2007

Original Interpretive Principles as the Core of Originalism

John O. McGinnis

Michael Rappaport

ORIGINAL INTERPRETIVE PRINCIPLES AS THE CORE OF ORIGINALISM

*John O. McGinnis**
*Michael Rappaport***

Abortion and Original Meaning is a powerful article that is sure to have resonance in the field of constitutional interpretation. Professor Balkin undertakes what many previously would have thought a conjuror's trick: he attempts to locate the constitutional right to abortion, the poster child for imposition of the judiciary's own idiosyncratic values, in the original meaning of the Constitution. And he seeks to accomplish this feat by purporting to show how the theory of the living constitution is really an orginalist theory, once original meaning is properly divorced from the framers and ratifiers' expectations of how the provisions would be applied—what Balkin calls "original expected applications."

As such, the article has great strategic value: it attempts to appropriate for the living constitution philosophy the intellectual capital and public respectability that originalism has earned recently in the academy as well as the wider world. Even more boldly, it brands those who have claimed to be originalists as heretics to the true religion, on the ground that their focus on the original expected applications kills the document's vitality. By contrast, Balkin claims that his focus on the principles of the original meaning gives it life.

In our view Balkin presents a false dichotomy—either embrace abstract principles whose meaning is almost infinitely malleable or confine the Constitution to the applications the Framers imagined. We believe there is a middle way that is also a better way. Under this view, the Constitution's original meaning is informed by, but not exhausted by, its original expected applications. In particular, the expected applications can be strong evidence of the original meaning. Moreover, reasonable people

* Professor of Law, Northwestern University.
** Professor of Law, University of San Diego.

at the time of the Framing likely embraced such principles of interpretation and, as we shall show, it is their principles of interpretation that should guide the content of originalism, not Balkin's or anyone else's exegesis of the essence of true originalism.

In this brief reply we first argue that Balkin lacks a strong justification for following originalism of any kind. We also show that the best justification for originalism—that originalist interpretation is most likely to lead to good consequences—suggests that one should follow the principles of interpretation that a reasonable person at the time of the framing and ratification thought would be applied to the Constitution. Applying different principles severs the Constitution from the process which ensured that the Constitution had consensus support, and it is that consensus support that is the best guarantee of the Constitution's contemporary beneficence. Second, we briefly address the role of precedent in constitutional originalism. While Balkin suggests that reliance on precedent is a problematic move for originalists, we argue that the original meaning of the Constitution allows for the use of precedent.

Finally, we show that a reasonable person at the time of the Framing was more likely to have embraced interpretative principles that considered expected applications than Balkin's abstract "originalist" principles. In a short comment, we confine ourselves to brief outlines of two important points. First, people at the time of the enactment of the Constitution would have been unlikely to eschew expected applications because such applications can be extremely helpful in discerning the meaning of words.[1] Balkin's disregard of expected applications discards important information that would impede Balkin from reaching the results he desires. Second, risk-averse citizens would be unlikely to adopt interpretive principles of the kind Balkin advocates—a kind of free-form textualism glossed by the meaning which social movements of each generation give to the text. Such principles

1. In our view, the appropriate interpretive rules are those that would have been employed in the process of enacting the Constitution. Those interpretive rules would be those that a reasonable person at the time of the Constitution's enactment would have applied to the Constitution. It is not necessarily the interpretive rules employed by the framers or the ratifiers. After all, the process of enacting the Constitution also included the general public, who debated and elected the ratifiers. Perhaps the best description of this wider set of people would be the enactors, a term which we will sometimes employ. Of course, the interpretive rules used by the framers or ratifiers will be evidence of those that a reasonable person would have employed, but they are not automatically the correct rules.

carry a great deal of risk, because they do not protect the nation against the effects of social movements that pursue undesirable policies.

I. JUSTIFYING ORIGINALISM

Balkin does not offer a very thick justification of originalism. He says: "Constitutional interpretation by judges requires fidelity to the Constitution. Fidelity to the Constitution means fidelity to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text." But this formalist defense is insufficient to provide a normative defense of originalism and is so vague that it does not provide any guidance as to the content of the originalism that is to be defended.

Professor Balkin's normative defense proves insufficient, because he does not provide a persuasive reason why we should follow the original meaning of the Constitution, regardless of whether the Constitution or the process that led to its enactment were desirable. Assume, for instance, that an undesirable constitution was fabricated by a single individual and forced on the polity. Would we be obliged to follow this document, simply because it was the legal text that called itself the Constitution? It is a curious position for someone who defends the living Constitution to offer a justification of an interpretive theory of originalism that disregards the consequences of the Constitution for those living at the time of its enactment, let alone those living today.

Moreover, it is unclear from this justification why fidelity should be limited to the enactors' principles. There is nothing intrinsic to the concept of fidelity that requires that we ignore their intended or expected applications and follow only their principles. Indeed, it seems odd to say that you are being a faithful agent if you do something of which you know the principals would have disapproved simply because the action followed a general principle that you purport to derive from their command. Perhaps that is one possible understanding of fidelity, but hardly the only one. For instance, when interpreting statutes, many people believe that fidelity requires hewing closely to intentions expressed in legislative history, including expected applications of the statute.

Balkin needs a richer theory to justify originalism. We have recently provided such a theory ourselves. Briefly, we argue in

four steps that originalism is the best interpretive approach for the United States Constitution because it is more likely to produce desirable results than other interpretive approaches. First, entrenched constitutional provisions that are desirable should take priority over ordinary legislation, because such entrenchments operate to establish a beneficial framework of government and rights.[2] Second, appropriate supermajority rules tend to produce desirable entrenchments by generating constitutional provisions that are widely supported and are likely to produce net benefits.[3] Third, appropriate supermajority rules have generally governed the passage of the Constitution and its amendments.[4] Finally, this argument for the desirability of the Constitution requires that judges interpret the document based only on its original meaning because those at the time of the enactment used only that meaning in deciding whether to adopt the Constitution.[5] They did not rely on the meanings of Ronald Dworkin, Richard Posner, or Jack Balkin.

This justification suggests that the focus of originalism should be on how a reasonable person at the time of the Constitution's adoption would have understand its words and thought they should be interpreted. The Constitution's provisions were based on commonly accepted meanings and the interpretive rules of the time. Some of the provisions had clear meanings. Others may have seemed ambiguous, but the enactors would have believed that their future application would be based upon the interpretive rules accepted at the time. Thus, their assessment of the meaning and the desirability of the Constitution would depend on the interpretive rules that they thought would apply. It is their view of the appropriate interpretive principles, not ours or Professor Balkin's, that should be controlling today.

This understanding of the appropriate interpretive rules can also be defended on the basis of fidelity. We are true to the original document passed by the enactors if we interpret it in the manner that they would have expected it to be interpreted. While one might argue that we are not faithful to the enactors if we consider their expected applications when they would not

2. John O. McGinnis & Michael Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U.L. REV. 383, 386 (2007).

3. *Id.* at 386–88.

4. *Id.* at 388–89. While there is one significant way in which those supermajority rules were not appropriate—the exclusion of African-Americans and women from participating in the selection of constitutional drafters and ratifiers—this defect has rightly been removed.

5. *Id.* at 389–90.

have desired or expected us to do so, this argument assumes that faithfulness depends on the interpretive approach they would have expected to be applied.

In sum, Professor Balkin's distinction between expected application meaning and original meaning should no more control constitutional interpretation than any other philosophical or personal conceptualization of meaning. The decision to adopt the Constitution was based on an understanding of how ambiguous constitutional clauses would be interpreted and that understanding must be respected if we are to derive the benefits that the Constitution was originally thought to confer.

II. ORGINALISM AND PRECEDENT

Professor Balkin suggests that his brand of originalism proves superior to that of expected application orginalism in large part because its embrace of broad principles does not require it to repudiate the substantial number of decisions palpably at variance with expected application orginalism. He argues that those like Justice Scalia, who he views as following expected application originalism, rely on precedent to avoid the unpalatable consequence of overruling a slew of decisions that have become part of the social fabric. But Balkin argues that acceptance of such precedent "undercuts the claim that decisions that are inconsistent with original expected applications are illegitimate. It suggests that legitimacy can come from public acceptance of the Supreme Court's decisions, or from considerations of stability and economic cost, not from fidelity to text and original understanding."

Balkin's claim questioning the legitimacy of relying on constitutional precedents, however, misunderstands the Constitution and its original meaning. While Balkin assumes that originalism and precedent conflict, that will not be true to the extent that the Constitution incorporates or allows for precedent, which it appears to do in two ways. First, the concept of "judicial power" in Article III may be best understood as requiring the judiciary to decide cases in accordance with some notion of precedent. Second, the Constitution may treat precedent as a matter of federal common law that is modifiable by federal statute—thereby allowing for precedent without compelling it.[6] Both

6. *See* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000).

of these interpretations are supported in different ways by the fact, which we do not have the space to show, that there was a general acceptance of some aspects of precedent when the Constitution was adopted.[7] These interpretations might be combined in a variety of ways. For example, the Constitution might incorporate a thin or minimal theory of precedent and then leave the remainder to be determined by federal common law and federal statute.[8]

To be sure, precedent at the time of the Framing and the early republic may have been relatively soft in that it resolved only ambiguities, whereas some modern precedent seems to insulate clear errors of interpretation from reversal.[9] While some of these clear errors should no doubt be reversed, modern precedent rules, as authorized by federal common law and influenced by the structure of the Constitution, might establish stronger protections for some precedent. Where it is clear that a precedent has been widely and deeply accepted so that overturning it would lead to a constitutional amendment, a strong argument exists for the Court to continue to adhere to the precedent, even if it represents a clear error.[10] For instance, had the Supreme Court not interpreted the Equal Protection Clause to provide equal rights to women, such rights almost certainly would have been adopted by constitutional amendment and therefore it makes sense to follow those precedents even if it were clear that they conflicted with the original meaning.[11]

Moreover, even if one assumes that the original meaning of the Constitution does not contemplate precedent, it is not clear why Balkin's evolutionary approach to original meaning is supe-

---

7. The practice of following precedent is assumed by various notables at the time of the Framing, including Blackstone and despite their differences, by both Hamilton and Brutus. *See* WILLIAM BLACKSTONE, 1 COMMENATARIES *65; Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 The WRITINGS OF JAMES MADISON, at 447 (Gillard Hunt, ed., 1908); THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999); Brutus, *Essay XV*, N.Y. JOURNAL, Mar. 20, 1788, *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *at* 308 (Ralph Ketcham ed., 1986).

8. *See* Michael B. Rappaport, Reconciling Originalism and Precedent (unpublished paper on file with authors).

9. *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 14 (2001) (arguing that precedent would not insulate clearly erroneous decisions but only settled ambiguities).

10. *See* Reconciling Originalism and Precedent, *supra* note 8 (advocating such an approach).

11. *See* McGinnis & Rappaport, *supra* note 2, at 396 (suggesting that the Constitution would have been amended had the Supreme Court not protected women under the Equal Protection Clause).

rior to an approach that combines originalism and precedent. While precedent would by assumption introduce values external to the original meaning, that would hardly distinguish it from Balkin's approach. Balkin would allow social movements to spin the constitutional text as they choose with no limits except their ability to persuade the Court that their gloss should be adopted. Precedent, by contrast, at least limits the departures from the Constitution to those that have already occurred and does so based on widely held values of stability and continuity.

Balkin also argues that reliance on precedent underscores a more important problem with expected application originalism: "Our political tradition does not regard decisions that have secured equal rights for women, greater freedom of speech, federal power to protect the environment, and federal power to pass civil rights laws as mistakes that we must unhappily retain; it regards them as genuine achievements of American constitutionalism and sources of pride . . . No interpretive theory that regards equal constitutional rights for women as a blunder that we are now simply stuck with because of respect for precedent can be adequate to our history as a people."[12]

Balkin here appears to be confusing pride and propriety. Even if we assume that the decisions he lists are generally deemed to be achievements and sources of pride, that does not make them either legal or proper. We are all familiar with the situation when a decision is made improperly, but it nonetheless produces desirable results. For example, a soldier may disobey an officer's command and thereby cause a battle to be won. While we may be overjoyed by the result in the particular case, that would not change our view that disobeying orders is illegal and improper. Similarly, the Supreme Court's nonoriginalist behavior in these cases might have led to desirable results, but that would not mean the Court behaved properly and legally.

Balkin's celebration of equal constitutional rights for women as an unambiguous source of pride is particularly anomalous when he interprets these rights to support a right to abortion. Many of our fellow citizens regard such an interpretation as a cause for shame. The mixed perception of decisions that can be categorized under the heading of women's rights underscores a problem with Balkin's free-form method of interpretation: by ignoring original expected applications of provisions, he can

12. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 298–99 (2007).

regularly reach results that not only would have been rejected as interpretations when the constitutional provisions were enacted, but also enjoy no consensus today. What justification does he then have for enforcing them?

In contrast, our theory provides a reason for following precedent that is rooted in respect for originalism rather than pride. Judges may follow precedent because the Constitution allows judges to give weight to precedent. We are not "stuck" with precedents any more than we are stuck with the original provisions of the Constitution. Precedent can constitute part of the system the original Constitution established.

III. THE IMPROBABILITY OF A STRONG DICHOTOMY BETWEEN ORIGINAL EXPECTED APPLICATIONS AND ORIGINAL MEANING

In a paper of this length, we cannot conclusively show that people at the time of the Constitution's enactment would not have applied Professor Balkin's approach, but even in a short space we can offer strong reasons to believe that they would have considered expected applications in constructing the original meaning of the document. First, while the original meaning may not be defined by the expected applications, these applications will often be some of the best evidence of what that meaning is. Second, discarding expected applications in favor of abstract principles, as influenced by social movements, transfers tremendous power from the enacters of the Constitution to future interpreters. A Constitution that was established to place limits on future government actors would not delegate power so generously.

First, reasonable people when the Constitution was enacted would have recognized, as Balkin does not seem to, that it is hard to ascertain what constitutional provisions mean without reference to expected applications. The original meaning of the words would not normally be defined by the expected applications, but instead by the meaning that people at the time would understand the words to have. But some of the best evidence of that meaning would be the expected applications, especially when widely held. Words are slippery things and dictionary definitions do not pin down their political meanings any more than they pin down the meaning they would have in recipes, technical manuals, or haute couture. Context is important and the recovery of context can be greatly enhanced by considering how the

words would have been applied in the sociopolitical usage of the day. It is important to note that Balkin provides no evidence that interpretive principles at the time of the Framing (or for that matter at any other time) would have discarded so much information.

Using expected applications is particularly important for modern interpreters, because usage may have changed in dramatic or subtle ways since the Framers' day. Expected applications are especially useful because they caution modern interpreters against substituting their own preferred glosses on meaning for those that would have been widely held at the Framing. While most important for subsequent interpreters, expected applications would even be useful when the Constitution was enacted, because they would have helped to clarify the meaning of inevitably unclear provisions.

Reliance on expected applications is even appropriate in cases when a constitutional provision is best understood as adopting a general understanding or principle. The language of a provision may appear to adopt a general principle, but verbal formulations often do not tell us which particular variation of a principle was intended. For example, the meaning of the Equal Protection Clause might suggest an anticaste principle, but it may not clearly indicate the version of the principle that was adopted—to what extent, and under what circumstances, the principle allowed distinctions between different groups. The expected applications will help us determine which version of the principle was adopted.

Some expected applications might even be given greater weight. An expected application might be so much at the core of a provision that the application is constitutive of its meaning. For example, assume that most discussions and definitions of freedom of speech at the time of the Constitution described it generally as protecting the right to express one's views. Still, if it were widely expected that it would categorically prohibit prior restraints, then that prohibition might be properly deemed to be part of the principle even if later interpreters could make a strong case that some prior restraints were consistent with freedom to express one's opinions.

While expected applications are important evidence of the meaning of a provision, they are not always to be followed, even if they are widely held. But the circumstances must provide strong reasons for believing the applications were mistaken, rather than being merely applications modern interpreters hap-

pen to reject. Imagine that deposits were found that appeared in 1787 to be gold, but that turned out, after scientific knowledge advanced, to be a different substance that resembled gold but did not have the properties that made it valuable. Even if everyone in 1787 believed that the deposits were gold, a court might properly conclude in 1887 that they were not gold under the constitutional provision limiting states from making anything but gold or silver legal tender. In this case, it would be clear as a factual matter that the deposits were not gold as the term was defined in 1787, even though people had mistakenly believed that they were. Even people who believed in 1787 that the deposits were gold would now accept that they had been mistaken. By contrast, where a legal provision purports to incorporate moral or policy beliefs and those beliefs are open to several interpretations, one is much less justified in concluding that the expected applications of people at the time were mistakes. In those circumstances, the generation that framed such a provision in 1787 is likely to believe that its application was correct and that later generations have simply developed different values. Thus, it is more likely that later interpreters are mistaken about the content of the provision that was adopted than that interpreters at the time were mistaken about the meaning of the provisions they wrote.

Second, it seems to us very unlikely that interpreters at the time of the Constitution's enactment would have discarded expected applications because that would have given subsequent interpreters a very large measure of interpretive freedom. Balkin's own article exemplifies this. When the Equal Protection Clause is unmoored from expected applications, it will be filled by other kinds of content. In Balkin's case it seems to be largely filled by subsequent social movements, as when the clause is understood in light of the women's movement to encompass a right to abortion.[13] This kind of free-form interpretation moves enormous power from the enactors of the Constitution to subsequent interpreters[14] and thus is unlikely to be embraced by risk-averse

13. We cannot help but also point out that Balkin's method of interpreting the text in light of meaning that social movements bestow on it may well justify *Lochner* as well as *Roe*. The free labor movement that began in the mid-nineteenth century suggested that the right to contract was an essential liberty. In that light, the Privileges or Immunities Clause could be reasonably interpreted to secure a fundamental right to contract and require the government to provide a substantial justification before interfering with that right.

14. At times Balkin seems to be arguing that those who framed the Equal Protection Clause intended the clause to be given an evolving meaning. In this essay, we do not

citizens. Indeed, it is a little difficult to see what is left of a recognizable originalism, not to mention the amendment process, if social movements have such substantial discretion to apply constitutional provisions as they see fit. To put the point differently, why would one adopt a fixed constitution if it can be changed so easily by social movements?

While we are extremely skeptical that Balkin's interpretive approach is the one that reasonable people at the time of the Constitution's enactment would have employed, we do not mean to suggest that the original interpretive approach has been fully developed. Although there has been promising scholarship by Jefferson Powell,[15] John Manning,[16] and others that suggests that the Framers' generation employed an original meaning approach to statutes and the Constitution, much more work remains to be done on the interpretive principles antecedent to the Constitution and how they may have been refracted by the constitutional structure. Such research will help us determine with greater precision the appropriate principles of originalist interpretation.

CONCLUSION

Despite our doubts about important aspects of his theory, we welcome Professor Balkin's embrace of originalism. Originalism is a method of legal interpretation, not a political or ideological stance. It will improve the development of a sound originalism, if scholars of all political persuasions join the search for original meaning and for the original principles of interpreta-

---

have space to evaluate this claim. But if true, it would make largely irrelevant Balkin's claim that originalism should not be guided by expected applications, because in that case those who framed the Clause would have expected that its applications evolve. The expected applications of the Equal Protection Clause would then be the living constitution. We believe that Balkin's distinction between expected original applications and original meaning is the more theoretically interesting aspect of his paper and thus make the distinction the focus of our commentary.

15. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). While Jefferson Powell's article is often thought to count against originalism, it is actually at most a critique of original intent originalism. The typical response of original meaning scholars is to view the evidence he supplies as supporting original meaning originalism. The more general point is that the scholarship growing out of Powell's work has done much to show that original meaning interpretation was followed by many of those in the Framers' generation. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 96–100 (2004); Charles A. Lofgren, *The Original Understanding of Original Intent*, 5 CONST. COMMENT. 77 (1989); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'*, 72 IOWA L. REV. 1177 (1987).

16. *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

tion. A cross-party, cross-ideological consensus will offer good evidence that we are reaching correct answers no less surely than the original consensus in favor of constitutional provisions offers good evidence of their beneficence.