IN MEDIAS RES

LARRY YACKLE*

It's common in academic circles to distinguish between positive arguments (which describe things as they are) and normative arguments (which prescribe the way things ought to be). The distinction dissolves as soon as accounts of how the world works spill over into justifications for the status quo. That happens a lot, especially in discussions of theory. It happens again in David Strauss' wonderful monograph.[1] Strauss offers a succinct exposition of the constitutional system we actually observe, coupled with a powerful explanation of how and why the scheme functions as it does and genuine reassurance that, on the whole, we can and should be satisfied.

I am convinced Strauss has all this about right. In the main, I come to praise him. I will make this clear in Part I. We have a living Constitution. We make it up as we go along, according to a frame of reference that both enables and curbs our appetite for change and, into the bargain, holds us together as a people. I do have reservations about some aspects of his case, though, and I will sketch them in Part II. I also wonder what implications Strauss' theory may have for a purely normative question he doesn't address – namely, how an original document should be drafted for the purpose of fostering a living Constitution over time. I offer some thoughts along those lines in Part III.

I

Legal theorists can't muddle along like real people, operating within the constitutional system, never pausing to reflect on the whole of which they and their actions are a part. Theorists are supposed to explain stuff. They are supposed to connect the dots, or at least to try. Professor Strauss carries this burden as well as anyone writing in the field today. He imposes no deep philosophical concepts on the Constitution; he reads no contested political values into it. Instead, he offers a down-to-earth, objective, and above all wise appraisal of what we are doing and where we may be going. His analysis entails all the judgment, humility, and caution he associates with the common law method on which, in his view, we rely for the living Constitution.

The first hundred pages of this book are a tour de force. Strauss initially identifies the challenges the Constitution poses for the evolving American society. He next demolishes the appeal of originalism as a plausible account of our national experience – originalism, at least, in any of its familiar forms. He

* Professor of Law, Boston University.

[1] *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

then introduces common law methodology as a theoretical explanation that better fits the facts. His treatment is sophisticated, yet free of legal jargon (and distracting citations) that can discourage even serious readers. To make his case even more accessible to a general audience, Strauss illustrates the common law method at work in two celebrated contexts – the Supreme Court's incremental development of now-settled principles touching free speech and racial equality. This is a masterful academic achievement. I would not have dreamed that so much crucial ground could be covered so economically without sacrificing accuracy.

II

Persuaded as I am by Professor Strauss' primary argument that we have a living, common law Constitution, I have some (modest) concerns about his additional arguments in chapter 5. There, he contends that the historical, documentary Constitution is "as important as the living Constitution of precedents and traditions."[2]

I must say I'm not sure how this can be so, given that common law methodology does the heavy lifting. Strauss plainly doesn't credit any notion that the written Constitution is entitled to respect because of its origins. With Jefferson, he dismisses any claim that we are bound to follow decisions made by somebody else a long time ago – because they were smarter than we are or because they asserted an authority to rule us centuries later. Certainly, Strauss rejects the idea that the document enjoys democratic *bona fides*. Even if the 1789 document was adopted democratically (it wasn't, of course, but even if it was), we would not be obliged to give it priority over a statute our own generation sees fit to enact. Originalists can contend that the historical document is a higher law for these reasons. But Strauss can't – and doesn't.

In the event, Strauss says this: "[O]ur adherence to the written Constitution does not have to depend on veneration of our ancestors or on any acknowledgment of their right to rule us from the grave. The written Constitution is valuable because it provides a common ground among the American people."[3] This common ground consists of at least some, and perhaps numerous, specific decisions that the document makes well enough to command consensus support – well enough to leave alone. There are two ideas here. One is that the document on display at the National Archives is *the* Constitution, providing the text to which we must subscribe. The other is that *the* written Constitution has genuine value for us today.

It may be that this document summons enough general agreement about enough specific questions to form the common ground of which Strauss speaks. I will come to that in a minute. But our current (implicit) endorsement of choices the document makes with particularity doesn't necessarily entail acceptance of the document as a whole as *the* Constitution. After all, we also

[2] *Id.* at 101.

[3] *Id.*

agree on specific provisions in other writings. I dare say the Massachusetts Traffic Code declares somewhere that when an operator is traveling on a two-way street, he or she should ordinarily bear to the right; that when two vehicles meet at an unmarked crossroads, the one to the right gets to pull away first; and that the speed limit along unmarked stretches of the Southeast Expressway in Boston is 55 mph. None of these decisions is objectively correct, but we accept them because they reasonably settle points that otherwise would require endless, wasteful debate. Well, maybe not the speed limit. The point is that if agreement on tolerable particulars is what makes a document the Constitution, the one under glass isn't the only candidate.

We, or most of us, do embrace the amended 1789 document as the Constitution. Strauss says that "[a]llegiance to the [written] Constitution, and a certain kind of respect for the founding and for crucial episodes in our history, seem, to many people, central to what it is to be an American."[4] He doesn't mean that we should be patient with strong views honestly held, even if those views rest on a fundamental misconception. In this passage, as I understand it, he means that the public accepts this document as *the* Constitution, and no further grounds for legitimacy need be considered. Other theorists take essentially the same view.[5] Maybe Henry Monaghan put it best: the authority of this document is "our master rule of recognition."[6] We agree that this is the document; let's move on.

I am content with this answer. Questioning what everybody takes to be the starting place risks trivializing the serious conversation we are trying to have. So I agree, you will be reassured to hear, that the Mass Traffic Code is not the United States Constitution. I hasten to say, though, that I would be more comfortable embracing the 1789 document as our foundation if it were, shall we say, more foundational.

Turn to the second idea in Strauss' explanation for why we adhere to the written Constitution – namely its value as the source of a common ground that holds us together. According to Strauss, this common ground is pointedly *not* to be found in the capacious textual formulations that are typically linked to our most heralded aspirations – due process of law, equal protection of the laws, freedom of expression, and like assurances of individual liberty and dignity.[7] Those aspects of the written Constitution have consensus support only at a level of generality that drains them of any real decision-making significance. They are the protean matters from which the living Constitution develops.[8] Nor is common ground located in the document's structural

[4] *Id.*

[5] *See, e.g.*, Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1772 (1997); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 547 (1999).

[6] Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 384 (1981).

[7] *See* STRAUSS, *supra* note 1, at 104.

[8] *See id.* at 52-76.

allocations of governmental power – the separate federal executive, the bicameral federal legislature, the independent judiciary, and individual states with some measure of autonomy. And it is not in the provisions that envision elections and thus some manner of democratic self-government. Those, too, are elements of the written Constitution on which the living Constitution builds.

The common ground Strauss has in mind lies in far less salient provisions specifying definite answers to comparatively unimportant questions. This must be so, he explains, because the very point of the argument is that we agree on these answers, or at least we are willing to accept them, and we can agree only on relatively minor matters where the stakes are low and any plausible settlement is good enough for government work.[9] In earlier scholarship on which this book is based, Strauss explains this idea as an instance of conventionalism – "the notion that it is more important that some things be settled than that they be settled right."[10] He offers numerical illustrations: the provisions in Articles I and II prescribing age requirements and fixed terms for federal officers.

Strauss doesn't contend that these and other definite settlements in the text must form our common ground because their specificity makes it necessary to adopt a formal amendment to make a change. Originally, for example, the default date for Congress' initial meeting was the first Monday in December. We changed it by amendment to January 3.[11] The need for that amendment only proves that good-enough answers win consensus support only when, and as long as, there are no strong reasons for adopting an alternative.[12]

It's fair to ask whether a consensus on unimportant constitutional choices is sufficient to establish a genuine common ground that unites us in a single enterprise, which then proceeds on its own shaped by common law methodology. We can easily beef up the list. There are certainly other places where the fact of a settlement is convenient but its content is not. We need a way to break ties in the Senate, and authorizing the Vice President to do so is probably as good an answer as any.[13] We need a presiding officer when an impeached President goes on trial, and drafting the Chief Justice for that service seems unobjectionable.[14] But when we tote up these and other illustrations, I wonder whether the whole is any more than the sum of its parts.

To put the point another way, I wonder whether the good-enough answers the written Constitution supplies conform to any pattern, far less a pattern

[9] *See id.* at 110-11.

[10] David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1733 (2003).

[11] *See* U.S. CONST. amend. XX, § 2.

[12] *Cf.* STRAUSS, *supra* note 1, at 113 (explaining the need for making this shift regarding a specific point on which the original document had spoken).

[13] *See* U.S. CONST. art.1, § 3, cl. 4.

[14] U.S. CONST. art. 1, § 3, cl. 6.

demonstrating the common ground we're looking for. Notice that in many respects the document forgoes definite settlements we might have expected it to provide. The arrangements for the election of senators and representatives are left to the discretion of state legislatures or Congress.[15] And Congress alone has discretion to fix the time for choosing the electors who will select the President.[16] Notice, too, that the written Constitution provides some fairly definite settlements that almost certainly don't enjoy widespread support today. The electoral college is the usual illustration. But over the last year lots of us have begun to question the wisdom of requiring the Congress to assemble every year and barring either the House or the Senate from adjourning for long without the consent of the other. I needn't say what the public would think about a provision requiring us to pay members of Congress for their services (if there were any such provision).

Strauss insists that the value we get from the written Constitution derives from its text. He doesn't kiss the book and pass on. He assigns words real work to do. Sometimes, he explains, the written Constitution "decides" issues without benefit of common law analysis.[17] More fundamentally, the language in the document plays a role in *every* instance. "[O]ne of the absolute fixed points of our legal culture is that we cannot . . . say that the text of the Constitution doesn't matter."[18] "We cannot make an argument for any constitutional principle without purporting to show, at some point, that the principle is consistent with the text of the Constitution."[19]

Strauss explains that the "common law approach" entails giving the words in the written document their "ordinary, current meaning."[20] If I understand him correctly, this goes for all the words – both words used in particularistic provisions that make up our common ground and words used in more general provisions from which common law analysis proceeds. He explains that current meaning trumps historical meaning because, after all, "[t]he idea is to find common ground on which people can agree today."[21] That suggests provisions that settle minor points well enough to gather consensus support. Yet Strauss goes immediately on to a discussion of a protean provision (the Sixth Amendment) and demonstrates that assigning current meaning allows common law methodology to reach results consistent with modern predilections.

With respect to the definite settlements that make up common ground, giving the words of the text their "ordinary, current meaning" is not so easy. Bracket the postmodern insight that words have no significance at all apart

[15] *See* U.S. CONST. art. 1, § 4, cl. 1.

[16] *See* U.S. CONST. art. 2, § 1, cl. 4.

[17] STRAUSS, *supra* note 1, at 101.

[18] *Id.* at 103.

[19] *Id.*

[20] *Id.* at 106.

[21] *Id.*

from what the reader, any reader, chooses to attach to them. As I understand him, Strauss takes the conventional position that words can convey meaning, and he would acknowledge (I think) that the meaning words convey depends on the context in which they are used. His argument is that, under the common law approach, the proper context is the one that current understandings provide – not the historical context that originalists insist upon.[22] With respect to definite settlements, accordingly, the idea must be (I think) that we have widespread consensus about the meaning of the words in which those settlements are stated, as we now understand the context in which they appear. The form this agreement about context takes is the purpose we think words have in the place we find them.

Take one of Strauss' concrete examples of a textual provision that makes a particular decision well enough to draw general modern support and thus to form part of the common ground on which so much turns: the provision in Article II specifying the 35-year age requirement for becoming President.[23] Strauss doesn't say what purpose he thinks we currently assign to this. But he must think we do agree on its purpose, else we can't subscribe to the choice of 35 years as an acceptable rule. Trouble is, there is more than one plausible purpose to choose.

One is that an age requirement ensures that anybody who gets to be President is mature enough to do the job. A 35-year rule serves that purpose well enough. There are others. Akhil Amar contends that the original purpose was to keep the sons of well-known fathers from trading on their family names to obtain office despite their lack of merit.[24] The 35-year rule served that purpose pretty well, too, by postponing "famous son" campaigns until other, more capable candidates could prove their worth. Moreover, the age requirement worked in tandem with the four-year term for elected Presidents – preventing a sitting President from hanging on until his son could be anointed his successor. English kings sometimes managed that trick. But in this country, so the argument goes, nobody could stay in office long enough to hold the place for a son who could not run until after he was 35 years old.[25]

Multiple purposes pose a quandary for Strauss. To make the 35-year age requirement serve as an element of our common ground, he has to explain it as resolving a matter in our minds now and resolving it well enough to win acceptance despite disagreements that (we agree) aren't worth the candle to sort out. To do that, he must explain what that matter *is*, this is to say what question requires resolution but admits of an imperfect answer. If we don't know what problem an age requirement for the presidency addresses, we can't know that the 35-year rule supplies a good-enough settlement – which, in turn, joins with other definite settlements of other minor issues to create a common

[22] *But see infra* text accompanying note 26.

[23] *See* STRAUSS, *supra* note 1, at 8.

[24] AKHIL REED AMAR, AMERICA'S CONSTITUTION 160 (2005).

[25] *Id.* at 163.

ground, which, in turn, opens the way for us to make what we will out of the rest of the Constitution. It may be that, at this point, Strauss allows for some attention to original understanding after all. He says that with respect to relatively unimportant questions like this, "[t]he text and the original understandings are natural places to look for a solution."[26] But to go that route is to abandon his otherwise sweeping rejection of originalism as a means of arriving at constitutional meaning.

I have pushed this last point pretty far. The principal argument Strauss makes about the written Constitution is that it offers points of departure for common law development. He insists only that the results we reach on constitutional questions today must be "consistent" with the text – not that our results must follow from the text in the hard, interpretive way that originalists have in mind. I can live with this. The point here is merely that when it comes to the minor matters Strauss thinks the document resolves via definite, good-enough rules, the connection between the results we reach and the language the text employs is supposed to be fairly tight, thus to justify adherence to the original document because it supplies our common ground.

III

I said at the outset that the proper mission of legal theory is explanatory. In that spirit, Professor Strauss devotes his attention to the American constitutional scheme as it exists now. He explains that a living Constitution is "an attribute of a mature society, one in which precedents and traditions have had an opportunity to develop and evolve."[27] He has nothing to do with the way constitutional principles "get established in the first place."[28] It would be grossly unfair, then, to complain that Strauss fails to address any changes he would recommend in our familiar, occasionally amended, 1789 document.

It must also be said that Strauss seizes a certain advantage. He begins in the middle of things and describes what he sees from our vantage point today. I do wonder whether what he has to say about the Constitution we have created in this country bears on the kind of foundational document we would choose if we were to begin again with the purpose of laying the groundwork for common law evolution. Let's be purely and artificially normative for a moment and consider what an original document should look like if it is to promote the development of a Constitution that is both alive and well. I take it we can proceed from some overlapping premises.

We can posit that the existing document has, in fact, fostered a living Constitution without proposing that the content of this document is optimal for the purpose. So far as I can see, Strauss makes no such claim. If we had the drafting task to do over again, we wouldn't necessarily scan the written Constitution we have and click on "copy." We wouldn't necessarily start with

[26] STRAUSS, *supra* note 1, at 111.

[27] *Id.* at 117.

[28] *Id.*

this document and edit it into shape. We might begin again on a clean slate and try to fashion provisions even better suited to the living Constitution project.

We can also identify a living Constitution as our goal without abandoning all hope for a viable society. I will be blunt about this. The governmental system that has taken shape in the United States is a monstrous failure. Under its aegis, we have plundered the natural environment, killed or maimed countless people in this country and abroad, driven great numbers of others into poverty, and treated a favored few (like everyone at this conference) to a style of life with comforts checked only by the certain knowledge that things cannot go on this way much longer. Mostly, these miseries flow from our selfish culture. Yet our basic law bears some of the blame. We have a Constitution that celebrates personal avarice, parochialism, and short-term interests to the exclusion of *any* sense of the public good. Realistically speaking, it's probably too late to save ourselves, or even to save the planet from ourselves. The Constitution *is* a suicide pact.[29] Even so, in this academic setting, we may pause to consider whether we might have done better if our living Constitution had emerged from a different organic document. The optimistic among us may contemplate whether a better written Constitution might yet help us find a way out of the fix we've gotten ourselves into.

We must acknowledge some facts of life. Any talk of writing a good original document is hypothetical to a fault. The drafting task calls for sober judgment about the ideal and brackets all the reasons why sober judgment is most unlikely to be exercised. As the man says, constitutions aren't written in cold blood. They are written hard upon violent conflicts when factions that recently laid down their arms are trying to consolidate their positions. The drafting table is another battlefield, a little less risky to physical health but dangerous in all manner of other ways. Hanna Lerner contends that the process doesn't often identify common ground, but rather sharpens existing divisions.[30] At best, the focus is on the immediate allocation of power rather than on any long-term arrangements that might develop if given the chance. In other writing, Professor Strauss contends that fledgling societies typically depend on adherence to constitutional text as a means of ensuring legitimate political actions until stable traditions and institutions form to engender trust independently.[31]

Nevertheless, Albert Blaustein reports that most of the world's constitutions have recently been, or soon will be, revised or drafted anew.[32] Even the Brits,

[29] *But cf.* Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (famously warning that the Bill of Rights should not be turned into such a pact).

[30] HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 33 (2011).

[31] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 924 (1996).

[32] ALBERT P. BLAUSTEIN, FRAMING THE MODERN CONSTITUTION: A CHECKLIST, at v (1994).

whose unwritten Constitution has served for centuries, now seem bent on codifying their basic law in one place.[33] It may be that this zeal for foundational documents reflects a disturbing expectation that a writing can and should command the future – the antithesis of what we have in mind. We wouldn't want a reassessment of the document we have to feed that misapprehension. The point of the exercise, again, is to consider the optimal way a document might be written to facilitate the growth of an American living Constitution we make up as the future unfolds.

The risks entailed in any redrafting are numerous and obvious. In the best of circumstances, the prodigal forces that have brought us to our current crisis would invade the effort. Success would almost certainly depend on an open, inclusive drafting process, even if the public character of the debates accentuates differences and ends up making agreement difficult. Justus Schönlau ascribes any legitimacy the EU Charter of Fundamental Rights may enjoy to the open convention used to formulate its provisions.[34] Not that constitutions can't survive if they are forged in less appealing circumstances. General MacArthur's lawyers banged out the initial draft of the Japanese Constitution inside a week and presented it to the Japanese government virtually as a *fait accompli*.[35] Japan survived as a nation, and a pretty good one. But few of us would propose that a constitution concocted in that way would foster the development of a genuine living constitution for the people concerned. Then again, it is frightening to say the least even to contemplate Sandy Levinson's idea. He thinks we should commission another constitutional convention with a mandate to examine everything now in place and to fix anything that needs fixing.[36]

Setting aside the difficulty of choosing the right drafting process, the challenge of selecting the content of the document we seek would be ever so much more baffling. One can imagine that the ideal written Constitution would describe the system's architecture. We might ponder whether we really want the national government to be divided even roughly into three functional spheres, whether we want to cordon off regions of the country into units, and, certainly, whether we want individual units to have any sort of autonomy or, instead, to be arms of the national government. These are controversial questions. Malcolm Feeley and Ed Rubin have shown, for example, that

[33] *See* ANDREW BLICK, CODIFYING – OR NOT CODIFYING – THE UK CONSTITUTION: A LITERATURE REVIEW 3 (2011) (collecting recent publications in point). Numerous reforms adopted in recent years have already advanced the codification movement along, though in a fragmented way. VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION 4-5 (2009).

[34] JUSTUS SCHÖNLAU, DRAFTING THE EU CHARTER: RIGHTS, LEGITIMACY AND PROCESS 3-4, 107-13 (2005).

[35] KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING 16-17 (1991).

[36] SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 173 (2006).

federalism has little affirmative value to offer and is best understood as an historically expedient but flawed means of mitigating internal divisions along regional lines.[37] We have federalism only because the states wouldn't accede to a more functional form of government.[38]

Consider, too, that structural relationships have evolved considerably by dint of the living Constitution we want to promote. The power of the Executive has expanded, the Judiciary has moved over to make room for the Administrative State, and Congress (alas, Congress) has become essentially dysfunctional. The place of the states has also changed dramatically, of course. Moreover, developments at this level are connected. One reason Congress can't legislate effectively in the national interest is that every state gets two senators, each of whom gets one vote – an arrangement that notoriously distributes power and wealth to lightly populated states west of the Mississippi.[39] Nor are changes in these quarters at an end. Allocations of power are constantly shifting and doubtless will move in surprising ways in the future. As the Executive Branch in this country has consolidated its position, many structural changes in the United Kingdom have come at the expense of executive authority.[40] If we try so much as to outline the framework of American government, we risk hobbling the emergence of better public mechanisms to deal with an unknowable future.

Many drafting projects around the globe center on identifying and describing individual rights. Schönlau reports that drawing up the EU Charter of Fundamental Rights was thought to be essential to establishing the legitimacy of the EU itself.[41] One should think that democracy and individual rights go hand in hand, the one enabling majoritarian sentiments largely to prevail and the other checking the popular impulse to crush nonconformity. Still, some sophisticated observers question the wisdom of putting individual rights first and foremost. Levinson, for example, doubts that anything in a written Constitution can protect individuals effectively and for long.[42] For him, it is most important to create political structures that ensure the ability of the people to elect their own government and hold it to account. Then, he thinks, we can anticipate that in a serious discussion the majority will be

[37] MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 151 (2008).

[38] *See* John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 816 (1961).

[39] *See* LEVINSON, *supra* note 36, at 59-60.

[40] BOGDANOR, *supra* note 33, at 289.

[41] SCHÖNLAU, *supra* note 34, at 3.

[42] Sanford Levinson, *Do Constitutions Have a Point? Reflections on "Parchment Barriers" and Preambles*, *in* WHAT SHOULD CONSTITUTIONS DO? 150, 153 (Ellen Frankel Paul et al. eds., 2011).

persuaded to recognize and retain any individual rights that are truly essential.[43]

Our current written Constitution offers a poor model regarding individual rights. It's hard to think that, starting over again, we would pick the peculiar list in the Bill of Rights, which was so plainly tied to recent experience. Today, a good case could be made for articulating "positive" rights of a rather more immediate import – like rights to food, shelter, and medical care.[44] Recall, too, that the living Constitution we have respects individual rights with only the most tenuous links to the document in the Archives. To improve on that record, we may want to *avoid* specifying rights in any particulars, the better to leave their development to courts employing common law methodology. Strauss, for his part, contends that the text always matters as a touchstone. It wouldn't do if the written Constitution's provisions were entirely open-ended.[45] By his account, we need enough text to supply an initial reference point, even if it doesn't (and shouldn't) channel the thinking of courts actually fashioning the living Constitution by common law means. One of his examples is *Gideon v. Wainwright*, where the Supreme Court had the benefit of a textual wrinkle that almost certainly appears in the Sixth Amendment only by coincidence.[46]

Of course, no one would propose that, writing on a clean slate, we should spell out individual rights arbitrarily merely to supply the living Constitution with words to chew into something worthwhile. This last point only flags another dilemma. If we began again in an effort to nurture a living Constitution, we would soon realize that suitable language to describe individual rights is hard to come by.

All these starting-over problems are daunting to say the least. So maybe it's just as well that theorists' primary task is to explain things as they stand in our own time, leaving for another day the problems we would face at the dawn of a new constitutional order.

* * * * * *

David Strauss' book is a jewel. It is intelligent, stimulating, exciting, and sensible at one and the same time. Into the bargain, the book is manageable to the ordinary but serious reader who genuinely wants to know something about the Constitution we really have – that is, the Constitution we have made for ourselves.

---

[43] LEVINSON, *supra* note 36, at 175.

[44] *See, e.g.*, Herman Schwartz, *Economic and Social Rights*, 8 AM. U. J. INT'L L. & POL'Y 551, 553 (1993).

[45] STRAUSS, *supra* note 1, at 111.

[46] *Id.* at 107.