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## CORRESPONDENCE

### Postmodern Constitutionalism as Materialism

*Francis J. Mootz III\**

Professor J.M. Balkin's recent essay in the *Michigan Law Review*<sup>1</sup> assesses the implications that postmodernism holds for constitutional law. Although I agree with Balkin about many of the specific issues that he believes must be addressed in a postmodern constitutionalism, I find that his manner of talking about postmodernism is unproductive in an important way. Balkin quite correctly argues that a postmodern constitutionalism should not mimic the fragmented and superficial culture of postmodernity, nor should it devolve simply to normative claims that postmodernity is desirable and should be embraced or adopted within the law. However, Balkin's thesis that a postmodern constitutionalism must focus on the material determinants of social life is an ambiguous, if not troubling, alternative. Postmodern thought recognizes that all understanding is context-specific, but this very lesson cautions against attempting to decode the material features of our social context in order to understand ourselves. I shall attempt to explain my reservations about Balkin's postmodern constitutionalism as clearly and concisely as Balkin has written his essay.

Balkin begins by distinguishing different facets of postmodernism. He regards the culture of postmodernity as the primary feature of postmodernism. Postmodernity "is the era of mass culture and mediatization" that has produced cultural artifacts exemplifying "fragmentation, diffusion, and emphasis on surface."<sup>2</sup> Balkin stresses that the culture of postmodernity is not a result of the triumph of progressive politics. Postmodernity is a sociological fact that exhibits both reactionary and progressive elements. Therefore, the fact that the Supreme Court is becoming increasingly reactionary is not inconsistent with the fact that our legal culture is postmodern. Balkin regards

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1. J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992).

2. *Id.* at 1968, 1969. In this regard Balkin describes MTV as a "paradigmatically postmodern phenomenon." *Id.* at 1970.

postmodern thought as a different facet of postmodernism. Postmodernity is marked by theoretical and critical perspectives that simultaneously grow out of the material conditions of the culture at large and also provide a vocabulary for comprehending them and reflecting on their impact. Postmodern thought challenges prevailing epistemologies and ontologies by rejecting the idea that there is a foundation for knowledge other than the historical flux of existence.

Balkin's central premise is that we can describe the cultural condition of postmodernity without becoming entangled in the difficult problems posed by postmodern thought. He argues that postmodern cultural forces "inscribed in ways of living that characterize the late twentieth century" are more primordial than the "epistemological reading" of postmodernism embodied in postmodern thought, which represents a reflective attitude about knowledge.<sup>3</sup> Balkin believes that his postmodern constitutionalism is immune from the standard critiques leveled at other philosophical orientations "because it is not merely a set of beliefs, but also a cultural environment in which beliefs occur."<sup>4</sup> Postmodernity is a cultural given that exists no matter what we may believe, Balkin asserts, and therefore "one does not have to be a postmodernist to recognize the pervasive effects of postmodernity in our lives."<sup>5</sup> For example, Balkin describes new technologies of information collection, collation, and dissemination, and then asks whether traditional liberal notions of autonomy that subtend American constitutionalism "continue to make sense in an age where control of information processing increasingly means new forms of control over individuals."<sup>6</sup> Balkin's point is that to focus on epistemological theories about the Constitution's indeterminate commitment to privacy rights is less useful than to describe postmodernity and then explore whether privacy is possible given the material features of postindustrial society. Balkin argues that epistemological critiques miss the point that postmodernity shapes our lives and knowledge regardless of whether we adopt a postmodern philosophical position.

Balkin's project holds a certain appeal. We might avoid, or at least put to the side, the messy jurisprudential issues raised by deconstruction and hermeneutics and instead undertake a practical assessment of material social reality and its impact on the legal system. This distinction is suspect from the start, however, and Balkin experiences difficulty maintaining it. On one hand, he argues that rejecting master

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3. *Id.* at 1975.

4. *Id.* at 1976.

5. *Id.* at 1974.

6. *Id.* at 1987.

narratives and foundational justifications for knowledge must be subordinated to examining the deeper effects of the changes wrought by material forces. On the other hand, he admits that these forces in turn must retrospectively “be interpreted and understood.”<sup>7</sup> Balkin does not explain how we are to investigate (interpret) the material forces that shape our lives, nor does he describe the value that this interpretation holds for us. Balkin’s essay might lead the casual reader to believe that empirical sociological inquiry is distinct from and has priority over critical reflection and a questioning engagement in legal dialogue. I do not believe that Balkin intends such a simplistic and misguided approach, but his bifurcation of the “material” and “theoretical” facets of postmodernism tends to confuse this issue.<sup>8</sup> Balkin’s emphasis on the material determinants of knowledge does not free us from the epistemological puzzles of postmodern thought. Instead, it elevates the importance of these epistemological concerns.

Balkin’s use of the word *material* is misleading. Although his references to the material determinants of knowledge suggest a neo-Marxist approach, Balkin has subsequently explained that his use of *material* is meant to breach the materialist-idealist distinction altogether.<sup>9</sup> Balkin wants his reader to regard our material condition as the forms of life that produce all knowledge. Even granting this qualification, I do not believe that reading such a capacious definition of *material* back into Balkin’s essay strengthens his argument.<sup>10</sup> Moreover, Balkin is still drawing a distinction, although the distinction is better termed as an opposition of prereflective and reflective experience. In this correspondence I argue that there are more productive

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7. *Id.* at 1968.

8. As a leading deconstructionist legal scholar, Balkin would appear to be the last person one would accuse of having postmodernism all wrong. I have found Balkin’s work to be closely related to my jurisprudential writings. See Francis J. Mootz III, *Hermeneutics and the Rule of Law: Why the Obvious Is Plausible* (Oct. 1992) (unpublished manuscript, on file with author). It is this backdrop that makes Balkin’s essay all the more puzzling to me.

9. Balkin made this point in a telephone conversation with me in early October 1992.

10. I am reminded of Paul Ricoeur’s assessment of neo-Marxist writings that move away from Marx’s scientific materialism by greatly expanding the definition of *work*. Ricoeur argues that from this perspective work comes to designate “the entire human condition of man, since there is nothing that man effects but by a toilsome act; there is nothing human which is not *praxis*.” Paul Ricoeur, *Work and the Word*, in *EXISTENTIAL PHENOMENOLOGY AND POLITICAL THEORY: A READER* 36, 37 (Hwa Yol Jung ed., 1972) (reprinted from PAUL RICOEUR, *HISTORY AND TRUTH* 197-219 (Charles A. Kelbley trans., 1965)). As Ricoeur indicates, a “notion which signifies everything no longer signifies anything.” *Id.* at 38.

Ricoeur’s theme is closely related to my argument. Ricoeur asserts that “there is not a kingdom of work and an empire of the spoken word which would set bounds to each other from without, but there is a power of the spoken word which traverses and penetrates everything human, including the machine, the utensil, and the hand.” *Id.* at 39. The word is a “critique of work . . . . It assumes an aloof attitude, it *reflects*.” *Id.* at 43.

postmodern readings of the relationship of prereflective life and reflective praxis.

Balkin provocatively characterizes postmodern thought as a “partial continuation of the Enlightenment” that seeks emancipation from “the chains created by science, technology, and rationality, which in the course of liberating us subjected us to new forms of control, bureaucracy, mediatization, suburbanization, and surveillance.”<sup>11</sup> The task of a postmodern constitutionalism is to determine how these material “chains” have affected the institution of law. Balkin apparently believes that there has been an epochal transformation from modernity to postmodernity and that this transformation has called forth postmodern thought as an evolutionary revision of the Enlightenment project. He contends that the character of postmodern thought is less important than the new culture of postmodernity, whose material forces transform us regardless of what beliefs we hold. In contrast, I believe that the material forces of contemporary society are a continuing development of the modern era and that postmodern thought is an epochal shift that attempts to deal with modernity on radically different terms than those proposed by Enlightenment thought.<sup>12</sup> Consequently, a postmodern constitutionalism should remain closely allied with the critical perspectives of postmodern thought.

I begin by questioning whether moving beyond epistemological critiques in order to confront the material factors that shape and change social practices makes sense. Balkin presses this agenda by arguing that the material features of industrialization were just as important to the modern era as was the self-understanding embodied in the ideals of Enlightenment. As evidence for this claim, Balkin points to the transformation through technology of fundamentalist cultures that remain steadfastly opposed to the Enlightenment commitment to rational, scientific knowledge. But surely this example cuts the other way: the technological colonization of the rest of the world by European and North American countries has not rendered these foreign cultures *modern* in the way that this term is understood in western cultures. Foreign cultures are not sundered from their traditions by the universalizing imperatives of scientific thought and technology. Rather, technology becomes rooted in the tradition it invades, even as it spurs new developments within that tradition. The material forces of cul-

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11. Balkin, *supra* note 1, at 1988-89.

12. See MARSHALL BERMAN, *ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY* (1982) (arguing that modernity stretches from the sixteenth century to the present and that epochal shifts mark the manner in which we define and cope with this evolving modern era).

tural life undoubtedly are tremendously important resources in the continual process of defining a society, but they are not brute determinants. We should not relegate critical reflection to the background of inquiry in favor of sociological descriptions of material features of society. Rather, we should demand that critical reflection assume a more practical task.<sup>13</sup>

Recall Balkin's privacy example. The technological threat to privacy only makes sense as a "threat" from some social conception of privacy. The mere presence of new technology does not threaten "privacy" as such. Postmodern constitutionalism need not reassess privacy solely because certain technology has been invented. Instead, technological development holds a certain significance for our society because it fits within our culture in a certain way, revealing stresses within the shared view that our society is an amalgam of rights-bearing individuals and also is a functionally organized and administered community. If postmodern constitutionalism must take account of the

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13. I do not mean to suggest that reflection is in some way more authentic than life as it is lived, nor that we should regard critical reflection as an external power brought to bear on the mundane realm of experience. Reflection simply is unavoidable once we come to regard life as puzzling. *See infra* note 17. Reflection is an effort to recover, articulate and explore the pre-reflective significance that lived experience holds for us. *See* MAURICE MERLEAU-PONTY, *The Philosopher and Sociology*, in SIGNS 98 (Richard C. McCleary trans., 1964). Merleau-Ponty rejects the idea that the social sciences will come to replace critical reflection by addressing themselves only to the "facts," and he also rejects the idea that philosophy is unconnected to sociological understanding.

The sociologist philosophizes every time he is required to not only record but comprehend the facts. At the moment of interpretation, he is already a philosopher. . . .

. . . The philosopher thinks about his experience and his world. Except by decree, how could he be given the right to forget what science says about this same experience and world? Under the collective noun "science" there is nothing other than a systematic handling and a methodical use — narrower and broader, more and less discerning — of this same experience which begins with our first perception. . . .

. . . .  
 . . . Accordingly, we must not simply say that philosophy is compatible with sociology, but that it is necessary to it as a constant reminder of its tasks; and that each time the sociologist returns to the living sources of his knowledge, to what operates within him as a means of understanding the forms of culture most remote from him, he practices philosophy spontaneously. Philosophy is not a particular body of knowledge; it is the vigilance which does not let us forget the source of all knowledge.

*Id.* at 101-02, 110.

Merleau-Ponty sees the task of reflection as plunging "into the perceptible, into time and history, toward their articulations. It does not surpass them through forces it has in its own right; it surpasses them only in their meaning." MAURICE MERLEAU-PONTY, *Introduction*, in SIGNS, *supra*, at 3, 21. History is not the progression of material social structures, nor is it the march of a disembodied reason.

Why ask if history is made by men or by things, since it is obvious that human initiatives do not annul the weight of things, and the "force of things" always acts through men? It is just this failure of analysis, when it tries to bring everything down to one level, which reveals history's true milieu. There is no "last analysis," because there is a flesh of history in which (as in our own body) everything counts and has a bearing — the infrastructure, our idea of it, and above all the perpetual exchanges between the two in which the weight of things becomes a sign as well, thoughts become forces, and the balance of the two becomes events.

*Id.* at 20.

material forces that shape our lives in mundane and practical ways, then inevitably it must also take account of both the significance that these forces hold for us and the ways that they are understood. I do not understand Balkin's assertion that "it is neither our shared ideas nor their social construction that become the key issues, but rather technological change and who has control over its shape and direction."<sup>14</sup> If all knowledge is acquired only through our inherence in a historical, material situation, then our efforts to understand this situation cannot help but invoke and critique shared perspectives.<sup>15</sup>

Balkin does acknowledge that material forces need "to be studied to understand how culture has changed for better or worse" under their influences, and that critical theory provides the necessary "general perspectives for interpreting and evaluating culture and the products of culture."<sup>16</sup> But the relationship of social fact and social theory is more immediate than Balkin suggests. We cannot avoid gripping, and being gripped by, a critical theoretical perspective if we pursue the question of postmodernity. Simply by asking how postmodern cultural forces are affecting legal practice, we adopt a critical and interpretive posture toward the social conceptions that define these forces. Otherwise, the question simply would not occur to us, and we would not have "postmodernity": we instead would have diffuse and unthematized social experience.<sup>17</sup> By talking about postmodernism, Balkin has adopted a critical perspective on contemporary American

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14. Balkin, *supra* note 1, at 1988.

15. Merleau-Ponty's phenomenology demonstrates how we can accept that knowledge is possible only on account of our situated, material condition as corporeal beings without falling prey to materialism. See MAURICE MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION* 70 (Colin Smith trans., 1962) (arguing that our bodily comportment in the world is the source of all knowledge but that modern thought wrongly regards the "body, which is my point of view upon the world, as one of the objects of that world").

16. Balkin, *supra* note 1, at 1971.

17. Some might argue that abandoning abstract critical perspectives would leave life pretty much as it exists now, but without the useless exercise of philosophical reflection. Talking about the end of philosophy is fashionable, but this is often a rhetorically provocative posture rather than a meaningful commitment. Certainly philosophy as an academic discipline does not create, direct, or justify existence. Such philosophical pretensions are quite ridiculous. However, abandoning philosophy in its truest sense — the questioning and challenging encounter with pre-reflective meaning relations — is a dangerous, unwarranted, and, I believe, difficult proposition to carry out. Even the ever-playful deconstructionist, Jacques Derrida, brutally criticizes other thinkers in a way that leaves no doubt that he believes doing so is somehow worth his efforts, that he is on to something, and that others should listen.

Devout postmodern legal thinkers inevitably carry forward philosophical reflection. See, e.g., Dennis Patterson, *Postmodernism/Feminism/Law*, 77 *CORNELL L. REV.* 254 (1992). Patterson's article is appropriately titled because it constitutes a third-order philosophical narrative. The ordinary language game of law is first the subject of a critical perspective loosely organized under the term *feminism*. In turn, Patterson assesses feminism according to the yardstick of postmodernism. The fact that Patterson concludes that a postmodern feminism is one that weaves an emancipatory narrative as part of legal practice does not undo the philosophical structure of his argument. This is not a failing of Patterson's article; things simply cannot be other-

society and therefore must grapple with all of the issues raised by postmodern thought.

Balkin accurately states that postmodernism involves more than merely rejecting philosophical metanarratives by accepting reason and knowledge as the products of localized and overlapping language games.<sup>18</sup> But what does it mean to argue that a postmodern constitutionalism should move beyond epistemological theory and instead should focus on the material determinants of social life by asking "how postmodern culture and technology have affected law as an institution"?<sup>19</sup> We can pursue this question by considering Balkin's essay as an essay. Why was it written? What part does his essay play in a postmodern constitutionalism?

For courts and lawyers to assimilate social changes into constitutional practice (as, for instance, by rearticulating personal privacy within a particular context) is one thing, but for Balkin to write about this potentiality within legal practice is quite another. If the material cultural forces of postmodernity shape legal practice above our wanting and willing, what is the point in telling us this? If postmodernity effects its full influence only after being interpreted or thematized in some manner, what has Balkin told us about how scholars, judges, lawyers, and citizens can influence this thematization? Phrased more concretely, if Balkin intends to tell lawyers and judges that they should read the Constitution in light of evolving cultural practices, has he told them something that they do not already know, or has he suggested a strategy that they do not already employ? If Balkin intends to provide lawyers and judges with a better method for practicing constitutional law, does he claim to have grasped "postmodernity" in such a way as to provide guidance for legal practitioners? Surely, Balkin would concede that the search for a method based on a description of reality is the very target of postmodern thought.<sup>20</sup>

Addressing these questions requires that we return to the age-old dispute in political theory regarding the relationship between emancipatory theory and social practice. Postmodern thought is provocative because it places in question whether theory and practice can be segregated to the extent suggested in the framing of such traditional questions. Postmodern theorists cannot pretend to decipher the mate-

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wise. In fact, I find many similarities between Patterson's philosophical conclusions and my own.

18. Balkin, *supra* note 1, at 1975.

19. *Id.* at 1978.

20. See, e.g., HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed., Crossroad 1989) (1960).



rial determinants of social life; this dog-chasing-its-tail conception of theory is a primary target of postmodern critiques. Postmodern theory assumes a more humble task: to reveal practice in a way that energizes it.<sup>21</sup> Postmodern thought is significant for law because it opens the possibility that legal practice might embody the critical bite that is always embedded, but often unrecognized, in legal dialogue. Practicing lawyers are no more able than legal theorists to grasp the material forces of social life from a distance; a postmodern legal practice is defined by an open comportment within legal dialogue rather than a conscious, rational seizing of the whole situation. Balkin's essay is not part of everyday legal practice; it is jurisprudential. To assess its value, we must clarify the relationship between postmodern jurisprudence and contemporary legal practice.

Postmodern jurisprudence rejects the idea that the culture in which we live can be separated from the rhetorical means by which we represent that culture to ourselves; it also rejects the idea that our theoretical perspectives stand aloof from the practices under study. In a culture lacking absolute foundations, jurisprudential critique of legal practice occurs when we reinterpret habitual thematizations, not from the privileged perspective of observer, but from the frontline perspective of one who shares in the labor of articulating these thematizations. Postmodern jurisprudence describes the dialogic character of knowledge and encourages a critical engagement that can lead to new understanding of our situation. Critical confrontations are possible only within this dynamic, intersubjective rhetorical space. For example, postmodern jurisprudence discredits the rhetorical power of originalism and attempts to present legal practice in a new light. This effort does not simply propound a new method of legal interpretation. Instead, it embodies a new way of understanding legal practice as a continuing dialogue between the demands of the present and our habituation in a traditional discourse. Postmodern jurisprudence questions the received wisdom about how law is practiced and offers instead a nonfoundational, critical account of all understanding, including legal understanding, that describes practice in an attempt to influence it.<sup>22</sup>

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21. My characterization of postmodern jurisprudence and postmodern practice follows the post-Heideggerian hermeneutics of Hans-Georg Gadamer and Paul Ricoeur rather than Jacques Derrida's deconstruction or Ludwig Wittgenstein's ordinary language philosophy. See Mootz, *supra* note 8; Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. (forthcoming Apr. 1993); Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur*, 68 B.U. L. REV. 523 (1988).

22. Balkin notes the "increasing insularity, self-absorption, and fragmentation of progressive academic writing, and the increasing irrelevance of that writing to the positive law of the U.S.

A postmodern legal practice would embody dialogic openness. The legal practitioner will never be able to define and take account of free-standing technologies that go "forward forever, mindlessly and powerfully" as a means of correcting the practice.<sup>23</sup> Rather, postmodern constitutionalism must work through the tangled connections between legal practice and political power that are revealed in legal discourse. The discourse of legal practice helps to define our world because it is an important venue in which we find our world.<sup>24</sup> Judges cannot help but be aware of increasingly advanced surveillance technologies when they decide cases that they regard as implicating privacy concerns. However, they are able to confront the problem of technological advances only by holding legal dialogue open to the broader dialogues about political and social organization in which the idea of privacy in postindustrial society is molded. The project of postmodern jurisprudence is to cajole decisionmakers to do just that. The attack on originalism presents not only a new description of practice but also a normative injunction that we should free legal practice from artificial and unproductive constraints. Postmodern jurisprudence is grounded in and descriptive of legal practice as an ongoing dialogue. There is no postmodern inquiry outside of or prior to this dialogue.<sup>25</sup>

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Constitution." Balkin, *supra* note 1, at 1967. But Balkin's argument contains nothing to convince the reader that his postmodern constitutionalism will be any more successful in shaping legal practice. Balkin's essay is not an argument within legal practice in the same way that a memorandum of law or doctrinal scholarship might be considered legal practice. Instead, his essay is jurisprudential. The task of jurisprudence is to place in question the unexpressed limitations defining practice.

My argument is that Balkin's essay is useful only if it helps us to see that the limits of contemporary legal practice are not limitations inherent in a supposed "nature" of legal practice. Postmodern jurisprudence should not move beyond the epistemological battle; it should win the battle. Just as the legal realists won the battle against doctrinal formalism, postmodern scholars must win the battle against foundationalism, not just on paper but by effecting a change in our very comportment within legal dialogue. Postmodern constitutionalism, as contextual legal practice, will follow in the wake of this reorientation.

23. *But cf.* Balkin, *supra* note 1, at 1989.

24. Of course, legal practice is not the only venue, nor is it necessarily always an important venue. For example, legal dialogue in the area of race relations is now seemingly spent without having achieved reconciliation. Admitting this is nothing more than admitting the limitations of postmodern constitutionalism and acknowledging that we participate in our culture in roles other than lawyer, scholar, or judge.

25. Balkin criticizes dialogic models of democratic legitimation as "impossible of attainment, or even worse, wholly irrelevant" due to "technological changes in dissemination of information." Balkin, *supra* note 1, at 1980. I agree that the ideal of society as a deliberative public body, or polis, appears quite naive to us today, but this is not because material social forces necessarily preclude democratic dialogue. In fact, the opposite seems true. When communism fell in Eastern Europe, observers widely acknowledged that closed societies simply could not operate in a technologically advanced culture. Fax machines, video cameras, and satellite feeds were all used to break the authoritarian grip on society. The failed reform effort in Beijing was put down in large part by removing these technological tools from the hands of the reformers and then brutally stifling dissent by physical coercion. The mediatization of American culture does

Postmodern constitutionalism cannot postpone normative commitments in favor of bare descriptions of the culture of postmodernity. By declaring itself postmodern, legal thought takes a position not only on how we acquire knowledge but also on how we should react to this new description.<sup>26</sup> Justice Scalia's legal opinions should not blithely be accepted as symptoms of a fragmented, incoherent culture; they should be criticized for spinning a fantasy about the character of legal dialogue, a fantasy that ultimately warps the dialogue. Nor should we regard postmodern critiques of Justice Scalia's new textualism as epistemological niceties that overlook the material forces of postmodernity. The postmodern critique of textualism, plain meaning, originalism, and crude Burkean traditionalism ultimately describes legal practice as a situated dialogue with a defining history and an undetermined future. It recognizes that legal practice cannot help but reflect the wider culture, but it also suggests how legal practice can be more responsive. Postmodern constitutionalism is not the study of our material context. It is a recognition that knowledge emerges from situated dialogue and a corresponding effort to hold ourselves open to this meaning-laden situation.

I do not dispute Balkin's insistence that a postmodern constitutionalism must be practiced within the specific contexts of our day and that these contexts include the powerful effect of technology on our lives. Balkin's outline of the effect of postmodern culture is a compelling story. But it is only a story, and a rather simple one at that. We

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not preclude dialogue; in fact, it feeds on the ideals of democratic dialogue even as it warps them. Political theorists must address what democratic dialogue means in this environment, but they need not abandon the ideal of public debate.

More importantly, discrediting any notion of dialogism runs counter to the central thrust of postmodern thought: all knowledge arises from a situated dialogue. Dialogism is not just a model of political legitimation that may or may not be achieved it is a recognition of certain ways of being and knowing that can either be facilitated or hindered.

26. Balkin does not subscribe to the antinormative, radically deconstructive views of some postmodern legal scholars. See, e.g., Pierre Schlag, *Normative and Nowhere To Go*, 43 STAN. L. REV. 167 (1990); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991). I believe that Balkin would align himself with Drucilla Cornell's longstanding efforts to counter these corrosive theoretical programs that destroy the possibility of ethics as part and parcel of their effort to subvert our foundational heritage. See, e.g., Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, in LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 147, 156 (Gregory Leyh ed., 1992). Nevertheless, Balkin does separate ethical (normative) prescriptions from a description of the material conditions of postmodernity. Balkin argues that the culture of postmodernity does not compel one vision of how law, medicine, or politics should be practiced. Instead, it serves as the material backdrop against which these normative choices are made. Balkin, *supra* note 1, at 1973. I am arguing against the idea that we can describe contemporary legal culture — as bureaucratized, commodified, and industrialized, for instance — without betraying normative commitments about how law should be practiced. Balkin's postmodern constitutionalism fails because it presumes that we can stand back and describe our condition as a prelude to formulating normative commitments, when in fact our descriptions are always symptomatic of normative commitments.

cannot move from the antifoundationalist epistemology of postmodernism to an investigation that looks behind social conceptions to the material forces shaping social life. We cannot investigate the material features of postmodernity and then set out to change legal dialogue. Rather, the lesson of postmodernism is that we can only push and be pushed by the situated dialogue itself.