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BOOK REVIEW

Jack M. Balkin, *Living Originalism*. Cambridge. The Belknap Press of Harvard University Press, 2011, pp. 474. \$35.00.

For the last generation at least, there has been a debate about ‘originalism’ in U.S. constitutional law. The core idea of originalism is that constitutional issues should be resolved by determining how the provision in question was understood when it was adopted. So, for example, if we want to apply the Fourteenth Amendment’s clause forbidding states to deny the ‘equal protection of the laws’, we should look at how that provision was understood – or, as the current form of originalism would put it, at the ‘original public meaning’ of that clause.

The opponents of originalism make a number of arguments. The controversial provisions of the U.S. Constitution were adopted long ago – mostly in the late 1700s or after the Civil War, in the mid-1800s. Ascertaining the original meanings is often a difficult historical project – maybe an impossible one, if the meanings were unclear or contested even at the time. Even if the original meanings can be ascertained, it will routinely be unclear how to apply them in today’s society: even assuming that Constitution-makers in the late-eighteenth or mid-nineteenth century thought that citizens had a right to be armed with the weapons that existed then, it does not follow that people have a right to carry much more powerful handguns in today’s much more urbanized and mobile society. And, of course, there is the question why decisions made long ago – even if we knew what they were and how to apply them – should govern us today. The earth, as Thomas Jefferson said, belongs to the living.

So, the critics of originalism say, constitutional law must be understood as something that evolves and changes over time, not as something settled in when a provision was adopted. In any event, the critics say, that is what American constitutional law is: many of its most celebrated achievements cannot be traced to – and are even inconsistent with – the original meanings that originalists would

sanctify. The most powerful example (although far from the only one) is the U.S. Supreme Court's 1954 decision in *Brown v. Board of Education*, which interpreted the Equal Protection Clause to forbid states to require African-American children to attend separate schools from whites. It is quite clear that when the Fourteenth Amendment was adopted, it was not understood to outlaw school segregation, and the *Brown* Court conspicuously did not claim otherwise. But the lawfulness of *Brown* has become a fixed point of American constitutional law.

There is no agreed-upon antonym to 'originalism'; one candidate is 'living constitutionalism', although that term and its cognates are often used derisively by originalists themselves and disclaimed by opponents of originalism. (The idea is that 'living constitutionalism' is a standardless free-for-all that licenses judges to do whatever they want to do in the guise of interpreting the Constitution.) Be that as it may, the title of Jack Balkin's impressive book reveals its ambition: to show that one can be an originalist while still endorsing not just *Brown* but a raft of similar decisions and, more generally, the 'living constitution' idea that constitutional law changes over time.

The ambition is not an entirely new one. Many commentators – and judges, too – have, implicitly or explicitly, taken the position that there is no necessary opposition between originalism and the kinds of things that living constitutionalists want to uphold. The reconciliation usually takes the form of acknowledging the binding force not of the specific decisions made when a constitutional provision was adopted but rather of the *principle* reflected in the provision. So, the argument goes, while it's true that the Fourteenth Amendment was not understood to outlaw school segregation, it *was* understood to enact the principle of equality between the races, in some form. We are obligated to adhere to that principle, but we need not apply the principle in the same way that the ratifiers of the Fourteenth Amendment applied it. If we believe that the principle of racial equality forbids school segregation, then the Fourteenth Amendment may properly be interpreted to forbid segregation, even if the generation that adopted the Amendment did not share that view about segregation. In that way, one can be an originalist – because one is loyal to the original principles – while still accepting all the important claims of living constitutionalism.

There is a well-known problem with this approach: at what level of generality do we describe the principle behind a provision? The Equal Protection Clause has to do with racial equality, certainly, but one can just as easily say that it is about equality more generally: that it reflects the principle that no group, whether or not a racial minority, should be treated in the way African-Americans were treated in the wake of the Civil War. If that is the appropriate principle, then the Equal Protection Clause, properly interpreted, might forbid discrimination against women – which is how the modern Court has interpreted it, even though it is entirely clear that the post-Civil War generation did not think it was outlawing discrimination against women. For that matter, under that principle, the Equal Protection Clause might forbid discrimination against gays and Lesbians – whose position today is analogous enough to that of post-Civil War blacks, one might say – even though that interpretation of the Clause would have been unthinkable in the mid-Nineteenth Century. Or perhaps the Equal Protection Clause requires the government to ameliorate poverty, or conditions in prisons. And so on. Once originalism is conceived in terms of the original principles, rather than more specific original decisions, nearly anything can be defended as an ‘originalist’ position, and one might as well admit that what is really going on is just a form of living constitutionalism, cloaked in an originalist guise.

Balkin’s reconciliation takes essentially this form of defining originalism as adherence to original principles. In fact, one of his shorthand phrases for his approach to the Constitution is ‘the method of text and principle’ – follow the text if it’s clear, but if it’s not, enforce the principle, not the specific applications envisioned by those who adopted the text. But Balkin does much more than that: he adds a number of things to the ‘original principles’ formula – not all of them successful, in my view, but some quite arresting and all worth considering.

First, many of the people who take this approach – that the ‘principle’ behind a provision binds, but the specific understandings do not – simply infer a principle from the wording of the provision or from general knowledge about the provision. Balkin’s account is much more substantial. He digs into the history behind several of the most important provisions of the Constitution – the Equal Protec-

tion Clause, the Commerce Clause (which authorizes Congress to regulate commerce among the states and is the basis for much federal legislation), and the Privileges or Immunities Clause of the Fourteenth Amendment (which Balkin believes should be the basis for applying the Bill of Rights to the states – a task that the Supreme Court has assigned to the Due Process Clause, the language of which seems much less fitted to the job). Balkin uses the history, among other resources, to argue for specific conclusions – in support of broad federal legislative power and abortion rights, for example. Balkin's discussions are interesting and exceptionally informative; it is impossible not to learn from them.

Second, Balkin emphasizes the role that political conflict plays in shaping constitutional law. He focuses particularly on 'social movements' – the movements for civil rights for African Americans and for women's rights, the conflicting movements that favored and opposed abortion, the efforts of opponents of gun control to establish a constitutional right to possess handguns for self-defense, and several others. The picture he paints is that the Constitution's principles establish a 'framework', but people argue – in the political realm, and secondarily in the courts – about how those framework principles should be elaborated. This process, he says, ensures that the Constitution will maintain its democratic legitimacy. A more specific form of originalism would make the Constitution beholden to past generations and, in that sense, undemocratic. But because we take only the principles from the past – and work out their content for ourselves – the Constitution maintains its democratic connection to each generation of Americans.

These are important contributions that go beyond the usual resort to 'principle' as a way of reconciling originalism with living constitutionalism. But as valuable as these contributions are, they also reflect what seems to me to be a gap at the heart of Balkin's project. His account of the history of the various provisions, which is both erudite and fluent, is advocacy, as Balkin freely admits; he is defending certain positions on controversial constitutional issues, like abortion rights. There is nothing wrong with that. But if Balkin is offering us an account of how to determine what the Constitution requires, he should not just make an argument; he should explain how one decides whether an argument is correct.

In Balkin's scheme, his advocacy is a form of 'constitutional construction' (e.g., pp. 14–16) – a way of filling out the content of the principles that establish the 'framework'. Construction consists of 'implementing and applying the Constitution using all of the various modalities of interpretation: arguments from history, structure, ethos, consequences, and precedent' (p. 4). But what counts as a good construction? Balkin gives us a grab bag of 'modalities'. He uses each of them, often in a rhetorically effective way. But how much weight does one assign to each of these elements, if they conflict? What 'history' is relevant, and how does one interpret it? How does one ascertain an 'ethos'? When is one entitled to say that bad consequences outweigh the other factors? Of course there won't be an algorithm governing this process; it will require an exercise of judgment. But a theory of constitutional interpretation should say something about how one goes about making those judgments. Balkin says strikingly little.

This is, I think, not an oversight. It is an artifact of the way Balkin conceives his project: it is related to his emphasis on political conflict and mobilization as a means of resolving constitutional issues. Balkin is right in saying that constitutional issues are often settled – in fact – by these sorts of political processes. The processes are complicated, and Balkin's account sometimes seems to be a little stylized, to over-emphasize popular movements as opposed to more diffuse developments, and generally to understate the difficulty of establishing causation in these contexts. But Balkin is certainly right that courts are in various ways responsive to the political currents in the society around them. And – an even more important contribution of Balkin's account – I think he is also right in saying that in a democratic society, courts (and other interpreters) should be responsive to some degree and would lose legitimacy if they were not.

But I am not sure Balkin recognizes that his descriptive observations, which dwell so heavily on processes of democratic contestation, have limited normative significance. To say that constitutional issues are in fact resolved by various political influences – by the outcomes of conflicts, mobilizations, and counter-mobilizations – does not tell a judge (or a legislator, or for that matter a conscientious citizen) how they should be resolved. If I am trying to decide whether there is a constitutional right to marry someone of

the same sex, it does not help me to say – as Balkin does – that that issue will be resolved by a process of conflict, argument, and mobilization. Probably it will, eventually, but that does not help me make my decision. Often, when Balkin gets to the point of describing how his approach should be applied, he says, in effect: we will have an argument; maybe I will persuade enough people, or maybe you will persuade enough people, and that will resolve the issue. But *should* I be persuaded? Balkin's theory does not answer that question. In fact I am not sure that Balkin recognizes that that question needs to be answered. His relentless focus on the forms of rhetoric that are used to argue about the Constitution, and on the political determinants of the outcomes of those arguments, obscures the question from his view.

Balkin says, for example, that 'the most important function of theories of constitutional interpretation is not to constrain judges in difficult and contested cases' because '[c]onstraint in these situations comes mostly from other institutional features of our political system' (p. 93). This conflates two questions: the social scientist's question why judges behave as they do, and the judge's (or other participant's) question how she should behave (and when she can properly be criticized). So what do '[t]heories about the right way to interpret the Constitution provide', on Balkin's view? They 'offer people a language to defend and criticize' existing arrangements 'with the hope of moving [them] closer to their values and ideals' (p. 93). Those theories 'offer platforms, concepts, and languages for legitimation, critique, persuasion, dissent, and mobilization that might promote eventual constitutional reform' (p. 94). Balkin's theory gives us a set of argumentative resources. What it doesn't tell us is how a person who is not just making arguments but is deciding how to interpret the Constitution – a judge, a legislator, or a citizen – should determine whose 'values and ideals' ought to be incorporated into the law, and to what degree, and which 'constitutional reform[s]' should be adopted.

This explains, I think, why Balkin is content to provide just an assortment of 'modalities' – history, consequences, precedent, 'ethos' – and then to present arguments that draw on all those things, without offering a way of deciding when a judge (or anyone else) should accept an argument. He is, as he says, engaging in the process of

democratic debate that he describes as the ultimate source of constitutional law, and he is hoping to prevail. The idea is that if he wins the argument, his views will rightfully become the law; if not, not. '[L]iving constitutionalism', Balkin tells us, is a theory 'addressed to all citizens who want to know how the Constitution-in-practice changes through constitutional construction and why these processes of constitutional change are democratically legitimate' (p. 279).

But even originalism, for all its flaws (which seem to me fatal) offers something more than that. It tells us who should win the argument: the one whose views accord with the original meanings. Various forms of living constitutionalism also say how to resolve these issues: by finding the best moral principles that fit established practices, or by adhering to the approach historically taken by the common law, or by making a rough calculation of costs and benefits. All of these approaches have weaknesses. But Balkin seems not to be answering the question they tackle – or even to see that it is a question that should have an answer. *Living Originalism* is lively, tremendously learned and informative, and rhetorically powerful. Its attack on the more familiar forms of originalism is very effective. Anyone interested in constitutional law should read this book, and read it with care. But in the end the theory it offers does not successfully compete with its rivals because, in a sense, it does not even enter the field of play.

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