, in *LIVING LEGISLATION: DURABILITY, CHANGE, AND THE POLITICS OF AMERICAN LAWMAKING* 255 (Jeffery A. Jenkins & Eric M. Patashnik eds., 2012). On "the policy state," see Karen Orren & Stephen Skowronek, *Pathways to the Present: Political Development in America*, in *OXFORD HANDBOOK ON AMERICAN POLITICAL DEVELOPMENT* (Richard Valelly, Suzanne Mettler & Robert Lieberman eds., forthcoming).

contemporary liberal-left uneasy in ways they never were for Progressives or New Dealers). The Grossmann and Hopkins account finds that Americans are partial to principles but that they generally approve of the policy agenda of the Democrats.³³ This suggests that Democrats could benefit from talking in more principled ways about their preferred public policies. One very American way to talk in a principled way is to reference Constitutional requirements and principles in a way that is neither perfunctory nor defensive, but confident and proud.

The Democratic ambivalence about telling “constitutive stories”³⁴ in the form of “constitutive narratives”³⁵ is, perhaps, ultimately the problem inherent in a coalition that, post-1960s, entails an alliance of “liberal” and “Left”—with the former emphasizing liberal universalism and the latter identity/organic particularism. To the extent that it is a liberal universalist document and framework, the U.S. Constitution, Torres and Guinier (Aziz Rana, Robin West and others) emphasize, systematically marginalizes certain types of claims.

It is at this point that the constitutional project Jack Balkin is trying to revitalize—which ultimately prevailed against conservatism in the Progressive Era and New Deal—grinds to a stop, leaving Democrats in the ring, achieving policies here and there, to be sure, but perpetually back on their heels. Perhaps it is naïve to suggest something so rarified as a new narrative would help Democrats solve the concrete problems of governance (and winning elections) with which they are so vexed. But, in the distinctive institutional order of the U.S., “visions of coherence” have played a critical role in transcending just the sorts of barriers and breakdowns that many now perceive as dysfunctional.³⁶

Adam Sheingate has noted that, across time, complex, heterogeneous institutional environments with ambiguous and uncertain borders like ours are subject to distinctive patterns of constitutional development in which the foundational rules fall into complicated patterns of stability and change, settlement and unsettlement, interpretation, reinterpretation, and adjustment.³⁷ In this iterative process, uncertainties about rules and

33. Grossmann & Hopkins, *supra* note 15, at 122; Klein, *supra* note 15.

34. ROGERS M. SMITH, *STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP* (2003).

35. BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 13, at 30.

36. Victoria Hattam & Joseph Lowndes, *The Ground Beneath Our Feet: Language, Culture, and Political Change*, in *FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING 199* (Stephen Skowronek & Matthew Glassman eds., 2007); Adam Sheingate, *The Terrain of the Political Entrepreneur*, in *FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING*, *supra*, at 13; *see also* JOHN GERRING, *PARTY IDEOLOGIES IN AMERICA, 1828-1996* (1998).

37. The discussion in these final paragraphs is drawn from my *BU Law Review* article. *See* Kersch, *supra* note 8, at 1104–08.

boundaries are both inherent in the rules themselves and generated by goal-directed political actors in whose interest it is to unsettle and change less advantageous into more advantageous rules. In such an order, political and intellectual entrepreneurs and leaders can draw from a diverse and robust set of traditions of political thought and culture that are constantly in flux. The history of American constitutional development provides many instances in which coherent constitutional theories work successfully to overcome potential veto points and countervailing centers of power.

Distinctive features of the U.S. constitutional order, which is characterized by a relatively brief written Constitution fashioned, *ab initio*, to fragment political power, but with its stipulated boundaries and divisions overlapping, shared, abstract, and uncertain, make it—especially when combined with a tradition of providentialist nationalism³⁸—highly susceptible to influence through stories about purpose and about how understanding the boundaries in certain ways either advances or thwarts those purposes, a dynamic reinforced by the nation’s “creedal” political culture (as both problem and opportunity).³⁹ Historically, the trajectory of U.S. constitutional development has been shaped in major ways by the enlistment of these stories in political contention, with the victors ultimately enlisting them in framing programmatic public policies and instituting and justifying new constitutional rules.

In recent years, conservatives have been highly successful in using such theories in politics. The Democrats, I believe—following at least in some way Balkin’s broader project, if not necessarily his particular approach—must find a way to tell the sorts of patriotic, nationalist, constitutional stories that will both satisfy and motivate, if not expand, their coalition, and redound to the benefit of their preferred public policies.

38. See ERNEST LEE TUVESON, *REDEEMER NATION: THE IDEA OF AMERICA’S MILLENNIAL ROLE* (1968).

39. See SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (1981); see also J. DAVID GREENSTONE, *THE LINCOLN PERSUASION: REMAKING AMERICAN LIBERALISM* (1993); RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* (1998).