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**LIVING ORIGINALISM AND LIVING  
CONSTITUTIONALISM AS MORAL READINGS OF THE  
AMERICAN CONSTITUTION**

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INTRODUCTION

With this event – A Symposium on Jack Balkin’s *Living Originalism* and David Strauss’s *The Living Constitution* – we launch a Boston University School of Law series of symposia on significant recent books in law. The distinctive format is to pick two significant books that join issue on an important topic, to invite the author of each book to write an essay on the other book, and to invite several Boston University School of Law faculty to write an essay on one or both books.

What are the justifications for pairing Balkin’s *Living Originalism*<sup>1</sup> and Strauss’s *The Living Constitution*<sup>2</sup> in this series? I suggest three. First, both

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<sup>1</sup> JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

books have the word “living” in their titles. They are engaged in a debate about the form that “living” constitutional theory should take. This is code for offering alternatives to originalism as conventionally understood. Indeed, these books are two of the best criticisms of conventional varieties of originalism ever written. But if Strauss came to bury originalism, Balkin came to praise it. Or Balkin came to bury conventional forms of originalism, but to praise a new form, living originalism.

Second, both Balkin and Strauss make evidently conservative arguments to justify their liberal theories of living originalism and living constitutionalism. I want to point out two parallel ironies. Balkin claims that originalism – which as conventionally understood makes a virtue of thwarting constitutional change – provides the best foundation for a liberal theory of constitutional change.<sup>3</sup> And Strauss contends that Edmund Burke – who conventionally is understood to oppose change – provides the best justification for a liberal theory of the living constitution.<sup>4</sup>

Third, the two books complement one another and to some degree may remedy one another’s shortcomings. Sandy Levinson drew a famous distinction between constitutional protestants and constitutional catholics: protestants insist on the authority of every individual citizen to interpret the Constitution, while catholics insist on the courts as the ultimate if not exclusive interpreters of the Constitution.<sup>5</sup> If Balkin is our most thoroughgoing constitutional protestant,<sup>6</sup> Strauss may be one of our most committed constitutional catholics.<sup>7</sup> That is, Balkin provides the best account to date of popular constitutional interpretation outside the courts, while Strauss provides the best account to date of common-law constitutional interpretation inside the courts. Perhaps the two together provide the groundwork for a more complete, ecumenical approach to constitutional interpretation.

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

<sup>3</sup> BALKIN, *supra* note 1, at 28-34 (rejecting Justice Scalia’s originalism, according to which the whole purpose of the Constitution is to prevent change, in favor of a “framework originalism,” within which the Constitution channels and shapes change rather than preventing it).

<sup>4</sup> STRAUSS, *supra* note 2, at 41-44.

<sup>5</sup> SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 29 (1988).

<sup>6</sup> *See* JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 10, 41, 61-72, 94-101, 235-39 (2011) (developing a protestant theory, which argues that no institution of government, especially the Supreme Court, has a monopoly on the authority to interpret the Constitution and stresses the role of popular movements in interpreting the Constitution); BALKIN, *supra* note 1, at 74-99 (developing a protestant theory of constitutional faith and redemption).

<sup>7</sup> I hasten to acknowledge that Strauss does not focus exclusively on constitutional interpretation by the courts but also acknowledges the idea of the Constitution outside the Courts. *See, e.g.*, STRAUSS, *supra* note 2, at 47-48, 67, 121, 129. Nonetheless, his focus is on how courts engage in common-law constitutional interpretation. *See id.* at 33-49.

I already have written a paper on Balkin's book for a symposium in *University of Illinois Law Review*.<sup>8</sup> And so, I shall focus my remarks here on criticism of or engagement with Strauss's book. But I will begin by discussing the Balkanization (and Balkinization) of originalism. I then will sketch the ways in which both Balkin's theory of living originalism and Strauss's theory of living constitutionalism are best understood as moral readings of the Constitution.

#### I. THE BALKANIZATION (AND BALKINIZATION) OF ORIGINALISM

In recent years, some have posed the question, "Are we all originalists now?" Indeed, some have claimed that we are all originalists now.<sup>9</sup> If anything would prompt that question and claim, it would be constitutional theorists like Ronald Dworkin and Balkin dressing up their theories in the garb of originalism (or, at any rate, being interpreted as originalists). For these scholars are exemplars of two *bête noires* of originalism as conventionally understood: namely, moral readings of the Constitution and pragmatic, living constitutionalism, respectively.<sup>10</sup> By a "moral reading," I refer to a conception of the Constitution as embodying abstract moral and political principles, not codifying concrete historical rules or practices. Yet in recent years Dworkin has been interpreted as an abstract originalist,<sup>11</sup> and Balkin has now embraced the method of text and principle, which he presents as a form of abstract living originalism.<sup>12</sup> I suggest that we are witnessing the "Balkanization" of originalism (when originalism splits into warring camps) along with the "Balkinization" of originalism (when even Balkin, hitherto a progressive, pragmatic, living constitutionalist, becomes an originalist).

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<sup>8</sup> See James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669.

<sup>9</sup> See, e.g., ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011).

<sup>10</sup> See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 176-77, 351-55 (1990) (criticizing Dworkin's view and arguing that the "attempt to define individual liberties by abstract moral philosophy" involves succumbing to the "temptations of utopia," that is, reading one's own vision of utopia into the Constitution); see also *id.* at 167 (critiquing "[t]he notion of a 'living Constitution'"); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38-47 (1997) (critiquing "The Living Constitution"); *id.* at 144-49 (critiquing Dworkin's "moral reading" of the Constitution).

<sup>11</sup> See, e.g., Amy Gutmann, *Preface to SCALIA, supra* note 10, at xi-xii (stating that Dworkin "defends a different version of originalism from Justice Scalia's," according to which constitutional provisions "'set out abstract principles rather than concrete or dated rules'"); Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 201 (2000) (interpreting Dworkin as an "originalist" who argues that the Founders chose abstract principles).

<sup>12</sup> BALKIN, *supra* note 1, at 3, 6-7.

Randy Barnett, a new originalist, greeted Balkin's transformation with glee, suggesting that if Balkin is an originalist, we are all truly originalists now.<sup>13</sup> I have the opposite reaction. I believe that Balkin's metamorphosis marks a significant moment in the history of pragmatic constitutional theory: the moment when a hitherto leading pragmatic living constitutionalist embraced the method of text and principle, an approach to constitutional interpretation that is for all intents and purposes equivalent to a moral reading. In this paper, I plan to explore affinities and differences between Balkin's and Dworkin's and my own abstract, aspirational theories. And I want to turn Barnett's question around and ask my own: Are we all moral readers now?

We should recall Justice Scalia's famous put-down of "nonoriginalists" in *Originalism: The Lesser Evil*.<sup>14</sup> He argues as if the originalists are united in their conception of constitutional interpretation and asserts that they are opposed by a motley group that he dubs the "nonoriginalists." Justice Scalia claims that the only thing that these "nonoriginalists" can agree upon is that originalism is the wrong approach.<sup>15</sup> He adds, invoking a maxim of electoral politics, "You can't beat somebody with nobody," suggesting that there really is not a viable alternative to originalism.<sup>16</sup>

I want to turn this assertion around. There are numerous varieties of originalism, and the only thing they agree upon is their rejection of moral readings. Some of the varieties include the following. It all began with conventional "intention of the Framers" originalism.<sup>17</sup> Then it became "intention of the ratifiers" originalism.<sup>18</sup> Of course, we also have "original expectations and applications" originalism (what I elsewhere have called "narrow" or "concrete" originalism).<sup>19</sup> Then came "original meaning" originalism, which was refined as "original public meaning" originalism (officially, this is now the position of Scalia and Barnett).<sup>20</sup> Scalia himself distinguished "strong medicine" or "bitter pill" originalism from "faint-

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<sup>13</sup> See Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405 (2007) (reviewing Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007)).

<sup>14</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855, 862-63 (1989).

<sup>15</sup> *Id.* at 855.

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 1-10* (1977).

<sup>18</sup> See, e.g., BORK, *supra* note 10, at 144.

<sup>19</sup> See SOTIROS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 84-91* (2007).

<sup>20</sup> See SCALIA, *supra* note 10, at 38 ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."); see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89-94* (2004) (explaining the movement to, and advantages of, original meaning originalism).

hearted” originalism.<sup>21</sup> Then came “broad” originalism (advocated by Lawrence Lessig and many others).<sup>22</sup> Now comes “the new originalism” (so characterized by Whittington) as distinguished from “the old originalism.”<sup>23</sup> Finally, we add “abstract” originalism (which some, including Whittington, have attributed to Dworkin).<sup>24</sup> And we must not forget Balkin’s “method of text and principle,” a form of abstract originalism.<sup>25</sup> Indeed, Mitchell Berman has distinguished seventy-two varieties of originalism in his tour de force, *Originalism is Bunk*.<sup>26</sup>

Given how much these versions of “originalism” differ, it would not mean much to claim that we are all originalists now. In my book, *Fidelity to Our Imperfect Constitution*<sup>27</sup> – of which this piece will be a part – I plan to examine the spectacular concessions that originalists have made to their critics, along with the Balkanization (and Balkinization) of originalism. I shall show the extent to which we are all moral readers now. Whether or not we are all moral readers now, I argue here that both Balkin’s living originalism and Strauss’s living constitutionalism are moral readings of the Constitution.

## II. BALKIN’S LIVING ORIGINALISM AS A MORAL READING OF THE AMERICAN CONSTITUTION

Balkin frames the central clash in constitutional theory as being between originalism and living constitutionalism.<sup>28</sup> He splendidly develops the third way of a living originalism, a position that combines the appeal of both originalism and living constitutionalism and avoids the weaknesses of each.<sup>29</sup> Balkin’s arguments for his living originalism over conventional varieties of originalism are absolutely cogent and thrillingly compelling.<sup>30</sup> His arguments for his living originalism over living constitutionalism are penetrating and

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<sup>21</sup> See Scalia, *supra* note 14, at 861-63.

<sup>22</sup> See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171-73 n.32 (1993) (developing a broad originalist conception of fidelity as “translation,” under which constitutional interpretation must encompass both text and context).

<sup>23</sup> Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 607-12 (2004) (characterizing “the new originalism” as focused on creating a “basis for positive constitutional doctrine” and concentrating on fidelity to public meaning at the time of ratification, not judicial “restraint” or deference to democratic processes).

<sup>24</sup> See Amy Gutmann, *Preface to SCALIA*, *supra* note 10, at xi-xii; Whittington, *supra* note 11, at 201.

<sup>25</sup> See BALKIN, *supra* note 1, at 3-20 (discussing the concept of fidelity to text and principle).

<sup>26</sup> Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 14-15 (2009).

<sup>27</sup> James E. Fleming, *Fidelity to Our Imperfect Constitution* (book in progress under contract with Oxford University Press) (on file with author).

<sup>28</sup> See BALKIN, *supra* note 1, at 3.

<sup>29</sup> See *id.* at 3-20.

<sup>30</sup> See *id.* at 100-08.

persuasive.<sup>31</sup> But I would frame the central clash as being between originalisms and moral readings. Balkin's third way might be conceived not only as a living originalism but also as a moral originalism – an abstract originalism that is also a moral reading of the Constitution.

First, Balkin's method of text and principle conceives the Constitution as embodying not only rules but also general standards and abstract principles.<sup>32</sup> He, like Dworkin and I, rejects efforts by originalists to recast abstract principles as if they were rules (or terms of art) by interpreting them as being exhausted by their original expected applications.<sup>33</sup> In interpreting these general standards and abstract principles, we have to make moral and political judgments concerning the best understanding of our commitments; history alone does not make these judgments for us in rule-like fashion.

Second, more generally, Balkin's living originalism – with his argument that fidelity to original meaning is owed to our abstract framework and commitments<sup>34</sup> – resonates with the Dworkinian idea of the Constitution as a charter of abstract powers and rights. It also resembles Dworkin's conception of the quest for fidelity in constitutional interpretation as pursuing integrity with a moral reading of the Constitution.<sup>35</sup>

Third, Balkin's conception of our constitutional principles as embodying abstract aspirations<sup>36</sup> accords with the aspirationalism of moral readings.<sup>37</sup> Our principles are not merely a historical deposit to be preserved but are moral commitments that we aspire to realize more fully over time.

Fourth, and relatedly, Balkin's ideas of faith and redemption resonate with a moral reading's commitment to interpret the Constitution so as to make it the best it can be.<sup>38</sup> (In my work, I have characterized this in terms of a commitment to a Constitution-perfecting theory.<sup>39</sup>) Granted, moral readers

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<sup>31</sup> See *id.* at 50-57, 277-319. I make this judgment notwithstanding my respect for Strauss's book ably defending a living constitutionalism. See STRAUSS, *supra* note 2, at 1-5.

<sup>32</sup> See BALKIN, *supra* note 1, at 14, 23-34, 256-73.

<sup>33</sup> See *id.* at 6-7, 42-45, 100-08.

<sup>34</sup> *Id.* at 21-34.

<sup>35</sup> See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7-12, 74-76 (1996) [hereinafter DWORKIN, *FREEDOM'S LAW*]; RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 125-29 (1993). I take the term "integrity" from Dworkin's conception of "law as integrity." See RONALD DWORKIN, *LAW'S EMPIRE* 176-275 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*].

<sup>36</sup> BALKIN, *supra* note 1, at 59-64.

<sup>37</sup> See BARBER & FLEMING, *supra* note 19, at 75-76.

<sup>38</sup> See DWORKIN, *LAW'S EMPIRE*, *supra* note 35, at 255 ("Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be.").

<sup>39</sup> JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY*

like Dworkin and I do not generally speak in terms of faith and redemption. But there are unmistakable affinities here between Balkin's commitment to interpret the Constitution so as to redeem our faith in its promises and aspirations and Dworkin's and my commitment to interpret the Constitution in its best light.

Fifth, Balkin's living originalism is also like a moral reading in recognizing simultaneously (1) that we should interpret the Constitution so as to make it the best it can be or to redeem our faith in its promises and aspirations and yet (2) that the Constitution in practice is highly imperfect.<sup>40</sup> I plan to develop all of these arguments more fully in my book, *Fidelity to Our Imperfect Constitution*.

### III. STRAUSS'S LIVING CONSTITUTIONALISM AS A MORAL READING OF THE AMERICAN CONSTITUTION

Now I shall turn to criticism of or engagement with Strauss's book. Strauss opens by taking up the challenge in Justice Scalia's maxim of electoral politics that "you can't beat somebody with nobody."<sup>41</sup> Strauss defends a well-grounded competitor to originalism, "an approach derived from the common law and based on precedent and tradition."<sup>42</sup> And he argues that his theory of common-law constitutional interpretation is superior to originalism in every important respect.<sup>43</sup> I find his arguments persuasive, but I shall propose four friendly amendments. All four cohere around the idea that Strauss should frame his theory of common-law constitutional interpretation as a moral reading of the Constitution.

#### A. *Originalism and Its Sins*

Chapter 1 – "Originalism and Its Sins" – like Strauss's book as a whole, presents thoroughgoing criticisms of originalism. His three main criticisms of conventional originalism are the problem of amateur history;<sup>44</sup> the problem of translation;<sup>45</sup> and Jefferson's problem – "the earth belongs . . . to the living" and therefore the dead hand of the past should not control the living.<sup>46</sup>

These criticisms are convincing. But I would add a more fundamental criticism that better supports a common-law approach as a moral reading: originalism misconceives the very character of the Constitution and the

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16 (2006).

<sup>40</sup> Compare BALKIN, *supra* note 6, at 103-38 (developing a theory of constitutional faith and redemption that acknowledges the evil and imperfection in the constitution in practice), with FLEMING, *supra* note 39, at 220-27 (defending a Constitution-perfecting theory that acknowledges imperfections, tragedies, and other misfortunes in the Constitution).

<sup>41</sup> See STRAUSS, *supra* note 2, at 4.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 18-21.

<sup>45</sup> See *id.* at 21-23.

<sup>46</sup> See *id.* at 24-25.

character of constitutional interpretation. The Constitution is a framework or scheme of abstract aspirational principles and ends, not a code of detailed historical rules. Accordingly, interpretation of our constitutional commitments requires judgments of moral and political theory about how those principles and ends are best understood and realized. From this standpoint, we can see that originalism revises our “great outline” of “majestic generalities” into a “prolix” code of specific rules and terms of art. These formulations, which come straight out of Chief Justice John Marshall’s opinion in *McCulloch v. Maryland*<sup>47</sup> and Justice Robert Jackson’s opinion in *West Virginia v. Barnette*<sup>48</sup> – canonical expressions of living constitutionalism – may sound congenial to Strauss’s approach. I think they ultimately are, but I have two concerns about the way Strauss puts his arguments.

One, Strauss describes common-law constitutional interpretation as an evolving process of developing precedent and tradition, coupled with judgments of fairness and good policy.<sup>49</sup> So far, so good. But some of his formulations make it sound like judges engaged in this process make judgments of fairness and good policy as if they were simply making pragmatic judgments rooted in concern to develop sensible doctrine, rather than judgments about how best to elaborate the abstract moral and political principles to which the Constitution commits us – or judgments about how best to realize our aspirational principles. He acknowledges this point elsewhere in the book, e.g., where he speaks of common-law courts as relying on “general principles derived from precedents and on its judgments about good policy.”<sup>50</sup> Likewise, he refers to “a living constitution that exists apart from the text and the original understandings – that exists in, for example, the principles that protect freedom of expression and those of *Brown v. Board of Education*.”<sup>51</sup> In short, we should conceive the Constitution as a framework or scheme of abstract aspirational principles that we elaborate through common-law constitutional interpretation.

Two, I fear Strauss disparages abstract principles more than he should and more than is good for him. He does so when he criticizes “moderate originalism” as distinguished from conventional varieties of originalism. Moderate originalism, as he presents it, “changes the level of generality at which the original understandings are described.”<sup>52</sup> In particular, moderate originalists conceive the relevant original understandings “at the level of

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<sup>47</sup> 17 U.S. 316, 407 (1819) (conceiving the Constitution as marking “great outlines,” not enumerating details with the “prolixity of a legal code”).

<sup>48</sup> 319 U.S. 624, 639 (1943) (conceiving the Constitution’s commitments in the Bill of Rights as “majestic generalities”).

<sup>49</sup> STRAUSS, *supra* note 2, at 34-36.

<sup>50</sup> *Id.* at 110.

<sup>51</sup> *Id.* at 101.

<sup>52</sup> *Id.* at 26.

principle rather than specific outcomes” or applications.<sup>53</sup> Yes indeed. Balkin is a moderate originalist in this sense.<sup>54</sup> Strauss objects:

The problem with this kind of moderate originalism is that it can justify anything. Once we say that we are bound only by the principle, rather than by the specific outcomes, that the founders envisioned, we can always make the principle abstract enough to justify any result we want to reach.<sup>55</sup>

I would expect Justice Scalia, but not Strauss, to say this about moderate or abstract originalism. Strauss instead should welcome these moderate originalists with their abstract principles into the camp of living constitutionalists. He should argue that the common-law approach elaborates the meaning of these abstract principles. Instead of suggesting that abstract principles do not constrain constitutional interpretation, he should argue that the constraints are those of the common-law approach. In short, Strauss should reconstruct common-law constitutional interpretation along the lines of a moral reading of the Constitution.

#### B. *The Common Law*

In chapter 2 – “The Common Law” – Strauss makes four arguments for the common-law approach over originalism: it is more workable;<sup>56</sup> it is more justifiable;<sup>57</sup> it is what we actually do;<sup>58</sup> and it is more candid.<sup>59</sup> These arguments are persuasive. But Strauss leaves out an important feature of common-law interpretation that, if incorporated, would make his account of common-law constitutional interpretation more compelling. Lord Mansfield famously argued that “the common law . . . *works itself pure* by rules drawn from the fountain of justice.”<sup>60</sup> I interpret this idea to mean that, as the common law evolves, it works toward greater coherence, unity, and justice – or, to use Dworkin’s and my terms, greater integrity and perfection.<sup>61</sup> Applied

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<sup>53</sup> *Id.* at 26-27.

<sup>54</sup> Balkin’s “living originalism” rejects conventional forms of originalism, in particular the idea that constitutional interpretation requires fidelity to “original expected applications.” See BALKIN, *supra* note 1, at 6-16. Instead, he argues that it requires fidelity to original meaning more abstractly conceived. He argues for fidelity to the text and conceives the text not merely as detailed rules but also as general standards and abstract principles. See *id.* at 14, 23-34, 256-73. He sums up this idea in calling his theory “the method of *text and principle*.” *Id.* at 1.

<sup>55</sup> STRAUSS, *supra* note 2, at 27.

<sup>56</sup> *Id.* at 43.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 44.

<sup>59</sup> *Id.* at 44-45.

<sup>60</sup> *Omychund v. Barker*, (1744), 26 Eng. Rep. 15, 23 (Ch.); 1 Atk. 21, 34.

<sup>61</sup> See DWORKIN, *LAW’S EMPIRE*, *supra* note 35, at 176-275 (developing a theory of “law as integrity”); FLEMING, *supra* note 39, at 16 (developing a “Constitution-perfecting

to constitutional law, this idea entails, in Dworkin's famous formulation, that we should strive to interpret the Constitution so as to make it the best it can be.<sup>62</sup> I have applied this idea in developing a Constitution-perfecting theory of constitutional interpretation.<sup>63</sup> Or, Mansfield's idea entails, in Balkin's formulation, that we should interpret the Constitution so as to redeem our faith in it.<sup>64</sup> Maybe this idea of the common law working itself pure is implicit in Strauss's book, particularly in his analysis of the development of freedom of speech doctrine in chapter 3 and equal protection doctrine in chapter 4. I would make this idea more explicit. Doing so would bring out the sense in which his common-law constitutional interpretation is a moral reading of the Constitution. It is not just a matter of making unbounded judgments of fairness and good policy.

C. *The Role of the Written Constitution: Common Ground and Jefferson's Problem*

Strauss turns in chapter 5 to offer an account of the role of the written Constitution in the common-law approach. He argues that the written Constitution provides "common ground" for settling disputes and that his common-law approach has a better response to "Jefferson's problem" – that "the earth belongs to the living" – than does originalism.<sup>65</sup> So far, so good. But Strauss neglects to answer an important challenge to common-law constitutional interpretation – what I shall call the "*Cooper v. Aaron* problem" – concerning the relationship between the written Constitution and what the Supreme Court has said about the Constitution. Here, I repeat a criticism I made of Strauss's approach several years ago in a symposium marking the fiftieth anniversary of *Cooper v. Aaron*, the Supreme Court decision reaffirming *Brown v. Board of Education* in the face of resistance to it in Little Rock, Arkansas.<sup>66</sup> Strauss gave the keynote lecture.<sup>67</sup>

Strauss does not develop a criterion for distinguishing the Constitution from constitutional law (common law). *Cooper* proclaims that the U.S. Supreme Court is the ultimate interpreter of the U.S. Constitution for the federal system: "[T]he federal judiciary is supreme in the exposition of the law of the Constitution."<sup>68</sup> In recent years, many discussions of *Cooper* have focused on

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theory").

<sup>62</sup> See DWORKIN, *LAW'S EMPIRE*, *supra* note 35, at 255.

<sup>63</sup> See FLEMING, *supra* note 39, at 16.

<sup>64</sup> See BALKIN, *supra* note 1, at 74-99.

<sup>65</sup> STRAUSS, *supra* note 2, at 99-102.

<sup>66</sup> See James E. Fleming, *Rewriting Brown, Resurrecting Plessy*, 52 ST. LOUIS U. L.J. 1141, 1149-52 (2008). In this section I draw from that piece.

<sup>67</sup> David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065 (2008).

<sup>68</sup> *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

this pronouncement and on what *Cooper* entails for “judicial supremacy.”<sup>69</sup> My focus will be different. We should distinguish between two fundamental interrogatives of constitutional interpretation that are at issue in *Cooper*<sup>70</sup>: (1) *What* is the Constitution? and (2) *Who* may authoritatively interpret it? When people talk about the Supreme Court’s opinion in *Cooper* in terms of judicial supremacy, they are talking about *Cooper*’s answer to the *Who* interrogative: the Court’s anointment of itself as the ultimate interpreter of the Constitution.<sup>71</sup>

But I want to talk about *Cooper*’s answer to the *What* interrogative. In *Cooper*, the Supreme Court practically equates the Constitution itself with what the Supreme Court says about the Constitution. The reasoning proceeds by syllogism.

**Major premise:** “Article IV of the Constitution makes the Constitution the ‘supreme Law of the Land.’”<sup>72</sup>

**Minor premise:** *Marbury* declared that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>73</sup>

**Conclusion:** “It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land.”<sup>74</sup>

Put another way, the Court practically obliterates the distinction between the Constitution itself and constitutional law. In doing so, as President Ronald Reagan’s Attorney General Edwin Meese famously objected, “[T]he Court seemed to reduce the Constitution[, our fundamental and paramount law,] to the status of ordinary constitutional law, and to equate the judge with the lawgiver.”<sup>75</sup>

What turns on this distinction between the Constitution itself and constitutional law? Nothing less than whether we can criticize the Supreme Court’s decisions as erroneous interpretations of the Constitution. As Meese put it, “To confuse the Constitution with judicial pronouncements allows no standard by which to criticize and seek the overruling of what University of Chicago Law Professor Philip Kurland once called the ‘derelicts of

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<sup>69</sup> See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1372-81 (1997).

<sup>70</sup> For works that conceptualize the enterprise of constitutional interpretation on the basis of not only these two interrogatives but also a third – *How* ought we to interpret the Constitution? – see FLEMING, *supra* note 39, at 71-72, and WALTER F. MURPHY, JAMES E. FLEMING, SOTIRIOS A. BARBER & STEPHEN MACEDO, *AMERICAN CONSTITUTIONAL INTERPRETATION* v (4th ed. 2008).

<sup>71</sup> See, e.g., Alexander & Schauer, *supra* note 69, at 1361.

<sup>72</sup> U.S. CONST. art. VI, § 2; *Cooper*, 358 U.S. at 18.

<sup>73</sup> 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>74</sup> *Cooper*, 358 U.S. at 18.

<sup>75</sup> Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 987 (1987).

constitutional law' – cases such as *Dred Scott* and *Plessy v. Ferguson*.<sup>76</sup> It pains me to acknowledge that Meese might ever have been right about anything, but I must say it: Meese was right this time.<sup>77</sup> And let's observe a splendid irony: Meese is saying that the implication of *Cooper*, the case that reaffirmed *Brown*, which overruled *Plessy*, is that we cannot criticize *Plessy* as wrongly decided.

I want to generalize Meese's criticism of *Cooper* and frame it as a challenge to Strauss's theory of common-law constitutional interpretation. For *Cooper*, in its equation of the Constitution itself with constitutional law, may seem to be a canonical expression of common-law constitutional interpretation. Therefore, one of the challenges for common-law constitutional interpretation is to articulate a criterion for criticizing the Supreme Court's interpretations of the Constitution on the ground that they have misinterpreted the Constitution. Any adequate theory of constitutional interpretation needs a criterion for distinguishing the Constitution itself from constitutional law. Originalism in all of its varieties readily provides such a criterion: Original meaning of the Constitution may trump judicial doctrine of constitutional law at any time.<sup>78</sup> Living originalists like Balkin no less than conventional originalists like Edwin Meese can say this. Dworkin's moral reading of the Constitution<sup>79</sup> and Sotirios A. Barber's and my philosophic approach to constitutional interpretation<sup>80</sup> also readily provide such a criterion: We can always criticize judicial doctrine from the standpoint of the moral and political theory that provides the best justification of the Constitution.

What about Strauss's theory of common-law constitutional interpretation? Does it provide a criterion for distinguishing the Constitution from constitutional law? Does it provide a standpoint from which to criticize the "derelicts of constitutional law" such as *Plessy*? From which to justify *Brown*? From which to criticize the work of the Roberts Court?

A theory of common-law constitutional interpretation that incorporates a moral reading of the Constitution could justify *Brown* by stating that the anti-caste principle of equal citizenship manifested in *Brown* is the best interpretation of the Equal Protection Clause and that *Plessy*'s view that "separate but equal" does not deny equal protection is mistaken.<sup>81</sup>

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<sup>76</sup> *Id.* at 989.

<sup>77</sup> Cf. Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1072 (1987).

<sup>78</sup> See, e.g., SCALIA, *supra* note 10, at 38-47; Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 26 (1994); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 17 (2007).

<sup>79</sup> See, e.g., DWORKIN, *FREEDOM'S LAW*, *supra* note 35, at 2.

<sup>80</sup> See, e.g., BARBER & FLEMING, *supra* note 19, at xiii-xiv, 155-70.

<sup>81</sup> See DWORKIN, *LAW'S EMPIRE*, *supra* note 35, at 379-92.

Strauss presumably would say that a “rational traditionalist” theory of common-law constitutional interpretation like his own<sup>82</sup> – since it does not merely defer to tradition but subjects it to rational criticism and development – also can criticize *Plessy* and justify *Brown*, but it is a little harder to articulate why. He certainly allows moral insights and judgments into common-law constitutional interpretation – he speaks of judgments of fairness and good policy<sup>83</sup> – but it is less clear how he can do so (and how he does so) than it is, say, with Dworkin’s moral reading or Barber’s and my philosophic approach. And so, we should ask whether a moral reading is really doing the work here in criticizing *Plessy* and justifying *Brown*, not a version of common-law constitutional interpretation that is an alternative to a moral reading.

#### D. *Constitutional Amendments and the Living Constitution*

Chapter 6 is my favorite part of Strauss’s book. As against the familiar originalist arguments that the very existence of Article V, with its procedures for constitutional amendment, is an argument against the living constitution, Strauss argues, “Article V . . . vindicates the claim that we have a living constitution.”<sup>84</sup> He argues, “The living Constitution is the primary . . . way in which the Constitution, in practice, changes.”<sup>85</sup> He even argues, ingeniously, that Article V and constitutional amendments are largely irrelevant to constitutional change.<sup>86</sup> At one point, he says, “Living constitutionalism is about how constitutional principles change, not about how they get established in the first place.”<sup>87</sup> Here I think Strauss bypasses an opportunity to argue that the very obduracy of Article V to constitutional amendment reflects the genius of the constitutional design: it fosters the kind of approach to interpretation that he proposes.

Many have criticized Article V for its obduracy to constitutional amendment.<sup>88</sup> In support of Article V, I make two points.<sup>89</sup> First, I would give two cheers for Article V in a defensive sense, for it has protected the

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<sup>82</sup> David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996).

<sup>83</sup> STRAUSS, *supra* note 2, at 34-36, 110.

<sup>84</sup> *Id.* at 116.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 115-16; *see also* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1457 (2001).

<sup>87</sup> STRAUSS, *supra* note 2, at 117.

<sup>88</sup> *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 20-24 (2006) (deploring the difficulty of amending the Constitution through Article V procedures).

<sup>89</sup> I have explored these points in further detail in the context of assessing Bruce Ackerman’s famous theory of amending the Constitution outside Article V. *See* James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1533-34 (1998) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998)). I draw from that analysis here.

Constitution and its citizens against the recent rash of “amendmentitis” (to use Kathleen Sullivan’s apt term).<sup>90</sup> Numerous illiberal and ill-conceived amendments that would erode basic liberties or limit important powers have been introduced in Congress in recent years: the Flag Burning Amendment, the Balanced Budget Amendment, the Parental Rights Amendment, the Religious Freedom Amendment, the Human Life Amendment, and the Federal Marriage Amendment, to name a few. Despite the claims of representatives and senators in Congress to have a mandate from the People, all of the measures that have come up for a vote have failed to secure the two-thirds vote of both houses required by Article V to propose an amendment for ratification by the states. Article V’s requirements have protected the Constitution and its citizens from such measures.<sup>91</sup>

Second, there is much to be said for Article V in an affirmative sense. As Lawrence Sager has cogently argued, the obduracy of Article V to ready and easy amendment of the Constitution has encouraged and fostered broad interpretation of the Constitution’s rights-protecting and power-conferring provisions.<sup>92</sup> It has underscored the character of the Constitution as a charter of majestic generalities and abstract principles as opposed to a code of relatively specific original meanings (as original expected applications). Thus, Article V has underwritten approaches to constitutional interpretation like those of Dworkin’s moral reading, Sager’s justice-seeking constitutionalism, and my own Constitution-perfecting theory. Not to mention Strauss’s common-law approach. That is as it should be – by design, not by accident. And not because judges have circumvented Article V as the exclusive route for legitimate constitutional change.

I grant that an argument along these lines is implicit in Strauss’s discussion of “[t]he genius of the U.S. Constitution”: “precisely that it is specific where specificity is valuable and general where generality is valuable.”<sup>93</sup> I would bring this argument to bear on the analysis of the Article V procedures for amendment themselves: they underwrite common-law constitutional interpretation as a moral reading of the Constitution.

#### CONCLUSION

Both Balkin’s *Living Originalism* and Strauss’s *The Living Constitution* present devastating criticisms of originalism as conventionally understood and

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<sup>90</sup> See Kathleen M. Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT, Fall 1995, at 20 (criticizing a rash of proposals to amend the Constitution).

<sup>91</sup> I acknowledge that Article V’s requirements also have made it difficult to adopt amendments that would secure basic liberties, such as the Equal Rights Amendment. But the Equal Protection Clause of the Fourteenth Amendment should be interpreted to secure equal citizenship for women.

<sup>92</sup> LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 183-87, 213-19 (2004).

<sup>93</sup> STRAUSS, *supra* note 2, at 112.

develop powerful and attractive theories of constitutional interpretation and change. Balkin's theory of living originalism and Strauss's theory of living constitutionalism are best understood as moral readings of the Constitution, for both conceive the Constitution as embodying abstract moral and political principles, not codifying concrete historical rules or practices. And both conceive constitutional interpretation as a project of elaborating and realizing the best understandings of our constitutional commitments.