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Book Notes: Living Originalism, by Jack M. Balkin

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Book Note

LIVING ORIGINALISM, by Jack M. Balkin[1]

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JACK BALKIN IS ON A MISSION to prove that the idea of Living Originalism is not "green pastel redness," which is to say, an oxymoron.[2] In attempting as much, Balkin, a professor of law at Yale, presents an emerging alternative theory of constitutional interpretation that seeks to reconcile the competing aspirations of traditionally conservative Originalism[3] and traditionally liberal Living Constitutionalism.[4] In Balkin's view, "we do not face a choice between living constitutionalism and fidelity to the original meaning of the text" because "[t]hey are two sides of the same coin."[5]

Given his sterling liberal credentials, Balkin's announcement five years ago that he was an Originalist surprised many.[6] His apparent conversion unleashed a cottage industry of often angry replies, with fellow liberals assailing Balkin for joining the other side after "finding that he couldn't beat 'em" and conservatives accusing him of co-opting their school with "little ... left of a recognizable originalism."[7] *Living Originalism*, then, is a rebuttal five years in the making.

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1. (Cambridge, Mass: Belknap Press, 2011) 480 pages.
2. The turn of phrase was once used to characterize another controversial idea in American constitutional law. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980) at 18 ("[W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness'").
3. See *e.g.* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1998).
4. See *e.g.* David A Strauss, *The Living Constitution* (New York: Oxford University Press, 2010).
5. *Supra* note 1 at 20.
6. See Jack M Balkin, "Abortion and Original Meaning" (2007) 24:2 Const Comm 291.
7. Ethan J Leib, "The Perpetual Anxiety of Living Constitutionalism" (2007) 24:2 Const Comm 353 at 353; John O McGinnis & Michael Rappaport, "Original Interpretative Principles as the Core of Originalism" (2007) 24:2 Const Comm 371 at 381.

The book is divided into three parts. In Part I, Balkin explains his own particular conception of Originalism—what he calls "framework originalism"[8]—and seeks to distinguish it from alternatives. Balkin's principal contention is that traditional Originalists engage in a subtle but crucial redefinition of "original meaning" by limiting it to "original expected application."[9] In doing so, they obscure the significance of the framers' specific linguistic choices. In Balkin's view, where the text provides an "unambiguous, concrete and specific rule"—such as the minimum age requirement for the president—"the principles or purposes behind the text cannot override the textual command."[10] In contrast, where the text provides for a principle—such as "equal protection" or "freedom of speech"—"we must flesh out subsidiary principles that explain it."[11] For Balkin, "the use of different types of legal norms and silences makes perfect sense."[12] Whereas clear-cut rules constrain freedom, "the vague and abstract language of principles ... channel[s] politics ... by articulating a collection of key values and commitments"—providing a framework, in other words.[13] By crafting a text with such distinctions, the framers recognized that "[t]he Constitution is an intergenerational project of politics" that must allow succeeding generations to engage in their own "constitutional constructions."[14]

In Part II, Balkin applies his theory in three now-controversial areas. In each case, his focus is on original meaning as understood through evolving constitutional constructions. On the Commerce Clause, he firmly rejects the view of traditional Originalists, who look to the rise of the modern regulatory state either as wholly anathema to the Clause's original meaning or as a "pragmatic" exception to it.[15] In Balkin's view, "the New Deal, while preserving the Constitution's original meaning, featured a series of new constitutional *constructions* by the political branches that were eventually ratified by the federal judiciary."[16] On equal protection, Balkin seeks to show why the gap between original expected application and original meaning matters, contending that the former cannot credibly justify landmark civil rights decisions such as *Brown v Board of Education* while

8. See *supra* note 1 at 21ff.
9. *Ibid* at 7.
10. *Ibid* at 14.
11. *Ibid.*
12. *Ibid* at 24.
13. *Ibid* at 25.
14. *Ibid* at 75, 4.
15. *Ibid* at 138.
16. *Ibid* at 139 [emphasis in original].

the latter can.[17] Finally, though Balkin concedes that unenumerated rights are misplaced under the Due Process Clause, he finds a constitutional home for them—including those controversial ones concerning sexual autonomy—under the Privileges and Immunities Clause, long considered a dead letter by all except some hard-core Originalists.[18]

In the third and final part, Balkin addresses concerns about the democratic legitimacy of evolving constitutional constructions by courts. He contends that such constructions reflect "changes in what kinds of positions are thought reasonable and unreasonable, off the wall and on-the-wall ... prompted by the contemporaneous work of the political branches and social mobilizations."[19] For that reason, the US Supreme Court's desegregation of public schools in *Brown* "did not arise full-blown from the head of Earl Warren," just as the Court's opinion in *District of Columbia v Heller* "largely followed the emerging public vision of gun rights."[20] In this way, "courts translate constitutional politics into constitutional law" in a way that is "democratically responsive in the long run."[21]

The book's achievement may also be its principal vulnerability. On a host of hot-button topics, such as abortion, marriage equality, and the Commerce Clause, of which the latter has taken on increased importance in light of the challenge to the Obama administration's health care reform effort, Balkin's right answer does not necessarily ask liberals to sacrifice much, if anything. To that extent, some may argue that *Living Originalism* continues a rather American tradition of constitutional interpretation merely being politics by other means. That, however, may be just fine with Balkin.

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17. *Ibid* at 226-28. See *Brown v Board of Education of Topeka*, 347 US 483 (1954) (finding that state laws mandating separate schools for black and white students were unconstitutional).
18. *Ibid* at 191-92, 212-13. See *McDonald v Chicago*, 130 S Ct 3020 at 3059 (2010), Thomas J, concurring (concluding that the right to keep and bear arms applies to the states through the Privileges and Immunities Clause).
19. *Ibid* at 306.
20. *Ibid* at 321, 324. See also *District of Columbia v Heller*, 554 US 570 (2008) (recognizing an individual right to possess firearms under the Second Amendment).
21. *Ibid* at 325, 337.