

books in print

Jack Balkin's Dual Examination of the Constitution

Jack Balkin

Living Originalism
and

*Constitutional Redemption:
Political Faith in an Unjust World*

Harvard University Press, 2011

Jack Balkin, Knight Professor of Constitutional Law and the First Amendment, published two books this year, one on constitutional interpretation and one on the Constitution's role in American politics and life.

In *Living Originalism*, which came out in November 2011, Balkin argues that the best versions of originalism and living constitutionalism are compatible rather than opposed. He offers a constitutional theory that demonstrates why modern conceptions of civil rights and civil liberties, and the modern state's protection of national security, health, safety, and the environment, are fully consistent with the Constitution's original meaning. And he shows how both liberals and conservatives, working through political parties and social movements, play important roles in the ongoing project of constitutional construction.

By making firm rules but also deliberately incorporating flexible standards and abstract principles, the Constitution's authors constructed a framework for politics on which later generations could build. Americans have taken up this task, producing institutions and doctrines

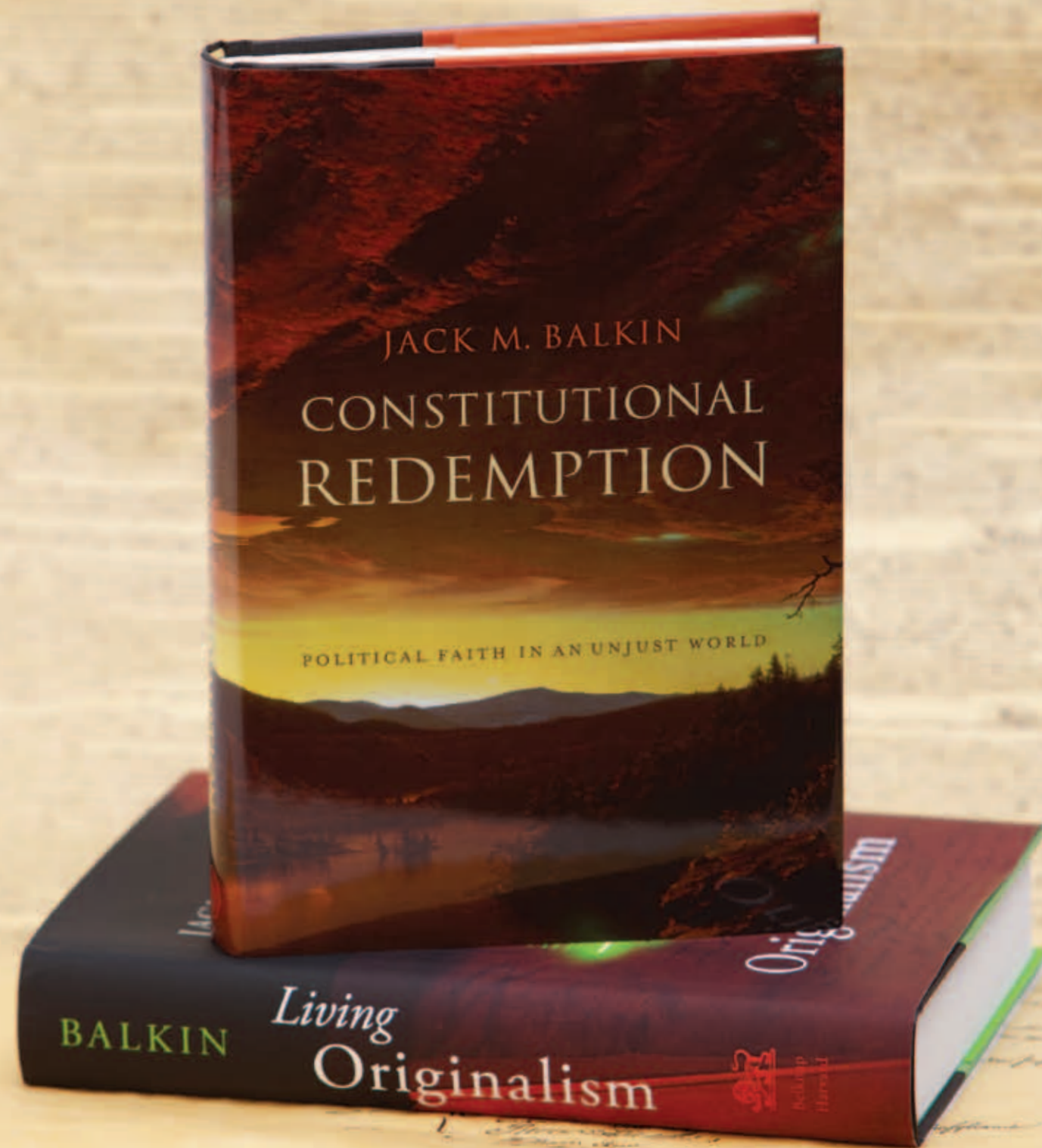
that flesh out the Constitution's text and principles. Balkin's analysis offers a deepened understanding of the Constitution that is at once originalist and living constitutionalist, and a vision that allows all Americans to reclaim the Constitution as their own.

In *Constitutional Redemption: Political Faith in an Unjust World*, released in May 2011, Balkin argues that the Constitution's legitimacy depends on Americans' enduring belief that, despite its current failings, the constitutional system can be made "a more perfect union."

The American constitutional project, Balkin argues, is based in faith, hope, and a narrative of shared redemption. Because Americans have believed in a story of constitutional redemption, we have assumed the right to decide for ourselves what the Constitution means and have worked to persuade others to set it on the right path. As a result, constitutional principles have often shifted dramatically over time.

For people who think that the American political system is perfectly fine just as it is, constitutional faith is not necessary. But when, as often happens, we find that we are constitutional dissenters or that the political system seems broken, belief in the legitimacy of the Constitution requires a leap of faith—a gamble on the ultimate vindication of a political project that has already survived many follies and near-catastrophes, and whose destiny is still over the horizon.

Photograph by Harold Shapiro



Here's just a sampling of the many other books recently written or edited by our alumni, faculty, staff, and students.

We welcome your submissions. If possible, please send us two review copies of your book: one for the Lillian Goldman Law Library and one for the Alumni Reading Room.

ACADEMICS

James G. Dwyer

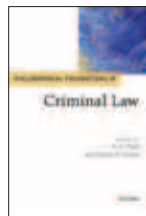
**Moral Status and Human Life:
The Case for Children's Superiority**
Cambridge University Press, 2011

What is moral status, and how is it determined? Are adults superior to children in this category? Dwyer '87 tackles these issues and more. Unique in its inclusion of moral psychology, the author offers a general theory that may help resolve debates over many

moral issues, including abortion, animal rights, and environmental protection. Dwyer asserts that children are in fact morally superior and suggests how government policy, law, and social life might be different if it reflected this assumption.

Stuart P. Green, R.A. Duff
Philosophical Foundation
of Criminal Law

Oxford University Press, 2011



In their newest book, Green '88 and Duff identify the key issues and questions underlying the philosophy of criminal law. The authors tackle the many challenges in the field, including over-imprisonment and the

principles of criminal responsibility. With contributions from leading figures in criminal law theory, the book is ideal for scholars and advanced students of criminal law. The authors simultaneously analyze and critique leading legal and philosophical theories in the field while setting an agenda for future research in the field.

Robert C. Post

**Democracy, Expertise, and Academic Freedom:
A First Amendment Jurisprudence
for the Modern State**
Yale University Press, 2011

THE PREVAILING THEORIES of freedom of speech are incomplete, argues Robert C. Post '77, Dean and Sol & Lillian Goldman Professor of Law, in his latest book. The familiar understanding of the First Amendment, which stresses the "marketplace of ideas" and holds that "everyone is entitled to an opinion," is inadequate to create and preserve the expert knowledge necessary for a modern democracy to thrive. For a contemporary society reliably to answer such questions as whether nicotine causes cancer, the free and open exchange of ideas must be complemented by standards of scientific competence and practice that are both hierarchical and disciplined, he writes.

Post develops a theory of First Amendment rights that tries to balance the need for the free formation of public opinion with the need for the creation and dissemination of expertise. Along the way he offers a new account of the constitutional doctrine of academic freedom that solves many of the puzzles that now afflict judicial decision-making in this area.

Lior Jacob Strahilevitz

Information and Exclusion
Yale University Press, 2011



Nearly all communities are exclusive in some way, and this is tolerated or criticized depending on the basis of the exclusivity. Exclusivity based on race or class is much more controversial than state or language. In his

newest book, Strahilevitz '99 describes how lawmakers commonly misunderstand the workings of exclusion, thereby leaving enormous loopholes in the law. Using colorful examples and anecdotes, Strahilevitz introduces a theory for understanding how exclusivity is created and maintained in residential, workplace, and social settings.

**Mateo Taussig-Rubbo, Winnifred
Fallers Sullivan, Robert A. Yelle**

After Secular Law
Stanford Law Books, 2011



The separation of the state from religion has been conceived as not only central to the emergence of the modern era and social order, but also necessary for its preservation for the achievement of justice, the authors write. Taussig-Rubbo '01, Sullivan and Yelle call into question this simplistic narrative of the separation of law and religion, exploring the challenges posed by lingering religious formations and other aspects of globalization. With contributions from leading scholars in law and religion, this book provides a compelling look into the effect of secularism on our laws.

**Sandra G. Thompson, Hillary K.
Valderrama, Jennifer L. Hoggood**

**American Justice in the Age of
Innocence: Understanding the
Causes of Wrongful Conviction and
How to Prevent Them**
iUniverse, 2011



With hundreds of criminal convictions overturned in light of DNA technology, Thompson '88, Valderrama and Hudson tackle the puzzle of true justice in a flawed criminal justice

system. The authors say that in the face of the disturbing realization that the system has failed so many, the focus has shifted from punishing the guilty to protecting the innocent. A fascinating and oftentimes startling discussion of the causes of unreliable evidence and wrongful convictions is followed by the authors' solutions to the many challenges posed to litigators, policy makers, and most importantly, innocent criminal suspects.

CURRENT AFFAIRS

Steven Brill

**Class Warfare: Inside the Fight to
Fix America's Schools**
Simon & Schuster, 2011



Has the American public education system collapsed to a point where it is an obstacle to the American dream? Exploring if, how and why we are failing our nation's children, award-winning journalist Brill '75 takes readers on a national treasure hunt for the answers. Brill's narrative

includes conversations with all people affected by our schools' performance, from single mothers to struggling teachers, from lawyers to President Obama himself. Brill concludes with an innovative, albeit surprising, solution.

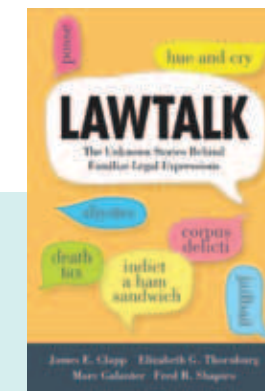
**Fred Cohen with James L. Knoll IV,
Terry A. Kupers and
Jeffery L. Metzner**

**Practical Guide to Correctional
Mental Health and the Law**
Civic Research Institute, 2011



This book by Cohen '61 LL.M. is meant to provide hands-on guidance to correctional professionals and health care professionals who serve correctional populations, attorneys and policymakers, and students. This is a condensed and updated version of Cohen's

The Mentally Disordered Inmate and the Law.



**James E. Clapp, Elizabeth G. Thornburg,
Marc Galanter and Fred R. Shapiro**

**Lawtalk: The Unknown Stories
Behind Familiar Legal Expressions**
Yale University Press, 2011

FRED SHAPIRO, Associate Librarian for Collections and Access Services and Lecturer in Legal Research, is among the authors of this examination of law-related words and phrases in everyday language. Terms like boilerplate, jail-bait, pound of flesh, rainmaker and the third degree are often used without the speaker being aware of their origins or legal significance. Even that most American of terms, posse, takes its origins from English law and the seventeenth-century Latin phrase *posse comitatus*, or "power of the county." *Lawtalk* reveals the stories behind familiar legal expressions that come from sources as diverse as Shakespeare, vaudeville, and Dr. Seuss. A scholarly book written in an entertaining and highly readable style and augmented by historical images and humorous sidebars, *Lawtalk* explores—and explodes—popular linguistic myths and misunderstandings. The result is a book that will appeal to readers with an interest in all things linguistic, legal, historical, and cultural. This is the fourth book in the Yale Law Library Series in Legal History and Reference.

Mary Dudziak

**War Time: An Idea, its History,
its Consequences**
Oxford University Press, 2012



Dudziak '84 asks why we think of war as temporary when it goes on and on, and why we allow our civil liberties to continue to be sacrificed. The inattention of the American people, more disconnected than

ever from the wars being fought, leaves America without political restraints on the exercise of American war powers, she argues. Here Dudziak analyzes "wartime" as an actual form of time and examines how the confusion about war and time helps enable our politics of war.

Menachem Mautner

Law and the Culture of Israel
Oxford University Press, 2011



Since the late 1970s the Jewish community, divided into secular and religious factions, has been struggling over the stewardship of Israeli culture, writes Mautner '80 LL.M., '83 JSD. Mautner tackles Israeli law, culture, and

society at large while offering a convincing argument that the Israeli Supreme Court has been a central player in the struggle between these two groups and fresh insight as to how to close this divide.

Robert Pozen

**The Fund Industry:
How Your Money Is Managed**
Wiley Finance, 2011



In this book Pozen '72 JD, '73 JSD offers an inside look at how mutual funds work — how they invest money, distribute their shares to the public, and provide service to fund shareholders — and why they have become the invest-

ment vehicle of choice for investors around the world. The book covers: how mutual funds operate, how to evaluate funds, how fund managers pick stocks and bonds, how mutual funds are sold, and the opportunities and challenges of investing and gathering assets internationally.



Owen Fiss
The Dictates of Justice:
 Essays on Law and Human Rights
Republic of Letters Publishing, 2011

IN 1985, STERLING PROFESSOR Emeritus of Law Owen Fiss was called to Argentina to advise its president, Raúl Alfonsín, and his administration on the trials that the country was then conducting to hold its military accountable for human rights abuses. In this book, the perspective that Fiss extracted from his experience in Argentina is brought to bear on some of the most vexing human rights issues in the modern world. A commitment to the processes of national self-determination so central to the Argentine human rights trials leads Fiss to cast a critical eye on the turn to international tribunals that tends to supplant national efforts to adjudicate human rights claims. He also takes on the human rights issues posed by the fight against terrorism in the post-9/11 era and once again tries to frame those issues within the terms of national law. He describes how Presidents Bush and Obama put in jeopardy, and sometimes transgressed, principles that had long been part of the American Constitution tradition and that had allowed the United States to speak proudly and boldly about human rights. At times critical, at other times celebratory, this book offers a vision of what a law faithful to the ideals of human rights could be.

Andrew S. Rosen
Change.edu: Rebooting for
the New Talent Economy
Kaplan Publishing, 2011



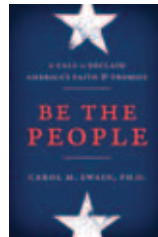
Imagine a university where programs are tailored to the needs of each student, the best professors are available to everyone, curriculum is relevant to the workplace and the value of education is demonstrable. That future is possible, but in danger from a system of incentives emphasizing prestige and tradition ahead of access and outcomes, writes Rosen '85, CEO of education company Kaplan Inc. In this book he challenges the status quo and strives to re-frame the conversation about education in America.

Barry A. Sanders
American Avatar: The United States
in the Global Imagination
Potomac Books, 2011



"America," as imagined around the world, is an imperfect reflection of reality and of people's hopes, dreams and fears, Sanders '66, writes. Debunking the belief that views of America have become largely negative and impervious to change in a post-9/11 world, Sanders provides textual analysis of the roots of people's views of this country. Asserting that a person's view of America is composed of their memory bank of images, along with a bias that influences the effects of these images, Sanders offers a solution to the problem of enhancing America's image strategically.

Carol M. Swain
Be the People: A Call to Reclaim
America's Faith and Promise
Thomas Nelson, 2011



For the most part, "we the people" have met the recent radical shifts in our nation with a collective shrug, Swain '00 MSL writes. With Americans everywhere questioning our nation's status and direction, the author makes a plea that we return to our original purpose and values. Tackling issues such as immigration, national security, race and religion, Swain offers her take and potential solutions for these contentious issues.

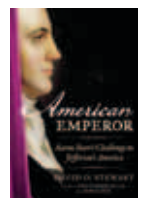
HISTORICAL

Lois S. Montbertrand
Unit Serial Numbers from the "First U.S.
Army Build-Up Priority Tables, List A, D+1
through D+14" D-Day (Normandy)
Lulu.com, 2011



Detailing information concerning the top secret codes assigned to more than 2,000 of the World War II US Army troop units chosen to participate in the D-Day operations, Montbertrand '85 offers a fresh take on one of the most notorious military operations in US history. Reconstructing the months prior to the invasion, Montbertrand brings light to the covert methods used by the military to invade Nazi-occupied Europe and bring World War II to a close.

David O. Stewart
American Emperor: Aaron Burr's
Challenge to Jefferson's America
Simon and Schuster, 2011



At the dawn of a new century, Aaron Burr was on every short list of men who could become president of the United States, says Stewart '78. In this compelling exploration of the trials and triumphs of one of the most notorious political figures in the early American republic, Stewart uses detailed historical evidence and captivating storytelling to portray the life of a man who, although



Linda Greenhouse
The U.S. Supreme Court: A Very Short Introduction
Oxford University Press, 2012

GREENHOUSE '78 MSL transforms her thirty years covering the Supreme Court for *The New York Times* into a primer on the Court and how it works. At less than 125 pages, the book lives up to its promise of a "short" introduction, but still examines the origins of the highest court, the Court at work, the justices, the chief justice, the other branches, the Court and the public, and the Court and the world. Greenhouse, Senior Research Scholar in Law, Knight Distinguished Journalist-in-Residence, and Joseph Goldstein Lecturer in Law, cites examples such as *Brown v. Board of Education*, the Americans with Disabilities Act, the Violence Against Women Act, and *Bush v. Gore*.

never President, helped shape our nation's government through political office, international engagement, and even murder.

Theodore M. Vestal
The Lion of Judah in the New World:
Emperor Haile Selassie of Ethiopia and
the Shaping of Americans' Attitudes
toward Africa
ABC-CLIO, 2011



Vestal '58 LAW examines the charismatic Haile Selassie and why this African head of state so captivated Americans. Including a brief biography of the emperor and the history of Ethiopia, the book highlights Selassie's astute use of public relations and personal diplomacy through the Cold War and his ultimate rejection by the U.S. that eventually brought about that country's civil war.

FICTION AND OTHER

Philip Galanes
Social Q's: How to Survive the Quirks,
Quandries and Quagmires of Today
Simon & Schuster, 2011



Galanes '91 has turned his popular *New York Times* "Style" column into a book that answers the most awkward and pressing questions of modern times with wise, witty—and occasionally saucy—solutions. Filled with essays on everything from how and when to de-friend someone on Facebook to what

to say when a friend's beauty experiment goes bad, Galanes offers answers to the shifting etiquette of a modern world. (See page 117.)

William Ian Miller
Losing It
Yale University Press, 2011



In his new book, Miller '80 offers a humorous and insightful perspective to the subject of growing old. The "it" in the title refers to one's mental capacities such as memory, the ability to focus, and processing speed. Drawing on a lifetime of deep study, Miller presents his takes on topics such as wisdom, complaining, and sentiments.

Matthew Pearl
The Technologists
Random House, 2012



In post-Civil War Boston, where tradition was revered and the future proved uncertain, several acts of sabotage lead the city to blame mechanical innovations as the culprit. A group of students from MIT's chartering class must fight to ensure that technology is not abandoned (or abolished) in their city. In his newest novel, Pearl '00 turns out a tale of fighting labor unions, a sensationalistic press, and a dark mastermind bent on destroying the city.

Steven D. Price
The World's Funniest Lawyer Jokes:
A Caseload of Jurisprudential Jest
Skyhorse Publishing, 2011



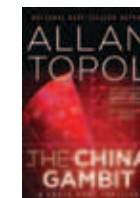
In his new book, Price '65 pokes fun at his own profession with endless anecdotes, one-liners, and forensic funnies. With no stereotype left untouched, Price targets attorneys' fumbles in court ("Did he kill you?"), their horrible reputation ("What do you get someone who is graduating from law school?" "A lobotomy."), and the public's attitude toward them ("How do you stop a lawyer from drowning?" "Shoot him before he hits the water.").

Sonia Taitz
In the King's Arms
McWitty Press, 2011



In this romantic literary novel Taitz '81 constructs the story of Lily Taub, a brilliant and headstrong American daughter of Holocaust survivors. While in Oxford, Lily meets English aristocrat Julian Aiken. His anti-Semitic family, however, considers Lily a destructive force in both Julian's life and their own sense of order. But amid the drama lies a sense of magic and the healing possibility of love.

Allan J. Topol
The China Gambit: A Craig Page Thriller
Vantage Point Books, 2012



Espionage, deceit, greed and revenge combine in the new novel by Allan Topol '65. Topol's book, the first in a trilogy, is a thriller featuring Craig Page, who attempts to thwart a plot by the ruthless Chinese General Zhou to cut off the flow of imported oil to the United States. Zhou's goal is to leapfrog China ahead of the United States in world domination, and Craig must bury his own personal tragedy to save his country, and ultimately, his own life.

ALSO OF NOTE

Johannes Reich'o8 LL.M.
Grundsatz der Wirtschaftsfreiheit
Dike Verlag, 2011