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The Balkanization of Originalism

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THE BALKANIZATION OF ORIGINALISM

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Are we all originalists now? If anything would prompt that question, it would be Ronald Dworkin and Jack Balkin dressing up their theories in the garb of originalism (or, at any rate, being interpreted as originalists). For they are exemplars of two *bête noires* of originalism as conventionally understood: namely, the moral reading of the Constitution, and pragmatic, living constitutionalism, respectively.[1] Yet in recent years Dworkin has been interpreted as an abstract originalist[2] and Balkin has now embraced the method of text and principle, which he presents as a form of abstract originalism.[3]

Randy Barnett greeted Balkin's paper with glee, proclaiming that if Balkin is an originalist, we are all truly originalists now.[4] I have the opposite reaction. I believe that Balkin's paper marks a significant moment in the history of pragmatic constitutional theory: the moment when a leading hitherto pragmatic living constitutionalist embraced the method of text and principle, an approach to constitutional interpretation that is for all intents and purposes

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1. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 38–47 (1997) (critiquing "the living Constitution"); *id.* at 144–49 (critiquing Dworkin's "moral reading" of the Constitution); ROBERT H. BORK, THE TEMPTING OF AMERICA 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").

2. *See, e.g.*, Amy Gutmann, *Preface* to SCALIA, *supra* note 1, at 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"); 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, *Abortion and Original Meaning*, 24 CONST. COMMENT. (forthcoming).

4. Randy E. Barnett, Remarks at the Maryland Constitutional Law Schmooze (Dec. 1, 2006).

equivalent to Dworkin's moral reading. And so, I want to turn Barnett's question around and ask: Are we all moral readers now?

But first I want to recall Scalia's famous put-down of "nonoriginalists" in *Originalism: The Lesser Evil*.[5] He argued as if the originalists were united in their conception of constitutional interpretation and asserted that they were opposed by a motley group that he dubbed the "nonoriginalists." He claimed that the only thing that these "nonoriginalists" could agree upon was that originalism is the wrong approach.[6] He added, invoking a maxim of elective politics, "You can't beat somebody with nobody," suggesting that there really wasn't a viable alternative to originalism.[7]

I want to turn this assertion around as well and observe that there are numerous varieties of originalism, and the only thing they agree upon is their rejection of the moral reading. Let me just list some of the varieties. It all began with conventional "intention of the Framers" originalism.[8] Then it became "intention of the ratifiers" originalism.[9] Of course we also have "original expectations and applications" originalism (what I elsewhere have called "narrow," or "concrete," originalism).[10] Then came "original meaning" originalism (officially, this is now the position of not only Scalia but also Barnett).[11] Scalia himself distinguished "strong medicine" originalism from "faint-hearted" originalism.[12] Then came "broad" originalism (advocated by Larry Lessig and many others).[13] Now comes "the new originalism" (so characterized by Keith Whittington) as distinguished from "the old originalism."[14] Finally, we add "abstract" originalism (which some

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

6. *Id.* at 855.

7. *Id.* at 852–55.

8. *E.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY 1–10 (1977).

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

10. *See* SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION 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 89–94 (2004) (explaining the movement to, and advantages of, original meaning originalism).

12. *See* Scalia, *supra* note 5, at 861–62.

13. *See, e.g.*, Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171–73 (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, 607–10 (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).

have attributed to Dworkin).[15] And of course we must not forget Balkin's "method of text and principle," a form of abstract originalism.[16] With all due respect to Randy Barnett, given how much these versions of "originalism" differ, it would not mean much to claim that this display shows that we are all originalists now. Indeed, we are witnessing the Balkanization of originalism (as well as the Balkinization of it).

Furthermore, there is a trick in the question "Are we all originalists now?" Even to pose the question seems to presuppose what I shall call "the originalist premise." To answer the question affirmatively certainly shows this presupposition. The originalist premise is "the assumption that originalism, rightly conceived, *is* the best, or indeed the only, conception of fidelity in constitutional interpretation."[17] 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!

Worse yet, raising the question "Are we all originalists now?" may presuppose that we have all come around to Scalia's and Bork's way of thinking, without conceding that their versions of originalism themselves are moving targets that have moved considerably toward the positions of their critics. To illustrate, let's have a pop quiz. Read the following passage:

> In short, all that a judge committed to original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows. It does not follow without difficulty, and two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at

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15. *See supra* note 2.

16. *See supra* note 3.

17. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1344 (1997) (emphasis added); *see also* BARBER & FLEMING, *supra* note 10, at 104 (stating that the originalist premise "is the assumption that some form of originalism just has to be the only approach to the Constitution that is truly faithful to it").

different results, but that in no way distinguishes the task from the difficulties of applying any other legal writing.

Who wrote the passage? Choose from the following:

1. Lawrence Lessig (a broad originalist)
2. Ronald Dworkin (proponent of a moral reading of the Constitution)
3. Robert Bork (an old originalist)
4. Keith Whittington (a new originalist)
5. Jack Balkin (a "method of text and principle" originalist)

The correct answer: (3) Robert Bork![18] I bet that at least some readers got the answer wrong. And I bet that some thought that the correct answer might be any of the choices besides Bork. The passage suggests that, whether or not Bork would admit it, he has made spectacular concessions to critics of originalism like Dworkin. For example, notice how abstractly he conceives original understanding (e.g., note his reference to "principle" or "value"). And notice how open to judgment he acknowledges interpretation to be (it does not sound like interpretation is simply a matter of discovering historical facts that are dispositive, as opposed to elaborating abstract principles or values). Finally, notice how slippery he is in moving from original understanding to original purpose (after already moving, off stage, from intention of the Framers to original understanding of the ratifiers).

Thus, I ask, are we all moral readers now?

18. BORK, *supra* note 1, at 162–63.