JACK BALKIN'S RICH HISTORICISM AND DIET ORIGINALISM: HEALTH BENEFITS AND RISKS FOR THE CONSTITUTIONAL SYSTEM

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LIVING ORIGINALISM. By *Jack M. Balkin*. Cambridge and London: Harvard University Press. 2011. Pp. 339. $35.

INTRODUCTION

Jack Balkin's *Living Originalism*[1] is a sweet read. It is beautifully written, illuminating, and provocative. It is conducive to deep reflection about foundational questions.

In the book, Balkin reasons from two points of view—the perspective of the constitutional system as a whole and the perspective of the faithful participant in that system (p. 130). First, he provides a systemic account of constitutional change, which he calls "living constitutionalism." Second, he offers an approach to constitutional interpretation and construction, which he calls "framework originalism." These two components—living constitutionalism and framework originalism—together constitute his overall theory of "living originalism."

Reasoning from the systemic perspective, Balkin develops an attractive theory of the processes of constitutional change. His account features prominently the roles of citizens, social movements, civil society, politicians, and judges in shaping the meaning of the Constitution in practice. His approach is descriptively more accurate than its main competitors and normatively appealing in its emphasis on the need for invested participants in the constitutional system to continuously perceive and vindicate the preconditions for the legitimacy of the system.

Balkin may, however, be too quick to dismiss a concern held by some invested participants. These participants fear "that arguing that their views are correct is . . . undermined . . . by the theory of how the constitutional system produces legitimacy over time" (p. 131). To understand from the systemic perspective that "we are . . . participants in a constitutional system

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1. Jack M. Balkin is the Knight Professor of Constitutional Law and the First Amendment, Yale Law School.

in which dissent and contestation, persuasion and argument, help make the system democratically legitimate over time"[2] is to acknowledge that the meaning of the Constitution in practice changes over time. It is, therefore, to stare the fact of interpretive discretion in the face.[3] And facing up to the fact of discretion encourages consciousness of one's own consciousness, which may cause those who suffer from "modernist anxiety" to question whether they can be confident that their own constitutional views are correct.[4] Such self-confidence, however, underwrites effective advocacy for those who do not consider themselves free to act as if they were certain they were right when they are, in fact, not certain.[5]

Reasoning from the individual perspective, Balkin provides a persuasive, if imperfect, account of the characteristic importance of constitutional text in the American tradition. But Balkin does not seem to register the potential consequences of turning to "originalism" given how long the term has been associated in public debates with a conservative political practice. A progressive declaration in 2013 that "we are all originalists now" would risk lending unintended support to the ongoing fruits of conservative originalism, including an unsettling of the New Deal Settlement, the Second Reconstruction, and more.

Such a development would be troubling not only from the perspective of progressive constitutionalists, but also from the perspective of the constitutional system. Those who either misunderstand Balkin or wish to repurpose him—as Balkin seeks to repurpose originalism—might use a progressive embrace of Balkin's very thin version of originalism to throw everyone into an easily caricatured originalist camp. That misappropriation, in turn, might undermine the diversity of constitutional opinion that exists in fact and that secures the legitimacy of the system as a whole.

Part I describes Balkin's "living originalism." It separates the theory into its component parts and then considers the theory as a whole. Part II analyzes some potential consequences of embracing Balkin's living constitutionalism. It mostly applauds his systemic account of constitutional change but questions its compatibility with effective advocacy from the individual perspective. Part III examines the case for Balkin's framework originalism. It argues that framework originalism better accounts for the presumptively exalted status of the constitutional text than does David

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2. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 183–84 (2011) [hereinafter BALKIN, CONSTITUTIONAL REDEMPTION].

3. It may be possible to view the law as fully determinate but still think that persuasion and argument are necessary to legitimate it. Balkin, however, believes that the meaning of the Constitution in practice changes over time, and that it must in order to be legitimate. Balkin is right to believe that the meaning of the Constitution in practice changes over time, as the recent fight over health care reform illustrates. In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), five justices articulated a novel constitutional distinction between regulating and requiring commerce.

4. For a discussion of modernist anxiety, see *infra* Section II.B.

5. In this regard, legal academics may be differently situated from advocates and judges. *See infra* Section II.B.

Strauss's common law constitutionalism, but questions the political consequences of embracing the "O" word. This Review concludes by identifying a common theme connecting the concerns expressed here about *Living Originalism*. That common theme is the difference between constitutional theory in an ideal world and constitutional theory in the fallen world we inhabit. In this fallen world, our adversaries may not fight fair, we may feel disconnected from the past, and our words may have effects in the world that we do not intend but that we ignore at our peril.

I. Living Originalism

As a description of Balkin's project, "living originalism" may seem a misnomer. An "originalism" that is "living" may be a contradiction in terms. After all, "[l]iving constitutionalists argue that the practical meaning of the Constitution changes—and should change—in response to changing conditions."[6] "Originalists," by contrast, "argue that some aspect or feature of the Constitution is fixed when the Constitution—or a subsequent amendment to the Constitution—is adopted, that it is fixed because of the act of adoption, and that this fixed meaning is binding as law today."[7] If living constitutionalism focuses on flux, originalism focuses on fixity.

As these quotations indicate, Balkin is hardly confused about this. His "living originalism" is best viewed as a contraction. It combines two ideas—living constitutionalism and framework originalism—that together constitute his overall theory. In Balkin's work, "living constitutionalism" plus "framework originalism" equals "living originalism." I consider each component separately and then consider them together.

A. *Living Constitutionalism*

If constitutional theories had colors associated with them, originalism's banner would be black or blood red. These colors symbolize death, and originalists like Justice Scalia praise the "dead" Constitution.[8] In vivid contrast, living constitutionalism would fly a green flag. If any season symbolizes life, it is spring, and if any color symbolizes springtime, it is green.

Judging from the front of the jacket of Balkin's book, which is mostly black and deep red with just a hint of green light shining through, one might think that his theory is more originalist than living constitutionalist. (One might further suspect this because "living" modifies "originalism" in the book's title.) The back of the jacket, however, is all green. Moreover, when

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6. Balkin, Constitutional Redemption, *supra* note 2, at 226.

7. *Id.*

8. *See, e.g.*, Michael C. Dorf, *The Undead Constitution*, 125 Harv. L. Rev. 2011, 2011 (2012) ("In what might be regarded as his standard 'stump' speech, Justice Scalia has repeatedly championed what he calls the 'dead Constitution.' "); *This American Life: Scalia Vigorously Defends a "Dead" Constitution* (NPR radio broadcast Apr. 28, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=90011526.

one opens the book, one notices that the jacket is all green on the inside as well. And if one removes the jacket, one observes that the book cover itself is mostly green. Finally, if one sifts through the first few pages, one discovers that Balkin dedicates the book to his Yale colleagues Reva Siegel and Robert Post, two prominent living constitutionalists.[9] All of this is symbolically appropriate. In Balkin's theory, living constitutionalism is no qualifier or sideshow. It is the main event.

Balkin argues that each generation of Americans must implement the Constitution's text, rules, standards, and principles in its own way, which it does "through building political institutions, passing legislation, and creating precedents, both judicial and nonjudicial" (p. 3). He calls this process of fleshing out the often underdeterminate constitutional text "constitutional construction." According to Balkin, constitutional constructions by previous generations help to "shape how succeeding generations will understand and apply the Constitution in their time" (p. 4). He distinguishes constitutional construction from constitutional interpretation, which he defines as the act of ascertaining the original semantic meaning of the text (p. 4).

"Living constitutionalism" is Balkin's term for this interpretive account of how the American constitutional system functions and legitimates itself. In his view, this account is "the best way to understand the interpretive practices of our constitutional tradition and the work of the many political and social movements that have transformed our understandings of the Constitution's guarantees" (p. 4). Balkin underscores that living constitutionalism validates the fruits of this social practice, fruits that many Americans today view as the practice's greatest achievements rather than as pragmatic exceptions or mistakes that they are stuck with out of respect for stare decisis.[10] Examples of these fruits include *Brown v. Board of Education*[11] and the civil rights revolution, Social Security and other safety-net programs, and the equal citizenship stature of women.[12]

In Balkin's hands, then, living constitutionalism explains the role of constitutional politics in shaping constitutional constructions.[13] It also provides "a theory about how the entire system of constitutional construction—including the work of the political branches, courts, political parties, social movements, interest groups, and individual citizens—is consistent with democratic legitimacy" (p. 279). Living constitutionalism does not tell judges how to decide constitutional questions.[14] Indeed, it is not a

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9. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, at 25 (Jack M. Balkin & Reva B. Siegel eds., 2009); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

10. Pp. 110–12 (critiquing this strategy of conservative originalism).

11. 347 U.S. 483 (1954).

12. *See* p. 109 (discussing these and other examples).

13. *See* p. 279 (writing that living constitutionalism "explain[s] how constitutional construction occurs in response to constitutional politics").

14. Pp. 277–78 (noting that living constitutionalism is not "a philosophy of judging that explains and justifies how courts should interpret the Constitution").

theory of how anyone should decide constitutional questions. Balkin does not view living constitutionalism as a decisional approach that can compete with the various flavors of non-Balkinian originalism.

B. *Framework Originalism*

If constitutional construction does the work of building out, and if living constitutionalism explains how that building out occurs and legitimates itself, "framework originalism" identifies *what* is being built out. This phrase captures Balkin's view that the Constitution provides "an initial framework for governance that sets politics in motion" (p. 3). Framework originalism is a (mostly underdeterminate) decisional approach. It requires fidelity to, and only to, the framework—to the original semantic meaning of the constitutional text and "to the rules, standards, and principles stated by the Constitution's text."[15] Balkin distinguishes his theory of interpretation from "skyscraper originalism" (pp. 21–23), which is what most people imagine when they imagine originalism. Skyscraper originalists make much greater demands on the present by requiring fidelity to original intentions, purposes, or expected applications, even when they purport to care only about semantic meaning.[16]

In Balkin's view, regarding oneself as bound by *more* than framework originalism renders one unable to explain the American constitutional tradition, including its greatest achievements. Moreover, regarding oneself as bound by *less* than framework originalism puts one in essentially the same boat as David Strauss's common law constitutionalism.[17] As Balkin understands Strauss's view, fidelity to the text is nothing more than a convention, and no part of the text is unalterable through common law methods. Balkin rejects this position as inconsistent with the actual role of the text in constitutional practice. Framework originalism requires fidelity to original meaning, nothing more and nothing less.

C. *Living Originalism*

Distinguishing Balkin's living constitutionalism and framework originalism in the way that I have indicates that living originalism is a bit of an odd duck. (That is not criticism. My children and I happen to love ducks, including odd ones.) Living originalism combines a particular conception of the systemic point of view (living constitutionalism) with a certain

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15. P. 3; *see also* p. 45.

16. *See* p. 104 ("[T]oday's original meaning originalists often view original expected applications as very strong evidence of original meaning . . . . Hence, even though conservative originalists may distinguish between the ideas of original meaning and original expected applications in theory, they often conflate them in practice.").

17. For Strauss's most recent articulation of his theory, see DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010). *See also* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003).

conception of the individual point of view (framework originalism). This is striking, and it may have implications for the efficacy of constitutional advocacy in the present, as I suggest in Part II.

Something else about living originalism is evident from the above description. To those who adopt the individual perspective, the theory offers little guidance regarding how to decide constitutional questions about which people disagree. Balkin's living constitutionalism self-consciously has nothing to say about the matter, and complying with framework originalism is not difficult. Anyone can do it.

Indeed, it is something that almost everyone already does by not arguing, say, that a thirty-four-year-old can become president.[18] It is something almost everyone already does by possessing some view of constitutional equality, ranging from that of the *Plessy* Court,[19] to the *Brown* Court,[20] to any member of the Roberts Court.[21] In Balkin's view, the original semantic meaning of "equal protection of the laws" is the same as its contemporary meaning.[22] He does not identify this meaning, but it is capacious.

Balkin remits the resolution of constitutional questions, whether by citizens, politicians, or judges, to the modalities that characterize familiar constitutional practice: history, structure, precedent, ethos, and consequences.[23] In other words, Balkin's "construction zone" is enormous. Readers must look elsewhere if they seek a decision theory to supplant the varieties of non-Balkinian originalism, which purport to give relatively detailed answers to the question of what the Constitution means in specific controversies. For this reason, I refer to Balkinian originalism as "Diet Originalism," and I contrast it with what Balkin calls "skyscraper originalism" and I call "Originalism Classic." Diet Originalism bears some relation to Originalism Classic in terms of outward appearance, but it contains little of the constraint that can weigh down the user.[24]

To be clear, so far I mean to describe Balkin's theory. I do not mean to criticize it. For example, I do not fault Balkin for failing to provide a robust

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18. *See* U.S. CONST. art. II, § 1, cl. 5 (providing that the president must be at least thirty-five years old).

19. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

20. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

21. See, for example, the five opinions in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

22. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 2, at 231.

23. For a classic discussion, see generally PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

24. Of course, the phrase "Originalism Classic" risks effacing the many varieties of originalism that purport to constrain discretion much more than Balkin's originalism. For discussions of different kinds of originalism, see generally, for example, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009), and Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009). My purpose, however, is to distinguish Balkinian originalism from other originalisms, not to distinguish among the other originalisms.

theory of constitutional decision. I do not believe there is one, at least if one wants to account for constitutional practice as it has existed over the course of American history and probably must continue to exist if constitutional law is to retain its legitimacy.[25] Moreover, I share Balkin's view that the constraining capacity of interpretive theories is greatly exaggerated relative to other limits on judicial authority.[26]

II. Living Constitutionalism

This Part analyzes Balkin's systemic theory of constitutional change. It mostly, though not entirely, approves of his account. This Part suggests, however, that an invested participant who embraces Balkin's systemic account may be at a disadvantage in advocating particular interpretations of the Constitution.

A. *Historicism, Discretion, and Advocacy*

Constitutional theory requires a persuasive account of legitimate constitutional change, and there is much to admire about Balkin's. It includes all of the relevant actors, movements, and institutions in the American constitutional system. Moreover, it accounts for the pervasiveness of constitutional change, both large and small, over the course of American history, regardless of whether the public is aware that change is occurring at a particular time. In addition, Balkin does not rely on controversial claims that certain federal laws or Supreme Court decisions are equivalent to Article V amendments. Balkin's living constitutionalism is thus descriptively more accurate than an account that rests only on Article V, and it avoids many of the criticisms that have been directed at Bruce Ackerman's influential theory of "constitutional moments."[27]

There is, however, one nontrivial defect with Balkin's systemic account: his framework originalism bleeds into it. As noted above, he approvingly describes social movements as engaged in constitutional construction. Construction, however, presupposes respect for the constitutional framework. This is because construction, unlike simply starting over again, takes place on the framework. The problem for Balkin is that successful social

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25. I have elsewhere argued that constitutional law must take some account of the conditions of its public legitimation. *See generally* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 Tex. L. Rev. 959 (2008).

26. *See* Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. Rev. 1129, 1131 (2012) ("Judicial constraint . . . occurs not because judges consciously follow a single correct method of interpretation, but because a host of different institutional factors limit who can become a judge, structure judicial decision making, and influence the professional and constitutional culture in which judges reason and attempt to persuade their audiences."). For further discussion, see pp. 16–20.

27. *See generally* 1 Bruce Ackerman, We the People: Foundations (1991); 2 Bruce Ackerman, We the People: Transformations (1998); Bruce Ackerman, *The Living Constitution*, 120 Harv. L. Rev. 1737 (2007). For Balkin's discussion of Ackerman, see pp. 309–12.

movements may have little idea about the original semantic meaning of constitutional language.

For example, many political advocates for gay rights presumably have no knowledge of the original meaning of the Equal Protection Clause, let alone the equal protection component of the Fifth Amendment's Due Process Clause.[28] Even so, their activities and those of their adversaries have greatly impacted the constructions that enter public discourse and, eventually, judicial decisions.[29] Balkin's systemic theory of constitutional change can account for this phenomenon only if he insulates his living constitutionalism from his framework originalism. The book, fairly read, does not suggest that he realizes this.

Also worthy of examination is Balkin's claim that one can adopt both living constitutionalism and framework originalism without encountering a performative contradiction or engaging in self-undermining behavior.[30] Balkin brilliantly invites us to inquire whether the same person can simultaneously apprehend the historical processes of constitutional change from the systemic point of view while confidently making claims on the Constitution in the present from the individual point of view.

Balkin recognizes that the systemic perspective must be consistent with the individual perspective (p. 130). "[P]eople who make arguments internal to the practice of constitutional law," he writes, "should not have to worry that arguing that their views are correct is in any way undermined or contradicted by the theory of how the constitutional system produces legitimacy over time" (p. 131). He insists that his systemic and individual perspectives are consistent.[31] Specifically, Balkin writes that embracing constitutional historicism implies adopting a twofold apprehension of oneself as a participant in the constitutional system.[32] On the one hand, "[w]e are participants in a constitutional system with decided views on what is a good and bad interpretation of the Constitution at our moment in time."[33] On the other hand, "we are also participants in a constitutional system in which dissent and contestation, persuasion and argument, help make the system democratically legitimate over time."[34] A Balkin-style historicist reasons both synchronically and diachronically. While we may think that our own interpretations are right, "we also understand that people's minds can be changed and have been changed, including our own."[35] What is more, we must never

28. *See infra* notes 84–86 and accompanying text.

29. Thus Michael Dorf writes that "genuinely progressive movements of the sort that Balkin rightly celebrates do better to use the Constitution, if at all, strategically or even disingenuously." Dorf, *supra* note 8, at 2054.

30. P. 131; BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 2, at 183–84.

31. P. 131 ("[T]here is no contradiction between these two perspectives.").

32. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 2, at 183 ("A historicist view of the Constitution implies a dual understanding of ourselves as participants.").

33. *Id.*

34. *Id.* at 183–84.

35. *Id.* at 184.

forget that "we have many of the constitutional views we have because of the constitutional culture in which we live."[36]

I agree that there is no tension between the systemic and individual perspectives if one focuses only on fidelity to the original meaning of a constitutional provision, and if the original meaning is determinate. This is because of Balkin's division of labor between living constitutionalism and framework originalism. As noted, living constitutionalism is the realm of change, and framework originalism is the realm of stability up until ratification of an Article V amendment. Insofar as Balkin's individual perspective concerns only the determinate framework, there can be no tension with his systemic account of constitutional change. The framework provides clear criteria of validity for constitutional views, and the multitude of permissible changes in the Constitution in practice over time must respect those criteria.[37]

For Balkin, however, the framework decides far fewer questions than do typical versions of originalism. When one operates within his spacious "construction zone," there are no clear criteria of constitutional validity. The reason why "dissent and contestation, persuasion and argument"[38] are possible is that the legal materials available for use in construction are underdeterminate and often severely so. Dissent, contestation, persuasion, and argument are unheard of when the text is determinate. Thus, we do not debate whether there must be two houses of Congress.[39]

Participants in the constitutional system who have adopted Balkin's systemic perspective necessarily know all of this because underdeterminacy is obvious from the systemic perspective. Knowing this, they have no choice but to face up to the fact of interpretive discretion. And staring discretion in the face may give an interpreter reason to "worry that arguing that their views are correct is . . . undermined . . . by the theory of how the constitutional system produces legitimacy over time" (p. 131). Framed precisely, the systemic perspective may undermine the individual perspective because understanding the Constitution from a systemic perspective may require one to hold beliefs or attitudes that are in tension with the beliefs or attitudes needed to persuade others about the best meaning of the Constitution. To put it bluntly, one may be forced to lie or disguise her actual beliefs about the truth of what she is arguing in public in order to participate effectively in the system. How does one argue with certainty that one is right and others are wrong when one is acutely aware of the discretion and judgment that one is exercising?

One can endeavor to negotiate this problem by being a bit less certain—that is, by being careful about how one characterizes one's constitutional arguments from the individual perspective. Specifically, one can avoid

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36. *Id.*

37. Again, I question whether social movements typically behave this way. See *supra* text following note 27.

38. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 2, at 183.

39. *See* U.S. CONST. art. I, § 1.

conflating one's constitutional constructions with the Constitution itself; one can, for example, take care not to frame one's constructions as timeless and logically compelled by the constitutional text. Balkin largely succeeds on this score, as he tends to present his nonoriginalist arguments as the best all-things-considered constructions given who we Americans are as a people at this time in our history.[40]

Matters are less clear, however, if one focuses on whether characterizing one's constitutional claims in a careful way is self-undermining. Politically, it may not be a fair fight if one is as subtle and nuanced as Balkin's historicist participant while one's adversaries look people in the eye and tell them without hesitation or qualification—tell them *unself-consciously*—THIS IS WHAT THE CONSTITUTION MEANS. It may not matter who is right.

The concern is not merely that effective advocacy of, or resistance to, constitutional change in the present may require one to suppress public articulation of one's systemic account of constitutional change. The concern is not about less-than-full *candor* but about a more troubling trade-off between *honesty* and efficacy.[41] Effective advocacy may require the very conflation of construction with the Constitution that Balkin's living constitutionalism denies, at least when one's adversaries conflate the two.[42]

In truth, Balkin simply asserts that those who make claims on the Constitution need not "worry that arguing that their views are correct is in any way undermined . . . by the theory of how the constitutional system produces legitimacy over time" (p. 131). He never really explains why this is so; the matter does not appear to trouble him.

It would be preferable to be persuaded by Balkin that there is no irreconcilable conflict between the *truth* of constitutional law's creation and the *preconditions* of its creation. But there may be cause for concern. Someone who has fully embraced both components of Balkin's theory must argue from the individual perspective with the awareness that her views are not compelled by the Constitution; that there are other reasonable constructions of the Constitution; that the ability of her adversaries to express their views is crucial to the system's legitimacy; that her position is more "best" than "true"; that it may not have been best in the past and may not be best in the future; and that she possesses the position she is pressing in significant part because of the constitutional culture in which she presently lives. She must see herself and her constitutional convictions as an effect as well as a cause.

Just as the ability of one's adversaries to express their views is crucial to the system's legitimacy, so too is the ability of oneself to express one's views—and to do so without one hand tied behind one's back. The concern,

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40. See especially Part II on constitutional construction.

41. Paul Mishkin stressed the distinction between dishonesty and less-than-full candor. *See* Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1505 n.168, 1512 (2007).

42. To be sure, there are settings in which those who are the most certain that they are right do not make the most effective advocates. I am skeptical, however, that American constitutional politics is one of those settings.

in other words, is internal to the legitimacy of the constitutional system as a whole. If such legitimacy requires the constitutional conversation to include all reasonable voices, then participants in ongoing constitutional debates should not be at a self-imposed disadvantage stemming from the self-conscious manner in which they argue from the individual point of view.

The institutional role that one occupies may make all the difference here. It is troubling from the standpoint of scholarly integrity that concern over the efficacy of arguments from the individual perspective might move a scholar to provide anything but the most accurate account of how our constitutional system functions. By contrast, it may be ethically permissible for those whose exclusive business it is to adopt the individual point of view—specifically, judges and advocates with clients—knowingly to make arguments that conflate constitutional meaning with constitutional construction, and thus to deny the fact of judicial discretion and the existence of reasonable disagreement.[43] If the ethics of distinct institutional roles require different responses to the potential trade-off between honesty and efficacy, then scholars, judges, and advocates should respond differently to Balkin's book.

B. *Modernist Anxiety and Postmodernist Detachment*

Much legal scholarship, however, is not entirely sealed off from legal advocacy, even when the scholar avoids explicit involvement in litigation and politics. The legal scholar, therefore, may have cause for concern that adopting Balkin's systemic account of constitutional change may undermine the very individual mechanisms that make such change possible. The legal scholar may not feel free to act as if she were certain she was right when, in fact, she is not certain.

And yet Balkin does not share this concern. Maybe this indicates differences between him and me in subjectivity and temperament.[44] Although self-diagnosis in a law review is rare, perhaps I suffer from "modernist

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43. For a rare attempt by a judge to confront the fact of judicial discretion from the individual perspective, see McDonald v. City of Chicago, 130 S. Ct. 3020, 3103 (2010) (Stevens, J., dissenting) ("[O]nly an honest reckoning with our discretion allows for honest argumentation and meaningful accountability."). For an illustration of the vulnerabilities to which a jurist exposes himself by acknowledging from the individual perspective what is obvious from the systemic perspective, see *id.* at 3052 (Scalia, J., concurring) (criticizing the Stevens approach as "incapable of restraining judicial whimsy"). *See generally* Neil S. Siegel, *Prudentialism in* McDonald v. City of Chicago, 6 DUKE J. CONST. L. & PUB. POL'Y 16 (2010).

44. Balkin is hardly alone. Robert Post writes that "we are long past the day when we can plausibly imagine judicial work as merely ministerial and mechanical, like the work of a scribe or a computer," and "everyone knows that judges have discretion in their interpretation of the law." Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1331 (2010). He then observes that "[f]rom the internal point of view of the law, of course, judges merely follow the law." *Id.* at 1331 n.73. He also notes "the knots that judges get themselves into when they seek to reconcile this internal perspective with the fact of judicial discretion." *Id.* I have difficulty with the "of course" in the above quotation in light of Dean Post's preceding (and correct) observations about the fact of judicial discretion.

anxiety," and perhaps Balkin has moved on to postmodernist detachment and irony.[45]

In *Law, Music, and Other Performing Arts*, Balkin and his coconspirator, Sanford Levinson, investigate the "the increasing sense of isolation and estrangement from the past and from tradition" that is partially constitutive of modernity.[46] Modernists are markers of the passage of time. "An increased attention to the historicist elements of culture," Balkin and Levinson observe, "brings with it an understanding of the profound differences between the perceptions of times past (and irrevocably lost) and those of our own."[47] What is more, our knowledge of the rifts between past and present produces an awareness that the same ruptures will come to characterize the relationship between present and future.[48] This "awareness of historical situatedness cause[s] us to stand at a suitable distance from our own most deeply held convictions."[49]

Modernism is characterized in part by a deep consciousness of one's consciousness—specifically, by concerns about the integrity of one's consciousness. At the heart of the experience of modernity lie worries about genuineness—"questions about the meaning of authenticity, whether of one's beliefs or practices."[50] "Modernity might be described as the experience of feeling self-conscious about one's relationship to the past and to tradition, isolated and alienated—in a word, inauthentic."[51] Such self-consciousness can undermine confident, unself-conscious participation in a present cultural tradition or social practice.

When one registers one's distance from the past (and thus registers the present's distance from the future), one can respond with "modernist anxiety," a feeling of being unmoored or disconnected, at sea. This experience "produces the emotional search for resonance, tranquility, solidity, and stability."[52] Alternatively, one can find salvation in surrender, accepting in a detached way the historical ruptures that have been and will yet be. The postmodernist understands that he is inauthentic in an important sense, but this does not trouble him. He knows he is playing a role and he is okay with

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45. *See* Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1627–46 (1991) (book review) (explicating modernist anxiety and contrasting it with postmodernist responses to estrangement from the past).

46. *Id.* at 1630.

47. *Id.* at 1631.

48. *See id.* ("[I]n the future our own mixtures of insight and blindness will be interpreted from that then-present perspective from which one tries to understand the past. *We will then be perceived in ways that we cannot perceive ourselves*." (emphasis added) (quoting DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823, at 15 (1975)) (internal quotation marks omitted)).

49. *Id.* at 1632.

50. *Id.*

51. *Id.* at 1634.

52. *Id.* at 1637.

it. "By forsaking modernist anxiety, the interpreter moves closer and closer towards postmodern irony."[53]

The modernist is anxious. The postmodernist asks, "[W]hat anxiety?"[54] The modernist is troubled by the irony of the situation in which he finds himself: just as he condemns the blindness of previous generations, so too will future generations condemn his shortsightedness. The postmodernist loses no sleep over this irony. He is at peace with his detachment.

The difference between modernist anxiety and postmodernist detachment may help to make sense of why I worry about the relationship between the systemic and individual perspectives in constitutional law, and why Balkin does not. The rich historicism that characterizes Balkin's systemic perspective captures a defining feature of the experience of modernity: the perceived chasm that separates the present from the past. Those who suffer from modernist anxiety respond by asking troubling questions about the authenticity of their own performances from the individual point of view. They worry about how they can be so confident that they are correct when they are so mindful of the historically contingent discretion they are exercising.

Those who possess postmodernist detachment and irony do not pose these potentially paralyzing problems. From their perspective, nothing good can come of posing them. Thus Balkin has little or nothing to say about such matters in *Living Originalism*. He just makes the best arguments he can in several chapters. And yet there may be cause for concern, even as one continues to make arguments from the individual point of view.[55] All of us are "trying to figure out how one meaningfully inhabits a practice of performance after innocence has been lost,"[56] but we may differ in our responses to our shared situation.[57]

Modernist anxiety is triggered by being invested as a participant in constitutional practice who also understands how the constitutional system operates over time. The tension between the systemic and individual

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53. *Id.* at 1639.

54. *Id.* at 1646 n.196. So does the premodernist, but for an entirely different reason. *See id.* at 1646 & n.196.

55. *See, e.g.*, Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012) (arguing that the Taxing Clause justifies the Affordable Care Act's minimum coverage provision and shared responsibility payment); Michael C. Dorf & Neil S. Siegel, *"Early-Bird Special" Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision*, 121 YALE L.J. ONLINE 389 (2012), *available at* http://yalelawjournal.org/2012/01/19/dorf&siegel.html (arguing that the federal Tax Anti-Injunction Act allows preenforcement challenges to the minimum coverage provision); Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591 (2011) (arguing that the minimum coverage provision is both justified by the Commerce Clause and consistent with judicially enforceable limits on the commerce power).

56. Levinson & Balkin, *supra* note 45, at 1658.

57. And yet Balkin reaches for originalism. So maybe he has more modernist anxiety than he lets on. *Cf. id.* at 1644 (identifying "Robert Bork's jurisprudence of original intention as a quintessentially modernist response").

perspectives may be compared to the tension between the external and internal points of view.[58] Those who take the external point of view are nonparticipants in the system. They are also uninvested in the success of the system. Thus the external–internal dichotomy captures characteristic disagreements between political scientists and academic constitutional lawyers over the grounds of judicial decision. Political scientists typically take the external point of view of the uninvested observer.[59] Academic constitutional lawyers tend to take the internal point of view of the faithful participant who may (or may not) have views about how the system moves in history.[60]

The external–internal dichotomy also illuminates the disagreement between H.L.A. Hart and Ronald Dworkin over law's partial indeterminacy in hard cases.[61] Hart has an unblinking appreciation of the ineluctability of judicial discretion.[62] This is because Hart's legal theory (positivism) is self-consciously descriptive; he takes the external point of view.[63] Standing outside of legal practice, he can greet with skepticism the claims of certain participants inside (called judges) that they always merely *find* the law and never *make* the law.[64]

Dworkin, by contrast, emphatically rejects the idea that the law ever runs out. He equates discretion with lawlessness.[65] His position becomes more explicable once one apprehends that his jurisprudence is, to a signifi-

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58. For a classic statement of the distinction between the external and internal points of view, see H.L.A. HART, THE CONCEPT OF LAW 88–91 (2d ed. 1994).

59. *See, e.g.*, Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 605–06 (1963) ("To put it bluntly, the real problem is how the Supreme Court can pursue its policy goals without violating those popular and professional expectations of 'neutrality' which are an important factor in our legal tradition and a principal source of the Supreme Court's prestige."); *see also* RONALD BEINER, POLITICAL JUDGMENT 159–60 (1983) (distinguishing the reflective and "understanding spectatorship" of the historian from the predictive and "objectifying spectatorship" of the social scientist).

60. Like Balkin, this Review focuses on invested individuals who can view the constitutional enterprise from either the individual or the systemic perspective. There is no modernist anxiety without investment.

61. *See* HART, *supra* note 58, at 272 ("The sharpest direct conflict between the legal theory of this book and Dworkin's theory arises from my contention that in any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete.").

62. *See id.* ("If in such cases the judge is to reach a decision . . . he must exercise his *discretion* and *make* law for the case instead of merely applying already pre-existing settled law.").

63. *See id.* at 240 ("My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law . . . .").

64. *See id.* at 274 ("There is no doubt that the familiar rhetoric of the judicial process encourages the idea that there are in a developed legal system no legally unregulated cases. But how seriously is this to be taken?").

65. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 37–39 (1986) [hereinafter DWORKIN, LAW'S EMPIRE]; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81–130 (1977).

cant extent, evaluative and justificatory;[66] he takes the internal point of view (as well as the individual, invested perspective).[67] Indeed, in *Law's Empire* he denies any distinction between legal philosophy and legal practice.[68]

The strength of one is the weakness of the other. Dworkin can make little sense of an obvious fact from the external point of view: the ineluctability of judicial discretion. Hart never tells us how a judge who is aware of the external perspective can perform her internal function honestly. Rather, Hart seems to suggest only that the two points of view are reconcilable in that the external description of a practice may differ from the way it is experienced internally.[69] True enough, but this observation does not solve the problem of how one is to proceed when in the grip of both perspectives simultaneously. While Balkin, unlike Hart, is an invested participant in the system he is analyzing, he too never really tells us how a participant who is aware of the systemic perspective can perform her individual function honestly and effectively.

III. Balkin's Framework Originalism

This Part analyzes Balkin's framework originalism. It argues that Balkin's approach better accounts for the characteristic importance of the constitutional text in American constitutional practice than does David Strauss's common law constitutionalism, but that Balkin fails to persuasively account for the rare but significant instances in which ostensibly clear text

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66. *See, e.g.*, Dworkin, Law's Empire, *supra* note 65, at 90 (describing general theories of law as "constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice," so that "no firm line divides jurisprudence from adjudication or any other aspect of legal practice").

67. *See, e.g.*, Frederick Schauer, *Pitfalls in the Interpretation of Customary Law*, *in* The Nature of Customary Law: Legal, Historical, and Philosophical Perspectives 13, 25 n.28 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007). "Understanding Dworkin's claim that there is 'one right answer' to any legal question requires understanding that for Dworkin the important perspective is that of the judge making the decision." *Id.* "When we read Dworkin charitably," Schauer writes, "we see that his 'one right answer' claim is not an ontological one, but is rather about the processes by which the judge comes to what *he* believes to be *the* right answer." *Id.* "And if we see the 'one right answer' claim as one of judicial phenomenology and not one of legal ontology, the claim becomes far more plausible." *Id.*

68. *See* Dworkin, Law's Empire, *supra* note 65, at 90 ("So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law."); Hart, *supra* note 58, at 243 ("[Dworkin] identifies jurisprudence as 'the general part of adjudication', and this is to treat jurisprudence or legal theory as itself a part of a system's law seen from the internal viewpoint of its judicial participants.").

69. *See* Hart, *supra* note 58, at 243 ("[T]he descriptive legal theorist may understand and describe the insider's internal perspective on the law without adopting or sharing it."); *id.* at 244 ("Description may still be description, even when what is described is an evaluation."); *cf. id.* at 241 ("It is not obvious why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin's conceptions of legal theory.").

does not seem to bind us. This Part then questions the political consequences—for progressives and for the constitutional system as a whole—of embracing any form of originalism, including Balkin's.

A. *Constitutional Convictions*

Why does Balkin, a living constitutionalist if ever there was one, have any use for originalism of any stripe? In anticipation of cynics and skeptics, he insists that his motives are pure. "I did not become an originalist to hoist conservatives by their own petards, or to engage in a shallow 'me-toosim[,]' " he writes.[70]

Balkin's originalism helps to make sense of some widely shared convictions about the constitutional text—namely, that it is binding law, so that one is not free to ignore it when it is clear, such as when it states a fully determinate rule. Almost no one is persuaded by "purposive" (re)readings of the various clauses imposing age qualifications for federal offices.[71] Almost no one argues that Arnold Schwarzenegger may lawfully serve as President.[72] And as much as Sanford Levinson laments various structural features of the Constitution, he does not argue that we are free to ignore them—to abolish via statute, say, the equal representation of the states in the Senate, the Electoral College, or the president's veto power. On the contrary, his concerns spring from the fact that the text is clear on these matters and he cannot responsibly advocate ignoring clear text as being consistent with legality.[73]

Yet again, Balkin has identified a profoundly important question. Why do we regard clear text as binding? The answer is not obvious. Balkin's framework originalism offers a better answer to this question than the one provided by a major competitor, David Strauss's common law constitutionalism.[74]

Strauss recognizes that constitutional interpreters must establish the consistency of their interpretations with the text of the Constitution.[75] Strauss accounts for the exalted status of the text by offering a "common ground justification."[76] It is sometimes "more important that things be settled than that they be settled right, and the provisions of the written Constitution settle things."[77] In Strauss's view, the text is binding because of "the practical judgment that following this text, despite its shortcomings, is

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70. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 2, at 232.

71. *See* U.S. CONST. art. I, § 2, cl. 2 (House); *id.* art. I, § 3, cl. 3 (Senate); *id.* art. II, § 1, cl. 5 (President).

72. *See id.* art. II, § 1, cl. 5.

73. *See generally* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006).

74. *See* sources cited *supra* note 17.

75. STRAUSS, *supra* note 17, at 103 (describing as "one of the absolute fixed points of our legal culture" that "[w]e cannot say that the text of the Constitution doesn't matter"); *see id.* ("We cannot make an argument for any constitutional principle without purporting to show, at some point, that the principle is consistent with the text of the Constitution.").

76. *Id.* at 101–03.

77. *Id.* at 102.

on balance a good thing to do because it resolves issues that have to be resolved one way or the other."[78]

Notwithstanding its well-known virtues, Strauss's account does not persuasively distinguish the sanctity of the text from the sanctity of judicial precedent. Precedents may serve the same focal-point function that Strauss attributes to the text. Revisiting precedents that have long been deemed settled "takes time and energy," and "can spin out of control and create serious social divisions."[79] And yet, American constitutional lawyers regard even *Marbury v. Madison*[80] and *McCulloch v. Maryland*[81] as revisitable, at least in principle, by the Supreme Court. No portion of truly clear constitutional text is so regarded. An amendment is deemed necessary to overcome clear text. A common law approach seems unable to make sufficient sense of the special importance of the text in constitutional practice. The text is more than a common ground or convenience, and certain parts of it are not subject to change via common law methods. The text, when it is clear, is characteristically regarded as binding law.

Yet Balkin's approach, too, is not above criticism. He never specifies the antecedent theory of obligation according to which clear text binds the present. Instead, he variously and vaguely references original acts of popular sovereignty (pp. 54–55), rule-of-law values (p. 268), and the need for the Constitution to be "our law" (p. 268). He should say more. His account incorporates widely shared beliefs about the binding nature of clear text, but he does not fully explain *why* these beliefs are correct notwithstanding various objections such as the dead-hand problem.[82]

Another problem with Balkin's approach is that ostensibly clear text does not always seem to bind. For example, there are various ways to try to negotiate the fact that the First Amendment is directed at Congress alone ("Congress shall make no law . . . .") and not at the federal government more generally.[83] Balkin argues that this is a clear case of nonliteral usage—that "Congress" is a term that "stands for all of the lawmaking and law enforcement operations of the federal government" (pp. 204–05). But notwithstanding his formidable arguments, these facts remain: the language says "Congress," not "Congress and the President" or "the United States," and the Constitution elsewhere distinguishes the legislative authority of Congress (such as Article I, Section 8) from the enforcement power of the Executive (such as the Take Care Clause of Article II, Section 3).

Similarly, consider *Bolling v. Sharpe*.[84] Chief Justice Warren deemed it "unthinkable" that the same Constitution would permit race discrimination

78. *Id.* at 105.

79. *Id.*

80. 5 U.S. (1 Cranch) 137 (1803).

81. 17 U.S. (4 Wheat.) 316 (1819).

82. *See* pp. 41–49 (discussing the dead-hand problem).

83. U.S. Const. amend. I.

84. 347 U.S. 497 (1954).

by the federal government while prohibiting it by the states.[85] His point about "thinkability" likely has more to do with why the case was decided the way it was—and why it is regarded as legitimate today—than Balkin's historical argument that "due process already includes ideas of equal protection" (p. 252).

Consider another possible example. In Balkin's view, the original meaning of "Commerce" in Clause 3 of Article I, Section 8 transcends commercial or economic subject matter and includes social interactions.[86] I am persuaded by this broader understanding of "commerce," but what if it is wrong? Other jurists and scholars disagree with Balkin on this point.[87]

Even if he is wrong, I still find it hard to believe (notwithstanding my modernist anxiety!) that Congress lacks the power to regulate serious noneconomic problems of collective action facing the states. As I have argued elsewhere, the basic structural purpose of Article I, Section 8 is to empower Congress to solve collective action problems—including spillover effects—that the states cannot address as effectively on their own.[88] What about a flu pandemic that disrespects state borders, in which case an individual might be subject to federal regulation—including a mandate to get vaccinated—by simple virtue of the fact that he is present in a particular place at a particular time? Robert Cooter and I have unconventionally urged looking to the General Welfare Clause in such a scenario,[89] but I doubt it will fare any better in terms of original semantic meaning.[90]

Balkin has a way out of this dilemma if the word "commerce" is ambiguous and its meaning is subject to reasonable doubt: under his theory, one moves to constitutional construction. In that case, there are sound structural reasons—that Balkin and I have separately but similarly articulated[91]—as to why his account is the best construction of an ambiguous text.[92]

But Balkin has no way out if there is no ambiguity and he is demonstrably wrong about the original meaning of "commerce." Even so, the original

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85. *Bolling*, 347 U.S. at 500.

86. *See* chapter 9; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

87. *See, e.g.*, Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce"*, 2012 U. ILL. L. REV. 623.

88. *E.g.*, Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. 29 (2012).

89. *See* Cooter & Siegel, *supra* note 88, at 170–75.

90. The Court would likely tell an "economic" story and rely on the Commerce Clause. For a discussion of recent evidence that informs this prediction, see Siegel, *supra* note 88, at 52–53.

91. *See supra* notes 86, 88 and accompanying text.

92. For Balkin, structural principles are constructions; they are not part of the framework. As Balkin discusses in Chapter Twelve, however, structural principles can be underlying principles that are needed to apprehend and apply the text. Those who engage in construction ascribe structural principles to the text in order to make sense of it.

meaning would not matter—and should not matter—in the case of a public health emergency or other circumstances where the stakes are high enough.

Such examples, although atypical, suggest that we do not always view seemingly clear text as binding. We may not view it as binding if (1) we perceive something enormously important to be at stake and (2) there are ways of making the text seem less clear. If ostensibly clear text is more than a convention or convenience, it may also be less than fully binding under certain circumstances.

B. *Political Consequences*

So far I have inquired into whether framework originalism makes sense of widely shared constitutional convictions. Another conversation worth having is whether a collective commitment to originalism can underwrite the legitimacy of the constitutional system as a whole. Because legitimation of the constitutional system, like the legitimation of any governmental institution, "is constituted by its collective acceptance,"[93] answering this question turns on the potential consequences of talking Balkin's talk in the world—how it may move people who are not constitutional scholars and who do not teach in law schools.

One possibility is that progressive constitutionalists, like their conservative counterparts, will be able to leverage the power of text and history to express their own constitutional convictions. Thus Balkin writes that "originalism, textualism, and a return to basic principles resonate so deeply with the public," and that "people routinely invoke the founders and their great deeds in arguing with each other about what the Constitution truly means."[94] Balkin is right to counsel progressives not to reflexively run from text and history: constitutional fidelity requires attention to both; they are often persuasive forms of constitutional authority; and they do not compel conservative outcomes as a general matter. More ambitiously, Balkin may pull off a feat of intellectual judo by capturing and repurposing originalism.

But there is another possibility. Ours is a world in which originalism has been identified with conservatism in American law and politics for decades.[95] In such a world, progressive constitutionalists should ask themselves what conservative activists, politicians, and judges might do with a progressive declaration that "we are all originalists now."

For example, will such a declaration lend support to viewing the Court's decision in *District of Columbia v. Heller*[96] as a good-faith attempt at applying a methodology that (if Balkin succeeds) may appear universally shared?

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93. JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 117 (1997); *see id.* at 118 ("[I]nstitutions survive on acceptance . . . .").

94. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 2, at 233.

95. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA (1990); ANTONIN SCALIA, A MATTER OF INTERPRETATION (Amy Gutmann ed., 1998); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

96. 554 U.S. 570 (2008).

The *Heller* Court's interpretation of the Second Amendment is consistent with Balkin's thin framework, and the Court's interpretation is one of several possible constructions of the text.[97] Whoever one thinks was the better originalist in *Heller*, Justice Scalia must have been pleased that Justice Stevens elected to fight on Justice Scalia's "turf."[98] What about an originalist rejection of post-1937 Commerce Clause jurisprudence, as Justice Thomas urges?[99] What about an originalist rejection of abortion rights, which may be advanced if defenders of such rights concede that the debate should be decided on originalist grounds?[100] Conservative-originalist defenses of progressive achievements such as constitutional sex equality are likely to remain exceptional and marginally significant in any event, coming as they do decades after the key fights were had.[101]

Some of Balkin's critics do not appear to register this concern. Judging from casual conversation in the faculty lounge and conference halls, they tend to focus instead on whether Balkin himself is politically motivated in embracing originalism. More important than the purity of Balkin's heart, however, is the question of political consequences even if Balkin himself has the best of intellectual intentions.

Nor does Balkin appear to register this concern. He is an astute observer of the politics of conservative originalism,[102] but he does not consider the pertinence of these politics to the political reception of his own framework originalism. Overlooking the potential effects of embracing any sort of "originalism," he may misdiagnose the principal causes of progressive resistance to his approach.

Balkin opines that living constitutionalists may resist framework originalism because (1) "they are not sure what framework originalism actually entails"; (2) "they instinctively fear that originalism of any form leads to reactionary policies and blocks beneficial change"; and (3) "as members of a learned elite they tend to associate the Constitution not with its text but with the rules, doctrines, and commentaries that professional lawyers know

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97. Balkin himself has written that *Heller* was rightly decided. *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 436 (2007) ("I believe that the same history that shows that the Fourteenth Amendment established an anti-subordination principle also shows that the Second Amendment protected an individual right that applies to the states as well as the federal government. This is certainly not my preferred policy result, and it may have very bad consequences, depending on how the Second Amendment's guarantees are worked out." (footnote omitted)).

98. *See Heller*, 554 U.S. at 637 (Stevens, J., dissenting).

99. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius (*The Health Care Cases*), 132 S. Ct. 2566, 2677 (2012) (Thomas, J., dissenting); United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

100. *See* pp. 214–18; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 291–92 (2007).

101. *See, e.g.*, Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

102. *See* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 2, at 232–33.

and whose knowledge distinguishes them from nonprofessionals."[103] Here I think Balkin errs.

If progressive scholars are unsure of what framework originalism entails, then the distinction between interpretation and construction will likely be lost on activists, politicians, and judges who are accustomed to conflating originalism with conservatism, and to using originalism in the narrow fashion that Balkin rejects. In political discourse, for example, one routinely hears arguments from original intent or original expected application ("the Framers/Founders never would have protected abortion or gay rights"); one rarely encounters a Balkinian argument about the original semantic meaning of the Due Process and Equal Protection Clauses (that supports abortion rights and gay rights).[104] Progressives may thus have good reason to fear where any originalist approach will lead in America in 2013. Their concerns may have little to do with preservation of elite forms of professional reason.

The foregoing concerns about framework originalism are especially relevant to progressive constitutionalists, but they are not merely relevant only to them. If one believes, as Balkin wisely does, that the legitimacy of the constitutional system depends on a diversity of constitutional convictions, then one should care whether accepting Balkin's framework originalism would toss everyone into an originalist camp that is easily caricatured as embracing conservative constitutional commitments. This would be unproblematic from a systemic perspective if almost everyone in the United States was (the same kind of) conservative, but the country is heterogeneous. A similar problem would be posed if a prominent conservative legal academic were to call upon fellow conservatives to declare boldly that "we are all living constitutionalists now" during a period of liberal ascendancy in law and politics.[105] In a well-functioning system—a system that gives voice to the extant diversity of constitutional opinion—one side of a longstanding clash of constitutional visions does not make fundamental moves that help its adversaries much more than they help itself.

The concern I am raising is empirical. Will Balkin's work capture originalism, or will it be captured by the conservative political practice of

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103. *Id.* at 234.

104. *See* Dorf, *supra* note 8, at 2022–23 ("The available evidence indicates that members of the public at large hold views about originalism, but they do not sharply distinguish among original intent, original expected application, and original semantic meaning."). Neither do many members of the news media. For example, Jeffrey Toobin writes that "[o]riginalists, whose ranks now include Scalia and Thomas, believe that the Constitution should be interpreted in line with the intentions and beliefs of its framers." Jeffrey Toobin, *No More Mr. Nice Guy: The Stealth Activism of John Roberts*, NEW YORKER, May 25, 2009, at 42, 46. For an important recent study of public views about originalism, see generally Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011).

105. *See* Dorf, *supra* note 8, at 2044 ("[A]ny reasonably well-informed observer knows that the term 'living constitutionalism' encodes liberal sympathies, just as originalism encodes conservative ones—and not just for legal elites but for the general public as well.").

originalism?[106] I fear the latter is more probable. In fact, I predict that Balkin's originalism will be hijacked and mischaracterized by others who have a more conservative agenda than Balkin. When it happens, Balkin's defenders will at least have work like this to cite in response. I do not doubt that there are times when it is stunningly effective to seize a word or an idea and redeploy it for different purposes.[107] But in this instance, Balkin's ideological adversaries may be more likely to execute the backflip than he is.

To be clear, I am not suggesting that scholars should remain silent about some truth out of concern that others will misuse it. Here, a label other than "framework originalism" would equally (or better) approximate the truth. As noted in Part I, Balkin's originalism is so much thinner than conventional forms of originalism that it is difficult to overstate the contrast. It turns out that we are not all originalists now, not even Balkin. The umbrella label of "originalism" misleads more than it leads. It would be more illuminating to distinguish Balkin's Diet Originalism from Originalism Classic, and to describe the individual component of his theory as "framework textualism."

I do not expect Balkin to give up the "O" word. This ship of his has already left the harbor, and his mind has long been on a quest to overcome apparent oppositions.[108] But those who think they may like the taste of Diet Originalism might consider my suggestion to choose a healthier alternative.

CONCLUSION

If a common theme links the concerns I have raised about *Living Originalism*, it is the difference between constitutional theory in an ideal world and constitutional theory in the fallen world we inhabit. In an ideal world, all participants in constitutional debates would resist conflating their constitutional constructions with the Constitution itself. But in a world in which one's adversaries strenuously reject any such distinction, a historicist appreciation of constitutional reality as it really is may cause one to bring the nuanced tools of a scholar to a blunter form of social interaction.

In an ideal world, there would be no cause for modernist anxiety and thus no occasion for self-consciousness about one's constitutional convictions. But in a world in which innocence has been lost, some of us may doubt that we can move as effortlessly as Balkin does from the systemic to the individual points of view, and then back again.

In an ideal world, one could evaluate the extent to which Balkin's framework originalism makes sense of our constitutional convictions without considering the real-world implications of declaring that "we are all

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106. A third possibility is that a progressive embrace of "originalism" will have no impact—that conceding the label will make no difference.

107. *See generally* DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 3–16 (1987).

108. *See, e.g.*, p. 3 (arguing that the choice between living constitutionalism and originalism "is a false one" because "[p]roperly understood, these two views of the Constitution are compatible rather than opposed"); p. 21 (calling them "two sides of the same coin"); J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669, 1669–72 (1990).

originalists now" in public debates. But in our fallen world—a world whose fallenness Balkin writes about so movingly in *Living Originalism* and *Constitutional Redemption*—it would be naive and potentially damaging to proceed in such a fashion.