2007

The Progressive Political Power of Balkin's "Original Meaning"

Dawn Johnsen

THE PROGRESSIVE POLITICAL POWER OF BALKIN'S "ORIGINAL MEANING"

*Dawn Johnsen**

Jack Balkin's *Abortion and Original Meaning* should be widely read and debated, not only by constitutional theorists but by a broad range of those who care about his subject: how the United States interprets its foundational document. How should those who are part of that interpretive enterprise—from federal judges to "we the people"—go about the process of defining our core constitutional principles and who we are as a nation? And how should that interpretive process apply to one of the most controversial issues of the day, abortion?

Constitutional theory, of course, is the subject of an enormous scholarly literature, and others have agreed with Balkin that the Constitution is both binding law that requires fidelity (over preferred policy outcomes) and "living" in its application to changing times. One obvious question for Balkin—and for anyone writing in the area—is what he adds to the existing literature. By standard measures familiar to legal academics, he contributes much: a jurisprudentially strong interpretive theory that emphasizes the centrality of original meaning from what can be described as a progressive perspective. Fidelity to the Framers does not require, as some originalists suggest and some progressives fear, freezing constitutional norms to the narrow original expectations of the Framers. Nor does a living Constitution approach require disregarding the Framers' original meaning.

This comment, though, explores a more unorthodox and indirect contribution: the articulation of a progressive interpretive methodology that is not only strong jurisprudentially, but that also offers the potential for relatively broad accessibility and political efficacy, for the Constitution outside the courts and the

* Professor of Law, Indiana University School of Law – Bloomington. I am very grateful to my excellent research assistants Jeff Macey and Aaron Stucky and for helpful comments from Daniel O. Conkle, Robert Post and H. Jefferson Powell.

constitutional influences of social movements. In a working democracy, constitutional theory has import beyond academia. That import is particularly pronounced at a time when influential elected officials continue a decades-long assault on "activist" judges, with charges that those who protect constitutional rights and liberties seek illegitimately to "make" (as in "make up") rather than "interpret" law. The nation has special need for prominent scholars who can develop and explain principled constitutional theory in popularly accessible and politically effective terms. Balkin's prior work establishes his preeminence in this regard, and this latest article brings his abilities to the pressing and enduring issues of the role of original meaning and the constitutional status of abortion bans.

The issues of originalism and abortion illustrate that academics on the ideological right have excelled at reaching beyond academic circles to shape politics and public policy. As Professors Robert Post and Reva Siegel have recently observed, the extensive scholarly criticism of originalism since its rise in the 1980's, while impressive on its own terms, is incomplete in its inattention to the actual terms of originalism's remarkable successes.[1] The literature exposes the deficiencies of originalism as an interpretive methodology, most notably its inaccuracies and inconsistencies, and quite convincingly devastates its jurisprudential claims. Yet originalism's enormous influence has come less as a theory of jurisprudence than as a highly persuasive political ideology that inspires passionate political engagement. The right uses both originalism and abortion to far greater political advantage than public opinion polls would predict, including to impugn the constitutional fidelity of "nonoriginalists" and supporters of *Roe v. Wade*.[2]

Progressives will benefit from *Abortion and Original Meaning*, whether or not they are steeped in constitutional theory. As they read, they will feel their spirits soar and at times will silently (perhaps audibly) cheer. They will be empowered as Balkin provides deepened understanding and improved ways of articulating their constitutional views. Balkin eloquently demonstrates that progressives, no less than originalists of the traditional stripe, care about fidelity to the constitutional text, adherence to consti-

1. Robert Post & Reva Siegel, *Originalism As A Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006); *see generally* Dawn Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century*, 1 HARV. L. & POL'Y REV. 239 (2007).

2. 410 U.S. 113 (1973).

tutional principle, and respect for the intent of the Framers of that great document. And his approach to original meaning encourages belief that the Constitution indeed is a great document, susceptible of principled interpretations that promote equality and liberty for all.

Originalists of the traditional stripe from the ideological right no doubt will remain unmoved. They will contest Balkin's premise that original meaning and living constitutionalism are compatible—that originalists have fostered a false dichotomy between the two by conflating the original meaning of the constitutional text (which Balkin says must constrain interpretation) and the text's "original expected application" (endorsed by originalists like Justice Antonin Scalia). Originalists certainly will oppose Balkin's attempted appropriation of the phrase "original meaning." They will disagree especially with Balkin's view of the original meaning of the Fourteenth Amendment's Equal Protection and Privileges or Immunities Clauses as protective of reproductive liberty. Balkin anticipates such responses and notes that, to the extent they come, he will have succeeded in structuring the debate on appropriate terms.

Balkin's "text and principle" methodology should be evaluated in comparison with the longer litany of interpretive sources and methods that the Court traditionally uses and progressives typically endorse. That list includes: text, structure, original meaning, original expected application (to use Balkin's phrase), judicial doctrine, political branch practice, settled expectations, consequences, and the nation's tradition, ethos and values.[3] Balkin describes his approach more simply: "constitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles that underlie the text."[4]

---

3. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (describing six modalities of constitutional argument: historical, textual, structural, doctrinal, ethical, and prudential); H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 208 (2002) ("In constitutional argument it is legitimate to invoke text, constitutional structure, original meaning, original intent, judicial precedent and doctrine, political-branch practice and doctrine, settled expectations, the ethos of American constitutionalism, the traditions of our law and our people, and the consequences of differing interpretations of the Constitution."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 85 (3rd ed. 2000) (theorizing that appropriate modes of constitutional interpretation include "text, structure, history, the nation's values or ethos, and doctrine").

4. Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007). Balkin continues, "[t]he task of interpretation is to look to original meaning and underlying principle and decide how best to apply them in current circumstances." *Id.* Some principles follow directly from particular text, while others must be inferred from the constitutional structure (such as separation of powers and democracy). Fidelity to

The disparity between the approaches is not as great as it might initially seem, because Balkin would allow appropriate consideration of these other sources (including original expected application) as aids to interpretation. He would recognize, however, a hierarchy of methods in that only text and principle (interpreted in light of original meaning) control interpretation and are essential to constitutional fidelity. Balkin explains the secondary status of other methods in part by urging that we view citizens, not courts, as the standard interpreters when considering what constitutes constitutional fidelity. This point is fundamental, and in my view accurate. Constitutional interpretation by judges raises special institutional considerations, including the need for additional interpretive constraints. Thus, courts employ a range of doctrinal devices that constrain their authority and role, such as deferential standards of review, political question doctrine, and standing and other jurisdictional requirements. Presidents and Congress also play important interpretive roles, though they face their own constraints. In place of the typical court focus, Balkin emphasizes the substantial work of social and political movements—"the lifeblood of fidelity to our Constitution"—as "[e]ach generation makes the Constitution their Constitution by calling upon its text and its principles and arguing about what they mean in their own time."[5]

Balkin's emphasis on text and principle is very appealing, and debate about its relative merits will surely advance constitutional theory. For now, I want to return to Post and Siegel's observation that originalism has succeeded primarily as a political ideology that has motivated political engagement and action. Progressives, too, must consider the political viability of how they respond to originalism and how they articulate their preferred interpretive methodology. On this score, "text and principle" shows promise. The longer standard litany of sources and methods to my mind is clearly correct and within the jurisprudential mainstream. With a nonexpert audience, though, it risks creating the (mis)impression of inappropriate indeterminacy and unprincipled discretion left to the interpreter, who can pick and

---

text requires consideration of principle as well because, although some constitutional text is relatively concrete and specific, other text describes relatively abstract and general concepts. Balkin's approach is consistent with the relatively familiar argument that when the Framers chose to use text that describes abstract and general concepts, they typically sought to embody abstract and general principles that must be fleshed out by later generations.

5. *Id.* at 302, 301.

choose to suit desired ends—and, in the case of conflict, even disregard text and principle.

By emphasizing which among the methods are essential to constitutional fidelity and affirming the centrality of original meaning (properly defined), Balkin reclaims for progressives both the document and the Framers. Progressive interpretive theory arguably cannot succeed—and should not succeed—either jurisprudentially or politically unless it in some measure acknowledges the primacy of the text and the relevance of original meaning.

Balkin's popularly accessible narrative is not only politically viable, but potentially politically superior to originalism. Justice Scalia, like many originalists, tolerates for the sake of stability some decisions that he believes the Court as an initial matter decided incorrectly by failing to adhere to the original expected application. Balkin explains that this frequent need to resort to stare decisis reveals a fatal inadequacy of originalism:

> Our political tradition does not regard decisions that have secured equal rights for women, greater freedom of speech, federal power to protect the environment, and federal power to pass civil rights laws as mistakes that we must unhappily retain; it regards them as genuine achievements of American constitutionalism and sources of pride. These decisions are part of how and why we understand ourselves to be a nation that has grown freer and more democratic over time. No interpretive theory that regards equal constitutional rights for women as an unfortunate blunder . . . can be adequate to our history as a people.[6]

This is but one of many statements in *Abortion and Original Meaning* that will cause progressive readers, beaten down from years of rhetoric about illegitimate judicial activism, enthusiastically to jot in the margins, and think "this is the America I know and love." Under Balkin's theory, revered judicial rulings that protect cherished rights and expand political inclusion for those previously disfavored were correct when issued and are consistent with original meaning. They should be celebrated as American constitutionalism at its best, not excused as unfortunate but sturdy precedents.

The article's promise for political influence is enhanced by its application of the "text and principle" approach to *Roe v.*

6. *Id.* at 298–99.

Wade and the constitutional status of abortion, originalists' most frequent target. Even many self-described progressives and liberals find *Roe* difficult to defend. As in the case of originalism, constitutional arguments about the government's authority to restrict abortion have reached beyond academia, far more than the vast majority of constitutional issues, to have profound political impact. As Supreme Court cases go, *Roe* is widely recognized and debated. Scholars are joined by anti-abortion advocates and elected officials in relentless attacks that claim the right to privacy is unsupported by either the constitutional text or the Framers' intent—and that those who disagree are unprincipled, anti-democratic judicial activists.

Balkin's compelling account of why what he terms the "conventional wisdom" on *Roe* is wrong will inspire and empower supporters of *Roe* and legal abortion, who desperately need improved articulations of the right that can persuade not only (or primarily) courts but also political actors and ultimately the public. Unlike *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[7] in which the Court eloquently described the nature of the right at stake but rested as well on arguments from *stare decisis*, Balkin provides an entirely affirmative account of why the original meaning of the Constitution is best interpreted as affording women protection from abortion bans. He explains why *Roe* is best viewed as entirely faithful to constitutional "text and principle."

Although the Fourteenth Amendment does not use the word "privacy" (a point *Roe* opponents repeat ad nauseam), it does speak of "liberty" in the Due Process Clause, which the Court has interpreted as protecting private decision-making regarding childbearing. Balkin personally finds greater protection for the right to choose abortion in the original meaning of the Citizenship, Privileges or Immunities, and Equal Protection Clauses. Those clauses, which on his reading the Court has misinterpreted and underenforced, guarantee a right of equal citizenship that prohibits the state from subordinating women or assigning them second-class status based on their capacity to become pregnant. For some contemporary, especially non-legal, audiences, this emphasis on women's equality and sexual subordination will not directly translate into political messages as persuasive as the traditional focus on privacy and individual liberty. But Balkin's discussion of alternative sources of the abortion

7. 505 U.S. 833 (1992).

right and how the Court came to locate it in the Due Process Clause helps provide a more complete and accurate picture of the nature of the right and its import to women—a picture of the right, moreover, that is grounded in the politically powerful and legitimizing language of text and original meaning.[8]

I do question one aspect of Balkin's analysis: his suggestion that we should view the abortion right as two separate rights. Other commentators, including Supreme Court Justices, have considered the right in its component parts.[9] That exercise can prove extremely useful. The particular division Balkin endorses, though, seems to me theoretically incomplete and possibly politically and practically inadequate. His first right, "a woman's right not to be forced by the state to bear children at risk to her life or health," essentially tracks the Court's consistent recognition to date, from *Roe* to *Casey* to *Stenberg*,[10] that the government may not impose on women significant threats to their health. A woman therefore must be permitted to terminate a pregnancy at any point, even after fetal viability, if her health is endangered. This aspect of the right does seem valuable to isolate—for courts, for legislatures, and for public opinion.

Balkin describes the second right as "a woman's right to decide whether or not to become a mother and assume the obligations of parenthood." He would have the courts protect this right against state-enforced motherhood only for a limited period of pregnancy: "it requires only that women have a reasonable time to decide whether to become mothers and have a fair and realistic opportunity to make that choice."

Lost in this division is a complete sense of the physical intrusion that abortion bans inflict on women's bodily integrity. The first right does reflect an aspect of bodily integrity but is lim-

8. This analysis is valuable beyond abortion as a case study that illustrates the general nature of judicial doctrine, including doctrine's inherent limitations and its distinctiveness from the document.

9. For example, Justice Harry Blackmun, concurring in part and dissenting in part in *Casey*, described the following two ways in which abortion restrictions violate women's constitutional rights: "First, compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm." 505 U.S. at 927 (Blackmun, J., concurring in the judgment in part, and dissenting in part). "Further, when the State restricts a woman's right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning—critical life choices .... Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life." *Id.* at 927–28.

10. Stenberg v. Carhart, 530 U.S. 914 (2000).

ited to specific threats to a woman's health or life beyond the standard threats that accompany pregnancy and childbirth—for example where a pregnant woman develops cancer. The second right deals with parenthood and the "life-altering set of responsibilities that come with being a parent," responsibilities that pertain equally when a child is adopted. This right would protect against a government effort to force women (or men) to adopt children in need of homes, or possibly even to take in foster children in need of emergency care. It does not, however, capture the physical and psychological harms inflicted on women by government-mandated pregnancy and childbearing, including the significant health risks that accompany even "normal" pregnancies.

A more complete conception of this second right, one that reflects the intrusion on women's bodily integrity as well as the life-altering social responsibilities, I think also suggests that the right is best understood as existing for the entire duration of pregnancy rather than only for a reasonable time in which to make a decision. The right exists throughout pregnancy, but a separate question remains whether the government possesses an adequate justification for overriding that right. Balkin and I essentially end up at the same bottom line, though. I think that the Court in *Roe* and *Casey* dealt well with the government's competing interest in protecting fetal life by allowing abortion bans (with health exceptions) after the point of fetal viability. Balkin's formulation is helpful in thinking about how this balance is struck, because the viability line does allow women a reasonable time to decide whether to accept, indeed in many cases to welcome, the bodily changes and also the future parenting obligations.[11] Balkin would prefer a "discourse shaping" approach that leaves greater room for legislative involvement in selecting the point in pregnancy after which abortion would be illegal. Although I see the theoretical appeal in this alternative (especially if the Court had adopted it back in 1973), I have serious concerns about moving to this approach decades later. In the end Balkin agrees that, at this point in the doctrinal development, it is best to stick with the viability line.

The principal potential inadequacy I see in the way Balkin presents his two rights is that he considers only laws that would

11. *Cf. Casey*, 505 U.S. at 870 ("The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.").

ban abortion, and not the literally hundreds of state laws that impose a myriad of obstacles and restrictions on women and abortion providers. Anti-abortion legislators and advocates hope such laws will ultimately render their states, and ultimately the nation, "abortion free" just as effectively as would an abortion ban. Indeed, the strategy is working: as of 2007, in three states, only one abortion provider remains, and nationwide the number of providers has been steadily declining since 1973.[12] Balkin does acknowledge the existence of some restrictive abortion laws short of bans—namely, mandatory waiting periods and parental consent requirements—not to assess their constitutionality, but only in the context of considering what would be a reasonable period after which a state could criminalize abortion in accordance with his second right. By Balkin's own, possibly overly optimistic, estimation, even if the Court were to overrule *Roe* expressly and completely, only up to a dozen states would outlaw abortion. Balkin's analysis, I think, would be more theoretically complete and practically helpful if it was expanded to address as well the types of abortion restrictions that are most threatening to women today, and that would remain most threatening in most states even if the Court were to overrule *Roe* and uphold abortion bans.

As this discussion of Balkin's abortion analysis illustrates, "text and principle" leaves substantial room for disagreement about its application to particular issues, even among progressives. That indeterminacy may lead to charges of jurisprudential and political inadequacy. Balkin doesn't purport to resolve all applications, and far more than a persuasive interpretive methodology is needed for ultimate political success. He does, though, seek to structure debate. Some progressives will question whether such indeterminacy is best debated on grounds initially staked out by, and now closely associated with, ideological conservatives—to my mind, a close question. Post and Siegel, for example, caution progressives who would embrace a version of originalism, and warn against "a method of interpretation that strongly privileges the history of constitutional lawmaking over the experience of living under the Constitution."[13] Whether or

12. Some of the most insidious examples are described by abortion advocates as "TRAP" laws, for "targeted regulation of abortion providers." Under the guise of reasonable-sounding, but medically unnecessary, health regulations, states require extremely expensive remodeling of abortion clinics, regulations that essentially require the building of small hospitals and as a practical matter result in the closing of clinics.

13. Robert Post & Reva Siegel, *How Liberals Need to Approach Constitutional Theory*, THE NEW REPUBLIC ONLINE, Sept. 18, 2007.

not one ultimately finds Balkin's precise formulation convincing, it powerfully highlights essential aspects of a successful interpretive methodology.

In emphasizing the potential political and public policy value of *Abortion and Original Meaning*, I do not denigrate its inherent value or interest to the more traditional law review audience, among whom it was widely read and well regarded even while in draft form. I do seek to encourage that audience to consider more intentionally the potential impact of this and other scholarship beyond academia. Progress and even transformation on policy matters related to constitutional interpretation clearly can be aided by academic scholarship, as evidenced by the ideological right's successes on these very issues of originalism and abortion. *Abortion and Original Meaning* should be widely read and also summarized and translated—for it is quite long—to reach even broader audiences. It has the potential to help unmask the hypocrisy behind vacuous sound bites such as "strict constructionist" and "judicial activist"—and to advance popular understanding of how we should determine constitutional meaning. Fidelity to "text and principle," consistent with original meaning (properly defined), is one appropriate and appealing basis on which to debate progressive constitutionalism.