Reading into the Constitution

Articles
Peter Berkowitz on **Living Originalism** *by* Jack M. Balkin

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How far do the president's powers reach in wartime? May the government restrict political expenditures by corporations and unions? Is it within Congress's authority to compel all people, on pain of paying a substantial fine, to purchase health insurance?

It is a remarkable fact about liberal democracy in America that left and right agree that to answer such hard questions we must consult the 224-year-old document that brought this country into being, and abide by what it requires, prohibits, and permits. And it is a prominent feature of our polarized politics that the quest to determine the Constitution's meaning concerning the great issues of the day excites vehement disagreement between left and right.

The two sides bring to the search for the Constitution's meaning competing theories. Progressives tend to view the Constitution as a kind of living organism that grows and develops, and should be adjusted or altered by courts in response to unfolding circumstances. Conservatives generally believe that however much circumstances may have altered, courts are bound by the Constitution's original meaning.

Both the doctrine of the living constitution and the doctrine of originalism derive support from common sense and from sober observation of liberal democracy in America. On the one hand, as living constitutionalists emphasize, times change, norms evolve, and some of the Constitution's clauses — the First Amendment prohibition on laws abridging freedom of speech, the Eighth Amendment prohibition on cruel and unusual punishment, the Fourteenth Amendment promise that no state shall deny any person life, liberty, or property without due process of law and no state shall deny any person the equal protection of the laws — seem to invite courts to apply open-ended terms such as "cruel and unusual," "speech," "due process," and "equal protection" in light of the best available understandings.

On the other hand, as originalists stress, the original meaning, or range of meanings, of constitutional provisions, serve as the starting point and anchor for analysis that properly regards the Constitution — as the Constitution proclaims itself to be — as the supreme law of the land; any congressional statute, presidential action, or state law that conflicts with the

Constitution's original meaning should be rejected as unconstitutional; and by showing fidelity to the original meaning of the Constitution, which is the most authoritative statement of the people's will and reason, judges maintain courts' democratic legitimacy.

Contrary to much conventional wisdom in the legal academy, which sees the living constitution and originalism as diametrically opposed schools of constitutional theory, Jack M. Balkin, Knight professor of constitutional law and the First Amendment at the Yale Law School, sides with common sense and sober observation. The choice between living constitutionalism and the doctrine of original meaning, he argues, is a false one: "Properly understood these two views of the Constitution are compatible rather than opposed."

To vindicate this conciliatory claim, Balkin "offers a constitutional theory, framework originalism, which views the Constitution as an initial framework for governance that sets politics in motion, and that Americans must fill out over time through constitutional construction." Like originalists, Balkin insists on the need for "fidelity to the original meaning of the Constitution, and in particular, the rules, standards, and principles stated by the Constitution's text." But he believes that fidelity to original meaning also requires, in the spirit of living constitutionalism, the development of "constitutional constructions that best apply the constitutional text and its associated principles in current circumstances."

Balkin is certainly not the first progressive legal scholar to attempt to root his constitutional theory in the Constitution. In Freedom's Law: The Moral Reading of the American Constitution (1997) New York University Law Professor Ronald Dworkin sought to show how fidelity to the Constitution required judges to respect grand principles — due process, fairness, and justice — so as to ensure that the laws of the land treat persons with equal concern and respect. And in Active Liberty (2005), Supreme Court Justice Stephen Breyer argued that fidelity to the Constitution obliged judges to give priority to reaching decisions that promote citizens' participation in political life. In both books, however, the authors' professed concern for the meaning of the Constitution seemed a transparent guise for reading into the Constitution their progressive moral and political priorities.

In contrast, Balkin takes history seriously and adroitly integrates law and politics. He has read massively — political debates, speeches, cases, contemporary legal scholarship — and synthesized prodigiously. His intricate elaboration of framework or living originalism, which at its most ambitious amounts to an account of what American constitutional government is and ought to be, provides much to admire and much to ponder and sets a new standard in grand constitutional theory.

Balkin insists that original meaning is binding, while contending that fidelity to it requires interpreters to distinguish between instances in which the Constitution identifies a bright line rule — Article II, Section 1 requires thatthe president must be at least 35 years of age — and instances such as the Due Process and Equal Protection Clauses in which the Constitution proclaims general principles whose original meaning stays the same but whose

application can be expected to change. He explains how culture, social movements, political mobilization, and electoral politics inevitably and properly interact with judicial interpretation while insisting on the obligation to preserve the all-important distinction between politics and law. And apart from a single lapse in the final three pages in which he adduces George W. Bush administration officials connected to the policy of enhanced interrogation as instances of "constitutional evil," he writes about conservative legal theory and conservative politics critically without that anger or disdain that disfigures much academic legal theory.

Yet in the end Balkin cannot resist the temptation to which Professor Dworkin and Justice Breyer thoroughly succumbed. The sometimes ingenious arguments that Balkin develops to show how originalism, correctly understood, requires in controversial issue after controversial issue decisions that advance progressive goals and prohibit outcomes favored by conservatives violate the sensible strictures that he sets forth for determining and respecting original meaning. They also further underscore that constriction of the liberal imagination that permits academic progressives to not merely view progressive goals as, all things considered, good public policy, but to equate them with reason, morality, and the law.

To define framework originalism, Balkin distinguishes it from the approach of originalism's most famous proponent, Supreme Court Justice Antonin Scalia, and raises a number of serious objections that conservatives will benefit from confronting squarely. Balkin agrees with Scalia that judges are bound by the original meaning of the Constitution. He agrees that the Constitution's original meaning consists in how those who were voting for its ratification or ratification of its Amendments would have understood it. He agrees that original meaning must be determined by standard forms of inquiry into Constitutional text, structure, and history. And he agrees that judges are bound by original meaning and barred from substituting for it their moral and political judgments.

Famously, however, Scalia maintains that even when the Constitution inscribes a standard or principle — say, "cruel and unusual" in the Eighth Amendment — it actually constitutionalizes the original interpretation of that standard or principle, for example, the meaning of cruel and unusual in 1791 when the Eighth Amendment was ratified. In contrast, Balkin argues that the constitutionalization of standards and principles obliges judges to apply the reasonable understanding of those standards and principles in light of contemporary challenges and contemporary norms and understandings. This, he stresses, does not give judges a license to do as they please. Before they can be applied, the meaning of standards and principles must be ascertained through exacting historical study, and must be consistent with the Constitution's underlying structural principles and goals.

Scalia's fundamental error, according to Balkin, is to confuse fidelity to the Constitution's original meaning with fidelity to "the original expected application." Of course, when the Constitution articulates a determinate rule, there is no gap: the original meaning of the requirement that the president be at least thirty-five years of age coincides with its expected

application, in the founding era as well as today. But when the Constitution articulates an indeterminate standard such as "unreasonable searches and seizures" in the Fourth Amendment or a general principle such as the Fourteenth Amendment's "equal protection of the laws" it is reasonable to suppose — and Balkin marshals considerable historical evidence indicating that so it was understood at the founding and in the years after the Civil War when the Fourteenth Amendment was debated and ratified — that the Constitution instructs judges to determine the import and scope of the standards and principles in light of developing norms and changing social and political circumstances. After all, if the Constitution's exclusive purpose had been to bind the American people to determinate rules, it would have been possible to specify in the Fourth Amendment the kinds of searches and seizures that were forbidden, or to limit the reach of the Fourteenth Amendment's promise of equal protection of the laws so as to, say, exclude women by stating that no state shall deny persons equal protection of the law on account of "race, color, or previous condition of servitude," as does the Fifteenth Amendment in securing the right to vote for the newly freed blacks.

Scalia's equation of original meaning with original expected application, according to Balkin, gives rise to many difficulties, particularly in regard to precedent. Originalists are forced to treat many precedents, which they regard as errors (in particular those providing constitutional legitimation of the regulatory and welfare state forged by the New Deal) as, in Scalia's words, "pragmatic exceptions" to the imperatives of originalism that must be preserved for the sake of political stability. This reflects, Balkin argues, an admission contrary to the tenets of Scalia's originalism "that legitimacy can come from public acceptance of the Supreme Court's decision, or from considerations of prudence or economic cost." In addition, contends Balkin, in deciding which precedents to leave undisturbed and which to limit or overturn, judges committed to originalism reinstate the kinds of policy decisions and vest in judges the kind of discretion that the theory was meant to preclude. Finally, originalism misrepresents the American political tradition, Balkin asserts, because it treats as regrettable errors — in regulation, welfare provision, and civil rights protection — the assumption of responsibilities and the performance of tasks by government that have come to be seen by significant majorities "as genuine achievements of American constitutionalism and sources of pride."

The most significant limitation of Scalia's originalism, in Balkin's eyes, is that it "cannot account for how political and social movements and post-enactment history shape our constitutional tradition." In fact, argues Balkin, the Constitution is always both at rest and in motion. While the original meaning of the Constitution does not change, except by the amendment procedures laid out in Article V, the application of the text, since it includes standards and principles, does. Indeed, "because conditions are always changing, new problems are always arising, and new forms of social conflict and grievance are always emerging, the process of argument and persuasion about how to apply the Constitution's text and principles is never ending."

Balkin recognizes, at least formally, that the drama of constitutional democracy that he depicts is a two way street: Views about salient norms and the proper reach and application of constitutional principles may be governed as much by a conservative aspiration for a restoration of the Constitution's lost meaning concerning, say, the right to bear arms as by a progressive aspiration for redemption of the Constitution's grand promises as, for example, in the Preamble's aspiration to "form a more perfect Union." But in the course of his book, Balkin makes clear that the progressive idea of redemption, or "the claim that our Constitution is always a work in progress — imperfect and compromised, but directed toward its eventual improvement," is the worthy aspiration. He proclaims that his "theory of constitutional interpretation is also a theory of redemptive constitutionalism" (italics in the original). He does not proclaim that his theory of constitutional interpretation is also a theory of constitutional restoration. In other words, on Balkin's reading, the Constitution is fundamentally a progressive document whose original meaning gives priority to redemption and allows but does not respect restoration. Yet recovering what is inevitably lost and the wisdom embodied in tradition are also vital imperatives for all legal systems. To the extent that Balkin's theory, or at least his application of his theory, recognizes restoration, it is only to recover the Constitution's lost progressive meaning and show that it authorizes progressive policies. This governing moral and political intention distorts his understanding of the Constitution's original meaning and hinders his quest for fidelity.

Consider balkin's analysis of the modern regulatory and administrative state and the Commerce Clause, to which he devotes his longest chapter and which he asserts serves as "a good test for the plausibility of any theory of constitutional interpretation." He argues that the New Deal is consistent with "the Constitution's original meaning," "its text," and "its underlying principles." And that Article I, Section 8, Clause 3 of the Constitution, which provides that "Congress shall have the power . . . to regulate commerce . . . among the several states," played a pivotal and, in Balkin's eyes, entirely legitimate role in justifying New Deal expansion of government power. To be sure, it was necessary for the Supreme Court to apply new constructions or interpretations of the unchanging powers that the Commerce Clause conferred on Congress to legitimate the new functions that the political branches fashioned to deal with emerging challenges of regulation and administration the United States faced as a rising industrial world power. But properly understood, argues Balkin, the Commerce Clause is an extremely broad and flexible grant of power to Congress whose extreme breadth and flexibility are built into its original meaning but cannot be defined or exhausted by its original application.

Attempting to turn the tables on conservative originalists, Balkin charges that they have "tended to view the commerce power through modern eyes" and therefore have misread it. Whereas conservatives have identified the original meaning of commerce narrowly with the trade of commodities or somewhat less narrowly with economic activity in general, Balkin argues that those are constructs created by 19th-century courts. In contrast, in the 18th century, "commerce meant 'intercourse,' and it had strongly social overtones" (italics in the

original). In Balkin's interaction theory of commerce, the commerce clause gives Congress the authority to regulate all sorts of interactions among the states, "whether they are used for commercial or noncommercial purpose," provided they present a federal problem.

In addition to failing to grasp the breadth of the 18th-century concept of commerce, conservative originalists have failed to appreciate the flexibility inscribed in the original meaning of "federal and enumerated powers," a phrase Balkin believes is more accurate than limited and enumerated powers. According to Balkin, in the founding era the Constitution was understood "to give Congress power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action." Federal power kicks in where state power cannot solve the problems that arise between states: "Properly understood, the commerce power authorizes Congress to regulate problems or activities that produce spillover effects between states or generate collective action problems that concern more than one state." A target of regulation only lies beyond Congress's power under the commerce clause, asserts Balkin, "if Congress cannot reasonably conclude that an activity presents a federal problem."

If Balkin were correct that the original meaning of commerce included social interactions generally and that an enumerated power is a power Congress needs to deal with a problem that states cannot be expected to solve on their own or collectively, then he is also correct that the continually expanding modern activist state is unproblematic and that the individual mandate of the Affordable Care Act falls easily within Congress's authority under the Commerce Clause.

But Balkin's account of the original meaning of the Commerce Clause is not correct.

First, while he correctly notes that one of the meanings of "commerce" in the 18th century — as today's dictionaries will confirm remains true of the word — was much wider than trade or economic activity, including social relations generally, he asserts without adequate investigation that commerce's widest meaning was incorporated into the Constitution and was consistent with the publicly understood meaning of the Constitution's use of the term. It wasn't. Oddly, given Balkin's dedication to recovering the Constitution's original meaning, his book's extensive index does not contain a single entry for The Federalist, the collection of 85 newspaper articles authored by Alexander Hamilton, John Jay, and James Madison, which became the authoritative exposition of the Constitution and the deservedly most famous contribution to the ratifying debates. And Balkin's 100-plus pages of footnotes contain one passing reference to Federalist 10 in which he distorts Madison's view.[1] In The Federalist, the term "commerce" generally does not refer to social relations of all sorts. Rather, and contrary to Balkin's contention that such distinctions were introduced into American constitutional discourse by 19th-century courts, The Federalist regularly contrasts commerce to agriculture and manufacturing and routinely uses the term to refer to the activities of trade, finance, and exchange through markets.

Second, Balkin bases his extremely flexible understanding of the meaning of federal and enumerated powers on a misreading of a statement by "one of the key founders, James Wilson, in the Pennsylvania ratifying convention in 1787." Balkin quotes Wilson:

> Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.

Balkin takes this to mean that Congress may legislate in all cases where states are separately or collectively incompetent. But he does not pay enough attention to Wilson's phrase "object of government," which does not refer to any object at which government may aim but rather government's legitimate objects or purposes.

We can be confident that Wilson assumed a distinction between legitimate and illegitimate objects of government action for reasons connected to the third major flaw in Balkin's interpretation of the original meaning of the Commerce Clause, which is his demotion or suppression of the supreme underlying structural principle of the Constitution and of its highest goal: The principle is that of limited government and the goal is the securing of individual liberty. Federalist proponents and Anti-Federalist opponents of the Constitution were united in the conviction that the central task of government was to secure individual liberty, and that the central challenge was to forge a national government that would be powerful enough to secure liberty but robustly limited so that it would not wield its power to crush liberty. Accordingly, in Federalist 45 Madison reaffirmed the notion that pervades The Federalist that "The powers delegated by the proposed Constitution are few and defined. Those which are to remain in the state governments are numerous and indefinite." In that context, Madison observes that the power to regulate commerce is a new power beyond those contained in the Articles of Confederation but "which few oppose and from which no apprehensions are entertained." Balkin's reading of the Commerce Clause, which turns the Constitution into a charter of unenumerated and virtually limitless powers, makes nonsense of Madison's assurances that the Commerce Clause is consistent with the Constitution's assignment of few and defined powers to the federal government. It also relegates the Constitution's supreme underlying structural principle of limited government to irrelevance. And it turns the goal of securing individual liberty, which both sides in the debate over the ratification of the Constitution agreed was paramount, into an afterthought.

To determine whether the Constitution gives Congress authority to compel people to buy health insurance or pay a substantial fine — and other hard questions such as how far the president's powers reach in wartime and whether the government can restrict the political expenditures of corporations and unions — it is certainly not sufficient to recognize that ours is first and foremost a constitution of limited powers whose primary purpose is to secure the rights shared equally by all. But it is indispensably necessary.

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[1] Balkin claims Madison argues that "the values of a national political majority . . . may often be more moderate and better protect the right of minorities than those of a smaller more homogeneous political community." In fact, in Madison's view, moderation comes not from the values of the national majority (which Madison does not discuss), but from the Constitution's sound institutional design: Representation enlarges and refines the will of the people, and the size and diffusion of the population either prevents dangerous passions from arising in the majority or prevents majorities from carrying out "schemes of oppression."