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### The Balkinization of Originalism

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# THE BALKINIZATION OF ORIGINALISM

James E. Fleming\*

*This Article suggests that, with the publication of Jack Balkin's Living Originalism, we are witnessing the "Balkanization" of originalism (when originalism splits into warring camps) along with the "Balkinization" of originalism (when even Balkin, hitherto a pragmatic living constitutionalist, becomes an originalist). It goes on to argue that Balkin's living originalism is what Ronald Dworkin has called a "moral reading" of the Constitution, for it conceives the Constitution as embodying abstract moral and political principles, not codifying concrete historical rules or practices. Furthermore, despite important differences, there are unmistakable affinities between Balkin's commitment to interpret the Constitution so as to redeem our faith in its promises and aspirations, and Dworkin's commitment to interpret the Constitution so as to make it the best it can be.*

## I. THE BALKANIZATION (AND BALKINIZATION) OF ORIGINALISM

In recent years, some have posed the question, "Are we all originalists now?" If anything would prompt that question, it would be constitutional theorists like Ronald Dworkin and Jack Balkin dressing up their theories in the garb of originalism (or, at any rate, being interpreted as originalists). For these scholars are exemplars of two *bête noires* of originalism as conventionally understood: namely, the moral reading of the Constitution and pragmatic living constitutionalism, respectively.<sup>1</sup> By

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\* Professor of Law, the Honorable Frank R. Kenison Distinguished Scholar in Law, and Associate Dean for Research and Intellectual Life, Boston University School of Law. I prepared this Article for the University of Illinois College of Law Conference on Jack Balkin's *Living Originalism*, April 8-9, 2011. I want to thank Professors Larry Solum and Kurt Lash for inviting me to participate. I am indebted to Jack Balkin for his remarks in reply to this Article as well as the other Articles. And I am grateful to Albert Cahn, Courtney Sartor, and Emily Strauss for helpful assistance. In Part I, I draw from James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10, 10-12 (2007).

1. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 176-77, 351-55 (1990) (criticizing Dworkin's view and arguing that the "attempt to define individual liberties by abstract moral philosophy" involves succumbing to the "temptations of utopia," that is, reading one's own vision of utopia into the Constitution); *id.* at 167 (criticizing the notion of a "living Constitution"); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37-47 (Amy Gutman ed., 1997) (critiquing "The Living Constitution"); *id.* at 144-49 (critiquing Dworkin's "moral reading" of the Constitution).

“moral reading,” I refer to a conception of the Constitution as embodying abstract moral and political principles, not codifying concrete historical rules or practices. Yet in recent years, Dworkin has been interpreted as an abstract originalist,<sup>2</sup> and Balkin has now embraced the method of text and principle, which he presents as a form of abstract “living” originalism.<sup>3</sup> In my Article, I shall suggest that we are witnessing the “Balkanization” of originalism (when originalism splits into warring camps) along with the “Balkinization” of originalism (when even Balkin, hitherto a pragmatic living constitutionalist, becomes an originalist).

Randy Barnett, a new originalist, greeted Balkin’s transformation with glee, proclaiming that if Balkin is an originalist, we are all truly originalists now.<sup>4</sup> I have the opposite reaction. I believe that Balkin’s metamorphosis marks a significant moment in the history of pragmatic constitutional theory: the moment when a hitherto leading pragmatic living constitutionalist embraced an approach to constitutional interpretation that is for all intents and purposes equivalent to a moral reading. I plan to explore affinities and differences between Balkin’s, Dworkin’s, and my own abstract, aspirational theories. And I want to turn Barnett’s question around and ask, “Are we all moral readers now?”

We should recall Justice Scalia’s famous put-down of “nonoriginalists” in *Originalism: The Lesser Evil*.<sup>5</sup> He argues as if the originalists are united in their conception of constitutional interpretation and asserts that they are opposed by a motley group that he dubs the “nonoriginalists.” Justice Scalia claims that the only thing that “nonoriginalists” can agree upon is that originalism is the wrong approach.<sup>6</sup> He adds, invoking a maxim of electoral politics, “You can’t beat somebody with nobody,” suggesting that there really is not a viable alternative to originalism.<sup>7</sup>

I want to turn this assertion around and observe that there are numerous varieties of originalism, and that the only thing they agree upon is their rejection of moral readings. Some of the varieties include the following: It all began with conventional “intention-of-the-Framers” originalism.<sup>8</sup> Then it became “intention-of-the-ratifiers” originalism.<sup>9</sup> Of

2. See, e.g., Amy Gutmann, *Preface to A MATTER OF INTERPRETATION*, *supra* note 1, at vii, xi-xii (stating that Dworkin “defends a different version of originalism from Justice Scalia’s,” according to which constitutional provisions “set out abstract principles rather than concrete or dated rules” (internal quotation marks omitted)); Keith E. Whittington, *Dworkin’s “Originalism”: The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 201 (2000) (interpreting Dworkin as an “originalist” who argues that the Founders chose abstract principles).

3. JACK M. BALKIN, *LIVING ORIGINALISM* 3, 6–7 (2011).

4. See Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405 (2007) (reviewing Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007)).

5. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855, 862–63 (1989).

6. *Id.* at 855.

7. *Id.*

8. E.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 1–10 (1977).

9. E.g., BORK, *supra* note 1, at 144.

course, we also have “original-expected-applications” originalism (what I elsewhere have called “narrow” or “concrete” originalism).<sup>10</sup> Then came “original-meaning” originalism, which was refined as “original-public-meaning” originalism (officially, this is now the position of Justice Scalia and Barnett).<sup>11</sup> Justice Scalia himself distinguished “strong-medicine” or “bitter-pill” originalism from “faint-hearted” originalism.<sup>12</sup> Then came “broad” originalism (advocated by Lawrence Lessig and many others).<sup>13</sup> Now comes the “new originalism” (so characterized by Keith Whittington) as distinguished from the “old originalism.”<sup>14</sup> Finally, we add “abstract” originalism (which some, including Whittington, have attributed to Dworkin).<sup>15</sup> And we must not forget Balkin’s “method of text and principle,” a form of abstract originalism.<sup>16</sup> Indeed, Mitchell Berman has distinguished seventy-two varieties of originalism in his tour de force *Originalism Is Bunk*.<sup>17</sup>

Given how much these versions of “originalism” differ, it would not mean much to claim that we are all originalists now. In my book, *Fidelity to Our Imperfect Constitution*<sup>18</sup>—of which this piece will be a part—I plan to examine the spectacular concessions that originalists have made to their critics, along with the Balkanization (and Balkinization) of originalism. I shall show the extent to which we are all moral readers now. Whether or not we are all moral readers now, I shall argue here that Balkin’s living originalism is a moral reading of the Constitution. But first, I want to acknowledge ten great things about Balkin’s living originalism; five about his living originalism in its own right and five about his critique of conventional originalisms.

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10. See SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 84–91 (2007).

11. See SCALIA, *supra* note 1, at 38 (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”); see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89–94 (2004) (explaining the movement to, and advantages of, “original meaning” originalism).

12. See Scalia, *supra* note 5, at 861–63.

13. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165, 1171–73 & n.32 (1993) (developing a broad originalist conception of fidelity as “translation,” under which constitutional interpretation must encompass both text and context).

14. Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL’Y* 599, 607–12 (2004) (characterizing “the new originalism” as focused on creating a basis for positive constitutional doctrine and concentrating on fidelity to public meaning at the time of ratification, not judicial “restraint” or deference to democratic processes).

15. See, e.g., Gutmann, *supra* note 2, at xi–xii; Whittington, *supra* note 2, at 201.

16. See BALKIN, *supra* note 3, at 3–20 (discussing the concept of fidelity to text and principle).

17. See Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1 (2009).

18. JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION* (under contract with Oxford University Press) (on file with author).

## II. THE TOP TEN THINGS ABOUT BALKIN'S LIVING ORIGINALISM

### A. *Five Great Things About Balkin's Living Originalism in Its Own Right*

First, Balkin provides, in *Living Originalism* and its companion volume, *Constitutional Redemption: Political Faith in an Unjust World*,<sup>19</sup> one of the two best accounts of constitutional faith yet developed; the other, of course, being Sanford Levinson's account in his excellent book, *Constitutional Faith*.<sup>20</sup> With all due respect to Levinson, I believe that Balkin's account is more constructive and confident about the possibility of redemption of our faith. To put the contrast starkly, Balkin's faith is rooted in commitment to the possibility of redemption through a project of realizing our aspirations (as in, faith will show us the way), whereas Levinson's faith is rooted in skepticism and doubt about that possibility (as in, faith is all we have to go on). Indeed, Balkin's faith has led him to develop an abstract, aspirational originalism, whereas Levinson's lack of faith has driven him to condemn our Constitution as undemocratic and to call for a new constitutional convention.<sup>21</sup>

Second, Balkin's two books together offer the most constructive use of narrative or story yet developed in U.S. constitutional thought. Skeptics about the value of "stories" should be forced to reexamine their doubts upon reading his powerful and inspiring development of the idea of our constitutional project as a narrative of redemption. Much of the work on stories focuses on the standpoints of minority communities or outsiders.<sup>22</sup> Balkin shows how not only minority communities or outsiders, but also social movements in general, can bring about constitutional change by pressing their narratives of redemption.<sup>23</sup>

Third, Balkin offers a theory of constitutional change that is superior to Bruce Ackerman's account in *We the People* (both *Foundations* and *Transformations*).<sup>24</sup> Balkin shows that we do not need Ackerman's complex apparatus of amendment outside the formal procedures of Article V to give an adequate account of constitutional change and transformation after the Civil War and during the New Deal.<sup>25</sup> Instead, we do

19. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

20. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

21. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 11–24 (2006).

22. See, e.g., Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 65–68 (1983); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness As Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 7, 7–10 (1989); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 *MICH. L. REV.* 2073, 2077–84 (1989).

23. See BALKIN, *supra* note 19, at 25–26; BALKIN, *supra* note 3, at 81–89.

24. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

25. See BALKIN, *supra* note 19, at 195–203; BALKIN, *supra* note 3, at 74–99, 309–12, 139.

better with Balkin's (and Levinson's) idea of partisan entrenchment<sup>26</sup> and Balkin's (and Reva Siegel's) accounts of social movements.<sup>27</sup>

Fourth, Balkin develops the best account to date of constitutional legitimation and of what Justice Brennan and others have called "contemporary ratification."<sup>28</sup> In many formulations, the idea of contemporary ratification seems hardly more than a metaphor or slogan. Balkin richly describes the processes of constitutional legitimation and contemporary ratification through constitutional protestantism, social movements, and the like: the processes whereby the "basic law" of the Constitution becomes both "higher law" and "our law," not just an authoritarian imposition by people who are long dead and gone.<sup>29</sup> What is more, it is the best version of popular constitutionalism—both positive and normative—that I have read. On Balkin's account, constitutional law is not just a practice by judges and lawyers but also a practice of the people themselves.

Fifth, Balkin in these two books elaborates the best historically grounded, aspirational constitutionalism of which I am aware. He skillfully weaves together a constitutional historicism with an aspirational constitutionalism.<sup>30</sup> Many works that are historicist tend to be determinist or complacent, draining the critical and aspirational force from our constitutional commitments. Many works that are aspirationalist tend to be abstract and universalist, not sufficiently grounded in our particular history with our particular commitments. Though in places Balkin's historicism seems on the verge of getting the better of his aspirationalism,<sup>31</sup> the latter—his faith in the project of working out the best interpretations of our commitments—survives, indeed triumphs. His is a hortatory historicism and a grounded aspirationalism. Walking this tightrope is no easy task, but he pulls it off with considerable aplomb. My major criticism, suggested below, is that Balkin is too bashful about his aspirational constitutionalism—framing it within a constitutional historicism—and therefore he leaves unexplored the affinities between his own aspirationalism and more openly aspirational moral readings of the U.S. Constitution.

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26. See BALKIN, *supra* note 19, at 201; Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 489–502 (2006); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001).

27. See BALKIN, *supra* note 3, at 81–89; Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 929 (2006).

28. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986).

29. See BALKIN, *supra* note 3, at 41–49, 59–73.

30. See *id.* at 59–73; BALKIN, *supra* note 19, at 116–123, 174–225.

31. See, e.g., BALKIN, *supra* note 19, at 174–225.

*B. Five Great Things About Balkin's Critique of  
Conventional Originalisms*

Balkin's critique of conventional originalisms—in particular, original-expected-applications originalism—is a rout, cleverly developing cogent, dispositive criticisms. First, he shows that original-expected-applications originalism is not faithful to original meaning.<sup>32</sup> His own method of text and principle is more faithful.<sup>33</sup> The upshot of his analysis is that original-expected-applications originalism is inherently revisionist. Because of its substantive (conservative), institutional (restraint), and jurisprudential (rule of law as a law of rules) commitments, original-expected-applications originalism revises the Constitution—from our charter of abstract aspirational principles into a code of concrete historical rules—rather than being faithful to it.<sup>34</sup>

Second, Balkin skewers conservative originalism on the place of precedent in our constitutional practice. Conservative originalism treats precedents inconsistent with original expected applications as “mistakes” for which we have to make a “pragmatic exception” to originalism. Balkin shows, to the contrary, that many of these precedents are worthy achievements brought about through struggles over the meaning of our constitutional commitments, indeed, achievements that reflect wisdom and moral learning.<sup>35</sup>

Third, more generally, Balkin is devastating in his criticism of conventional originalisms on his three criteria for an acceptable constitutional theory: that a theory should conceive the Constitution as being capable of serving as “basic law,” “higher law,” and “our law.”<sup>36</sup> These are good criteria for assessing contending theories, and conventional originalisms fail abysmally on all of them, particularly the second and third. They fail to show why we should respect the Constitution as “higher law” (as an expression of worthy aspirations) and why we should affirm it as “our law,” as distinguished from viewing it as an authoritarian imposition by people who are long dead and gone.

Fourth, Balkin shows that most versions of original-public-meaning originalism are a sham: basically a public relations move to avoid the devastating criticisms of prior versions of originalism. In practice, most original-public-meaning originalists conceive original public meaning as basically original expected applications, and therefore they fall back into the problems of those prior versions of originalism.<sup>37</sup> Despite their new theoretical justification of originalism to evade the old criticisms, these original-public-meaning originalists leave the practice of originalist

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32. See BALKIN, *supra* note 3, at 100–12.

33. See *id.* at 3–20.

34. See *id.* at 106–08.

35. See *id.* at 10, 118–22.

36. *Id.* at 59–73.

37. See *id.* at 100–01, 103–05.

scholarship the same: they just go on digging up the concrete intentions and expected applications of the Framers (and, in some instances, the ratifiers).

Fifth, Balkin shows that original-expected-applications originalism fails because its proponents take it as axiomatically given and justified rather than making arguments for it.<sup>38</sup> Proponents typically assume it to be the only legitimate approach to interpretation. I have analyzed this problem in terms of the proponents' assumption of the "originalist premise."<sup>39</sup> The originalist premise is the assumption that originalism, rightly conceived, *is* the best—or indeed the only—conception of fidelity in constitutional interpretation. Put more strongly, it is the assumption that originalism, rightly conceived, *has to be* the best—or indeed the only—conception of constitutional interpretation. Why so? Because originalism, rightly conceived, just *has to be*. By definition. In the nature of things—in the nature of the Constitution, in the nature of law, in the nature of interpretation, in the nature of fidelity in constitutional interpretation! Axiomatically. Balkin is one of the few originalists I have seen whose work does not manifest the originalist premise. He argues brilliantly for his originalism as an account of fidelity, faith, and redemption<sup>40</sup> and, counterintuitively, for an originalism as the best account of constitutional legitimation and change.<sup>41</sup>

### III. BALKIN'S LIVING ORIGINALISM AS A MORAL READING OF THE CONSTITUTION

Balkin frames the central clash in constitutional theory as being between originalism and living constitutionalism.<sup>42</sup> He does a splendid job of developing the third way of a living originalism: a position that combines the appeal of both originalism and living constitutionalism and avoids the weaknesses of each.<sup>43</sup> Balkin's arguments for his living originalism over conventional varieties of originalism are absolutely cogent and thrillingly compelling. And his arguments for his living originalism over living constitutionalism are penetrating and persuasive.<sup>44</sup> But I would frame the central clash as being between originalisms and moral readings. And I want to bring out that Balkin's third way might be conceived not only as a living originalism but also as a moral originalism; that is, an abstract originalism that is also a moral reading of the Constitution.

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38. *Id.* at 6–12.

39. See BARBER & FLEMING, *supra* note 10, at 104; James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335, 1344 (1997).

40. See BALKIN, *supra* note 19, at 1–16, 247–50; BALKIN, *supra* note 3, at 74–99.

41. See BALKIN, *supra* note 19, at 232; BALKIN, *supra* note 3, at 35–38, 320–29.

42. See BALKIN, *supra* note 3, at 3.

43. See *id.* at 256–73.

44. I make this judgment notwithstanding my respect for David Strauss's recent book ably defending a living constitutionalism. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).



First, Balkin's method of text and principle conceives the Constitution as embodying not only rules but also general standards and abstract principles.<sup>45</sup> And he, like Dworkin and me, rejects efforts by originalists to recast abstract principles as if they were rules (or terms of art) by interpreting them as being exhausted by their original expected applications.<sup>46</sup> In interpreting these general standards and abstract principles, we have to make moral and political judgments concerning the best understanding of our commitments; history alone does not make these judgments for us in rule-like fashion.

Second, more generally, Balkin's living originalism—with his argument that fidelity to original meaning is owed to our abstract framework and commitments<sup>47</sup>—resonates with the Dworkinian idea of the Constitution as a charter of abstract powers and rights. It also resembles Dworkin's conception of the quest for fidelity in constitutional interpretation as pursuing integrity with a moral reading of the Constitution.<sup>48</sup>

Third, Balkin's conception of our constitutional principles as embodying abstract aspirations<sup>49</sup> accords with the aspirationalism of moral readings.<sup>50</sup> Our principles are not merely a historical deposit to be preserved but are moral commitments that we aspire to realize more fully over time.

Fourth, and relatedly, Balkin's ideas of faith and redemption resonate with a moral reading's commitment to interpret the Constitution so as to make it the best it can be.<sup>51</sup> (In my work, I have characterized this in terms of a commitment to a "Constitution-perfecting theory."<sup>52</sup>) Granted, moral readers like Dworkin and I do not generally speak in terms of faith and redemption. But there are unmistakable affinities here between Balkin's commitment to interpret the Constitution so as to redeem our faith in its promises and aspirations, and Dworkin's and my commitment to interpret the Constitution in its best light.

Fifth, Balkin's living originalism is also like a moral reading in recognizing simultaneously that (1) we should interpret the Constitution so

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45. BALKIN, *supra* note 3, at 23–34.

46. *See id.* at 42–45.

47. *Id.* at 21–34.

48. *See* RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7–12, 74–76 (1996) [hereinafter *DWORKIN, FREEDOM'S LAW*]; RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 125–29 (1993) [hereinafter *DWORKIN, LIFE'S DOMINION*]. I take the term "integrity" from Dworkin's conception of "law as integrity." RONALD DWORKIN, *LAW'S EMPIRE* 176–275 (1986) [hereinafter *DWORKIN, LAW'S EMPIRE*].

49. BALKIN, *supra* note 3, at 59–64.

50. *See* BARBER & FLEMING, *supra* note 10, at 75–76.

51. *See* DWORKIN, *LAW'S EMPIRE*, *supra* note 48, at 255 ("Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be.").

52. JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* 16 (2006).

as to make it the best it can be or to redeem our faith in its promises and aspirations, and yet (2) the Constitution in practice is highly imperfect.<sup>53</sup> I fear that Balkin may underappreciate this aspect of aspirational moral readings like Dworkin's. Indeed, I chastised him concerning this matter in my review of his other book, *Constitutional Redemption*.<sup>54</sup> *Living Originalism*, as well as *Constitutional Redemption*, reflects a "largely aspirational" view of constitutional interpretation.<sup>55</sup> Yet, in his other book, Balkin implies that some aspirational theories of constitutional interpretation are not as historically grounded in the recognition of constitutional evil as his is. He mentions the work of Sotirios Barber and Robin West, and he might have mentioned that of Dworkin.<sup>56</sup> Yet, if you seek authors who are prepared to condemn U.S. constitutional practice today as unjust, evil, and indeed teetering on failure, you need look no further than to the works of aspirationalists like Barber, West, and Dworkin.<sup>57</sup>

I have asked Balkin on several occasions what the difference is between his method of text and principle and Dworkin's moral reading of the Constitution. Each time I have asked Balkin this question, he has seemed perplexed or even annoyed with me for suggesting that there are similarities. Now that I have read *Living Originalism*, as well as *Constitutional Redemption*, I understand why. But I also understand more clearly than before how his theory is a moral reading.

Perhaps Balkin was annoyed because I asked what the difference is between his method of text and principle and *Dworkin's* moral reading. Perhaps I should have said, instead, that I think he has developed a compelling moral reading. Maybe Balkin would not have grimaced at that formulation. And then, perhaps I should have asked, what is the difference between his theory and *a* moral reading?

Now, why would Balkin be annoyed at my suggestion that there are similarities between his method of text and principle and Dworkin's moral reading? I have several speculations.<sup>58</sup> First, he is a postmodernist whose skepticism (about moral reality, right answers, best interpretations, and all things Dworkinian) makes him loathe to acknowledge any affinities to a theory that confidently contends that our principles have real meaning, that there are best interpretations of them, and the like.

53. See BALKIN, *supra* note 19, at 119–225; BALKIN, *supra* note 3, at 74–81.

54. I reviewed the manuscript of *Constitutional Redemption* for Harvard University Press.

55. See BALKIN, *supra* note 3, at 62; see also BALKIN, *supra* note 19, at 120.

56. BALKIN, *supra* note 19, at 262 n.27.

57. See generally RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE (2006); Sotirios A. Barber, *Constitutional Failure: Ultimately Attitudinal*, in THE LIMITS OF CONSTITUTIONAL DEMOCRACY 13 (Jeffrey K. Tulis & Stephen Macedo eds., 2010); Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765 (1992).

58. I found these speculations confirmed in Balkin's reply at the conference. Balkin's discussion of the difference between his and Dworkin's accounts of "principles," BALKIN, *supra* note 3, at 308–09, does not really speak to the question of whether Balkin's method of text and principle is a moral reading.

This point may come out more clearly in *Constitutional Redemption*,<sup>59</sup> but it is still evident in *Living Originalism*<sup>60</sup> (and his reply at the conference confirmed this point<sup>61</sup>).

Second, I speculate that Balkin is too much of a historicist to welcome suggestions of affinities to Dworkin's decidedly nonhistoricist views. This point, too, comes out more clearly in *Constitutional Redemption*,<sup>62</sup> but again, it is implicit in *Living Originalism*.<sup>63</sup>

Third, Balkin's theory grows out of, and aims to justify, a protestant constitutionalism and thus a popular constitutionalism.<sup>64</sup> He undoubtedly sees Dworkin as an exemplar of a catholic constitutionalism and a court-centered, antipopular constitutionalism.<sup>65</sup> But we should recall that Levinson, in his early work on the distinction between protestantism and catholicism in constitutional interpretation, interpreted Dworkin as a constitutional protestant on the question of who may authoritatively interpret the Constitution.<sup>66</sup> In any case, a moral reading is not necessarily a court-centered, antipopular vision. In fact, I daresay that constitutional protestantism and popular constitutionalism are most obviously expressed in the form of moral readings. For "the lawyerhood of all citizens"<sup>67</sup> celebrated by constitutional protestantism seems more likely to generate readings of the Constitution as embodying moral principles than as enacting lawyerly terms of art.

Fourth, and relatedly, Balkin's popular constitutionalism incorporates conceptions of social movements, constitutional legitimation, and change that seem deeply at odds with, or at least far afield from, Dworkin's emphasis on how the superhuman "Judge Hercules" decides hard cases.<sup>68</sup> Furthermore, on Dworkin's conception, it would seem that we must have an overriding concern to preserve the Constitution against social movements and the vicissitudes of our democratic culture and poli-

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59. Let me illustrate. Chapter two of *Constitutional Redemption* manifests an unacknowledged incongruity between Abraham Lincoln and Balkin. Balkin uses Lincoln to set up the idea of faith in the future and the Declaration of Independence's promise of a democratic culture. BALKIN, *supra* note 19, at 18–23. But Lincoln conceives that our narrative is dedicated to certain substantive ends: Lincoln's narrative has a known beginning and a known end, all justified by the normative status of the end. *Id.* Balkin (the postmodernist that he is) evidently cannot quite bring himself to conceive such a story; instead, his story is one of a commitment to a democratic culture, and we will just have to wait and see where it leads and where it ends. *See id.* at 23–32.

60. *See* BALKIN, *supra* note 3, at 74–81.

61. *See* Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 854–56.

62. *See* BALKIN, *supra* note 19, at 174–225.

63. *See* BALKIN, *supra* note 3, at 260–63, 268–70.

64. *Id.* at 17–18, 93–99; BALKIN, *supra* note 19, at 10, 61–72, 94–98.

65. BALKIN, *supra* note 3, at 328 & 349 n.12.

66. LEVINSON, *supra* note 20, at 42–44; Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123, 139–44.

67. Sanford Levinson, *The Specious Morality of the Law*, HARPER'S, May 1977, at 35, 99 n.\*.

68. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105–30 (1977).

tics.<sup>69</sup> Fair enough. But that is simply to observe that the substance of Dworkin's moral reading, and of his conception of legitimate constitutional democracy, is quite different from those of Balkin's moral reading. It is not to say that Balkin's theory is not *a* moral reading.

For all these reasons, and no doubt others that Balkin could provide, he bristles at the idea that his theory has affinities to *Dworkin's* moral reading. In the next Part, I want to add one more rhetorical reason, alluded to at the beginning of this Article, when I suggested that the only thing originalists can agree upon is that they reject moral readings.

#### IV. THE RHETORICAL STRATEGIES OF THIRD WAYS: AVOIDING THE ORIGINALISMS OF BERGER AND JUSTICE SCALIA AS WELL AS THE MORAL READING OF DWORKIN

I imagine that Balkin will resist my characterization of his living originalism as a moral reading. Furthermore, I expect that he will resist my embrace of his theory. Just as he would feel uncomfortable if, say, Raoul Berger, instead of turning over in his grave upon the publication of Balkin's *Living Originalism*, were to rise from the dead to embrace Balkin's theory. Let me explain by discussing the rhetorical strategy of third ways between originalisms and moral readings.

Years ago, when I taught at Fordham, I co-organized a conference on fidelity in constitutional interpretation<sup>70</sup>—for which Balkin wrote his piece *Agreements with Hell and Other Objects of Our Faith*.<sup>71</sup> I observed that many in constitutional theory seek to develop broad or abstract versions of originalism that follow a third way by avoiding the errors of narrow, concrete originalism, but also avoiding Dworkin's moral reading. Accordingly, I pointed out that broad or abstract originalists like Lessig make a virtue of distinguishing their theories from, on the one hand, those of Berger and Justice Scalia and, on the other, that of Dworkin.<sup>72</sup> Likewise, faint-hearted or moderate originalists like Justice Scalia make a virtue of distinguishing their theories from the originalism of Berger as well as from the moral reading of Dworkin.<sup>73</sup> Balkin no more wants to be identified with Dworkin's moral reading than Justice Scalia wants to be identified with Berger's old, bitter-pill originalism.

Dworkin and Berger are equal and opposite foils, whipping boys for originalists of most stripes. But Balkin shows that most conservative originalists, who officially adopt original-public-meaning originalism to

69. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 69–71 (1985) (presenting courts as “the forum of principle” as against the “battleground of power politics”).

70. Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997).

71. J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703 (1997). Balkin incorporated much of this article into his companion book. BALKIN, *supra* note 19, at 103–38.

72. Fleming, *supra* note 39, at 1353.

73. See Scalia, *supra* note 5, at 854, 861.

avoid the pitfalls of Berger's originalism, end up embracing original-expected-applications originalism and thereby veer over into Berger's originalism or something similar.<sup>74</sup> And I suggest that Balkin, who is at pains to differentiate his living originalism from Dworkin's moral reading, ends up propounding a method of text and principle that is the functional equivalent of a moral reading.

#### V. TWO CRITICISMS OF BALKIN'S METHOD OF TEXT AND PRINCIPLE

After all this praise for Balkin's method of text and principle, I shall close by making two criticisms. The first concerns theory of meaning, and the second relates to substantive vision of the Constitution.

Balkin says that we owe fidelity to the original meaning. And he says it is original semantic meaning, not original expected applications, that counts.<sup>75</sup> But it is not clear to me that he propounds an adequate theory of semantic meaning to do the job here. Balkin certainly has shown the difficulties of versions of originalism that equate original meaning with original expected applications.<sup>76</sup> And he certainly has shown that the relevant original meaning to which fidelity is owed is that of abstract, aspirational commitments, not specific historical expectations and applications.<sup>77</sup> But I think he is going to need more here by way of a theory of meaning than he provides to defend his originalism—his “semantic originalism,” if Larry Solum will forgive my appropriation of his term.<sup>78</sup>

Notably, Balkin's theory justifies one's having a substantive vision of the Constitution, but is not itself a substantive vision. That is, the folks who have faith in the Constitution and seek redemption of its aspirations have substantive visions of what the Constitution's core commitments are. In our world of constitutional protestantism, that is as it should be. But Balkin himself does not put forward a substantive vision of the Constitution's core commitments. In this respect, his book is unlike many other leading books in constitutional theory. For example, John Hart Ely's *Democracy and Distrust* is not just a theory of how to interpret the Constitution or a theory of judicial review: it also puts forward a substantive vision of the Constitution's core commitments, a theory of representative democracy.<sup>79</sup> And Cass Sunstein's *The Partial Constitution* is not just a theory of how to interpret the Constitution or a theory of judicial review: it also puts forward a substantive vision of the

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74. See BALKIN, *supra* note 3, at 100–08.

75. *Id.* at 12–14.

76. *Id.* at 100–08.

77. *Id.* at 59–64.

78. See Lawrence B. Solum, *Semantic Originalism* 2–10 (Univ. of Ill. Coll. of Law Ill. Pub. Law and Legal Theory Research Papers Series No. 07-24, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244).

79. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–104 (1980).

Constitution as embodying a theory of deliberative democracy.<sup>80</sup> Similarly, my *Securing Constitutional Democracy* is not just a theory of how to interpret the Constitution or a theory of judicial review: it also advances a substantive vision of the Constitution as embodying a constitutional democracy protecting basic liberties associated with deliberative democracy along with deliberative autonomy.<sup>81</sup> The same can be said of Dworkin's many works of constitutional theory.<sup>82</sup>

Substantively, I have no criticisms of Balkin's applications of his method of text and principle to, for example, the commerce power, the privileges or immunities clause, the equal protection clause, and the due process clause. These chapters are skillful, learned, compelling applications of the method to interpreting these important constitutional provisions (and we can see from them that Balkin embraces a progressive substantive vision of the Constitution). Balkin calls this fidelity to the original meaning.<sup>83</sup> I would call it "fit work" in service of a moral reading of the Constitution.<sup>84</sup> For he shows the grounding—in text, history, structure, and underlying principles—for a progressive moral reading of the Constitution. Thus, he shows that his reading, in Dworkin's terms, "fits" and "justifies" the Constitution.<sup>85</sup> The book is also a splendid illustration of how a progressive liberal moral reading of the Constitution can abundantly satisfy his three criteria for an acceptable constitutional theory: that it show the Constitution to be not only "basic law," but also "higher law" and "our law."<sup>86</sup> Balkin's oeuvre would be more satisfying if he applied the method of text and principle to develop and justify a substantive vision of the Constitution.

## VI. CONCLUSION: HYPOTHETICAL OF RERATIFYING THE FOURTEENTH AMENDMENT AS THE TWENTY-EIGHTH AMENDMENT

I shall end with a hypothetical that will suggest an important way in which Balkin's living originalism is more like a moral reading than like conventional originalisms. Let us imagine, in 2012, that We the People ratify the following Twenty-Eighth Amendment to the U.S. Constitution:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

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80. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 123–94 (1993).

81. FLEMING, *supra* note 52, at 61–85.

82. See, e.g., DWORKIN, *FREEDOM'S LAW*, *supra* note 48; DWORKIN, *LIFE'S DOMINION*, *supra* note 48.

83. BALKIN, *supra* note 3, at 35–49.

84. See Fleming, *supra* note 39, at 1353 (arguing that broad originalists come within the "big tent" of the moral reading, and provide support for the moral reading by grounding it in fit with historical materials).

85. For Dworkin's formulations of the two dimensions of best interpretation, fit and justification, see DWORKIN, *LAW'S EMPIRE*, *supra* note 48, at 239.

86. See BALKIN, *supra* note 3, at 59–73.

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Look familiar? Is this some kind of joke? Don't I know that the Fourteenth Amendment, Section 1, already contains this very text? But let us imagine that, out of worries about originalism's expiration date (to use Adam Samaha's formulation<sup>87</sup>) and out of concern to achieve contemporary ratification, We the People decide to ratify this language from 1868 in our own time of 2012. How would different varieties of originalists interpret this Twenty-Eighth Amendment? And how would moral readers like Dworkin?

I daresay that originalists like Scalia and Bork would say that we have to interpret the Twenty-Eighth Amendment exactly as we interpret the Fourteenth Amendment: as embodying the original public meaning or original expected applications as of 1868! One might think that, even on Justice Scalia's originalism, the relevant original public meaning would be that of 2012. That, even if the public meaning of 2012 is irrelevant in interpreting the Fourteenth Amendment, it would be centrally relevant in interpreting the Twenty-Eighth Amendment. And so, for example, "liberty" in 2012 would include substantive liberties like the right of a woman to decide whether to terminate a pregnancy, the right of gays and lesbians to intimate association, and the like, even if "liberty" in 1868 did not include such rights. But Justice Scalia and Judge Bork do not take the view that the meaning of the Fourteenth Amendment's due process clause is different from that of the Fifth Amendment's due process clause, even though one was ratified in 1868 and the other in 1791. To the contrary, they argue (or assume) that the meaning of the two is identical.<sup>88</sup> I fully expect that they would argue that the meaning of the Twenty-Eighth Amendment is exactly the same as the meaning of the Fourteenth Amendment as of 1868.

I also daresay that a living originalist like Balkin and a moral reader like Dworkin would say that we should interpret the Twenty-Eighth Amendment exactly as we have been interpreting the Fourteenth Amendment: as embodying the best understandings of privileges or immunities, due process, and equality as of 2012. Balkin, because of his theory of constitutional legitimation and change, with its understanding of contemporary ratification, can say this without difficulty or embarrassment. So can Dworkin. But I believe that my hypothetical should pose difficulty and embarrassment for Justice Scalia's and Judge Bork's versions of originalism. It suggests that they would resist the idea of contemporary ratification even in circumstances of contemporary ratification!

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87. Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1364 (2008).

88. See, e.g., BORK, *supra* note 1, at 83.