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REPLY TO KOPPELMAN: ORIGINALISM AND THE (MERELY) HUMAN CONSTITUTION

*Steven D. Smith**

Andy Koppelman's provocative diagnosis¹ of originalism, of Jack Balkin, and of disgust gets one thing right and several things backwards. Or so it seems to me. I'll start with the things Koppelman gets backwards. Then I'll say what I think Koppelman gets right, and how he and Balkin make a potentially valuable (albeit partly inadvertent) contribution not only to originalism but to the ongoing experiment in democratic self-governance.

I

Over the last several years, and to the surprise of some, Professor Balkin has proclaimed himself an originalist. He has advocated what he calls the "method of text and principle"—an approach which, by interpreting the Constitution's original meaning to embrace a set of open-ended principles, is able to justify pretty much any results that the most ardently progressive constitutional heart could desire.² Less expansive originalists have sometimes expressed skepticism about Balkin's ostensible conversion, and on occasion they have vigorously criticized the version of originalism that Balkin advocates.³

* Warren Distinguished Professor of Law, University of San Diego. This comment was written by invitation as a reaction to Andy Koppelman's essay called "Why Jack Balkin is Disgusting." I thank Larry Alexander and Michael Perry for helpful comments on an earlier draft.

1. Andrew Koppelman, *Why Jack Balkin is Disgusting*, 27 CONST. COMMENT. 177 (2010).

2. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 *passim* (2007) [hereinafter *Constitutional Redemption*]; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 *passim* (2007).

3. See, e.g., Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U.L. REV. 857, 879–80 (2009). For an incisive criticism from a non-originalist perspective, see Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two about Abortion)*, 24 CONST. COMMENT. 383 (2007).

Koppelman thinks he perceives in this critical reaction a feeling of “disgust,” and it is this perception that informs his assessment of originalism. I confess that I am not perfectly clear on exactly what the originalists’ ostensible feeling of disgust⁴ is supposed to reveal. Sometimes Koppelman indicates that disgust serves to police the boundary between the human and what might be called the *subhuman*—to distinguish humans from “animals and animal waste products.” (184–185). The larger discussion suggests, however, that disgust reflects a revulsion against the (merely) *human*—“our animal vulnerability and mortality” (184)—arising out of a yearning for something that transcends the human: “transcendent aspiration,” “transcendent ideal,” and a “transcendent ideal of justice.” (180, 182). So the overall argument, as I understand it, is that originalists feel disgust toward Balkin because he has ostensibly demonstrated⁵ what originalists are loathe to admit—namely, that the Constitution “is a human construct” and that “[w]e are, perhaps, all that the Constitution is constituted out of. Its innards are as slimy as ours.” (187)

There is in this assessment a valid and valuable point, I believe, which I will come to shortly. In general, though, Koppelman’s diagnosis seems . . . well, pretty much upside down. It is as if Koppelman has gotten his characters mixed up—he has confused Macbeth with Macduff, so to speak—and thus has ascribed to originalists the qualities and aspirations of their critics, and *vice versa*.

After all, it has been *critics* of originalism, not the originalists, who have most often betrayed a powerful yearning for a higher-than-human or transcendent Constitution,⁶ accompanied by a dissatisfaction—“disgust,” if you like—for the

4. Originalists with whom I am acquainted (and, speaking as a sort of “fellow traveler,” I am acquainted with a fair number of them) often view Balkin’s position as interesting, or curious, or misguided and unpersuasive, but I have not encountered originalists who find either Balkin or his views “disgusting.” I take it, though, that Koppelman is indulging in a bit of provocative ironic hyperbole to frame his thesis—a thesis, it should be noted, that is plainly admiring toward Balkin’s work.

5. Koppelman suggests that the “Early Balkin”—the one associated with deconstruction and postmodernism—accomplished this disenchantment *discursively*. The “Later Balkin,” more subtle and oblique, has confirmed the deconstructive demonstration *performatively*—by embracing originalism without relinquishing his progressive commitments, and thereby acting out the collapse of originalism into its long-time nemesis, “living Constitutionalism.” Koppelman’s interpretation of Balkin has the virtue—or is it a vice?—of giving a kind of (persistently) subversive and (recently) deceptive unity to Balkin’s earlier and current work.

6. For a lengthier discussion of this tendency, see Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583 (1993).

merely human Constitution. Thus, we behold Ronald Dworkin insisting that the Constitution and the law must be viewed as a body of comprehensive and coherent moral principles, fully accessible only to a demigod like Dworkin's Hercules.⁷ Dworkin disdains, as unworthy of our respect, a constitution understood merely as the legal expression of a series of political decisions and compromises.⁸ Or we observe Larry Sager, who regards the Constitution as a perfect embodiment of justice.⁹ Or Robin West, who views the Constitution not so much as a mundane legal instrument as "a source of moral insight and a vision of the just society"¹⁰

To be sure, not all of those who reject originalism are given to these exhilarating visions (or hallucinations?). Some favor a humbler "common law Constitution" in which meanings evolve historically along with changing values and commitments of the political community.¹¹ But as one might expect, this more Burkean conception of the Constitution fits awkwardly with a practice of an active and "progressive" judicial review. At some point, it seems, the argument has to be (unless it deliberately veers in an elitist direction) that nine elderly men and women insulated inside a marble building in Washington are more in tune with the current, living beliefs and commitments of "the People" than elected legislators are—or perhaps than "the People" themselves are? That wanton implausibility tends to push progressive constitutionalists down the path of viewing the Constitution as something more transcendent. The Constitution becomes a sort of living deposit of more ethereal principles¹²—principles whose content surpasseth the understanding the mere mortals who actually draft and vote for the words, and which accordingly must in the fullness of time be articulated and

7. RONALD DWORKIN, *LAW'S EMPIRE* 176–266, 355–99 (1986).

8. *Cf.* RONALD DWORKIN, *FREEDOM'S LAW* 74 (1996) (referring contemptuously to those who, by viewing the Bill of Rights as a set of particular historical decisions, would turn it into "a document with the texture and tone of an insurance policy or a standard form of commercial lease").

9. Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 *Nw. U.L. REV.* 410 (1993).

10. ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM* 18, 261 (1994).

11. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877 (1996). I have sometimes inclined to some such more gradualist and tradition-oriented conception. Steven D. Smith, *Separation as a Tradition*, 18 *J.L. & POL.* 215 (2002).

12. *Cf.* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 525 (1989) (describing Constitution as "a rich lode of principle").

refined (and, of course, forcibly imposed) by judges (counseled, of course, by legal scholars).¹³

In short, it is non-originalists who characteristically exhibit contempt for the merely human Constitution. Conversely, originalists make up the party that not only acknowledges but indeed *insists on* the human character of the Constitution. Originalists are diversely minded, to be sure; but insofar as originalism has a central and animating normative purpose,¹⁴ that purpose, it seems, is to empower *people*—actual *human beings*—to debate and deliberate and then adopt constitutional provisions with the confidence that these will mean and do pretty much what the human beings who adopt them understand and intend the provisions to mean and do.¹⁵ Some originalists look to the “subjective” intentions of enactors as the source of these meanings¹⁶; others view the official enactors as working to craft a more “objective” law in accordance with conventional linguistic meanings that the enactors are presumed to understand and use.¹⁷ Either way, originalism treats the Constitution and its meanings as a thoroughly human affair.

This is not to say that originalists cannot believe in transcendent realities and truths. Some do, probably, and some don't. Some originalists surely believe that constitutional

13. In Ronald Dworkin's “Law's Empire,” judges famously serve as “princes,” while legal philosophers (like Dworkin) assume the role of “seers and prophets.” DWORKIN, *supra* note 7, at 407.

14. Some originalists disavow any normative purpose, and offer originalism as simply a theory of meaning or interpretation. See, e.g., Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 195 (2001). My own view, succinctly put, is that there cannot be any “*the account*” of meaning (or of interpretation): there are various possible accounts, and whether a particular account is persuasive and useful will depend on what sort of interpretive enterprise we are engaged in, and why. By this view, originalism (or any other theory of legal interpretation) cannot be divorced from its normative purposes and implications.

15. In this vein, Michael McConnell explains:

All power stems from the sovereign people, and the authority of the Constitution comes from their act of sovereign will in creating it. It follows that the Constitution should be interpreted in accordance with their understanding. This is the theoretical foundation of originalism. If the Constitution is authoritative because the people of 1787 had an original right to establish a government for themselves and their posterity, the words they wrote should be interpreted--to the best of our ability--as they meant them.

Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132 (1998) (citations omitted). For a good account, see KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 110–59 (1999).

16. See, e.g., Larry Alexander & Saikrishna Prakash, “*Is That English You're Speaking?*”: *Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004).

17. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

provisions are sometimes adopted on the basis of, or as a way of implementing, notions of morality or justice that are not merely human constructions: I am not sure whether originalism could be an even remotely attractive approach—to our own Constitution anyway—without some such assumption. Even so, originalism insists (with some arguable lapses that I will note momentarily) that what counts as *law*—as valid, enforceable law—is what human beings enact, and that the meaning of that law is what those human beings understood it to be.¹⁸

So then why does Koppelman suppose that originalists yearn for a transcendent Constitution, and that they would be disgusted by someone who shows that the Constitution is of merely human provenance (if that is what Balkin has shown)? There is in fact some slight warrant for this assessment, I believe, which I will mention in a moment, but it is not the warrant that Koppelman has in mind. The feature of originalism that he seems primarily concerned with is an ostensible claim of—or perhaps a psychological need for?—determinacy. Originalists are said to believe that their approach to interpretation “purges adjudication of discretion” (179) and that it delivers “fixity and determinacy.” (179) In ascribing this naive belief to originalists, however, Koppelman fashions a straw person vulnerable to easy pummeling.

It is true (though in my view unfortunate) that some originalists describe original meaning as “objective.” But “objective” does not equal “determinate”: there are lots of things that are in some sense “objective” but that we do not know with certainty, and that accordingly remain undetermined (for us). Originalists also argue, sometimes, that unless constitutional meaning is tied to “original meaning” or “framers’ intentions” or something of the sort, then constitutional texts could be interpreted to mean just about anything¹⁹: the argument implies that originalism is *more* determinate than non-originalist

18. In theory, to be sure, originalism is compatible with the possibility that the people might simply incorporate some general principle or ideal into positive law and authorize future judges to enforce the principle or ideal in whatever way they come to understand it. Progressive interpreters like Dworkin (and Balkin) seem inclined to suppose that many provisions in the Constitution—especially the First and Fourteenth Amendments—do just that. But in fact it seems unlikely that citizens and political actors would readily choose to make such an open-ended (and irresponsible?) decision. Thus, originalists are characteristically as resistant to such interpretations as non-originalists (and a few progressive originalists, like Balkin) are enthusiastic.

19. See, e.g., Larry Alexander, *Of Living Trees and Dead Hands: The Interpretation of Constitutions and Constitutional Rights*, 22 CAN. J.L. & JURIS. 227, 234 (2009).

interpretation is. But originalism might be more constrained than at least some of its hermeneutical rivals without promising anything like “fixity and determinacy.” Maybe some originalists make the strong claim of determinacy that Koppelman ascribes to them, but I don’t know who they are; I do know that leading originalists have frequently been explicit in *disavowing* that claim.²⁰

In sum, Koppelman’s diagnosis seems for the most part backwards, and maybe a little perverse. It indicts originalists for a failing that is most characteristic of their opponents, and that in fact originalism is calculated to expose and resist.

II

Even so, I think that Koppelman is right (even if not for the reasons he gives) to suggest that originalists sometimes follow non-originalists in succumbing to what we might call the “transcendental temptation”—to the urge to view the Constitution as more than human.²¹ In doing this they depart from their core commitments—like Christians who retaliate, or rational choice theorists who unreflectively perform selfless acts of kindness. Still, the departure is common enough. And Koppelman is right to perceive that Balkin’s conversion to originalism, whether sincere or (as Koppelman seems to imply) strategic, serves to underscore this common failing, and thereby to raise a serious challenge to the viability of the originalist enterprise.

More specifically, in recent years, many professing originalists have stressed that constitutional interpretation should seek to ascertain and follow the “principles” supposedly contained in constitutional provisions, not the “expected applications” of the provisions’ enactors.²² It is understandable

20. See, e.g., *id.* at 235; see also Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 523 (2003) (“People certainly should not embrace originalism in the false belief that it will provide determinate answers to all questions of constitutional interpretation: neither originalism nor any other plausible approach to the Constitution can do so.”).

21. Actually, originalists may go transcendental in more than one way. In my view, originalists who have recently argued for an almost Platonic original meaning that need not correspond to the understandings of either the “enactors” or the “public”—the flesh-and-blood human beings who lived at the time a provision was enacted—have departed from originalism’s healthy insistence on viewing law and meaning as human. But this is a rarified heresy which need not be discussed here.

22. See, e.g., Mark D. Greenberg & Harry Litman, *The Original Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998); ROBERT H. BORK, *THE TEMPTING OF*

that originalists would emphasize interpretation in accordance with constitutional “principles.” For one thing, a constitution understood as an embodiment of principles may seem more worthy of respect. In addition, originalists are sometimes drawn to the “principled” approach as a way of justifying decisions—mainly *Brown v. Board of Education*—that seem beyond criticism but that are difficult to explain on originalist assumptions: Robert Bork’s defense of *Brown* is a notable instance.²³ Originalists also turn to principle to deflect the familiar “dead hand of the past” objection. If originalism entails following the particular notions and conceptions of men who have been dead for centuries, that is, the approach may indeed seem intolerably reactionary. But if originalism means following the “principles” adopted in the past—principles that presumably may be or must be adapted to present circumstances—the approach seems less musty. Or at least so goes the argument.²⁴

Beyond such tactical considerations, it seems that originalist interpreters must of necessity view constitutional provisions as expressing principles, or at least general categories of some sort, if the provisions are to have any current and useable meaning at all. Imagine an interpretive approach that tried to eschew “principles” and categories in favor of some sort of radical nominalism in which words are understood to refer not to universals or real categories, but only to the particular items or instances contemplated by the person uttering the words. Thus, when I say “red” I am not referring to any general quality or property; rather, I am simply using the term as a shorthand to describe a number of particular instances that I find it convenient to group together—my niece’s hair, the apple I am munching on at the moment, the sunset I saw yesterday evening, and so forth (possibly including the color my face will turn when I try to defend this ill-conceived nominalistic notion against any moderately intelligent interlocutor). On this assumption, constitutional interpretation would be impossible. The term

AMERICA 162–63 (1990). I have elsewhere argued that the distinction between “principles” and “expected applications,” if not illusory, is at least overdrawn and often misleading. Steven D. Smith, *That Old Time Originalism* 11 (Univ. San Diego Sch. Law, Research Paper No. 08-028, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1150447.

23. Bork, *supra* note 22, at 82.

24. See, e.g., Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 249–50 (1991) (arguing that “originalism presents no question of rule by the ‘dead hand of the past’” because “[o]riginalists properly seek in the historical materials an intelligible principle capable of guiding contemporary decision”).

“cruel” in the Eighth Amendment would refer to a particular set of punishments that the framers happened to disfavor. (Beheading? The rack? But don’t even these terms refer to *categories* of punishments?) The term “persons” in the Equal Protection Clause would encompass those human beings known to the enactors of the clause; once those persons passed beyond this mortal vale, the term would have no further application, and hence would effectively expire.

This sort of radical nominalism would make originalist constitutionalism (and probably law itself, and maybe communication generally) impossible. So it seems that originalists have no choice but to treat constitutional provisions as expressions of general categories of some sort.²⁵ Often, it seems, those categories are conceived of in terms of “principles.”

But this apparently inevitable resort to something like principles also presents serious problems. Only one of those problems need be mentioned here²⁶: understanding constitutional provisions as embodiments of principles opens up originalism to precisely the sort of open-ended, licentious interpretations (licentious at least from the perspective of more staid originalists) that Balkin offers. After all, many and perhaps most originalists have long advocated, basically, the “method of text and principle”: Balkin, arguably, is simply a more prodigal practitioner of that method. He is, one might say, Bork-explaining-*Brown* ratcheted up a level or two. No doubt Balkin has taken originalist methods in directions that many originalists do not want to go. But in what sense are his general methods, as opposed to his particular conclusions, so different from what many other originalists commend?

More constrained originalists might of course quarrel with Balkin’s specific arguments and conclusions. They might argue that he has extracted the wrong principle from some constitutional text, or that he has misunderstood or misapplied that principle in reaching some particular conclusion. Once the disagreements shape up in this way, though, it seems that Balkin has won. The difference between originalism and “living Constitutionalism” has vanished, and all parties are playing the

25. Cf. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U.L. REV. 703, 711 (2009) (“By necessity, legislators, and certainly constitution-makers, deal in categories.”).

26. For discussion of other problems, see Smith, *supra* note 22 at 20–22.

sort of game that Balkin and Dworkin and company want to play.

For academics, there may be nothing to lament in this development. Originalism achieves a kind of academic respectability, and originalists and non-originalists can join together to debate a host of interesting questions, both historical and theoretical. What is the best account of the Fourteenth Amendment's privileges or immunities clause? What is the most philosophically adequate way to conceive of the "meanings" that interpreters seek to discover or construct? Alas, what gets lost or forgotten is merely . . . the practical normative purpose that animated originalism in the first place—namely, the purpose of permitting the People (meaning the actual human beings who write constitutional provisions and read them and argue about them and ultimately vote for or against them) to make and entrench political decisions with the assurance that those entrenched decisions will mean and do essentially what the People understand and intend them to mean and do. Thus, originalists who resort too readily to "principle" have as a practical matter abandoned the project that was their reason for being in the first place. They thereby validate Lon Fuller's observation that "[n]o one more than [the legal philosopher] runs the risk of forgetting what he is trying to do. In no field more than his is the thinker likely to be lured from his goal into bypaths of his own thought or fall a victim to his own metaphors and abstractions."²⁷

So then, is Koppelman right after all, despite his topsy-turvy ascription of roles and attitudes? Are originalists in the end, and despite their contrary pretensions, beguiled by the temptation of a transcendent Constitution? And has Balkin succeeded in showing that originalism is not viable as an approach that is truly distinct from the methods used by proponents of the "living Constitution"?

Not necessarily. But the prospects for a viable and distinctive originalism depend, I think, on resistance to the easy move to "principle," and on retention of something more like a notion of commonsensical and conventional categories.

In this vein, a faithfully originalist approach to free exercise or equal protection or cruel and unusual punishment would not primarily try to extract some principle from the relevant

27. LON FULLER, *THE LAW IN QUEST OF ITSELF* 2 (1940).

constitutional provision and then use that principle as the point of departure for elaborating a constitutional doctrine and jurisprudence largely insulated (by the principle) from what the human beings who enacted the provision thought it meant. The approach would not treat “expected applications” and “meaning” as identical, exactly; it would recognize that constitutional provisions necessarily refer to categories, not just to lists of particular instances that the enactors had in mind. But a genuinely originalist approach would insist that the pertinent question is *not* “What does the category cover, *really*?” or “What does the principle *actually* entail?” The question, rather, is “What did the category (or the principle) mean *to them*?”—namely, to the people or the generation who adopted the provision.

III

So, is this sort of admirably unambitious, resolutely unprincipled originalism actually possible? It seems to be available as a matter of commonsense practice. Justice Scalia employs it, I think, when even in the face of disdainful criticism from both non-originalists and professing originalists, he maintains that the Eighth Amendment cannot be interpreted to prohibit capital punishment because the enactors plainly authorized such punishment. Similarly, even without (or especially without) any overall theory of what the Fourteenth Amendment was originally intended or understood to do, the academically unadulterated will know to be wary when a scholar asserts that the amendment, *interpreted according to its original meaning*, “protect[s] homosexuals from discrimination even if nobody knew there were such things as homosexuals in 1868, or, if they knew what homosexuals were, would have opposed the extension of the principle to that social group.”²⁸ They will perceive this assertion as, most likely, the product of a piece of (perhaps artful, perhaps sincere, perhaps well-intended) academic sophistry.

But can this unsophistical and unsophisticated approach survive without—or, more to the point, can it survive *in the face of*—theoretical examination and elaboration? I’m honestly not sure. In recent years, originalism has become a highly theoretical enterprise.²⁹ I have elsewhere expressed doubts—doubts, not

28. *Constitutional Redemption*, *supra* note 2, at 488.

29. The outstanding manifestation is surely Lawrence B. Solum, *Semantic*

confident judgments—about the value of some of this theorizing.³⁰ But I also suspect that originalism would benefit if more of the theoretical acumen were directed not so much toward elaborating and widening the gulf between “intentionalist” and “public” (or between “subjective” and “objective”) accounts of *meaning* but instead toward explaining the workings of what we might call *conventional categories*. How is it that enactors of a legal provision can adopt or incorporate categories that are not simply lists of particular instances without those categories assuming some sort of Platonic status (or, worse yet, merely verbal status), thereby becoming unmoored from the conscious, concrete intentions and understandings of the people who chose to approve them?³¹ How, in short, can we keep the Constitution a merely human document?

I have suggested that the animating purpose of originalism is to permit “the People” to adopt constitutional provisions with the confidence that these provisions will mean basically what the People understand them to mean, and will have basically the implications and consequences that the People intend the provisions to have. In a political community with democratic commitments or pretensions, that seems a worthy purpose. But the enterprise does seem to depend on something like the possibility of conventional or merely human (as opposed to either “real,” in the philosophical sense, or merely verbal) categories. If, in attempting to explain why Balkin is not a faithful originalist, theorists are prompted to focus on and develop that possibility, then Balkin (assisted by Koppelman) will have done originalism—and, more generally, the on-going project of democratic self-governance—a valuable service.

Originalism (Ill. Pub. Law Research Paper No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

30. See, e.g., Smith, *supra* note 22.

31. For at least the beginnings of an effort in this direction, see Larry Alexander & Emily Sherwin, DEMYSTIFYING LEGAL REASONING 160–62 (2008).