

JACK BALKIN AS THE PICASSO OF CONSTITUTIONAL THEORISTS

Sanford Levinson*

*This Article examines Jack Balkin's seminal book, *Living Originalism*, and his influence on constitutional theory. In this Article, the author draws illuminating comparisons between Balkin, whom he considers to be one of the giants and geniuses of twentieth and twenty-first century constitutional theory, and Pablo Picasso, acknowledged as one of the giants and geniuses of the twentieth century art world. The author focuses his comparison on Picasso's version of Diego Velázquez's great 1656 painting, *Las Meninas* (The Maids of Honour). Although Picasso's *Las Meninas* may not look like the Velázquez original, Picasso very much saw himself working within a tradition of art, and one presumes that one purpose of his fifty-eight studies was to establish his legitimate place in a lineage of great artists most definitely including Velázquez. Similarly, a central point of Balkin's *Living Originalism* is that fidelity to U.S. constitutionalism requires an acknowledgement of changed conditions and the concomitant necessity of adjustment. The author suggests that the *Living Originalism* audience will either realize that the only plausible form of originalism is indeed "*Living Originalism*" of the kind delineated by Balkin or, instead, look at *Living Originalism* with the same kind of skepticism that some viewers undoubtedly direct at Picasso's version of *Las Meninas*.*

In case you were wondering, this title is no joke. It came to me as I was visiting Barcelona in March 2011, shortly before we gathered in Champaign-Urbana for the conference on Jack Balkin's *Living Originalism*. I was going through the Picasso Museum there. One of its major rooms is devoted to fifty-eight studies and paintings that Pablo Picasso made between August and December 1957 as an homage to Diego Velázquez's great 1656 painting, *Las Meninas* (*The Maids of Honour*). In its entry on that painting, Wikipedia is certainly reliable in its concise statement that "[t]he work's complex and enigmatic composition raises

* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin. I am very grateful to Larry Solum for inviting me to participate in what was an extremely interesting conference on Jack Balkin's marvelous work.

questions about reality and illusion, and creates an uncertain relationship between the viewer and the figures depicted. Because of these complexities, *Las Meninas* has been one of the most widely analysed [sic] works in Western painting.”¹ As I was going through the room and looking at Picasso’s “takes” on *Las Meninas*—culminating in a large version designed, presumably, to evoke the original in its entirety²—it occurred to me that one might view Picasso’s work as “interpretations” of Velázquez’s “pre-*cedential*” image. The question, obviously, is the extent to which we regard it as a “faithful rendering,” given that, as one might expect, it looks quite different in very many ways from the original, even as it is clearly similar in others, such as basic composition. It turns out, incidentally, that another extraordinarily Spanish artist, Francisco de Goya, also created around 1778 an etching titled *Las Meninas, After Velázquez*,³ though I did not know that until after I began preparing this Article. In any event, it is quite explicitly Picasso to whom I wish to compare Balkin, and not Goya.

It is presumably uncontroversial that Picasso was, by any measure, one of the giants (and geniuses) of twentieth century art, and many would undoubtedly drop the limitation only to the art of the past century. I personally believe that Balkin is one of the giants (and geniuses) of twentieth and twenty-first century constitutional theory. Not to put too fine a point on it, I consider *Living Originalism* the best book I have ever read on constitutional interpretation. Ever since I first read Balkin’s work, when reading a manuscript of his essays around 1986 or so that I had been sent to evaluate by the University of Wisconsin Press, I knew that he was an exceptionally interesting and illuminating thinker. One of the greatest pleasures of my life, both personal and professional, has been having Balkin as a sometime colleague, permanent friend, and frequent coauthor, from whom I am constantly learning. Indeed, from the perspective of what is now one-quarter century of reading and learning from his work, I can also recognize distinctive periods in Balkin’s thought, just as any student of Picasso can periodize his work. The Picasso of the “Blue Period”⁴—strongly present in the Barcelona museum—is very different from the artist who, with Georges Braque, would revolutionize painting only a decade later with the development of what came to be called “analytical cubism,” which in turn was succeeded by other

1. *Las Meninas*, WIKIPEDIA, http://en.wikipedia.org/wiki/Las_Meninas (last modified Dec. 21, 2011).

2. For an image of Picasso’s final oil painting, see *Pablo Picasso. Las Meninas. After Velázquez. 1957*. OGLA’S GALLERY, <http://www.abcgallery.com/P/picasso/picasso211.html> (last visited Jan. 21, 2012).

3. See, e.g., *Goya and Velázquez*, EEWEEEMS.COM, <http://www.eeweems.com/goya/velasquez.html> (last visited Jan. 21, 2012).

4. WILLIAM RUBIN, *PICASSO IN THE COLLECTION OF THE MUSEUM OF MODERN ART* 24–28 (1972); see also 2 FREDERICK HARTT, *ART: A HISTORY OF PAINTING, SCULPTURE, AND ARCHITECTURE* 397 (1976).

distinctive periods.⁵ So it has been with Balkin. His “structuralist” and “deconstructionist” periods, among others, have now led to his new emergence as an extraordinary “originalist,” no doubt to the consternation of many of his friends and devotees. Perhaps I should compare Balkin to another protean giant of U.S. culture, Bob Dylan, inasmuch as I am old enough to remember vividly my own sense of betrayal when first hearing, at a concert in Boston in 1965, the “rock-band Dylan” who had taken over from the acoustic folksinger my wife-to-be and I had heard on our very first date in 1963 and then heard again in 1964 prior to his 1965 transformation.

The basis for my comparison of Balkin with Picasso is not only the protean aspects of Balkin’s remarkable body of work. There is, I think, a deeper connection, having to do with the notion of “representation” and its relation, possibly, to what some might regard as “illusion.” So it is important to recognize the extent to which Picasso, in his own distinctive way, was *not* an abstract artist—in contrast, say, to Mark Rothko or Josef Albers, whose work concentrated on the formal properties of colors when juxtaposed with one another.⁶ Rather, from the beginning to the end of his career, Picasso was a *representational* painter who emphasized the limits of the received tradition of representational art and believed that it needed to be rethought in fundamental ways.⁷ This did not entail rejecting the proposition that the task of the artist is in fact to capture something significant about reality (and, along the way, to challenge the viewer’s received wisdom about what “representation” involved). Analytical cubism, for example, is based, among many other things, on the fact that no single perspective—of the kind one might find in a traditional portrait, for example, including, of course, portraits that Picasso painted with great skill early in his career—can capture an object or a person. With a piece of sculpture, we can look at the object from all sorts of vantage points and realize, among other things, that it looks very different depending on the point from which the viewer is standing. This may simply be a way of defining sculpture as three-dimensional, whereas painting is confined to a single, flat surface, and artists must inevitably

5. See HARTT, *supra* note 4, at 400.

6. On Rothko, see, for example, *Mark Rothko: Introduction*, NAT’L GALLERY ART, <http://www.nga.gov/feature/rothko/intro1.shtm> (last visited Jan. 21, 2012). On Albers’s particular project of art, see, for example, JOSEF ALBERS, *INTERACTION OF COLOR: NEW COMPLETE EDITION* 37–44 (2010) (describing technique centering around the juxtaposition of colors).

7. For a good discussion of the difference between “representation” and “abstraction,” see Stephen Park, *Abstraction*, UNIV. CHI.: THEORIES MEDIA KEYWORD GLOSSARY (2008), <http://csmt.uchicago.edu/glossary2004/abstraction.htm>. See also *Abstract vs. Figurative Art*, ARTSTORY.ORG, <http://www.theartstory.org/definition-abstract-vs-figurative-art.htm> (last visited Jan. 21, 2012) (placing Picasso in the realm of the “figurative” (next to Norman Rockwell in the illustrations presented) as against those artists described as “abstract”). For a far more theoretical discussion, see Karen Sullivan, *The Languages of Art: How Representational and Abstract Painters Conceptualize Their Work in Terms of Language*, 30 *POETICS TODAY* 517 (2009). I am grateful to Pamela Allara, now retired from the Brandeis University Department of Art, for corroborating my impression that Picasso is far better described as “representational” than as “abstract” in the context of twentieth century art.

figure out ways of confronting the limitations posed by that reality. One might become self-consciously illusionistic, as with *trompe d'oeil*; one can reject the enterprise of representation entirely, as with, say, Rothko and many of his contemporaries. Or one can redefine the enterprise of representational art, as did Picasso.

So now we turn to constitutional theory and, in particular, the relationship between “constitutional theory” or “constitutional interpretation” and a particular text called “the Constitution,” though, obviously, it is a matter of controversy whether one can sensibly confine “the Constitution” to a canonical text called “the Constitution of the United States.” I have written elsewhere of “protestant” and “catholic” notions of what might be termed “Constitution-identity;” and only a hard-line “protestant” would confine “the Constitution” to what can be seen at the National Archives or found at the front or back of standard casebooks on U.S. constitutional law.⁸ Still, even “catholics” recognize at least the *relevance* of the text, and, given my own recent turn toward “constitutional design” and “hard-wired structures,” there are aspects of my own approach to the Constitution that I would freely describe as at times “mindless textualism”⁹ (as in “What part of January 20th do you not understand?”).

In any event, one often asks of a portraitist whether he or she “truly” captured the subject of the portrait. Could one, adopting Owen Robert’s (in)famous suggestion, place a portrait next to a person and say, “Yep, I cannot tell the difference (save, perhaps, that the portrait is not lifesize).” There is, after all, a tradition in art going back to the ancient Greeks where *mimesis* is the highest value, and the acid test is similar to the Turing Test regarding computers (i.e., could an observer actually tell which is the “real” and which is simply the “portrait of the real?”).¹⁰ Certain contemporary “hyperrealists” certainly attempt to confound the boundaries between “photography” (identified by many with “the real”) and “art” (defined, concomitantly, as interestingly different from what can be achieved through photography, else why continue painting in the “realist” tradition once photography is invented?). To the extent that we appreciate Picasso, we can say something like, “You may think the portrait is not accurate, but, once you understand what Picasso is trying to do, you realize that it really does capture, far more so than more conventional portraiture, deep truths.” And, perhaps, this is true of his distinc-

8. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27–53 (2d ed. 2011).

9. See, e.g., SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 17–27 (2012) (explaining the distinction between the basically textual “Constitution of Settlement” and the “Constitution of Conversation” about the indeterminate aspects of the Constitution).

10. On the “Turing Test,” see Graham Oppy & David Dowe, *The Turing Test*, *STAN. ENCYCLOPEDIA PHIL.*, <http://plato.stanford.edu/entries/turing-test/> (last updated Jan. 26, 2011). The contemporary artist Mark Tansey does a wonderful artistic riff on the notion of “realism” in art in his series on “the innocent eye.” See ARTHUR C. DANTO, *MARK TANSEY: VISIONS AND REVISIONS* 16–26, 35 (Christopher Sweet ed., 1992) (“[P]ictures are inherently problematic.”).

tive take on *Las Meninas*. It may not “look like” the Velázquez original, but it might be a mistake to expect “literal” mimesis. Picasso very much saw himself working within a tradition of art, and one presumes that one purpose of his fifty-eight studies was to establish his legitimate place in a lineage of great Spanish (and world) artists that most definitely includes Velázquez (and Goya).

As Balkin and I have written elsewhere about traditions in musical interpretation,¹¹ a truly *living* tradition does not require that one engage in simple repetition of what has come before. No one today writes such “Bach-like” chorales or fugues that one cannot tell the difference between one written in 1740 and one written today, even if one can speak meaningfully of contemporary composers who are part of a tradition going back to Bach. Still, almost anyone could tell the difference between a piece composed three centuries ago and one composed today, even before turning to the almost inconceivably different performance practices that we take for granted today as against those even of two centuries ago. Similarly, I take it that a central point of *Living Originalism* is that fidelity to the tradition of constitutionalism in the United States—particularly if we are to make it, in Balkin’s useful notion, *our* Constitution instead of merely an “external” document to be analyzed with the same detachment that one might apply to, say, the French or Fiji constitutions—requires an acknowledgment of changed conditions and the concomitant necessity of adjustment.

Consider in this context Justice John Marshall’s opinion in *M’Culloch v. Maryland*,¹² which I believe is possibly the most important single opinion (as distinguished from its result, which could easily have been attained through a number of interpretive paths) in our history. For years, I confess, I found somewhat mysterious Justice Felix Frankfurter’s remarkable statement (even for the effusive and hyperbolic Frankfurter) that Marshall’s phrase, “it is *a constitution* we are expounding,” in his opinion was “the single most important utterance in the literature of constitutional law—most important because [it is the] most comprehensive and comprehending.”¹³ One might ask what is so amazing about this phrase, since it is glaringly obvious that Marshall and his colleagues were doing just that—i.e., expounding the meaning of the Constitution. What makes the sentence worthy of Frankfurter’s approbation, though, is what follows; where Marshall, in effect, sets out what is most important about legal documents that we call “constitutions.”¹⁴ Thus, he emphasizes that the U.S. Constitution is “intended to endure for ages to come, and, con-

11. Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991) (book review).

12. *M’Culloch v. Maryland*, 17 U.S. 316 (1819).

13. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 218–19 (1955).

14. See *M’Culloch*, 17 U.S. at 415.

sequently, to be adapted to the various *crises* of human affairs.”¹⁵ Interestingly enough, he italicizes “crises,” though one might believe that the term “to be adapted” is equally worthy of emphasis.

The point is that John Marshall recognized that the U.S. Constitution *must* be a “living Constitution” (a term that, of course, he did not use) if it was to achieve the most fundamental purpose of “endur[ing] for ages to come.”¹⁶ In this belief, he was (perhaps in spite of himself), a faithful disciple of Thomas Jefferson, Marshall’s despised adversary, who wrote that just as “manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”¹⁷ This is true, it turns out, of *all* institutions and practices, including art, music, and, of course, the law. I take it that none of the distinguished “originalists” gracing the University of Illinois for the remarkable “summit conference” convened by Larry Solum and Kurt Lash disagree with Marshall’s basic point about adaptation. All, I presume, support the Thirteenth, Fourteenth, and Fifteenth Amendments (for starters), all of which changed the 1787 Constitution in fundamental ways that would have undoubtedly drawn strong condemnation (and probable rejection of any Constitution containing them) in 1787.¹⁸ Rather, the debate concerns whether the *necessary* adaptation is exclusively a product of formal amendment or, instead, can come as well through innovative interpretations proffered by legislatures, executives, courts, and, especially important in Balkin’s telling, social movements that may serve to place these political worthies in office. Needless to say, many of these “interpretations” are extremely controversial, especially when initially put forth; opponents are more than willing to denounce them as “illegitimate” because they stray from conventional wisdom. But, for better or worse, their proponents prevail in “the court of public opinion,” through elections and otherwise, and their success is ultimately reflected in judicial legitimation of views that years before would have been rebuffed and perhaps even regarded as frivolous. I am one of those people who certainly believe, as does, say, Steve Griffin, that one cannot possibly claim to understand the operative practices and history of “Constitutional Development in the United States” without giving full recognition to non-Article V adaptations that may well deserve the appellation “amendments.”¹⁹ One should note, though, that a crucial aspect of Balkin’s recent work, some of it done with me, is to challenge Bruce Ackerman’s

15. *Id.*

16. *Id.*

17. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) ix, ix (2006).

18. See LEVINSON, *supra* note 9, at 36.

19. See, e.g., RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995) (including essays by, among others, Sanford Levinson, Stephen M. Griffin, and Bruce Ackerman attacking the “standard understanding” of that history).

emphasis on amendment outside of Article V, which by definition requires a wholesale rejection of “originalism” in any of its forms. Instead, Balkin offers a narrative of often-fundamental constitutional changes that are, nonetheless, justified by reference to the foundational (and original) text and immanent principles that have been there from the beginning, whether measured by 1787 or, as in the case of the Fourteenth Amendment, 1868.²⁰

Consider in this context Balkin’s elaboration of his theory of “texts and principles” that, of course, undergirds his entire project. He goes out of his way to tell the reader that “we”—and it is no small question to discern who the imputed “we” is—“want to make sure that in our eagerness to articulate new principles,”²¹ which will presumably provide effective adaptations to inevitable crises, “we do not wind up with a play on words.”²² And therein lies the rub. To what extent will those committed to the kinds of originalism that Balkin so devastatingly criticizes—including, of course, the formidable phalanx of originalists brought to the University of Illinois and represented in this symposium—declare, upon reading Balkin’s book, that the scales have fallen from their eyes? As a result, they might go on, they now realize that the only plausible form of originalism is indeed “living originalism” of the kind delineated by Balkin, even if, perchance, they disagree with some specific applications. Such “as-applied” disagreement would not require rejecting the general approach of “texts and principles” that Balkin develops. Or, to the contrary, will they look at *Living Originalism* with the same kind of skepticism with which some viewers undoubtedly look at Picasso’s version of *Las Meninas* and declare that, whatever this is, it certainly is merely a play on words, suggesting that it connects with the great work by Velázquez only in the sense that a parasite is “connected with” its host. Thus, these skeptical viewers would undoubtedly proclaim that the Velázquez is art, but also attempt to expel from the category of “real art” the distortions and assaults on the viewer often found in Picasso’s paintings.

Consider also one of the other invocations of “modern art” in an article about constitutional interpretation, Mark Tushnet’s classic *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*.²³ In particular, this article includes Tushnet’s famous critique of the “craft interpretation” of how to do constitutional law by reference to Justice Blackmun’s opinion in *Roe v. Wade*.²⁴ Tushnet writes:

Craft limitations make sense only if we can agree what the craft is. But consider the craft of “writing novels.” Its practice includes Trollope writing *The Eustace Diamonds*, Joyce writing *Finnegan’s*

20. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

21. *Id.* at 267.

22. *Id.*

23. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821 (1983).

24. *Id.* at 818–21.

Wake, and Mailer writing *The Executioner's Song*. We might think of Justice Blackmun's opinion in *Roe* as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion. To say that it does not look like Justice Powell's decision in some other case is like saying that a Cubist "portrait" does not look like its subject as a member of the Academy would paint it. The observation is true, but irrelevant both to the enterprise in which the artist or judge was engaged and to our ultimate assessment of his product.²⁵

One might well regard Tushnet's comment as rather snarky, even though I suspect that those who support the notion of constitutionally supported reproductive rights can easily agree that Justice Blackmun's opinion exhibits, shall we say, some remarkable problems with regard to its persuasiveness for anyone not predisposed to accept the policy outcome. This presumably helps to explain why one of Balkin's books is an edited collection on *What Roe v. Wade Should Have Said*, a presumably unnecessary book were it the case that there was some professional consensus, even among devotees of reproductive rights, that it was a truly commendable example of whatever might count as judicial artistry.²⁶ But is it possible that Blackmun's opinion was simply a "bad" example of "cubist" constitutional interpretation, precisely because, to accept Tushnet's hyperbole, it is "totally unreasoned," as against a "good" model of constitutional cubism, which, as in Balkin's work, is extensively reasoned, even if it delineates often-surprising pictures?

Given Balkin's concern about the descent into what might be termed, altogether pejoratively, as "merely clever wordplay," he emphasizes that we should indeed "look to history—where it is available—[to provide] a check on our assumptions about what 'the text can bear.'"²⁷ After all, he writes, "We must avoid a play on words because rule-of-law values require that we preserve semantic meaning over time."²⁸ Is this an echo of, among others, Larry Solum? But recall, one of Balkin's central concerns, both in this book and in his other 2011 book, *Constitutional Redemption: Political Faith in An Unjust World*,²⁹ is that the Constitution be worthy of what I have elsewhere called "constitutional faith,"—that it is embraced as "our Constitution" precisely because it "connects our present political aspirations and commitments with the aspirations and commitments of previous generations, including not only the adopting generation but all that succeed it," who may, of course, have deviated in important (and altogether commendable) ways from the particular ex-

25. *Id.* at 821.

26. See WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005).

27. BALKIN, *supra* note 20, at 267.

28. *Id.* at 268.

29. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 49–50 (2011).

pectations of the “adopting generation.”³⁰ “For the Constitution to succeed as ‘our law,’” he writes, “we must be able to see ourselves as embarked on a common project that begins in the past and that we bring into the future.”³¹ How do we achieve this “common project”? Balkin tells us:

[W]e try to interpret the past in the present as articulating principles which we are still committed to today. When we pledge fidelity to the past, we always do so from the standpoint of the present. Fidelity to the past is a present-day decision about what we are committed to *seen through the lens of a present-day perspective*.³²

And the point, of course, is that there is no alternative to adopting a “present-day perspective;” we truly “cannot go home again” if by that we mean returning in some pristine sense to life as it was lived several centuries ago. We can attempt to imagine what life was like when, for example, life expectancies, particularly for women experiencing child birth, were far lower than is the case now. “Marriage” would have a far different meaning, given the common expectation, especially for men, that they would have multiple wives over a lifetime. “Until death do we part” has a fundamentally different meaning in a world where each partner can expect the other to live until eighty. As we have written elsewhere, even devotees of “early music” who insist on “authentic” performance practices are not adverse to performing in modern concert halls and conforming to the expectations of a modern audience that the performance will last no more than two hours or so.

Even if the facts of history do not change, and even if we uncover no new historical sources, what history means to us and the way it appears to us continually do change, because we ourselves are moving through history and *continually see what happened in the past through new perspectives*.³³

If we have not already gotten the point—Jack does sometimes have a tendency to repeat himself!—he writes that “[h]istory always looks new to us because we ourselves are constantly changing; *our perspectives are constantly shifting under our feet*.”³⁴

One of the things we know from the study of cultural history is that it took time to assimilate such artists as Picasso or Stravinsky (who wrote the riot-producing *Le Sacre du printemps* (*The Rite of Spring*)³⁵ just as Picasso was working out the “rules” of analytical cubism) and to place them within distinctly living traditions of their respective arts. If we can accept the notion that Velázquez and Picasso were engaged in a truly

30. BALKIN, *supra* note 20, at 268.

31. *Id.* at 268.

32. *Id.* (emphasis added).

33. *Id.* (emphasis added).

34. *Id.* at 269 (emphasis added).

35. See THOMAS FORREST KELLY, *FIRST NIGHTS: FIVE MUSICAL PREMIERES* ch. 5 (2000) (describing the first performance in Paris).

“common project” across the centuries—in a way, perhaps, that Mark Rothko was not—then we should surely grant the same generosity of linkage to Balkin. But, as already suggested, the identity of the “we” is crucial.³⁶ It is surely no surprise that I am very much taken by *Living Originalism*. After all, among other things, it provides a systematic and intellectually persuasive scaffolding that defends a particular perspective of our “common project” to which I already adhere. I suspect Balkin likes the Constitution more than I do, in part because he more or less ignores the structural aspects of our political system that are “hardwired” because of decisions made in 1787 and that make their own unfortunate contribution to the now-widespread perception that the U.S. political system is “dysfunctional” or even pathological.³⁷ Thus, I now find it impossible to declare allegiance to the Constitution as “my” Constitution.³⁸ I therefore strongly support a constitutional convention that would junk much of the 1787 Constitution and replace it with institutions far more congruent with our twenty-first century notions of “democracy” and “effective government.” Still, both of us like the far-too-often ignored Preamble to the Constitution,³⁹ and I certainly believe that the Constitution was much improved by the addition of the Fourteenth Amendment, which I am more than happy to interpret along Balkinian lines.

But, as I have already suggested, I am not really the primary audience for this book. The real question is what people like those attending this symposium—as well as the absent Michael McConnell and, dare I say it, Justice Antonin Scalia—will say about it. Consider, for example, some of the critical response to the famous Armory Show of 1913, which introduced to U.S. audiences many now-classic, then-ultramodern, artists.⁴⁰ Several critics looked at the work of Matisse and Picasso from the perspective of the critical standards established by John Ruskin. Thus, [p]hrases like “truth and honesty” and “fidelity to nature,” which were coined by Ruskin, became mainstays in the American vocabulary of critical writing. According to many skeptics of the new art, its supporters were amateurs, writers who had no knowledge of art history. Frank Jewett Mather spoke of the critics who supported modernism as superficial dilettantes: “The trouble with the newest art and its critical champions is that fundamentally they have no real breadth of taste. These people are devoted to fanaticisms, catchwords, all manner of taking themselves too seriously.”⁴¹

36. See *infra* text accompanying notes 21–22.

37. See, e.g., LEVINSON, *supra* note 9, at 143.

38. See *id.* at 245–52.

39. See BALKIN, *supra* note 20, at 269–70.

40. *Marketing Modern Art in America: From the Armory Show to the Department Store* [hereinafter *Marketing Modern Art*], available at <http://xroads.virginia.edu/~museum/armory/marketing.html> (last visited Jan. 21, 2012); see also J.M. Mancini, “One Term Is As Fatuous As Another:” *Responses to the Armory Show Reconsidered*, 51 AM. Q. 833, 842–43 (1999).

41. *Marketing Modern Art*, *supra* note 40 (citations omitted).

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Today, of course, such critics are held up to ridicule, not because “truth and honesty” or even “fidelity to nature,” have been completely supplanted, but, rather, because we operate in the twenty-first century with quite different definitions of what those terms might mean. We have assimilated the teachings not only of Picasso and Matisse, but of still other modern and contemporary artists who have formed our own consciousness. We stand not only on the shoulders of giants, but, of course, we see the world quite differently precisely because we can climb up on those shoulders and are no longer confined to the ground to provide us apt perspectives.

For me, and no doubt for others, Jack Balkin is truly a giant on whose shoulders I am grateful to stand. But it would be foolish to believe that that is a universal reaction. I am sure I am not the only person who remains extremely interested, for reasons going well beyond close friendship, in the critical response that will greet this truly extraordinary book.

