THE PERPETUAL ANXIETY OF LIVING CONSTITUTIONALISM

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It certainly seems like the originalists are winning. Professor Jack Balkin—finding that he couldn't beat 'em—joined them.[1] Living constitutionalists used to turn to Balkin as a reliable advocate; he recently wrote "we are all living constitutionalists now."[2] But Balkin has forsaken them. Losing such an important advocate might be a sign that what some once deemed the "ascendant" and dominant theory in constitutional interpretation is on the decline.[3] Still, don't count living constitutionalism out of the game just yet—and don't think one can embrace Balkin's approach and a true living constitutionalism at the same time.

We have before us in Balkin's new constitutional theory a lefty originalism to join another prominent conception of the same propounded by Balkin's colleague, Akhil Amar.[4] Lefty

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1. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

2. Jack M. Balkin, *Why No One Truly Believes in a Dead Constitution*, SLATE, Aug. 29, 2005, http://www.slate.com/id/2125226.

3. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853 (1989) ("Those who have not delved into the scholarly writing on constitutional law for several years may be unaware of the explicitness with which many prominent and respected commentators reject the original meaning of the Constitution as an authoritative guide."); Jonathan R. Macey, *Originalism as an 'Ism'*, 19 HARV. J.L. & PUB. POL'Y 301, 301 (1996) ("[A]mong constitutional law scholars at elite schools, the idea of being an originalist is tantamount to being some sort of intellectual Luddite."). *But see* Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 495 (1996) ("[A]lmost everyone is an originalist in at least some limited sense."); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 687 (1991) ("It seems difficult, in American political-legal culture, to make a persuasive case for nonoriginalism . . . . That difficulty helps to explain why it is so hard to locate a real, live nonoriginalist, whether judge or, even, academic theorist.").

4. *See* Akhil Reed Amar, *Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, Too)*, SLATE, Sept. 21, 2005, http://www.slate.com/id/2126680. Some charge another colleague, Bruce Ackerman, with the title too. *See* Suz-

originalism, however, is not some new Yale invention.[5] Hugo Black and John Hart Ely might be part of its old guard. Still, Balkin's coming-out as a lefty originalist now self-consciously aims to bury living constitutionalism as an independent theory and disarm its power. Balkin tells us that the choice between "originalism" and "living constitutionalism" is overdrawn and "rests upon a false dichotomy." He argues that we must maintain fidelity to the original meaning of the document—but that fidelity is achieved by committing to the original meaning of "text and principle" rather than to the "original expected application" of those texts and principles. The former is "binding law" and the latter is not. Once we embrace this distinction, Balkin contends, we can retain the flexibility and adaptability that underwrites what he takes to be living constitutionalism's agenda and simultaneously pledge allegiance to an original meaning originalism. His final result is an impressively original and respectably originalist defense of abortion rights under the United States Constitution.

But why are the Constitution and its original principles binding, again? And is living constitutionalism really dead after Balkin's coup de grâce (or is it a coup d'état)? An anxious approach to the first question should lead to a negative answer to the second. In short, living constitutionalism's core animating anxiety is that the Constitution (and most especially its original meaning) may not be binding—and that anxiety leads to interpretive mechanics that are fundamentally in tension with the interpretive mechanics that originalists prefer.[6] On this important measure, Balkin is now an originalist through and through; and living constitutionalism remains alive as a real alternative. Living constitutionalism is more than a pedestrian desire for flexibility and adaptability, an excuse for nominally liberal results, and an

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anna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 933 (1992) ("Ackerman's theory is merely originalism flying under liberal colors."). *But see* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007) (arguing for a form of living constitutionalism).

5. Although I can't spell out the differences in this context, what I'm calling "lefty" originalism is rather different from what Timothy Sandefur has recently called "liberal originalism." *See* Timothy Sandefur, *Liberal Originalism: A Past for Our Future*, 27 HARV. J.L. & PUB. POL'Y 489 (2004).

6. Throughout this essay, I am clearly generalizing about living constitutionalism—and making a claim about its psychology that is, admittedly, somewhat hard to verify. One could undoubtedly find people who purport to be living constitutionalists and desire only flexibility in interpretation. These people may, after all, be satisfied with Balkin's considerable achievements and may be willing to become Balkinized originalists.

attempt to have a "conversation between the generations" about vague and ambiguous clauses in the Constitution.

I want to focus here on a relatively underdeveloped aspect of Balkin's paper: his quick dismissal of living constitutionalism and his underlying assumption that living constitutionalists will be able to embrace his approach without difficulty. To be sure, many originalists will read Balkin to be a living constitutionalist in disguise—and may not let him into their club, notwithstanding his bona fides as an adept historian of the Fourteenth Amendment. But my main thesis here is that Balkin should no longer be welcomed by the living constitutionalists, despite his claim to be meeting their fundamental needs.[7]

Balkin's discussion engages originalists, first and foremost. Although he devotes substantial effort to rejecting an "original expected applications originalism," he still aims to demonstrate his street credibility as an originalist. Indeed, living constitutionalists get little more than a passing mention in Balkin's paean to original meaning. We get no real flavor of what a coherent account of living constitutionalism might look like—nor how Balkin's approach might leave living constitutionalists satisfied that his unifying theory meets their concerns. It may be that the very metaphor of a living constitution is full of "teasing imprecision," as former Chief Justice Rehnquist once wrote.[8] But once I explicate a bit about living constitutionalism here (or one variant

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7. This club and those who try to explain it hardly even appear in Balkin's account that purports to dismiss it. Some relatively well-known sources would likely include HOWARD LEE MCBAIN, THE LIVING CONSTITUTION: A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW (1927); EDWARD S. CORWIN, AMERICAN CONSTITUTIONAL HISTORY (Alpheus Mason & Gerald Garvey eds., 1964); EDWARD S. CORWIN, TWILIGHT OF THE SUPREME COURT (1934); Edward S. Corwin, *Constitution v. Constitutional Theory*, 19 AM. POL. SCI. REV. 290 (1925); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963); Charles Beard, *The Living Constitution*, 185 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 29 (1936); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986); HERMAN BELZ, A LIVING CONSTITUTION OR FUNDAMENTAL LAW?: AMERICAN CONSTITUTIONALISM IN HISTORICAL PERSPECTIVE (1998); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191 (1997); Adam Winkler, *A Revolution Too Soon: Women Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456 (2001). An exciting new statement can be found in Ackerman, *supra* note 4.

My reconstruction of living constitutionalism here is very selective—and imposes a particular perspective on a broad-ranging group of jurists, many of whom could reasonably contest my account. The purpose here is only to show how a central form of living constitutionalism remains an important alternative to Balkin's approach.

8. William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976). For a recent philosophical discussion of the metaphor, see Aileen Kavanagh, *The Idea of a Living Constitution*, 16 CAN. J.L. & JURIS. 55 (2003).

thereof), I should be able to establish how Balkin's "text and principle" methodology fails to accommodate fully the center of living constitutionalism. Original meaning originalism and living constitutionalism are hardly, as Balkin concludes, "opposite sides of the same coin." Indeed, they trade in different currencies.

Under any reading of originalism, lefty or otherwise, history is its main currency.[9] First-order constitutional interpretation is a project of uncovering some historical truth or reconstruction about the text and structure of the Constitution. In this regard, Balkin's originalism is no different from any other: the original public meaning at the time of ratification is at the core of the theory and it achieves a privileged position in Balkin's interpretive project. Although this is not always perfectly clear in Balkin's discussion of his theory, I take him to be distinguishing between the "text and principles" that are to be derived *only* from their original historical meaning—which he deems immutable and binding—and the "application and implementation" thereof—which can change with the times. Tying the text and principles to the historical fact of the matter is his basic concession to originalism, whereas his flexibility in application and implementation is his attempt to incorporate living constitutionalism.

Different kinds of originalists, however, admit different modalities of constitutional interpretation into constitutional decision-making in further iterations of the interpretive process.[10] So Scalia's "faint-hearted" originalism, to take a widely-

9. For a fuller account, one would have to specify the *scope* of the history that can be admitted in pursuing the original meaning of a provision. For my purposes here, I assume that most originalists prefer, in the first instance, an investigation into the original public meanings of constitutional provisions—as their ratifiers would have understood them.

One could, however, take a broader view of the constitutional history that is relevant in constitutional interpretation—and still maintain focus on history as such. This is, perhaps, the strategy of Barry Friedman and Scott B. Smith, who self-consciously look for a "third way" between originalism and living constitutionalism. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998).

10. A useful set of the modalities of constitutional interpretation comes from PHILIP C. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3–119 (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 13–14 (1991). It includes text, history, structure, doctrine, ethical considerations, and prudential considerations. Bobbit argues that the set is "legitimate" insofar as the Supreme Court uses each modality in its decision-making processes. In short, my thesis here is that originalists and living constitutionalists differ on which modalities to admit into the interpretive process and when. And because of this difference, Balkin's approach cannot so easily dismiss the dichotomy between his lefty originalism and a faithful account of living constitutionalism.

discussed example, yields to precedent and prudential considerations occasionally.[11] Randy Barnett's theory of "constitutional construction" helps fill the gaps left over after first-order originalism does its work and vagueness remains.[12] And Balkin's original meaning originalism, though self-consciously rather different from Scalia's originalism and Barnett's construction, also allows different modalities to fill out and apply the "text and principles" in a conceptually later stage of constitutional interpretation. Balkin's rights to abortion have their roots in historical excavation—that is where the original meaning of the principles comes from. But the principles gain flesh and heft through a variety of constitutional modalities that help "translate" the principles (with fidelity, fit, and justification) for our time. Balkin's specification and translation of his "text and principles" may depart too far from original meaning for some originalists' taste but there is no doubt that Balkin's procedure involves a conceptually prior historical project in the first instance.

To generalize only somewhat, originalists seem to agree that first-order debates about constitutional interpretation are questions for history. This has all kinds of benefits, which is why originalism is attractive to so many: It is parsimonious; it gives us ground to debate hard questions at some remove from our personal political and moral preferences; it may keep judges in check so they don't impose their preferences upon us; it may allow our confirmation battles to be less explosive (assuming everyone bought in);[13] and it may be the best way (or only way!) to

11. *See, e.g.*, Randy E. Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CIN. L. REV. 7 (2006).

12. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 118–30 (2004). Barnett draws from and employs terminology developed by KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (2001).

13. I must say that I've always found this particular argument difficult to understand. If there were an interpretive consensus around *any* theory of constitutional interpretation, confirmation hearings might be simplified. But even supposing originalism became the only credible interpretive approach, people would still occasionally deploy it differently, rely on different histories, and reach different results. Our two most committed originalists on the Supreme Court, Justices Antonin Scalia and Clarence Thomas, deploy the theory differently—and some of the debates among originalists can be just as heated as the disputes between the originalists and the living constitutionalists. If one needs a recent example, watching Barnett try to boot Scalia from the originalist camp is especially fun. *See* Barnett, *supra* note 11. Perhaps Barnett will help purify the originalist camp in the long run; if he does, Balkin likely won't be admitted to it. Indeed, Balkin's account looks a bit like a modified and more history-friendly version of the "underlying principles" approach Barnett has recently dismissed. *See id* at 19–22. Yet, for some reason I can't quite figure out, Barnett goes a bit soft on Balkin in his contribution to this Symposium. *See* Randy Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405

get at the very meaning of the text itself.[14] This is why some originalists think originalism is simply the pragmatic choice: it is, perhaps, a lesser evil, there is no good and coherent competitor, and democratic legislatures and social movements will function better if we embrace its elegant minimalism.

It bears repeating, I think, that although originalists are unified about first-order interpretation that draws upon the history and historical sources surrounding ratification, there are certainly intramural disagreements among the originalists about what sorts of considerations may legitimately be considered at the "back end," once a meaning or original principle is derived historically. Indeed, Balkin invites us to see constitutional interpretation as a two-stage process (text and principles, then application and implementation)—and all originalists give history pride of place at the first stage. From there, there are some divergences about application: decision-makers occasionally smuggle doctrine, consequences, prudence, construction with a "liberty presumption," practice, and political morality through the back door to keep originalism palatable or to translate its historical commands for our time. Although some originalists deny that there can be any gap between the first order inquiry and ultimate constitutional decision-making, it cannot easily be denied that many originalists depart from their first-order inquiry after excavating some "original meaning." Because Balkin clearly prioritizes history in his first order inquiry into "text and principles," the originalists should welcome him to their team.[15]

Living constitutionalists, by contrast, trade in a different currency. They simply do not privilege history (of ratification) in constitutional interpretation. They don't necessarily sideline text, history, and structure; these are just parts of the motley constellation that is constitutional interpretation. Balkin is undoubtedly right that living constitutionalists are particularly con-

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(2007).

14. Whether and how well originalists accomplish these desiderata is an ongoing conversation that I will not try to summarize or capture here.

15. I concede that most probably don't think about constitutional interpretation as a two-step process. Indeed, Barnett has called the "back end" stage "construction"—and would constrain when and how construction may supplement interpretation. One of the nice innovations of Balkin's rich paper is that he invites us to think in this fruitful way.

For those unwilling to see interpretation through this lens, however, I could probably run a very similar argument by focusing upon the relative weight originalists give certain modalities as compared to the living constitutionalists. And it would still be the case that Balkin's privileging of history at the principle-derivation stage puts him closer to the originalists. In any case, I actually believe that looking at interpretation through the two-step makes the differences I want to highlight clearer, so I stick with it in the text above.

cerned with the "dead hand of the past" controlling the present generation.[16] But precisely because they are, they cannot be content with Balkin's methodology: original meaning originalism—even Balkin's kind that allows contemporary translations on the "back end"—gives pride of place to the very dead hand living constitutionalists are convinced we must resist to maintain the document's present-day legitimacy.[17] Originalists either bracket the problem of the document's legitimacy, evade the basic question of the document's legitimacy, or are content that they have come up with some account that takes this question off the table. Living constitutionalists just can't get over it; the anxiety about legitimacy is always present and pervasive.[18] And Balkin is no longer anxious or pessimistic about the legitimacy of the document.[19] Indeed, he is cheerful and optimistic.

Living constitutionalists are plagued by anxiety about the dead hand of the past—and think we need to update and affirm the document's underlying principles if it is to be binding on anyone living today. The fixation on the dead hand of the past is not a mere motto but a mood with real interpretive consequences. To be sure, no one loses sight of the fact that it is a written document—a fact which itself has some interpretive

16. *See* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 392 (Julian P. Boyd & William H. Gains, Jr. eds., 1958) ("the earth belongs in usufruct to the living;" "The question whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water."); Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* THE PORTABLE THOMAS JEFFERSON 552, 560 (Merrill D. Peterson ed., 1975) ("Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believe most promotive of its own happiness. . . .").

17. For an example of a living constitutionalist resisting the dead hand, see Ackerman, *supra* note 4. In particular, Ackerman questions whether the structure of the basic document makes any sense in our time. The Constitution, he argues, envisions citizens being citizens of states first and the nation only second. Today's citizens, by contrast, are Americans first and Vermonters only second. *Id.* at 1749–50. Although he doesn't quite speak in the language of anxiety I employ here, he does not assume away constitutional legitimacy in his interpretive methodology—and precisely because he doesn't, his interpretive mechanics do not privilege original meaning. *Id.* at 1776–77. For Ackerman, special statutes may be admitted in the first stage of interpretation to derive and understand the very principles themselves. *Id.* at 1802.

18. It is possible, of course, that different parts of the Constitution elicit different levels of the anxiety. The Preamble's substantial generalities may, perhaps, rest on a different footing than the specificities of the amendment provisions.

19. For a new statement of pessimism about the document, see SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006). Although he claims that nothing in the book is to be taken as relevant to a theory of constitutional interpretation, *id.* at 23, it is hard to imagine that such pessimism and anxiety is irrelevant to the practice of interpretation. Indeed, I think it underwrites living constitutionalism itself.

ramifications.[20] But living constitutionalists insist that the legitimacy of the document cannot be fully defended if our first-order approach to it draws exclusively upon the historical. This requires that at the first-order level of constitutional interpretation and first-order derivation of the document's underlying principles themselves much more than history must be in play. The entire matrix of the various modalities of constitutional interpretation is fair game to enable an authentic dynamicism that can contribute to contemporary legitimacy. One cannot mollify the living constitutionalist merely by telling her, as Balkin does, that the document can achieve some flexibility and adaptability through some broadly-phrased clauses here and there.

To state it slightly differently, it is only our Constitution because it is suffused with and supported by contemporary assent. But living constitutionalists do not pledge faith (as Balkin's "text and principles" approach requires) *before* interpretation gets off the ground. Living constitutionalists demand that the living's views and expectations be reflected in the principles of the document itself; their needs cannot be deferred for the later "application and implementation" stage of constitutional interpretation. Without an effort to tether the contemporary generation's consent to the document and its principles, it might ultimately be legitimate to abandon it altogether. That threat is very real for the living constitutionalist, who can revere and venerate the document only when it is unmoored from its original meaning—or, perhaps, only when the Preamble is taken to announce the underlying principles for the whole document at a very high level of generality.

Although some living constitutionalists might prefer more regular constitutional conventions to help the process of legitimation, most living constitutionalists don't want to abandon the document altogether. They can generally concede with Balkin that the living have undeniable connections with the dead—that we share a collective memory and fate with them. Yet, a living constitutionalist insists that the document is only ours when our consent to it today is something other than completely fictive. Therefore, any first-order constitutional interpretation that pre-

20. Originalists routinely point to the document's "writtenness" and amendment provisions to argue against an evolving Constitution. *See, e.g.*, Diarmuid O'Scannlain, *Today's Senate Confirmation Battles and the Role of the Federal Judiciary*, 27 HARV. J.L. & PUB. POL'Y 169, 179 (2003). Writtenness and the possibility of repeal and modification, however, doesn't necessarily preclude dynamic interpretation. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1481 (1987).

vents the full range of interpretive modalities from destabilizing original meaning risks betraying the entire "social contract." This is a key to living constitutionalism and, in turn, the key that locks Balkin out of the club.

In summary, a core difference between the originalists and the living constitutionalists turns on what we might call interpretative mechanics—and Balkin aligns himself with the originalist form. Originalists exclude many "extrinsic" constitutional modalities in their first pass at any particular constitutional question; living constitutionalists let it all in from the start. Discussions of consequences, underlying principles of political morality, prudence, doctrine, rule of law considerations: all these are relevant (even if not, perhaps, equally relevant) for living constitutionalists at the first moment that a question of constitutional interpretation presents itself. Originalists either rule these considerations out of the interpretive game entirely or admit them only in later conceptual stages of the interpretive enterprise.

Many people would have no trouble with originalist mechanics because they take for granted that the document is binding. Without anxiety about the basic legitimacy of the document and the original principles it embodies, originalists can keep a lot of questions and considerations at bay in the first stage of interpretation. Perhaps if we agree that the document has inherent bindingness, one can reasonably argue that the document's meaning is revealed in the first instance as a question of history.

Living constitutionalists can and do offer theories of meaning to contest this last supposition; they argue that meaning itself requires dynamic interpretation. But that debate is not my core concern here because much more is at stake in constitutional interpretation than a debate about linguistic meaning; constitutional interpretation is a social practice of legitimation for the living constitutionalist. Nor is my central interest here the empirical question about which interpretive mechanics better describe actual constitutional argumentation and constitutional politics in state and society.[21]

21. Indeed, originalism (even of Balkin's form) may seem like an undesirable theory because it just doesn't seem like a good positive account of what people (whether seen as "the people," judges, social movements, or law professors) are contesting in constitutional politics and constitutional discourse. They aren't necessarily having a debate about history in the first instance—even if they acknowledge that history is an important factor or modality in the interpretive project too. It is hard to see much of the debate about abortion in particular as an effort to uncover historical principles and apply them

Rather, my central concern is what I think motivates and animates living constitutionalism's interpretative mechanics. Conceding the fundamental bindingness of the document when confronted with every question of constitutional interpretation (as many originalists, including Balkin must do) impliedly rejects the living constitutionalist's preference that constitutional interpretation and adjudication should, every time constitutional dialogue gets off the ground, re-ask in the first instance the question of the very legitimacy of the document as our social contract today.

To be sure, the instability implied by constitutional politics and constitutional interpretation with such high stakes is daunting. It can even seem subversive, unsettling what we think of as an especially important part of constitutional government: restraining majoritarianism and protecting certain rights from everyday political contest.[22] The consequent messiness, seeming lack of discipline, purported lack of fidelity (and actual lack of faith from time to time), disrespect for the document, and too substantial delegation to the judiciary likely go a long way in explaining why living constitutionalism is unattractive to so many. It is part of why Balkin feels the need to distance himself from this seemingly antinomian orientation. But it will satisfy only a few living constitutionalists to be handed some vague clauses that can be updated easily.[23] This just isn't enough to make the

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in our time; at its core it is a debate about very fundamental questions of political and personal morality. Those engaging in these debates may be surprised to learn that they have to read the Congressional Record to justify their positions.

Living constitutionalism, by contrast, can perhaps make better sense of the positive reality of constitutional discourse: this is especially so when we focus on constitutional interpretation by citizens, whom Balkin puts at the core of his theory of constitutional interpretation. Citizens are probably much worse than judges at limiting their discourse to history in deriving "text and principles," which Balkin's originalism requires.

22. I tend to think this critique against living constitutionalism, although commonly heard, misunderstands and oversimplifies the political project of constitutionalism. But this is hardly the place for such an argument.

23. Gillman's account of living constitutionalism in Gillman, *supra* note 7, sometimes reads as if Balkin's distinction between "original expected application" and "original meaning" might do the trick. *See id.* at 221 (highlighting the separation of "principles" from "the particular means" the framers used to realize them). *id.* at 222–23 (invoking Justice Brandeis's dissent in *Olmstead v. United States*, 277 U.S. 438 (1928)). *id.* at 231 (invoking a statement of living constitutionalism by FDR). But there is much in Gillman's summary of living constitutionalism's advocates that is not as easy to reconcile with Balkin. *See id.* at 222–25 (drawing upon Brandeis's idea that interpretation might "ignore[] the expressed will of the sovereign in favor of an imagined set of aspirational goals" that are barely expressed in the document itself and explaining the result in *Home Building & Loan Ass'n v. Blaidsdell*, 290 U.S. 398 (1934) as justifiable only if the very basic principles expressed in the document are subject to radical reinterpretation). *id.* at 235–36 (discussing Corwin's explicit rejection of "fidelity to tradition" and his belief that

living constitutionalists happy and get them to stop pestering us with their questions that go to the very core of our practice of constitutionalism.

Living constitutionalism takes the threat of basic illegitimacy very seriously. Although the document needn't be considered profane,[24] neither can it be treated as sacred.[25] Our civic life together is not a religious covenantal community that requires adherence to our governing document just because it happens to exist and happens to help constitute us as a people. The document and our life under it always stands in need of moral, practical, and political justification—and living constitutionalism always requires us to ask for that justification at the very moment when we ask for the meaning of the document and its provisions. This is why living constitutionalists cannot give history pride of place and require a much more eclectic approach to first-order inquiries in its interpretive mechanics. Balkin assumes a faith that living constitutionalists think needs to be earned through the interpretive process itself.[26]

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the meaning of the Constitution itself must change with time), *id.* at 236 (highlighting Corwin's insistence that the document must gain authority only from the living).

This tension within Gillman's account obviously highlights that living constitutionalism is a big umbrella—and surely some will be able to live with Balkin's original meaning originalism. But I would guess that most of them, if they were honest, would not for the reasons I specify here: his interpretative mechanics and mood are originalist.

It may be that living constitutionalists would find it dangerous and embarrassing to admit their psychological condition. But I think my analysis here should nevertheless help explain why they will have trouble embracing Balkin's account.

24. The classic invocation here is William Lloyd Garrison's view of the Constitution as "A Covenant with Death and an Agreement with Hell." *See* William Lloyd Garrison, THE LIBERATOR, May 6, 1842, at 3.

25. *See* MCBAIN, *supra* note 7, at 272 (arguing that the Constitution "was not handed down on Mount Sinai by the Lord God of Hosts. It is not revealed law. It is no final cause"). I concede that some living constitutionalists cannot help themselves and resort to calling the Constitution sacred text. *See, e.g.*, Ackerman, *supra* note 4, at 1752–53 . Although I don't see this metaphor as appropriate for an honest living constitutionalism, a weak form of textualism is potentially consistent with living constitutionalism. For more on how that might work, see *infra*.

26. The deepest work analyzing faith in the Constitution is SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988). There, one can surely see on display the sort of agnosticism, ambivalence, and demand for legitimacy I am attributing to living constitutionalism. Although Levinson once pledged a tortured faith in that early work, he no longer would be willing to sign the document himself. *See* LEVINSON, *supra* note 19, at 5. Back when Balkin was a living constitutionalist, one could see him embracing Levinsonian anxiety about constitutional faith:

> Law offers us the promise of justice without ever making good on that promise in full. That is why the most basic problem of jurisprudence is the problem of faith in law; and the most basic question in jurisprudence is the question to what extent our faith in law is justified. At the heart of law, and the philosophy of law, lies the problem of faith and idolatry.

Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sandy Levinson*, 38 TULSA L.

Admittedly, it is somewhat unfashionable these days to believe that political obligation, our obligation to obey the law of the Constitution, stems from any social contract theory of the traditional liberal form. Still, underlying many versions of both originalism and living constitutionalism remains some view that the Constitution's legitimacy as binding law derives, in part, from its role as our organizing social contract.[27] To say, as some do,[28] that it binds only our government and our officials—who themselves swear an oath to it to renew its bindingness[29]—evades the most basic reality that the Constitution plays a central role in all of our political lives. Accordingly, when looking for the assent or consent of the governed to legitimate the document, it is not terribly uncommon to think of the Constitution in contract law terms (even though the analogy falls apart in many different ways).[30] Randy Barnett has done the most to use contract theory to help underwrite originalism and its quest to quiet the anxious question of the "dead hand" distressing the living constitutionalists.[31] But I think some contract ideas may also be marshaled on

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REV. 553, 577 (2003). For his original meaning originalism, Balkin has had to leave his worries about constitutional idolatry behind—with the living constitutionalists.

27. BARNETT, *supra* note 12, is a notable—and very interesting—exception. I very much doubt he squares the circle of legitimacy with his alternative to popular sovereignty. But his originalism displays the very confidence in legitimacy I have ascribed to that group of constitutional theorists. In some ways, originalism is driven by the fear of the consequences of taking the possibility of illegitimacy seriously; it represses the problem to cope with the fear. *See id.* at 5 (warning that rejecting originalism may lead to disorder because we might have to conclude that "no one [is] behind the curtain and [judges'] commands are utterly devoid of binding authority").

28. *E.g.*, *id.* at 12.

29. As Judge Frank Easterbrook has written, "[o]ur constitutional order does not depend on hypothetical contracts. There are actual contracts. Like other judges, I took an oath to support and enforce both the laws and the Constitution. That is to say, I made a promise—a contract." Frank Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1122 (1998).

30. Among the most important ways (that may dissuade us from pursuing this thin analogy at all) is that contracts require actual assent among parties, something that we can never hope for in constitutional politics. There are many other forceful objections to pursuing this analogy as well. *See, e.g.*, RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, DEMOCRACY 82–142 (2003); Trevor W. Morrison, *Lamenting* Lochner*'s Loss: Randy Barnett's Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839 (2005).

31. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999). Contract theory has also been marshaled to defend a particular set of propositions about constitutional interpretation in David McGowan, *Ethos in Law and History: Alexander Hamilton, the Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 756 (2000); and Easterbrook, *supra* note 29.

As it turns out, Barnett views "popular sovereignty" as an implausible account of the Constitution's legitimacy. *See generally* BARNETT, *supra* note 12, at 11–52. And his helpful discussion suggests that even contract principles may be unwelcome because of the difficulty of finding anything resembling "consent" to the contract. This doesn't, as it

the side of the interpretive theory preferred by living constitutionalism.

If we were to indulge the analogy for a moment, perhaps what is most notable about our constitutional contract is that it is very difficult to modify—and that there is virtually no negotiating over the written terms by the living. It is a form contract, a classic "contract of adhesion."[32] The terms are offered on a "take-it-or-leave-it basis" and the "only alternative to complete adherence is outright rejection."[33]

Yet it is still more disturbing than a mere consumer contract of adhesion because unlike some objective manifestations of assent that routinely precede formation in most form contracting, there is precious little most citizens do to manifest assent. Some of our officers take oaths to uphold the Constitution—and for these people it is, perhaps, much more similar to a classic consumer contract. But for most citizens whose lives are affected by and organized by the Constitution, there are only very attenuated manifestations of assent, some of which are produced, perhaps, under coercion. Citizens may pay taxes to the constitutionally sanctioned government and may follow many of the laws promulgated by those given authority through the Constitution's provisions. But these activities may just as easily be the product of coercion—the threat of being jailed—rather than affirmative assent to the social contract. Voting is more voluntaristic, of course, but we needn't manifest any allegiance to the process: We partake because the results of elections will control us anyway. In short, consent to our central contract of adhesion is extremely attenuated.

A living constitutionalist might look to some theorists of form contracts to see if there are any special interpretive rules that might govern such instruments. Randy Barnett's theory of form contracting[34]—a relatively adhesion-friendly theory, to

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turns out, prevent Barnett from resorting to contract theory to underwrite originalism.

32. Some further discussion of this idea (in a different context) can be found in Alex Kozinski & Harry Susman, *Original Mean[der]ings*, 49 STAN. L. REV. 1583, 1598–1600 (1997). They address whether the ratifiers themselves could be bound by the adhesive nature of the Constitution. One critical problem they identify—which applies to my use of the analogy too—is that the idea is somewhat anachronistic. As they note, "[t]he term 'contract of adhesion' did not appear in the United States until 1919." *Id.* at 1599 n.108. But living constitutionalists are freed from the difficulties of anachronism, perhaps, because they don't see themselves as bound by the original intent of original intent.

33. E. ALLAN FARNSWORTH, CONTRACTS 312 (2d ed. 1990).

34. *See* Randy E. Barnett, *Consenting to Form Contracts*, 71 FORD. L. REV. 627 (2002).

boot—highlights a few special limitations of adhesion contracts. First, an actual manifestation of assent is important to trigger enforceability. We seem to lack that manifestation with respect to most citizens and, accordingly, the enforceability of the contract becomes a source of debate and anxiety in the very first instance.

Even if we could bracket that hurdle (and to get the interpretive project off the ground, the living constitutionalist may need to concede that some general assent to some basic text may be implied), Barnett insists that we can never commit through a form contract "to violate the rights of others or . . . transfer or waive an inalienable right."[35] Accordingly, there may be a "higher law" that doesn't itself derive from the Constitution. This "higher law" can constrain the terms in a contract of adhesion. More, the "higher law" supplied by political morality more generally might be imagined to vary with the times. That is so because formation under the adhesive contract happens anew for each citizen, triggering a new baseline set of inalienable rights conferred by our renewed sense of justice in each generation.

Together, these contract ideas can help living constitutionalists explain both why they are terribly anxious about legitimacy in the first instance and why they think fundamental principles of political morality and ethics are always in play when taking to the task of interpreting our constitutional contract of adhesion. There are ways out of the "higher law" of the dead if a "higher law" of the living trumps it.[36]

There is more to the analogy, too. It is routine in form contracting to construe any ambiguities that arise in interpretation and construction against the drafter. To be sure, clear, conspicuous, and especially visible terms in a contract of adhesion are often enforceable.[37] But as soon as any ambiguity arises, the con-

35. *Id.* at 637.

36. Much of Bruce Ackerman's career can be seen as an effort to specify conditions for "higher lawmaking" outside of the document's formal amendment procedures. *see, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266–94 (1991), which themselves are arguably *unconscionable* given the reality of what it takes to modify the document formally. The "usage of trade" on practices of constitutional amendment in the world community reveals the American constitution to be the single most difficult Constitution in existence to amend. *See* Donald Lutz, *Toward a Formal Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 261 (Sanford Levinson ed., 1995); LEVINSON, *supra* note 19, at 204 n.29 (discussing Lutz and the Yugoslav Constitution, which was harder to amend when it existed). This unconscionability may be yet another reason living constitutionalists are much more open to non-Article V amendment.

37. *See generally* Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*,

sumer under the adhesive contract will likely be able to have the contract construed to her benefit and against the drafter. As one court put it, "if some substantive provision of [an] agreement is fairly susceptible of a certain construction and the contractor actually and reasonably so construes it, in the course of . . . performance, that is the interpretation which will be adopted."[38]

Finally—and most pertinent to the potential for living constitutionalists to draw from the concept of the contract of adhesion to explicate their interpretive principles—contracts of adhesion can be limited to consumers' "reasonable expectations."[39] Terms are not to be interpreted to "exceed some bound of reasonableness."[40] To be sure, usually when courts construe adhesion contracts in light of "reasonable expectations," the relevant expectations are measured as of the time of formation.[41] But "formation" in the case of the Constitution is happening over and over again with each new living citizen that is drawn into the contract. So we must transpose the doctrine to help us interpret the document upon implementation and enforcement as well. As the Supreme Court wrote in *Carnival Cruise Lines v. Shute*,[42] "clauses contained in form . . . contracts [of adhesion] are subject to . . . scrutiny for fundamental fairness." Thus, interpreters are given a somewhat free hand to legitimize form contracts by policing for fundamental fairness. Barnett's motto seems particularly apt: "We must never forget that it is a form contract [we are] expounding."[43]

To be fair, not all courts and commentators embrace the principles of interpretation for contracts of adhesion that I discuss here.[44] Still, seeing the Constitution for the kind of social

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96 HARV. L. REV. 1173 (1983). Perhaps here is where the living constitutionalist can cede something to a pure textualism: The President must be 35 years old because it is crystal clear (and doesn't, perhaps, offend inalienable rights)—and only limited general assent seems to be required for such a clear provision. For more on the distinction between general assent and specific assent in form contracts, see KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

38. WPC Enter., Inc. v. United States, 323 F.2d 874, 876 (1963).

39. RESTATEMENT (SECOND) OF CONTRACTS § 211, cmts. e–f (1981).

40. Barnett, *supra* note 34, at 638.

41. *See, e.g.*, Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1, 38–39 (1991).

42. 499 U.S. 585, 595 (1991).

43. Barnett, *supra* note 34, at 639.

44. Judge Easterbrook seems willing, for example, to enforce any provision of a contract of adhesion as long as it isn't unconscionable. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (1996); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (1997). Moreover, Barnett actually embraces these Easterbrook decisions and aims to limit the broad reasonable expectations doctrine of cases like *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*,

contract that it is recommends particular interpretive principles. If the Constitution is a contract of adhesion, we should, in our very first pass at interpretation and construction: (1) investigate the type of assent we can justifiably ascribe to citizens; (2) enforce bits of text that are plain, uncontroversial, and particularly clear; (3) construe ambiguous phrases against the "drafter" and in favor of those who are assenting today;[45] (4) protect the kinds of inalienable rights that the contractual document must be read to respect (rights that can change over time as the contract reforms anew); (5) protect the reasonable expectations of today's signatories; and (6) assess whether the document and its potential applications accord with fundamental fairness. This is a living constitutionalism, indeed, that does not privilege history (though history may be relevant in assessing reasonable expectations) and takes seriously the task of legitimating the document for today's generation.[46]

Some final points, in conclusion. My aim here has not been to convert anyone to living constitutionalism. I suppose one either obsesses about the inter-generational problem of constitutionalism and enables the anxiety to spill over to first-order constitutional interpretation or one doesn't. In any case, I have probably provided at least as many reasons to reject living constitutionalism as I have reasons to embrace it. It is hard, perhaps, to fault those who don't trust judges with life tenure or even the people themselves to undertake such a complicated interpretive project.[47]

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227 N.W.2d 169 (Iowa 1975) to the "radically unexpected." There is probably an important difference between those who want to enforce the "reasonable expectations" of the consumer and those who want to enforce all of the contract and any of its applications that aren't radically unexpected. Barnett gives us as much reason to embrace the former, however, as he does to embrace the latter. In any case, it is possible that the amendment provisions of the Constitution are unconscionable, *see* Ackerman, *supra* note 36, rendering non-Article V amendment perfectly constitutional after all.

45. When Kozinski and Susman considered the analogy, they assumed that the drafter against whom the ambiguous provisions might need to be construed is the federal government. *See* Kozinski & Susman, *supra* note 32, at 1598–99. But we could just as easily imagine that ambiguities need to be construed against the authors and ratifiers of the original text who purported to bind future generations through a form contract.

46. The Hollywood pitch is something like this: Corwin meets Corbin.

47. About the issue of judicial restraint in particular, I think Balkin's remarks are innovative and interesting—and could be incorporated into accounts of living constitutionalism. For Balkin, the constraints on judges come not from theories of constitutional interpretation but from what he calls "institutional features of the political and legal system." Balkin, *supra* note 1, at 309. If living constitutionalism needs an account of judicial restraint—and surely it does because the threat of illegitimacy from juristocracy is also substantial—Balkin offers a persuasive one.

One might say that the living constitutionalist merely displaces the illegitimacy from

My modest project here has been to highlight Balkin's failure to address fully the needs and anxieties of a living constitutionalism that is more than an anti-theoretical desire for flexibility and nice liberal results like the right to abortion. Indeed, I fear he trivializes living constitutionalism by suggesting that he accounts fully for its needs. By specifying some details about the interpretive mechanics of living constitutionalism and what may motivate those mechanics, I hope I have been able to suggest why originalism and living constitutionalism are not, as Balkin asserts, two sides of the same coin. Make no mistake: Balkin rejects living constitutionalism when he easily professes a faith in basic legitimacy. Living constitutionalism accepts fidelity as one modality of constitutional interpretation; but it doesn't have the faith that underwrites originalism, which preaches fidelity to the original meaning as the primary mode of interpretation.

A real question remains for the limited project I have undertaken here, however. Even if I am correct that Balkin embraces the interpretive mechanics of the originalists by dancing their two-step and prioritizing the historical in the derivation of principles, I still haven't shown that his resisting a full-scale confrontation with the question of the document's legitimacy in the "first step" makes any difference to constitutional outcomes. There may be some methodological and mechanical differences between his form of lefty originalism and the form of living constitutionalism I describe here—but I have hardly shown that this is a distinction that makes a real difference.[48] I have, perhaps, shown that the two theories have somewhat different sensibilities on a core question of interpretive methodology. But if they can get the same results, maybe Balkin's living constitutionalist friends won't feel abandoned, after all.

I can't fully evaluate this prospect, mostly because neither Balkin's lefty originalism nor my reconstruction of living consti-

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the document onto the judiciary. Perhaps. But the living constitutionalist can believe with Balkin that the judiciary is under much more substantial control by the living than the document itself—and the possibility of judicial restraint (even with eclectic interpretive mechanics) is very real.

48. Another thing I have not done here is argue for any right to abortion from the perspective of living constitutionalism. I have occupied myself here with much a more theoretical agenda (and, in the process, have made some controversial claims about the psychology of living constitutionalism). One of the great contributions of Balkin's work, however, is that he does much more than describe his "text and principles" approach as a matter of theory; he shows us how it works. Living constitutionalists are admittedly much better at theory than at careful specifications of how the motley method works in practice. At the very least, Balkin's flirtation with originalism should inspire real living constitutionalists to do more to specify how their interpretive mechanics produce results.

tutionalism (and especially the latter) are sufficiently detailed to say with any certainty that they would regularly produce the same results. Yet, even supposing that the two accounts would routinely produce similar results, people surely choose their constitutional theories for reasons other than the particular outcomes they can produce on the questions of abortion, gay marriage, and affirmative action. More, just because there may be some identity of results does not mean that we can avoid the task of choosing which method we prefer to get them.

Finally, and most central to my themes here, living constitutionalism is a mood and an anxiety at its core; its atmospherics are, I think, substantially different from Balkin's optimistic originalism. So even if Balkin's originalism and living constitutionalism converge on certain outcomes, living constitutionalists might ultimately find Balkin's disposition too cheery and alienating to keep him around. The originalists have faith; living constitutionalists are agnostics and require each generation to ask and answer the question of constitutional legitimacy in its own voice.