CAN ORIGINALISM BE SAVED?

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INTRODUCTION

Jack Balkin's ambitious and impressive book, *Living Originalism*, announces its mission in its title.[1] "Living constitutionalism" and "originalism" seem like antonyms. Living constitutionalism, roughly speaking, is the view that what the Constitution requires changes over time, even if the document is not formally amended. Originalism holds that the requirements of the Constitution were fixed, at least in crucial respects, at the times that its respective provisions were adopted. Professor Balkin's task is to reconcile these views: "Properly understood," he says, "these two views of the Constitution are compatible rather than opposed."[2]

But beneath the surface, reconciliation is not quite an adequate description of what Balkin is trying to do. "Reclamation" might be better: Balkin wants to reclaim originalism for what would usually be described as liberal or progressive constitutional principles. Today, originalism is associated with "conservative" views about the Constitution: concern about extensive federal power; skepticism about gay rights; hostility to *Roe v. Wade*.[3] Living constitutionalism, rightly or wrongly, tends to be associated with the opposite views, and constitutional principles that many "progressives" would like to see developed and extended, such as forbidding discrimination on the basis of sexual orientation, seem to require a living constitutionalist justification. Balkin's reclamation project is an effort to show that progressive principles can be justified on originalist grounds. Indeed, he says, originalism, properly

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[1] JACK M. BALKIN, LIVING ORIGINALISM (2011).

[2] *Id.* at 3.

[3] 410 U.S. 113 (1973).

understood, supports those principles; only originalists who misunderstand originalism would reject them.[4]

Do these twin projects – reconciliation and reclamation – succeed? Only, it seems to me, by treating originalism not as a way of resolving constitutional issues but rather as a rhetorical resource: a means of enlisting our constitutional forebears in support of views that we have arrived at for other reasons. That is Balkin's achievement, and it is important. But, in my view, it does not establish originalism, in any recognizable form, as a way of doing constitutional law.

I. THE ORIGINALIST DILEMMA

The central challenge that Balkin's project has to overcome is that originalism seems to be either implausible or entirely manipulable. The only kind of originalism that is reasonably determinate leads to conclusions that practically no one accepts.[5] But less determinate forms of originalism can be enlisted to support pretty much anything.

The problem can be illustrated with *Brown v. Board of Education*,[6] the case that declared state-sponsored school segregation to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. When the Equal Protection Clause was adopted, it was understood not to invalidate racial segregation in public schools.[7] That conclusion is nearly universally accepted.[8] Notably, the Supreme Court in *Brown* all but conceded as much.[9] But *Brown* is a fixed point in constitutional law; no approach to constitutional interpretation can survive if it does not accept *Brown*. So if originalism holds that constitutional provisions require and forbid only what they were understood to require or forbid when they were adopted, then originalism is implausible.

How can originalism be reconciled with *Brown* and therefore be saved from implausibility? The usual response is to say that *Brown* is consistent with originalism as long as the original understandings are characterized at the right level of generality.[10] The proper way to understand the Equal Protection Clause – according to this defense of originalism – is that the Clause adopted a principle of racial equality.[11] The drafters and ratifiers of the Fourteenth

[4] *See* BALKIN, *supra* note 1, at 3-4.

[5] *See id.* at 8.

[6] 347 U.S. 483 (1954).

[7] *See, e.g.*, Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56 (1955).

[8] The outstanding exception is Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

[9] *Brown*, 347 U.S. at 489.

[10] Today, originalists usually say that the key idea is "original public meaning," not original "understandings." I will address this distinction below. *See infra* Part II.

[11] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 82 (1990).

Amendment believed that segregation was consistent with racial equality. But we now know better. And – on this account – our only obligation is to be consistent with the *principles* that the Fourteenth Amendment established. We are not obligated to accept the ratifiers' views about the application of those principles. If it is true that separate cannot be equal, then *Brown* adhered to the principles of the Fourteenth Amendment, and *Brown* is therefore consistent with originalism, properly understood.

The problem with this defense is that the choice of a level of generality is arbitrary. If the Equal Protection Clause is characterized as establishing a principle of racial equality, then *Brown* is correct, but discrimination against women is not unconstitutional. (It is, so far as I know, universally accepted that the Equal Protection Clause, when it was adopted, was not understood to outlaw discrimination against women.) But why stop at *racial* equality? The Equal Protection Clause doesn't mention race. Why not treat it as enacting a general principle of equality? Then discrimination against women is unconstitutional, and discrimination against gays might be, too, even though, again, no one in 1868 thought that discrimination against gays had become unconstitutional with the adoption of the Fourteenth Amendment. For that matter, why not interpret the Equal Protection Clause to require the large-scale redistribution of income and wealth, on the ground that redistribution is required by the equality principle that the Equal Protection Clause embodies? The drafters and ratifiers of the Clause did not have that view about redistribution, but their views about redistribution, like their views about segregation and women and gays, are not decisive; what matters is the principle, and, we have concluded, the principle requires redistribution. Therefore massive wealth redistribution is consistent with originalism. And so on. If we are allowed to change the level of generality at which we characterize the original understandings, then originalism can justify anything.

II. HOW ORIGINALIST IS "LIVING ORIGINALISM"?

Balkin deals with the implausibility problem straightforwardly. As I said, it is central to his mission to save originalism from the criticism that it is inconsistent with well-established results. He does this by rejecting what he calls "original expected application" – the view that "the way that the adopting generation would have expected the relevant constitutional principles to be articulated and applied" should govern today.[12] "[T]he concrete judgments of the framing generation are quite important," Balkin says, "but they are not decisive."[13]

But then he is left with the manipulability problem. If we are not bound by the specific judgments of the people who adopted the relevant provision, which general judgments are we bound by? How can we identify a level of generality at which the original understandings should be characterized, so as to prevent

[12] BALKIN, *supra* note 1, at 7.

[13] *Id.* at 31.

originalism from being defined in a way that allows it to be invoked by pretty much anyone?

Here, if I understand correctly, Balkin does several things. First, he draws a distinction between ascertaining the meaning of a constitutional provision, on the one hand, and "constitutional construction," on the other.[14] Ascertaining meaning seems to be the distinctively originalist task; "constitutional construction" is highly non-originalist. "Constitutional construction" consists of "implementing and applying the Constitution using all of the various modalities of interpretation: arguments from history, structure, ethos, consequences, and precedent."[15] Second, Balkin tells us that ascertaining meaning consists of determining "the semantic content of the words in the clause."[16] This is a helpful and critical clarification, because the word "meaning" has – unfortunately there's no good way to say this – many possible meanings, as Balkin observes.[17] Third, Balkin emphasizes that the Constitution contains "rules," "standards," and "principles."[18] Rules are "determinate"; the examples are that a President must be thirty-five years old and that there are two houses of Congress. Balkin's examples of standards are the Fourth Amendment's prohibition against "unreasonable" searches and seizures and the Sixth Amendment's requirement of a "speedy" trial. His examples of principles are the Free Exercise Clause, the Free Speech Clause, and the Equal Protection Clause.[19]

Nothwithstanding these careful distinctions, I do not think Balkin has solved the problem of identifying a non-arbitrary level of generality. Take, first, Balkin's axiom that "[f]idelity to 'original meaning' in constitutional interpretation refers only to . . . the semantic content of the words in the clause."[20] The technical-sounding term "semantic content" makes this claim seem precise, but it is not clear, to me at least, what is being asserted here. As I mentioned earlier, many originalists today say that the "original public meaning" is binding, and I think that formulation has similar problems.[21]

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[14] *Id.* at 4. Balkin cites two other authors who have made a similar distinction between "interpretation" and "construction." *See* RANDY BARNET, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118-27 (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5 (1999).

[15] BALKIN, *supra* note 1, at 4.

[16] *Id.* at 13.

[17] *See id.* at 12.

[18] *See id.* at 6.

[19] *See id.*

[20] *Id.* at 13.

[21] Balkin distinguishes his view from many of those who embrace "original public meaning" originalism, primarily in chapter 6. His criticisms of the way in which that form of originalism is practiced seem to me on target. In addition, "original public meaning" originalism is, I believe, subject to the criticisms I make in the text, perhaps to an even greater extent than Balkin's brand of originalism; in fact, Balkin effectively criticizes

One way to understand what Balkin is saying about "semantic content" is that an interpreter shows sufficient "fidelity" so long as she uses constitutional language in a way that a speaker of English would recognize as non-eccentric. Balkin specifies that the meaning in question – that is, the hypothetical English speaker – must belong to the time when the Constitution was adopted, not today,[22] which certainly seems right, given that Balkin is proposing a form of originalism. There are some other issues about ascertaining meaning that I think Balkin deals with a little too quickly – how much does the hypothetical speaker know about law or about the nature of the Constitution? – but those issues can be left aside.[23] It would be eccentric (then or now) to say that "thirty-five years," for the President's age, means the time it takes some planet other than earth to go around the sun thirty-five times. So a claim like that about the age qualification would be precluded by originalism.

But if this is all that originalism requires, then Balkin seems to have embraced the form of originalism that is highly manipulable. It is hard to think of any serious dispute about constitutional law in which one side is attributing to a provision a meaning that, simply as a matter of English, the provision cannot bear. As a matter of English, "equal protection of the laws" could easily mean "equal protection from the vicissitudes of the market"; it follows there is an originalist interpretation in which the Fourteenth Amendment requires massive redistribution. At the other end of the political spectrum, it does not strain the English language to say that when the government requires me to pay taxes, it has "taken" my "property"; therefore redistributive taxation is unconstitutional under the Fifth Amendment's Just Compensation Clause.[24] If "semantic content" is the only limitation, both of those views can be presented as soundly originalist. And those are extreme views, of course; in the current state of the law, neither is remotely plausible.

So if Balkin is saying only that originalism requires that a claim about how to interpret the Constitution must be consistent with a non-eccentric use of the language, originalism can justify pretty much any interpretation that anyone is likely to propose and many views that no one would seriously propose. But if "semantic content" is intended to impose a more severe limit on the universe of possible interpretations, what would that limit be? One answer, of course, is the original expected application. Whatever the phrase "equal protection"

"original public meaning" originalism on essentially these grounds. See *id*. at 107-08.

[22] *See id.* at 37.

[23] For example, Balkin says that "the word *speech* in the First Amendment is a synecdoche: it is an example that stands for a larger category of expression." *Id.* at 13. But how do we know this? Whose point of view are we taking up in order to reach this conclusion? For that matter, why is "speech" the relevant unit of analysis? The phrase in the First Amendment is "*the freedom of speech*," and perhaps, in the legal culture of the time – or to certain participants in the legal culture – that phrase had a fairly specific meaning.

[24] This view of the Just Compensation Clause is advanced in RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 297-303 (1985).

might mean in English, the Equal Protection Clause extends as far as the ratifiers thought it extended, and no further. But Balkin rejects that view,[25] and for good reason: it would impale originalism on the implausibility horn of the dilemma. One polar solution – "semantic content," understood to mean acceptable English usage – produces the manipulability problem; the other polar solution – original expected application – leads to implausibility. I do not think Balkin – or anyone else, as this is hardly a problem of his creation – has described a coherent originalist conception of "meaning" between those two poles.

This is more than an analytical problem. The risk here is of a kind of false precision that allows originalism to be at its manipulable worst. To be fair, I think this is much less of a problem for Balkin than it is for certain "original public meaning" originalists. "Original public meaning" can become a kind of black hole. It is not just English language usage, because that is wide-open. It is not the original expected application, because then *Brown* would be wrong. So what can happen is that the proponent of "original public meaning" disappears into the archives, assembles some evidence from the founding period, and announces that he has discovered the "original public meaning" without ever explaining how, exactly, one figures out what that is.

It is not fair to Balkin to say that he engages in this kind of project. Instead, I believe that for Balkin, when the "semantic content" runs out, one has to resort to "constitutional construction." Indeed much of the book consists of learned and elegant arguments about issues in constitutional law that draw on all the various sources that inform "constitutional construction" – "history, structure, ethos, consequences, and precedent."[26] But at this point, originalism seems to have left the stage: constitutional construction is just a form of living constitutionalism. "Consequences" and "precedent," at least, are core elements of forms of living constitutionalism that reject originalism. "History" and "ethos," judging from Balkin's arguments, are not limited to events associated with the adoption of the relevant provisions: they involve accounts of the significance of events before and after the provisions were adopted.

In fact, I am not sure there is any deep inconsistency between Balkin's "constitutional construction" and a common-law-like approach to the Constitution, which I believe to be the most plausible form of living constitutionalism. A common-law approach would pay attention to the judgments of the generation that adopted the relevant provisions, just as it would pay attention to other "precedents," judicial and otherwise. It pays attention to history for the same reason. And "consequences" – if that means matters of good policy and fairness – play a significant role, although a limited role, in common-law decision making.

In any event, to the extent Balkin's approach calls for constitutional construction, it is not originalist; it is living constitutionalist. Construction, it

[25] *See* BALKIN, *supra* note 1, at 6.

[26] *Id.* at 4.

seems, kicks in as soon as the "semantic content" proves indeterminate. But "semantic content" is indeterminate in, essentially, any constitutional controversy that is worth talking about. At least that is true if "semantic content" is understood in terms of English-language usage, and once the implausible form of originalism is rejected, I do not see how else to understand it. So every view can claim to be originalist, while "construction" – a form of living constitutionalism – actually decides the issues.

III. RULES, STANDARDS, PRINCIPLES, AND THE FOURTEENTH AMENDMENT

Balkin's distinction among rules, standards, and principles seems to be designed specifically to deal with the problem of identifying the proper level of generality in interpreting a provision. The provisions themselves, Balkin is saying (if I understand correctly), will tell us the level of generality at which they should be interpreted. If a provision is a rule, it should not be generalized at all. The provision requiring the President to be thirty-five years old is a rule; it is not principle saying that the President must be mature. It would be wrong to treat this rule as if it were a principle. But by the same token, it is wrong to limit principles or standards to the specific expectations of the adopting generation. The Equal Protection Clause states a principle, so it should not be interpreted as a determinate rule that, for example, does not reach racial segregation or discrimination against women. The content of the principle has to be worked out over time.

Balkin's distinction – between provisions that authorize interpreters to work out a changing meaning over time, and those that prescribe a fixed meaning – has a long and proud lineage.[27] But I do not think this way of dealing with the text enables originalism to escape the problem about identifying a level of generality; it does not rescue originalism from being either implausible or manipulable. The reason is that whether a provision is a rule, a standard, or a principle usually cannot simply be determined from the text. Constitutional provisions *become* rules, standards, or principles, depending on how the law develops. At many places in his book, Balkin is eloquent and erudite in explaining how the Constitution becomes what later generations make of it. The same is true of where a provision falls on the continuum from highly determinate rules to open-ended standards.

For example, the First Amendment forbids Congress from making any law "respecting the establishment of religion."[28] "Establishment of religion" might be given a meaning that would make this Clause something close to a rule:

[27] *See, e.g.*, Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting); United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7-8 (1996); LEARNED HAND, THE BILL OF RIGHTS 22-24 (1960); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, *in* PRINCIPLES, POLITICS & FUNDAMENTAL LAW 3, 24 (Herbert Wechsler ed., 1961).

[28] U.S. CONST. amend. I.

Congress may not create a religious establishment like the Church of England, but as long as it does not do that, it may aid religion in any way it wishes. Or the Clause might be more like a standard: excessive government aid to religion is forbidden. Or it might be what Balkin would call a principle – something like: politics should be based on public reason, not on forms of reasoning accessible only to certain faith communities. The text, in isolation, does not tell us which of these interpretations is correct. Similarly, the Self-Incrimination Clause – "no person shall be compelled in any criminal case to be a witness against himself" – has, in some ways, become a source of a foundational principle: that we have an adversarial, not an inquisitorial, system of criminal justice.[29] But it could also be just a standard: in general, a person should not be forced to inculpate himself, whether by testifying in court, by giving out of court statements, or – this is the view of some dissenting opinions[30] – by being the involuntary source of non-testimonial evidence. Or the Self-Incrimination Clause could be a narrow but determinate rule, like a rule of evidence, that applies only to a criminal trial.

Of course there are some provisions in the Constitution – the President's minimum age or (a much more important provision) the date on which he leaves office – that do seem very determinate and therefore rule-like. But even an open-ended term like "reasonable" in the Fourth Amendment can be (and to some extent has been) reduced to a rule. And the rule-like Seventh Amendment has turned into something much more like a principle.[31] The constitutional provisions that give rise to controversy are those that can be read as something other than a determinate rule. The question whether the provision is a rule, a standard, or a principle – or, better, where on the continuum the provision falls – is not settled by the text in isolation.

An "original expected application" originalist is untroubled by this. She doesn't have to decide from the text alone whether a provision is a rule, a standard, or a principle; on the contrary, she says that we must look to see how the people at the time thought the provision would apply. And there may be a general understanding, when a provision is adopted, about what kind of norm it is creating. A living constitutionalist is also untroubled: for a living constitutionalist, whether a provision will be seen as a rule, a standard, or a principle will be determined by the evolutionary logic of the living constitution. But Balkin wants to reject both of those views – the first because it is "original expected application" originalism, the second because it does not acknowledge the role of originalism at all. So except for the highly determinate provisions, Balkin leaves us, again, with a living constitutionalism that is originalist only to a very limited (and basically uncontroversial) extent –

[29] *See generally* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009).

[30] *See, e.g.*, Schmerber v. California, 384 U.S. 757, 779 (1966) (Fortas, J., dissenting).

[31] *See, e.g.*, Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 461 (1977).

it does not permit constitutional provisions to be interpreted in a way that is inconsistent with their English-language meaning.

Balkin's treatment of the Fourteenth Amendment illustrates some of these difficulties. Once again, Balkin's book is excellent in many ways. His account is filled with insights about the way American constitutional law has developed, and it is impossible to read his discussions of specific issues without learning a lot about our history. The discussion of the Fourteenth Amendment is no different. But whether his account is originalist in any meaningful sense – that is another matter.

Balkin begins his discussion of the Fourteenth Amendment's guarantees of equality with two familiar and important points about the understandings of the Reconstruction Era when the Amendment was adopted. The first is that "the framers" wanted to outlaw "class" and "caste" legislation. The second is that the Reconstruction Congress distinguished among civil, political, and social rights: the Fourteenth Amendment, as that Congress conceived it, protected civil rights but not political rights (quintessentially the right to vote) or social rights (of which the clearest example was the right to marry a person of another race).[32] "The historical record is clear that constitutionally protected equality was limited by the distinction between civil, political, and social rights, and the expected applications of the framers and ratifiers are consistent with this tripartite division."[33]

Balkin asserts that the first of these central ideas – the prohibition against class and caste legislation – survives today; the second, the tripartite distinction, does not.[34] As a characterization of current constitutional law, this is essentially right. The paradigm example of the kind of discrimination forbidden by the Equal Protection Clause is the treatment of African Americans in the caste-like Jim Crow South. But that kind of discrimination is forbidden in every realm of life – voting, jury service, education, marriage, public golf courses – without regard to the distinction among civil, political, and social rights.

This is a good test case for the choice between originalism and living constitutionalism: two conceptions of equality, both present at the inception; one has flourished, and one has been discarded. Does originalism have any basis for distinguishing between them? Balkin asserts, very plausibly, that what he calls "modern conservative originalism" has no such basis. His version of originalism, he says, can make such a distinction.[35] Why is that?

Balkin's answer is illuminating: "The difference between framework originalism [Balkin's term for his view] and conservative originalism is the difference between viewing history as a *resource* and viewing it as a

[32] *See* BALKIN, *supra* note 1, at 222-23.

[33] *Id.* at 228.

[34] *See id.* at 231-37.

[35] *See id.* at 228.

command."[36] Balkin is quite explicit, admirably so, in asserting that, on his account, it is entirely appropriate to choose among various notions that the Framers put forward. "If we decide that we want to adopt certain constructions and expectations of the framing generation, that is our choice and, equally important, our responsibility. It is not something compelled by fidelity to the constitutional plan."[37] In justifying the use of notions of caste and the rejection of the civil/social distinction, Balkin – quite consistently with his general statements – refers to the New Deal; to the civil rights revolution; and to "[c]ontemporary constitutional understandings."[38]

I am unable to see any distinction between this approach and living constitutionalism. Living constitutionalism, of course, does not rule out using history as a resource; some versions of living constitutionalism, such as those that draw on the common-law tradition, place great emphasis on history. In fact, Balkin's approach seems to me quite similar in its foundations to common-law constitutionalism – drawing on an evolutionary development in the law, coupled with a judgment about fairness, morality, or good policy. (Balkin emphasizes extra-judicial developments more than, although not to the exclusion of, judicial precedent, but I do not think that is inconsistent with a common-law account. That, though, is a matter for another day.) To say that the use of history is not "compelled by fidelity to the constitutional plan" is, I think, to repudiate the core of originalism. To say that history is a "resource" and not a "command" raises the question of how and when that "resource" is to be used. And to say that a view is originalist just because it uses history as a resource – at times and in ways that are determined by non-originalist criteria – is to reveal the manipulability of originalism.

None of this should be taken to disparage the magnitude or importance of Balkin's achievement. The kinds of appeals Balkin makes – to the Framers, to the best of our constitutional traditions, to the crucial turning points in our history – are powerful appeals. They are ways of uniting the society, of identifying common ground among people who might otherwise think of themselves as opponents. There is nothing wrong with that; on the contrary, it is valuable and important. But it is not a way of figuring out what the law is. For that, we need something other than originalism.

[36] *Id.* at 229.

[37] *Id.*

[38] *Id.* at 230-31.