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Why Jack Balkin is Disgusting

Andrew Koppelman*

Yale Law Professor Jack Balkin didn't win friends when he announced that (1) he is now a constitutional originalist and (2) the original meaning of the Fourteenth Amendment protects the right to abortion.¹ His claim to membership in the originalist club brought forth a small army of eager bouncers, who were sure that originalism couldn't possibly defend the paradigmatic departure from the Constitution's original meaning.²

Balkin has indeed posed a radical challenge to the vision of law that drives the originalists - more radical

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¹ Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comm. 291 (2007); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 Const. Comm. 427 (2007).

² See, e.g., Steven D. Smith, *That Old Time Originalism*, June 23, 2008, at 11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1150447 ("Balkin's acceptance of originalism may seem surprising, given his general tendencies and preferred conclusions: it is almost as if Christopher Hitchens were to announce that he has become a born again Christian."). I have had conversations with many colleagues, both originalist and nonoriginalist, who are confident that Balkin has got to be kidding.

than he is willing to admit. His theory is in such deep tension with a commonly held vision of the rule of law that his argument is, to put the point precisely, disgusting. But that doesn't mean that he is wrong.

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Balkin argues that the best version of originalism is based, not upon the way in which the framing generation would have expected the text to be applied, but rather upon the public meaning of the text. The Fourteenth Amendment enacts principles of equal citizenship. Those principles are violated if the state uses women's capacity for pregnancy as a basis for assigning them a second class status or denying them liberty.

Originalism, Balkin argues, is not inconsistent with the idea of a living constitution, because in practice the meaning of constitutional principles shifts over time. Some constitutional terms, such as "equal protection," are intentionally abstract, leaving the specification to be worked out by later generations. Mobilized social movements, invoking their own interpretations of those texts, play a legitimate role in determining which

specification will ultimately prevail.³ The constitutional protection of sex equality, for example, is the consequence of the feminist movement of the 1970s, which changed the mind of the public in a way that eventually was reflected in the interpretation of the Constitution.⁴ The triumph of gun rights in *District of Columbia v. Heller*⁵ is another example.⁶

Some originalists have disputed Balkin's specific argument about abortion, but that disagreement doesn't explain the scandal that Balkin has provoked.⁷ The real issue is the suggestion that originalism is capacious enough to support this result. The idea that social movements shape constitutional law is particularly distressing to originalists, who are committed to the idea that the Constitution's meaning does not shift over time. John McGinnis and Michael Rappaport write, "it is a little difficult to see what is left of a recognizable originalism, not to mention the amendment process, if

³ *Abortion and Original Meaning* at 305, 308-09; *Constitutional Redemption* at 456-57, 491, 493-6, 504-11.

⁴ Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *Nw. U. L. Rev.* 549, 574, 582 (2009).

⁵ 128 S.Ct. 2783 (2008).

⁶ *Framework Originalism* at 584.

⁷ My interest here is that scandal, not Balkin's specific argument, which I won't discuss further except to note that I'm sympathetic to the kind of move he is making. See Andrew Koppelman, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion*, in Alexander Tsesis, ed., *Promises of Liberty: Thirteenth Amendment Abolitionism and Its Contemporary Vitality* (forthcoming 2010); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 *Nw. U. L. Rev.* 480 (1990).

social movements have such substantial discretion to apply constitutional provisions as they see fit.”⁸ Steven Calabresi and Livia Fine claim that Balkin’s originalism “substitutes the rule of engaged social movements for the rule of law.”⁹

These charges draw blood only if there is a feasible alternative to the world contemplated by Balkin – an originalism that purges adjudication of discretion and the vagaries of political change.

Balkin’s argument is both descriptive and normative. The descriptive part is an account of how constitutional interpretation is done in the United States – how constitutional interpreters in this culture make their way from the spectacularly vague commands of “equal protection” and “due process” to determinate legal outcomes. The normative part pronounces this process good. Like so many liberal legal theorists in the age of the Rehnquist and Roberts Courts, Balkin is a stodgy defender of the status quo.

Putting it this way, however, understates the radicalism of his conservatism. His earlier writings imply that it is simply impossible for constitutional law to have

⁸ John McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 Const. Comm. 371, 381 (2007).

⁹ Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 Nw. U. L. Rev. 663, 687 (2009).

the fixity and determinacy that his critics long for.
Constitutional interpreters are condemned to be free.¹⁰

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The giddy vertigo implicit in Balkin's theory is made clearer in his earlier book, *Cultural Software*¹¹ - a book he has not so much as mentioned for several years now, for reasons we will consider shortly. *Cultural Software* ambitiously seeks to synthesize evolutionary biology, hermeneutics, semiotics, anthropology, psychology, linguistics, sociology, and many other disciplines into a unified theory of ideology.

Following the evolutionary biologist Richard Dawkins, Balkin argues that the basic units of thought are "memes," contagious ideas, traditions, styles, and behaviors that manage to get themselves transmitted from one mind to another. Handshakes, melodies, clichés, styles of dress are all memes; they "encompass all forms of cultural know-how that can be passed to others through . . . imitation

¹⁰ The phrase "condemned to be free" is Sartre's. See Jean-Paul Sartre, *Being and Nothingness* 152 (1943; Routledge 2003). Balkin's affinity with existentialism is made clear in J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *Cardozo L. Rev.* 1613, 1629-30 (1990).

¹¹ J.M. Balkin, *Cultural Software: A Theory of Ideology* (1998).

and communication."¹² These are combined, in a necessarily ad hoc and untidy way, into the "abilities, associations, heuristics, metaphors, narratives, and capacities that we employ in understanding and evaluating the world."¹³

How is it that given memes manage to replicate themselves over time? Balkin suggests that there is no single answer to this question. The difference between a meme and a gene is that biologists have converged on a single account of what a gene is and how it replicates itself. Memes, on the other hand, replicate themselves in a bewildering variety of ways. The tune "Three Blind Mice" manages to perpetuate itself from one generation to the next; so does the practice of brushing teeth; but the mechanisms are different.

Sometimes these heterogeneous mechanisms are mutually reinforcing. The persistence of racism is an example. Racism can be produced by "dissonance reduction among subordinate groups, by conceptual imperialism among dominant groups, by faulty inferences from prototypes and salient examples, by conceptual homologies that oppose blackness and whiteness, by suppression and projection of superior and inferior associations, by social scripts featuring stock characters and expectations about ethnic

¹² Id. at 43.

¹³ Id. at 6.

groups, and by recurrent cultural narratives about the American 'savage war.'"¹⁴ These different cognitive tools are mutually reinforcing. "Ideological mechanisms are the result of bricolage and circumstance; their heterogeneity and disorder are the best evidence of their historical emergence."¹⁵ Their effects can only be countered by criticism that uses other cognitive tools of the same kind, contingent mechanisms that have been thrown into our hands by historical circumstance.

Balkin wants to evaluate ideological effects by their justice or injustice. Justice, he thinks, is a transcendent ideal, "an inchoate yearning that we attempt to articulate through our cultural constructions."¹⁶ It "can never be perfectly realized,"¹⁷ but it has an irresistible power just the same. It is puzzling how this transcendent aspiration can have the anchoring effect Balkin contemplates amid the world of flux that he describes.¹⁸ It appears to be necessary to take it as an object of practical faith that it does. "[T]ranscendent ideals are presupposed by the rhetorical situation of

¹⁴ Id. at 258.

¹⁵ Id.

¹⁶ Id. at 162.

¹⁷ Id. at 144.

¹⁸ He writes elsewhere that the sense of justice "is an inchoate, indeterminate and indefinite drive that acts as a goad rather than as a guide." J.M. Balkin, *Being Just With Deconstruction*, 3 Soc. & Leg. Stud. 393, 402 (1994).

having to persuade an audience. They seem to spring forth magically from the rhetorical encounter."¹⁹

But a judgment of justice or injustice does not help us understand the mechanisms by which ideological effects operate. Unlike earlier theorists such as Marx, Balkin assigns no distinct etiology to pernicious ideologies. Just and unjust forms of cultural knowledge perpetuate themselves through the same strategies.

Balkin's understanding of collective deliberation, David Charny observes, is

a sort of war of all against all, a return to the state of nature, except that the warriors are not so much individuals as the memes that define individuals and that use them as vectors of propagation. The public space is not a collection of rational selves, but a swarm of viral particles of information.²⁰

The outcome of rhetorical contestation will necessarily be chaotic and unpredictable. A fortiori, this

¹⁹ *Cultural Software* at 149.

²⁰ David Charny, *Farewell to an Idea? Ideology in Legal Theory*, 97 Mich. L. Rev. 1596, 1614 (1999)(review of *Cultural Software*). Charny continues: "What rescues this from utter bleakness is the (individually limited though collectively determinative) power of each self to influence memetic propagation, and the celebratory sense in which this diversity spawns ideals and aspirations that might elude a more tightly controlled communal discourse." Id. This celebration of the proliferation of diverse cultural forms is also a central theme in Balkin's approach to questions of free speech. See, e.g., J.M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NYU L. Rev. 1 (2004).

is true of constitutional contestation. What constrains constitutional law is not a set of rules, but a set of rhetorical norms, themselves unstable and shifting over time, that determine which moves are legitimate. Richard Posner has observed that "thinking like a lawyer" really means "an awareness of approximately how plastic law is at the frontiers - neither infinitely plastic . . . nor rigid and predetermined, as many laypersons think."²¹ Balkin agrees, and emphasizes the way in which the boundaries shift as culture does, so that an argument regarded as crackpot and "off the wall" at one time becomes accepted doctrine later on.²²

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Balkin wrote in 1997, the year before *Cultural Software* appeared, that "[o]ur theories of the Constitution are makeshift attempts, reflecting the concerns of our era,

²¹ Richard Posner, *The Problems of Jurisprudence* 100 (1993).

²² *Abortion and Original Meaning* at 309; *Constitutional Redemption* at 514; *Framework Originalism* at 577, 584, 588, 605. The bald fact of endorsement by powerful political actors can shift the boundaries of the crackpot, as when constitutional interpretations which "would have been regarded by most lawyers and judges as off the wall" became respectable when the Supreme Court endorsed them in *Bush v. Gore*, 531 U.S. 98 (2001). Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 *Tulsa L. Rev.* 553, 567-68 (2003). Any suspicion that Balkin himself regards legal argument as infinitely plastic is dispelled by his appalled reaction to that decision. See Jack M. Balkin, *Bush v. Gore and the Boundary between Law and Politics*, 110 *Yale L. J.* 1407 (2001).

but dressed up as timeless claims about interpretation."²³ The Constitution never really measures up to our transcendent ideal of justice. The turn to ideal constitutionalism, which identifies the Constitution with that transcendent ideal, is a way of coping with the cognitive dissonance this produces.²⁴ But even our aspirations are historically conditioned. We can't step out of our own skin. We can imagine redemption, but we are fated to live in a fallen world.²⁵

Balkin doesn't talk like this any more. He's now in the dressing-up business himself. This is clearest in his discussion of the question of the weight of precedent.

[S]ocial movements sometimes succeed because they correctly see that the world has changed and that we must implement constitutional principles differently than we did before. When constitutional doctrine responds to their arguments, we should value these new decisions not because they are precedents, and not

²³ J.M. Balkin, *Agreements With Hell and Other Objects of Our Faith*, 63 *Fordham L. Rev.* 1703, 1719 (1997).

²⁴ *Id.* at 1731. He is evidently influenced here by his former Texas colleague Philip Bobbitt, who likewise denies that there is any algorithm for constitutional interpretation, but defends the consequent indeterminacy on the basis that it "gives us a way to measure a possible legal world against our sense of rightness, going back and forth between a proposed interpretation and its world, and ourselves." *Constitutional Interpretation* 158 (1991). Balkin frequently refers to Bobbitt's modalities of constitutional law, which entail indeterminacy. See, e.g., *Constitutional Redemption* at 483, 484, 485, 511.

²⁵ The implicit theology here is more Jewish than Christian: not only is the Messiah's arrival endlessly deferred, he has never been here.

because social movements supported them, but because these decisions better implement constitutional text and principle in changing times.²⁶

Precedents are to be judged against the text, but the text is a placeholder for our aspirations, which transcend any text. This is what "better" means in the sentence just quoted. Because our background assumptions and aspirations shift over time, the Constitution can no more have a stable meaning than anything else in the fluid world of cultural software. Balkin rejects "the idolatry of mathematical precision in legal reasoning."²⁷ The boundary that separates the plausible from the implausible

is the boundary that distinguishes the Rule of Law from the arbitrary exercise of power. But if that boundary is not fixed, but moveable, and if that boundary can be moved through politics, or through the assertions of powerful people who seek to maintain their power, the certainty of our faith in law might well be shaken.²⁸

²⁶ *Constitutional Redemption* at 478. Smith observes that Balkin uses a bewildering variety of verbs to describe the relation between text and principle: "underlie," "points to," "embodies," "presumes," "adopt[s]," "enacts," "endorses," "employs," is "connected to," "attempt[s] to embrace." Smith, *That Old Time Originalism*, at 11-12.

²⁷ Balkin, *Idolatry and Faith*, at 562.

²⁸ *Id.* at 568.

So in his recent constitutional writings, Balkin is gentle about delivering this bad news. I suspect that this is why, contrary to his own wry professional advice to legal academics to cite yourself whenever possible, he has hardly ever cited *Cultural Software* in his constitutional work, and a few years ago stopped doing so altogether.²⁹

This hasn't kept his critics from feeling that Balkin has taken something precious from them. Orin Kerr declares that Balkin "attempts to eliminate the rhetorical power of originalist arguments by making essentially everything an originalist argument."³⁰ Ed Whelan, noting the "near-infinite malleability" of Balkin's theory, argues that "a theory that can explain anything really explains nothing."³¹ Matthew Franck writes that Balkin has "succeeded only in destroying everything about the edifice of originalism except the sign that hung on the building, which he picked up from the rubble and slapped on the construct hitherto

²⁹ J.M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 Chi.-Kent L. Rev. 843, 856-59 (1996). A Westlaw search of "au(balkin) & "cultural software"" yielded four articles citing the book, the most recent from 2005. When asked about this reticence, Prof. Balkin responded: "There are many connections between Early Balkin and Later Balkin, but they are esoteric and none of them are particularly useful to readers." Personal communication, June 25, 2009. Pay no attention to that man behind the curtain.

³⁰ Orin Kerr, *Jack Balkin, Soul-killer*, <http://prawfsblawg.blogs.com/prawfsblawg/2008/08/jack-balkin-sou.html> (visited June 26, 2009).

³¹ Ed Whelan, *Reply to Balkin on Abortion and Original Meaning--Part 1*, available at <http://bench.nationalreview.com/post/?q=ZDJlYjMlMDYyYmM0MzMlOTE0NjhmZTBmMmFhYTRhMjI=> (visited June 26, 2009).

known as the 'living Constitution.'"³² Conversations with other constitutional scholars have shown me that these comments are only the tip of the iceberg. The sheer outrage that Balkin has provoked demands explanation.

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The resistance to Balkin's indeterminacy claim - a resistance he understands, which is why he's so coy about the depth of the indeterminacy - operates in much the same way as the cognitive content of the emotion of disgust. Research in psychology, Martha Nussbaum reports, finds that disgust "has a complex cognitive content, which focuses on the idea of incorporation of a contaminant."³³ People will not eat food that has even briefly touched an unacceptable object, even if that object is harmless, such as a sterilized cockroach. "The ideational content of disgust is that the self will become base or contaminated by ingestion of the substance that is viewed as offensive."³⁴ The objects of disgust tend to focus on animals and animal

³² Matthew Franck, *Jumping to Conclusions*, National Review Online, Aug. 18, 2007, available at <http://bench.nationalreview.com/post/?q=YmJiMzc3OTc3YjZlMGY4YzJjOTRiODc0NTk2ZTdhdhNWY=> (visited June 26, 2009).

³³ Martha C. Nussbaum, *Hiding From Humanity: Disgust, Shame, and the Law* 87 (2004). See also Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* 200-06, 220-22, 346-50 (2001).

³⁴ Nussbaum, *Hiding From Humanity* at 88.

waste products. “[T]he motivating idea has to do with our interest in policing the boundary between ourselves and nonhuman animals, or our own animality.”³⁵

The core objects of disgust are those that remind us of our animal vulnerability and mortality. This emotion appears to be an inevitable part of civilization, but, Nussbaum observes, it has a dangerous tendency to be associated with group subordination. “[T]hroughout history, certain disgust properties - sliminess, bad smell, stickiness, decay, foulness - have repeatedly and monotonously been associated with, indeed projected onto, groups by reference to whom privileged groups seek to define their superior human status. Jews, women, homosexuals, untouchables, lower-class people - all these are imagined as tainted by the dirt of the body.”³⁶ Such projected disgust is contrasted with an ideal of the pure, hard, uncontaminated, impenetrable, invulnerable self - a dangerous delusion, precisely because it tends to produce such projections.³⁷

³⁵ Id. at 89.

³⁶ Id. at 108.

³⁷ Id. at 107-115. It would be delusional even if it did not produce these ideological effects, insofar as it rests on denial of one's own mortality. See Cathy R. Cox, Jamie L. Goldenberg, Tom Pyszczynski & David Weise, *Disgust, Creatureliness and the Accessibility of Death-Related Thoughts*, 37 Eur. J. Soc. Psychol. 494 (2007). As it happens, disgust sensitivity is associated with conservative political attitudes. Yoel Inbar, David A. Pizarro, & Paul Bloom, *Conservatives Are More Easily Disgusted Than Liberals*, 23 Cognition & Emotion 714

The hard impenetrable constitutional theory, one that is self-sufficient and not vulnerable to penetration by discretion and contingency, is a similar self-protective delusion.³⁸ The continuing appeal of originalism has become increasingly puzzling as it has become clear that it is as contingent and contestable as any of its rivals.³⁹ The disgust that Balkin elicits offers an answer to the puzzle.

Steven D. Smith, who understands the role of faith in constitutional theory better than most, laments that after Balkin, "originalism is no longer available as a distinct approach to further (or at least attempt to further) the worthy purposes . . . for which it was devised - namely, constraining courts in history-grounded ways, and preserving the ability of democratic institutions to enact constitutional provisions with relatively definite and fixed meanings. That seems a regrettable loss (even for those who doubt originalism's ability ultimately to provide

(2009); Yoel Inbar, David A. Pizarro, Joshua Knobe, & Paul Bloom, *Disgust Sensitivity Predicts Intuitive Disapproval of Gays*, 9 *Emotion* 435 (2009).

³⁸ Bobbitt observes that in Robert Bork's shift from libertarianism to originalism, what persists is the "yearning to escape from mere politics to a decisive world of rules." *Constitutional Interpretation* at 102.

³⁹ On the varieties of originalism, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090282. On the other hand, originalism is not infinitely plastic. It cannot support an argument that misrepresents its sources or conceals pertinent evidence. See Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 *Nw. U. L. Rev.* 727 (2009).

what it promises)."⁴⁰ Smith is nostalgic for that lost paradise, even though he knows that it never really existed. He flirts with (but cannot bring himself to surrender to) the bad faith of fundamentalism, which rejects modernity even though it is itself a product and reflection of modernity.⁴¹

Balkin's invocation of originalism simultaneously invokes and undermines that fixity and stability. "The tropes of fidelity to text and principle, and of their restoration and redemption in history are not simply fables we tell ourselves," he writes. "These tropes allow us to see the Constitution as a transgenerational project that connects different generations and identifies them as a single people stretched out over time."⁴² This is like saying that God is not simply a fable because the idea of God allows the church to see itself as a single community. It doesn't answer the question. The community would very much like to know whether the object of its faith is real. Eric Posner is right that Balkin is "trying to figure out what the PR angle of originalism is and how to duplicate

⁴⁰ Smith, *That Old Time Originalism*, at 11.

⁴¹ On the bad faith of fundamentalism, see Peter L. Berger, *The Heretical Imperative: Contemporary Possibilities of Religious Affirmation* 61-86 (1979).

⁴² *Constitutional Redemption* at 522.

it."⁴³ The problem is like the quandary of atheists who want to invoke religious language because it symbolically expresses human aspirations, even though whatever power the language has depends on the sense that God is a reality and not merely a metaphor.⁴⁴

Balkin isn't merely faking it, because he thinks that the transcendent ideal of justice can endure any amount of deconstruction. "[E]ven the faithful, even the person who believes in God fervently and devotedly, knows that the works of religion, the products of religion, the practices and conventions of religion, are made by mortal human beings, by communities of belief that extend and evolve over time, sometimes over many centuries."⁴⁵ In the same way, even the person who firmly believes in the rule of law knows that it is made by fallible mortals. "So even the most devoted face the dangers inherent in faith, and they face them not because they are agnostic but precisely because they have given their lives over to faith."⁴⁶ The

⁴³ Quoted in Ari Shapiro, *Conservatives Have 'Originalism'; Liberals Have ... ?*, NPR All Things Considered, June 23, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=105439966&ps=cprs> (visited June 26, 2009).

⁴⁴ Simon Blackburn, *Religion and Respect*, in *Philosophers Without Gods: Meditations on Atheism and the Secular Life* 179 (Louise M. Antony ed. 2007).

⁴⁵ Balkin, *Idolatry and Faith*, at 558.

⁴⁶ Id. Further evidence that doubt is not equivalent to faking it is provided by Pope Benedict XVI:

[B]oth the believer and the unbeliever share, each in his own way, doubt *and* belief, if they do not hide from themselves and

framers displayed their faith by codifying abstract ideals such as equal protection. When we today offer our best understanding of those ideals, we manifest the same faith. That is a kind of originalism. But it's not the kind that conservative originalists were hoping for.

Balkin thinks that faith is possible without endorsing implausible factual claims about the world. But human beings evidently vary in the degree to which they need to believe such claims in order to sustain their faith.⁴⁷ The preacher may be vividly aware of the facts that make faith difficult, but that doesn't obligate him to talk about them in every sermon.

We live in a world in which the Constitution isn't really a higher standard outside ourselves. It is a human construct, legitimated, if at all, by things unseen. We are, perhaps, all that the Constitution is constituted out

from the truth of their being. Neither can quite escape either doubt or belief; for the one, faith is present *against* doubt; for the other, *through* doubt and in the *form* of doubt. It is the basic pattern of man's destiny only to be allowed to find the finality of his existence in this unceasing rivalry between doubt and belief, temptation and certainty. Perhaps in precisely this way doubt, which saves both sides from being shut up in their own worlds, could become an avenue of communication. It prevents both from enjoying complete self-satisfaction; it opens up the believer to the doubter and the doubter to the believer; for one, it is his share in the fate of the unbeliever; for the other, the form in which belief remains nevertheless a challenge to him. Joseph Cardinal Ratzinger, *Introduction to Christianity* 40-1 (rev. ed. 2004).

⁴⁷ See Andrew Koppelman, *Naked Strong Evaluation*, 56 *DISSENT* 105 (Winter 2009) (book review of CHARLES TAYLOR, *A SECULAR AGE* (2007)).

of. Its innards are as slimy as ours. How disgusting is that?