Jack Balkin’s Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System


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INTRODUCTION

Jack Balkin’s *Living Originalism* is a sweet read.1 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.2 First, he provides a systemic account of constitutional change, which he calls “living constitutionalism.” Second, he offers an individual approach to constitutional interpretation and construction, which he calls “framework originalism.”

Reasoning from the systemic perspective, Balkin develops a compelling 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 continuously to perceive and vindicate the preconditions for the legitimacy of the system.

Balkin may, however, be too quick to dismiss the possibility that a historicist sensibility will undermine self-confidence about one’s own constitutional convictions. Such self-confidence underwrites effective advocacy in the present. A deep appreciation of the historical processes of constitutional change disables one from honestly claiming that one’s constitutional convictions are timeless and logically compelled by the constitutional text. Historicism instead teaches that one’s constitutional convictions are in large part a product of history, and that the validity of those convictions turns in significant part on one’s success in persuading others in the present. This knowledge about how the constitutional system works, which encourages consciousness of one’s own consciousness, may cause those who suffer from “modernist anxiety” to question whether they can be sure that they their constitutional views are correct.

*Professor of Law and Political Science, Duke Law School. For illuminating conversations, I thank Bruce Ackerman, Jack Balkin, Jamie Boyle, Josh Chafetz, Michael Dorf, Barry Friedman, Craig Green, Linda Greenhouse, Sanford Levinson, Dahlia Lithwick, Robert Post, Jedediah Purdy, Reva Siegel, and participants in “Constitutional Interpretation and Change: A Conference on Jack Balkin’s *Living Originalism*,” which was held at Yale Law School on April 27-28, 2012. It is rare to encounter a legal academic of Jack’s stature who is also a mensch. I am honored to call him my friend.


2 See, e.g., id. at 130 (“The argument of this book operates on two levels: at the level of the constitutional system as a whole, and on the level of practice by individual participants.”).
Reasoning from the individual perspective, Balkin provides a persuasive, if imperfect, account of the importance of the constitutional text in the American tradition. But Balkin does not seem to register the potential consequences of turning to “originalism” following decades in which the term has been associated in public debates with a conservative political practice. A progressive declaration in 2012 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. Conservative activists, politicians, and judges, who may 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 separates “living originalism” into its component parts. Part II analyzes some potential consequences of embracing Balkin’s living constitutionalism. Part III does the same for his framework originalism. The Conclusion identifies a common theme that connects the concerns expressed here about Living Originalism. It is the difference between constitutional theory in an ideal world and constitutional theory in the fallen world we inhabit.

I. LIVING ORIGINALISM

As a description of Balkin’s project, “living originalism” may seem a misnomer. An “originalism” that is “living” may be no mere oxymoron. It 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.”\(^3\) “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.”\(^4\) 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 first consider each component separately, and I 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

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\(^3\) JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 226 (2011).

\(^4\) Id.
“dead” Constitution. ⁵ In vivid contrast, living constitutionalism would wave 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 his theory is more originalist than living constitutionalist. (One might further suspect this because “living” modifies “originalism” in the book’s title, not the other way around). The back of the jacket, however, is all green. Moreover, when 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 and living living constitutionalists.⁶ All of this is symbolically appropriate. In Balkin’s theory, living constitutionalism is no qualifier or sideshow. It is arguably the main event.

Balkin argues that each generation of Americans must implement the Constitution’s text, rules, standards, and principles in their own day, which they do “through building political institutions, passing legislation, and creating precedents, both judicial and nonjudicial.”⁷ He calls this process of fleshing out the often under determinate 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.”⁸ He distinguishes constitutional construction from constitutional interpretation, which he defines as ascertaining the original semantic meaning of the text.⁹

“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.”¹⁰ Balkin underscores that living constitutionalism validates the fruits of this social practice that many Americans today view as its greatest achievements, not as pragmatic exceptions or mistakes we are stuck with out of respect for stare decisis.¹¹ Examples include Brown v. Board of Education and the civil rights revolution,¹² Social Security and other safety net programs, and the equal citizenship stature of women.¹³

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⁷ BALKIN, LIVING ORIGINALISM, supra note 1, at 3.

⁸ Id. at 4.

⁹ Id.

¹⁰ Id.

¹¹ See id. at 110–12 (critiquing this strategy of conservative originalism).


¹³ See BALKIN, LIVING ORIGINALISM, supra note 1, at 109 (discussing these and other examples).
In Balkin’s hands, then, living constitutionalism provides “an account . . . of the processes of constitutional decisionmaking.” It “explains how constitutional construction occurs in response to constitutional politics.” Moreover, it 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.”

Living constitutionalism is not “a philosophy of judging that explains and justifies how courts should interpret the Constitution.” Indeed, it is not a 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.” Framework originalism is a (mostly under determinate) 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.”

Balkin distinguishes his theory of interpretation from “skyscraper originalism,” 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 about only semantic meaning.

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. 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

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14 Id. at 278.
15 Id. at 279.
16 Id.
17 Id. at 277.
18 Id. at 3.
19 Id.; see id. at 45.
20 See id. at 21–23 (contrasting framework originalism and skyscraper originalism).
21 See id. at 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.”).
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, living originalism is a bit of an odd duck. (That is not criticism. My children and I happen to love ducks, including odd ones.) Most legal scholars, at least within a single work, adopt either the perspective of the constitutional system as a whole or the perspective of the individual participant. Living originalism, by contrast, combines a particular conception of the systemic point of view (living constitutionalism) with a certain 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 will 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 almost everyone already does by not arguing, say, that a thirty-four-year-old may be president.23 It is something almost everyone already does by possessing some view of constitutional equality, ranging from that of the Plessy Court,24 to the Brown Court,25 to any member of the Roberts Court.26 In Balkin’s view, the original semantic meaning of “equal protection of the laws” is the same as its contemporary meaning. He does not identify this meaning, but it is capacious.27

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.28 In other words, Balkin’s “construction zone” is enormous. Readers must look elsewhere if they seek a decision theory to supplant the varieties of 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

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23 See U.S. CONST. art. II, § 1, cl. 5 (providing that the president must be at least 35 years old).
24 Plessy v. Ferguson, 163 U.S. 537 (1896).
26 See, for example, the five opinions in Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007).
27 Balkin, Constitutional Redemption, supra note 3, at 231.
28 For a classic discussion, see generally Philip Bobbitt, Constitutional Interpretation (1993); Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1982).
bears some relation to Originalism Classic in terms of outward appearance, but it contains little of the constraint that can weigh down the user.\(^2\)

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 theory of constitutional decision. I do not believe one exists, at least if one wants to account for constitutional practice as it has always existed in this country and probably must exist if constitutional law is to retain its legitimacy.\(^3\) Moreover, I share Balkin’s view that the constraining capacity of interpretive theories is greatly exaggerated relative to other limits on judicial authority.\(^4\)

II. LIVING CONSTITUTIONALISM

A. Historicism and Advocacy

Constitutional theory requires a persuasive account of legitimate constitutional change, and there is much to admire about Balkin’s. It includes all 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 relies on no controversial claims that certain federal laws or Supreme Court decisions are the legal equivalent of Article V amendments. Balkin’s living constitutionalism is thus descriptively more accurate than an account that rests only on Article V, and avoids many of the criticisms that have been directed at Bruce Ackerman’s influential theory of “constitutional moments.”\(^5\)

There is, however, one non-trivial defect with Balkin’s systemic account: his framework originalism bleeds onto it. At 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 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.\(^6\) Even so, their activities, and those of their agonists, have greatly impacted the constructions that enter public discourse and, eventually,

\(^2\) Of course, the phrase “Originalism Classic” risks effacing the many varieties of originalism that purport to constrain discretion much more than Balkin’s originalism. See, e.g., Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009); 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 originalisms in the latter category.

\(^3\) I have elsewhere argued that constitutional law must account for the conditions of its legitimation. See generally Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

\(^4\) For a discussion, see BALKIN, LIVING ORIGINALISM, supra note 1, at 16–20.


\(^6\) See infra notes 97-98 and accompanying text (discussing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).
judicial decisions. 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. 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 theory’s two different perspectives must be consistent with each other,” and that “people who make arguments internal to the practice of constitutional law 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.” He insists that his systemic and individual theories are entirely consistent. “[T]here is no contradiction between these two perspectives.”

“A historicist view of the Constitution implies a dual understanding of ourselves as participants,” he writes. On the one hand, “[w]e are participants in a constitutional system with decided views on what is good and bad interpretation of the Constitution at our moment in time.” 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.” A Balkin-style historicist reasons both synchronically and diachronically. “We may believe that our own views are correct; at the same time, we also understand that people’s minds can be changed and have been changed, including our own.” What is more, we must never forget that “we have many of the constitutional views we have because of the constitutional culture in which we live.”

I agree that there is no performative contradiction if one focuses only on fidelity to original meaning. This is because of Balkin’s division of labor between living constitutionalism and framework originalism. As we have seen, 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 point of view concerns only the framework, there can be no logical contradiction with his systemic account of constitutional change. The framework

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34 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 5, at 44.
35 Id. at 131; see BALKIN, CONSTITUTIONAL REDEMPTION, supra note 3, at 183–84.
36 BALKIN, LIVING ORIGINALISM, supra note 1, at 130, 130–31.
37 Id. at 131.
38 Id. at 183.
39 Id.
40 Id. at 183–84.
41 Id. at 184.
42 Id.
provides criteria of validity for constitutional views that exist apart from the historical processes of constitutional change.

When one operates within the “construction zone,” however, there are no criteria of constitutional validity outside of those historical processes. Historicism teaches that one’s constitutional views are in large part a product of history. Historicism further teaches that the validity of one’s constitutional convictions depends to a substantial degree on persuading others to adopt one’s point of view. Participants in the constitutional system who know all of this may have reason to “worry that arguing that their views are correct is . . . undermined or contradicted by the theory of how the constitutional system produces legitimacy over time.” How does one honestly argue with certainty that one is right when one’s very rightness depends in part on persuading one’s audience that one is right?

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, there is no contradiction if one avoids conflating one’s constitutional constructions with the Constitution itself—if one takes 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-thing-considered constructions given who we Americans are as a people at this time in our history.

Matters are less clear, however, if one focuses on whether characterizing one’s constitutional claims in a careful way is self-undermining. The question is pertinent to all participants in the constitutional system, but it is particularly acute for progressive constitutionalists. This is because the conservative political practice of originalism (in contrast to originalism as a method of interpretation) has for decades aggressively conflated its constitutional constructions with the Constitution itself and has achieved significant success in changing the course of constitutional law. Politically, it may not be a fair fight if one is as subtle and nuanced as Balkin’s historicist participant while one’s adversaries stare people in the eye and tell them without hesitation or qualification—tell them unself-consciously—WHAT THE CONSTITUTION MEANS, ALWAYS AND FOREVER. It may not matter who is right. Conservative originalism has succeeded in making such arguments notwithstanding the trenchant criticism it has endured.

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 tradeoff between honesty and efficacy. 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.

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.” He never really explains why this is so. The matter does not appear to trouble him.

I would certainly prefer 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 when one compares the advocacy of many a conservative originalist with a progressive constitutionalist who shares Balkin’s substantive commitments and has fully embraced both components of Balkin’s theory. Such a progressive 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 also an effect, not just as a cause.

Many conservative originalists will deny all of this. Conservative originalism is distinguished by its certainty, not its modesty. Again, it may not be a fair fight in the competition to persuade others of the rightness of one’s constitutional arguments.

Although progressives may have particular reason to worry, the problem is no mere matter of political expediency for progressives (or conservatives for that matter). If the ability of one’s adversaries to express their views is crucial to the system’s legitimacy, then so is the ability of oneself to express one’s views—and to do so without one hand tied behind one’s back. The concern, in other words, is internal to the legitimacy of the constitutional system as a whole. It warrants attention even if one does not wish to enhance the scoring ability of Team Progressive. One need believe only that the constitutional conversation should include all reasonable voices, including those with which one disagrees, whether they stress the conservative or the progressive dimensions of our highest constitutional traditions. One need believe only that one party to ongoing constitutional disagreements should not be at a self-imposed disadvantage stemming from the self-conscious manner in which its proponents argue from the individual point of view.

It may help to consider the question in terms of institutional role. 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

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49 BALKIN, LIVING ORIGINALISM, supra note 1, at 131.
constitutional system functions. By contrast, it may be ethically permissible for those whose business it is to adopt the individual point of view—specifically, advocates and judges—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.\(^\text{50}\) If the ethics of distinct institutional roles require different responses to the potential tradeoff between honesty and efficacy, then scholars, judges, and advocates should respond differently to Balkin’s book. Much legal scholarship, however, is not entirely sealed off from legal advocacy. 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.

\section*{B. Modernist Anxiety and Postmodernist Detachment}

And yet Balkin does not share these concerns. He has responded in conversations that participants in constitutional practice may ethically insist that their views are compelled by the Constitution—that suggesting otherwise is an observation from the systemic point of view, not a pertinent consideration from the individual point of view. The fact that I do not fully apprehend this suggestion, let alone take comfort in it—the fact that the matter gives me pause, but not him—may indicate differences between us in subjectivity and temperament.\(^\text{51}\) Although self-diagnosis in a law review is rare, perhaps I suffer from “modernist anxiety,” and perhaps Balkin has moved on to postmodernist detachment and irony.\(^\text{52}\)

In \textit{Law, Music, and Other Performing Arts}, Balkin and his co-conspirator, Sanford Levinson, investigate the “the increasing sense of isolation and estrangement from the past and from tradition” that is partially constitutive of modernity.\(^\text{53}\) 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.”\(^\text{54}\) What is more, our knowledge of the rifts between past and present produces an awareness that the same ruptures

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\item For a rare attempt by a judge to confront the fact of judicial discretion from the individual perspective, see \textit{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 \textit{McDonald}, 130 S. Ct. at 3052 (Scalia, J., concurring) (criticizing the Stevens approach as “incapable of restraining judicial whimsy”). For a discussion, see generally Neil S. Siegel, \textit{Prudentialism in McDonald v. City of Chicago}, 6 DUKE J. CONST. L. & PUB. POL’Y 16 (2010).
\item 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 C. Post, \textit{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.” \textit{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.” \textit{Id.} I have difficulty with the “of course” in the above quotation in light of the preceding (and correct) observations about the fact of judicial discretion.
\item \textit{Id.} at 1630.
\item \textit{Id.} at 1631.
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will come to characterize the relationship between present and future. This “awareness of historical situatedness cause[s] us to stand at a suitable distance from our own most deeply held convictions.”

Modernism is characterized in part by a deep consciousness of one’s consciousness—specifically, with 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.” “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.” Such self-consciousness can undermine the confident, unself-conscious participation in a present cultural tradition or social practice.

When one registers one’s distance from the past (and thus the present’s distance from the future), one can respond with “modernist anxiety,” a feeling of being unmoored, disconnected, at sea. This experience “produces the emotional search for resonance, tranquility, solidity, and stability.” 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 it. “By forsaking modernist anxiety, the interpreter moves closer and closer towards postmodern irony.”

The modernist is anxious. The postmodernist asks, “what anxiety?” 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 post-modernist loses no sleep over this irony. He is at peace with his detachment.

The difference between modernist anxiety and postmodernist detachment may help 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 like me, 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 must persuade enough others that they are correct in order to be correct.

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

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55 See id. (quoting DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823, at 15 (1975) (“[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.”)).
56 Id. at 1632.
57 Id.
58 Id. at 1634.
59 Id. at 1637.
60 Id. at 1639.
61 Id. at 1646. So does the premodernist, but for an entirely different reason. See id.
Balkin has little or nothing to say about such matters in *Living Originalism*. He just makes the best arguments he can in several chapters. “What anxiety?,” he in essence asks. And yet there may be cause for concern, even as one continues to make arguments from the individual point of view.\(^{62}\) All of us are “trying to figure out how one meaningfully inhabits a practice of performance after innocence has been lost,”\(^{63}\) but we may differ in our responses to our shared situation.\(^{64}\)

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 perspectives may be distinguished from the tension between the external and internal points of view.\(^{65}\) The latter dichotomy helps to explain the oft-expressed concern that legal realist descriptions of Supreme Court decision making have a self-fulfilling quality.\(^{66}\) The truth of realist insights from the external perspective can alter the internal perspective of the judge.

The external-internal dichotomy also captures characteristic disagreements between political scientists and legal academics over the grounds of judicial decision. Political scientists typically take the external point of view of the uninvested observer.\(^{67}\) Legal academics 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.\(^ {68}\)

The external-internal dichotomy also illuminates the disagreement between H. L. A. Hart and Ronald Dworkin over law’s partial indeterminacy in hard cases.\(^ {69}\) Hart has an unblinking


\(^{63}\) Balkin & Levinson, *supra* note 52, at 1658.

\(^{64}\) 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”).

\(^{65}\) 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).


\(^{67}\) 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.”); *Cf.* 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).

\(^{68}\) In addition to the external-internal and systemic-individual dichotomies, one can also distinguish the perspective of one who is invested in the constitutional system and wants it to succeed from the perspective of one who wants to understand the system but is uninvested in it. With Balkin, this Essay 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.

\(^{69}\) See HART, *Postscript, in The Concept of Law*, supra note 65, 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
appreciation of the ineluctability of judicial discretion. This is because Hart’s legal theory (positivism) is self-consciously descriptive; he takes the external point of view. Standing outside 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.

Dworkin, by contrast, emphatically rejects the idea that the law ever runs out. He equates discretion with lawlessness. His position becomes more explicable once one apprehends that his jurisprudence is, to a significant extent, evaluative and justificatory; he takes the internal point of view (as well as the individual, invested perspective). Indeed, in Law’s Empire he denies any distinction between legal philosophy and legal practice.

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.
enough, but this observation does not solve the problem of how one is to proceed when one is in the grip of both perspectives simultaneously.

Balkin, unlike Hart, is an invested participant in the system he is analyzing. Similar to Hart, however, Balkin never really tells us how such a participant who is aware of the systemic perspective can perform her individual function both honestly and effectively. Balkin does not solve the problem of how one is to proceed when one is in the grip of both perspectives simultaneously.

III. BALKIN’S FRAMEWORK ORIGINALISM

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 his motives are pure, not political. “I did not become an originalist to hoist conservatives by their own petards, or to engage in a shallow ‘me-toosim,’” he writes.78

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, as it is 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.79 Almost no one argues that Arnold Schwarzenegger may lawfully serve as President.80 And as much as Sanford Levinson laments various structural features of the Constitution, he does not argue that we are free simply 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 consistent with legality.81

Yet again, Balkin has his finger on a profoundly important question. Why do we regard clear text as binding? The answer is not obvious. Balkin’s framework originalism offers a powerful alternative to the answer provided by a major competitor, David Strauss’s common law constitutionalism.82

Strauss recognizes 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. 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.”83 Strauss accounts for “the sanctity of the text”84 by offering a

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78 BALKIN, CONSTITUTIONAL REDEMPTION, supra note 3, at 232.
79 See U.S. CONST. art. I, § 2, cl. 2 (House); art. I, § 3, cl. 3 (Senate); art. II, § 1, cl. 5 (President).
80 See U.S. CONST. art. II, § 1.
82 See the works cited supra note 22.
83 STRAUSS, THE LIVING CONSTITUTION, supra note 22, at 103.
84 Id. at 102.
“common ground justification.”85 “Sometimes,” he writes, “it is more important that things be settled than that they be settled right, and the provisions of the written Constitution settle things.”86 In Strauss’s view, “what makes the text of the Constitution binding” is “the practical judgment that following this text, despite its shortcomings, is on balance a good thing to do because it resolves issues that have to be resolved one way or another.”87

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.”88 And yet, even Marbury v. Madison89 and McCulloch v. Maryland90 are regarded as revisitable, at least in principle, by the Supreme Court. No portion of 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 if more than a common ground or convenience, and certain parts of it are not subject to change via common law methods. The text is 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,91 rule-of-law values,92 and the need for the Constitution to be “our law.”93 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.94

Another potential 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.95 Balkin argues that this is a clear case of non-literal usage—that “Congress” is a term that “stands for all of the lawmaking and law enforcement operations of the federal government.”96 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 from the enforcement power of the Executive.

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85 Id.
86 Id. at 101–102.
87 Id. at 105.
88 Id.
89 5 U.S. (1 Cranch) 137 (1803).
90 17 U.S. (4 Wheat.) 316 (1819).
91 BALKIN, LIVING ORIGINALISM, supra note 1, at 54–55.
92 Id. at 268.
93 Id.
94 See id. at 41–49 (discussing the dead hand problem).
95 U.S. CONST. amend. I.
96 BALKIN, LIVING ORIGINALISM, supra note 1, at 204–205.
Similarly, consider *Bolling v. Sharpe*. Chief Justice Warren deemed it “unthinkable” that the same Constitution would permit race discrimination by the federal government while prohibiting it by the states. 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.”

There are other possible examples. 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. But what if he is wrong? I have no informed view, but many jurists and scholars disagree with him on this point.

Even if he is wrong, I still find it hard to believe (notwithstanding my modernist anxiety!) that Congress lacks the power to regulative 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. 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—in 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, but I doubt it will fare any better in terms of original semantic meaning.

Balkin has a way out of this dilemma if the word “commerce” is ambiguous, and its meaning is subject to reasonable doubt. Then, 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—why his account is the best construction of an ambiguous text.

But Balkin has no way out if there is no ambiguity and he is demonstrably wrong. Again, I have no idea about the original meaning. My point, rather, is that it would not matter—and

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98 See BALKIN, LIVING ORIGINALISM, supra note 1, at 252.
99 See Chapter 9 of Living Originalism.
101 Yet if more and more people disagreed with me on this question, at a certain point I would need to reassess my own constitutional views. I would not possess the same views with the same degree of confidence regardless of whether most participants in the constitutional system regarded those views as crazy or mainstream.
103 See id. at 170–75.
104 The Court would likely tell an “economic” story and rely on the Commerce Clause. For a discussion of recent evidence that underlies this prediction, see Siegel, supra note 62.
105 See supra notes 99, 102 and accompanying text.
106 For Balkin, structural principles are constructions; they are not part of the framework. As Balkin discusses in Chapter 12, 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 to make sense of it.
should not matter—in the case of a public health emergency or other circumstances where the stakes are high enough.

Such examples suggest that we do not always view seemingly clear text as binding. Rather, we view it as binding so long as (1) we do not perceive something enormously important at stake, and (2) there are ways of making the text seem less clear. Then we sometimes treat apparently clear text as less than entirely 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 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,” 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.” Balkin is right to counsel progressives not to reflexively run from text and history. 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. In such a world, progressive constitutionalists should ask themselves what conservative activists, politicians, and judges may do with a progressive declaration that “we are all originalists now.”

For example, will such a declaration unintentionally lend support to, say, the Court’s decision in District of Columbia v. Heller as a good-faith attempt at applying a methodology that (if Balkin succeeds) may appear universally shared? Whoever one thinks was the better originalist in Heller, Justice Scalia must have been pleased that Justice Stevens elected to fight on Scalia’s “turf.” What about an originalist rejection of post-1937 Commerce Clause jurisprudence, as Justice Thomas urges? Or an originalist re-interpretation of the Equal Protection Clause as requiring colorblindness? In constitutional politics, the inaccuracy of such a

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108 Balkin, Constitutional Redemption, supra note 3, at 233.
re-interpretation may not matter.112 What about an originalist rejection of abortion rights, which may be advanced if defenders of such rights concede that the debate should be joined on originalist grounds?113 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 fight was had.114 It should perhaps give Balkin some pause that, almost without exception, “conservative originalists appear to have welcomed [him] into the originalist fold.”115

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,116 but he does not consider the pertinence of this 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 and whose knowledge distinguishes them from nonprofessionals.”117 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 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).118 Progressives may thus have good reason to fear where any

112 See e.g., Berman, supra note 29, at 91–92.
115 Dorf, supra note 5, at 18 n.93.
116 Balkin, Constitutional Redemption, supra note 3, at 232–33.
117 Id. at 234.
118 See Dorf, supra note 5, at 12-13 & n.61 (“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.” (citing Jamal Greene, Nathaniel Persily, & Stephen Ansolabehere, Profiling Originalism, 111 COLUM. L. REV. 356 (2011)). Thus Jeffrey Toobin writes that “[o]riginalists, whose ranks include Scalia and Thomas, believe that the Constitution should be interpreted in line with the intentions and
originalist approach will lead in America in 2012. Their concerns may have little to do with preservation of elite forms of professional reason.

As with Balkin’s living constitutionalism, 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 were (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 boldly to declare that “we are all living constitutionalists now” during a period of liberal ascendancy in law and politics.119 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 agonists 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 originalism? I fear the latter is more probable. In fact, I predict that Balkin’s originalism will by hijacked and mischaracterized by politicians or judges with a much 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 there are times when it is stunningly effective to seize a word or an idea and redeploy it for different purposes. 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 textualist.”

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.120 But those

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119 See Dorf, supra note 5, at 34-35 (“[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.”).

120 See, e.g., Balkin, Living ORIGINALISM, supra note 1, at 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”); id. at 21 (calling them “opposite sides of the same coin”); Jack M. Balkin, Nested Oppositions, 99 YALE L.J. 1669 (1990).
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, an 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 originalists now” in public debates. But in our fallen world—a world whose fallen-ness Jack writes about so movingly in Living Originalism and Constitutional Redemption—it would be naïve and potentially damaging to proceed in such a fashion.