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### Constitutional Principles

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## CONSTITUTIONAL PRINCIPLES

DAVID LYONS\*

Principles that are not given by the constitutional text are sometimes attributed to the Constitution. This is done within Professor Balkin's "framework originalism."<sup>1</sup> The question I wish to consider is how it may properly be done. How can it be shown that the Constitution is committed tacitly to a given principle? I shall discuss Balkin's theory with that question in mind.

Balkin presents framework originalism as a mean between mistaken extremes – between "conservative originalism," which holds that constitutional meaning is completely settled, and "living constitutionalism," which regards constitutional meaning as forever unsettled.

Framework originalism holds, first, that the Constitution's text should be understood in terms of its "semantic content."<sup>2</sup> I understand this to be the view that the meaning of the text is determined by the linguistic conventions that existed when the Constitution or an amendment was ratified. That would, at any rate, be the commonsensical, default position, which requires no justification. Any other approach to text meaning would require substantial justification. That, I take it, is the *originalist* aspect of Balkin's theory.

Framework originalism holds, second, that the Constitution provides a "plan" for developing a system of governance. This, too, is the default position. The Constitution provides for a Congress, a President, and a Supreme Court, whose respective authorities it outlines. But the Constitution does not generally tell Congress what laws to enact, how the President should enforce the law, or how the Supreme Court should adjudicate. So the Constitution leaves much to be done by those who are authorized under it to make and apply laws. That, I take it, is the *framework* aspect of Balkin's theory.

Framework originalism holds, third, that as the Constitution's plan is mainly given in general terms, it frequently requires interpretation. Interpretations are provisional and might reasonably be changed. Changing circumstances may generate reasons for questioning a prevailing interpretation, and amendments call for a revised interpretation of the modified document. As framework originalism accepts facts like these, it is presented by Balkin as a kind of *living* originalism. That, too, seems right.

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\* Revised version of comments presented at the Boston University School of Law symposium on November 3, 2011.

<sup>1</sup> JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

<sup>2</sup> *Id.* at 12.

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Balkin stresses that constitutional interpretation involves ascribing principles to the Constitution, principles that are not laid down by its text. He calls them “underlying principles”<sup>3</sup> and distinguishes two kinds. Some concern the constitutional system as a whole.<sup>4</sup> Others, like freedom of expression, concern the substance of specific provisions.<sup>5</sup> I shall mainly be concerned here with principles of the latter kind. The question I want to pursue is what kind of relation Balkin supposes such a principle has to the Constitution. What, in his view, counts as a good argument for ascribing a principle to the Constitution?

Let me illustrate each of these kinds of principles. Balkin refers to the separation of powers as a principle of the first kind.<sup>6</sup> I would put the matter somewhat differently. The text entails a division of legal authority among decision makers. That complex fact is the separation of powers. We might call it a principle, but so far it merely provides a label for a complex fact. It does not explain the division of authority that is specified by the Constitution or provide a basis for deciding relevant cases when they arise. It does not offer a formula telling us which powers are, and ought to be, shared and between what offices.

We may theorize about the separation of powers by citing a value that we believe it implements, such as the prevention of concentrated power. If in hard cases we interpret and apply the Constitution so power is effectively diffused, we are treating the Constitution as committed to the prevention of concentrated power. We may then refer to *that* value as a constitutional principle.

For a principle of the second kind, consider the Takings Clause. It tells us that private property that is taken for public use must be justly compensated, without telling us how to determine just compensation. If we believe there is a fact of the matter about just compensation (which might vary with context), we may try to identify such a principle. As the Constitution calls for just compensation, it calls in effect for the application of a sound principle concerning justice in compensation. We may then attribute that principle to the Constitution.<sup>7</sup>

I take the following for granted. If a theory that contemplates the ascription of principles to the Constitution does not assume that such an attribution is inherently, irremediably arbitrary, it should tell us how to distinguish reasonable from unreasonable attributions. It should also tell us whether it is possible for some attributions to be uniquely sound.

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<sup>3</sup> *Id.* at 259.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 259-60.

<sup>6</sup> *Id.* at 259.

<sup>7</sup> We might of course be mistaken about what constitutes just compensation, in which case our interpretation of the Takings Clause will be correspondingly mistaken.

Balkin appears to endorse the latter position, for he refers to some interpretations as “correct”<sup>8</sup> and others as “wrong.”<sup>9</sup> The question, then, is how he distinguishes reasonable from unreasonable attributions of principles to the Constitution. What does he regard as a good attributional argument? Balkin appears to suggest an answer in the following passage:

To understand the text, we need to put ourselves “on its side,” honestly attempting to further what we believe to be its purposes as best we can understand them. To do this we can and should bring to bear all of the traditional modalities of constitutional argument, including history, structure, and consequences.<sup>10</sup>

If texts have purposes, they must be given those purposes by people. Two obvious possibilities of the donors are (1) those who created the text (the Framers) and (2) those who apply the text (the interpreters). Given Balkin’s rejection of conservative originalism, one might expect him to reject possibility (1).<sup>11</sup> Given his endorsement of living originalism, one might expect him to entertain possibility (2).

Let’s consider, for example, Balkin’s discussion of equal protection. Balkin interprets the provision mainly on the basis of statements made by Framers (in this case, principal supporters) of the provision, supplemented by references to subsequent case law.

Balkin maintains, first, that “equal protection” concerns more than equal enforcement of the law; he maintains that “equal protection” refers to *equality before the law*.<sup>12</sup> Surprisingly, he takes that equivalence to be more or less obvious. In case anyone should have doubts, he offers statements by Framers of the proposed amendment as supporting evidence. I wish to focus on that use of evidence, specifically the following passage from *Living Originalism*:

In the debates on the Fourteenth Amendment, the Framers articulated a number of different and overlapping conceptions of equality before the law. Taken together, they prohibited four different types of unequal treatment. The first was legislation that made arbitrary and unreasonable distinctions between persons. The second was “class legislation,” consisting of “special” or “partial” legislation that unjustifiably singled out a group for special benefits or special burdens. The third was “caste” legislation – that is, legislation that created or maintained a disfavored caste or subordinated a group through law. The fourth was legislation

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<sup>8</sup> *Id.* at 132; *cf. id.* at 85.

<sup>9</sup> *Id.* at 4; *cf. id.* at 132.

<sup>10</sup> *Id.* at 205.

<sup>11</sup> Except that conservative originalism, as Balkin explains it, looks to applications that were contemplated by the framers, not the purposes they wished the legal change to serve. More on this below.

<sup>12</sup> *Id.* at 222-23.

that selectively restricted or abridged basic rights of citizenship and that therefore treated people as second-class citizens.<sup>13</sup>

I believe a fair summary of the view embodied in *Living Originalism* is this: The original meaning of “equal protection” is equality before the law. The four principles given above refer to types of unequal treatment that would violate the requirement of equality before the law (and thus would violate the requirement of equal protection). But the principles themselves are not entailed by the concept of equality before the law. Taken together, their relation to that general requirement is like the relation between an abstract concept and a more concrete “conception”<sup>14</sup> or, as Dworkin would put it, an interpretation of the concept.<sup>15</sup> The principles amount to a theory, possibly incomplete, of how to implement the Equal Protection Clause.<sup>16</sup>

The quoted passage seems to imply that our understanding of the Equal Protection Clause should be guided by Framers’ expectations of how the clause would be applied. And that use of historical evidence might seem to clash with Balkin’s rejection of conservative originalism, which he understands to hold that interpretation should be based on the Framers’ expectations of how the Constitution would be applied.

Can Balkin’s use of statements by Framers of the Equal Protection Clause be reconciled with his rejection of conservative originalism? I believe so.

The question is, “What kind of reasoning makes statements by Framers relevant to a proper understanding of the equal protection clause?” More specifically, “What entitles us to regard the principles cited by a couple of Framers as principles that underlie that constitutional provision?”

It is worth stressing that conservative originalism offers no tenable answer to this kind of question. In this I agree with *Living Originalism*.<sup>17</sup> It may be useful to explain why.

According to *Living Originalism*, conservative originalists hold that the Constitution’s meaning is determined by what the Framers<sup>18</sup> had in mind, but

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<sup>13</sup> *Id.* at 221-22 (footnotes omitted).

<sup>14</sup> *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 9 (1971).

<sup>15</sup> *See* RONALD DWORKIN, LAW’S EMPIRE 45-86 (1986).

<sup>16</sup> BALKIN, *supra* note 1, at 259.

<sup>17</sup> But I believe its critique of conservative originalism does not identify the view’s deep, fatal flaws. *See* Lyons, *Original Intent and Legal Interpretation*, 24 AUSTL. J. LEGAL PHIL. 1 (1999).

<sup>18</sup> We have at least as much reason to follow what the adopters (the actual lawmakers) had in mind. If we were to take them into account, too, the theory’s ambiguity and complexity would ramify accordingly. To simplify matters, I shall ignore the gap between framers and adopters. I think one reason we look to framers, such as the authors of the *Federalist Papers*, is that we think they had good ideas about constitutional design. In that respect, originalist theorizing may not be value-neutral as claimed but rather driven (perhaps unconsciously) by value judgments.

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in practice they refer only to how the Framers expected the Constitution to be applied.<sup>19</sup>

As so far described, conservative originalism is ambiguous. It might be understood to hold in general that the meaning of any text is determined by what was going on in the minds of its authors. That would be implausible. It would imply, for example, that what I write or say cannot fail to express what I have in mind. No one believes this, and for good reason. Speakers and writers often come to see that they have used the wrong words to express what they had in mind. It is possible for this to happen – it is possible for me to use the wrong words to express what I have in mind – precisely because words have conventional meanings (what Balkin calls their semantic content) that are *not* determined by what their user has in mind on a particular occasion.

Given those truisms, conservative originalism might alternatively be understood to hold that there is a special reason to understand *legal* texts (or specifically the Constitution) in terms of what was going on in the minds of its Framers. But, as far as I can see, no plausible reason has ever been offered to support such an approach to legal (or specifically constitutional) interpretation.

So the question we face is, “Why should interpretation of the Equal Protection Clause be guided by statements that were made by a couple of its Framers?” I shall consider three possible answers to that question – three possible interpretations of *Living Originalism*’s willingness to be guided by such statements.

We might suppose, first, that *Living Originalism* regards the Framers’ statements as expressing the public’s understanding, at the time, of what equality before the law requires. But *Living Originalism* does not claim any such thing. It does not even argue that the quoted statements represent a controlling consensus within the Republican-dominated Congress that proposed the Fourteenth Amendment. And, even if those statements did express Congress’s understanding of the clause, that would not show that the wider public embraced the same understanding of the clause. *Living Originalism* suggests the contrary when it observes that “Congressional Republicans as a group were probably more racially egalitarian than much of the public.”<sup>20</sup>

A second possible answer to the question, “Why should interpretation of the Equal Protection Clause be guided by statements that were made by a couple of its Framers?” is that such an approach reflects a convention within the legal system. This would be like the convention that reports of congressional

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<sup>19</sup> This practice ignores other things the Framers presumably had in mind that would seem equally relevant to such a view, especially what they hoped to achieve by their lawmaking – their intended purposes. If we take the relevant purposes into account, the result is a theory that generates contradictions, because contemplated or intended applications sometimes undermine intended purposes, so that interpretation based on one species of “original intent” clashes with interpretation based on the other species.

<sup>20</sup> BALKIN, *supra* note 1, at 223.

committees, when uncontested, are to be used by courts that are charged with interpreting legislation.<sup>21</sup> But *Living Originalism* gives us no reason to suppose that there is such a convention or that the statements made were not contested.

A third possible answer to the question, “Why should interpretation of the Equal Protection Clause be guided by statements made by a couple of its Framers?” is that the statements make good sense of the Equal Protection Clause. Or, as Balkin also puts it, those particular statements help us to construe the Fourteenth Amendment so that its application contributes to a favorable view of the Constitution.

This answer is suggested in the following way. *Living Originalism* tells us that one must proceed with the “belief that the Constitution is worth preserving, despite its faults, and that even if the Constitution-in-practice permits serious injustices in the present, our commitment to the plan will be redeemed in the future.”<sup>22</sup> What’s required is a

spirit of charity toward the past, when we see it as striving or aspiring to the goals of the Preamble – “to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.”<sup>23</sup>

This seems to tell us that we should interpret the Constitution as favorably as possible, so that it lives up to its stated values – values to which one can hardly take exception – at least as far as that is compatible with a reasonable reading of the text. Such an approach would provide us with a criterion of interpretive soundness. When *Living Originalism* is itself read in “the spirit of charity,” it seems to embody that approach to constitutional interpretation.<sup>24</sup>

Balkin does not defend this approach in general terms. Instead, he claims that sound interpretation of the Constitution requires that one be convinced that the constitutional future will be better than the past; that “[f]idelity to the Constitution requires faith [not only] in the value [but also in the] ultimate success of the constitutional project.”<sup>25</sup> It is unclear why one must believe not only that the Constitution-in-practice *may* become more just but also that it *will* become more just. That seems to be asking too much, and for no good reason.

There is good reason not to encourage faith in the outcome. It might suggest that the best policy is political passivity. That is not the way constitutional progress can be made and has been made. Without the civil rights movement,

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<sup>21</sup> Dworkin suggests that there is such a convention regarding statutory construction, in *A MATTER OF PRINCIPLE* 320-22 (1985).

<sup>22</sup> BALKIN, *supra* note 1, at 58.

<sup>23</sup> *Id.* at 269. I shall not try to interpret the idea that the Constitution could somehow be “striving or aspiring.”

<sup>24</sup> This approach may remind us of “constructive interpretation” as developed by Dworkin in *Law’s Empire*. See DWORKIN, *supra* note 15.

<sup>25</sup> BALKIN, *supra* note 1, at 77; *cf. id.* at 79.

for example – a movement that entailed not only widespread sacrifice over considerable time but invaluable lives lost in the process – there would have been no *Brown v. Board of Education*,<sup>26</sup> no Civil Rights Act of 1964,<sup>27</sup> no Voting Rights Act of 1965,<sup>28</sup> and no opportunity for the courts to enforce them. Faith will not cut it.

Here's a different suggestion. As law, the Constitution profoundly affects our most vital interests and our most important social relations. That provides adequate reason to construe the Constitution so that it promotes as far as possible the values of the Preamble.<sup>29</sup> As the moral requirement does not assume that things *will* get better, it is unclear why interpretation should make that assumption.

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<sup>26</sup> 347 U.S. 483 (1954).

<sup>27</sup> Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 28 U.S.C. § 1447 (2006) and 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (2006)).

<sup>28</sup> Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973bb-1).

<sup>29</sup> See DAVID LYONS, *MORAL ASPECTS OF LEGAL THEORY: ESSAYS ON LAW, JUSTICE, AND POLITICAL RESPONSIBILITY* 194-96 (1993).