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## BOOK REVIEW

### THE UNDEAD CONSTITUTION

LIVING ORIGINALISM. By Jack M. Balkin. Cambridge, Mass.: The Belknap Press of Harvard University Press. 2011. Pp. vi, 474. \$35.00.

THE LIVING CONSTITUTION. By David A. Strauss. New York, N.Y.: Oxford University Press. 2010. Pp. xviii, 150. \$21.95.

*Reviewed by Michael C. Dorf\**

#### INTRODUCTION

In what might be regarded as his standard “stump” speech, Justice Scalia has repeatedly championed what he calls the “dead Constitution.”<sup>1</sup> The bon mot was and remains a good laugh line, but it has become increasingly inappropriate over the course of the quarter century during which Justice Scalia has been delivering it. When he was appointed to the Supreme Court in 1986, dead constitutionalism, that is to say, originalism, was still a mostly insurgent position within constitutional theory. Since then, and in no small part thanks to Justice Scalia’s own influence, originalism has become a leading approach to constitutional interpretation.<sup>2</sup>

Meanwhile, originalism’s supposed archenemy, the living Constitution, has never been much more than a placeholder. As Professor David Strauss observes, “the critics of the idea of a living constitution,” that is to say, originalists, “have pressed their arguments so forcefully that, among people who write about constitutional law, the term ‘living constitution’ is hardly ever used, except derisively.”<sup>3</sup>

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<sup>1</sup> *E.g.*, *Scalia Vigorously Defends a “Dead” Constitution*, NPR (Apr. 28, 2008), <http://www.npr.org/templates/story/story.php?storyId=90011526>; *see also* Reva B. Siegel, *Heller and Originalism’s Dead Hand — In Theory and Practice*, 56 *UCLA L. REV.* 1399, 1408 (2009) (noting that in “many speeches” Justice Scalia has called for a “dead constitution” (internal quotation marks omitted)).

<sup>2</sup> *See* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 91 (2004). I use the term “interpretation” here in a loose sense. Some originalists (and others) distinguish between constitutional “interpretation” and constitutional “construction.” *E.g.*, JACK M. BALKIN, *LIVING ORIGINALISM* 103–05, 341–42 n.2 (2011); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 5–9 (1999). Unless otherwise noted, I shall use the term “interpretation” in the more colloquial sense — that is, to cover both the narrow sense in which Balkin and Whittington define interpretation and what they call constitutional construction.

<sup>3</sup> DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 2 (2010).

Enter Strauss and another distinguished constitutional scholar, Professor Jack Balkin, to revive and redeem the living Constitution — to convert it from a term of derision into a proud banner, much in the way that the LGBTQ rights movement successfully appropriated the term “queer” from the bigots who meant it as an insult. In their respective books, Strauss and Balkin argue that the living Constitution, not the dead one, validates what is best in our constitutional tradition.<sup>4</sup>

Strauss and Balkin address somewhat different audiences. Both Strauss and Balkin write lucid prose that should be comprehensible and enlightening to an interested layperson, but Strauss will likely reach a wider audience, whereas Balkin will likely have more influence within the academy. Strauss’s short book contains no citations and speaks to the general public.<sup>5</sup> Balkin’s much longer book is deliberately more scholarly.

Despite uniting under the banner of the living Constitution, Strauss and Balkin offer different theories of what the living Constitution is and why the People should give it their allegiance. Strauss offers a descriptive account of constitutional law in which the Supreme Court uses the common law method to interpret and adapt the Constitution to changing times. He also thinks, as a normative matter, that the common law method itself confers legitimacy on the Court’s decisions.<sup>6</sup> By contrast, Balkin places greater emphasis on popular movements. He argues that the Constitution’s legitimacy derives from a historical process of continual popular commitment to see in the Constitution the possibility of redeeming the document’s own promises of a more just society.<sup>7</sup>

Strauss and Balkin also display different attitudes toward the word “originalism.” Strauss consistently contrasts the living Constitution

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<sup>4</sup> *Id.* at 4; BALKIN, *supra* note 2, at 3–4.

<sup>5</sup> Strauss’s book draws on arguments developed in some of his prior academic work. See David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717, 1732 (2003) (elaborating the common law theory of American constitutionalism and averring that constitutional text matters notwithstanding the dead hand problem because it can serve as a “focal point” for securing agreement); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879–80 (1996) (arguing that viewing American constitutional history as a process of common law development over time provides a better descriptive and normative account than does originalism); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 850–52 (2007) (showing that the most notable decisions of the Warren Court were the culmination of common law development); David A. Strauss, *Commentary, The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1468–69 (2001) (contending that constitutional amendments adopted via the Article V process have been neither a necessary nor a sufficient condition for constitutional change).

<sup>6</sup> See STRAUSS, *supra* note 3, at 38 (“Legal rules that have been worked out over an extended period can claim obedience for that reason alone.”).

<sup>7</sup> See BALKIN, *supra* note 2, at 22 (stating that the “authority” of courts and political actors “to build out the Constitution over time . . . comes from their joint responsiveness to public opinion over long stretches of time”).

with originalism.<sup>8</sup> By contrast, Balkin gives his book the provocative title *Living Originalism*. He argues that originalism and living constitutionalism are not really antagonists but “two sides of the same coin.”<sup>9</sup> Yet scratch the surface and the reader finds that Strauss arguably agrees, at least if one defines originalism as broadly as Balkin does. “Some professed originalists,” Strauss says, “define ‘original meaning’ in a way that ends up making originalism indistinguishable from a form of living constitutionalism.”<sup>10</sup> Both Balkin and Strauss vigorously critique versions of originalism that give dispositive weight to the concrete expected applications of the People who framed and ratified the Constitution and its amendments.

Nonetheless, the disagreement between Strauss and Balkin over the relationship between originalism and living constitutionalism is not entirely a quibble over labels. Strauss rejects, while Balkin endorses, what is sometimes called “semantic originalism.”<sup>11</sup> Strauss says that constitutional interpreters should be free to interpret words and phrases in the Constitution in accordance with their contemporary meaning, even when contemporary meaning differs from original meaning.<sup>12</sup> Balkin denies that interpreters who wish to remain faithful to the Constitution may take advantage of such semantic drift.<sup>13</sup>

In embracing the originalist label, Balkin aims to accomplish a kind of intellectual jujitsu, turning a theory that was engineered largely by political conservatives toward liberal ends.<sup>14</sup> If originalism can

<sup>8</sup> STRAUSS, *supra* note 3, at 4–5, 28–29, 113.

<sup>9</sup> BALKIN, *supra* note 2, at 21; accord JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 228 (2011) [hereinafter BALKIN, CONSTITUTIONAL REDEMPTION].

<sup>10</sup> STRAUSS, *supra* note 3, at 10–11.

<sup>11</sup> See Ronald Dworkin, *Comment*, in A MATTER OF INTERPRETATION 115, 121 (Amy Gutmann ed., 1997) (chiding Justice Scalia for his inconsistent application of “semantic-originalis[m]”); Lawrence B. Solum, *Semantic Originalism* 68–75 (Ill. Pub. Law & Legal Theory Research Papers Series, Working Paper No. 07-24, 2008), available at <http://papers.ssrn.com/abstract=1120244>.

<sup>12</sup> See STRAUSS, *supra* note 3, at 106 (“Other things equal, the text should be interpreted in the way best calculated to provide a point on which people can agree and to avoid the costs of reopening every question. . . . The current meaning of words will be obvious and a natural point of agreement. The original meaning might be obscure and controversial.”).

<sup>13</sup> See BALKIN, *supra* note 2, at 36–37 (asserting that adherence to contemporary meaning rather than original meaning would have the supposedly unacceptable consequence that “if the commonly accepted meaning of the words changes over time, the legal effect of the provision will change as well”).

<sup>14</sup> As Strauss notes, originalism is not inherently conservative. See STRAUSS, *supra* note 3, at 29 (discussing Justice Black’s invocation of original understanding for largely liberal ends). However, over the course of the last three decades, originalism has been promoted primarily by conservative jurists. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA 143 (1990); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696–97 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–63 (1989). Balkin does not claim that originalism is inherently conservative, but he does recount modern originalism’s politically conservative origins and evolution. See BALKIN, *supra* note 2, at 100–08.

validate a constitutional right to abortion, as Balkin's version of originalism does,<sup>15</sup> then liberals need not fear originalism, and conservatives who seek to undermine the legacy of the Warren and Burger Courts must go back to the drawing board.

Perhaps, however, the ploy will backfire.<sup>16</sup> Balkin's "if you can't beat 'em, join 'em" move could be read as a tacit admission that originalism has vanquished its chief foe. Widespread acceptance of Balkin's views would allow conservatives to say that even liberals now accept originalism<sup>17</sup> but then turn around and define originalism narrowly. Balkin and other leading "new" originalists like Professors Randy Barnett, Lawrence Solum, and Keith Whittington make originalism respectable by answering objections leveled at "expectations-based originalism"<sup>18</sup> — but judges, elected officials, and the public misuse the credibility that these scholars lend to originalism more broadly by relying on evidence about the framers' and ratifiers' expected applications in considering concrete cases.<sup>19</sup>

Acceptance of any form of originalism carries a related risk: new originalists may rely on the relative open-endedness of original meaning in order to justify results that comport with their values, even as they claim to be guided only by the supposedly more determinate expected applications of the framing generation. Justice Scalia makes this move in *District of Columbia v. Heller*,<sup>20</sup> as Balkin himself acknowledges. Balkin writes in *Living Originalism* that "[s]uperficially, the arguments in the opinion refer to original meaning. Yet originalist arguments can be offered in both directions, and the most important evidence is not of original meaning in 1791 but of living constitutionalism in the nineteenth century."<sup>21</sup> Thus, as Balkin pointedly and accurately stated on his blog shortly after *Heller* was decided, Justice

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<sup>15</sup> See BALKIN, *supra* note 2, at 214–18 (arguing that state laws forbidding abortion violate the Equal Protection Clause and the Privileges or Immunities Clause of the Fourteenth Amendment).

<sup>16</sup> To be clear, Balkin has denied that he "bec[ame] an originalist to hoist conservatives by their own petards." BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 9, at 232. But his subjective motivation is not the point. Balkin's nominal embrace of originalism is a move in a wider conversation. As someone who embraces the view that words have meaning apart from the subjective intentions of speakers, Balkin should understand how his words will be read, regardless of how he intends them.

<sup>17</sup> See Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 400 n.20 (2010) (pointing to Balkin, as well as Professors Bruce Ackerman, Ronald Dworkin, and Akhil Amar as candidates for the "liberal originalist" label); Akhil Reed Amar, *Rethinking Originalism*, SLATE (Sept. 21, 2005, 12:36 PM), <http://www.slate.com/id/2126680/> (advising liberals to "take a second look" at originalism as an interpretive tool).

<sup>18</sup> BALKIN, *supra* note 2, at 18.

<sup>19</sup> See *infra* pp. 2020–23.

<sup>20</sup> 128 S. Ct. 2783 (2008).

<sup>21</sup> BALKIN, *supra* note 2, at 120.

Scalia's majority opinion in the case depends on "a living constitutionalist argument disguised as law office history."<sup>22</sup>

To be sure, Balkin does not think that Justice Scalia's *Heller* opinion properly applied new originalism.<sup>23</sup> Other new originalists, however, disagree.<sup>24</sup> Yet Balkin does not seem to realize that by contributing to the respectability of any form of jurisprudence called originalism, he helps to provide Justice Scalia and others with the cover to make what Balkin himself regards as fundamentally dishonest moves.<sup>25</sup> Balkin might regard this outcome as harmless error in a case like *Heller*, which he thinks reached the right result,<sup>26</sup> but it will not always be. Indeed, people who think that *Heller* was wrongly decided will think that substantial damage has already been done.

Balkin's embrace of the originalist label thus risks lending credence to the very views that he and Strauss assiduously and effectively critique. But it is also a missed opportunity, because in branding his theory as a new twist on an old idea, Balkin undersells his real accomplishment: his subtle account of how social and political movements contribute to legitimate constitutional change.

Despite its pretensions of objectivity and determinacy, the real strength of conventional originalism was always the way in which it seemingly derived its theory of interpretation from a straightforward and intuitively appealing theory of legitimacy: *because acts of constitutional lawmaking were needed to make the Constitution into law, its words should be interpreted in accordance with the meanings those words had when they became law.*

The conclusion follows from the premise, but the premise is false, or at least highly contestable. The Constitution is not law today simply because its provisions were adopted by the People in 1789, 1791,

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<sup>22</sup> Jack M. Balkin, *Is Heller an Original Meaning Decision?*, BALKINIZATION (July 2, 2008, 9:31 AM), <http://balkin.blogspot.com/2008/07/is-heller-original-meaning-decision.html>.

<sup>23</sup> See *id.* ("[Justice] Scalia seems to believe (incorrectly) that the purposes attributed to a clause at the time of the founding are a part of its original meaning. Having made that mistake, he also seems to believe that if a purpose attributed to an amendment is not among its original purposes, it cannot be a legitimate purpose because it is not part of the original meaning.")

<sup>24</sup> See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 940 (2009) ("[I]t is hard to imagine finding a clearer example of original public meaning originalism in an actual judicial decision."); Randy E. Barnett, Op-Ed., *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 ("Justice Scalia's opinion is the finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court."); see also Balkin, *supra* note 22 ("Many commentators, including my good friends Randy Barnett and Larry Solum, have praised Justice Scalia's opinion in *Heller v. District of Columbia* [sic] as a sparkling example of original meaning originalism.")

<sup>25</sup> See Balkin, *supra* note 22 (describing an alternative course that, Balkin says, "would have been far more honest" than the course that Justice Scalia's opinion in *Heller* took).

<sup>26</sup> See *id.* ("[Justice] Scalia's basic result . . . seems to me to be correct.")

1868, and so forth. The Constitution is law today because it continues to be accepted today.

There is more to the story, of course. How do we know the Constitution is accepted today? Is the absence of a revolution sufficient to legitimate the Constitution? How much weight should be given to constitutional understandings that developed between adoption and the present? And what exactly is it that the People today accept when they accept “the Constitution”?

Balkin addresses these questions in developing an attractive alternative to conventional originalism’s theory of legitimacy. In his view, popular acceptance of the Constitution provides only a thin version of legitimacy, what he calls *sociological* legitimacy.<sup>27</sup> Such legitimacy operates from what Professor H.L.A. Hart termed the “external” perspective.<sup>28</sup> Someone outside the United States can tell that the Constitution is in fact law in the United States in 2012 by noting how the People and their elected officials accept it as such.<sup>29</sup> But more is required to confer on the Constitution its thick democratic legitimacy. The People must share an attitude toward the Constitution or, as Balkin puts it, they must have “faith in the eventual redemption of the Constitution.”<sup>30</sup>

Popular acceptance can make the Constitution a useful focal point for settling otherwise fractious questions; it can provide what Strauss calls “common ground.”<sup>31</sup> Yet the focal-point account of the Constitution does not fully capture the role the Constitution plays in American life.<sup>32</sup> Balkin offers a bridge between the brute fact of popular acceptance, to which Hart’s theory and Strauss’s focal-point view would direct us, and a vision of “constitutional patriotism” that better fits Americans’ long-term attitudes toward our Constitution.<sup>33</sup>

<sup>27</sup> See BALKIN, *supra* note 2, at 64.

<sup>28</sup> H.L.A. HART, *THE CONCEPT OF LAW* 86–89 (2d ed. 1994).

<sup>29</sup> Because it is tangential to my current purposes, I am glossing over the question of *whose* acceptance is critical to making a legal system operative. See, e.g., Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 725–26 (2006).

<sup>30</sup> BALKIN, *supra* note 2, at 72.

<sup>31</sup> STRAUSS, *supra* note 3, at 104–11.

<sup>32</sup> Strauss first admits as much. “The common ground justification,” he writes, “seems to reduce the Constitution from being a quasi-sacred document, the product of the framers’ genius, to being a desiccated focal point . . .” *Id.* at 112. Yet Strauss goes on to say that “it is a mistake to think that the common ground justification diminishes the Constitution.” *Id.* If so, that is because it leaves room for the sort of democratic legitimacy on which Balkin’s account centers.

<sup>33</sup> Although he did not coin the term “constitutional patriotism,” Professor Jürgen Habermas typically receives credit for associating it with something like the attitude Balkin thinks is key to the Constitution’s democratic legitimacy. See Frank I. Michelman, *Morality, Identity and “Constitutional Patriotism,”* 76 DENV. U. L. REV. 1009, 1010 (1999) (explaining that constitutional patriotism “consists in a conscious sharing of sentiments of attachment to the community, inspired by the community’s perceived attachment to the counterfactual idea” of what the constitution can

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The balance of this Review situates the living Constitutions on offer from Strauss and Balkin within the debate over constitutional interpretation. Part I describes the solid ground that Strauss and Balkin share: the arguments they offer against originalism as conventionally understood. Although few judges and almost no scholars expressly endorse expected-application originalism anymore, it retains wide appeal among politicians and the public, thus making it an important target of criticism. Moreover, some of the arguments Strauss and Balkin offer against expected-application originalism also undermine new originalism, notwithstanding Balkin's claim to be a new originalist.

Part II explores the implications of both authors' substitution of contemporary democratic acceptance for past ratification as the chief criterion of constitutional legitimacy. It uses the democratic criterion to referee the disagreement between Strauss and Balkin over semantic originalism. I side with Strauss. I argue that semantic originalism is wrong for reasons that can be traced to Balkin's own account of the constitutional legitimacy of changed constructions. Balkin rightly highlights the role of social and political movements in generating constitutional meaning, but such movements rarely pay attention to original semantic meaning, except perhaps by accident. Balkin endorses semantic originalism, but his own view of constitutional legitimacy provides the best grounds for rejecting semantic originalism. Thus, quite apart from its potential for providing aid and comfort to the sorts of originalists with whom Balkin disagrees, Balkin's brand of originalism should be rejected even on its own terms.

Part III explains that both Strauss and Balkin ultimately rest their theories on "classical conservative" or Burkean, rather than progressive, views. They envision the Constitution as a vehicle for preventing radical change. That vision may prove useful for blocking reactionary programs of the sort currently on offer from the Tea Party and other libertarian movements. But while Burkeanism may be a lesser evil than the dead Constitution, it is not the progressivism that the metaphor of a living Constitution calls to mind. For progressives, Strauss and Balkin offer only an undead Constitution, not a living one.

What would a truly living Constitution look like? This Review does not offer an affirmative theory in detail, but it gestures toward a synthesis of Strauss's and Balkin's visions. As Balkin argues, social and political movements build the meaning of the Constitution over time, but contrary to Balkin's claims, they pay barely any attention to

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become) (citing JÜRGEN HABERMAS, *Struggles for Recognition in the Democratic Constitutional State*, in *THE INCLUSION OF THE OTHER* 203, 225–26, 203–36 (Ciarin Cronin & Pablo De Grieff eds., Ciarin Cronin trans., 1998)).

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constitutional text, much less to original meaning. The views of these movements necessarily influence judges and Justices who are drawn from the larger society and appointed through a political process, but because they are judges, they use legal tools — especially the common law method emphasized by Strauss — to sort among those social and political changes that can be reconciled with the constitutional text and those that cannot.

What authorizes judges to play that role? Why not simply eliminate judicial review and permit social and political actors to change or even ignore the Constitution if they so choose?

Part of any persuasive answer must involve the substantive justice of the outcomes that judicial review produces — including their impact on democracy itself. No purely procedural theory of judicial review would be satisfying if it led to generally bad outcomes. But if a contribution to substantive justice is a necessary condition for judicial review, it is not a sufficient one. Benevolent dictatorship could satisfy a condition of substantive justice without satisfying a condition of democratic legitimacy.

In the end, the *democratic* legitimacy of judicial review comes from nothing grander than the fact that what the People more or less willingly accept when they accept the Constitution's legitimacy is an ongoing legal tradition that includes judicial review. The result is the highly imperfect system with which we are familiar. It is unrealistic to expect anything better. Even a living Constitution will not be a perfect one.<sup>34</sup>

## I. WHAT'S WRONG WITH ORIGINALISM?

Over thirty years ago, Professor Paul Brest offered a powerful critique of the “quest for the original understanding.”<sup>35</sup> Some of what Brest had to say no longer seems relevant to the debate over originalism. For example, one piece of Brest's argument showed the difficulty of identifying the authors of the Constitution and constructing a single determinate intent that they all shared.<sup>36</sup> Once most self-styled originalists disavowed “original intent” in favor of “original meaning,”<sup>37</sup> that criticism lost its bite.

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<sup>34</sup> Cf. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 358 (1981) (calling liberal constitutional theorists to task for supposedly thinking that the Constitution, properly interpreted, guarantees just those rights that the theorists favor on normative grounds).

<sup>35</sup> Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

<sup>36</sup> See *id.* at 213–16.

<sup>37</sup> As Barnett, one of the leading new originalists, explains: “‘original meaning’ refers to the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted. . . . By contrast, ‘original intent’ refers to

In what might be regarded as a backlash against this reformulation, some scholars have noted that the differences between meaning and intent are not so sharp as new originalists contend<sup>38</sup> or, more radically, that meaning necessarily connotes intent.<sup>39</sup> But let us assume that new originalism escapes the critique of intentionalism. Even so, much of what Brest wrote in 1980 remains highly salient to the current debate. Brest offered theoretical and practical grounds for rejecting not only a jurisprudence of original intent, but also a jurisprudence of original meaning. Both Strauss and Balkin echo Brest's core arguments, developing them in ways that show how most of the efforts of originalists to answer the criticisms by Brest and others fall short.

This Part provides an overview of the core arguments against both old and new originalism. Before coming to those arguments, however, this Part explains why expected-application originalism remains relevant to the broader debate over constitutional interpretation. The successive sections then consider the contentions that expected-application originalism misreads the constitutional text by substituting rules for standards and principles, that all versions of originalism lead to unthinkable results, and that originalism cannot be reconciled with the practice of according *stare decisis* effect to nonoriginalist precedents. I forestall discussion of another important objection, the dead hand problem, until Part II, because it closely connects to the questions of legitimacy addressed therein.

### A. Varieties of Originalism

The simple dichotomy between old originalism and new originalism does not begin to capture the many variations of originalism now on offer.<sup>40</sup> A new originalist could reject intentionalism but still think that the concrete expectations of people who use a word are part of that word's meaning. In this view, if most speakers who used the words "equal protection" in 1868 would have thought that denying

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the goals, objectives, or purposes of those who wrote or ratified the text." Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001); see also Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 607-10 (2004) (providing a similar catalogue of the differences between old and new originalism).

<sup>38</sup> See, e.g., Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?*, 85 CORNELL L. REV. 1609, 1611-13 (2000) (answering yes to the question posed in the title of the article); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 558 (2003) ("[O]ur views of 'original meaning' and 'original intention' will tend to converge in practice even if the two concepts remain distinct in theory.")

<sup>39</sup> See Larry Alexander & Saikrishna Prakash, *"Is that English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 972 (2004); Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 649-50 (2005).

<sup>40</sup> See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247-62 (2009) (describing the evolution of originalism); James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10, 11-12 (2007) (listing versions of originalism).

women the opportunity to practice law did not deny women equal protection of the laws because such speakers subscribed to a separate-but-equal conception of equality, then a state law denying women the right to practice law would be consistent with the original meaning of the Fourteenth Amendment's Equal Protection Clause. Balkin calls this view "skyscraper originalism," because someone who subscribes to it thinks that the original meaning contains the blueprint for the entire constitutional edifice — the skyscraper.<sup>41</sup> Balkin contrasts skyscraper originalism with his own view, which he calls "framework originalism."<sup>42</sup>

Stated abstractly, Balkin's contrast between framework originalism and skyscraper originalism places him in the company of other new originalists. Whittington, for example, also rejects the notion that the Constitution is a blueprint; he attributes much of extant constitutional doctrine to constitutional "construction" that occurs within the spaces left open by the Constitution's meaning.<sup>43</sup> But Balkin is less of a formalist than Whittington and most other self-described originalists are, and thus he understands the Constitution to protect constitutional "principles" that stand behind but need not be embodied in the text.<sup>44</sup> This difference is as much a matter of attitude and temperament as it is one of philosophy.

Justice Scalia, who is a new originalist insofar as he rejects original intent in favor of original meaning,<sup>45</sup> is also, at least sometimes, an expected-application originalist.<sup>46</sup> Is anybody else? In a largely critical essay responding to an earlier version of Balkin's argument, Professor Mitchell Berman complained that Balkin's case against expected-application originalism targeted a straw person because Balkin provided scant evidence of other contemporary originalists' endorsing

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<sup>41</sup> BALKIN, *supra* note 2, at 21.

<sup>42</sup> *Id.* at 21–23. Balkin's contrast between a framework and a skyscraper echoes the metaphor used by then-Professor Woodrow Wilson, who described the Constitution as "a corner-stone, not a complete building." WOODROW WILSON, CONGRESSIONAL GOVERNMENT 9 (Transaction Publishers 2002) (15th ed. 1900).

<sup>43</sup> See WHITTINGTON, *supra* note 2, at 6 (describing constitutional construction as "a necessary and essentially political task" whereby "[s]omething external to the text . . . must be alloyed with it in order for the text to have a determinate and controlling meaning within a given governing context").

<sup>44</sup> See BALKIN, *supra* note 2, at 106, 204–05.

<sup>45</sup> See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION, *supra* note 11, at 3, 38 (arguing that statutory and constitutional interpretation should focus on "the original meaning of the text, not what the original draftsmen intended").

<sup>46</sup> See Interview by Calvin Massey, Law Professor, Univ. of Cal. Hastings Coll. of Law, with Antonin Scalia, U.S. Supreme Court Justice (Sept. 2010), in *Legally Speaking: The Originalist*, CAL. LAW., Jan. 2011, at 33, 33 [hereinafter *The Originalist*] ("Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant." (quoting Justice Scalia)).

original expected application rather than original semantic meaning.<sup>47</sup> Indeed, Berman observed that there is even some doubt about whether Justice Scalia endorses expected-application originalism.<sup>48</sup>

In *Living Originalism*, Balkin supplies some of the missing evidence. He contends that even though conservative new originalists tend to say that they are committed only to semantic originalism, their substantive arguments show that they are really still in the grip of expected-application originalism. In addition to pointing to Justice Scalia, Balkin offers the example of a well-known article by Professor Michael W. McConnell, which purports to show that *Brown v. Board of Education*<sup>49</sup> was consistent with the original meaning of the Equal Protection Clause.<sup>50</sup> McConnell's evidence, Balkin explains, goes to the framers' expected application of the clause, rather than to the 1868 semantic meaning of the words "equal protection."<sup>51</sup> Balkin also might have cited Professor Steven Calabresi. To paraphrase an insightful article by Professor Thomas Colby, Calabresi talks the original-semantic-meaning talk,<sup>52</sup> but walks the original-expected-application walk.<sup>53</sup>

It is possible to explain away some or perhaps even all of these examples. Balkin discusses an important article by Professors John McGinnis and Michael Rappaport, in which they recognize that there may be a gap between original meaning and original expected application in theory but that in practice the two are, in their view, closely linked.<sup>54</sup> Likewise, McConnell, Calabresi, and other nominal adherents to original public meaning could say that whenever they invoke

<sup>47</sup> See Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 385–89 (2007).

<sup>48</sup> See *id.* at 386–87 (characterizing Justice Scalia's view of expected-application originalism as complex, but conceding the point for the sake of argument).

<sup>49</sup> 347 U.S. 483 (1954).

<sup>50</sup> See BALKIN, *supra* note 2, at 105 (citing Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995)).

<sup>51</sup> *Id.* at 105–06.

<sup>52</sup> See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 772–73 (2011); see also Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 669 (2009) (stating that Balkin "is just plain right" that "fidelity to original meaning does not require fidelity to original expected application" (quoting Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009) (emphasis omitted)) (internal quotation marks omitted)).

<sup>53</sup> See Colby, *supra* note 52, at 773–76 (comparing Calabresi to Justice Scalia, who "often employs the very expectations jurisprudence that he claims to have disavowed," *id.* at 773, and critically analyzing Calabresi's new originalism); see also Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1085 (2005) (reviewing BARNETT, *supra* note 2) (defining the Fourteenth Amendment's original understanding as equivalent to its framers' concrete expected applications regarding sodomy and abortion).

<sup>54</sup> BALKIN, *supra* note 2, at 106–08 (discussing John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378–81 (2007)).

concrete expectations they do so simply to shed light on original public meaning. If so, there would be no inconsistency between what they say and what they do.

Quite apart from whether Balkin truly catches his academic interlocutors in inconsistency, expected-application originalism also remains an important target because of its wider currency. For example, Justice Thomas clearly belongs in the public-meaning-in-theory-but-expected-application-in-fact camp. Consider his dissent in *Brown v. Entertainment Merchants Ass'n*.<sup>55</sup> Justice Thomas began with the semantic originalist proposition that “the goal” of constitutional interpretation “is to discern the most likely public understanding of” the provision in question — in this case, “the freedom of speech” — “at the time it was adopted.”<sup>56</sup> However, he provided no evidence of the 1791 semantic meaning of “speech” or “the freedom of speech” but instead examined evidence of the “practices and beliefs held by the Founders.”<sup>57</sup> This evidence, he claimed, shows that during the Founding period, adults had no right to speak to minors without the minors’ parents’ consent.<sup>58</sup> He concluded that as originally understood, the term “the freedom of speech” could not have included such a right.<sup>59</sup> This reasoning is semantic originalism in name only.

Members of the Senate Judiciary Committee do not even bother to claim nominal fealty to original public meaning. They use original intent, original expected application, and original semantic meaning more or less interchangeably when questioning Supreme Court nominees.<sup>60</sup> The views such senators hold about constitutional interpretation are important not only in their own right but also because of what they tell us about the views of those senators’ constituents. The available evidence indicates that members of the public at large hold views

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<sup>55</sup> 131 S. Ct. 2729 (2011) (invalidating a California law limiting the sale of violent video games to minors).

<sup>56</sup> *Id.* at 2751 (Thomas, J., dissenting) (quoting *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3072 (2010) (Thomas, J., concurring in part and concurring in the judgment)) (internal quotation marks omitted).

<sup>57</sup> *Id.* at 2752 (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring in the judgment)) (internal quotation marks omitted).

<sup>58</sup> *See id.*

<sup>59</sup> *Id.* at 2759.

<sup>60</sup> *See, e.g., The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 158 (2010) (statement of Sen. John Cornyn, Member, S. Comm. on the Judiciary) (averring that *Brown v. Board* “restored the original meaning of the Fourteenth Amendment” and stating that the work of “a number of prominent legal scholars” lent support to that position); *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 454 (2009) (statement of Sen. Orrin G. Hatch, Member, S. Comm. on the Judiciary) (contrasting, at a constituent’s request, the Constitution as it “was originally intended” with contemporary precedent).

about originalism, but they do not sharply distinguish among original intent, original expected application, and original semantic meaning.<sup>61</sup>

Perhaps Berman is right that expected-application originalism was, as a practical matter, “demolished” over a decade ago.<sup>62</sup> Even so, a substantial fraction of the public and of legal elites seem not to have gotten the memo. Strauss’s *Living Constitution* addresses a general audience and thus cannot be faulted for debunking a widely held view.<sup>63</sup> Meanwhile, Balkin’s *Living Originalism* uses expected-application originalism mostly as a foil for developing Balkin’s own position. Accordingly, it is worth rehearsing their arguments against expected-application originalism.

### B. Substituting Rules for Standards

Like Brest and others before them, Strauss and Balkin take aim at what they regard as a linguistic error on the part of expected-application originalists. Where the Constitution speaks in the open-ended language of standards or principles<sup>64</sup> rather than rules, they say, a later reader keeps faith with the text by treating the language as a standard or principle rather than as code for a rule that draws its content from the specific expected applications of the enacting generation. The Eighth Amendment is a familiar example. For an expected-application originalist, a punishment that was not considered cruel in 1791 is, constitutionally speaking, not cruel today. Yet to read the standard-like word “cruel” as mere shorthand for practices considered cruel in 1791, Strauss and Balkin say, is to ignore the Constitution’s use of a standard rather than a rule.<sup>65</sup>

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<sup>61</sup> In a recent article, Professors Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere analyze surveys of public opinion regarding constitutional interpretation. See Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011). The authors “are more concerned with the associated ideological commitments of those who affiliate with originalism” than with identifying precisely what version of originalism people accept. *Id.* at 370. However, the data they collect and report allow insight into the latter question. The data show that people tend not to distinguish sharply among “original intentions of the authors,” “the values of those who wrote our Constitution,” and “what the Constitution meant when it was written” — questions using these different descriptions of originalism produced broadly similar answers. *Id.* at 362–64, 364 tbl.1, 368 & tbl.4.

<sup>62</sup> Berman, *supra* note 47, at 385. Berman credits an article by Professors Mark Greenberg and Harry Litman for this demolition. See *id.* (citing Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998)).

<sup>63</sup> See STRAUSS, *supra* note 3, at 11–12 (focusing on expected-application originalism).

<sup>64</sup> Balkin distinguishes between standards, which are open-ended constitutional provisions, and principles, which may or may not be embodied in specific constitutional clauses and state abstract values that can be outweighed by other considerations. See BALKIN, *supra* note 2, at 6, 24. For present purposes, I shall lump standards and principles together, contrasting them both with rules.

<sup>65</sup> See *id.* at 6; STRAUSS, *supra* note 3, at 113 (“What originalism does is take general provisions and make them specific.”).

Brest posed the issue well when he wrote that “[t]he extent to which a clause may be properly interpreted to reach outcomes different from those actually contemplated by the adopters depends on the relationship between a general principle and its exemplary applications.”<sup>66</sup> Both Strauss and Balkin think that this relationship is necessarily tenuous in a document that juxtaposes standards (no “cruel and unusual punishments,” no “unreasonable searches and seizures,” no law “abridging the freedom of speech,” and so forth) with highly specific rules (senators serve for six years, treason convictions require either a confession in open court or the testimony of at least two witnesses, presidential terms begin and end on January 20 at noon, and so forth). Why use standards in some places and rules in others if not to signify that where the document uses standards, it should be understood to permit changing interpretations as times and circumstances change?

Balkin connects the use of standards and principles to the process of constitution-making. In order to secure the supermajoritarian support needed to enact constitutional language, Balkin says, constitution writers and amenders “use abstract and general language to paper over disagreements that would emerge if more specific language were chosen.”<sup>67</sup> To associate the general language with any specific expectations would not honor the original linguistic choice. Balkin thus concludes that the use of standards and principles rather than rules can best be understood as reflecting a deliberate delegation of authority to future interpreters.

But why would constitution writers choose to delegate power to future generations when the whole point of a constitution is to limit majoritarian politics or, in Justice Scalia’s piquant phrase, to guard against the possibility that history will not be a march of progress but that society will instead “rot”?<sup>68</sup> Balkin persuasively answers that Justice Scalia is wrong. Constraining politics may be the point of some highly specific provisions, but Balkin says that constitution writers throughout the world over more than two centuries cannot have been so obtuse that they would aim for that form of constraint while consistently writing broadly worded rights guarantees and structural provisions.<sup>69</sup> Hence, Balkin says, such provisions “are designed to *channel* and *discipline* future political judgment, not forestall it.”<sup>70</sup>

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<sup>66</sup> Brest, *supra* note 35, at 217.

<sup>67</sup> BALKIN, *supra* note 2, at 28.

<sup>68</sup> Scalia, *supra* note 45, at 41.

<sup>69</sup> See BALKIN, *supra* note 2, at 28–29.

<sup>70</sup> *Id.* at 29. For my own account of what is wrong with Justice Scalia’s view that the purpose of a constitution is to prevent backsliding, see Michael C. Dorf, *The Aspirational Constitution*, 77

In similar fashion, Strauss writes that what expected-application “originalism does is take general provisions and make them specific. Indeed, that is the point of [expected-application] originalism: to confine judges to specific outcomes rather than leaving them free to interpret the general provisions.”<sup>71</sup> Suppose he is right. Does it necessarily follow that expected-application originalism is wrong?

The answer depends on what one concludes about two further questions: First, how important is it to constrain judges? And second, how effectively does expected-application originalism in fact constrain judges? If one thought that constraining judges was extremely important, one might be willing to interpret constitutional standards as though they were rules, even though doing so would, in some sense, be inconsistent with the text. After all, language by itself has no normative force. Perhaps the reasons we have for keeping faith with the text are not as strong as the reasons we have for wanting to constrain judges.

Balkin rejects the foregoing possibility as conflating the question of how the Constitution should be construed with the question of whether the special institutional setting of adjudication gives judges reasons to limit themselves to constitutional constructions that are not as far-reaching as those adopted by citizens and elected officials.<sup>72</sup> This answer leaves open the possibility that “Balkinized” judges might appropriately “underenforce[]” the Constitution,<sup>73</sup> although Balkin himself does not directly explore that possibility in *Living Originalism*.

Both Balkin and Strauss also reject the claim that expected-application originalism better constrains judges than the other standard methods of constitutional construction.<sup>74</sup> To be sure, it is not clear that *any* methodology does a very good job of constraining judges. Strauss points to the dueling history-laced opinions in *Heller* as evidence that judges use evidence of the original understanding opportunistically. It is more than a little bit suspicious, he says, that the ideologically conservative Justices found that the original understanding supported an individual right to firearms possession while the ideologically liberal Justices found that it did not.<sup>75</sup>

Strauss is right, of course, but the point can hardly be limited to originalist opinions. To give the most notorious example of the last

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GEO. WASH. L. REV. 1631, 1644–51 (2009) (arguing that, as a matter of historical fact, constitutions are typically written to achieve current legal change rather than to prevent backsliding).

<sup>71</sup> STRAUSS, *supra* note 3, at 113–14.

<sup>72</sup> See BALKIN, *supra* note 2, at 17.

<sup>73</sup> LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 81 (2004) (emphasis omitted); *see also id.* at 71–81 (arguing that courts may not be able to give full effect to the constitutional ideals that government officials must honor).

<sup>74</sup> See BALKIN, *supra* note 2, at 18–19; STRAUSS, *supra* note 3, at 17–18.

<sup>75</sup> STRAUSS, *supra* note 3, at 20–21.

few decades, the per curiam opinion in *Bush v. Gore*<sup>76</sup> mostly applied common law reasoning rather than seeking the original understanding, but doing so did not free it of ideological influence.<sup>77</sup> More broadly, it appears that once the Court has chosen the cases on its docket, left/right ideology plays a very large role in how a given Justice will vote.<sup>78</sup> If expected-application originalism is mostly “bunk,”<sup>79</sup> so are its chief rivals. Balkin accepts the point when he writes that “interpretive theories are [not] a major factor in why constitutional doctrines change over time.”<sup>80</sup>

If expected-application originalism is no better than other interpretive theories, does that mean it is no worse? No. Strauss does claim that common law constitutionalism better constrains judges than expected-application originalism does,<sup>81</sup> but this affirmative claim for his theory is not essential to the negative case against expected-application originalism. I began to explore the relative ability of different interpretive theories in response to the claim that expected-application originalism’s substitution of rules for standards and principles might be justified because it better constrains judges than either nonoriginalism or Balkinized originalism. But it does not,<sup>82</sup> and so the charge that expected-application originalism improperly substitutes rules for standards and principles remains unrebutted. I turn next to arguments

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<sup>76</sup> 531 U.S. 98 (2000).

<sup>77</sup> See *id.* at 104–07 (applying cases recognizing a constitutional right to vote).

<sup>78</sup> See, e.g., Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583 (2001); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). In citing the work of the leading “attitudinalists,” I do not mean to imply agreement with all of their findings and methods. For example, the coding of Supreme Court cases in the leading database leaves out important information. See Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477 (2009) (describing deficiencies in the coding for the data set originally produced by Professor Harold Spaeth and now online at <http://scdb.wustl.edu/>). That said, I regard the finding that ideology plays a large role in Supreme Court decisionmaking to be unassailable.

<sup>79</sup> Cf. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

<sup>80</sup> BALKIN, *supra* note 2, at 91; see also BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

<sup>81</sup> See STRAUSS, *supra* note 3, at 43–46.

<sup>82</sup> But see *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3057–58 (2010) (Scalia, J., concurring) (asserting that in “the most controversial” cases the Court decides, *id.* at 3058, original expectations provide greater constraint than living constitutionalism). Justice Scalia omits affirmative action and campaign finance from his list of the Court’s “most controversial” cases, see *id.* at 3058 (listing abortion, assisted suicide, sodomy, and capital punishment), perhaps because his own democracy-restricting votes on those issues are difficult to square with original expected applications. He also does not address any of the political science showing the influence of ideology regardless of professed jurisprudential commitments. See *supra* note 78.

that, if accepted, counsel against at least some forms of new as well as old originalism.

### C. *Unthinkable Results*

At least since Brest, critics have argued that no version of originalism can be taken seriously because its adoption would lead to unthinkable results. Strauss offers a catalogue of unthinkable results that would result from the consistent and honest application of expected-application originalism: (1) “The Bill of Rights would not apply to the states.”<sup>83</sup> (2) “Racial segregation of public schools would be constitutional.”<sup>84</sup> (3) “The government would be free to discriminate against women.”<sup>85</sup> (4) “The federal government could discriminate against racial minorities (or anyone else) pretty much any time it wanted to.”<sup>86</sup> (5) “States could freely violate the principle of ‘one person, one vote’ in designing their legislatures.”<sup>87</sup> (6) “Many federal labor, environmental, and consumer protection laws would be unconstitutional.”<sup>88</sup>

Not everything on this list is entirely uncontroversial. Consider claim (1). Strauss’s claim that originalism cannot produce incorporation of the Bill of Rights is subject to doubt.<sup>89</sup> Claim (2) has also been contested. Strauss argues that originalists’ efforts to claim *Brown v. Board* necessarily require them to abandon originalism in favor of an original understanding defined at so high a level of generality as to be indistinguishable from living constitutionalism,<sup>90</sup> but he does not reckon with the argument of his former colleague, McConnell, that *Brown* was consistent with the original expected application of the Fourteenth Amendment. My point is not that McConnell is right; I share Strauss’s view that the framers and ratifiers of the Fourteenth Amendment did not expect it to outlaw de jure segregation.<sup>91</sup> The

<sup>83</sup> STRAUSS, *supra* note 3, at 15 (emphasis omitted).

<sup>84</sup> *Id.* at 12 (emphasis omitted).

<sup>85</sup> *Id.* at 13 (emphasis omitted).

<sup>86</sup> *Id.* at 14 (emphasis omitted).

<sup>87</sup> *Id.* at 15 (emphasis omitted).

<sup>88</sup> *Id.* at 16 (emphasis omitted).

<sup>89</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS 181–214* (1998). *But see* Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 365 (2009) (“Viewed through the lens of original public meaning, the historical case for incorporation is . . . problematic.”).

<sup>90</sup> See STRAUSS, *supra* note 3, at 26–27.

<sup>91</sup> See Raoul Berger, *The “Original Intent” — As Perceived by Michael McConnell*, 91 NW. U. L. REV. 242, 248–59 (1996) (recounting the legislative history of the Civil Rights Act of 1866 and the Fourteenth Amendment); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1882–83 (1995) (arguing that despite making “an important contribution to our understanding of congressional attitudes toward school segregation in the 1870s,” McConnell “fails to show either that *Brown* is correct on originalist grounds, or even, as he more modestly claims, that *Brown* is ‘within the legitimate range of interpretations’ of the Fourteenth Amendment” (quoting McConnell, *supra* note 50, at 1093)); Earl

point is simply that originalists may contest the claim that their methodology cannot produce any particular modern result.

Yet it hardly matters. Strauss is surely right in broad outline, and so is Balkin, whose own list of key results that skyscraper originalism renders problematic includes: the scope of federal power since the New Deal, including both federal regulatory agencies and federal civil rights laws; paper money; sex equality; protection for interracial marriage; protection for contraception; and modern free speech rights.<sup>92</sup> Even if one were persuaded that some of these results were consistent with originalism, it would be more tedious than useful to show that others were not. Originalism is a reform program premised on the idea that the Supreme Court has gone awry in the modern era by generating nonoriginalist precedents.<sup>93</sup> If those nonoriginalist precedents serendipitously corresponded with all or nearly all of the results that would have been reached by applying originalist methods, we would have very strong reason to doubt that the supposed originalist trying to justify those decisions was reporting the original understanding rather than his own views.

Balkin's own stance is instructive. He views original meaning as substantially more malleable than most other originalists do. Those other originalists could worry that Balkin's capacious understanding of original meaning will lack any constraining force. Accordingly, they may regard Balkin's effort to reconcile originalism with living constitutionalism as evidence that Balkin is not really an originalist.<sup>94</sup> For most originalists — and possibly for Balkin himself, who, despite what

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M. Maltz, *Originalism and the Desegregation Decisions — A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 228 (1996) (“[A] direct constitutional attack on segregated schools was unthinkable in the period in which the Fourteenth Amendment was drafted, passed, and ratified”); Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2342 (1995) (reviewing OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE*, 1888–1910 (1994)) (arguing that the prevailing view in 1868 and even considerably later was that segregation was legally permissible).

<sup>92</sup> See BALKIN, *supra* note 2, at 8.

<sup>93</sup> See *id.* at 101 (“Contemporary originalism arose from efforts by conservative legal scholars and politicians to combat what they saw as overreaching by liberal judicial decisions in the Warren and Burger Courts, what is sometimes referred to as liberal judicial activism.”).

<sup>94</sup> I have put the discussion in the text above in the subjunctive mood because, with one clear exception, conservative originalists appear to have welcomed Balkin into the originalist fold. The exception is Professor Steven Smith. See Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189, 189 (2010) (objecting that Balkin's version of originalism “is able to justify pretty much any results that the most ardently progressive constitutional heart could desire”). For very polite versions of Smith's objection, see Calabresi & Fine, *supra* note 52, at 692, which contends that “as a matter of original public meaning, there are more rules and fewer standards or principles in the Constitution than Professor Balkin acknowledges,” and Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 355 (2007), which predicts that “many originalists will read Balkin to be a living constitutionalist in disguise — and may not let him into their club.”

his conservative critics might think, believes that original meaning is somewhat constraining — producing unthinkable results appears to be a virtue rather than a vice of originalism.

But how can that be? One possibility is that nonoriginalists ask too much of creative constitutional interpretation. In other words, perhaps originalists believe that the unthinkable would not be so bad. For example, if the Supreme Court were to overrule *New York Times v. Sullivan*<sup>95</sup> on the ground that its holding is inconsistent with the 1791 or 1868 meaning of the First Amendment, no great social disruption would ensue. Some reportage would be subject to a more substantial chilling effect, and some news organizations would have to allocate more of their budgets to paying defamation judgments, but we would get by. Indeed, we might not even notice much of a difference in the law in practice, insofar as state tort law and state constitutional law incorporate the *Sullivan* rule.

The same point can even be made about *Brown v. Board*. If the Supreme Court were to reverse *Brown* tomorrow, virtually nothing tangible would change. The very unthinkable of reversing *Brown* reflects the fact that it has been absorbed into American consciousness and law. To be sure, there remains a lively debate about what *Brown* means outside the context of de jure racial segregation.<sup>96</sup> But Strauss understands that there would be little practical impact from overruling *Brown* today. That is why he warns that adopting originalism would mean that “[r]acial segregation of public schools would be constitutional.”<sup>97</sup> He does not say that de jure racial segregation of public schools would be practiced.

Should we therefore conclude that originalism would not lead to dreadful consequences after all? Hardly. For one thing, there is an important distinction between abandoning a nonoriginalist precedent that forbids some practice and abandoning a nonoriginalist precedent that permits a practice. *Sullivan* and *Brown* are examples of the former. If the Court were to say that states can impose liability on journalists for false statements even absent a showing of reckless disregard for the truth, or that public schools can practice de jure racial segregation, we might be able to depend on the democratic process to prevent states from actually taking advantage of their new constitutional freedom. However, Strauss and Balkin also give examples of modern doc-

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<sup>95</sup> 376 U.S. 254 (1964).

<sup>96</sup> Compare *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J., plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”), and *id.* at 748 (Thomas, J., concurring) (agreeing with Chief Justice Roberts), with *id.* at 798–802 (Stevens, J., dissenting) (disagreeing with Chief Justice Roberts’s analysis of *Brown*), and *id.* at 863–64 (Breyer, J., dissenting) (same).

<sup>97</sup> STRAUSS, *supra* note 3, at 12 (emphasis omitted).

trines that permit laws and institutions we cannot now do without but that would be invalidated under many versions of originalism. A ruling that the Federal Reserve Board, paper money, or the Clean Air Act is unconstitutional because inconsistent with the original meaning of Article I, Section 8, could not be superseded by ordinary politics and, given the difficulty of the amendment process, would therefore do serious damage to the national interest.

Justice Scalia has said that Americans who want more rights than the Constitution's original meaning confers should simply persuade their "fellow citizens it's a good idea and pass a law."<sup>98</sup> That would be a fair point from a judge or Justice who practiced across-the-board judicial restraint along the lines advocated most famously by Professor James Bradley Thayer.<sup>99</sup> However, modern originalism does not advocate across-the-board judicial restraint.

Moreover, even within the domain in which originalism would result in the scaling back of doctrines that limit the freedom of political actors, the parade of horrors is still, well, horrible. Although sacrificing *Sullivan* and *Brown* would not have immediate tangible legal consequences, these and other cases have come to stand for more than the legal doctrines they announced. They symbolize the association in the public imagination of the Constitution with core ideals of liberty and equality. A decision by the Supreme Court reversing these or other landmark civil liberties or civil rights cases would signal a retreat from constitutional liberty and equality themselves. Explaining why, despite misgivings about the initial rule, he would not vote to overturn *Miranda v. Arizona*,<sup>100</sup> the late Chief Justice Rehnquist wrote for the Court in a 2000 case that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."<sup>101</sup> More generally, it counts as a serious strike against an interpretive philosophy that it requires courts to overturn precedents that are not only part of our national culture but also celebrated as such.

Originalists understand as much and thus try to show that their approach does not in fact require the sacrifice of the most cherished nonoriginalist precedents. The next two sections examine their main efforts.

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<sup>98</sup> *The Originalist*, *supra* note 46, at 33 (quoting Justice Scalia).

<sup>99</sup> See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

<sup>100</sup> 384 U.S. 436 (1966).

<sup>101</sup> *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

*D. Avoiding Unthinkable Results by a Bait and Switch*

Some originalists have argued that the most cherished nonoriginalist results are in fact consistent with the original understanding. They typically make one of two kinds of arguments. We have already encountered the first kind of argument in efforts by the likes of McConnell to show that the framers and ratifiers in fact expected a cherished nonoriginalist result, in his case *Brown*. However, as noted above, given the reformist goals of originalism, it would be surprising and highly suspicious if this methodology reproduced just those results that could not be sacrificed without dooming the whole originalist project.

We have also encountered the second kind of argument, in which originalists abandon expected-application originalism in favor of original semantic meaning, which they then define at a sufficiently general level to encompass the cherished result, notwithstanding its contradiction of the original expected application. The best known example of this gambit is Judge Bork's "confirmation conversion" with respect to *Brown* during the hearings on his ultimately unsuccessful Supreme Court nomination. As Professor Ronald Dworkin would later observe, in order to explain how he could support *Brown* but still maintain fealty to originalism in other contexts, Judge Bork was reduced to arguing in favor of original semantic meaning at a high level of generality, but highly selectively and without any principled justification.<sup>102</sup>

To be clear, when Dworkin, Strauss, Balkin, or other living constitutionalists level this charge against originalists, they are not objecting to the move to a high level of generality per se. As noted above,<sup>103</sup> they think that constitutional provisions that use the language of standards or principles rather than rules *should* be read at a relatively high level of generality. The charge against Bork and others is that they are trying to have their cake and eat it too. First, they accept original semantic meaning as a matter of theory; then, they show how original semantic meaning is consistent with our most cherished results, especially including *Brown*; but finally, they turn around and revert to expected-application originalism to reject other, less iconic, liberal results.

This three-step dance has played out repeatedly with respect to *Brown*, but variations on it can be used more broadly. Consider sex discrimination. In the wake of McConnell's efforts to demonstrate that *Brown* falls within the narrow original understanding of the Fourteenth Amendment, Professor Ward Farnsworth noted that the move,

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<sup>102</sup> See RONALD DWORKIN, FREEDOM'S LAW 294–301 (1996) (criticizing BORK, *supra* note 14).

<sup>103</sup> See *supra* section I.B, pp. 2023–26.

even if successful, redeems originalism only if it can be repeated for other cherished results.<sup>104</sup> Yet it cannot be repeated for sex discrimination, Farnsworth observed. It would be unthinkable for the Constitution to permit most forms of official sex discrimination, but, as Farnsworth shows, the framers and ratifiers of the Fourteenth Amendment overwhelmingly did not expect that the Equal Protection Clause would bar most forms of sex discrimination.<sup>105</sup>

In response to Farnsworth — and to arguments to similar effect by Professor Reva Siegel<sup>106</sup> and by me<sup>107</sup> — Steven Calabresi and Julia Rickert recently wrote an article that employs steps one and two of the three-step bait and switch just described.<sup>108</sup> Defining the original meaning of the Equal Protection Clause at a high level of generality, they conclude that the original public meaning of that clause was a prohibition on caste.<sup>109</sup> They then explain that even though the framers and ratifiers in 1868 would not have understood sex discrimination as caste-like, today we properly see it that way.<sup>110</sup> Thus, they say, modern sex discrimination doctrine is correct, even though the Court arrived at it using nonoriginalist methodology.<sup>111</sup> Because Calabresi and Rickert published their article in the *Texas Law Review*, I shall call these two moves the “Texas two-step.”

Most living constitutionalists would not seriously object to the Texas two-step. Hence, despite the fact that Calabresi and Rickert suggest that their view contradicts my own, I believe that their article actually vindicates my view: we agree that the sexist original expected application of the Fourteenth Amendment should not prevent modern interpreters from reading it as forbidding most forms of official sex discrimination.

The question is what comes next. Do laws forbidding abortion violate the anticaste principle? In another article applying his anticaste reading of the Equal Protection Clause, Calabresi and a different co-author, Livia Fine, say they do not.<sup>112</sup> Why not? In answering that question, Calabresi and Fine adopt a variant on the third step in the

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<sup>104</sup> See Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1294–95 (2000).

<sup>105</sup> See *id.* at 1233–89.

<sup>106</sup> See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

<sup>107</sup> See Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002).

<sup>108</sup> See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

<sup>109</sup> See *id.* at 6–7.

<sup>110</sup> See *id.* at 7–10.

<sup>111</sup> See *id.* at 15.

<sup>112</sup> See Calabresi & Fine, *supra* note 52, at 695–98 (disagreeing with Balkin’s argument that some laws restricting abortion relegate women to an inferior caste).

three-step dance: they employ a methodology that is inadequate to reproduce all of the landmark opinions that they must retain to avoid discrediting originalism but that permits them to reject the abortion right. Calabresi and Fine rest their view that abortion prohibitions do not violate the anticaste principle on the following factual claim: “there has never either in 1787 or in 1868 or in 1973 or today been an Article V consensus of three-quarters of the states that laws against abortion send” a “social message that women are inferior.”<sup>113</sup> The criterion of “Article V consensus” is arguably consistent with what Calabresi and Rickert say in justifying the modern sex discrimination cases because they point to the ratification of the Nineteenth Amendment as satisfying it.<sup>114</sup> But that criterion is manifestly incompatible with the method that originalists must use to justify *Brown* itself. Surely there was no Article V consensus in 1868 or 1954 that Jim Crow sent a message that African Americans are inferior. To be sure, there is such a consensus today, but that still leaves Calabresi and Rickert endorsing a methodology under which *Brown* was wrong when decided.<sup>115</sup>

More fundamentally, if one accepts that the Constitution sometimes enacts broad principles, why should the application of those broad principles ever depend on there being a consensus (whether one that satisfies Article V or not) that some particular practice falls within or outside of that principle? Balkin’s argument against misunderstanding supermajoritarianism bears repetition here: The framers and ratifiers used general language precisely when they could not reach consensus on the application of that general language to concrete cases they had occasion to consider.<sup>116</sup> If we can nonetheless apply the Constitution’s abstract language to such concrete cases, we can also apply it to applications that the framers and ratifiers did not consider but that are salient to us, such as abortion.

That said, I do not mean to pick on Calabresi and his coauthors. To their credit, they accept much of the disciplining power of the Texas two-step by employing mostly the same sorts of arguments when evaluating constitutional claims they must vindicate as they do when evaluating constitutional claims they want to reject. Thus, most of Calabresi and Fine’s arguments are refreshingly free of assertions to the effect that abortion cannot be protected now because it was not protected in 1868. Instead, Calabresi and Fine offer straightforward normative reasons against recognizing an abortion right. For instance,

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<sup>113</sup> *Id.* at 697.

<sup>114</sup> See Calabresi & Rickert, *supra* note 108, at 9 (“The change in our understanding of women’s abilities has been constitutionalized by a monumental Article V amendment — the Nineteenth Amendment, which in 1920 gave women the right to vote.”).

<sup>115</sup> Moreover, *Brown* itself may have played a central role in creating today’s consensus.

<sup>116</sup> See *supra* p. 2024.

they contend that laws banning abortion do not compel women to become mothers because women can avoid that fate either by not having sex or by being very careful to use reliable means of birth control.<sup>117</sup> One can agree or disagree, but at least one is engaged in an argument about the real issues.

Unfortunately, scholars and, more importantly, judges are not always so constrained by the logic of their own arguments. If originalists consistently employed the methods they use to salvage sacrosanct landmark decisions when deciding new cases, then they would all be Balkinized originalists, which is to say essentially living constitutionalists. But they do not.<sup>118</sup> Accordingly, originalists need some other way to avoid the conclusion that their approach leads to unthinkable results.

### *E. Avoiding Unthinkable Results Through Stare Decisis*

Originalists who want to avoid unthinkable results sometimes rely on stare decisis as a supplement to their efforts to rationalize modern case law on originalist grounds. Both Balkin and Strauss note Justice Scalia's explanation that an originalist judge finding himself on a court with a substantial body of nonoriginalist case law cannot, as a practical matter, simply overrule that case law. As Justice Scalia has repeatedly stated, only "a nut" would inflict such a massive disruption on our law and thus the country.<sup>119</sup>

This disclaimer is, as Strauss acknowledges, "disarming."<sup>120</sup> Strauss nonetheless criticizes selective originalism on the ground that it is unprincipled. "What principle," he asks, "determines when it is right to abandon originalism?"<sup>121</sup> Strauss thus echoes a concern previously voiced by Professor Henry Monaghan, who observed that adherence to nonoriginalist precedents may be justifiable in instrumental terms, but if so, then one has opened the door for all sorts of other instrumental arguments for nonoriginalist results.<sup>122</sup>

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<sup>117</sup> See Calabresi & Fine, *supra* note 52, at 696.

<sup>118</sup> See *supra* pp. 2021–22.

<sup>119</sup> Antonin Scalia, Wriston Lecture at the Manhattan Institute for Policy Research: On Interpreting the Constitution (Nov. 17, 1997) (transcript available at <http://www.manhattan-institute.org/html/wl1997.htm>) ("I am an originalist. I am a textualist. I am not a nut.")

<sup>120</sup> STRAUSS, *supra* note 3, at 17.

<sup>121</sup> *Id.*

<sup>122</sup> See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 772 (1988) ("[T]o accord status to stare decisis requires an acknowledgement that originalism plays a purely instrumental role . . . . But if the Court legitimately may prevent inquiry into original understanding in order to *maintain* transformative change, does this concession also license prospective disregard of original understanding when the Court is satisfied that change is necessary to maintain systemic equilibrium?").

In principle, these questions may not be so difficult to answer. Some scholars have argued that adherence to nonoriginalist decisions does not betray the original understanding because stare decisis itself was part of the original meaning of “the judicial power” that Article III confers on federal courts.<sup>123</sup> In this view, so long as modern stare decisis doctrine more or less conforms to the original understanding of stare decisis, there is no contradiction.

To similar effect, Justice Scalia characterizes stare decisis as a “pragmatic exception” to whatever primary interpretive theory one thinks best, whether it is one or another flavor of originalism or some other approach.<sup>124</sup> He is correct that *some* other theories of constitutional interpretation must also make their peace with precedents that, by the lights of those theories, are mistaken but essential to the constitutional order. For example, Professor John Hart Ely’s representation-reinforcing theory of constitutional law<sup>125</sup> has difficulty justifying *Griswold v. Connecticut*<sup>126</sup> and other “privacy” decisions, but cannot simply discard them wholesale. Likewise, Thayer’s counsel of deference to political actors except in cases of clear constitutional violation<sup>127</sup> cannot directly account for much of modern constitutional doctrine interpreting the Bill of Rights and the Fourteenth Amendment. Stare decisis indeed operates as a supplement to these theories, as it does for originalism.

However, not all constitutional theories need to rely on stare decisis as an *exception* to justify otherwise incorrect results. Stare decisis is “baked in” to Strauss’s common law constitutionalism because Strauss puts precedent at the very heart of his theory of interpretation. Meanwhile, although Balkin rejects any strong attachment to wrongly decided constitutional precedents, he also builds into his living originalism the means of avoiding unthinkable results by placing political and social movements — which are the real drivers of the evolution of constitutional law over time — at the heart of his account. Thus, he also has no need to characterize stare decisis as a pragmatic exception to his view.

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<sup>123</sup> See William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 18 (1994) (“It is clear that the common law method, as adopted by the Framers’ generation and rooted in Article III, emphasized Blackstonian precedent in all cases, not primarily for commercial predictability, but as the principal bulwark against usurpation of the rule of law by judicial tyranny.”); see also Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 662–66 (1999); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 82–83, 90–92 (2000).

<sup>124</sup> Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION, *supra* note 11, at 129, 140 (emphasis omitted).

<sup>125</sup> See JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

<sup>126</sup> 381 U.S. 479 (1965).

<sup>127</sup> See *supra* p. 2030.

By contrast, non-Balkanized originalists do need the awkward addition of *stare decisis*. Worse, they cannot simply bite the bullet once, accept the nonoriginalist precedents that have accumulated to date, and start anew with originalism, because they must constantly play catch-up with new, nonoriginalist results. As Balkin observes:

[E]ach time conservative originalists add a new “mistake” to the list, each time they adjust themselves to the evolving constitutional regime, they confront a world in which more and more of the Constitution-in-practice is in irremediable error and less and less can be made consistent with their theories of original meaning. This is a loser’s game, a war of constitutional attrition in which originalists must continuously concede ground to the constitution-making power of the public that originalists fail to recognize as a source of democratic legitimacy.<sup>128</sup>

To be sure, originalists could bite a different bullet and accept the unthinkable results to which their unadulterated views lead, as Justice Thomas often does.<sup>129</sup> But most originalists, to their credit, turn “faint-hearted” when push comes to shove.<sup>130</sup> The core problem for faint-hearted originalists, which is to say nearly all originalists,<sup>131</sup> is knowing when push comes to shove. An inconsistent originalism that accommodates change sometimes but not always thereby sacrifices originalism’s claim to constrain judges and its claim to be the exclusive legitimate source of interpretive guidance. Without these qualities, one may as well simply jettison originalism in favor of an approach that builds accommodation to change into the theory’s core.

## II. A NONORIGINALIST ACCOUNT OF LEGITIMACY AND ITS INTERPRETIVE IMPLICATIONS

If we reject originalism, we must find some substitute for originalism’s theory of legitimacy. Strauss rejects the standard originalist account of legitimacy because of the dead hand problem.<sup>132</sup> But what is the alternative? And if we need not be bound by the concrete expected applications of long-dead framers and ratifiers, why should we

<sup>128</sup> BALKIN, *supra* note 2, at 118–19.

<sup>129</sup> See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in the judgment) (arguing that the Establishment Clause was originally understood as a federalism provision and therefore should not be incorporated against the states); *United States v. Lopez*, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring) (noting that he “might be willing to return to the original understanding” of the Commerce Clause).

<sup>130</sup> Scalia, *supra* note 14, at 864 (stating, with reference to a hypothetical Eighth Amendment challenge to flogging, that “in a crunch I may prove a faint-hearted originalist”).

<sup>131</sup> But see Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13–16 (2006) (arguing that Justice Scalia’s faint-heartedness renders him not an originalist at all, leaving Justice Thomas as the Supreme Court’s only real originalist).

<sup>132</sup> See STRAUSS, *supra* note 3, at 100 (“What possible justification can there be for allowing the dead hand of the past . . . to govern us today?”).

be bound by the text they wrote? Balkin puts the point sharply. He notes that “because of the relative precision of their language,” the “hardwired” (that is, rule-like) features of the Constitution “represent a far more powerful dead hand of the past than other parts of the Constitution.”<sup>133</sup> Thus, he concludes, the dead hand objection “proves too much.”<sup>134</sup> It obliterates not only expected-application originalism but also any intergenerational project of lawmaking.<sup>135</sup>

Balkin is right, but only if one thinks that the Constitution’s legitimacy must be grounded in an original act of lawmaking. Yet living constitutionalists typically do not legitimate the Constitution in that way.

Where might a living constitutionalist look for nonoriginalist means of legitimating the Constitution? Scholars have offered a number of non-mutually exclusive answers. Professor Lawrence Sager has argued that the Constitution’s moral legitimacy derives from the fact that it can and should be interpreted to serve the ends of justice.<sup>136</sup> Strauss, following Burke, thinks that the living Constitution — understood as the body of precedents and practices that have evolved incrementally over time — deserves our respect because precedents and practices that have been built in this way are, ipso facto, likely to serve society’s goals well. Professor Richard Fallon has pointed to one straightforward legitimating theory that builds on the work of H.L.A. Hart to argue “that the Constitution owes its status as supreme law to contemporary practices of acceptance and rules of recognition.”<sup>137</sup> We can infer from the absence of serious efforts to drastically change the Constitution — indeed, we can infer from the widespread reverence for the Constitution<sup>138</sup> — that We the People today are reasonably happy with it.

But we still might want to know why the People are happy with the hardwired provisions, especially in light of the fact that some of them do some serious damage to our democracy. For example, equal representation in the Senate — which is about as hardwired as a provision can be — is unjustifiable in principle and leads to highly sub-

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<sup>133</sup> BALKIN, *supra* note 2, at 42 (internal quotation marks omitted).

<sup>134</sup> *Id.*

<sup>135</sup> *See id.* (“Taken to its logical conclusion, the dead-hand objection is an argument against having any constitutions (or indeed, any laws) that last more than a generation.”).

<sup>136</sup> *See* SAGER, *supra* note 73, at 5–10, 70–83 (offering a “justice-seeking” account of the judicial role).

<sup>137</sup> Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1117 (2008).

<sup>138</sup> For an excellent history of popular attitudes toward the Constitution, see MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* (1986).

optimal policies, like agriculture subsidies.<sup>139</sup> Strauss recognizes the need for a reason why the People *should* accept all of the hardwired provisions along with the open-ended ones. He asks rhetorically: “Why don’t we just forget about the requirement that the president be a natural-born citizen . . . since that requirement seems indefensible?”<sup>140</sup> He answers that acceptance of the whole Constitution permits the Constitution to serve a vital coordinating function. It provides common ground with respect to those matters that are more important to settle than to settle correctly<sup>141</sup> — like the length of Senators’ terms — while acceptance of the open-ended provisions provides a shared vocabulary for arguing about those matters that will never be ultimately settled — like the meaning and scope of equality and liberty.<sup>142</sup>

Strauss’s theory of legitimacy has implications for interpretation. From his focal point account, Strauss derives the “possibly surprising corollary . . . that the words of the Constitution should [usually] be given their ordinary, current meaning — even in preference to the meaning the framers understood.”<sup>143</sup> After all, modern readers will focus on what they understand the constitutional text to mean rather than the potentially “obscure and controversial” original meaning.<sup>144</sup> When the People view the Constitution as a focal point, they will focus on what it means to them, not what it may have meant to the enacting generation. In short, for Strauss, the move from grounding legitimacy in the original act of ratification to grounding legitimacy in current acceptance as a focal point entails a corresponding move from original semantic meaning to contemporary meaning.

Balkin rejects the focal-point theory for a number of reasons,<sup>145</sup> including, most fundamentally, its apparent arbitrariness. Balkin writes:

The common-law/focal-point approach offers no obvious connection between the law Americans live under and popular sovereignty. The text is

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<sup>139</sup> See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 54–55 (2006) (explaining the link between the rule of two senators per state and agriculture subsidies). Despite the seemingly hopeful parenthetical in the subtitle of Professor Levinson’s book, nothing can be done about the Senate without satisfying an impossibly high bar. See U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

<sup>140</sup> STRAUSS, *supra* note 3, at 105.

<sup>141</sup> *Id.* at 104–06.

<sup>142</sup> See *id.* at 112 (praising the framers’ genius in using general language “where generality is valuable”). As Balkin notes, Strauss does not much emphasize the channeling function of general constitutional language, but that function is consistent with Strauss’s focal-point view. See BALKIN, *supra* note 2, at 51 (“[A]lthough Strauss does not emphasize this, the presence of standards and principles in the text channels public understanding and discussion about the rights of citizens and the powers of government.”).

<sup>143</sup> STRAUSS, *supra* note 3, at 106.

<sup>144</sup> *Id.*

<sup>145</sup> See BALKIN, *supra* note 2, at 51–54.

not binding because we (or our political predecessors) adopted it as law; it is binding because it currently and conveniently settles an issue that might otherwise disrupt politics. Thus, the text could be any text produced by anyone, as long as Americans find it useful to settle matters. It could be the French constitution or the Turkish constitution.<sup>146</sup>

The parentheses contain the crucial phrase in the foregoing passage. Balkin appears to accept the standard originalist account of legitimacy. Adoption of the text by our “political predecessors” validates the Constitution for us. But why?

Balkin rightly rejects the standard originalist view that the acts of ratification in 1789, 1791, 1868, and so forth *in themselves* made the Constitution law for us now. Every generation has the power and right to decide whether to treat the Constitution as binding, he acknowledges. We could tear up the Constitution and start over or “take parts of the existing Constitution, discard the rest, and build a new Constitution on top of it.”<sup>147</sup> His argument is conditional: *if* we decide instead that we want to be faithful to the Constitution, then we must view ourselves as bound by the lawmaking acts of our predecessors.<sup>148</sup> Then, building on the work of his colleague Professor Scott Shapiro, who has helpfully elucidated law as an exercise in cooperative planning,<sup>149</sup> Balkin argues that fidelity to a written constitution necessarily entails original semantic meaning rather than contemporary meaning. “If we do not attempt to preserve legal meaning over time,” he asserts, “then we will not be following the written Constitution as our plan but instead will be following a different plan.”<sup>150</sup>

Balkin is not alone in thinking that fidelity to the Constitution entails fidelity to original semantic meaning. He is not even the first prominent proponent of the living Constitution to embrace original semantic meaning on this ground. For example, in a well-known essay commenting on Justice Scalia’s most extensive academic elaboration of his own views, Dworkin distinguished between “‘semantic’ originalism . . . and ‘expectation’ originalism.”<sup>151</sup> In criticizing Justice Scalia for relying on evidence relevant to expected-application originalism

<sup>146</sup> *Id.* at 54.

<sup>147</sup> *Id.* at 38.

<sup>148</sup> *See id.* (noting that his “argument . . . assumes that Americans want to be faithful to the written Constitution as law and . . . want to continue to accept it as our framework for governance”).

<sup>149</sup> *See generally* SCOTT J. SHAPIRO, LEGALITY (2011).

<sup>150</sup> BALKIN, *supra* note 2, at 36; *see also id.* at 46 (asserting that “[f]idelity to a written constitution requires at the most basic level that we see the constitutional text as our plan for political conduct,” and that to figure out what plan-following entails, “we ask how language was generally and publicly used when the text was adopted”).

<sup>151</sup> Dworkin, *supra* note 11, at 119.

while ostensibly embracing semantic originalism,<sup>152</sup> Dworkin made clear that he too embraced semantic originalism, which he had earlier called “innocuous.”<sup>153</sup> Indeed, anticipating Balkin, Dworkin suggested that semantic originalism is simply inherent in the process of interpretation. “Any reader of anything must attend to semantic intention,” he explained, “because the same sounds or even words can be used with the intention of saying different things.”<sup>154</sup> Balkin himself traces the ostensible obligation to adhere to original semantic meaning back to James Madison.<sup>155</sup>

Despite this distinguished company, Balkin is wrong. Fidelity to the Constitution does not always require adherence to original semantic meaning rather than contemporary meaning.

Consider an only partly hypothetical example. In a statement accompanying his signing of the Detainee Treatment Act of 2005,<sup>156</sup> President George W. Bush claimed that Congress could not limit his power, as Commander in Chief, to protect the American people from future terrorist attacks.<sup>157</sup> By his own later account, such protection included the use of what his Administration euphemistically called “enhanced interrogation” methods, including waterboarding.<sup>158</sup> Now suppose that peace activists and other concerned Americans had spearheaded political opposition to President Bush’s stance, claiming, among other things, that his position violated the allocation to Congress, in Article I, Section 8, of the power to “make Rules concerning Captures on Land and Water.”<sup>159</sup> Enemy combatants *captured* abroad, the activists might have argued, were entitled by this language to be treated in accordance with the rules laid down by Congress. Would the peace activists have been entitled to make that argument? Semantic originalism probably rules this argument out of bounds because in the eighteenth century, the word “captures” used in close proximity to the Constitution’s authorization for “Letters of Marque and

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<sup>152</sup> See *id.* at 120–22 (discussing Justice Scalia’s argument regarding the meaning of the Eighth Amendment).

<sup>153</sup> DWORKIN, *supra* note 102, at 291.

<sup>154</sup> Dworkin, *supra* note 11, at 117.

<sup>155</sup> See BALKIN, *supra* note 2, at 36–37 & 347 n.3 (quoting Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON 191–92 (Gaillard Hunt ed., 1910)).

<sup>156</sup> Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified as amended at 42 U.S.C. §§ 2000dd, 2000dd-1 (2006 & Supp. IV 2011)).

<sup>157</sup> See Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005).

<sup>158</sup> See GEORGE W. BUSH, DECISION POINTS, 169–71 (2010) (discussing his decision to authorize the use of “enhanced interrogation” methods, including waterboarding).

<sup>159</sup> U.S. CONST. art. I, § 8, cl. 11.

Reprisal”<sup>160</sup> would have been understood to refer to the capture of vessels as prizes, not to the broader notion of captures of anything or anybody, including enemy combatants.<sup>161</sup>

And yet, viewed in broader perspective, it should be clear that my hypothetical peace activists would have been acting in exactly the manner that Balkin says that people act when they keep faith with the Constitution. They read the Constitution as an intergenerational charter that is flawed but capable of “redemption.”<sup>162</sup>

To be sure, Balkin *contends* that adopting a contemporary reading in place of original semantic meaning is like abandoning part of the Constitution — that to do so is to “jettison . . . parts of” the Constitution.<sup>163</sup> “That is not redemption; it is surrender,”<sup>164</sup> he declares. Again, so Balkin says, but why? Surely the peace activists in my hypothetical example *believe* they are keeping faith with the Constitution. Reading the Constitution as an intergenerational document, they attribute to its words their contemporary meaning. Hence, they think that “captures” includes captures of enemy combatants. Moreover, the peace activists have an attractive account of this reading that ties it to congressional checks on the President’s power to make war. Who is Balkin to deny them their reading?

Perhaps the foregoing example is not so damning to Balkin’s position. Perhaps “captures” was not quite a term of art in 1789.<sup>165</sup> But Balkin cannot defeat every such example in this way without rendering his rejection of contemporary meaning an empty gesture.

To his credit, Balkin places political and social movements at the center of his account of the living Constitution. Yet people who are active in such movements often will not even have a very good idea of the words the Constitution uses;<sup>166</sup> much less will they be careful to

<sup>160</sup> *Id.*

<sup>161</sup> See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201–02 (2004) (“Congress’s power ‘to make Rules concerning Captures on Land or Water’ applies only to captured property.” *Id.* at 1202.); see also 1 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1797) (defining “capture” as “the act or practice of taking *any thing*; a prize”) (emphasis added); J. Gregory Sidak, *The Quasi War Cases*, 28 HARV. J.L. & PUB. POL’Y 465, 468 (2005); Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1683, 1728–33 (2009).

<sup>162</sup> BALKIN, *supra* note 2, at 75.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Balkin states that terms of art must be considered part of original semantic meaning. See *id.* at 45 (“[W]e want to know if the language uses generally recognized terms of art, and what those terms of art meant at the time.”).

<sup>166</sup> See Michael C. Dorf, *Whose Constitution Is It Anyway? What Americans Don’t Know About Our Constitution — and Why It Matters*, FINDLAW (May 29, 2002), <http://writ.news.findlaw.com/dorf/20020529.html>; *Americans’ Knowledge of the U.S. Constitution: A Columbia Law Survey*, COLUM. L. SCH. (May 2002), [http://www2.law.columbia.edu/news/surveys/survey\\_constitution/introduction.shtml](http://www2.law.columbia.edu/news/surveys/survey_constitution/introduction.shtml) (finding, in a random telephone survey of approx-

press only those claims that fit within the original semantic meaning of those words in case the meaning has changed. Often, such movements use the Constitution as no more than a rallying cry.

Consider another example. Balkin correctly notes how the Supreme Court's decision in *Heller* adopted the rhetoric of originalism but closely tracked arguments developed by the political movement for gun rights over the past two decades.<sup>167</sup> The intellectual leaders of that movement have argued, among other things, that the word "militia" in the Second Amendment originally referred to the "unorganized militia" and thus to the People in general; therefore, they say, the provision's introductory clause does not put the operative clause in a military service context.<sup>168</sup> But suppose that historical research (somehow) had proved conclusively that this claim and the other claims of those who favor reading the Second Amendment to protect an individual right to possess firearms were wrong — that the original semantic meaning of the Second Amendment was simply to guarantee that the state militias would not be abolished. Would that prove that the gun rights movement was not *really* about the Constitution? Is it likely that, if confronted with that evidence, those active in the movement would have abandoned their claim of constitutional right? Would that have been a fair demand to make of them or of any other reform movement?

One could go on and on imagining cases in which contemporary meaning diverges from original semantic meaning.<sup>169</sup> Are we to believe that social and political movements that achieve changes in our constitutional understanding always, but only by sheer coincidence, prefer original semantic meaning over contemporary meaning? Such a preference would have to be coincidental because even when the members and leaders of these movements sincerely believe they are redeeming the Constitution, they are almost certainly ignorant of original semantic meaning. Caring mostly about their substantive policy

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imately 1,000 Americans, that thirty-five percent believe the U.S. Constitution contains the statement "[f]rom each according to his ability, to each according to his needs," with thirty-four percent responding "don't know").

<sup>167</sup> See BALKIN, *supra* note 2, at 322–24. As Balkin acknowledges, his argument on this point closely follows Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008). Balkin, *supra* note 2, at 453 n.21.

<sup>168</sup> See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1166 (1991) ("In 1789, when used without any qualifying adjective, 'the militia' referred to all Citizens capable of bearing arms."); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1211–12 (1996); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 472–74 (1995).

<sup>169</sup> See Berman, *supra* note 47, at 392–93 (offering free exercise, freedom of speech, privilege against self-incrimination, and equal protection as examples in which one could plausibly think that modern case law, in response to social movements, has adopted principles inconsistent with the principle entailed by original semantic meaning).

aims, they will have strong reasons to invoke the Constitution opportunistically.

Responding to a version of the foregoing objection previously raised by Berman,<sup>170</sup> Balkin writes in *Living Originalism* that “political and social movements in the United States have regularly drawn on the constitutional text and its underlying principles to justify social and legal change.”<sup>171</sup> But none of the sources Balkin cites in support of that proposition shows that political and social movements have organized their efforts specifically around original semantic meaning *rather than* contemporary meaning. And again, why would they? What possible reason could the leaders of a social or political movement have for redirecting the energy of their rank and file away from constitutional claims that serve their interests as they see them and toward original semantic meaning, when the contemporary meaning of the text could encompass their true goals?

Balkin has a possible escape from this line of criticism. Perhaps the contemporary meanings of the constitutional clauses that take the form of standards and principles do not substantially differ from the original semantic meanings of those clauses. If so, then whatever differences we might note between various principles would be relegated to the domain of constitutional construction rather than meaning. Balkin could concede that the Free Exercise Clause was originally understood to enact “the principle that all religious believers ought to be entitled to worship as they choose,” while we now understand it to embody “the kindred — but distinct — moral principle that all persons, believers, agnostics and atheists alike, should be entitled to worship, or not, as they choose.”<sup>172</sup> However, Balkin might say that this concession only shows that our current construction differs from the original expected application. The original semantic meaning of the First Amendment may have embraced all along a concept of free exercise that was sufficiently vague to include both the original conception and the modern one.<sup>173</sup>

In order for this gambit to work, however, it must work every time. After all, the claim of semantic originalism is not that readers should *usually* prefer original meaning to contemporary meaning; semantic originalism demands that readers *always* prefer original meaning because, in their view, original meaning simply *is* meaning. But if origi-

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<sup>170</sup> See *id.* at 394 (“[S]ocial movements[ ]and political parties do more than argue about ‘how best to *apply*’ originally intended constitutional principles in contemporary circumstances. They argue as well about what the constitutional principles *are* . . . .”) (footnote omitted).

<sup>171</sup> BALKIN, *supra* note 2, at 83–84.

<sup>172</sup> Berman, *supra* note 47, at 392.

<sup>173</sup> See BALKIN, *supra* note 2, at 267 (characterizing the contemporary understanding of the Free Exercise Clause as involving only a departure from original expectations).

nal semantic meaning is always sufficiently vague to include contemporary meaning, then Balkin's version of originalism is empty. He will have vindicated the worry that he only joined the originalist team to destroy it from within.

Meanwhile, advocates of contemporary meaning bear a substantially lighter burden. To embrace contemporary meaning is not to insist that readers should always prefer contemporary meaning; it is only to allow that contemporary meaning can be a candidate for the best interpretation of a constitutional provision. If linguistic context or other considerations suggest that original meaning is preferable, then the un-Balkinized living constitutionalist can prefer original meaning — not because original meaning simply is meaning, but because in some particular example original meaning makes more sense of the text, all things considered, than contemporary meaning does.

Balkin himself provides two oddball examples that illustrate the point. He rejects the possibility that a modern interpreter might read the phrases “domestic Violence” and “Republican Form of Government” in the Guarantee Clause<sup>174</sup> to mean, respectively, intra-familial violence and government by the GOP, meanings that arose after 1789.<sup>175</sup> But one need not be a semantic originalist to reach Balkin's conclusions. The new meanings of “domestic Violence” and “Republican” have supplemented, rather than supplanted, their original meanings. Any competent reader of modern English will understand from the context that the Guarantee Clause uses “domestic Violence” to mean civil conflict and “Republican Form of Government” to mean representative government. We do not need semantic originalism to constrain contemporary readers from adopting wacky interpretations of the text. Attention to context and common sense will do just fine.

### III. MUST THE LIVING CONSTITUTION BE A BURKEAN CONSTITUTION?

Neither Strauss nor Balkin acknowledges that his respective version of the living Constitution has a political valence. For each, living constitutionalism is a methodology that may be employed to reach a variety of results. Yet any reasonably well-informed observer knows that the term “living Constitution” encodes liberal sympathies, just as originalism encodes conservative ones — and not just for legal elites, but for the general public as well.<sup>176</sup> Politically conservative living constitutionalism and politically liberal originalism are conceptual pos-

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<sup>174</sup> U.S. CONST. art. IV, § 4.

<sup>175</sup> See BALKIN, *supra* note 2, at 37.

<sup>176</sup> See Greene et al., *supra* note 61, at 378–85 (observing the correlation of support for originalism with views typically associated with conservatism).

sibilities that have been realized from time to time,<sup>177</sup> but as Balkin explains, originalism arose as a movement on the political right that aimed to counter what its proponents saw as liberal living constitutionalism. Those pairings remain valid today. Indeed, Balkin's left/liberal ideological sympathies explain why even his nominal embrace of originalism might be considered provocative, and why the title *Living Originalism* sounds oxymoronic.

Nor is the current association of originalism with conservatism and the living Constitution with progressivism a mere historical accident. Originalism is backward-looking and thus, other things being equal, more likely to yield results that either preserve the status quo or roll back the clock to an earlier status quo. By contrast, living constitutionalism should be inherently more progressive, insofar as one assumes that over the long run societies make moral progress.

Perhaps that assumption is wrong. As noted above, Justice Scalia has argued that "a society that adopts a bill of rights is skeptical" that evolution "mark[s] progress . . . as opposed to rot."<sup>178</sup> I have argued elsewhere that as a historical claim about the reasons why the People of the United States adopted the original Bill of Rights and subsequent rights-protective amendments, this view is largely false,<sup>179</sup> but let us put aside the merits of the disagreement to note its ideological dimension. People like Strauss, Balkin, and myself — who believe that human history is, if not exactly a steady march of moral progress, at least a process in which, over the long run, society's norms change for the better — are, more or less by definition, progressives.<sup>180</sup> Meanwhile, skepticism about the likelihood of moral improvement or a belief that social change will often mean the foolish casting aside of time-tested traditions is, likewise more or less by definition, conservative.

Given these deep connections between, on the one hand, originalism and conservatism, and, on the other hand, progressivism and living constitutionalism, it is arresting that both Strauss's and Balkin's versions of the living Constitution rest on Burkean conservatism.

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<sup>177</sup> Following Siegel's argument, Balkin suggests that the movement to read the Second Amendment as protecting an individual right was an example of politically conservative living constitutionalism, albeit in originalist garb. See *supra* note 167 and accompanying text. Strauss cites Justice Hugo Black as his generation's leading liberal originalist. See STRAUSS, *supra* note 3, at 29.

<sup>178</sup> Scalia, *supra* note 45, at 40–41 (internal quotation marks omitted); see *supra* p. 2024.

<sup>179</sup> See Dorf, *supra* note 70, at 1644–51 (arguing that the Bill of Rights, the Fourteenth Amendment, and the Nineteenth Amendment were adopted to change the legal status quo as opposed to entrenching that status quo against future backsliding).

<sup>180</sup> For evidence that we are right, see STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE* (2011) (tracing the decline of human violence over time).

Burkean conservatism does not entail originalism,<sup>181</sup> but it is conservatism nonetheless.<sup>182</sup> This Part elucidates and laments the Burkean underpinnings of both Strauss's and Balkin's projects.

### A. *Burkean Democracy*

Despite their other differences, Strauss and Balkin both see the Constitution as a vehicle for achieving democracy tempered by institutional restraints that inhibit rapid change. Each, in other words, relies on a conception of Burkean democracy. Strauss's reliance on Burke is explicit, while his focus on judicial decisionmaking obscures the democratic element in his account. Conversely, Balkin's project is proudly and self-consciously an exercise in popular constitutionalism, thus downplaying the Burkean suspicion of the passions of the mob.

1. *The Role of Democracy in Strauss's Living Constitution.* — In *The Living Constitution*, Strauss aims to establish the superiority of the common law method of constitutional interpretation over originalism by showing how the beloved modern case law of free speech and the now-canonical decision in *Brown v. Board* arose through the common law method.<sup>183</sup> One can grant the examples without conceding the general point. Strauss has cherry-picked two now widely accepted doctrines. In order for these examples to establish the more general point, Strauss would need to show that the common law method cannot lead to dreadful results or, if it can, that it is more likely to be self-correcting than other methods of interpretation.<sup>184</sup>

Strauss does not undertake this further project, and there are reasons to doubt that he could do so successfully. Consider *Citizens United v. FEC*,<sup>185</sup> a case that many commentators regard as dreadful.<sup>186</sup> The decision invalidated the limitations that the Bipartisan

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<sup>181</sup> See Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 509–10 (1996) (offering Burkean conventionalism as a conservative alternative to originalism).

<sup>182</sup> Professor Carl Bogus has argued that “Burke was a liberal — at least by today's standards,” Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 387 (2007), and that most of the received wisdom about Burke, including his supposed preference for the status quo, is mistaken, see *id.* at 391 (“Burke did not cling to the status quo. He was, in fact, a reformer. At times, he advocated radical reform, although when doing so he tried his best to predict and ameliorate the deleterious byproducts of changes he advocated.” (footnote omitted)). Here I invoke the conventional understanding of Burke, whether or not that understanding does justice to Burke's actual views.

<sup>183</sup> See STRAUSS, *supra* note 3, at 51–76 (free speech); *id.* at 77–97 (*Brown*).

<sup>184</sup> One can also object that the doctrines Strauss praises did not in fact arise through common law gradualism but instead were products of judicial creativity. See Matthew Steilen, *Reason, the Common Law, and the Living Constitution*, 17 LEGAL THEORY 279 (2011) (reviewing STRAUSS, *supra* note 3).

<sup>185</sup> 130 S. Ct. 876 (2010).

<sup>186</sup> See, e.g., Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 620–21 (2011) (describing polling data that reflect the unpopularity of the decision and suggesting that public opinion might thus temper the Court's willingness to apply its “extreme” philosophy consistently); Ronald Dworkin, *The Decision that Threatens Democracy*, N.Y. REV.

Campaign Reform Act of 2002<sup>187</sup> placed on speech funded by independent expenditures from the general treasuries of corporations and unions.<sup>188</sup> Critics focused particular attention on two premises of the ruling: that the First Amendment protects corporate speech<sup>189</sup> and that restrictions on the spending of money to fund speech are tantamount to restrictions on speech.<sup>190</sup> Yet both of those premises resulted from processes of common law evolution quite similar to the processes that produced broader free speech doctrine and *Brown*.<sup>191</sup> Indeed, the money-is-speech premise is itself a proper subset of the same First Amendment doctrine that Strauss himself lionizes.

Likewise, *Bush v. Gore*<sup>192</sup> built on decisions establishing the fundamentality of the right to vote and the principle of one-person, one-vote<sup>193</sup> that were contested when first decided but have come to be widely accepted as constitutional bedrock. Yet surely the common law method that gave rise to *Citizens United* and *Bush v. Gore* does not establish their correctness.

Perhaps Strauss does not really mean to say that the common law method necessarily generates correct results or eliminates incorrect ones. Maybe he means to say only that the common law method gives rise to *legitimate* results. Under this view, Strauss offers the common law method as a means by which law may be rendered legitimate; the

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BOOKS (May 13, 2010), <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy> (arguing that corporations should not have free speech rights). I have argued that the ruling was badly misguided, but not more so than other Supreme Court rulings in this area. See Michael C. Dorf, *The Marginality of Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 739, 739 (2011) (arguing that the decision will not dramatically increase the influence of moneyed interests on politics because those interests already exert enormous influence).

<sup>187</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

<sup>188</sup> See *Citizens United*, 130 S. Ct. at 898–99.

<sup>189</sup> See Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 245 (2010) (“Corporations are not the relevant actors whose rights we ought to be concerned about protecting. Corporations are not people, nor are they entitled to all the constitutional rights of individual citizens.”); see also Matthew A. Melone, *Citizens United and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DEPAUL L. REV. 29, 79–88 (2010); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365, 2370 (2010); Alexander Polikoff, *So How Did We Get into This Mess? Observations on the Legitimacy of Citizens United*, 105 NW. U. L. REV. COLLOQUY 203, 210–11 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/4/LRColl2010n4Polikoff.pdf>.

<sup>190</sup> See Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953, 971 (2011); Dworkin, *supra* note 186.

<sup>191</sup> The principle that corporations have constitutional rights can be traced back at least to *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886). *Buckley v. Valeo*, in reliance on earlier free speech and freedom of association precedents, declared that restrictions on campaign finance may be tantamount to restrictions on free speech. 424 U.S. 1, 19–23 (1976) (*per curiam*).

<sup>192</sup> 531 U.S. 98 (2000) (*per curiam*).

<sup>193</sup> See *id.* at 104–05 (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

common law method validates decisions reached pursuant to it because it is what Strauss calls an “ancient source of law.”<sup>194</sup> To establish this view, Strauss’s burden of persuasion would be quite low. Someone aiming to show that statutes enacted by the legislature are, ipso facto, legitimate forms of law would not also have to show that every law thus passed was a wise law. Likewise, we might think that Strauss need not show that every line of long-standing precedent to have arisen by the common law method is correct in order to show that the common law method confers legitimacy on decisions rendered according to it. Legitimacy is a substantially weaker criterion than correctness.

To be sure, Strauss’s chapters on free speech and *Brown* indicate that he really thinks the common law method leads to correct results, not just legitimate ones. He says as much at the end of his *Brown* chapter: in discussing *Roe v. Wade*,<sup>195</sup> he says that the Court’s repeated reexamination and reaffirmation of the decision, “over many years by a Court whose composition has changed, . . . should give us greater confidence that the precedent is *correct*.”<sup>196</sup>

Nonetheless, we can strengthen Strauss’s argument by imagining its goals as more modest than his actual goals. Strauss ought to say that Burkeanism provides one reason for thinking that the common law method is self-legitimizing: whether in life or in law, solutions that emerge gradually and stand the test of time should not be lightly discarded.

Where is the democratic element in Strauss’s view? Strauss understands that the Burkean legitimacy of the common law method partly depends on democratic legitimation. In his brief discussion of *Roe*, he acknowledges that “[p]rotracted opposition” to the abortion right precludes placing the case in the same category as some “decisions — like *Brown*; the one person, one vote cases; or some of the core First Amendment cases — that were initially controversial but have now gained near-universal acceptance.”<sup>197</sup> It is possible to read this passage to refer to protracted opposition among jurists, but I think the better reading invokes the protracted opposition to *Roe* among many ordinary Americans. Likewise, Strauss’s endorsement of contemporary meaning over original semantic meaning appears to be based on how average people, rather than legal elites, understand the Constitution.<sup>198</sup>

Strauss ought to say that decisions reached through the common law method that stand the test of time derive their legitimacy from

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<sup>194</sup> STRAUSS, *supra* note 3, at 3.

<sup>195</sup> 410 U.S. 113 (1973).

<sup>196</sup> STRAUSS, *supra* note 3, at 96 (emphasis added).

<sup>197</sup> *Id.* at 97.

<sup>198</sup> *See id.* at 106 (“The idea is to find common ground on which people can agree today.”).

popular acceptance, not just from judicial craft. The result would be a shallower but stronger account of constitutional law than Strauss purports to offer, one that does not tell us which cases are rightly decided and which ones are wrongly decided. Whatever one thinks about the utility of such an account, its premises should be clear. Although *The Living Constitution* emphasizes the Burkean virtues of the common law, it is best read as ultimately relying on democratic inputs to legitimate the living Constitution.

2. *The Role of Burkeanism in Balkin's Living Originalism.* — It is easy to see the role for democratic politics in Balkin's theory, but, one might ask, in what sense is his view Burkean? After all, Balkin does not expressly rely on Burke, whom he mentions only in a part of his book that describes the difficulties that expected-application originalism encounters in adapting to change.<sup>199</sup> Balkin's own approach

places relatively little weight on tradition per se.<sup>200</sup> Nonetheless, he needs something like Burkeanism for his justification of constitutionalism to work.

The core problem is that, as Balkin acknowledges, judicial review is not strongly countermajoritarian.<sup>201</sup> To be sure, Balkin does not go quite so far as some of the political scientists he cites in endorsing the idea that the Supreme Court is a majoritarian institution. The Court, he aptly states, is a “[p]layer” in, not a “[m]irror” of, the political process.<sup>202</sup> Balkin thus abjures Mr. Dooley's crude notion that “th' supreme coort follows th' iliction returns”<sup>203</sup> in favor of the more sophis-

<sup>199</sup> BALKIN, *supra* note 2, at 119 (stating that Burkean conservatism could justify the approach of expected-application originalists to precedent but that this approach “is not a coherent theory of fidelity to original meaning”).

<sup>200</sup> *See id.* at 15 (“Because the Constitution, and not interpretations of the Constitution, is the supreme law of the land, later generations may assert — and try to convince others — that the best interpretation of text and principle differs from previous implementing glosses . . .”).

<sup>201</sup> *See id.* at 217 & 412 n.140 (citing FRIEDMAN, *supra* note 80, at 297–98; TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 80–132 (1999); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006); Dahl, *supra* note 80, at 285; Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993)); *see also id.* at 286 (“When Alexander Bickel famously argued that ‘judicial review is a deviant institution in the American democracy,’ he gave insufficient weight to these majoritarian features of judicial review.” (endnote omitted) (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 18 (1962))).

<sup>202</sup> BALKIN, *supra* note 2, at 287. For a recent argument that the Court is more counter-majoritarian than the political science literature criticizing Bickel indicates, see Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103 (2011). Professor Pildes argues that “majoritarians” overstate the ability of political forces to exert direct or indirect control over the Court and that the strength of such forces has been waning in recent years. *Id.* at 116–17.

<sup>203</sup> FINLEY PETER DUNNE, *MR. DOOLEY'S OPINIONS* 26 (1901).

ticated view that, *over the long run*, social and political forces shape the living Constitution.<sup>204</sup> But, Balkin asks, “[i]f the Supreme Court responds to changes in public opinion and political configurations, why not eliminate the middleman and dispense with judicial review entirely?”<sup>205</sup> “Why not just get courts out of the business of holding anything unconstitutional and exercise judicial restraint in almost every case?”<sup>206</sup>

Balkin’s answer is easy to miss because he devotes only a few paragraphs to it. But it is crucial to his view. He says that judicial review’s key features reproduce the key features of constitutionalism more generally.<sup>207</sup> What are those key features? Judicial review adds another “veto point” at which legal change can be blocked,<sup>208</sup> thereby restraining simple majoritarianism and “creat[ing] a bias toward preserving the constitutional values of the political status quo.”<sup>209</sup> Thus, the status quo bias of judicial review “maintains the benefits of constitutionalism while allowing adjustments in interpretation over time in the face of sustained democratic mobilization.”<sup>210</sup> It is difficult to imagine a more clearly Burkean justification for judicial review or for constitutionalism.

### B. *The Limits of Burkean Living Constitutionalism*

There is nothing shameful in identifying with Burke’s anticipatory condemnation of the Jacobins and Napoleon.<sup>211</sup> But as a general outlook or philosophy, Burkeanism is inherently conservative. It treats the changes that democratic politics brings about as at least as much to be feared as to be welcomed. In the United States, with its relatively weak commitment to the social welfare state, the Burkean embrace of the social, political, and legal status quo usually creates a libertarian bias. That bias is compounded by the fact that the President or even a determined blocking minority in a single house of Congress can frustrate past efforts to build the rudiments of a social welfare state through selective nonenforcement or inadequate funding of the relevant programs. If one thinks that government is more likely to threaten than to promote human flourishing, even in a democracy,

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<sup>204</sup> See BALKIN, *supra* note 2, at 295 (“[N]ational politics . . . is the engine of constitutional construction and constitutional change.”).

<sup>205</sup> *Id.* at 320.

<sup>206</sup> *Id.* at 326.

<sup>207</sup> *See id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 327–28.

<sup>211</sup> See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 87–88 (Thomas H.D. Mahoney ed., Library of Liberal Arts 1955) (1790) (arguing that the implementation of the “barbarous philosophy” of leveling would lead to “nothing but the gallows”).

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then one has reason to embrace Burkeanism as a means of limiting government.<sup>212</sup>

But why would a progressive embrace Burkean conservatism? Strauss has an answer. He offers Burkeanism as a justification for distinctively *judicial* interpretation of the Constitution; he associates his view with traditional notions of the limited role of the judiciary.<sup>213</sup> But Balkin (expressly) and Strauss (at least tacitly) propound theories of constitutional change that are meant to apply to the People generally, not just to judges. Indeed, in Balkin's case, the People are the primary object of study. Why should people who are not themselves Burkean in their attitudes toward social, political, and legal change embrace a Burkean Constitution?

Non-Burkeans likely think that the original Constitution was a deeply flawed document<sup>214</sup> and that the great social justice movements — from abolitionism and women's suffrage through the civil rights and women's movements, and on to the contemporary LGBTQ rights movement — have been efforts to change the legal status quo. Those movements had justice on their side, and to the extent that Burkean respect for tradition retarded their progress, the non-Burkean progressive thinks that justice delayed was and is justice denied.

To be sure, in reactionary times, progressives might turn to Burkeanism as their last best hope of preserving what little we already have by way of a progressive political regime. Such tactical Burkeanism could be useful as a means of resisting radical change aimed at rolling back the social welfare state or other past progressive accomplishments. Yet neither Balkin nor Strauss gives any indication that he means his respective theory to be restricted to such times.

Given Balkin's emphasis on social and political movements, he might have gone down a different path. He might have argued that the American Constitution as written and as constructed over time rests on a Burkean view of democratic politics, but that such a view is flawed. In this alternative account, social and political movements in the United States would be making the best of a bad situation when they swim against the tide to bring about less change than they could accomplish in a different legal system. Such a stance would have placed Balkin in the company of Charles Beard and other progressives

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<sup>212</sup> That is not to say that all or even most contemporary libertarians are Burkeans.

<sup>213</sup> See STRAUSS, *supra* note 3, at 40–42 (associating Burkean humility with the common law method); see also Merrill, *supra* note 181, at 515–23 (associating Burkean conventionalism with judicial restraint).

<sup>214</sup> See, e.g., Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (describing the original Constitution as “defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today”).

who saw the Constitution as a betrayal of the democratic spirit of the American Revolution.<sup>215</sup> Or Balkin might have contented himself with description, noting the Burkean nature of American constitutionalism without taking a normative position.

Yet Balkin rejects both of these courses. He writes that his “account of living constitutionalism is neither merely descriptive nor purely external. To the contrary, it is normative and . . . considers [the constitutional] system’s role in promoting democratic legitimacy.”<sup>216</sup> And to be clear, the sort of democratic legitimacy that Balkin’s normative vision of the Constitution promotes is one that tempers democracy with the entrenched views of past political movements. That is a defensible normative view, but it is not what one would ordinarily describe as a progressive view.

Despite Burkeanism’s inherent conservatism, Balkin champions fidelity to the Constitution in Burkean terms because, he says, the original semantic meaning of “the text provides a common framework for constitutional construction that offers the possibility of constitutional redemption.”<sup>217</sup> Balkin offers dissenters a vocabulary with which to make claims for change while keeping faith with the common project of building out the Constitution in practice.<sup>218</sup>

There is undoubtedly something to this view. A common vocabulary permits people with different life experiences and values to speak to one another. It can be a valuable tool for taming social conflict. To put the point in terms that would have appealed to Burke, it sends the People into salons armed with pamphlets rather than to the barricades armed with bayonets. Meanwhile, even those who seek very substantial change will find that their appeal has greater resonance with their fellow citizens if they use language and ideas immanent in the constitutional culture rather than positioning themselves as radicals standing outside that culture.<sup>219</sup> Thus, Balkin rightly values productive discourse in a shared vocabulary. The question is what he sacrifices by asking that Americans use *the Constitution* as our common language.

If one thought that the Constitution was infinitely malleable — capable of taking on any meaning that a social or political movement

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<sup>215</sup> See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 154 (1921) (“[A]bove all, it is to the owners of personalty anxious to find a foil against the attacks of levelling democracy, that the authors of *The Federalist* address their most cogent arguments in favor of ratification.”).

<sup>216</sup> BALKIN, *supra* note 2, at 328.

<sup>217</sup> BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 9, at 232.

<sup>218</sup> See *id.* at 232–39 (describing how framework originalism enables “protestant,” in the sense of dissenting, readings of the Constitution).

<sup>219</sup> Cf. MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 35–66 (1987) (offering a sympathetic view of immanent critique as both more authentic and more efficacious than purportedly detached criticism).

chose to ascribe to it — then nearly nothing would be sacrificed by channeling claims for social, political, and legal change into the language of the Constitution. The language of American constitutionalism would be no more constraining on social and legal claims than is the fact that we conduct our political life mostly in English rather than in some other language. But Balkin does not think the Constitution is infinitely malleable, and so he must think there are claims that cannot be made, or at least cannot be made effectively, through the Constitution's language.

That limitation is not merely a function of Balkin's embrace of semantic originalism. If the Constitution's language — whether given its original semantic meaning or its contemporary meaning — limits the available constructions, then it limits the sorts of claims that can plausibly be made in the name of the Constitution.

It is difficult to imagine that the Constitution, as a guide to activism, would *not* constrain our politics. The Constitution is a classical liberal document that reflects and reinforces the tendency of American culture toward Lockean notions of government and rights.<sup>220</sup> It is possible to make claims, in the name of the Constitution, for a right to work or a right to minimum social welfare,<sup>221</sup> but it is much easier to make claims for a right to protest near funerals<sup>222</sup> or a right to block even the most minimal invasions of private property.<sup>223</sup> Activists who favor no more than a night-watchman state will find that wrapping their movement in the language of the Constitution provides rhetorical advantages, which may explain why the reactionary Tea Party move-

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<sup>220</sup> For the classic account of American constitutionalism along these lines, see LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 3–32 (1955), which explains the liberal tradition as both following from the absence of feudalism in colonial America and constraining the range of subsequent political thought. In relying on Professor Hartz's views about the limits of American liberalism, I do not deny that Hartz overstated the liberality of the American tradition. See Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 553–54 (1993) (arguing that Hartz grossly understated the anti-egalitarian strain in American thought); cf. Mary Fainsod Katzenstein et al., *The Dark Side of American Liberalism and Felony Disenfranchisement*, 8 PERSP. ON POL. 1035 (2010) (using the example of felon disenfranchisement to argue that, contrary to Smith, anti-egalitarianism is internal to American liberalism). The critique tends to support my larger point that the American liberal tradition associated with the Constitution has limited resources for progressives.

<sup>221</sup> See Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (defending the thesis that welfare rights may be found in the Constitution); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (same). But see Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363, 384 (2002) (discussing President Franklin D. Roosevelt's criticism of the Constitution for its failure to guarantee economic rights).

<sup>222</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207, 1217–19 (2011).

<sup>223</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–36 (1982).

ment, more than any other political movement in living memory, has identified its cause with the Constitution.<sup>224</sup>

But genuinely progressive movements of the sort that Balkin rightly celebrates do better to use the Constitution, if at all, strategically or even disingenuously. By instead succumbing to the American “cult of constitution worship,”<sup>225</sup> Balkin and those who follow his views risk taking the path of earlier progressives who had only “imperfect knowledge . . . of the enemy they face[d],” and thus failed “above all” because they did not “see their own unwitting contribution to his strength.”<sup>226</sup> Balkin’s suggestion that constitutional fidelity should be the touchstone of political activism, if followed, would deliver to progressives no more than an undead Constitution, rather than the living Constitution for which they yearn.

### CONCLUSION

*The Living Constitution* provides a succinct and useful descriptive account of how the courts decide constitutional cases, gesturing to democratic politics for a legitimating theory. *Living Originalism* offers a rich descriptive account of how “contentious politics”<sup>227</sup> produces and is in turn shaped by constitutional change.

Neither book tells courts how to decide cases. Balkin writes that “living constitutionalism is not a theory primarily addressed to judges.”<sup>228</sup> Although a relatively larger portion of *The Living Constitution* discusses how the Supreme Court decides constitutional cases, Strauss also largely eschews telling judges and Justices how to do their jobs. He, like Balkin, mostly explains how the Constitution and constitutional law actually work in practice. That is all to the good. No one needs another law professor offering advice to Justices who are not interested in what academics have to say.<sup>229</sup>

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<sup>224</sup> See, e.g., *CNN–Tea Party Republican Debate* (CNN television broadcast Sept. 12, 2011) (transcript available at <http://archives.cnn.com/TRANSCRIPTS/110912/se.06.html>) (statement of Rep. Michele Bachmann) (“I would bring [to the White House] a copy of the Declaration of Independence, the Constitution of the United States, the Bill of Rights, and that’s it.”); 157 CONG. REC. H2589–93 (daily ed. Apr. 12, 2011) (statement of Rep. Paul Broun, Jr.) (reading the U.S. Constitution).

<sup>225</sup> HARTZ, *supra* note 220, at 9.

<sup>226</sup> *Id.* at 13.

<sup>227</sup> See SIDNEY G. TARROW, *POWER IN MOVEMENT* 6 (3d ed. 2011) (“Contentious politics occurs when ordinary people — often in alliance with more influential citizens and with changes in public mood — join forces in confrontation with elites, authorities, and opponents.”).

<sup>228</sup> BALKIN, *supra* note 2, at 279; see also *id.* at 278 (“The best account of a living Constitution cannot be . . . a countertheory [to originalism] that offers particularized advice to judges about how to decide cases.”).

<sup>229</sup> See, e.g., Chief Justice John G. Roberts, Address at the Annual Fourth Circuit Court of Appeals Conference (C-SPAN television broadcast June 25, 2011) at 31:06, available at <http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/> (“If

Judging by recent Supreme Court confirmation hearings, the political insiders who are paid to know about such matters believe that the American public wants formalist judges.<sup>230</sup> Insofar as originalism is a brand of formalism,<sup>231</sup> a wide reading of both books would benefit the country as a whole. Strauss and Balkin both thoroughly debunk expected-application originalism. They offer much more realistic accounts of how constitutional law is made, Strauss mostly focusing on what happens inside the courts and Balkin mostly focusing on what happens outside the courts.

Engaged citizens would do well, however, to disregard Balkin's claim that, in order to make constitutional change, contentious politics must be faithful to the Constitution's original semantic meaning.<sup>232</sup> People taking part in social and political movements care about what they care about, and rightly so. For good or ill, the living Constitution will take care of itself.

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the academy wants to deal with the legal issues at a particularly abstract and philosophical level, that's great and that's their business, but they shouldn't expect that it would be of any particular help or even interest to the members of the practicing bar or judges."). To be more precise, Supreme Court Justices *say* they are not interested in legal scholarship. Their opinions suggest otherwise. See Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. (forthcoming 2012) (manuscript at 11, 14), available at <http://ssrn.com/abstract=1884462> (finding that, over the last six decades, the Supreme Court has cited legal scholarship in roughly one-third of its decisions, and that the long-term trend in decisions using scholarship is upward). Perhaps the Court mostly cites legal scholarship that is more concrete than the "abstract and philosophical" work the Chief Justice was discussing.

<sup>230</sup> See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of Judge John G. Roberts, Jr.) (likening the job of a judge or Justice to that of an umpire in baseball calling balls or strikes); 156 CONG. REC. S6757 (daily ed. Aug. 5, 2010) (statement of Sen. Charles Patrick Roberts) (stating during the confirmation debate regarding Associate Justice Kagan that "[o]ur judges must decide all cases in adherence to legal precedent and rules of statutory or constitutional construction"); 155 CONG. REC. S8780 (daily ed. Aug. 4, 2009) (statement of Sen. Charles Grassley) (stating during the confirmation debate regarding Associate Justice Sotomayor that "[i]t is critical that judges have a healthy respect for the constitutional separation of power and the exercise of judicial restraint" and that "[j]udges must be bound by the words of the Constitution and legal precedent").

<sup>231</sup> See Scalia, *supra* note 45, at 25 ("Long live formalism.").

<sup>232</sup> Put differently, social movement actors would do well to treat Balkin's account of how contentious politics leads to constitutional change as wholly separate from his claims about constitutional meaning. See Neil S. Siegel, *Jack Balkin's Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 MICH. L. REV. (forthcoming 2013).