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Why the 'Originalism' in 'Living Originalism'?

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INTRODUCTION

Jack Balkin's *Living Originalism*,[1] together with the companion volume *Constitutional Redemption*,[2] is an extraordinary achievement that secures his position in the front rank of American constitutional theorists. In those works, Balkin develops a constitutional theory he identifies alternatively as "living originalism" and as "framework originalism." In this latter expression, Balkin distinguishes two senses of the term "framework."

In the first sense of "framework," the Constitution establishes a framework for governance and politics.[3] The second sense of "framework" derives from the first. Governance, Balkin argues, involves state-building and constitutional construction by the political branches, not just by the courts.[4] Social and political movements, too, invoke the Constitution in their bids for social transformation, and so political discussion among ordinary citizens also has this dimension of constitutional argument and development. The Constitution, then, also provides a framework for constitutional politics.[5]

But while these senses of "framework" are clear in Balkin's "framework originalism," I find the invocation of originalism less obvious. In what

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

[2] JACK M. BALKIN, CONSTITUTIONAL REDEMPTION (2011).

[3] *See, e.g.*, BALKIN, *supra* note 1, at 3 (explaining that framework originalism "views the Constitution as an initial framework for governance that sets politics in motion, and that Americans must fill out over time through constitutional construction").

[4] *See, e.g., id.* at 5 (referring to the Social Security Act and later social welfare laws as "state-building constructions" that "build out the Constitution as they build out the country").

[5] See especially chapter 8 of *Living Originalism*, entitled "A Platform for Persuasion." *Id.* at 129-37.

follows, I first consider the reasons Balkin explicitly offers for that choice, and then I consider the extent to which original meaning (or original anything) is an important part of his approach at all. My interest is not in telling Balkin what to call his theory, but instead simply in exploring the extent to which it links with what might be considered originalist themes and concerns.

I. BALKIN'S EXPLANATION FOR HOW AND WHY HE BECAME AN ORIGINALIST

Chapter 8 in *Constitutional Redemption*, the companion volume to *Living Originalism*, is entitled "How I Became an Originalist."[6] There Balkin makes clear that he's not engaging in the simple outflanking move of adopting a label used by his political opponents. His commitment to the idea of originalism is more serious than that. But Balkin asks, forthrightly, "[W]hat does the language of originalism add to the idea of a living Constitution?"[7]

Balkin's answer is connected to his idea of how a written constitution may count as legitimate. It must, he says, be simultaneously basic law, higher law, and – the sense I'm most interested in here – "our law."[8] For a 223-year-old constitution to count as "our law," Balkin argues, we must see it as a project that connects us with past and future generations.[9] That's the vertical dimension in which the Constitution must be "our law." The horizontal dimension requires that ordinary citizens, not just officials and decidedly not just judges, must see themselves as, and be, constitutional interpreters.[10]

Balkin describes this idea of "our law" as a "narrative conception"[11] that requires "protestant interpretation" – interpretation not just by the legal priests but by the lay citizenry as well.[12] He intends the reference to Protestantism to include the idea that the written, original text plays a central role. The written

[6] *See* BALKIN, *supra* note 2, at 226-50.

[7] *Id.* at 232.

[8] *See* BALKIN, *supra* note 1, at 59.

[9] *See id.* at 60.

[10] *Cf. id.* at 88 (distinguishing "'horizontal translation' between citizens and professionals" from "'vertical translation' between the past and the present").

[11] *See id.* at 61.

[12] *See* BALKIN, *supra* note 2, at 10 ("[C]onstitutional legitimacy depends on what Sanford Levinson has called constitutional protestantism – the idea that no institution of government, and especially not the Supreme Court, has a monopoly on the meaning of the Constitution. Just as people may read the Bible for themselves and decide what they believe it means to them, so too citizens may decide what the Constitution means to them and argue for it in public life. For the constitutional project to succeed, it is not enough that people support the project. They also must be able to criticize the project as it has been developed so far. People must be able to disagree with, denounce, and protest the Constitution-in-practice, including especially the decisions of the courts, and claim the Constitution as their Constitution, so that they can help move the Constitution-in-practice toward arrangements that are closer to their ideals.").

text is public and available to all through the generations. In Balkin's narrative conception, the U.S. Constitution's text stands as a "potent symbol" of popular sovereignty and the transgenerational project of self-government.[13] The social movements that over the centuries have shaped the meaning of that Constitution have constantly referred to the written text and claimed to act in its name. This return to origins, Balkin argues, is the classic dissenter's move.[14] Whether offered today, as by the Tea Party,[15] or in the past, as by President Roosevelt against the Nine Old Men's interpretations,[16] populists and dissenters from orthodox official understandings characteristically have called for a return to the text.

Balkin intends his account of constitutional interpretation to speak to these populists and dissenters, not just – as with more orthodox theories – to the courts and especially the Supreme Court. That conception of his theory's purpose and addressees explains why Balkin wants to have at his disposal the *symbol* of the text and the *figure* of returning to origins. Further, the rich chapters of *Living Originalism* devoted to "construction" of the commerce power, the Privileges or Immunities Clause, and the Equal Protection Clause show considerable attentiveness to and great skill with historical sources.[17] But does that make his theory "originalist" in any sense like other theories described by their authors as "originalist?" I won't ask the further question, "would that matter?" I'll examine only the question of what the idea of originalism might bring to Balkin's project that otherwise likely would be missing.

II. THE PLACE OF ORIGINAL MEANING IN BALKIN'S FRAMEWORK ORIGINALISM

Balkin follows a common (though not universal) tendency in recent originalist theory: to distinguish between interpretation and construction, or as Balkin puts it more precisely, "interpretation-as-ascertainment[-of-meaning]" and "interpretation-as-construction."[18] The first is the capturing of the text's

[13] *Id.* at 237.

[14] *See id.* at 232, 234; BALKIN, *supra* note 1, at 97 ("Repeatedly, constitutional dissenters and insurgent movements have turned to the constitutional text and to the great deeds and commitments of the past – including most particularly those of the founding generation – as a justification for their assault on the status quo.").

[15] *See* BALKIN, *supra* note 2, at 243.

[16] *See id.* at 240-42; BALKIN, *supra* note 1, at 310.

[17] *See* BALKIN, *supra* note 1, at 138-255.

[18] *See id.* at 4. For a clear and, in its details, original development of this distinction, see Lawrence B. Solum, *Semantic Originalism* 67-89 (Illinois Pub. Law & Legal Theory Res. Paper Series, Paper No. 07-24, 2008), *available at* http://ssrn.com/abstract=1120244. Solum credits Keith Whittington and Randy Barnett as predecessors. *See id.* at 67. Balkin notes that some, including John McGinnis and Michael Rappaport, have rejected the distinction between interpretation and construction. BALKIN, *supra* note 1, at 356 n.18.

"semantic content."[19] The second, interpretation-as-construction, involves the working up of semantic content into legal (or at least law-related) discourse. Balkin describes that activity as "implementing and applying the Constitution using all of the various modalities of interpretation: arguments from history, structure, ethos, consequences, and precedent."[20] The issue of "[f]idelity to 'original meaning' in constitutional interpretation," Balkin says, concerns only the sense of meaning as "semantic content."[21] In *Constitutional Redemption*, Balkin tells us further that "[i]n almost every case the original semantic meaning of the text is the same as its contemporary semantic meaning."[22] There he lists, as examples of the "very small number of" differences between contemporary and original meaning, the following: "domestic violence" (now, more likely thought of as spousal battery than as civil rebellion), "magazine" (now a periodical rather than a storehouse for arms), and "Republican" (now more commonly used as the name of a major political party than to designate a form of government).[23] If those were the only examples of differences between contemporary and original meaning, then the question of "fidelity to original meaning"[24] would be simple.

Much more interesting, however, is Balkin's example in chapter 9 of *Living Originalism*: the word "commerce."[25] Now, he says, we are likely to understand the word "commerce" to include only, or at least most centrally, the buying and selling of commodities, together with their transportation.[26] In the eighteenth century, however, the term had a broader use.[27] Consistent with Chief Justice Marshall's gloss on "commerce" as "intercourse"[28] – a gloss not easily comprehensible to modern interpreters – Balkin uses the then-broader meaning of "commerce" to justify the New Deal construction of the constitutional term as at least permissible, i.e., as consistent with original meaning.[29] Here, an account of original meaning works to rule in a contemporary understanding that otherwise might be thought to exceed the text.

Their idea is "to derive as much of the Constitution-in-practice as possible from 'original meaning' and make as little as possible a matter of discretionary construction and adjustment." *Id.* Balkin calls this strategy "unworkable" and inconsistent with the way that "constitutional development" always has operated. *Id.*

[19] *See* BALKIN, *supra* note 1, at 12.

[20] *Id.* at 4.

[21] *Id.* at 13.

[22] BALKIN, *supra* note 2, at 242.

[23] *See id.* at 242-43; BALKIN, *supra* note 1, at 17.

[24] *See, e.g.*, BALKIN, *supra* note 2, at 229.

[25] *See* BALKIN, *supra* note 1, at 139-82.

[26] *See id.* at 150.

[27] *See id.* at 140, 149-59.

[28] *See* Gibbons v. Ogden, 22 U.S. 1, 67 (1824).

[29] *See* BALKIN, *supra* note 1, at 142-43.

As far as I could determine, Balkin does not offer an example of a constitutional term whose original semantic meaning would rule *out* the results of a contemporary interpretive choice.[30] I think this statement is true even of Balkin's critical discussion of Justice Thomas's understanding of "commerce." Balkin criticizes as "anachronistic" Justice Thomas's claim that the original meaning of "commerce" excludes "manufacturing, mining, or agriculture," as well as "any noneconomic activities."[31] But I think that, too, is an argument in favor of *more* permissible choices, not fewer: Justice Thomas is wrong, Balkin argues, to think that "original meaning" precludes the Supreme Court's broader post-1937 understanding of "commerce."[32] And when Balkin turns to "construction" rather than "interpretation as ascertainment of [semantic] meaning," he is even clearer in using textual consistency to rule constructions in as permissible, not to rule them out.[33]

The one possible counterexample I can think of is Balkin's understanding of the phrase "privileges or immunities" in the Fourteenth Amendment. Balkin rejects the narrow reading offered that phrase in *The Slaughter-House Cases*[34] and *United States v. Cruikshank*.[35] These cases, he says, "mangled the constitutional text and caused enormous mischief in subsequent years."[36] But even here, Balkin acknowledges that the Supreme Court has reached results similar to what might have been accomplished through the Privileges or Immunities Clause. In particular, nearly all of the Bill of Rights eventually were incorporated into the Fourteenth Amendment and thus made applicable as against the states. Balkin is right that formally the Court's "selective incorporation" method placed the burden of persuasion on those urging incorporation; he is likely right that the burden would have been switched under the Privileges or Immunities Clause.[37] Balkin may well be right (here I

[30] He suggests that equal protection has the same meaning (i.e., semantic content) now that it did in 1868. *See* BALKIN, *supra* note 1, at 37. When Balkin discusses the term "due process of law," he notes the argument that its "original semantic meaning" would preclude finding in the term a guarantee of equality (conceived instead as "substantive" rather than something having to do with "process"). *Id.* at 251. Based on historical investigation, he concludes that "lawyers in the decades following ratification of the Fifth Amendment thought that the equality reading was perfectly consistent with the text" in 1791 and 1868 and is and therefore "a permissible construction today." *Id.*

[31] *Id.* at 150.

[32] *Id.* at 153.

[33] *See, e.g.*, *id.* at 207 (explaining that a "self-defense" reading of the Second Amendment is "consistent with the text" and "therefore a permissible construction today"); *id.* at 251 ("[I]f an equality reading was consistent with the text [of the Fifth Amendment's Due Process Clause] in the early 1800s, it should be a permissible construction today.").

[34] 83 U.S. (16 Wall) 36 (1873).

[35] 92 U.S. 542 (1875).

[36] BALKIN, *supra* note 1, at 191.

[37] Balkin reasons,

> Our basic assumption should be that all individual rights specifically mentioned in the

express no view) that the Privileges or Immunities Clause might have been more hospitable to the few Bill of Rights guarantees not selectively incorporated under Due Process and might have led to different doctrinal contours of some rights that the Court has thought incorporated under Due Process.[38] The Privileges or Immunities Clause also would offer, Balkin is correct to observe, a more natural home for unenumerated rights such as those recognized in *Griswold v. Connecticut*[39] and *Lawrence v. Texas*.[40] But do we need an *originalist* theory to recognize that the Privileges or Immunities Clause is a more plausible location for substantive rights than the Due Process Clause? So much would seem to follow from the ordinary meaning of the constitutional language – "privileges or immunities of citizens of the United States," versus "due process of law." So even here, I wonder whether Balkin's reliance on the idea of originalism is necessary.

Perhaps the main use Balkin gives "original meaning," and the further idea of "fidelity to original meaning," is linked to his distinctions among rules, standards, and principles. His distinction between rules and standards is essentially the one marked at least since legal process theory. His distinction between rules and principles is in some respects similar to and in other respects different from Ronald Dworkin's well-known account.[41] Like Dworkin, Balkin sees principles as having "weight" and as requiring balancing against competing principles, not just on/off application.[42] And like Dworkin, Balkin rejects the identification of principles' meaning with their original expected application.[43] As does Dworkin, Balkin emphasizes the temporal dimension of principles: They, as opposed to rules, delegate authority to future interpreters.[44]

> text are presumptively privileges or immunities because We the People have placed them in the Constitution, and the burden is on the interpreter to prove why they are not really part of the basic rights of citizens.

Id. at 201.

[38] *See id.* at 202-07 (discussing the Seventh Amendment right to trial by jury in federal civil cases, the Establishment Clause, and the Second Amendment).

[39] 381 U.S 479 (1965).

[40] 539 U.S. 558 (2003); *see* BALKIN, *supra* note 1, at 208-19.

[41] *See* BALKIN, *supra* note 1, at 349 n.12 (noting that "my primary focus is not on judges, but on construction by all constitutional actors," including in particular the "new state-building constructions by the political branches"). Here I part company with Larry Alexander, who sees only similarities between Balkin's and Dworkin's account. *See* Larry Alexander, *The Method of Text and ? – Jack Balkin's Originalism with No Regrets* 7-14 (University of San Diego Legal Studies Research Paper Series, Research Paper No. 11-067, 2011), *available at* http://ssrn.com/abstract=1924568.

[42] *See* BALKIN, *supra* note 1, at 349 n.12.

[43] *See id.* at 6-7.

[44] *See id*. at 63 (explaining how application of constitutional text and principles "necessarily requires delegation to the future" as well as identification with the past to be truly "our Constitution"). Balkin suggests a difference with Dworkin here, *see id.* at 351 n.12, but I am not so sure. Without this idea of deferred interpretive authority, Dworkin

But in place of Dworkin's usual and conventional focus on judges deciding appellate cases, Balkin is concerned to emphasize that these future interpreters include the political branches and ordinary citizens.[45]

When Balkin speaks of fidelity to original meaning, often what he means is that contemporary interpreters must respect the choice among rules, standards, and principles that the text reflects.[46] Because most of the controversial language in the U.S. Constitution concerns principles, Balkin's interpretive precept most significantly implies that we must read principles *as principles* – and that means understand them as delegating much authority to future interpreters.[47] Because Balkin doesn't focus exclusively on specific moral principles implied by (or to use his metaphor, "underlying") constitutional text, Balkin's "method of text and principle" would not necessarily be Dworkin's "moral reading" of the Constitution.[48] Moreover, Balkin, perhaps more than Dworkin, presents his preferred approach – "framework originalism," with "text and principle" as the "associated theory of interpretation and construction" – not so much as a theory that generates particular conclusions as a "platform for persuasion" to be shared by those of very different substantive views.[49]

But like Dworkin, to the extent that constitutional language consists in or implies principles, "fidelity to the Constitution requires future generations to

would not be able to argue that the interpretation of principles authorizes judges to consult their best contemporary moral and political theory, balanced of course with considerations of "fit" to past precedent.

[45] *See id.* at 351-52 n.12.

[46] *See, e.g., id.* at 47 (arguing that the "economy of trust and distrust" toward future interpreters is part of the constitutional plan and that here, and here only, original "expectations and intentions" about application are binding).

[47] *See id.* at 63.

[48] *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1-38 (1996).

[49] "Platform for Persuasion" is the title of chapter 8 in *Living Originalism.* I don't want to overdraw the contrast with Dworkin here. Hercules, the imaginary superhuman judge who exemplifies Dworkin's "law as integrity" approach, reaches conclusions in the well-known cases Dworkin uses as examples, but in the Epilogue to *Law's Empire* Dworkin writes, "[T]his is too limited a test to be decisive; law students and lawyers will be able to test the illuminating power of law as integrity against a much wider and more varied experience of law at work." RONALD DWORKIN, LAW'S EMPIRE 411-12 (1986). Dworkin says explicitly that Hercules' "answers to the various questions he encounters" do not "*define* law as integrity as a general conception of law." *Id.* at 239. Instead, "law as integrity consists in an approach, in questions rather than answers, and other lawyers and judges who accept it would give different answers from his to the questions it asks." *Id.* But while Dworkin mentions constitutional interpreters besides judges in the opening to *Law's Empire*, *see id.* at 14-15 (mentioning "[c]itizens and politicians and law teachers" as persons who "also worry and argue about what the law is"), they quickly disappear and are not heard from again.

engage in constitutional construction."[50] And as Dworkin also argues, for Balkin the present-day interpreter isn't bound by the drafters' or the ratifiers' original expected applications.[51] Indeed, that freedom is *entailed by* fidelity to original meaning.

Balkin is quite clear that he, unlike many other originalists, doesn't pursue a theory of originalism primarily to discover and enforce limits on judicial interpretation.[52] Most of the constraint on judicial interpretation, he says, comes not from interpretive theory (whether his own or anyone else's) but from "institutional features of the political and legal system," as well as from legal culture, judges' peculiar cultural influences, and the more general culture.[53] Democratic legitimacy requires that each generation be able to see the Constitution as its own. If the Constitution is to be "our law," then interpretive choices – at least those connected with principles – cannot be made once and for all by the founding or ratifying generation. Balkin is emphatic here: "[W]e will inevitably interpret the Constitution according to contemporary 'meaning' in the sense of contemporary *applications* and contemporary *constructions*."[54] When it comes to construction of an abstract principle, for Balkin the question is, "what constructions make the most sense today?"[55] Among the tools of constitutional construction is evaluation of the consequences of constitutional choice.[56]

Balkin provides extended examples of how the method of text and principle might operate in practice. These examples are the core of chapters 9 through 11 of *Living Originalism*, discussing the Commerce Clauses, the Privileges or Immunities Clause, and "equality before the law" (in both the Equal Protection Clause and the Fifth Amendment's Due Process Clause). In these discussions, Balkin is attentive to (and deft at working with) historical understandings, including original expectations. He describes all of these materials as

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

[51] *See id.* at 23 ("[F]idelity to original meaning does not require fidelity to original expected application.").

[52] *See, e.g.*, *id.* at 17-19 (emphasizing the importance of interpreters other than judges); *id.* at 32 (rejecting the idea that "the purpose of the Constitution is to constrain foolish and unwise decisionmaking in the future"). In a particularly clear formulation, Balkin explains,

> Framework originalism . . . requires that judges apply the Constitution's original meaning. But it assumes that this will not be sufficient to decide a wide range of controversies and so judges will have to engage in considerable construction as well as the elaboration and application of previous constructions. Hence, fidelity to original meaning cannot constrain judicial behavior all by itself.

Id. at 22. Balkin typically uses the word "constrain" conjoined with a term commonly considered its opposite: "constrain and enable" is one favorite formulation, and "constrain and delegate" is another. *Id.* at 35, 46.

[53] *See id.* at 19.

[54] *Id.* at 43-44.

[55] *Id.* at 207.

[56] *See id.* at 4.

resources for the construction of principles, and he is interested in consulting them.[57] But so do those who call themselves non-originalists pay some attention to original understandings – including original expected applications – taking them, as Balkin does, not necessarily to bind present interpretation. Balkin's discussions in the "application" chapters of *Living Originalism* surely devote more space and energy to the reading of historical sources than would the average living constitutionalist. And further, the figure of returning to origins that Balkin identifies with originalist argumentation – whether by judges or by citizens involved in social movements – suggests a return to the text as source of authority in a way that standard living constitutionalists would avoid.[58] But Balkin argues also that admission to today's constitutional game requires that we accept certain interpretive conclusions often thought to be in tension with originalism. Among them are (1) the broad scope of Congress's commerce power established when the Supreme Court accepted the New Deal,[59] (2) the general legitimacy of the resulting administrative and welfare state,[60] (3) the constitutional invalidity of school segregation (whatever the original expectations of the Fourteenth Amendment's drafters),[61] (4) the extension of equal citizenship to women as well as men (again, whatever original expected applications might have been),[62] (5) a still more encompassing framework of civil rights legislation,[63] (6) "robust free-speech protections,"[64] and (7) what Balkin calls the "national security state," with large standing armies in peacetime, an extensive surveillance network, and a presidency powerful in foreign affairs.[65]

Balkin's acceptance of these developments isn't grudging.[66] They're not to be treated as an originalist's embarrassments, nor should they be understood as

[57] *See id.* at 12 (explaining that understanding original expected applications "helps us understand the meaning of the text and the general principles that animated the text").

[58] Balkin notes the very different attitude that the exemplary living constitutionalist David Strauss has taken toward the authority of text. *See id.* at 50 ("Strauss denies that the text is an authoritative command or political decision made in the past to which we owe any duty of fidelity or obedience. . . . [Instead, it] merely serves as a focal point for political activity around which people can usefully coordinate their activities.").

[59] *See id.* at 6 (referring to "the construction of the administrative state during the New Deal" as what we must understand, in addition to "original meaning and judicial precedents," as part of "our Constitution").

[60] *See, e.g.*, *id.* at 116-17.

[61] *See, e.g.*, *id.* at 117.

[62] *See, e.g.*, *id.* at 11-12.

[63] *See, e.g.*, *id.* at 5 (mentioning "[t]he Civil Rights Act of 1964, the Voting Rights Act of 1965, . . . and later social welfare laws").

[64] *Id.* at 109.

[65] *See id.* at 40-41, 109, 113, 116, 117, 297.

[66] A possible exception here might be to aspects of "the national security state." *See The Anti-Torture Memos: Balkinization Posts on Civil Liberties, the War on Terror and*

what Justice Scalia calls "pragmatic exceptions" to what otherwise would be a more consistent originalism.[67] Instead, Balkin works to show that the constructions underlying these constitutional developments are consistent with, and at least sometimes the best interpretation of, the principles that underlie constitutional text. But all these are constitutional *constructions*, not uncontestable ascertainments of original semantic meaning. Originalism, Balkin makes clear, does not as a method *require* these constructions. While it's at least reassuring to know that the principles underlying the constitutional text are capable of such constructions, the enterprise of construction that Balkin describes has its eye as much on the present and future as on the past. I mean that as observation, not as criticism. Balkin's revision of originalism sees it as establishing a link between past and present in which the past is less binding than previous originalists have thought. I'll leave to those who count themselves originalists to answer the question whether to admit Balkin to their society.

More interesting to me is Balkin's insistence that we look at the Constitution outside the courts and apart from judicial interpretation. As I suggested, Balkin has come to find the idea of originalism attractive primarily because he connects it to his idea of protestant constitutional interpretation, the importance of the political branches and social movements in constitution-building, and the characteristic tendency for Presidents and leaders of social movements alike to refer to the Constitution's text – there, underneath the decades of lawyerly interpretations – as what gives their claims authority. What is striking about many such invocations of pure text (this strikes Balkin, too)[68] is the shallowness of the invokers' claims. I'll leave aside the presently controversial example of the Tea Party that Balkin mentions from time to time. Consider another example that Balkin invokes: President Roosevelt's argument that he was the true defender of text and original meaning, while the Supreme Court sought to read into the document its own social and political values.[69] I remain unconvinced that either Roosevelt or his supporters demonstrated that Roosevelt's own understanding of federal power cohered with text in a way that his opponents' did not. For Roosevelt, the invocation of text seems to have been mostly just a move in the game, and probably not a particularly important one – not, at least, compared to the felt necessities of addressing the second dip of the Great Depression and to the saber-rattling of Roosevelt's Court-packing plan.

Presidential Power, BALKINIZATION, http://balkin.blogspot.com/2005/09/anti-torture-memos-balkinization-posts.html (last updated Dec. 22, 2006).

[67] *See, e.g.*, BALKIN, *supra* note 1, at 33 (offering his view that the "administrative and welfare state and the civil rights revolution" are not "pragmatic exceptions to originalism" but "perfectly consistent with it").

[68] *See id.* at 87-89.

[69] *See id.* at 241.

Balkin's reply is appropriate: Social movements involve a division of labor, and there are different roles for political spokespersons, rank-and-file supporters, and sympathetic lawyers and intellectuals.[70] Balkin has made a great contribution in emphasizing constitutional argumentation in social movements, as well as in the "state-building" of the political branches. I admire also his discussion of the influence that this constitutional argumentation outside the courts ultimately has had on the development of judicial doctrine. I find the idea of the Constitution-as-ongoing-project compelling.[71] I'm less certain only that such specifically originalist arguments are quite as central to this project as some parts of *Living Originalism* might suggest.

[70] *See* BALKIN, *supra* note 1, at 88.

[71] *See* HUGH BAXTER, HABERMAS: THE DISCOURSE THEORY OF LAW AND DEMOCRACY 140-45 (2011) (endorsing German philosopher Jürgen Habermas's notion of a constitution as a project to be developed through legislative and not just judicial action, with strong roots in civil-social organizations and public-sphere advocacy).