

JUDGE POSNER'S COMMON LAW CONSTITUTION

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INTRODUCTION

This past year, Judge Richard Posner published a pair of essays endorsing the common law method of constitutional interpretation. “David Strauss is right,” he wrote, in a contribution to *Slate’s* annual Supreme Court Breakfast Table. “The Supreme Court treats the Constitution like it is authorizing the court to create a common law of constitutional law, based on current concerns, not what those 18th-century guys were worrying about.”¹ He clarified and expanded on his position in a follow-up piece:

Some of my contributions this year have drawn an unusual number of criticisms, focused on language I used that could be read as suggesting that I don’t think the Constitution has any role to play in interpreting the law—that it should be forgotten; that constitutional law is and must and maybe should be entirely a judicial creation, like fields of common law.

That was not my intention, and I apologize if carelessness resulted in my misleading readers. What I think is undeniably true is that while the Constitution contains a number of specific provisions . . . many other provisions are quite vague.

. . . .

. . . Today’s judges are left to do the best they can, within the boundaries they perceive in phrases such as “due process,” or “cruel or unusual.” Their efforts in the aggregate create “constitutional law” based on what is sometimes called the “living Constitution.”²

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1 Richard A. Posner, *Entry 9: The Academy Is Out of Its Depth*. SLATE: SUPREME COURT BREAKFAST TABLE (June 24, 2016, 5:49 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2016/supreme_court_breakfast_table_for_june_2016/law_school_professors_need_more_practical_experience.html.

2 Richard A. Posner, *Entry 27: Broad Interpretations*. SLATE: SUPREME COURT BREAKFAST TABLE (July 1, 2016, 5:03 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2016/supreme_court_breakfast_table_for_june_2016/richard_posner_clarifies_his_views_on_the_constitution.html.

By invoking the “living Constitution,”³ Judge Posner implicitly acknowledges Professor David Strauss, who uses the “living Constitution” moniker to describe his own theory of common law constitutional interpretation.⁴ It is also worth noting that “common law constitutional interpretation” gets its name not because it is itself a field of purely judge-made general common law like torts or contracts, but because the method by which judges interpret the Constitution is, according to Professor Strauss, analogous to the common law method of distinguishing precedents over time with a keen eye for good policy.⁵ The failure to understand this distinction is the main source of confusion and outrage among Judge Posner’s critics.

Even to those who understand what he meant, Judge Posner’s words should come as a shock, given his two decades of scholarship opposing any and all constitutional theories.⁶ But while Judge Posner is notorious for his opposition to constitutional theory, he also has a reputation for being willing to change his mind.⁷ In endorsing Professor Strauss’s theory, he appears to have done just that. Judge Posner’s opposition to “the Constitution as common law” appears in his scholarship as recently as 2012.⁸ In November 2015, however, he

³ *Id.*

⁴ *See, e.g.*, DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 35 (2010) (arguing that our common law “small-c” constitution of doctrines and precedents, together with the written text of the Constitution, forms the “living Constitution”); *id.* at 46 (referring to “the living, common law Constitution”); *id.* at 56 (“The central principles of [First Amendment law] have been worked out by the courts, principally the Supreme Court, through a common law process, the living Constitution in action.”).

⁵ *Id.* at 33–34 (noting how the process by which Supreme Court Justices decide constitutional cases resembles the common law method).

⁶ *See, e.g.*, RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* 3 (1996) (arguing that “the central task of analytic jurisprudence is, or at least ought to be, not to answer the question ‘What is law?’ but to show that it should not be asked, because it only confuses matters”).

⁷ *See, e.g.*, Richard L. Hasen, *Why Judge Posner Changed His Mind on Voter ID Laws*, *THE DAILY BEAST* (Oct. 23, 2013, 2:35 PM), <http://www.thedailybeast.com/articles/2013/10/23/why-judge-posner-is-right-on-voter-id-laws.html> (quoting Judge Posner, who explained his regret at upholding Indiana’s voter identification requirements, which he called a “means of voter suppression”); *see also* Richard A. Posner, *Eighteen Years On: A Re-Review*, 125 *YALE L.J.* 533 (2015) (reviewing WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996)) (explaining the author’s change of opinion on the issue of same-sex marriage reflected in his previous review of Eskridge’s book); Debra Cassens Weiss, *Posner Explains his Changing Views on Gay Marriage: Should Public Opinion Matter?*, *A.B.A. J.* (Dec. 2, 2015, 5:45 AM), http://www.abajournal.com/news/article/posner_explains_his_changing_views_on_gay_marriage_should_public_opinion_ma (noting Judge Posner’s shift to supporting a federal constitutional right to gay marriage).

⁸ Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 *CAL. L. REV.* 519, 535 (2012) (criticizing “the Constitution as common law,” along with other modern constitu-

praised the theory in a speech given at a convention in Chicago.⁹ The following January he published a new book that included a more robust (but still non-committal) analysis of the theory, arguing that “Professor David Strauss is half right when he says that constitutional law (not all of it, but the parts most often involved in litigation, precisely because they are the parts expressed in the Constitution in language that is vague, ambiguous, or archaic) is a body of common law, thus changing as the society changes”¹⁰ Finally, in the aforementioned *Slate* piece published this past summer, Judge Posner gave a more confident and complete endorsement of the theory: “David Strauss is right: The Supreme Court treats the Constitution like it is authorizing the court to create a common law of constitutional law, based on current concerns, not what those [eighteenth] century guys were worrying about. In short, let’s not let the dead bury the living.”¹¹

The purpose of this Comment is to remove any doubt that Judge Posner is now a common law constitutionalist, to explain how this came to be, and to explore its implications. It will proceed in three stages. First, I argue that Professor Strauss’s theory is highly compatible with Judge Posner’s own trademark pragmatic approach to judicial decision-making, found in both his academic writings and judicial decisions.¹² So, in retrospect, Judge Posner’s affinity for common law constitutionalism should not come as a surprise. Second, I argue that Judge Posner’s adoption of Professor Strauss’s theory, with slight modifications, means that common law constitutionalism is no longer a single theory but rather a family of theories. Originalism experienced a similar phenomenon over the past few decades.¹³ Finally, I

tional theories, because these theories lead judges to the supposedly “correct” decision, rather than the most prudent or sensible one).

9 Josh Blackman, *Judge Posner on Judging, Birthright Citizenship, and Precedent*, JOSH BLACKMAN’S BLOG (Nov. 6, 2015), <http://joshblackman.com/blog/2015/11/06/judge-posner-on-judging-birthright-citizenship-and-precedent>; see also Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176, 176 n.3 (2016) (“Professor Blackman, who was in attendance that night (as was this author), posted a blog entry just a few hours after Judge Posner’s remarks faithfully transcribing them. I have checked with Judge Posner and he agrees, at least for the parts of his talk used in this essay, that he was correctly quoted.”).

10 RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 96 (2016).

11 Posner, *supra* note 1.

12 *Id.*

13 See STRAUSS, *supra* note 4, at 26 (noting that “moderate originalism . . . changes the level of generality at which the original understandings are described. Instead of saying that the original understanding is that ‘school segregation is acceptable,’ we should say that the original understanding is that ‘racial equality is required’”); see also AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 247 (2012) (describing a set of “canonical works,” such as Martin Luther King’s “I Have a Dream” speech, as having “achieved a special con-

conclude that Judge Posner's endorsement of common law constitutionalism begs the question of whether the conservative movement (of which Judge Posner is a member) might be better off if it were willing to branch out and contemplate alternatives to originalism. There are good reasons to believe that the common law approach is a suitable vehicle for the conservative movement. Currently, right-wing constitutional theorists remain almost universally loyal to originalism as the only legitimate way to interpret our Constitution.¹⁴ Judge Posner is the only major exception.

Part I of this Comment will clarify some key terms. Part I.A defines conservatism. Part I.B gives a brief overview of originalism. Part I.C describes common law constitutionalism and identifies the key difference between it and originalism. In Part I.D, I summarize Judge Posner's pragmatic approach to judicial decision-making.

In Part II, I show that Judge Posner's own writings on judicial pragmatism over the past twenty years are highly compatible with Professor Strauss's theory. His scholarship, judicial opinions, interviews, and speeches reveal that Posnerian pragmatism is virtually indistinguishable from common law constitutionalism. In particular, Judge Posner and Professor Strauss agree on: 1) the role of the constitutional text as a mere "jumping off point" or "starting point" for judicial common lawmaking; 2) the fact that policy considerations should (and often do) drive constitutional decision-making; 3) the

stitutional authority" because they "occupy a special niche in American constitutional discourse."); JACK M. BALKIN, *LIVING ORIGINALISM* 10–11 (2011) (contrasting how political parties use their own particular form of originalism to achieve their policy objectives). There are also libertarian originalists. This movement is generally associated with Richard Epstein and Randy Barnett. See generally RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION* (2016); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* (2014). Of course, the ultra-orthodox originalism championed by the late Justice Antonin Scalia remains quite popular. See generally Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1, 1 (1989) [hereinafter Scalia, *Is There an Unwritten Constitution?*] (noting that the answer is "[o]f course not"); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 850–51 (1989) [hereinafter Scalia, *Originalism: The Lesser Evil*] (offering praise for Chief Justice William Howard Taft's apparent originalism in *Myers v. United States*, 272 U.S. 52 (1926)); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) [hereinafter SCALIA, *A MATTER OF INTERPRETATION*].

¹⁴ See Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 38–41 (2011) (discussing the strong relationship between conservative ideology and originalist modes of interpretation). Liberal constitutional theory, meanwhile, is an incredibly diverse canon, which forms the basis of an extensive scholarly dialogue. In addition to the moderate originalisms of Jack M. Balkin and Akhil Reed Amar, that canon includes John Hart Ely's representation reinforcement, Ronald Dworkin's moral reading of the constitution, Justice Breyer's active liberty, and David Strauss's common law constitutionalism.

futility and unimportance of plumbing the Constitutional text for “right” answers; 4) the way that judges are constrained by prior precedents, but also the process by which judges can distinguish those precedents, resulting in a system that guides and legitimates the evolution of the law; and 5) the need for candor in judicial opinions.

In Part III, I consider potential objections to my argument that Judge Posner is a common law constitutionalist. I find that while Judge Posner’s and Professor Strauss’s approaches are not identical, the differences are not absolute. This is remarkable, because it means that common law constitutionalism is no longer one theory. Like originalism, it has evolved into a family of theories.

In Part IV, I conclude that while Judge Posner and Professor Strauss subscribe to the same general theory, they share different normative values, and so would almost certainly reach different results in different cases. Judge Posner is influenced by notions of economic efficiency and wealth maximization, which Professor Strauss does not share. Judge Posner’s unique strain of common law constitutionalism might have significant appeal to the conservative legal movement, which for now is almost universally originalist.

I. SOME KEY DEFINITIONS

A. *Conservatism*

This Comment makes numerous references to “conservative legal scholars,” and the “conservative movement.” I will not provide any formal definition of these terms. Instead I adhere to a positivist formulation: “conservatism” is what others say it is. Judge Posner, the late Justice Antonin Scalia, and Chief Justice John Roberts are conservative judges because the media and existing literature say so.¹⁵ For the same reason, the “conservative movement” typically refers to

¹⁵ See, e.g., Mitchell Hiltzik, *A Conservative Judge’s Devastating Take on Why Voter ID Laws Are Evil*, L.A. TIMES (Oct. 13, 2014), <http://www.latimes.com/business/hiltzik/la-fi-mh-why-voter-id-laws-are-evil-20141013-column.html> (referring to Judge Posner as a “conservative judge”); see also Ross Douthat, *Antonin Scalia, Conservative Legal Giant*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/13/opinion/antonin-scalia-conservative-legal-giant.html?_r=0 (referring to Justice Scalia as a “conservative legal giant”); Adam Liptak, *Chief Justice John Roberts Amasses a Conservative Record, and Wrath from the Right*, N.Y. TIMES (Sept. 28, 2015), http://www.nytimes.com/2015/09/29/us/politics/chief-justice-john-roberts-amasses-conservative-record-and-the-rights-ire.html?_r=0 (referencing Chief Justice Roberts’s conservative legal record).

those who favor traditional social institutions, limited government, and economic liberty.¹⁶

Of course, political views are usually more nuanced and complicated than that. Readers should not interpret my use of “conservative” as an attempt to pigeonhole. I use the term broadly.

This clarification is particularly necessary when discussing Judge Posner. He has a reputation in the media and scholarly literature as a “conservative.”¹⁷ But there is no doubt he has different political views than those of Chief Justice Roberts or the late Justice Scalia, despite the fact that they are all identified with the conservative label.¹⁸ Judge Posner favors the legalization of same-sex marriage and abortion, which puts him at odds with the movement on those issues.¹⁹ He is less fond of the label than he was thirty years ago, telling one interviewer, “I’ve become less conservative since the Republican Party started becoming goofy.”²⁰ But he still very much identifies as a conservative, citing his continued admiration for President Ronald Reagan and economist Milton Friedman.²¹ As a founder of the law-and-economics movement, he believes that justice is achieved through economic efficiency and social wealth maximization, because “in a world of scarce resources waste should be regarded as immoral.”²²

16 See GREGORY L. SCHNEIDER, *THE CONSERVATIVE CENTURY: FROM REACTION TO REVOLUTION*, xi (2009) (describing the conservative “label” as having come to stand for a “skepticism . . . toward government social policies; a muscular foreign policy combined with patriotic nationalism; a defense of traditional Christian religious values; and support for the free market economic system”).

17 See, e.g., Hiltzik, *supra* note 15.

18 See Richard A. Posner, *The Chief Justice’s Dissent Is Heartless*, SLATE (Jun. 27, 2015, 1:56 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_gay_marriage_john_roberts_dissent_in_obergefell_is_heartless.html [hereinafter Posner, *The Chief Justice’s Dissent Is Heartless*] (referring to the Chief Justice’s dissenting opinion in *Obergefell* as “heartless”); RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 219 (2013) [hereinafter POSNER, *REFLECTIONS ON JUDGING*] (describing what the author takes to be Justice Scalia’s “personal values,” including his “liking for guns” and “intense dislike of illegal immigrants”).

19 See *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 921–22 (7th Cir. 2015) (Posner, J.) (holding that that the statute placed an undue burden on women seeking abortion, and that it was thus unconstitutional); see also *Baskin v. Bogan*, 766 F.3d 648, 672 (7th Cir. 2014) (Posner, J.) (holding that states’ denials of marriage rights to same-sex couples violated the Fourteenth Amendment).

20 Nina Totenberg, *Federal Judge Richard Posner: The GOP Has Made Me Less Conservative*, NPR (July 5, 2012, 5:15 PM), <http://www.npr.org/sections/itsallpolitics/2012/07/05/156319272/federal-judge-richard-posner-the-gop-has-made-me-less-conservative>.

21 *Id.*

22 RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 23 (2d ed. 1977).

B. *Originalism*

Rather than quibble over competing definitions of “originalism,” I will adopt the one favored by the late Justice Antonin Scalia.²³ This is appropriate given his stature as the father of the modern originalist movement. “The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated.”²⁴ Implicit in Justice Scalia’s reasoning is the idea that the written text of the document is itself the source of our constitutional law. The central dilemma for originalists—and the key source of disagreement among competing versions of originalism—is what judges should do when the text does not provide a clear answer. “[Originalism’s] greatest defect,” Justice Scalia wrote, “is the difficulty of applying it correctly [I]t is often exceedingly difficult to plumb the original understanding of an ancient text.”²⁵

C. *Common Law Constitutionalism*

Professor David Strauss rejects the core assumption of originalism: that the written text of the constitution is the fundamental source of our law:

[I]f you think the Constitution is just the document that is under glass in the National Archives, you will not begin to understand American constitutional law. The written Constitution is a short document that has been amended only a handful of times. By comparison, the United States has over two centuries of experience grappling with the fundamental issues—constitutional issues—that arise in a large, complex, diverse, changing society. . . . Those precedents, traditions, and understandings form an indispensable part of what might be called our small-*c* constitution

. . . .

. . . It is the common law, which has been around for centuries, long before there was a written Constitution.²⁶

In other words, according to Professor Strauss, the source of our constitutional law is not the text but the precedent and doctrines expounded by the U.S. Supreme Court via the common law method.²⁷

²³ See generally Scalia, *Originalism: The Lesser Evil*, *supra* note 13; SCALIA, A MATTER OF INTERPRETATION, *supra* note 13.

²⁴ Antonin Scalia, Address at the Catholic University of America (Oct. 18, 1996), *quoted in* BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 246 (2014).

²⁵ Scalia, *Originalism: The Lesser Evil*, *supra* note 13, at 856.

²⁶ STRAUSS, *supra* note 4, at 34–36.

²⁷ David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884–85 (1996) (outlining the common law method of constitutional interpretation).

These precedents and doctrines often have little to do with the written text.²⁸ Sometimes, they directly contradict the text.²⁹ Professor Strauss observes that, “[t]he First Amendment, by its terms, applies only to ‘Congress.’”³⁰ And yet, there is no doubt under the current Supreme Court doctrine that it applies equally to the other two branches of the federal government.³¹ That the first word of the First Amendment is completely ignored in practice makes Professor Strauss’s theory extremely compelling.

This is not to say that, under Professor Strauss’s theory, the written text of the document plays no role in a common law constitutional system. In fact, the role it plays is vital, even though it is not the fundamental source of our law. Under a common law constitution, the text is the “starting point” that “narrows the range of disagreement” for the judges who craft the doctrines and precedents.³² The text facilitates the judge’s work, makes her job easier, because “[i]t takes time and energy to reconsider and resettle questions every time they come up.”³³ The text provides “common ground” for the Justices.³⁴

Note that it does not follow from this that the text must be interpreted according to its original meaning. Quite the contrary, Professor Strauss thinks that judges should apply the modern meaning of the constitutional text.³⁵ “The current meaning of words,” he asserts, “will be obvious and a natural point of agreement. The original meaning might be obscure and controversial.”³⁶ Strauss cites the Sixth Amendment’s Right to Counsel Clause as an example:

The Sixth Amendment gives a criminal defendant the right “to have the assistance of counsel for his defence.” The original understanding of this provision was that the government may not forbid a defendant from having the assistance of a lawyer that the defendant has retained—that much seems clear from historical sources. It was no part of the original under-

28 *Id.* at 884.

29 David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1, 30 (2015) (discussing how the rights guaranteed by the First Amendment are understood to be protected against intrusion from all branches of the federal government regardless of the “[f]irst [w]ord of the First Amendment”—“Congress”).

30 *Id.* at 3 (quoting U.S. CONST. amend. I).

31 *See id.* at 30 (noting that it “seems odd to suggest that ‘Congress’ should be read to include the other branches of the federal government”).

32 STRAUSS, *supra* note 4, at 104.

33 *Id.* at 105.

34 *Id.* at 104.

35 *See id.* at 106 (“One possibly surprising corollary is that usually this will mean that the words of the Constitution should be given their ordinary, current meaning—even in preference to the meaning the framers understood.”).

36 *Id.* at 106.

standing that the government might have to hire a lawyer for a defendant who could not afford one. But in the celebrated case of *Gideon v. Wainwright*, decided in 1963, the Supreme Court held that, in serious criminal prosecutions, the government must provide counsel for indigent defendants. That rule happens to fit nicely with the language of the Sixth Amendment. But it is just a coincidence

. . . But if the point is to establish common ground, this use of the language begins to make sense: as long as a court can show that its interpretation of the constitution can be reconciled with some plausible ordinary meaning of the text . . . the text can continue to serve the common ground function of narrowing disagreement.³⁷

This view of the text as a mere “starting point” cannot be reconciled with originalism.³⁸ To an orthodox originalist, it is nothing short of blasphemy. Justice Scalia, for instance, observed how “[m]any believe that [the written Constitution] is in effect a charter for judges to develop an evolving common law of freedom of speech, of privacy rights, and the like. I think that is wrong . . . I think it frustrates the whole purpose of a written constitution.”³⁹ The disagreement over the role of the text is fundamental and cannot be resolved. Originalism reveres the text as the source of constitutional law. Common law constitutionalism sees the text as a starting point for judges to create their own constitutional law via the common law method.

D. Posnerian Pragmatism

It is no secret that Judge Posner loathes constitutional theory. He has published widely on the subject, arguing that theories are inherently political and a waste of time.⁴⁰ “No master theories are available

³⁷ STRAUSS, *supra* note 4, at 107 (quoting U.S. CONST. amend. VI) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

³⁸ An originalist, moderate or orthodox, will never rule in a way that directly contradicts the meaning of the text (or at least she will not admit to doing so). Of course, a moderate originalist might reach the same outcome as a common law constitutionalist, but through a different justification. The moderate originalist will likely say she is following the original meaning of the text, but at a higher level of generality.

³⁹ SCALIA, A MATTER OF INTERPRETATION, *supra* note 13, at 13.

⁴⁰ See POSNER, REFLECTIONS ON JUDGING, *supra* note 18, at 179 (calling “textual originalism” in practice a “rhetorical mask of political conservatism,” which on the “political spectrum” stands opposite of a “freewheeling imaginative approach . . . so obviously unanchored as to be shunned even by liberal judges”); see also Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 2 (1998) [hereinafter Posner, *Against Constitutional Theory*] (suggesting that the “domain of constitutional theory” is “limited,” because many difficult interpretive issues “can be resolved pretty straightforwardly by considering the consequences of rival interpretations”); Posner, *supra* note 8, at 535 (discussing the “pretensions of constitutional theory,” which is “designed to tell judges . . . how to decide cases correctly rather than merely sensibly or prudently”); Richard A. Posner, *Tribute to Ronald Dworkin and a Note on Pragmatic Adjudication*, 63 N.Y.U. ANN. SURV. AM. L. 9–10 (2007)

to guide judges in performing their lawmaking role in a constitutional case, for there are no logical or empirical methods of choosing one constitutional theory . . . over another.”⁴¹ In 2012 he explicitly rejected the constitutional theories of Justice Scalia, Akhil Reed Amar, Judge Frank Easterbrook, Justice Stephen Breyer, Ronald Dworkin, John Hart Ely, Randy Barnett, Richard Epstein, and David Strauss, among others.⁴² Such theories, Judge Posner complains, fool judges and academics into believing they are capable of “unlocking the Constitution’s secrets.”⁴³

Rather than follow the marching orders of a theory, Judge Posner thinks judges should decide constitutional cases pragmatically. The pragmatic judge is a realist, who admits that judges make law, and so are “guided primarily by their prediction of the consequences of deciding the particular case.”⁴⁴ But Judge Posner is quite clear that pragmatism is itself not a theory, because it does not tell judges how to decide cases correctly. Whereas theories allow judges to hide their politics under the guise of saying “the Constitution made me do it,” the pragmatic judge does not hide her political preferences.⁴⁵ “A judicial opinion should state the true grounds of the judge’s decision. This duty of candor is necessary for informed criticism of judges.”⁴⁶

Judge Posner is quite right to say that pragmatism is itself not a constitutional theory. Something more is needed, particularly a view of what role the written constitutional text plays, if any, in deciding constitutional cases. In his most recent book, however, he explained his position on the role of the constitutional text:

What is called “constitutional law” is for the most part not in the Constitution itself. Compare the text of the Constitution and the understanding of it by its framers and ratifiers with the current body of constitutional law and you’ll see that what the judges have done and are continuing to do is treat the document as having authorized courts to create a body of constitutional law related only in the most general sense to its original understanding.⁴⁷

(disagreeing with Professor Dworkin’s “insistence” that principles should take priority over policy in guiding judicial decision-making).

41 Posner, *supra* note 8, at 540.

42 *See id.* at 535 (rejecting “[m]odern constitutional theories”—specifically those preferred by Justice Scalia, Judge Easterbrook, Professor Ely, Justice Breyer, and Professor Dworkin—as telling judges “how to decide cases correctly rather than merely sensibly or prudently”).

43 *Id.* at 546.

44 *Id.* at 540–41.

45 *Id.* at 536.

46 *Id.* at 542.

47 POSNER, *supra* note 10, at 94–95.

Here, Judge Posner is essentially describing a common law view of the Constitution. Despite his purported opposition to constitutional theory, this was not an aberration. Four years prior, he gave a similar response when an interviewer asked him to explain “the challenge of constitutional interpretation”:

If you actually read the Bill of Rights and the Fourteenth Amendment, some of the provisions are precise. They're the ones that are a real embarrassment. The Seventh Amendment says that you are entitled to a jury trial in any civil case . . . where the amount in controversy is more than twenty dollars. Well, that's ridiculous. That's twenty dollars in eighteenth century terms. It's an embarrassment. It results in entitling people to jury trials in tiny federal cases. It's ridiculous, but it's hard to get around. . . . When you have a Constitutional provision that's more than 200 years old, if it's very precisely stated it's likely to bear no relation to contemporary need, and that's a problem. . . . The other provisions, the ones that are vague, are simply given a modern meaning. . . . So, almost the entire body of constitutional law was created by the Supreme Court Justices, by free interpretation or no interpretation of the Constitution, just using the Constitution as a jumping off point.⁴⁸

When we combine Judge Posner's writings on judicial pragmatism with his statements about the insignificance of the constitutional text, we have the beginnings of a constitutional theory.⁴⁹ I summarize this theory as follows:

- 1) In most cases, the text of the Constitution is so vague that it imposes no limit on Supreme Court decision-making, serving only as a “jumping off point.” (In cases when the text is clear, the issue is typically non-controversial or embarrassingly outdated and irrelevant to the needs of contemporary society.)⁵⁰
- 2) Given that the text imposes no limit, virtually the entire body of constitutional law has been generated by the Supreme Court, by free interpretation or even no interpretation of the Constitution; the text serves merely as a “jumping off point.”⁵¹
- 3) Because Supreme Court Justices have almost total freedom to decide cases however they want, they *should* decide cases according to the pre-

48 Big Think, *Richard Posner: Constitutional Interpretation*, YOUTUBE (Apr. 23, 2012), <http://www.youtube.com/watch?v=EnLo2XJY2qU>.

49 See Posner, *supra* note 8, at 535 (discussing the unfortunate effects of modern constitutional theories which tell judges how to decide cases “correctly” rather than “sensibly or prudently”); see also Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 5 (1996) (discussing how pragmatist judges prioritize and make judicial decisions that are best for the present and future).

50 Posner, *Against Constitutional Theory*, *supra* note 40, at 2 (“Nothing pretentious enough to warrant the name of theory is required to decide cases in which the text or history of the Constitution provides sure guidance. No theory is required to determine how many Senators each state may have.”).

51 Big Think, *supra* note 48.

cepts of pragmatism. The Justices should reject any legalistic algorithm that tells them how to interpret the text “correctly.”⁵²

This is common law constitutionalism by another name. It is therefore unsurprising that Judge Posner has endorsed Professor Strauss’s theory, except perhaps that it took so long for him to do it.

II. POSNERIAN PRAGMATISM AND COMMON LAW CONSTITUTIONALISM: A CROSS-COMPARISON

What follows is an extensive comparison between Professor Strauss’s common law constitutionalism and Judge Posner’s writings on pragmatism and on the role of the constitutional text, revealing substantial similarities. Specifically, Judge Posner and Professor Strauss largely agree on the same theoretical framework, which can be summed up in five points: 1) the role of the constitutional text as a mere “jumping off point” or “starting point” for judicial common lawmaking; 2) the fact that policy considerations should (and often do) drive constitutional decision-making; 3) the futility and unimportance of plumbing the Constitutional text for “correct” answers; 4) the way that judges are constrained by prior precedents, but also the process by which judges can distinguish those precedents, resulting in a system that guides and legitimates the evolution of the law; and 5) the need for candor in judicial opinions.

A. *The Constitutional Text as a “Jumping off”/“Starting” Point*

Judge Posner and Professor Strauss agree on the role the constitutional text should play in our constitutional system: as a “jumping off point” or “starting point” for judicial lawmaking. Professor Strauss cites “significant benefits in using the provisions of the Constitution as a starting point—however imperfect they are from everyone’s point of view—and great potential costs in starting from scratch.”⁵³ This “narrows the range of disagreement, and is valuable for that reason. So even when the text does not come close to providing an answer, conventionalism still explains why the text is a shared starting point.”⁵⁴ Judge Posner similarly believes that the text imposes no practical limits on the Justices.⁵⁵ He writes that “almost the entire

⁵² See Posner, *supra* note 8, at 535 (arguing against modern constitutional theories, which tell judges “how to decide cases correctly rather than merely sensibly or prudently”).

⁵³ Strauss, *supra* note 27, at 912.

⁵⁴ *Id.*

⁵⁵ See Big Think, *supra* note 48 (“So, the text doesn’t impose a limit. Precedent doesn’t impose a limit. . . . Supreme Court Justices make up some principle.”).

body of constitutional law was created by the Supreme Court Justices, by free interpretation or no interpretation of the Constitution, just using the Constitution as a jumping off point."⁵⁶ Often, he observes, the written words are either so vague that they can be construed at will, or so embarrassingly precise that they have no impact.⁵⁷

B. Emphasis on Fairness, Policy, and Consequences

Judge Posner and Professor Strauss also agree that constitutional decision-making should not be decided formalistically like a math problem; judges should be attuned to the needs of the parties at hand. For instance, Judge Posner explicitly defines pragmatist judges as those "who don't insist that a legalistic algorithm will decide every case."⁵⁸ Professor Strauss writes, similarly, that "[constitutional law] is not like solving a math problem; it is not algorithmic. It involves the exercise of judgment."⁵⁹

Both also emphasize that, when deciding cases, judges should keep in mind practical consequences for society at large, not just for the parties at hand. Common law constitutionalism "explicitly involves arguments and considerations that aren't narrowly or distinctively legal, like judgments about fairness and good policy."⁶⁰ Similarly, a Posnerian pragmatist "must bear in mind not only the consequence of a decision for the parties, but also its effects on such systemic values as continuity, predictability, and stability of legal rules and decisions."⁶¹ Not surprisingly, both Professor Strauss and Judge Posner express deep admiration for Justice Benjamin Cardozo, particularly his belief that "[t]he final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."⁶²

In addition to his scholarship, Judge Posner's judicial opinions also mirror Professor Strauss's theory. As an example, consider *Baskin*

⁵⁶ *Id.*

⁵⁷ *See id.* (discussing the problem of words in the Constitution that are so "precisely stated" that they "likely . . . bear no relation to contemporary need" as well as "words that are so vague they can be applied to anything that bothers you").

⁵⁸ *See* Posner, *supra* note 8, at 539.

⁵⁹ STRAUSS, *supra* note 4, at 35.

⁶⁰ *Id.*

⁶¹ Posner, *supra* note 8, at 541.

⁶² STRAUSS, *supra* note 4, at 39 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66–67 (1921)); *see also* Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1380 (1990) (referring to the same Cardozo quote as "the pragmatist creed").

v. Bogan,⁶³ in which the Seventh Circuit contemplated a constitutional right to same-sex marriage. Judge Posner's questions from the bench during oral arguments focused on the unfairness of denying same-sex couples of the right to marry, since it imposed higher costs on such couples and their children:

Indiana provides, and then the Federal government is dragged along with it, very substantial, tangible benefits to a married couple. Now don't the children of a married couple, whether same-sex or opposite-sex, don't they benefit? The married parents are better off. They have all sorts of benefits—survivor benefits, spousal security, tax exempt—all sorts of things in federal and state. Doesn't that make the kids better off?⁶⁴

He went on to contemplate how the ability of same-sex couples to marry affects the supply/demand relationship in the market for child adoption,⁶⁵ and even argued that it is “cheaper to adopt a child if you're married because you'll get all these benefits from the state and the federal government.”⁶⁶ His focus was almost entirely on policy, with little discussion of the constitutional text. In fact, the Fourteenth Amendment is mentioned only twice in Judge Posner's *Baskin* opinion,⁶⁷ reflecting Strauss's observation that “the text of the Constitution will play, at most, a ceremonial role” in judicial opinions.⁶⁸

Of course, this does not mean that Judge Posner and Professor Strauss must agree on what actually constitutes fairness and good policy. They might decide certain cases differently, even if they both adhere to the common law method. Consider *NFIB v. Sebelius*,⁶⁹ which upheld the Affordable Care Act under the Taxing Power, but not the Commerce Power. Professor Strauss consistently defended the Affordable Care Act as constitutional under both powers, noting that it

⁶³ 766 F.3d 648 (7th Cir. 2014).

⁶⁴ Oral Argument at 5:10, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), http://media.ca7.uscourts.gov/sound/2014/rt.1.14-2386_08_26_2014.mp3 (asking whether there is a “strong interest in trying to get [children] adopted,” and noting that “it is much better for the kids to be adopted”).

⁶⁵ *Id.* at 15:02.

⁶⁶ *Id.* at 15:10. It is worth noting that at this point during oral arguments, Judge Posner became quite animated in defending the constitutionality of same-sex marriage on policy grounds. He admonished Indiana's Solicitor General for refusing to concede that legalizing same-sex marriage would make it easier for children to get adopted. *Id.* at 15:18. (“You should be wanting to enlist people as adopters so you can minimize [the number of children in foster care. Isn't this] pathetic? You've got ten thousand foster care children in Indiana. Don't you want to get them adopted?”).

⁶⁷ 766 F.3d at 654, 657.

⁶⁸ STRAUSS, *supra* note 4, at 33.

⁶⁹ 132 S. Ct. 2566, 2593, 2600 (2012) (holding that the Affordable Care Act's individual mandate is constitutional under Congress's Taxing Power, but not under the Commerce Power).

was reasonable for Congress to regulate the insurance industry and the law would make healthcare more affordable.⁷⁰ Judge Posner, perhaps more pessimistic than Professor Strauss about whether the law would actually work in practice, hinted that he would have been tempted to strike down the law if he sat on the High Court (though he ultimately would have upheld it strictly as a matter of political expediency). “[I]f the court had wanted to make ‘policy judgments,’ it could have had a field day. Chief Justice Roberts in his opinion said that that’s not the Supreme Court’s business. A legal realist would say that most Supreme Court decisions in constitutional cases are policy judgments”⁷¹

C. *De-Emphasis on “Correctness”*

Neither Judge Posner nor Professor Strauss insist on the absolute rightness of their theories. One chooses to be a common law constitutionalist because doing so produces the best and most honest results—for the case at hand, for society, for judicial economy, or even the integrity of the American legal system itself—not because it produces the one true interpretation of the law. Originalism is different in that regard. “An originalist,” Professor Strauss writes, “claims to be following orders. An originalist cannot be influenced by her own judgments about fairness or social policy; to allow that kind of influence is, for an originalist, a lawless act of usurpation.”⁷² Judge Posner’s own writings agree with this sentiment. He suggests that if originalists were to adopt a motto, it should be “The constitution made me do it.”⁷³ He excoriates those on the left and the right who plumb the constitutional text for “right” answers that do not exist.

D. *The Evolution of Doctrine and Precedent*

Common law constitutional interpretation is not driven solely by normative values about policy and fairness. It is also rooted in the

⁷⁰ See, e.g., David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 3–6, 21 (arguing that the Affordable Care Act is clearly constitutional under long-held understandings of the Commerce Clause); see also *id.* at 21 (noting that “self-insurance has recognizable economic effects on interstate commerce” and so it should be subject to regulation by Congress).

⁷¹ See Richard A. Posner, *Chief Justice Roberts Did the Right Thing—But It’s Still a Bad Law*, SLATE (June 29, 2012, 10:47 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/john_roberts_reached_the_correct_decision_but_obamacare_is_still_a_very_bad_law.html.

⁷² STRAUSS, *supra* note 4, at 45.

⁷³ Posner, *supra* note 8, at 536.

slow evolution of doctrine and precedent. “The common law,” Strauss observes, “does not treat precedents as untouchable; sometimes, precedents can be overruled. Exactly when they can be overruled is a complex matter, but there is at least one well-established pattern of overruling in the common law.”⁷⁴ He describes this pattern in detail, emphasizing how policy considerations allow a precedent to be gradually distinguished over time until it is finally overruled:

Characteristically the law emerges from this evolutionary process through the development of a body of precedent. A judge who is faced with a difficult issue looks to see how earlier courts decided that issue, or similar issues. The judge starts by assuming that she will do the same thing in the case before her that the earlier court did in similar cases. Sometimes—almost always, in fact—the precedents will be clear, and there will be no room for reasonable disagreement about what the precedents dictate. But sometimes the earlier cases will not dictate a result. The earlier cases may not resemble the present case closely enough. Or there may be earlier cases that point in different directions, suggesting opposite outcomes in the case before the judge. Then the judge has to decide what to do. At that point—when the precedents are not clear—a variety of technical issues can enter into the picture. But often, when the precedents are not clear, the judge will decide the case before her on the basis of her views about which decision will be more fair or is more in keeping with good social policy. This is a well-established aspect of the common law: there is a legitimate role for judgments about things like fairness and social policy.⁷⁵

The Court’s landmark decision in *Brown v. Board of Education*,⁷⁶ for instance, did not happen overnight: “a progression of precedents” over twenty years “had left [the] separate but equal [doctrine] hanging by a thread.”⁷⁷

Judge Posner acknowledges a similar tension between precedent and policy, with the former constraining the latter in a way that legitimizes the Constitutional decision-making process:

I’m a pragmatist. I see judges as trying to improve things within certain bounds. There are practical restrictions on the exercise of one’s moral views. There are specific laws that are deeply entrenched. Where the judges are free, their aim, my aim, is to try to improve things. My approach with judging cases is not to worry initially about doctrine, precedent, and all that stuff, but instead, try to figure out, what is a sensible solution to this problem, and then having found what I think is a sensible solution, without worrying about doctrinal details, I ask “is this blocked by some kind of authoritative precedent of the Supreme

74 STRAUSS, *supra* note 4, at 79.

75 *Id.* at 38.

76 347 U.S. 483 (1954).

77 STRAUSS, *supra* note 4, at 90.

Court"? If it is not blocked, I say fine, let's go with the common sense, sensical solution.⁷⁸

Conceptually, this identical to Professor Strauss's formulation, except perhaps that Judge Posner is a bit more forthcoming about how policy considerations drive his interpretation of the Constitution.

E. Candor in Judicial Opinions

An obvious criticism of the common law method of constitutional interpretation is that it "amounts to giving a blank check to judges and other interpreters."⁷⁹ Professor Strauss does not deny that a common law approach to constitutional decision-making invites judges to decide cases based on their policy preferences. Instead, he insists that this actually isn't a bad thing. In fact, he welcomes it. "[I]t is legitimate [for judges] to make judgments about fairness and policy" because "in a common law system those judgments can be openly avowed and defended . . ."⁸⁰ The more compelling these judgments are, the more likely it is that they will win over a larger share of the Court, and the more likely it is that they will withstand the test of time. And the longer they stand, the more stable and respected these decisions become.

Judge Posner agrees that the common law approach to constitutional decision-making encourages judges to decide cases according to their political preferences. And he also does not see this as a problem, because he believes that all constitutional decision-making is inherently political. To Judge Posner, this means that judges will at least be honest and open about their decision-making, which itself leads to a better judiciary. "A judicial opinion should state the true grounds of the judge's decision. This duty of candor is necessary for informed criticism of judges."⁸¹ This remark mirrors Professor Strauss's argument that "it is legitimate [for judges] to make judgments about fairness and policy" because "in a common law system those judgments can be openly avowed and defended . . ."⁸² It suggests that in endorsing Professor Strauss's theory, Judge Posner did not change his approach to constitutional interpretation, but rather took a second look at the theory and realized that it was more reflective of his own views than he initially realized.

78 Blackman, *supra* note 9.

79 STRAUSS, *supra* note 4, at 36.

80 *Id.* at 45.

81 Posner, *supra* note 8, at 542.

82 STRAUSS, *supra* note 4, at 45.

Judge Posner confronts this issue even more forcefully in his 2016 book. “Constitutional law,” he says “is the Supreme Court’s practice of forbidding whatever a majority of the Justices consider egregious invasions of rights that those Justices think people in the United States should have.”⁸³ In other words, the Supreme Court is a political institution; it might as well be honest about it. Recall his critique of Chief Justice Roberts’s decision in *NFIB v. Sebelius*, particularly his comment that “if the court had wanted to make ‘policy judgments,’ it could have had a field day.”⁸⁴

III. COMMON LAW CONSTITUTIONALISM AS A FAMILY OF THEORIES

Why did it take so long for Judge Posner to all but endorse a common law view of the Constitution? Professor Strauss first published his theory in 1996,⁸⁵ and Judge Posner declared himself as “against constitutional theory” as early as 1998.⁸⁶ Both men are on the faculty of the same law school, and are widely respected figures in legal academia. So it is surprising that, until very recently, there has been no scholarly dialogue between the two on this subject. As a result, the literature comparing Judge Posner’s views with common law constitutionalism is quite limited.

That being said, there are currently two potential objections to my argument that Judge Posner is a common law constitutionalist. The first comes from Professor Eric Segall, who contends that while Judge Posner and Professor Strauss have similar views about constitutional adjudication, their views about the role of the written constitutional text are fundamentally different.⁸⁷ The second objection comes from Judge Posner himself, who identifies some differences between his approach and Professor Strauss’s in his most recent book.⁸⁸ However, the lesson here is that Professor Strauss’s and Judge Posner’s approaches need not be identical. Originalism evolved from a single theory into a family of theories, with followers on both the left and right sides of the political spectrum. The same phenomenon is now happening to common law constitutionalism.

83 POSNER, *supra* note 10, at 96.

84 See Posner, *supra* note 71.

85 Strauss, *supra* note 27.

86 See Posner, *Against Constitutional Theory*, *supra* note 40, at 2 (arguing for the “limited domain of constitutional theory”).

87 See Segall, *supra* note 9, at 177 (distinguishing between how “far” Strauss and Judge Posner are willing to “go” in their view on the irrelevance of the constitutional text to outcomes).

88 POSNER, *supra* note 10, at 96.

A. *Professor Segall on the Role of the Constitutional Text*

In an article published earlier this year, Professor Eric Segall observes that Judge Posner and Professor Strauss “agree substantially on how the Supreme Court decides constitutional law cases.”⁸⁹ However, he ultimately concludes that Judge Posner and Professor Strauss have irreconcilable views towards the constitutional text. Specifically, he thinks Judge Posner believes the text doesn’t matter at all, whereas Professor Strauss is adamant that “it is never acceptable to announce that you are ignoring the text.”⁹⁰ In defense of this argument, Segall points to a 2012 speech by Judge Posner at a colloquium in Chicago:

If you look at the entire body of constitutional law, that body of law bears very little resemblance to the text of the Constitution in 1789, 1791, and 1868. . . . That’s the reality. The only useful way to advocate with regard to constitutional law is to give a good contemporary argument for or against a particular interpretation.⁹¹

Professor Segall, who was in attendance, notes that “Judge Posner’s remarks created significant controversy that night (and on social media), possibly because he said exactly what Professor Strauss warns is ‘never’ appropriate: that it is perfectly fine (even desirable) for judges to ‘ignore’ constitutional text.”⁹²

I disagree. The problem here is that Judge Posner’s off-the-cuff remark is incomplete. He says the “body of constitutional law . . . bears very little resemblance to the text,”⁹³ which is not the same as arguing that the text is irrelevant.

Perhaps Professor Segall is referring to Judge Posner’s comment that he is “not particularly interested in the [eighteenth century], nor [is he] particularly interested in the text of the Constitution.”⁹⁴ Judge Posner “[does not] believe that any document drafted in the [eighteenth] century can guide our behavior today. Because the people in the [eighteenth] century could not foresee any of the problems of the [twenty-first] century.”⁹⁵ If we compare this statement with Judge Posner’s 2012 interview, he expressed basically the same idea, but was more specific about the role of the text: “So, almost the entire body of constitutional law was created by the Supreme Court Justices, by free interpretation or no interpretation of the Constitu-

89 Segall, *supra* note 9, at 177.

90 *Id.* at 184 (alteration in original) (quoting Strauss, *supra* note 29, at 4).

91 *Id.* at 176 (citation omitted).

92 *Id.* at 177 (citation omitted).

93 *Id.* at 176 (citation omitted).

94 Blackman, *supra* note 9.

95 *Id.*

tion, just using the Constitution as a jumping off point.”⁹⁶ This answer is more complete, and more importantly, is completely consistent with Strauss’s theory. Judge Posner calls the text a “jumping off point,” not “completely irrelevant.” Professor Strauss calls the text a “starting point.” I do not see any meaningful distinction between these two phrases.

The real issue here is that Professor Strauss has a more fully robust and well-articulated view about the role of the Constitutional text. This makes sense. Professor Strauss has written countless articles and a book outlining and defending his theory. Judge Posner’s endorsement of common law constitutionalism is found in off-the-cuff informal remarks, a tangential discussion from his most recent book, and one paragraph from an article published in *Slate*.

B. Judge Posner on the Political Nature of Common Law and Constitutional Law

Perhaps the most damning objection to my argument that Judge Posner is a common law constitutionalist comes from Judge Posner himself. In his 2016 book, he lists some issues he has with Professor Strauss’s theory:

Professor David Strauss is half right when he says that constitutional law (not all of it, but the parts most often involved in litigation, precisely because they are the parts expressed in the Constitution in language that is vague, ambiguous, or archaic) is a body of common law, thus changing as the society changes

The reason Strauss is only half right is that common law in its strict sense differs critically from constitutional law in being much less political. Common law refers to judge-made legal doctrines governing private disputes in such fields as torts, contracts, and property. There is general satisfaction with these doctrines, in part because state legislatures can revise state common law and Congress can revise federal common law, whereas amending the federal Constitution is immensely difficult. . . . Constitutional law is the Supreme Court’s practice of forbidding whatever a majority of the Justices consider egregious invasions of rights that those Justices think people in the United States should have.⁹⁷

In other words, Judge Posner purportedly rejects the idea of a common law constitutional system because American constitutional law is blatantly political in a way that traditional common law is not.

There are two reasons to be skeptical of Judge Posner’s refusal to fully endorse Professor Strauss’s theory.

⁹⁶ Big Think, *supra* note 48.

⁹⁷ POSNER, *supra* note 10, at 96.

First, his explanation for why Professor Strauss is only half right does not fit with his previous scholarship. In the above excerpt, Judge Posner insists that American constitutional law is inherently political, whereas traditional common law is less so. But Judge Posner has long held that traditional common law is extremely political, as part of his writings on judicial pragmatism. This is evident in the deep admiration he has for California Chief Justice Roger Traynor, whose politically-minded approach to the common law led him to invent the law of strict products liability. Judge Posner observes that Chief Justice Traynor “announced explicitly that he was making public policy. . . . [Chief Justice Traynor] believed that modern times demanded judicial creativity and that modern advances in the social sciences would assist the judge in this task.”⁹⁸

But let’s assume we take Judge Posner at his word on the first point. The second problem is that, even if constitutional common law is more political than the common law of property or contracts, it does not follow that Professor Strauss is only half-right. At most, this disagreement is one of degree, not of kind. Judge Posner believes that constitutional law and traditional common law are inherently political, even if one is clearly more political than the other. This does not warrant saying that 50% of Professor Strauss’s theory is wrong.

Either way, one need not endorse the entirety Professor Strauss’s argument to be considered a common law constitutionalist. In fact, that is precisely the point. Originalism used to be one theory. It has since grown into a family of theories with many different branches. That is what is happening now with common law constitutionalism. Judge Posner’s version does not have to be identical to Professor Strauss’s, any more than moderate originalism has to be identical to orthodox originalism.⁹⁹ The bottom line is that Judge Posner rejects the text as the source of our constitutional law. He instead favors a mix of doctrine and precedent, with a heavy dose of fairness and good policy.

⁹⁸ Posner, *supra* note 8, at 540 (quoting BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* 121 (2003)) (describing Chief Justice Traynor’s method of deciding cases after referring to him as amongst the Justices who are “most admired by the legal profession and the judiciary”); *see also* Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 76–77 (1978) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932)) (Brandeis, J., dissenting) (arguing that while the Supreme Court has the power to implement the Justices’ own political views, it should resist doing so).

⁹⁹ *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 29 (2009) (noting that “some of us read the original intentions broadly, and others read them narrowly”).

IV. CONCLUSION: A NON-ORIGINALISM FOR CONSERVATIVES?

While Judge Posner and Professor Strauss subscribe to the same theoretical framework, they clearly share different normative values, resulting in different applications of the theory. Judge Posner tends to be persuaded by considerations of economic efficiency and wealth maximization.¹⁰⁰ This is what distinguishes his particular “conservative” brand of common law constitutionalism—conservative in the sense of advancing the principles of limited government and economic liberty, though certainly not in the sense of preserving traditional social institutions. He has long been an advocate of the Efficiency Theory of Common Law,¹⁰¹ which he also refers to interchangeably as “the economic theory” of common law.

If Judge Posner believes in the efficiency theory of common law, and if he believes that we have a common law constitution where the written text is largely irrelevant, then we might expect him to apply that economic theory of the common law to his constitutional jurisprudence.

The irony here is that thirty years ago, Judge Posner actually identified such a form of economics-oriented common law constitutionalism and explicitly rejected it:

There are two fundamental normative approaches to constitutional adjudication. The first regards the Constitution as essentially an empty vessel into which the judge pours his own ideas of sound policy. . . . A Justice who . . . believed that normative economics (say, the idea of wealth maximization that I have defended) provided the best orientation for public policy would feel himself free—at least insofar as he was able to persuade enough of his brethren to constitute a majority and able to avoid being overruled by constitutional amendment—to decide constitutional cases in such a way as to make constitutional law economically efficient. For such Justice,¹⁰² economics would provide a virtually complete guide to adjudication.

However, he rejected this common law style approach to constitutional interpretation because, in 1987, he believed that judges ought

¹⁰⁰ See generally POSNER, *supra* note 22; Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U.L. REV. 1 (1986) (proposing a model of evaluating regulations on free speech from an economic efficiency perspective); see also Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 31–33 (1972) (arguing that “a major function of the negligence system is to create the most economically efficient means of regulating safety”).

¹⁰¹ Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775, 775, 775 n.2 (1981) (noting that he has advocated for an efficiency theory of the common law, which he sometimes calls “the economic theory” of common law).

¹⁰² Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 32 (1987).

to be “constrained, most of the time anyway, by the text, structure, and history of the Constitution.”¹⁰³

Judge Posner has clearly changed his mind on the role of text, structure, and history of the constitution. He no longer believes judges are constrained by them. Today, he accepts that the Constitution is “an empty vessel into which the judge pours his own ideas of sound policy.”¹⁰⁴ He also likely thinks that judges should therefore “decide constitutional cases in such a way as to make constitutional law economically efficient.”¹⁰⁵ The “fundamental normative approach to constitutional interpretation” he described in 1987 forms the basis of an economics-oriented common law constitutional interpretation. He rejected it then, but now that he has endorsed Professor Strauss’ theory, it might appeal to him now.

Either way, it is quite remarkable that Judge Posner now supports common law constitutionalism, given his long-standing opposition to constitutional theory. It remains to be seen whether he will continue to say more on the subject. Let us hope that he does.

103 *Id.*

104 *Id.*

105 *Id.*