

## Balkin Talks Blogs

Online, Knight Professor of Constitutional Law and the First Amendment Jack M. Balkin is best known for the blog *Balkinization*, a political and legal blog he founded and maintains. Professor Balkin recently sat down for a Q & A with the *Yale Law Report* to give his thoughts on the legal blogosphere and how it's changing the nature of legal discussion and legal education.

Excerpts from the interview appear in the Winter 2007 issue of the *Law Report*; a transcript of the interview in its entirety appears below.

**YLR:** It seems there are several different models as far as the tone and perspective and subjects that legal blogs tackle. What blogs are out there and how do they differ from one another?

**Balkin:** There are now dozens if not hundreds of legal blogs. Let me mention just a few that illustrate the various types. *The Volokh Conspiracy* [<http://volokh.com/>], which was started by Eugene Volokh at UCLA, and *Balkinization* [<http://balkin.blogspot.com/>], which I started, are group blogs. *The Volokh Conspiracy* has a conservative to libertarian perspective and about ten or so regular contributors. It discusses law and public policy at a very sophisticated level, but it also has discussions of popular culture; it has puzzle contests and jokes, and it's great fun. It's an example of how blogging transcends existing categories and expectations. My blog, *Balkinization*, has a mostly liberal perspective with around five or six regular contributors. It offers fairly serious discussions of constitutional law, legal theory, and politics. That was deliberate; we decided that we wanted a particular voice and a particular style, so we don't have much in the way of gossip or discussions of popular culture. People come to us when they want to read academic views about law and politics at a fairly high level.

The *Becker-Posner blog* [<http://www.becker-posner-blog.com/>] is a joint blog by Gary Becker and Richard Posner. Once a week, they pick a topic, and one writes a short essay, and the other responds. People write comments on the blog, and they respond to them. It's a fairly structured approach to the medium.

*Althouse* [<http://althouse.blogspot.com/>], by contrast, is run by a single person, Ann Althouse, a law professor at Wisconsin who talks about law and politics in a very personal way. She's a moderate to conservative pundit who tells you how she feels about things—including popular culture—and she offers some legal analysis in the bargain. *Instapundit* [<http://www.instapundit.com/>] is run by Glenn Reynolds, who teaches at the University of Tennessee Law School (he's also a YLS alum). He has one of the oldest blogs (he started in 2001) and one of the most widely read, with millions of readers. His blog is pure punditry, from a conservative to libertarian perspective. He offers short snippets—sometimes just a single sentence—of his views on an enormous number of different topics, and he links to stories and articles that he finds interesting or that his

readers send to him. The tone is very different than say, *Becker-Posner* and *Balkinization*.

*Legal Theory Blog* [<http://lsolum.blogspot.com/>] is a one man operation run by Larry Solum at Illinois. It is really a tour de force and it must take an enormous amount of work. It's strictly devoted to academics. Any time a new paper comes out on SSRN (the Social Science Research Network—an online depository for drafts of new scholarship) that Larry thinks is interesting, he'll republish the abstract and provide a link. He'll tell you about all the new academic books that have recently been published; he will tell you about academic conferences that are coming up; he gives you basic introductions to important legal and philosophical concepts, he suggests reading lists for particular topics; in short, he's a one-man clearinghouse for the academic world. It's simply amazing what he is able to do by himself, and he performs an invaluable service.

The Georgetown [[http://gulcfac.typepad.com/georgetown\\_university\\_law/](http://gulcfac.typepad.com/georgetown_university_law/)] and Chicago Law [<http://uchicagolaw.typepad.com/>] blogs are devoted to serious discussion of academic issues along the lines of *Balkinization*. They consist of law faculty at particular law schools who have decided to blog together.

The postings on these blogs, generally speaking, are short. On *Balkinization*, we have adopted a certain style—we do mostly free-standing essays, so our postings can be quite long, up to 5,000 words, but usually they average about 1,000 words to 2,000 words, about twice as long as the average op-ed in a newspaper. On the other hand, on *Althouse* or *Instapundit*, the posts can be really short, perhaps a few sentences or a single paragraph.

Many legal blogs now specialize in particular fields like election law, disability law, corporate law, and tax law. Brian Leiter [<http://leiterreports.typepad.com/>] at the University of Texas runs *Leiter's Law School Reports*, a blog that's basically professional gossip about who's getting offers and visits and who's moving where.

Lawyers outside of the legal academy also blog, and they make some very valuable contributions. *How Appealing* [<http://howappealing.law.com/>] is run by Howard Bashman, who's a litigator in Philadelphia. He tells you everything that's happening in the world of appellate litigation. He links to op-eds on legal topics in the major newspapers, to recent decisions in the circuit courts and the Supreme Court, and to a wide range of legal commentary in the blogosphere. I should also mention *SCOTUS Blog* [<http://www.scotusblog.com/movabletype/>], which covers Supreme Court litigation and commentary and offers very sophisticated analysis—from the litigator's perspective—of what the Court is doing and why.

If you are looking for legal gossip outside the legal academy, there's *Above the Law* [<http://www.abovethelaw.com/>], run by YLS alum David Lat, who began his blogging career under the pseudonym Article III Groupie at a blog called *Underneath Their Robes* [<http://underneaththeirrobes.blogspot.com/>]. These two blogs provide entertaining commentary and bits of gossip about lawyers, judges and clerks.

Blogging is only one aspect of how legal writing is changing. You can't really understand how online media affect traditional legal scholarship without taking into account the Social Science Research Network (SSRN) and the proliferation of law professors' personal websites. When I write a draft of a new article, I put a copy on my website, [www.balkin.com] and a copy on SSRN. In effect, I've published the draft. This transforms the pace of legal scholarship. People can read the new drafts as soon as I am finished with them. The final versions may appear in law reviews months or even years later, but why wait for the law reviews when you can publish (and read) scholarship immediately on SSRN? Moreover, intellectual arbitrageurs like Larry Solum will tell you when the new pieces come out and how they fit into the existing scholarly conversation.

**YLR:** How is legal blogging changing legal discussion and legal education?

**Balkin:** Blogging changes the relationship between law professors and their audiences because professors can reach more people. It changes the relationship between law professors and journalists because law professors don't need journalists to get their ideas out to the broader public; conversely, blogging makes it easier for journalists to find the right experts to interview. It changes the timing and pace of legal scholarship because law professors can talk about cases the day they come down, driving the discussion forward in a very short time rather than through a series of law review articles that may take years to appear. Just as the Internet collapses the news cycle, it also collapses the publication and discussion cycle. It produces a type of legal writing that is more journalistic, more personal, and more driven by current events.

Compared with traditional legal scholarship, blogging produces a different combination of analysis and opinion. The conversation is more informal, and it progresses very quickly. People also use sources differently: they cite to supporting information or authorities by linking to them, so that you can see the evidence for yourself.

This morning [November 8, 2006] I wrote a post on the South Dakota law banning most types of abortion, which was defeated in a popular referendum. I used the referendum to discuss a recent article written by my colleague Reva Siegel in the online version of *American Prospect*, as well as an article she hasn't officially published yet, providing links to both. In this example I'm not only talking about the news, I'm connecting it to other political commentary and to the latest legal scholarship. It's a kind of legal discussion we haven't seen much of before.

This is the first generation of law students who are going to law school after the rise of the blogosphere. If you went to law school a few years ago, you were totally immersed in the experience of a single law school, and your professors (and the law library) were the main sources of expertise. Now law students can hear legal opinions from law professors and their fellow students around the country—and around the world—on almost any topic they desire. The blogosphere becomes part of your legal education. That didn't really exist before.

Law students are not merely consumers of these blogs, they're also producers. There are at least a dozen students currently writing blogs at Yale Law School. At other law schools, there are probably hundreds of student-run blogs. Some of them talk about the experience of being a law student; others offer legal and political commentary, and still others combine legal analysis with discussions of their hobbies, interests, and personal lives. Student-edited law reviews have been transformed by online legal publishing. Most law reviews have an online presence, many publish articles simultaneously in print and online versions, and several have started online publications that are hybrids between traditional journals and blogs. Blogs are an incredibly creative medium; there's an enormous number of things you can do with them, and they are going to have all sorts of interesting and unexpected effects on legal culture.

**YLR:** When did you start writing your blog?

**Balkin:** January, 2003.

**YLR:** Why did you start?

I run the Information Society Project here at Yale and I'm interested in the relationship between the Internet, democracy and free speech. In the fall of 2002 we held an ISP conference on what was then the new phenomenon of blogging—one of the first academic conferences, in fact. We invited Glenn Reynolds from *Instapundit*; Jeff Jarvis from *Buzzmachine* [<http://www.buzzmachine.com/>]; Josh Marshall from *Talking Points Memo* [<http://talkingpointsmemo.com/>], and several other prominent bloggers. I was fascinated by the legal issues that blogging raised, but even more fascinated by how it was changing the public sphere and political discussion.

A few months later I had dinner with Glenn Reynolds and Eugene Volokh (who began his blog in April 2002). Glenn said, "Jack, you'd be good at this; you should start your own blog." And so I did, the very next week.

Blogging is both a way of participating in the Internet and a way of learning about it. I have learned more about how the Internet affects public discourse from being a blogger than I would ever have learned from reading what other people had to say about it. There's no substitute for participating in the medium if you want to understand what the medium does: how it affects your relationships with other people; how it affects the work and the status of law academics; how it affects the dissemination of legal ideas throughout society; how it changes the law professor's calling; how it changes the nature of legal education. It's much easier to see what's happening from a blogger's perspective.

**YLR:** People pull a lot of information from your blog.

**Balkin:** It's completely changed my relationship with the mass media. The mass media used to have a small number of law professors they'd regularly call on the phone; these law professors always had to be ready to talk and to talk on anything, even if it wasn't in their field of expertise. The blogosphere allows people to advertise their expertise by

showing what they can do; they put their views out there for everyone to see. If you're a journalist and you want to know about the Military Commissions Act, you know that you can talk to Marty Lederman or me, or better yet you just read our blog posts; they'll tell you everything we have to say about the Military Commissions Act.

This not only makes it easier for journalists to find expert opinion, but it allows expert opinion to route around traditional media gatekeepers and reach the public directly. Several sites have sprung up that help people do this. *Memeorandum* [<http://www.memeorandum.com/>] collects links to major news stories and matches them with links to prominent blogs that cover those stories and comment on them. Similarly, *Technorati* [<http://www.technorati.com/>] lets you find out what people are saying about a particular topic in the blogosphere.

The blogosphere not only routes around the traditional mass media, it also gloms onto it, commenting on it and criticizing it. Conversely, the traditional mass media increasingly turn to the blogosphere for fresh content, and it's no accident that newspapers and magazines are becoming more interactive in their online versions and even starting their own blogs. The shape and structure of the public sphere is being transformed by the blogosphere.

**YLR:** How often do you post to *Balkinization*? What inspires you to post?

**Balkin:** I tend to be driven by what's in the morning news, by what I'm working on in my scholarship, and by what other bloggers and legal scholars are talking about. Take my post on the South Dakota abortion ban. I'd been following the South Dakota referendum, first, because it's in the morning papers, second, because I'm working on a book on *Roe v. Wade*, and third, because Reva Siegel is a colleague and friend of mine who's been working on similar issues. It's a convergence of all three things.

*Balkinization* did a series of posts on the controversies about torture and the NSA domestic surveillance program, as well as a series of posts on the Military Commissions Act as it was being drafted. Marty Lederman and I got very involved in these issues as a natural outgrowth of our interest in the effect of 9/11 and the War on Terror on civil liberties. Marty is a former Office of Legal Counsel lawyer, and both of us are part of an academic listserv on torture issues that features some of the most interesting people talking about these topics. And the news kept generating legal issues for us to talk about. After a while, we found ourselves caught up in the cycle of events and we tried to give a legal analysis of what was happening more or less in real time.

After a while, people began to send us drafts of the military commissions bill as they were being marked up in Congress. Things were changing in the bill at a fairly rapid pace, and people wanted to know what was actually going on. We tried to explain how the drafts were changing, where the problems were, what parts of the bill to focus on, what was a genuine civil liberties problem and what was not. Legal scholarship could never do this before because you could never do on-the-spot analysis.

**YLR:** Some of the YLS faculty blog on your site, right?

**Balkin:** Ian Ayres is a regular contributor. I invite all YLS faculty to write on the blog, and several have, including Bruce Ackerman, Bob Gordon, Oona Hathaway, Dan Kahan and Peter Schuck. Every year I send out a note to the Yale Law School faculty reminding them that the blog is available to them and inviting them to write for it. Most of our colleagues still prefer to express themselves through forms of traditional scholarship: law reviews and books. A smaller number have adapted to the world of the op-ed. Most faculty don't yet see how their work could usefully be articulated in a blog. That will take some time. My suspicion is that the younger you are, the easier it will be for you to adapt yourself to this format. There are many exceptions to the rule, of course. Basically, I think people stick with what they know how to do well, and people who have succeeded very well at traditional scholarship will continue to want to do that.

The most successful blogs tend to be run by younger law professors who aren't necessarily at the top-ten schools. That's because if you're an established professor at a top-ten school, you are already probably getting significant positive reinforcement for what you are doing. But if you're a law professor who's trying to establish a name for yourself, you quite understandably feel that not enough people are paying attention to what you're saying. The blogosphere is a wonderful way for you to put your ideas out there and gain an audience for ideas you think are valuable and worthwhile. Blogging democratizes legal commentary; it publicizes the scholarship and the expertise of a large number of law professors who would not have gotten a voice before.

**YLR:** In the past you said that blogs help break down partisan divisions. Do you think that's still true?

**Balkin:** Blogs simultaneously increase and decrease partisanship. On the one hand, they make it easier for people to find views that they already agree with. If you are a conservative, you can find conservative blogs to read; if you are a liberal you can find liberal blogs. Blogs aren't unique in this respect; you can also easily find conservative or liberal books that conform to your views, as well as newspapers, television programs and talk radio. But blogs—and the Web more generally—have this important difference: the way a blog cites to something is by linking to it. When people criticize each other, they're always linking to things they criticize, and this creates the possibility of being exposed to ideas and opinions you wouldn't otherwise have been exposed to.

Search engines—which are the primary way most people navigate the Internet—have a related effect. They can take you places—and confront you with pages—that are in some sense relevant to the subject you are searching for but that may not take the viewpoint you expected or that you support. As a medium, the World Wide Web encourages surfing and exploration and serendipitous discovery. Hence blogs—and the World Wide Web more generally—both accentuate and ameliorate polarization.

People tend to focus on the first effect, and indeed, they tend to blame polarization on the Internet to the exclusion of other media like talk radio, which, I think, are probably are

more responsible. But people don't recognize that blogs have a second, ameliorating effect on political discourse. They don't yet realize that the Internet may actually be better than traditional mass media in this respect, especially because contemporary marketing techniques increasingly seek out segmented audiences for books, television programs and radio talk shows. People point to general interest newspapers as the key remaining method for exposing people to a wide variety of views and opinions, but these newspapers are also available on the Web, and indeed, increasing numbers of young people read them *only* on the Web. Moreover, the Web versions of major newspapers increasingly allow interactivity and links to opinions from many different perspectives that their print versions do not. Finally, reading the news using aggregator sites like Memeorandum and Technorati puts different views in front of you in ways that traditional media do not.

**YLR:** How would you define the success of your blog?

**Balkin:** We consider our blog successful if we can provide serious commentary on legal issues, and if people who want that commentary are getting it. Our audience tends to include lawyers, law professors, law students, judges, judicial clerks, reporters who cover the legal beat, staffers on Capitol Hill, policy people and people at think tanks. We're happy if they read us and take us seriously. If the goal of the blog were to attract everybody, we'd have to do a very different blog. It would have to be much more aimed at popular culture or political punditry. Even so, we've been surprised at how many of our regular readers don't fall into any of the categories I just mentioned. They're ordinary citizens who are interested in the law and civil rights, and they just want to know what's going on. They read the blog faithfully, and we get emails from them all the time.

**YLR:** How many readers do you average?

**Balkin:** For some time we averaged about 60,000 readers per month, but starting in September 2006, it jumped up to well over 100,000. That was partly because of our coverage of the military commissions bill.

*Balkinization* attracts a fair number of readers, but it's by no means among the most popular blogs. We've been averaging 100,000 readers a month recently, but the most popular blogs will get that traffic in a single day.

Blog readership, like many other features of the Internet, is distributed according to what mathematicians call a power law—or more precisely, a related type of distribution called lognormal. The most popular blog might get an enormous number of readers—in the millions—but the readership for the second-most popular blog might be only half that. The readership drops off very quickly as you go down the list. By the time you get to the hundredth most popular blog, the total readership is far smaller, but the difference between the hundredth and the hundred and first isn't very great. If you plot the rank order against the number of readers on a graph, the data points swoop down quickly and then level out, producing the now-famous “long tail” of blogs that receive fairly small but consistent numbers of readers. That distribution, I should add, is quite important in

generating and preserving both commonality of experience and enormous diversity of content on the Internet. Many people read the most popular blogs and visit the most linked-to Internet sites, which, in turn, often link to less well-known sites and advertise and drive traffic to them. Conversely, the long tail of the distribution means that even the most specialized or unique perspectives can find a niche of loyal readers. My colleague Yochai Benkler's new book, *The Wealth of Networks*, gives the best account of this phenomenon and its consequences for democracy.

**YLR:** What happens when people post hastily? When they regret what they've written?

**Balkin:** Good blogging requires a certain kind of skill and discipline. Many law professors are perfectionists, and they will not publish anything unless they've gone over it dozens of times. That doesn't really work here. To blog you must develop the ability to articulate your thoughts relatively quickly and briefly, and you must have the courage to publish them. The medium lets you correct things later on, but you have to be willing to admit when you were wrong.

**YLR:** How long does an average post take you?

**Balkin:** It depends. The story I did on abortion this morning took about an hour to write and revise. I once wrote a very long post on *Dred Scott* and *Kelo*, which is about 5,000 words, and it took me a week or more to work on it. It's really a law review article; I just never submitted it to a law review. Marty Lederman has written substantial articles on torture or military commissions where he's taken days to hone the argument to get it just right, because he's making some very complicated legal analyses. So, the posts can take anywhere from an hour to a week or so.

**YLR:** Do some posts end up as law review articles?

**Balkin:** Sure. A lot of things I post eventually wind up as parts of law review articles. I've been working on issues of abortion law, constitutional change and constitutional interpretation for several years now. Many posts are on these topics. A series of posts on the national surveillance state worked its way into an article that Sandy Levinson and I just published in Fordham, as well as a lecture that I recently gave at the University of Minnesota, which will be published next year. Blogging serves as a scratch pad to test out new ideas that can be polished and later published as part of my "official" scholarship.

**YLR:** Are you ever afraid that if you post an idea, someone will take your idea and run with it?

**Balkin:** Actually, the reverse is more like it. Stating an idea in the blogosphere is a way of staking a claim to it, because once you've blogged it, you've published it, and you can prove when you did it. Not only that, but other people can cite to your argument. Law reviews increasingly cite to blog posts just as they cite to news articles or op-eds.



Blogging lets you tell the world that you are working on something new and here is the initial formulation.

Posting ideas on your blog is also a form of advertising, both for your ideas and for the fact that you have them. I should note that *Balkinization* doesn't take commercial advertisements. Some blogs do, but we don't. However, we do have one kind of advertising—we advertise our academic publications and our ideas. The right hand column of the blog has pictures of recent books by people who write for the blog, with links to make it easy to buy the book. Academics often talk about their work on their blogs, as well as the conferences they are attending and the speeches they are giving. Whenever I post a draft of a new article on SSRN, I usually try to write a blog post about it; when I publish a new book, I try to talk about the book. I encourage the people who write for the blog to do that as well.

**YLR:** Do you have anyone who does technical work?

**Balkin:** I do most of the technical work, but it's not very difficult. Blogger (a hosting company now owned by Google) provides the software we use; it takes a bit of effort to figure out how to design the blog and add features to it. Most of my fellow bloggers don't worry about that too much; they use very basic features and leave the other problems to me. I'm in charge of making sure that the page looks clean and well organized, but it's not particularly difficult programming; it requires basic knowledge of how to code web pages but not much more than that.

Blogging was designed to be incredibly easy to do. That's its great democratic advantage. You can start your own blog without knowing how to design a web page. In fact, people can write for my blog without knowing anything about computers or computer programming.

**YLR:** How about the evolution of the blog? Where is it going?

**Balkin:** Well for one thing there will probably be more video. We've seen the beginnings of this with YouTube. You can now put videos from YouTube on your blogs, and eventually more and more people will create their own videos and put them on their blogs. Podcasting—which essentially involves blogging using audio files—has already existed for some time. The future of the blog is multimedia. Text won't go away—it will just be supplemented.

In the legal academy, you will get an increasing integration between blogs and legal scholarship, between blogs and what you read in law reviews. As I mentioned, law reviews are already experimenting with blogs as adjuncts to their online presence. There will be more connections between blogs and SSRN and other online publications. More and more legal scholarship will occur in blog formats, or link to blogs, or cite to blogs, and the distinctions between blogging and other forms of legal scholarship will begin to blur, even if some important differences remain. As this happens, you'll see the public persona of law professors migrate to their blogs.

All this will take time. As I mentioned before, most law professors still don't view blogging or online publication as particularly important to what they do; indeed, they may see it as a distraction. New media will take hold more quickly among younger professors, and among students, in places where people are trying to gain audiences and give voice to their ideas. Eventually the importance of online media will become clear and the practice will migrate throughout the legal academy. In the long run, I expect, blogging will be viewed not as a new form of scholarship so much as a sort of hybrid of scholarship, teaching, and service. That's the way I tend to think of it: I'm doing a public service—reaching new audiences both inside and outside law schools, talking about legal ideas and conveying them to a mass audience. Over time, online media will change our notion of what a law professor is, what the law professor's vocation is and who his or her audience is.

But don't expect all this to happen overnight. The culture of legal institutions changes slowly. Most people who currently serve as gatekeepers for status, jobs, and opportunities in American law schools got where they are the old-fashioned way. They are not likely to embrace new-fangled media or methods unless it becomes clear to them that they provide real advantages. It may take a generation for law professors to figure out how online media transform what we do for a living. 🌀