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Deferentialism, Living Originalism, and the Constitution

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In this paper, I will compare two recent versions of originalism – my own, which I call “Deferentialism” and Jack Balkin’s Living Originalism.¹ After beginning with a brief summary of the leading theoretical ideas of the former, I will contrast those ideas with the conceptual apparatus provided by the latter. The final two sections of the paper will illustrate the significance of conceptual differences between the two approaches to several constitutional test cases.

Leading Ideas of Deferentialism

Deferentialism articulates correctness criteria for the interpretation of legal texts by legally authorized judicial actors. The theory rests on three claims.

- (i) The legal content of a statute or a provision of a written constitution *cannot* be identified with either the semantic content of the text or the legal or political rationale for its passage; it *can* be identified with what was said, asserted, or stipulated by lawmakers or ratifiers in passing or approving it.²
- (ii) In applying the law to the facts of a case, the legal duty of a judge is to reach the verdict determined by the stipulated content, unless (a) that content is vague and, as a result, it doesn’t determine a definite verdict, or (b) the content, the surrounding law, and the facts of the case determine inconsistent verdicts, or (c) the contents and facts are inconsistent with the rationale of the law, which is the chief publically stated purpose that proponents of the law advanced to justify it.
- (iii) In cases of type (iia-c), the judicial authority must *make new law* by articulating a minimum change in existing law that maximizes the fulfillment of the original rationale for the law.

Principle (i) identifies the content of a legal provision with what a reasonable person who understood the linguistic meanings of the words in the text, the publically available facts, the history of the lawmaking context, and the background of existing law into which the law in question is expected to fit would take to have been asserted or stipulated by the lawmaker in adopting the text.

¹Balkin, Jack M. 2011. *Living Originalism*. Cambridge: Harvard University Press, 2011; Soames, Scott. 2013. “Deferentialism: A Post-Originalist Theory of Legal Interpretation,” *Fordham Law Review*, 82: 597-617; reprinted in Soames, Scott. 2014. 320–341, *Analytic Philosophy in America*. Princeton: Princeton University Press. 2014.

² Saying, asserting, and stipulating are *speech acts* – or, in more technical philosophical terminology, *illocutionary acts*. Each involves taking a certain stance toward the representational content of the act. To say or assert that so-and-so is to commit oneself to its being true that so-and-so. To promise to do such-and-such is to commit oneself, often by asserting that one promises, to making it true that one does such and such. Stipulation is similar. For a proper authority to *stipulate* that, say, the speed limit on certain roads in California is 65 mph is for the authority to assert that the speed limit is 65 mph and for that very assertive act to be a, or the, crucial component in to making what is asserted true.

Sometimes the lawmaker is a legislative body, sometimes it is an administrative rule-making body, sometimes it is the chief executive issuing an executive order, and sometimes it is another judge, or court majority, whose written opinion modified a previous version of the law. What gives the assertive or stipulative speech acts of these institutional actors the force of law is their position in the constitutionally-based legal system that the populace as a whole acknowledges as authoritative. It not necessary that the populace itself possess detailed and extensive knowledge of the contents of all the various laws that are relevant to them, but it is necessary that the governed have access to that knowledge through the services of members of the legal profession to whom the asserted or stipulative contents of the laws are more directly communicated.

Principle (ii) covers cases in which vagueness or inconsistency leave judicial authorities no choice but to modify existing legal content in some way. Since courts are designed to mediate between the immense and unforeseeable variety of possible behaviors, on the one hand, and the legally codified general principles designed to regulate them, on the other, judges are frequently required to precisify legal provisions in order to reach determinate decisions in cases in which the antecedent contents of those provisions neither determinately apply, nor determinately fail to apply, to the special facts of the case. Inconsistency is also a constant concern. Since the body of laws in modern society is enormously large and complex, the task of maintaining consistency is never ending. Typically the inconsistency is not generated by two laws that flatly contradict each other -- so that no possible pattern of covered behavior could conform to both -- but rather by the combination of two or more laws with some possible, but unanticipated, behavior. Since the range of such behavior -- which, if it occurred, would generate inconsistency -- is without foreseeable bounds, no legislative process, no matter how careful, precludes the need for judicial resolutions of inconsistencies. The same can be said for inconsistencies between a law's content and its rationale that are generated by unanticipated circumstances following its implementation.

The point of principle (iii) is to limit the scope of the authority of judges to legislate by requiring such judicial legislation to be maximally deferential to the original lawmakers. Judges are required to reach a decision by resolving vagueness and inconsistency in ways that balance two potentially competing values – minimizing changes in antecedent legal content and maximizing the rationale of the original lawmakers for adopting that content. In order for this principle to do its job, the rationale of a law must be understood to consist, not of the aggregate of causally efficacious factors that motivated individual legislators to pass it, but rather of the chief reasons, publically offered, to justify its adoption.

The Affordable Healthcare Act of 2010 is a case in point.³ Among the motivators of individual members of Congress were political payoffs in the form of special benefits for their states or districts, political contributions from groups favoring and companies profiting from the act, the desire to advance the fortunes of their party and the agenda of their President, plus an ideological commitment to expanding government control over the economy and introducing a more socialistic system of medicine. But none of these were part of the rationale of the legislation in the sense relevant to deferentialist jurisprudence. Instead, its rationale was (i) to expand health insurance among the previously uninsured without jeopardizing existing plans that the already insured were satisfied with, (ii) to reduce the total amount the nation spends on health care without sacrificing quality, (iii) reducing the annual cost of health insurance and health care for most citizens, especially the poor, who would be subsidized, (iv) equalizing access to health care while preserving free choice among health care providers, and (v) making both health insurance and health care more reliably available by loosening their close connection with employment.⁴

³ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

⁴ See U.S. Department of Health and Human Services, In Focus: Health Disparities and the Affordable Care Act, <http://www.healthcare.gov/news/factsheets/2010/07/health-disparities.html> (visited Sept. 22, 2011).

When the rationale for a law is understood in this way, it is typically both public and knowable. Since recognizing that rationale need not involve endorsing it oneself, judges who are called upon to use it to modify the content of the law in resolving hard cases need not be put in the position of substituting their own normative and political judgments for those of the original legislators. This is crucial if the judiciary is to be genuinely deferential. There are, however, certain unpleasant realities about the nature of the rationale for a piece of legislation that must be clearly recognized for what they are, if judges are to appeal to legislative rationale in deferentialist adjudication.

One of these is that the publically stated arguments advanced for a proposed law can be deceptive, sometimes deliberately so. The public values to be served by a piece of pending legislation are routinely exaggerated. Worse, sometimes supporters know perfectly well that the public values that must be invoked in order to pass the legislation will be subverted, in whole or in part, rather than served by its passage.⁵ In short, the rationale for a law can be manipulated. Instead of closing their eyes to this, deferentialist judges should be alert for opportunities to use evidence of such manipulation to enhance the integrity of the democratic process. A law the rationale for which is contradicted by its content together with the facts arising from its implementation is for that very reason at risk of substantial judicial modification, or even invalidation.⁶ In a judicial regime known to be deferentialist, legislators will realize this and will

⁵ The Affordable Care Act is a good example. Not only have (i-iv) of the rationale just cited been contradicted by its implementation, many of its supporters realized that they would be when arguing for its passage.

⁶ Again, the Affordable Care Act, which came close to being declared unconstitutional in *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.*, provides a case in point. After failing to secure justification, under either the *Commerce Clause* or the *Necessary and Proper Clause*, for the act's individual mandate requiring citizens to buy health insurance, the majority agreed with Chief Justice Roberts that the mandate could be justified by reconstruing what had been characterized as a penalty imposed for violating it as a simple tax, justified by the *Tax Clause*, imposed on those who failed to buy insurance. Since it was politically important in passing the act that the mandate *not* be labeled by its supporters as a tax, we may conclude that *if* the mandate was not severable from the act, and *if* it was not justified by the *Commerce*, or the *Necessary and Proper*, clauses, *then* the act's survival of depended, *not* on bringing it's legal content into conformity with the rationale used to secure its passage, but on *increasing* the disparity between the two. Thus, Robert's reasoning was not deferentially justifiable. Indeed, it looks even worse today than it did so when rendered on June 28, 2012, now that it has become clear that the elements of the rationale noted in the previous footnote have been shown to be duplicitous.

have an incentive *not* to pass laws the contents of which subvert the rationales offered for them. So, far from being a problem for Deferentialism, this is a normative argument for it.

The kind of case just discussed must be sharply distinguished from a different sort of conflict between content and rationale. Sometimes supporters of legislation the rationale for which has been honestly presented are able to secure passage only by creating a loophole that wins the votes of certain interested parties at the cost of weakening or partly subverting the overarching rationale for the original version of the proposed law. Because in this case there is compromise without deception, the rationale for the resulting legal product must be understood to have been implicitly modified to accommodate the change in the content that was required for passage. A deferentialist judiciary will take this into account to ensure that the unamended version of the legislation that failed to win majority support is not later enacted by judicial rectification.⁷

Finally, there may be some cases in which a legislative majority is achieved and a bill is passed by groups of legislators the aims of which are so fragmented and difficult to aggregate that the shared common ground among them is minimal. In these cases, the overall rationale for the legislation will not be very substantial and the opportunity for subsequent judicial rectification of the content of the law will be limited. If such rectification is contemplated, the role of one of the two deferentialist values to be maximized – the fulfillment of stated rationale – will be sharply diminished. As a result, judges will be more tightly constrained to make the minimum modification of existing content that allows a definite result to be reached. Since this is, arguably, a desirable outcome, neither deceptive rationales, compromised rationales, nor rationales that resist substantial aggregation create fundamental normative difficulties for Deferentialism.

⁷ This answers a question raised by David Kaplan at the session on law and language at which this paper was presented on April 18, 2014 at the Pacific Division Meeting of the American Philosophical Association held in San Diego.

This is one of the factors that leads me to believe, as I have argued elsewhere, that Deferentialism is normatively superior to, and descriptively more accurate than, its competitors.⁸ The descriptive claim is based on the separation of powers, which is rooted in American tradition, embedded in federal and state constitutions, and widely accepted today. The normative claim is that more expansive conceptions of the judiciary put too much legislative authority beyond the reach of democratically elected representatives, and, in so doing, put the integrity and competence required for faithful judging at risk by investing too much authority to change the law in those whose task is to impartially decide what its content is.

Deferentialism is a narrowly circumscribed theory of criteria governing statutory and constitutional interpretation by American judges. Because the same principles govern both, the differences between the two types of interpretation are due to differences between constitutions and statutes. Although some constitutional provisions are precise and determinate, others are sweeping generalizations couched in vague and abstract language. As a result, their application to new cases in unforeseen circumstances is often less than fully determinate, with judges called upon to modify their contents based on their similarly sweeping rationales. By providing criteria for making such changes, Deferentialism delimits one important form of legitimate constitutional change outside the amendment process. But it is not a theory of all such change. The practices of key governmental actors – to initiate military action, to introduce vast new governmental agencies and institutions, to make recess appointments to fill vacancies that didn't occur *during* a recess, to make unilateral changes in legislation without congressional approval, and the like – can and sometimes have, when unchecked, adjusted constitutional boundaries. Such practices don't fall within the scope of

⁸ Soames 2013, 612-17, or 336-341 in the reprinting in Soames 2014.

Deferentialism, except to the extent that courts may, and sometimes must, recognize the new constitutional content they generate.

The deferentialist conception of judicial modification of constitutional content is the natural consequence of four basic truths. (i) The Constitution contains sweeping principles the contents of which encompass both a determinate core and an indeterminate periphery. (ii) To apply this content to new circumstances requires periodic adjustments of content. (iii) Making these adjustments is primarily the job of the Supreme Court. (iv) Because the Court does *not* have the constitutional authority to act as an independent political body, the adjustments it makes must be aimed at preserving the core assertively stipulated contents of constitutional provisions to the maximum extent possible, while authorizing only those changes that further the fulfillment of the original rationales of constitutional provisions.⁹

How Living Originalism Contrasts with Deferentialism

Deferentialism's single-minded focus on the role of the judiciary contrasts with Balkin's living originalist theory, which provides no explicit criteria reserved for the judiciary in guiding its application of the Constitution to difficult cases. Instead, his general remarks are aimed at all political actors who seek to further the founding project launched by both the Declaration of

⁹ What happens when the assertive content is (relatively) clear, but the rationale is attenuated, anachronistic, or nonexistent? The Second Amendment is such a case. *A well, regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.* Its content is given by the main clause, its rationale by the dependent clause. The content stipulates that the federal government can't impose a ban on guns and similar weapons. But it remains vague and subject to future precisification what counts as "arms" and what "infringing" on the right to bear them amounts to. The stated rationale provides guidance. Militias in 1791 were typically voluntary organizations of citizens armed to protect themselves, to keep order, to be available for military duty in emergencies when called up by the state, and even to guard against a tyrannical federal government. An argument can be made that this means that weapons reasonably serving similar functions today can be born by citizens, subject to regulation, while other weapons, like guided missiles and atomic bombs, have no constitutional protection. Although this is reasonable, it could be countered that since there are no longer militias in the original sense, and hence no rationale for the asserted content to fulfill, that content can be disregarded as fulfilling no constitutional purpose. Since this too is not unreasonable, the issue is a gray area for Deferentialism. I am inclined to think that the continued value of armed citizens capable of protecting themselves and others is a surviving remnant of the stated rationale, which, together with the priority of stated content over rationale, preserves the Second Amendment guarantee. See also (Balkin 2011, 206-07) which discusses the place of the Second Amendment in the application of constitutional guarantees to the states, and the changed view of its rationale in the minds of the framers and ratifiers of the Fourteenth Amendment in 1868.

Independence and the Constitution.¹⁰ Despite this difference, the two theories both insist on what they call *fidelity to the Constitution*. Deferentialism requires fidelity to asserted contents and their original rationales. Living Originalism requires fidelity to “original meanings” of constitutional passages, which, Balkin insists, neither determine nor are determined by, the way the original framers expected those passages to apply in particular cases.

This terminological difference signals no practical difference between the two theories when what Balkin calls “constitutional rules” – i.e. highly determinate passages – are concerned. Examples are “there are two houses of Congress,” “each state has two senators,” and “if no candidate receives a majority of the Electoral College, the President is determined by a vote in the House of Representatives, where each state gets a single vote; in similar circumstances the Vice President is determined by the Senate.” When applied to these provisions, Balkin’s *original meaning* and my *asserted content* yield equivalent results. This is significant. Balkin realizes that some “constitutional rules” may be neither normatively optimal nor even consistent with the overall democratic spirit of the Constitution – e.g., rules that each state, no matter what size, is represented by two senators and that each has a single vote in the House to determine the President in case of an Electoral College tie. It’s not hard to imagine arguments for changing these rules based on fairness, equality, or the need to bring our governing principles up to date. Yet, Balkin maintains, they can’t be changed by judicial interpretation. Why not?

Because, he argues, the Constitution is the law, which, like other law, remains in force until repealed.¹¹ I agree. How, in a nation of laws not subject to explicit time limits, could it be otherwise? What about provisions Balkin calls “standards and principles”? Though subject to

¹⁰See chapters 4 and 5 of (Balkin 2011), including the references to the Declaration of Independence on pp. 76, 84. Whereas Deferentialism seeks to specify the nature and limits of the *legal* authority and obligations of the judiciary in applying constitutional law, Living Originalism sees what Balkin calls “interpreting the Constitution” as a historical process of individual, group, and national self-definition that requires a normative attitude of “attachment” to the Constitution and “faith in the constitutional project, which is also faith in its redemption through history.” (p.74)

more indeterminacy than “rules,” surely they too must have some core determinate content. Doesn’t it deserve fidelity for the some reason? Although I think so, Balkin’s answer is unclear. Addressing this point, he says:

“Sometimes it is difficult to produce a rule to cover a wide variety of future situations, and so a standard or principle must do. Thus, choosing a standard or principle normally means that adopters are delegating the task of application to later generations...If adopters cannot use hardwired rules but do not want to delegate so much to future generations they can choose *historical* principles or *historical* standards...For example, adopters can choose language like “Congress shall make no law abridging the freedom of speech *as understood at the time of the adoption of this Constitution*”...To be faithful to such a norm, later generations must ask how such a principle would apply according to the *understandings* of the previous time. Generally speaking...the U.S. Constitution does not use this type of language. And this fact is quite important to constitutional construction today.”¹²

Balkin’s message is that because the Constitution doesn’t use *historical* principles or standards, it delegates the determination of the legal contents of its principles and standards to later generations. To whom does it delegate?¹³ Although his answer is “to all of us,” surely, whatever is delegated to others, the Court is the central locus of authority *to create law by applying constitutional principles*. Balkin sees the Court as applying the *linguistic meanings* of constitutional texts. When the meaning hasn’t changed, the Court will apply what he calls their, rather than the framers’, *understanding* of that meaning. It will, he says, “inevitably interpret according to contemporary “meaning” in the sense of contemporary *applications*...As a result, vague and abstract clauses will likely reflect *contemporary understandings* rather than *original understandings*...[This] is consistent with the preservation of the original semantic meaning of enacted laws over time.”¹⁴

What are these things called *different understandings* of the same meaning? Perhaps they are *what is asserted or stipulated* by different uses of the same constitutional text. This would have

¹¹Balkin 2011, 55.

¹² Balkin 2011, 40. My emphasis on all except ‘historical’.

¹³ Balkin’s understanding of the open-endedness of constitutional interpretation, construed as involving the *delegation* of broad authority to future generations is essentially connected to his picture, sketched in note 4 above, of constitutional interpretation as process of national self-definition requiring *faith* in future generations.

¹⁴ (Balkin 2011, 43-44) My emphasis on ‘contemporary understandings’ and ‘original understandings.’

two virtues. First, the asserted content of a use of a constitutional clause is what those who use it are committed to, and what they intend to guide the actions of others – which is what we are after when the Constitution is used to stipulate what is permissible. Second, identifying interpretive *understandings* with asserted content fits our theoretical understanding of the relationship between meaning and assertion. It is now a commonplace in the study of language that the *linguistic meaning* of a sentence cannot, in general, be identified with what is asserted by literal uses of it.¹⁵ Asserted content of a use of a sentence is the *joint* product of its linguistic meaning plus special circumstances of the context of use, including the shared presuppositions of the participants. This joint product is what one's linguistic performance commits one to and what knowledgeable hearers reasonably take one to be committed to. It is also what different parties jointly commit themselves to when they agree on a plan, sign a contract, or ratify a constitution. In the constitutional case, it is the law to which we must be faithful. But now there is a problem, for if the framers' *understanding* of the text is the assertively stipulated law to which we must be faithful, then Balkin is wrong in insisting that it is *not* the framers' *understanding*, but the *original linguistic meaning*, to which we must be faithful.

The problem is unavoidable as long as we recognize that what we must be faithful to is the law, that asserted content is the law because it is what the framers and ratifiers committed themselves to, and that this content can't, in general, be *the meaning of the text used to assert it*, because meaning is only one of two main factors determining content. Short of disputing this third, linguistic, point, the only way out for Balkin is to maintain that although the asserted content is what the framers and ratifiers agreed to, it is *not* the law to which we must be faithful. Rather, the

¹⁵ See chapter 7 of Soames, Scott. 2010. *The Philosophy of Language*, Princeton: Princeton University Press, 2010, which summarizes considerations advanced in the contemporary literature in support of the above thesis about the relationship between meaning and assertion (even for sentences that do not contain obviously context-sensitive items like 'I', 'you', 'today', 'now', and 'this'). See also Bach, Kent. 1994, "Conversational Implicature," *Mind and Language* 15:124-62, and Neale, Stephen. 2007. "On Location," in *Situation Semantics: Essays on the Philosophy of John Perry*, edited by Michael O'Rourke and Corey Washington, 251-393, Cambridge: MIT Press.

linguistic meaning of the text is what must be preserved, even if the content of the agreement resulting from its original use conflicts with the content some political actors use the text to assert today. Against this, I maintain that what we care about are the *contents* of our agreements – the promises made and guarantees given – not the preservation of the semantic modalities originally used.

The chief problem with *Living Originalism* is that it lacks the analytic middle ground provided by *asserted content*, which stands between the unspecific linguistic meanings of abstract clauses and the over-specific policy expectations of political actors who use them. Realizing that expected applications are too specific to be touchstones of fidelity, Balkin equivocates. Sometimes his talk of *original meaning* tracks what is really asserted content; sometimes it tracks semantic meaning that only partially determines that content. Instances of the former give the impression that *Living Originalism* is a version of Originalism.¹⁶ Instances of the latter give the impression that it is also a version of *Living Constitutionalism*. This, I believe, is an illusion; no unequivocal theory is a version of both.

Application of the Two Theories to Particular Constitutional Cases

I will illustrate this by comparing Deferentialism and *Living Originalism* on a few well-known constitutional issues. I begin with Balkin's suggestion that there is a lesson in the fact that the framers didn't use time-specific language like, "Congress shall make no law abridging the freedom of speech *as understood at the time of the adoption of this Constitution*." The lesson, he seems to suggest, is that they intended to *delegate* to future generations the authority to protect all and only the speech and communication that *future generations think should be free*, whether or not

¹⁶ See the discussions of the compact clause, the commerce clause, and the privileges or immunities clause. The discussion of the *necessary and proper* clause also belongs here, though what is really going on may be a revision of asserted content to bring it in line with its rationale in the manner of the Deferentialist principle (iic) above.

the central freedoms presupposed by the founders and ratifiers are included in the protected category. Surely, that won't do.

Here is a portion of the First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press...

What is a law *respecting the establishment of religion*, and what is it to *abridge the freedom of speech or the press*? There is, I think, no case for identifying what was stipulated in ratifying the amendment with its linguistic meaning.¹⁷ The First Amendment doesn't tell us that Congress shall make no law of any kind applying to a religious institution and no law restricting any form of speech. The key words are 'establishment' and 'abridging'. Americans knew what an established state religion was, because several states had tepid versions of one.¹⁸ Hence the core asserted content of the establishment clause was that the federal government must not interfere with the established religions in any state, and that it must not set up an official national religion, or endow any sect with the trappings of one. This is what cannot be transgressed without constitutional amendment no matter what "new understandings" may arise from whatever religious revivals may lie in our future. The establishment clause doesn't dictate complete neutrality toward religion vs. nonreligion, or even among all religions (provided all are free to practice).¹⁹ If some wish to guarantee such neutrality, they need to amend the Constitution.

¹⁷Balkin's discussion on pp. 204-05 of the "nonliteral" uses of 'Congress', 'speech', and 'press' in the amendment doesn't, I believe, track non-literal *meanings*. Instead, words are used with their ordinary meanings in a special context in which what is asserted goes beyond what the sentences containing them literally mean. The point is similar to cases in which metaphorical uses of words in sentences to express contents different from their literal meanings are often wrongly taken in literary criticism to be uses in which words and sentences have metaphorical *meanings*. The linguistic point is discussed in Soames, Scott. 2009. "The Gap Between Meaning and Assertion: Why What We Literally Say Often Differs from What Our Words Literally Mean," in *Philosophical Essays* Vol. 1. Princeton. Princeton University Press.

¹⁸ These varied in their exclusivity from "the Christian faith" (Delaware and Maryland) and "the Protestant faith" (New Hampshire, New Jersey, and South Carolina) to the Congregationalist Church (Connecticut and Massachusetts).

¹⁹ The matter has been muddled by the weight some interpreters give to Madison's support in Virginia's General Assembly from 1779 to 1786 of Jefferson's Bill for Establishing Religious Freedom -- which enjoined a more robust separation of church and state. Madison's role in proposing and securing the adoption of the First Amendment suggest that he hoped it to be interpreted in this way. But the asserted content of the text is not determined by what a small number of its proposers and supporters intended. It is determined by what ratifiers plus reasonable and knowledgeable members of the general public understood the nation to be committed to by its adoption. The relationship between church and state established by passage of Jefferson's bill in Virginia was not typical of the other states, and the understanding of Jefferson and Madison about the proper relationship between the two was not the common one.

As for freedom of speech and press, you can't abridge something that isn't already a reality. To abridge *War and Peace* is to truncate the original. To abridge the freedom of *speech* and of *the press* was, in 1791, to truncate the freedom to speak, write, communicate, publish and disseminate information and opinion long recognized in England and America. It is not just that the ratifiers of the Constitution *expected* the federal government not to abridge those freedoms *for the foreseeable future*; abridging them is what they *stipulated* that the government can *never* do. Of course, speech and communication today, as well as ways of regulating them, include forms that didn't exist then. The questions for current interpretation are: (i) *Which new forms of communication belong to the category protected by the original asserted content of the First Amendment?* (ii) *Which new forms of regulation fall under the category originally proscribed?* (iii) *Which decisions about new forms that don't fall under categories included in the original assertive content the First Amendment would best fulfill its original rationale -- which was to protect important political, cultural, educational, commercial, moral, religious, and artistic communication?* Since there is indeterminacy here, the Court has considerable authority to modify the content of First Amendment guarantees in the manner specified by Deferentialism. But not anything goes.

Next consider the Due Process Clause of the Fifth Amendment: *No person shall...be deprived of life, liberty or property without due process of law*. What does *without due process of law* mean? Its ordinary linguistic meaning is *without the process of law to which one is due*. But if that were the assertive content of the use of the clause, it would have added nothing to the processes of law guaranteed elsewhere in the Constitution. In fact, it added a guarantee that played an important role both in the run up to the American Revolution and in state governments after the Revolution. As Chapman and McConnell have shown, the term "due process of law" appears in 1354 British statute law, where it denotes the application of existing law by a judicial body -- which was prescribed by the Magna Carta as a condition limiting the King's ability to deprive a subject of

his rights.²⁰ It occurs again with the same assertive content in the 1628 Petition of Right and in legal writings in Britain up through the American founding, when -- following the Boston Tea Party -- the so-called the “Intolerable Acts” imposed by Parliament in 1774 inflamed the colonies for, among other things, inflicting punishments *without trial*. Following the Revolution, Alexander Hamilton used the term in remarks made to New York State’s General Assembly 1787 in arguing that *ex post facto* laws against loyalists violated “due process of law” by depriving them of property without benefit of a judicial proceeding.

This was the presupposed background that generated the core assertive content of the Due Process Clause, which guarantees that no rights involving life, liberty, and property may be deprived without the protection of a judicial process. Among these rights are those explicitly mentioned in the Constitution, which can’t be abrogated by legislation, and those traditional rights (to work, travel, raise a family, etc.) that can be regulated by legislative acts. As I have argued elsewhere, on this reading, the same deferentialist principle that invalidates the decision in *Lochner v New York* invalidates the decision in *Planned Parenthood of Southeastern Pennsylvania v Casey*.²¹ In both cases, the justices of the Supreme Court impermissibly inserted their policy preferences into the assertive content of a clause restricted to safeguarding procedural rights.²²

How and why does such judicial overreach occur? It began innocently with *Marbury v Madison*, when the Court ruled that Congress improperly granted authority *to the Court itself* to issue writs beyond what is specified in the Constitution. The result of this ironic decision was that the Court, in deference to its own limited authority under Article III of the Constitution, resisted an essentially inconsequential congressional increase in its authority, thereby asserting an immensely

²⁰ Nathan S. Chapman and Michael W. McConnell. 2012. “Due Process as Separation of Powers,” *Yale Law Journal*, 121:1672-1807.

²¹ Soames 2013.

²² Since the clause is repeated in the Fourteenth Amendment, it applied to state action, which was at issue in these cases.

greater authority to strike down acts of Congress nowhere explicitly asserted in the Constitution. Although this may sound suspect, it isn't. The logic of constitutional limits and guarantees requires a body, which can only be the Supreme Court, to judge when they have been violated. The same constitutional logic also requires that in adjusting the Constitution to new circumstances, the Court must *not* make up new constitutional content on its own, but must, to the maximum degree possible, *defer* to the Constitution. In the case of the Due Process Clause this means that the Court must not replace its original asserted content with the Court's own contemporary *understanding of the process of law to which one is due*. Adjustments of the original content to resolve vagueness and inconsistency are justified to the extent that they fulfill its original rationale. But our system of the separation of powers grants no authority to unelected, ostensibly non-political, justices to place their policy choices of beyond the reach of the normal operation of representative government.

My chief worry about Living Originalism is that it invites such judicial overreach. It's not, I think, that Balkin is fond of judicially imposed policy. But that, I worry, is what he may be led to when *principles* and *standards* are involved. The problem is the false dichotomy drawn between semantic meaning, which is often underspecified, and what he calls "expected policy applications," which are highly specific. The problem is illustrated in his discussion of Justice Scalia.

"Justice Scalia agrees that we should interpret the Constitution according to *the original meaning of the text, not what the original draftsmen intended*...But he insists that [content]...must be...applied in the same way...[it] would have been...applied when...[it was] adopted. As he puts it, the principle enacted in the Eighth Amendment "*is not a moral principle of 'cruelty' that philosophers can play with in the future, but rather the existing society's assessment of what is cruel. It means not...'whatever may be considered cruel from one generation to the next, but what we consider cruel today [i.e. 1791]'*"; otherwise it would be no protection against the moral perceptions of a future, more brutal generation" ...Scalia's version of "original meaning" is not original meaning in my sense, but a more limited interpretive principle, 'original expected application'. Original expected application asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with an legal terms of art)."²³

²³ Balkin 2011, p. 7. Italics indicate Scalia's words.

Balkin criticizes Scalia for identifying *original meaning*, to which we must be faithful, with original expected applications, to which we need not be faithful. The criticism is correct to the extent that Scalia's rejection of original intention fails to distinguish what J.L. Austin called *perlocutionary intentions* (encompassing consequences one expects to follow one's speech act) from what he called *illocutionary intentions* (encompassing shared expectations one relies on to determine the content of one's speech act).²⁴ But Balkin's position is the mirror image of Scalia's, and so is subject to a similar critique. Balkin is right to the extent that he maintains that original expected applications encompassed by the framers' perlocutionary intentions are not constitutive of constitutional content. But the critique of Scalia is incorrect to the extent that Balkin himself fails to distinguish the framers' illocutionary intentions, (which encompass shared presuppositions that contribute to asserted content) from their perlocutionary intentions (which reflect mere policy expectations that don't contribute).

The significance of this distinction is illustrated by the Fourth and Eighth Amendments.

4th Amendment: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated...

8th Amendment: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The key words are 'unreasonable' in the Fourth Amendment, and 'excessive' and 'cruel and unusual' in the Eighth. Because what counts as *unreasonable* varies across circumstances and times, the scope of constitutionally permitted searches and seizures may vary without changing the originally asserted content. Historical findings about those the founding generation deemed warranted may help us fix the weight *they* placed on personal privacy and security relative to other public values. This, in turn, may contribute to setting a lower bound below which the value of privacy and security can't be pushed by competing concerns. In this way, some of the founders

²⁴Austin, J.L. 1975. *How To Do Things With Words*, Cambridge: Harvard, 1975. See also pp. 240-42 of Soames, Scott. 2011. "Toward a Theory of Legal Interpretation," *New York University of Law and Liberty*, 6, 231-239.

expected applications of the Amendment may play an indirect and limited role in determining its content.

Analogous remarks apply to the Eighth Amendment prohibition of excessive bail, excessive fines, and cruel and unusual punishments. The asserted contents of the first two clauses prohibit bail and fines that are punitively out of proportion with the severity of the underlying charge or, in the case of bail, the amount needed to deter flight. The asserted content of the third clause forbids punishments that are cruel by virtue of being punitively out of proportion with the severity of the offense. The content of the amendment doesn't provide the scales by which offenses are ranked, which offenses are ranked where, or the scales and rankings of punishments. No doubt, historical research could provide information about which offenses were widely recognized in 1791 to be more serious than others and which punishments and fines for them were judged to be appropriately proportional, and so not excessive, cruel, or unusual. This creates a constitutional presumption that contemporary punishments and fines for offenses that are reasonably taken to be comparable in seriousness to similar offenses at the time of the founding – murder and petty theft, perhaps – must, in order to pass constitutional muster, not be substantially *more punitive* than those for similar offenses were then. To this limited extent Scalia is right in affirming, and Balkin is wrong in denying, that prevailing historical standards at the time of the founding play some constitutive role in determining the original Eighth Amendment content to which we owe fidelity.

This is so despite the fact that the comparisons needed to arrive at defensible results in real cases are not algorithmic. Changing social circumstances can render facially similar offenses more or less serious now than before, while different punishment regimes plus increased knowledge of their deterrent effects and the long-term consequences for those subjected to them, can lead to current applications that rightly differ from those expected by the founding generation. But, to the degree to which we recognize that the founders *moral standards* concerning punishment *do* play a

constitutive role in ruling out some possible punishments as *too punitive*, we must also recognize the burden they place on those today whose moral standards classify capital punishment as too extreme for any offense. The fact that many citizens share these changed standards may provide a reason *not* to impose that punishment. But it doesn't give the Court grounds to find its continued use by some states to be unconstitutional.

These examples illustrate the deferentialist balance between fidelity to the Constitution and the authority of the Supreme Court to modify constitutional content when required by unanticipated circumstances. While Deferentialism recognizes this authority, it places restrictive limits on it – so restrictive that some important decisions in recent decades don't pass muster (in the form they were originally rendered). This might seem to cause a conceptual problem. Since Deferentialism views Supreme Court precedents on constitutional matters as generating real constitutional content, one might argue that we owe the same fealty to the new content that we once owed to the now superseded content. But how can that be? Surely, the original Constitution holds a privileged place in our jurisprudence, as the touchstone to which we must perennially return. By contrast, one might argue, it is a virtue of Living Originalism that it identifies the original meaning of constitutional text as that to which we always owe fealty, while demoting what it calls mere *understandings*, both original and those in Supreme Court precedents, to the status of temporary implementations that may be discarded when new circumstances prompt a change.²⁵ Thus, it may seem that Living Originalism does, whereas Deferentialism does not, accord the original Constitution its proper pride of place.

²⁵ Balkin makes this point on pp. 50-58 in criticizing the view – espoused in Strauss, David. 2010 *The Living Constitution*, Oxford: Oxford University Press -- that our real constitution is a common law constitution of judicial and non-judicial precedents, and that we owe no special fealty to our written Constitution. In chapter 7 he balances this critique by siding with Strauss in criticizing originalists who don't recognize implicit constitutional changes that are sometimes ratified by the judiciary after being initiated by others. This criticism of other originalists doesn't apply to Deferentialism, which recognize some constitutional change by means other than amendment or judicial decision.

Not so. A Court precedent doesn't have the status of original constitutional content because its legitimacy is contingent on finding the application of that content in a case to require modifying it in accord with original rationale. When the Court overturns an earlier precedent-setting decision, it must be shown either that the earlier decision failed to respect antecedent constitutional content and rationale, or that new circumstances have arisen that make possible a resolution that better respects that content and rationale. Since this chain of justification stretches back to the Constitution, Deferentialism properly accords it pride of place as the touchstone against which judicial decisions are evaluated. It succeeds because it correctly recognizes inherent limits on the Court's authority to engage in constitutional construction.

As I have argued, I worry that Living Originalism doesn't consistently do so. This worry is qualified by the fact some of Balkin's most edifying discussions arrive at what are, for all intents and purposes, proper deferentialist results. I will close by recounting two cases.

Points of Potential Convergence

The first is his discussion of *the compact clause* of Article 1 section 10 of the Constitution, which *is*, as I read it, sensitive to original asserted content and rationale. The compact clause says "[n]o State shall, without the Consent of Congress...enter into any Agreement or Compact with another State." Commenting on this, Balkin observes:

"The language seems to state a ban on all agreements between states without congressional consent. But such a rule...would be unwieldy, if not absurd; it would require Congress to pass on administrative or ministerial arrangements between states in which the federal government has no interest, and that pose no danger to the federal union...Accordingly, the Supreme Court has always treated the compact clause as *stating a principle*...[I]t...has held that the clause prevents combinations that increase the power of the states at the expense of the supremacy of the federal government...Justice Field and later interpreters...*sought to understand the point of the text in order to understand what kind of constraint it creates. Treating the text as a hardwired rule was absurd*; therefore they assumed that the text was ambiguous and required construction."²⁶

²⁶ Balkin, 2011, 46-47.

Although the result is correct, the attempt to fit it into the *Living Originalist* framework is strained. The language of the clause is underspecified, not ambiguous. This is common when phrases *some/any/no so-and-so* are used, which often incorporate tacit restrictions on the subdomain of *so-and-so*'s quantified over. As in ordinary speech, the contribution to assertive content made here by the use of the phrase 'any agreement or compact with another state' is determined by *the point* of its use in the text, which is to prohibit agreements that diminish federal supremacy. This isn't *constitutional construction*, which modifies original asserted content in light of new facts. It is correct identification of what was asserted in a case in which asserted content is a function of more than linguistic meaning.²⁷ The residual problem with Balkin's otherwise insightful discussion of this clause is the mirror image of Scalia's otherwise insightful dissent in *Smith v United States*, where, lacking the analytical notion of *asserted content*, he wrongly identified it with the ordinary linguistic meaning of the clause "uses a weapon" in a congressional statute.²⁸ Here, lacking the same analytical notion, Balkin wrongly identifies original asserted content with a *later understanding of original linguistic meaning*. Fortunately, his final result is not affected.

Balkin also gets *Brown v Board of Education* substantially right, again for essentially deferentialist reasons. His discussion is important both for its critique of McConnell's originalist defense of *Brown* and for Balkin's identification of the *Privileges or Immunities Clause* as the driver of Fourteenth Amendment guarantees. Here is part of the Fourteenth Amendment.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

²⁷ See Soames 2009.

²⁸ Soames 2013 at 321-323.

McConnell's originalist defense of *Brown* bases it on the equal protection clause, the congressional supporters of which, he argues, intended to outlaw racially segregated public schools.²⁹ Balkin argues that this historical finding is not dispositive because McConnell conflates the framers' intended application of the text with its original meaning.

"McConnell showed that in the years following the ratification of the Fourteenth Amendment, many...congressmen and senators who proposed...[it] argued for desegregation of schools in proposed federal legislation...They supported this legislation on constitutional grounds, because they believed that segregated public schools violated the Fourteenth Amendment...My point...is that...[McConnell's] research...is...unnecessary if the question is whether *Brown* is consistent with *original meaning*...[He] thought that the best evidence of original meaning was evidence of original expected application...[He] did not use evidence of original expected application by the *general public* and the *ratifiers* of the amendment – whom ...[he] conceded probably strongly supported school segregation. Instead, he used evidence of original expected application by the *framers*. McConnell made his case for *original meaning* by making a case based on the *original intentions* of the framers."³⁰

Apart from conflating *original assertive content* with *original meaning*, Balkin's critique of McConnell is correct. Assertion is not a solitary, but a social, act that involves coordinating the intentions and expectations of asserters and addressees. Because of this, the assertive contents of linguistic performances are not found solely in minds of the performers. What is asserted by a use of a text is what the performance commits the performers to, which is what knowledgeable addressees who understand the linguistic meaning of the text and are familiar with the contextual background reasonably take them to be committed to. Since it is questionable that either the general public or the ratifiers could be expected to take the Fourteenth Amendment to commit the country to banning racially segregated public schools, McConnell's finding that key congressional supporters intended it to do so does not show that its ratification established the unconstitutionality of school segregation.

²⁹ McConnell, Michael W. 1995a. "Originalism and the Desegregation Decisions," 81 *Va. Law Rev.* 947; McConnell, Michael W. 1995b. "The Originalist Justification for *Brown*: A Reply to Professor Klarman," 81 *Va. Law Rev.* 1937.

³⁰Balkin 2011, 105. See also pp. 226-27.

Nevertheless *Brown* is Deferentially justified. Balkin agrees that its chief justification lies in the equal protection clause, but much of what he says would support the claim that the privileges or immunities clause -- which asserts that all citizens of the United States have rights deriving from their *national citizenship* that no state (after the Civil War) can infringe -- might rightfully be viewed as a contributor. Although Balkin calls this the *original meaning* of that clause, it is, I think, better characterized as its original asserted content.³¹ What were national rights involving public education in 1868? Since public education in America, including the territories as well as the states, was uneven, and not universally available, it is not obvious precisely what they were. Whether or not operating different and unequal schools in an area offering public schools was unconstitutional may very well have been arguable even then, even if the outcome may not be entirely clear. But whatever may be said of 1868, by 1954 changes in the general conditions of life and the role of government in the lives of citizens had removed any remaining doubt. The ubiquity and importance of systems of public education made it highly plausible that no class of citizens could be excluded from them. Since the so-called “separate but equal” systems to which African-Americans were in some places confined were inherently unequal to majority systems, many descendants of those the plight of whom it was the rationale of the Fourteenth Amendment to address were unconstitutionally denied the rights of citizens. Thus, the result reached in *Brown* was Deferentially correct.

So, although Deferentialism and Living Originalism arise from different conceptions of constitutional interpretation and employ different analytic tools, they can be used to reach similar results in some important cases.³² Nevertheless, I remain skeptical about how far this convergence

³¹ Balkin 2011, pp. 192-93.

³² The same can be said about the perspectives of Deferentialism and Living Originalism on a number of the issues involving the commerce clause and its expansive application in the last 75 years beyond narrow matters of trade, or even strictly economic matters (illuminatingly discussed in chapter 9 of *Living Originalism*). As before, the suggested convergence comes with the caveat it is the *original asserted content* of the commerce clause that best plays the role of

can be pushed. Whereas Balkin sees and celebrates the delegation of judicial authority to alter the basic tenets of our constitutional system, I seek to minimize that delegation by restricting needed alternations to those that are maximally deferential to original asserted content and rationale. If determinate constitutional rules are sacrosanct, then, as I see it, the rationales for, and determinate parts of, the asserted contents of all constitutional provisions are similarly sacrosanct. That, in a nutshell, is Deferentialism. It is also, I fear, what Living Originalism denies.

Balkin's *original meaning*. The *necessary and proper* clause, discussed on pp. 177-79, requires a related caveat. Although the clause empowers Congress *to do what it reasonably judges to be proper for the purpose of implementing the specifically granted powers*, more of less as Chief Justice Marshall thought, this interpretation is by no stretch of the imagination the *original meaning* of the words "The Congress shall have Power...to make all Laws which shall be necessary and proper for carrying into execution..." It is not even obvious that the correct interpretation was *asserted* by the original use of the constitutional text, as opposed to being a revision of an unduly weak original assertion needed to achieve the clear *rationale* of the clause, which was to ensure that Congress could adopt reasonable means, consistent with other constitutional provisions, to achieve the ends it had been given the power to pursue.