

## UNDERLYING PRINCIPLES

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In his article, *Abortion and Original Meaning*,<sup>1</sup> Jack Balkin makes the startling disclosure that he is now an originalist. “[C]onstitutional interpretation,” he writes, “requires fidelity to the original meaning of the Constitution and to the principles that underlie the text. The task of interpretation is to look to original meaning and underlying principle and decide how best to apply them in current circumstances. I call this the method of *text and principle*.”<sup>2</sup>

This is big. Jack Balkin is one of the most consistently creative and innovative progressive constitutional law theorists of our day. That he has been pulled by the gravitational force of originalism is a major development. I know what that force feels like.

### MY PATH TO ORIGINALISM: LYSANDER SPOONER

All the time I was doing my earliest writings on the Ninth Amendment and the Second Amendment, I considered myself a nonoriginalist. I concurred with the standard criticisms of originalism that were widely accepted by constitutional scholars: interpreting the Constitution according to the original intentions of the Framers was impractical, illegitimate, and contrary to the intentions of the Framers themselves. Nevertheless, I continued to research and write about the original meaning of the text, which continued to seem salient to me and many others.

Then, quite by serendipity, I came across a reference to Lysander Spooner’s 1845 book, *The Unconstitutionality of Slavery*,<sup>3</sup>

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

2. *Id.* at 293.

3. See LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* (rev. ed. 1860), reprinted in 4 *THE COLLECTED WORKS OF LYSANDER SPOONER* (Charles Shively ed., 1971).

in an anthology edited by Sandy Levinson.<sup>4</sup> Having been a fan since college of Spooner's 1870 essay, *No Treason: The Constitution of No Authority*,<sup>5</sup> my curiosity was piqued. When I looked at Spooner's monograph on slavery, I discovered an approach to constitutional interpretation I had not before considered.

Spooner was responding to the argument of the Garrisonian abolitionists that the Constitution was "a covenant with death and an agreement with hell" because it sanctioned slavery. In particular, he was answering a pamphlet by radical abolitionist lawyer Wendell Phillips entitled, *The Constitution: A Pro-Slavery Compact*.<sup>6</sup> Phillips had presented excerpts from the recently-disclosed notes of the constitutional convention by James Madison as proof that the Framers had intended to protect the institution of slavery in several passages of the Constitution, passages that seem to allude to the matter without using the term "slavery" or "slave."

In reply, Spooner maintained that the Constitution should be interpreted according to its public meaning at the time it was enacted. As Spooner argued:

We must admit that the constitution, of itself, independently of the actual intentions of the people, expresses some certain fixed, definite, and legal intentions; else the people themselves would express no intentions by agreeing to it. The instrument would, in fact, contain nothing that the people could agree to. Agreeing to an instrument that had no meaning of its own, would only be agreeing to nothing.<sup>7</sup>

How then is the Constitution's meaning to be determined? "[T]he only answer that can be given," Spooner concluded:

is, that it can be no other than the meaning which its words, interpreted by sound legal rules of interpretation, express. That and that alone is the meaning of the constitution. And whether the people who adopted the constitution really meant the same things which the constitution means, is a mat-

4. See Mark E. Brandon, *The "Original" Thirteenth Amendment and the Limits to Formal Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 215, 234 (Sanford Levinson, ed., 1995) (citing Spooner).

5. See LYSANDER SPOONER, *NO TREASON, NO. VI: THE CONSTITUTION OF NO AUTHORITY* (1870).

6. WENDELL PHILLIPS, *THE CONSTITUTION, A PRO-SLAVERY COMPACT* (New York: American Anti-Slavery Society 1845).

7. SPOONER, *supra* note 3, at 222; see also *id.* at 220 ("[I]f the intentions could be assumed independently of the words, the words would be of no use, and the laws of course would not be written.").

ter which they were bound to settle, each individual with himself, before he agreed to the instrument; and it is therefore one with which we have now nothing to do.<sup>8</sup>

Any secret intentions not embodied in the text itself were not binding on later interpreters:

The intentions of the framers of the constitution . . . have nothing to do with fixing the legal meaning of the constitution. That convention were not delegated to adopt or establish a constitution; but only to consult, devise and recommend. The instrument, when it came from their hands, was a mere proposal, having no legal force or authority. It finally derived all its validity and obligation, as a frame of government, from its adoption by the people at large.<sup>9</sup>

Since the Framers had chosen to use euphemisms for slavery, interpreters were obligated to give these terms their ordinary public meaning, rather than the meaning they would have only if one already knows from extrinsic information that they were intended to refer to slavery.

In addition, Spooner offered a theory of constitutional legitimacy that was startlingly modern in its reliance on hypothetical consent given the impossibility of any literal consent by the people.

Our constitutions purport to be established by "the people," and, in theory, "all the people" consent to such government as the constitutions authorize. But this consent of "the people" exists only in theory. It has no existence in fact. Government is in reality established by the few; and these few assume the

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8. *Id.* at 223. Spooner thought that general rules of interpretation were needed to choose among the various meanings of language:

[T]he same words have such various and opposite meanings in common use, that there would be no certainty as to the meaning of the laws themselves, unless there were some rules for determining which one of a word's various meanings was to be attached to it, when the word was found in a particular connection. . . . [The judge's] office is to determine the legal meaning of a word, or, rather, to select the legal meaning of [a] word, out of all the various meanings which the word bears in common use.

*Id.* at 163.

9. *Id.* at 114. Spooner asked: Did Mr. Madison, when he took his oath of office, as President of the United States, swear to support these scraps of debate, which he had filed away among his private papers? - Or did he swear to support that written instrument, which the people of the country had agreed to, and which was known to them, and to all the world, as the constitution of the United States?

*Id.* at 117.

consent of all the rest, without any such consent being actually given.<sup>10</sup>

Spooner then made a crucial move: The inevitable fact that actual consent is lacking limits the government to exercising only those powers to which every honest person could be presumed to have consented.

All governments . . . that profess to be founded on the consent of the governed, and yet have authority to violate natural laws, are necessarily frauds. It is not a supposable case, that all or even a very large part, of the governed, can have agreed to them. Justice is evidently the only principle that everybody can be presumed to agree to, in the formation of government.<sup>11</sup>

Finally, given this account of legitimacy, Spooner supplemented his original public meaning approach to constitutional interpretation with a rule of constitutional construction he borrowed from a “clear statement” rule for statutory construction that had been enunciated by Chief Justice John Marshall in *United States v. Fisher*. Here is Marshall’s formulation:

Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects.<sup>12</sup>

According to Spooner, in the absence of a clear statement to the contrary, where there is a choice between an innocent public meaning, and an idiosyncratic and manifestly unjust meaning provable only by reference to original intentions, constitutional legitimacy required the adoption of the innocent meaning. Spooner formulated the interpretive maxim as follows:

1st, that no intention, in violation of natural justice and natural right . . . can be ascribed to the constitution, unless that intention be expressed in terms that are legally competent to express such an intention; and 2d, that no terms, except those that are plenary, express, explicit, distinct, unequivocal, and to

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10. *Id.* at 12; *see id.* at 225 (“The whole matter of the adoption of the constitution is mainly a matter of assumption and theory, rather than of actual fact.”).

11. *Id.* at 143.

12. *United States v. Fisher*, 6 U.S. [2 Cranch] 358, 390 (1805).

which no other meaning can be given, are legally competent to authorize or sanction anything contrary to natural right.<sup>13</sup>

Spooner's arguments eventually persuaded Frederick Douglass famously to reverse his position on the constitutionality of slavery.<sup>14</sup> Modern readers, especially those who have not heard of Spooner before or who consider him a marginal figure, might pause for a moment to contemplate the sophistication of his approach.

This first encounter with original public meaning interpretation was an eye-opener for me. It seemed to avoid many, if not all, of the objections then being made against originalism based on original framers' intention or original ratifiers' understanding. Eventually, I came to the conclusion that, given a commitment to a written constitution and a correct view of constitutional legitimacy, original public meaning originalism was the best way to approach constitutional interpretation. In my Brendan Brown Lecture at Loyola University of New Orleans, I dubbed this approach, "An originalism for nonoriginalists," because it seemed to me that this version of originalism had a lot to offer to many constitutional scholars who, like me, considered themselves nonoriginalists.<sup>15</sup>

Now Jack Balkin has reached the same conclusion. I would like to think that, over the years, he was influenced by Frederick Douglass's 1860 Glasgow lecture on the unconstitutionality of slavery, which is given prominence in the casebook by Brest, Levinson, Balkin and Amar. In his speech, Douglass employs a Spoonerian public meaning approach. If confronting Douglass's arguments in the classroom did indeed contribute to Balkin's move to original public meaning originalism, then Lysander Spooner has struck again.

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13. SPOONER, *supra* note 3, at 58–59.

14. The ultimate success of Spooner's application of his method to the issue of slavery is beyond the scope of this comment. For a summary of his analysis see Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 PAC. L.J. 977 (1997). Easy access to Spooner's writings can be found at <http://www.lysanderspooner.org>.

15. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999). The argument presented there was revised and expanded in RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

## BALKIN'S ORIGINALISM: TEXT AND PRINCIPLE

In his article, Balkin contends that the “choice between original meaning and living constitutionalism . . . is a false choice.”<sup>16</sup> He specifically subscribes to the version of originalism based on “original meaning” rather than on either Framers’ intent or ratifiers’ understanding, although he freely acknowledges, as well he should, that evidence of the intentions of the Framers and ratifiers is often highly relevant to determining the public meaning of the words they decided to enact. To avoid confusion, it is useful to note that the difference among these methods of interpretation is defined, not by the evidence each includes or excludes from its analysis, but by what each method is trying to prove or disprove by use of evidence. Oftentimes each approach considers the very same evidence.

Balkin sharply criticizes the originalism of Justice Scalia, and others, who limit original meaning to the “expected applications” of the more abstract provisions to the problems of the day, and who then qualify their commitment to originalism to avoid objectionable results by selectively adhering to nonoriginalist precedents.<sup>17</sup> Although Justice Scalia deserves tremendous credit for shifting the focus of originalists away from Framers’ and ratifiers’ intentions to the public meaning of the text,<sup>18</sup> in my view, Balkin’s critique is telling and correct.<sup>19</sup> Unlike the process of determining original public meaning, in all but the rarest of cases,<sup>20</sup> limiting the more abstract provisions of the Constitution to their “expected application” is not an historical question. It calls instead for us to ask how the Framers *would have* expected the text to apply to concrete cases, which is a counterfactual rather than a factual inquiry. I have dubbed this approach “channeling the Framers.”<sup>21</sup>

16. Balkin, *supra* note 1, at 293.

17. *See id.* at 306.

18. *See, e.g.,* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Amy Gutman, ed., 1997) (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”).

19. For my critique of Justice Scalia’s approach, which I conclude cannot accurately claim to be originalist, see Randy E. Barnett, *Scalia’s Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CIN. L. REV. 7 (2006) (describing all the exceptions to originalism allowed by Justice Scalia that effectively swallow any originalist rule).

20. For an exception that proves the rule, see the dissenting opinion in *Home Bldg. & Loan Ass’n. v. Blaisdell*, 290 U.S. 398 (1934) (applying the original intent of the Contracts Clause to debtor’s relief legislation).

21. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U.

Balkin's "text and principle" approach to originalism is, he contends:

faithful to the original meaning of the constitutional text, and the purposes of those who adopted it. It is also consistent with a basic law whose reach and application evolve over time, a basic law that leaves to each generation the task of how to make sense of the Constitution's words and principles. Although the constitutional text and principles do not change without subsequent amendment, their application and implementation can. That is the best way to understand the interpretive practices of our constitutional tradition and the work of the many political and social movements that have transformed our understandings of the Constitution's guarantees.<sup>22</sup>

He then applies his approach to the constitutionality under the Fourteenth Amendment of governmental bans on abortion.

I am in agreement with nearly everything Balkin says about original meaning originalism in the Part II of his article. I am also sympathetic with his conclusions about the unconstitutionality of prohibitions on abortion, but will not address the substance of this issue here. Discerning and applying the original meaning of the Fourteenth Amendment is a tricky business and I intend to do more work on this subject in the future. For one thing, originalism properly done requires a careful attention to evidence; it is not enough that a particular interpretation is a plausible fit with the text.

In the balance of this comment, I merely express a caution about one facet of originalist methodology: the relationship between the text of the Constitution and the principles that underlie it. I will explain why the differing ways they conceive of this relationship distinguishes originalists from living constitutionalists. Balkin's treatment of this issue may unintentionally blur this still-useful line.

## TWO USES OF UNDERLYING PRINCIPLES

There are two ways to relate underlying principles to text, one that is a vital part of an originalist method of interpretation and another that is a negation of originalism. Unfortunately, it is very easy to slip from one to the other without realizing it. It happens all the time.

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CHI. L. REV. 101, 111 (2001).

22. Balkin, *supra* note 1, at 293.

In a crucial passage, Balkin describes the move to underlying principles when interpreting a text. It is worth quoting at length:

Underlying principles are necessary to constitutional interpretation when we face a relatively abstract constitutional command rather than language that offers a fairly concrete rule, like the requirement that there are two houses of Congress or that the President must be 35 years of age. When the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command. For example, the underlying goal of promoting maturity in a President does not mean that we can dispense with the 35 year age requirement. But where the text is abstract, general or offers a standard, we must look to the principles that underlie the text to make sense of and apply it. Because the text points to general and abstract concepts, these underlying principles will usually also be general and abstract. Indeed, the fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and abstract principles of constitutional law, whose scope, in turn, will have to be fleshed out later on by later generations. Nevertheless recourse to underlying principles limits the direction and application of the text and therefore is essential to fidelity to the Constitution.<sup>23</sup>

In this passage, Balkin correctly describes the relationship between text and underlying principle: given the *underdeterminacy* of language,<sup>24</sup> a resort to underlying principles is sometimes needed to discern the original meaning of the text but cannot be used to contradict or change that meaning. Although, in this passage, he seems to imply that *only* “[w]hen the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command,” I doubt this is the meaning he intended. To be faithful to the text *and* principle, as opposed to text *or* principle, underlying principles can *never* be used to override a textual command. Rather, I take Balkin to mean that, discerning the original meaning of the more abstract provisions of the text requires a greater reliance upon the principles that underlying these provisions.

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23. *Id.* at 304.

24. See Lawrence Solum, *On the Indeterminacy Thesis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (distinguishing underdeterminacy from indeterminacy).



To remain faithful to the Constitution when referring to underlying principles, *we must never forget it is a text we are expounding*. And it is the text, properly interpreted and specified in light of its underlying principles, *not the underlying principles themselves*, that are to be applied to changing facts and circumstances by means of constitutional doctrines. When you need to penetrate beneath the surface of the text to the principles that lie underneath, you must reemerge through the text. In other words, it is not the underlying principles that are applied to present circumstances but the original meaning of the text interpreted in light of these principles.

There is another highly familiar and very nonoriginalist way to see the relationship between “text and principle”: One could discern the principles underlying the text, and then apply these principles directly to new circumstances. By so doing, one can end up potentially expanding the reach of, and even contravening, the text itself.

For example, assuming that the original meaning of “the right to keep and bear arms”<sup>25</sup> in the Second Amendment refers to an individual right,<sup>26</sup> one could nevertheless identify the principle underlying the Second Amendment as the maintenance of public safety. Given the increased lethality of modern weaponry and our changed understanding about the relationship between firearms and public safety, it might then be contended that the underlying principle of the Second Amendment is best served by prohibiting the private ownership of firearms. More plausibly, one could contend that the underlying principle of the Second Amendment, as indicated by its preface, is the preservation of a “well-regulated militia” and, now that the militia has been superseded by the National Guard, the Amendment should be ignored.

Either use of underlying principles would then justify contradicting the portion of its text that explicitly protects a *right* to keep and bear arms—an individual right that serves one or more purposes, including both personal and collective self-defense—rather than interpreting and applying it. Put another way, this resort to underlying principles is not really a faithful interpretation

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25. U.S. CONST. amend. II.

26. An obviously highly contested assumption. See Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004).

of the text but is an all-too-familiar way of obviating textual commands.

Although I think that Balkin would reject this move, his article may invite some confusion on this point. The first source of possible confusion arises when he contends that “we do not face a choice between living constitutionalism and fidelity to the original meaning of the text. The two are opposite sides of the same coin.”<sup>27</sup> The term “living Constitution,” however, was coined to justify ignoring or contradicting the text in favor of applying the principles allegedly underlying the text to new facts and changing circumstances. Living constitutionalism’s claim to fidelity rests on its claim to be faithfully applying the enduring principles of the Constitution to new circumstances, even where ignoring or abandoning what it views as the archaic original text.

I believe that Balkin is revising or reinterpreting “living constitutionalism” so as to render it consistent with originalism—something I do myself—but this maneuver could easily be missed by uncaredful readers, who may be happy to claim the mantle of “originalist” while preserving an unvarnished living constitutionalism. I do not believe that this is Balkin’s endeavor, though I predict that other originalists may well make this charge. And they may do so because of how Balkin goes about analyzing the meaning of the Fourteenth Amendment.

In his discussion of abortion, Balkin is much more careful than most to bring the entire text of the Fourteenth Amendment to bear on the problem he is addressing, including the Privileges or Immunities Clause, and he presents important evidence of its original meaning. After identifying the principles underlying the Fourteenth Amendment as a whole as “equal citizenship, equal civil rights, and civil equality for all citizens of the United States,”<sup>28</sup> however, he then proceeds to apply the principle of “equal citizenship” directly to the problem of women’s rights in general and abortion rights in particular. The following passages are representative of the tenor of his analysis: “laws criminalizing abortion violate the Fourteenth Amendment’s principle of equal citizenship”<sup>29</sup>; “that laws that discriminate against women violate basic principles of equal citizenship in our Constitu-

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27. Balkin, *supra* note 1, at 348.

28. *Id.* at 311. The whole passage well exemplifies this approach: “The purpose of the Citizenship, Privileges or Immunities, and Equal Protection Clauses, and indeed of the entire Fourteenth Amendment, was to secure equal citizenship, equal civil rights, and civil equality for all citizens of the United States.” *Id.*

29. *Id.* at 292.

tion.”<sup>30</sup> Indeed, I count twenty-four references to “equal citizenship” in the article.

But there is no free floating “Equal Citizenship Clause” in the Fourteenth Amendment. Section 1 contains four moving parts that must carefully be considered and applied in light of their underlying principles. There is a Citizenship Clause that extends citizenship to “[a]ll persons *born* or naturalized in the United States, and subject to the jurisdiction thereof”<sup>31</sup>—a very important piece of text in the abortion context, as Balkin correctly explains. There is the Privileges or Immunities Clause that protects the “privileges or immunities” of all citizens, including women, from being abridged by the making or enforcing of a state law. There is the Due Process Clause that addresses the deprivations of life, liberty and property.<sup>32</sup> And there is the Equal Protection Clause, that provides all persons, male and female, whether citizens or not, with “the equal *protection* of the laws”<sup>33</sup>—laws that, presumably, do not on their face violate the privileges or immunities of citizens of the United States.

It seems quite plain that, unlike Section 2, the original public meaning of Section 1 of the Fourteenth Amendment is gender neutral. To apply it to particular cases requires the identification of those privileges or immunities enjoyed by all citizens, regardless of gender. And this would include, I would maintain, the natural right to control one’s body, including one’s reproductive processes, even against a competing moral concern for the unborn who, at least in the early stages of pregnancy, are neither “citizens” nor “persons” under the original meaning of the Constitution.

It is not my objective to present here a compelling originalist case for abortion rights. The matter is complicated by the need to interpret what it means to “abridge” the privileges or immunities of citizens. The last two paragraphs are offered solely to illustrate that, to the extent one needs to refer to an underlying principle of “equal citizenship,” an originalist must then re-surface through the text itself, which then gets applied to the problem at hand. I am concerned that Balkin’s extensive use of

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30. *Id.* at 319.

31. U.S. CONST. amend. XIV, § 1.

32. On its face, this clause seems to refer to the three forms of legal sanctions that ordinarily result from the application of laws to persons in the judicial process: One can be put to death (“life”), enjoined or imprisoned (“liberty”), or subjected to money damages or a fine (“property”). *See id.*

33. *Id.*

the equal citizenship principle divorced from text is a remnant of his former days as a living constitutionalist. Old habits die hard, and this particular habit is a very tough one to kick.

### CONCLUSION

I do not believe that Jack Balkin is trying to pull a fast one. I do not believe his aim is to steal or Balkinize the mantle of “originalism” and cleverly flip it to mean nothing more than the living constitutionalism beloved by so many constitutional scholars. I believe he is sincere in his embrace of original meaning originalism, and I share his belief that many, though not all, of the most cherished progressive results can be supported by a proper use of this methodology. He just needs to be a bit more sensitive about how principles work with, rather than undercut, text in an originalist “text and principles” approach.<sup>34</sup> In its present form, however, Balkin’s article is likely to confuse both originalists and nonoriginalists alike. And that would be a genuine pity.

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34. To this end, I recommend the work of John Manning. *See, e.g.*, John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *YALE L.J.* 1663, 1707 n.160 (2004) (textualists “are skeptical of the use of background intent or purpose to contradict the clear import of an otherwise precise statutory text. . . . When textualists do not feel the pinch of precise text, they think it appropriate for judges to try to make related texts coherent with one another. . . . When used properly, such analysis does not depend on background purpose to contradict a precise text, but rather reads an ambiguous provision in light of other parts of the same text.”); *see also* John F. Manning, *The Absurdity Doctrine*, 116 *HARV. L. REV.* 2387 (2003).