RESPONSE AND COLLOQUY

RESPONSE AND COLLOQUY CONCERNING THE PAPERS BY JACK BALKIN AND DAVID STRAUSS

JAMES FLEMING: So we'll open it up to questions. Pnina Lahav?

PNINA LAHAV: Jack, it's all wonderful, it's great scholarship, and it's certainly impressive, but it's not originalism. Tell us more about that.

JACK BALKIN: You can understand originalism as a formal matter, as a political phenomenon, and as a cultural phenomenon. As a formal matter, I think Larry Solum has a good definition of originalism. Originalism has three basic claims. First, originalists believe that something is fixed at the time of adoption of a constitution; that's the fixation thesis. Second is the amendment thesis: whatever this thing that is fixed can't be changed except through amendment. Third is the consequences thesis: that this thing, which is fixed at the time of adoption and can't be changed except through amendment, matters for the correct interpretation of the Constitution.

Originalism is a family of theories, all of which share these three elements in common. And I claim that my theory also has these three elements. First of all, what is fixed at the time of adoption is the original semantic meaning of the text. Second, it can't be altered, except through an Article V amendment. And third, it matters for interpretation; it's the framework on which all construction is built. There are some things that you just can't do because of the text. Some of them are obvious; some of them are a little more subtle. And so, as a formal matter, mine is an originalist theory.

On the other hand, it's not an originalist theory if we view originalism as a political phenomenon. Originalism arose out of a set of conservative mobilizations that begin in the '60s and '70s, that really flower in the '80s and '90s, and then become theorized in law schools. So yes, this book is not an example of political originalism. It's not the originalism we associate with the conservative movement in America. But there are earlier versions of originalism that have a different politics. There's Hugo Black's originalism, which mine has a lot of affinities to. If you think Hugo Black was an originalist, you should have no problem believing that I'm one.

The third aspect of originalism is cultural. This is a point David has made before, and I strongly agree with it. In the last chapter of my book, *Constitutional Redemption*,[1] I treat originalism as a cultural trope. Originalism

[1] JACK M. BALKIN, CONSTITUTIONAL REDEMPTION (2011).

involves the return to origin; it is a move to restore or redeem a practice. It's a characteristic, not simply of legal movements, but also of religious movements and cultural movements. You see it in Martin Luther. You see it in Zhu Xi's Neo-Confucianism. You see it in all sorts of mobilizations in the United States. You see it in the Tea Party, and you see it in liberal mobilizations as well. You also see it in the Populists. The cultural idea is that we must return, we must restore, we must redeem.

Such mobilizations are often textualist and protestant. They try to put the power of interpretation in the hands of ordinary participants and not in the hands of a hierarchy. They often argue that the hierarchy is corrupt and that it has undermined the true nature of the regime, or the true nature of the religion, or the true nature of the project, and therefore we must restore or redeem it.

My book clearly adopts this cultural trope of originalism. In fact, the conservative mobilizations I described before also have that cultural trope, too; it's just that liberals have forgotten it. Liberals don't remember that when people in the '60s and '70s started to make these arguments, that's what they were doing. They were saying: "Liberals have destroyed the Constitution. Liberals have corrupted it. Liberal elites have wiped the Constitution away and substituted some crazy liberal version of it. And we have to take the Constitution back and restore it and redeem it." This is the cultural trope of originalism, but it was also tied to a political program, which liberals don't accept.

So, Pnina, of the three ways of thinking about originalism – formal, political, cultural – I satisfy two out of three. And two out of three ain't bad.

GARY LAWSON: This is a completely unfair and absurd question. I'll open it up to both. Suppose that instead of 2011, this was 1911. Can either of you see writing books with the same methodological approach? Not the same conclusions, not the same analysis. Or is the methodology itself temporally and historically situated?

DAVID STRAUSS: I think so. I think my answer would be yes, that this is the way the Constitution's been understood. Not from the beginning, but there was a point when certain ways of doing things became established, and you didn't have to keep going back to the text to figure out how to do things. Which may have been fairly early on considering how much we brought over from Britain.

GARY LAWSON: I'll say 1811.

DAVID STRAUSS: Well, yes. One reason why I think this approach is so much a part of our way of doing constitutional law – not just in courts but generally, to take Jack's earlier point – is the U.S. Constitution entered mainstream on a legal tradition. And it modified it in lots of ways, but it didn't modify it in every way.

It was different in 1911. There wasn't nearly as much law about powers of Congress as there is today. That was not entirely a twentieth century development, but a late 19th century development. But sure, to understand what the Marshall Court was up to, and to understand what the court of the late nineteenth, early twentieth century was up to, I think they were doing common-law stuff.

JACK BALKIN: It's not an absurd question at all; it's actually a very good question. You know, Gary, my work is very historicist, and I think that intellectual problems and theories arise to solve the problems of the times in which they're offered. If we were writing these books in 1911, one of us might have been writing a book saying, "Why don't we have a British parliamentary system?" That's what people were thinking back then. And perhaps another of us would be writing a tract calling for socialist revolution. I'm not going to tell you who would have been whom. [laughter]

KHIARA BRIDGES: I would like to direct my question to David. In speaking about *Brown*,[2] you said that it would have been completely legitimate for the court to make a moral argument that segregation was wrong, it was immoral. And in fact, they were remiss in as much as they did not make a moral argument.

My question then is, how does the court determine the proper morality? It can't be through polling, because surely there was a moral dissensus around the question of segregation. I am all about the court making moral argumentation when the court agrees with my particular moral perspective, but I would be more hesitant towards the court making moral argumentation when they disagree with me.

DAVID STRAUSS: Thanks. A couple of things. Opinions in general, and the opinion in *Brown* in particular, are not a good guide to what was actually going on with the decision. The opinion, especially in a case like that, is going to be a public, diplomatic document, and is not going to be, and there's no requirement that it be, and it probably shouldn't be, a candid account of what was really going on. So I wouldn't want to criticize the opinion for not being more overtly moral. It was a little moral. I mean, there's no mistaking that the court thought segregation was morally bad. But I wouldn't want to criticize them for not going further in that direction.

By moral judgments, I really do just mean their moral judgments. You're right, I don't mean polling, I don't mean trying to reflect conventional morality. But I really do just mean, is it wrong or unfair or a stupid idea. I think courts do that all the time. That's not the only input. But I think they do that all the time.

If they're talking about some case involving the Fourth Amendment and

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[2] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

searches, they'll be thinking, is this unfair? And they'll be thinking, is this a sensible way to regulate the police? I'd lump those together as judgments – sometimes it's more natural to call them morality, sometimes it's more natural to call them good policy. But they're all those kinds of judgments.

And you're right, of course, that if we simply turned them loose and said "do the right thing," I don't think any of us would want to live in that world. Or at least there'd be times when we'd regret having acceded to living in the world when the judges didn't agree with us.

This is, I think, the great insight of what I'm going to call the common-law approach. But it's much broader than that. It really is the strand of small-c conservatism, which is, don't be too confident about your judgments. If you can show that your judgments have this validation from other sources, historical and contemporary, then okay, if you're sure. But the feeble and fallible contrivances of our wisdom, in Burke's phrase, are not enough to justify significant changes. And that's the idea.

One way to think about the point you made at the end, about not trusting judges, is to say, okay, if you knew that the people making these decisions were going to disagree with you on political issues, but were going to act in good faith, what approach would you give them? We certainly wouldn't say, "Just do what you think is right." I don't think we would give them originalism, because I think it leaves too much open. I think it's too easy to look at what the Framers said and see what you want.

I think the common law hedges them in. I think that is a good argument for it, that this is what you'd give your enemies if you had to give them something, because they would do less damage with this than they would with the other approaches.

HUGH BAXTER: I have a question for David. I know the answer, since I've read your book, but I wonder if you can say a little bit about how your theory handles *Roe v. Wade*,[3] and then *Casey*,[4] and then *Carhart*.[5]

DAVID STRAUSS: Whatever one thinks of the decision in *Roe* – I think it was rightly decided, although a difficult case – *Roe* has done terrible things to constitutional theorizing. Because I think it has driven a lot of conservatives, who would otherwise be sensible enough not to be originalists – sorry, Gary, I had to get that in [laughter] – to originalism, because they hate *Roe*. They're trying to find some platform to get at it. And, on the other side of the debate, I think it's encouraged a degree of openness, a looseness on the part of supporters of *Roe*.

The best I can do with *Roe* is to say, on a common-law approach, it's a tough decision. It ought to be a tough decision. If an approach says *Roe* is

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[3] 410 U.S. 113 (1973).

[4] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[5] Gonzales v. Carhart, 550 U.S. 124 (2007).

easy one way or another, I think that's a point against the approach. I think there are well-established strands of the law that support what the court did in *Roe*. The principle that people have autonomy in deciding the composition of their family is well established in the law, not just judge-made law, statutory law as well. And the idea that people have control over their bodily integrity goes way back in the common law.

You put those two together and at least the right that the court recognized in *Roe*, the right of a woman to control what goes on as far as whether she'll have a child, is pretty firmly anchored.

If you were to say, "Well, okay, but why is that not overcome by the interest in fetal life?" That, I think, is a much more difficult question. I've written about it. I have some answers to that. But I think it's a difficult question. I think it is justifiable, but I think it's hard to justify.

JAMES FLEMING: I want to give the students a chance to ask questions.

NAMRATA KOTWANI: Maybe I don't understand it well, Professor Balkin, but is your idea of regime reinforcement in tension with the idea of checks and balances? Not as a law student, but as a citizen, don't courts do their best work when they disrupt the regime, like say *Brown*, those kinds of cases? Does that make sense?

JACK BALKIN: It's an excellent question. What do political scientists mean when they talk about regime maintenance? They do not mean something opposed to checks and balances. Rather, they ask how the system of separation of powers works in a particular regime, and how the different institutions play their respective roles within the regime.

Let me give you an example. The New Deal revolution features enormous popular mobilization and a series of elections in which Democrats win election after election. They're pushing for a different conception of what government is about. Under that new conception, the federal government and the states will have amazing new powers to regulate the economy in the public interest.

At the same time, the President gains the power to run new administrative agencies, which will be able to combine judicial, legislative, and executive rulemaking functions.

That creates a problem. What are the limits to this new social contract? What limits the power that has been bestowed by this new regime? And that's where courts come in.

Courts play an important role in defining this new regime. They explain what the limits of federal power are. They legitimate. And legitimation is Janus-faced. That is, courts both permit and deny at the same time. They say, "You can do this, but you can't do that." They give a bunch of explanations for why power is appropriately or legitimately exercised and simultaneously explain what it would mean for power not to be appropriately or legitimately exercised. That's what these landmark opinions are doing, really.

Second, at the same time, the political branches build new institutions. Congress creates the Administrative Procedure Act, which puts courts in a new role. In this new role, courts try to supervise and restrain executive overreaching in these new executive agencies. This happens in '46 with the APA.

Here again, the courts legitimate the administrative state. They're both telling you what you can do and telling you what you can't do. It's two sides of the same coin.

A third aspect of the regime is the question of judicial review. The courts face a problem after 1937: If we're supposed to defer in areas of social and economic legislation, why are we getting paychecks? I mean, what are we doing for a living? This puzzle leads to the famous footnote in *Carolene Products*[6] and the reconceptualization of the purpose of judicial review. David's written an article about *Carolene Products* that I mentioned earlier.[7]

In the old (pre-New Deal) regime, there's an undifferentiated thing called liberty that courts are supposed to protect. Courts are the guardians of constitutional liberty. Liberty is described in common-law categories, and it's a complicated mess.

The new regime reconceptualizes what liberty is and the role of courts in interpreting law and enforcing it. Now part of the courts' job is to police the political process. Part of the courts' job is to protect the written provisions of the Bill of Rights, as opposed to an undifferentiated conception of liberty. And part of the courts' job is to articulate public values over time and to make sure that these values are protected.

That's a different role, in some ways, than the courts had in the previous Lochner-era or police-power regime. It also has this dual feature of legitimation, simultaneously telling the political branches what they can do, and what they can't do. From the standpoint of federalism it has an additional feature: courts police outliers in state and local governments.

So, for example, if one jurisdiction has very odd or unusual laws – on, say, freedom of expression or voting rights – that seem to be really draconian in the context of other states or localities, the court's job is to say, "Sorry, you can't do that."

A lot of the early criminal procedure decisions – *Powell v. Alabama*[8] is one example – police outliers, especially in the Deep South. In fact, you can understand *Brown v. Board of Education* from this standpoint, too. At least this is Scot Powe's view in his book on the Warren Court.[9] By the time you get to *Brown,* de jure segregation in public schools has been outlawed everywhere except the Deep South. And in the border states, it's by local county option only. Essentially *Brown* imposes a national – Scot would say

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[6] United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

[7] David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251.

[8] 287 U.S. 45 (1932).

[9] L.A. SCOT POWE, THE WARREN COURT AND AMERICAN POLITICS (2002).

Northern – view of equality on a regional majority. We can understand *Loving v. Virginia*,[10] *Lawrence v. Texas*,[11] and a bunch of other cases this way as well.

This conception of the judicial role is not inconsistent with separation of powers; rather, the question is what role courts play in the construction of the particular regime in which we currently reside.

JAMES FLEMING: Any more student questions?

COURTNEY GESUALDI: This question could be for either of you, but probably most for Professor Strauss. I'm wondering if we have this common-law system in interpreting the Constitution, what role do you see the actual document playing in interpreting?

DAVID STRAUSS: Right, that is the question, isn't it? I want to say the document plays a critical role, but not a very visible role. Jack adverted to this a bit, but let me say a little more about it.

In any system, there are some things that you really just want to have settled. And how you settle it is of secondary importance, but it needs to be settled, and it needs to be settled beyond dispute. Jack mentioned some of these things.

You need to know when the President leaves office. To say the President will leave office at an appropriate time after losing an election, that's a recipe for chaos. You need to know that noon, on January 20th, the President will leave office.

You need to know the answers to questions like that, like what system of representation you're going to have, where representatives come from, how many for each state. Some of that actually was left up for grabs in the original Constitution, and some things didn't work so well as a result. But there are issues like that that need to be settled.

We need the text to play that role. The text does it very nicely. It's there. People follow it. To try to recreate all of that through a system of precedent or adjudication would be terribly difficult, and not worth it. Because what we really want is settlement.

Given that we want the text to serve that purpose, it makes sense for us to say we're not just going to adopt the text for some purposes and ignore it for other purposes. It makes sense for us to say, you've always got to connect your views about what the law is to the text, because once you start blowing off the text, then people might draw into question these things that really need to be settled, and it would be very dangerous if they drew those matters into question.

For example, suppose you said about a decision about abortion or whatever, "who cares what provision of the Constitution I'm interpreting, I think it's

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[10] 388 U.S. 1 (1967).

[11] 539 U.S. 558 (2003).

correct." Once you say that, someone might say, well, if you didn't care about the text in that case, why do you care about it when I make an argument that conditions in the world really require that the President stay on after his term? Why can't we ignore the text again?

So that's my account. What the text does is to settle some things. The other thing it does is to put limits on things we might do. So we're going to have a criminal justice system that looks a certain way. Now, within the boundaries set by the Constitution there are all kinds of issues that we're going to litigate, but the basic shape of the criminal justice system – there are going to be lawyers, there are going to be juries, there are going to be impartial judges – is laid out in the Constitution. We're going to disagree, but the disagreement is cabined.

So I think the text plays that role. And it's absolutely critical in the sense that you really could have terrible results if it didn't play that role, but it's low visibility because these are issues that don't get litigated; that's the whole idea – they don't get litigated.

So when cases get litigated, and certainly when cases reach the front page, the text is just not in the picture. Then the limits set by the text, we're operating comfortably within them, and the fighting is over things the text doesn't resolve.

JACK BALKIN: David has just given me a great idea about how we use the text. In chapters nine through eleven of my book, I discuss the commerce power and the Equal Protection and Privileges or Immunities Clauses of the Fourteenth Amendment. David says of these chapters: "Well, I notice Jack is making lawyerly kinds of arguments, trying to explain how you would get to the modern state and to modern civil rights and civil liberties protections by using very familiar lawyer's materials. Jack doesn't realize it, but he's actually engaged in common-law argument. He's using all of the resources of the past and he calls it text and principle. But I, David Strauss, call it common-law reasoning."

And David is right: I'm using all of the familiar lawyer's tools in developing constitutional constructions. In David's model, all of the features of the lawyer's toolkit, the familiar modalities – in Philip Bobbitt's terms – are part of the common lawyer's toolkit. The common lawyer draws on precedents. He draws on statutes. He draws on canons of construction. He draws on famous speeches. He draws on history and uses it to create or construct his account.

But if David's right, then the text must do more than simply function as a coordination mechanism. Because the common lawyer often looks to the text of a statute, and in this case the text of the Constitution, in order to explain and justify certain kinds of structural arguments.

Take the treatment of voting rights under the Equal Protection Clause. Looking at the text of the Constitution, we might notice a series of amendments all having to do with voting – and expanding the right to vote.

And we could see, in hindsight – just as David says in his discussion of the rise of modern products liability law – that these successive amendments seem to be approaching a more general principle – that voting is a fundamental interest, or at least a very important interest for purposes of the Equal Protection Clause. The right to vote by now seems presumptively to extend to all adults, at least by the Twenty-Sixth Amendment.

That would be a very familiar common-law style of reasoning, where we use the text of the Constitution in order to draw a structural conclusion about a principle we see emanating from the Constitution itself. This use of the text, however, would be different than the focal point model that David offers in his book. Rather, it would be consistent with treating the text as just another part of the common lawyer's toolkit.

Now, David doesn't mention this approach in his book, but I take it, given the remarks he's made here, that he wouldn't find it strange at all. He might be happy to admit that common-law lawyers could use the text in common-law style reasoning. They might compare different parts of the text and consider how one part differs from another and why the words are in a certain order and so on, as long as these textual arguments are part of a larger structural account. We would use the text, in other words, in order to make a common-law argument. What do you think of that?

DAVID STRAUSS: I think that is part of the common lawyer's approach. I mean, that's what goes on in common-law cases. It's a very familiar part of admiralty, as I mentioned, which sort of synthesizes the law and the precedents and the statutes.

What's distinctive about the common-law view is what you're using the text for. There is one account of this kind of argument that says – and Jack used the word structure – that says, well, there's certain imperatives that emerge from the structure of the Constitution. So look at the Constitution, it values separation of powers. There is, as Jack says in his book, there is no separation of powers clause, but you look at the Constitution and you can see that the Framers value separation of powers. There's no federalism clause, but you look at it and you see federalism is structurally important to the Constitution.

If you stop there, I think that's not common law-ish. That's more, "I'm going to dope out what my instructions were. I got some orders from my superior, and my superior is no longer around, hasn't been around for a while, and I can't quite figure out how to carry out these orders. So I'm going to look at what she said and, you know, she didn't quite say this, but when I look at Point A, Point B, Point C, you know, I bet she wanted me to do E and F."

Sometimes these structural arguments take that form. With statutory interpretation, I think that is often totally the right way to think about it. That's not a common-law way to think about it. The common-law way to think about it is more like, "I think this is a good idea. Is it just me out there all on my own thinking it's a good idea? If it is, then I can't do anything about it. But if this is a good idea and things have been moving in my direction, and other people

have thought it is, too, and there are lots of developments that suggest that I'm not the only one who thinks this is a good idea, well, then maybe I have a reason to implement it."

And it's using that approach, rather than reading the document simply as a set of sometimes very subtle, sometimes hard-to-read instructions.

So I would say that's the difference. The other thing I'd want to say about common law – and one reason I think it's an effective response to the criticisms that are often made of "living constitutionalism" – is that this has been going on for a long time. This isn't something that we just thought up. This has been going on since way before the founding of the country, and judges have been doing it, and doing it at least well enough. And if you can maintain continuity with that, that's a point in its favor.

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DAVID STRAUSS: Thank you, Jim, for the friendly amendments. And thanks also to Linda and Hugh for really illuminating talks. Let me just touch on a couple points Jim made, and then I do want to say something connected to Linda's talk, and in a way with Hugh's as well.

The question, as Jim put it, is can a common-law view distinguish between the Constitution and constitutional law. And he connected that question with two other issues. One is the *Cooper v. Aaron*[12] problem. And the other is whether the approach that I've tried to put forward can give an account of erroneous decisions, can explain why *Plessy v. Ferguson*,[13] for example, was wrong.

I want to say these are three different questions, and have to be answered differently. The Constitution versus constitutional law, I think that's a very difficult question, and I'm not sure that needs to be answered. I don't know why it matters whether we consider *Marbury v. Madison*,[14] the principle of judicial review, part of the Constitution or part of constitutional law. Or the principle that you can't engage in racial discrimination, or the principle that you can't throw your political opponents in jail. By the way, it's not at all clear the First Amendment, as originally adopted, was intended to preclude that. Some of those people who were instrumental in drafting the First Amendment went out and passed the Alien and Sedition Acts and did try to throw their political opponents in jail.

So those are principles that have developed over time. Whether we say, "No, no, they are now in the Constitution," or say, "Well, they're part of constitutional law," I don't know what turns on that. You could designate the text as the Constitution and the rest as constitutional law. I think that's a

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[12] 358 U.S. 1 (1958).

[13] 163 U.S. 537 (1896).

[14] 5 U.S. (1 Cranch) 137 (1803).

perfectly sensible thing to do. But then I'd want to say there are lots of things in what we're calling constitutional law that are as absolutely as firmly rooted as anything in the text. And in fact, subject to fewer interpretive liberties than many of the provisions in the text are.

So I'm not sure that's a useful distinction. I think it's very, very difficult to draw. And it might just be better to say, no, we're doing constitutional law, that's the project. And the text plays a role in that project, and precedent plays a role in that project, and some other stuff plays a role in that project, and we don't need to draw that distinction.

Now, I'm not sure Jim would disagree with that, but I think he would say, "Well, then you need to explain why some decisions, acts of constitutional lawmaking, are wrong if you're not going to say they're inconsistent with the Constitution." I agree, this time I completely agree that any theory has to have a way of doing that, has to have a way of condemning some decisions as wrong.

But it's not as if we have trouble saying certain common-law decisions are wrong. They're wrong through their inconsistency with precedent, or they're wrong just as a matter of policy and morality. If a court came up today and said automobile drivers are strictly liable if they're in an accident with a pedestrian, in any jurisdiction I know of, that would be wrong, that would be inconsistent with precedent. (It might or might not be such bad policy.) That would be a wrong common-law decision, because of its inconsistency with the common-law sources of law.

As to whether *Plessy* is wrong as a matter of law, I think questions like that are actually kind of hard. *Plessy* I think we can say is wrong because Jim Crow segregation was actually a pretty new institution at the time *Plessy* was decided. There weren't really deep historical roots, contrary to what segregationists tried to claim. But if you were to ask a question, for example, in 1950, would it have been wrong for the Supreme Court to refuse to recognize a constitutional right to gay marriage, as a legal matter, would that be a wrong decision?

Some of us might think today it would be the right thing for the Supreme Court to recognize their right. Whatever your views are about that, it's hard for me to see my way clear to saying in 1950, it would have been legally wrong for the Supreme Court to say, no, there is no such right. Or that whatever your views are about capital punishment today, that in 1850, it would have been wrong for the Supreme Court to say capital punishment is not unconstitutional in all circumstances. You might want to condemn it morally, you might even want to say in some of these instances, this is an occasion in which the Supreme Court should have engaged in a version of civil disobedience and done something that was legally wrong, but morally imperative.

But I think these are hard questions. And I think that theory ought to recognize them as hard questions.

As for Jim's view that my theory of common-law constitutional

interpretation is a moral reading, we're all doing some imperialism here and saying, no, no, your theory's actually my theory. And I want to do that with Jim's theory of the moral reading as well. I think that the idea of integrity in the moral reading is really doing the work that commitment to precedent does in common-law theories. This is obviously a bigger conversation. But I'd want to say that one virtue of the common-law approach is that it has much deeper roots, that we've been doing common law for a lot longer than we've been doing law's integrity or the moral reading.

A quick comment on some of the issues Linda raised and Hugh also. Jack and I have had this conversation before, and Linda brought this out. I'm disquieted by the use of religious metaphor and religious language in talking about the Constitution.

Imagine someone who said, "Look, I live in your country, I'll play by the rules, but my faith commitments are elsewhere, I have no interest in vesting my faith in your Constitution. In fact, I think it's blasphemous to do so, and I've no interest in your redemptive projects. And my traditions stem from somewhere other than your Founders. I feel no connection to your Founders. I just want to play by the rules and live here." We ought to be able to give that person an account of constitutional law consistent with those views.

Those aren't my views, they're not Jack's views, they're not your views, and maybe it's just a hypothetical person who thinks that way. But we ought to have an account for that person that doesn't rely on faith. I worry that the reliance on faith is a little bit illiberal, that it's a way of establishing a community that excludes people who say, "My traditional and faith commitments lie elsewhere," and we shouldn't do that.

For me, that approach gives me some pause about what I otherwise think is a really fruitful and powerful way of thinking about the Constitution. I think the things Linda said brought out that disquiet, which I think she might share.

JACK BALKIN: One way of approaching one question Linda asked is this: It's 2011 and you're at a meeting between Tea Party people and Occupy Wall Street people. And they're both making contradictory claims on the Constitution. How do I know who's right?

It should be obvious, just from the way I phrased it, that there's no way of knowing outside of time and outside of politics who's right. As a participant, you must stake a claim on who's got the right conception of the Constitution. You must evaluate them in your own day as best you can. It's always possible that neither of them has the right conception of the Constitution.

Some social mobilizations have done things that in retrospect we've been proud of – for example, the civil rights movement – and some have done things that in retrospect we haven't been proud of – for example, the Know-Nothings or the Klan. But are there a set of algorithms or criteria you can use at the time to decide who was right and who was wrong? There are only the criteria that you would use – as a participant in the system – to decide what a good interpretation of the Constitution is. That is to say, you are a participant and

you're judging others as a participant.

An interesting feature of constitutional politics is that sometimes you persuade other people that you are right, and sometimes they persuade you. Sometimes you end up winning; sometimes you end up being the dissenter. That is how constitutional politics works.

But you should never give up your own right to pronounce on whether you think the received wisdom or dominant powers in constitutional politics are right or wrong. You should always be able to say, "Well, you guys may be winning, you guys may control the Supreme Court now, in fact, you guys may also control the Presidency and Congress. But I still think you're wrong. I still think that you are mangling the Constitution." That's the right of the dissenter.

But this brings me to the other point that Linda was making. That may be so, but what are the resources you would bring to bear in order to make such a judgment? And this actually connects the idea of a fallen Constitution to the question that you were asking about *Plessy*. That is, was *Plessy* correctly decided in 1896? Or to put it another way, was it the best one could do with the Constitution?

It is a mistake to think that the resources that are available in 1850 for making a constitutional argument are identical to the resources that we have today in 2011. Each time has its own set of resources. The claim that the Constitution is redeemable is not a claim that in 1850 people could or should see the Constitution exactly the way we would see it in 2011, or even that they would agree with our considered moral judgments today.

The claim, rather, is that each time has its resources for constitutional redemption and that what actually happened, as we view things in hindsight, does not exhaust what was available to the people of a particular time, even if things did not turn out well. The resources available in the constitutional tradition in 1850 are present for people to strike out a better path. And they have to judge that path from their own time, they have to assess how it might be possible for them to redeem themselves in their own time. That's what the possibility of constitutional redemption means. But, of course, the resources available to you at your time are always limited. They're limited by political compromise, by injustice, by all of the restrictions of everyday life, by lack of knowledge, by unintended consequences, and by many other things. Besides, in real life, all forms of political redemption are compromised. They're never secure. They're never guaranteed. They're never pure. They're never innocent. That's also a feature of redemption.

When we look closely at all of the progressive movements, or movements for liberty or equality of the past, we discover that they were all deeply compromised in their own day. We see that now. In fact, people saw it then, too. Whether you're trying to achieve a more equitable distribution of wealth in America, or whether you think gay people should be able to marry the people they love, or whether you think that we haven't done enough about the mass incarceration of African Americans in the United States – no matter what your goal, you will discover the same problem of fallenness in your own

attempts to try to bring about justice.

But that does not mean that you should give up simply because you can't achieve perfection. You're not required to achieve the great work, but you are not free to refrain from it.

Linda noted the religious imagery in my arguments about redemption. It is a kind of religious imagery, but it does not owe its authority to any particular religion. Religions are a way of understanding basic problems about the human condition – collectivity, community, sacrifice, faith, hope for something better in the future. Religions are very good at articulating these values, but they're human values. And different religions articulate them in different ways.

To say that these are inherently religious values is to misunderstand why religions exist. Religions explain these values to people and make community out of these values.

Now, we could trace the genealogy of this particular set of religious ideas, and Linda is right that they feature an interesting amalgam of Protestantism, but it's not entirely Protestant. It's not Calvinist, because you don't know that you're saved, and there is no guarantee that you're going to be saved. It's a little bit Jewish; which is hardly surprising, because after all, who am I? A nice Jewish boy from Kansas City, Missouri.

Every good deed hastens the coming of the Messiah. And in this story, the Messiah hasn't shown up yet, so it's clearly Jewish, not Christian. It might be Daoist. After all, redemption means returning the Constitution to its proper path. Now that's a Daoist idea as much as it is a Jewish idea.

So you might say that this is a mongrel conception. It doesn't correspond to any particular religion. Perhaps that's true, but of course I'm not trying to correspond to any particular religion. I'm trying to make an argument about politics. It so happens that the easiest way to make these arguments is to draw on certain ideas that are particularly salient in religious traditions, but with respect to which religion does not have a monopoly.

But I wanted to put you on the spot, Hugh. Throughout the book I argue that democratic legitimacy is produced over time, through a process, starting from a situation which is imperfect. Through the use of democratic means and democratic discussion and protest Americans attempt to produce increased democratic legitimacy over time.

Hugh, you just finished a big book on Habermas,[15] who also has an account of democratic legitimacy as something produced over time. And what I wanted to know is this: what are the similarities and differences between the account of how democratic legitimacy is produced over time in *Living Originalism*[16] and the version that Habermas is trying to articulate in *Between Facts and Norms*[17] and other works?

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[15] HUGH BAXTER, HABERMAS: THE DISCOURSE THEORY OF LAW AND DEMOCRACY (2011).

[16] JACK M. BALKIN, LIVING ORIGINALISM (2011).

[17] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (1996).

HUGH BAXTER: There's an extraordinary similarity. And here are the things that leap to mind. One of them is the image of Constitution as a project, that it's an unfinished project; it will never be finished. It's ongoing. It goes through generations.

Second, the emphasis on the Constitution outside the courts. And so, he gives you a fairly elaborate mapping of social theory, of the infrastructure necessary for the Constitution to be democratically legitimate. It isn't just courts; it requires – and this will be congenial to you – it requires first that problems be raised and ventilated within civil social organizations – clubs, organizations, the workplace for that matter, although he doesn't locate that in civil society.

And then eventually, they percolate – he loves water metaphors – and wind up in the public sphere. And some of the ideas there are translated or put in a form where they can be accessible or understood within, for example, legislatures or courts.

So it's the same kind of image I think you have of Constitution making from the ground up. And he's interested also in the political branches, not just the courts.

So I see the similarities as being very, very striking.

JAMES FLEMING: Let's open it up to questions from the audience.

UNIDENTIFIED: When you talk about redemption, or when you talk about originalism, you say that it's a project of interpretation, going back to the principles of the Founders and the Constitution. And so, what is the redemption project that we're supposed to be embarking on? Is it a redemption of the original meaning of the Constitution? Or is it a redemption of our personal stake in the interpretation of it?

JACK BALKIN: The preamble actually tells you what the project's supposed to be about – to achieve a more perfect union, establish justice, ensure domestic tranquility, secure the blessings of liberty to ourselves and our posterity.

What it means to redeem, of course, is not simply to follow an established path. In other words, we're not redeeming the Founders' vision of a more perfect union. We're redeeming *our* vision of a more perfect union. A promise was made in the past: We're going to have equality. We're going to have equal protection of the laws. Every citizen is going to be guaranteed the privileges and immunities of citizenship. They promised. They said they were going to do it. Okay, now we have to make it happen.

But of course, the problem is the Founders' vision of what it would mean to fulfill that promise might not be satisfying to us. It might in fact be a terrible idea. We have to fulfill that promise in our time. That's what we mean by redemption.

Redemption is not making things conform to a preexisting template. It's not a Hegelian story, in which the oak was always there in the acorn, with all of its leaves. Instead, you have to actually make the promise real; you have to redeem it.

Here's another way of thinking about it. Think about redemption stories in the Bible: the redemption of man by Christ, the redemption of the Hebrews by God. Now, after the redemption occurs, is everything exactly as people expected it would be? No. It's all contingent. Things occur that nobody imagined were going to occur. And the problems that one faces are the problems that occur because of how you got to where you're going to be.

In fact, what's so interesting about the redemption story of the Hebrews is that it is kind of a downer. The Hebrews were redeemed. They have a big celebration. Miriam the prophetess starts singing, and they're all dancing around. And about a couple weeks later they're praying to the Golden Calf. And then there's a lot of smiting. [laughter]

Then, everything's hunky-dory for a while. And then they have a rebellion. And then there's more smiting. And then there are more problems. By the way, these guys who are rebelling and worshiping idols – I should just point out – these are the redeemed ones. The ones who stayed in Egypt were not redeemed.

And so, eventually, God realizes that these people are worthless. Well, he doesn't say that exactly. He says they're all going to have to die in the desert, and a new generation is going to have to be born that is actually worthy of being free. That's why the Hebrews have to wander in the desert for forty years.

The meaning is that only people who had the benefit of the imperfect redemption of the past could actually redeem themselves in a way that was appropriate for the future. That is, only people born in freedom were deserving of the opportunity that would enable them to win the Promised Land.

This is a very sad story, right? Because it says that the first redemption is incomplete, it's compromised, it's impure, it's not innocent. But it makes possible another redemption, and that redemption, in turn, makes possible yet another redemption.

So we're not bound by the redemptive ideals of the Founders. My goodness, we wouldn't want to be. But they offer us the possibility of our own redemption.

LINDA McCLAIN: Listening to Jack talk makes me realize how complicated using a term like redemption is. I could tell another story about how Adam sinned, and ever since then Man has been in exile, and what does it take to put Man right? It's justification through faith in Jesus. And it's not me who lives, but Christ who lives in me; my body's now the temple for the Holy Spirit.

Jack, you use language of impurity, incompleteness, imperfection, inevitably fallen. But there's a Christian narrative, which is, the work is done, and Jesus did it, through the Atonement, and now you have to live a Christ-like

life in this world. Your conception reminds me more of a model of vulnerability, we don't know how it's going to come out, God is kind of powerless, God Himself is vulnerable. There are many different versions of theology, and some of them really do think that there's this powerlessness of God, and humans have to help redeem God. There's some Jewish mysticism that sparks have all been trapped and we can all liberate the sparks.

There are so many different pictures of redemption, but not every picture is, as you described it, that it is imperfect, always impure, and that you restore the state that was lost.

JACK BALKIN: This is my understanding of redemption.

LINDA McCLAIN: I understand.

JAMES FLEMING: David's book certainly communicates his wariness about faith and redemption and all these things. But I would point out that the title of his first chapter is "Originalism and Its Sins."

KEN KERSCH: Maybe I'm just echoing what you said in your remarks, Jim, but I want to ask both speakers about originalism and its nature. When I think of originalism, I think of it as the argument that there is only one legitimate source for us or for judges to look at. And that authoritative source of constitutional meaning, however we interpret it, is the founding, or the moment that provision of the text was ratified.

How much is the difference between the two of you that Jack Balkin, as an originalist, is a monist as to what we look at as sources in constitutionalism? For Jack, it's one thing – we look to the founding, though he has a very capacious understanding of that. How much is Jack a monist, and how much is Professor Strauss a pluralist? He says we might look at original meaning, we might look at the text, we might look at pragmatic considerations, all sorts of things.

DAVID STRAUSS: Jack's going to speak for himself. I don't see him as a monist, as looking only to one source. But I also don't see him as an originalist, so I don't know that I'm going to be very helpful on that side of the question you raise, which I think is a good question, about just how you define originalism.

Leaving aside the cultural trope – which I do think with Jack is a lot of what's going on in these debates – I think here's the distinction. And it's an old distinction in law. I do this a little bit in the book. You can think of law as a command. In lots of contexts, that's the right way to think about it. If you're a bureaucrat and you've got the code of federal regulations, there's your law. At least that's the starting point. You might need to interpret, you might need to elaborate, but that's it. And it's authoritative because it's been issued by the person who has the power to issue it. Lots of times, not all the time, but lots of

times statutes work the same way. And there are circumstances in which the Constitution, I think, should be viewed that way, to a degree. A recent constitutional amendment I think has that kind of authority.

There's a different conception of law, though, and that is law as, at its root, like custom. It didn't emerge at some particular time, there's no lawgiver. And if you think about custom or the common law, that's true of it. There's no authoritative act that created the law. It emerged from a variety of sources over time and it was never 100% clear at what time that became the law, but we can say now it is.

UNIDENTIFIED: Hayekian.

DAVID STRAUSS: Well, there's a Hayekian element to it, there's a Burkean element to it. Yes, it's that tradition, as opposed to the Austinian tradition. And I see originalism as the Austinians and the common lawyers as Burkean. And I think they're both respectable traditions; I just think for the U.S. Constitution as it is, in our time, that the Austinian tradition doesn't work and the Burkean one does.

JACK BALKIN: No one has ever accused me of being a monist. The key distinction is between commands and resources. Things that are adopted, at whatever time, are commands; you have to follow them. But resources for construction are things that occur throughout history, and there are many of them.

RESPONSE AND COLLOQUY CONCERNING THE PAPERS BY GARY LAWSON AND DAVID LYONS

JACK BALKIN: David Lyons is asking two separate questions, and I want to separate them. Remember, I said before that I'm interested in what's a command and what's a resource for construction. The original meaning of the text is a command. Everything else is a resource. For example, if the text says "equal protection of the laws," we have to apply the guarantee of "equal protection of the laws." The original expected applications, the original intentions, the original articulations of principle are not part of original meaning, and therefore they are not commands. They're resources for construction.

Now, David asks, why should these materials, which are not commands, play any role at all as resources? That is, why do we exclude them when we're trying to figure out what original meaning is, and yet bring them back in when we're trying to engage in the work of construction? That's a great question. Here is, I think, the best answer to it.

I talk about two different kinds of underlying principles in Chapter 12 of the book. One kind are structural principles, and the other kind I call heuristic principles. The idea of a heuristic is an aid to understanding. These are principles that we use to try to do our job. And in some sense we have no

choice but to ascribe certain kinds of heuristic principles to the abstract principles that we find in the text. Because if we didn't, we wouldn't be able to get anywhere.

But, when we search for heuristics to build out constructions, why should we turn to a reconstruction of principles, commitments, ideas that we find in the time of the founding – or indeed, at any other time in history? That is to say, why would you look to history at all in order to come up with heuristics for articulating abstract principles?

Suppose that you're arguing that gay people shouldn't be imprisoned for having sex or that they should be able to marry the people they love. And suppose in support somebody offered an argument from history: "Yes, that is class legislation. That is making gays into a disfavored caste. That is attempting to subordinate them through law."

Consider the following response: "Why in the world would I be interested in *that* question? I want to know what equality requires. I don't care at all whether or not this is caste legislation or whether this is class legislation. Come on, that's just what Senator Jacob Howard said at some point in the Congressional debates. I don't care at all."

This is really what David is getting at when he asks his question. The answer is that when we're in the realm of heuristic, when we're in the construction zone, when we're no longer interested in the question of what the [original meaning of the] command is, but we're trying to come up with tools for construction – we're trying to explain to somebody else who disagrees with us what the right way to go forward is – we have to find common topics, common topics that people we deal with in the public square understand as having some purchase on them.

We need, in other words, to quote Vico, a *sensus communis* [a common sense]. We need to find something that others see as part of them, and that we see as part of us, that allows us to reason together. Now we're no longer in the realm of logic, we're in the realm of rhetoric and dialectic. We're trying to find common tools of argument and understanding. And what we do inevitably – and I think we are right to do so – is draw upon memory and upon historical statements of principle. And then we take those statements of memory, and we refine them through our present-day experience.

What did Jacob Howard [who introduced the Fourteenth Amendment in the Senate] know about gay people? He probably didn't know a damn thing about gay people. Maybe he was gay, I don't know, but I doubt he knew anything about gay people. Yet when we [use Howard's language and] say that these laws are class legislation, that these laws are caste legislation, what we are doing is invoking the memory of a particular commitment, articulated by someone in the past, and claiming it as our commitment. We are saying, "You should believe in this, too, because, after all, this is your history, too. This is your memory, too."

This is an interesting kind of move that law makes continuously. It's a claim about memory, and that's not true of many forms of moral argument.

For example, if we were going to make an argument about gay rights in the context of a philosophical treatise, and we made an appeal to historical memory, I think that most philosophers would say, "Oh, come on, get to the real argument. Stop making the crazy argument from memory."

Whereas, in the context of law, the argument from memory and the appeal to memory as a form of heuristic in order to articulate a moral principle is seen as completely appropriate. It's what you do. Why is this an appropriate form of legal argument? I think it has something to do with the requirement that we understand ourselves as continuing a political project that has been bequeathed to us by people in the past and that we are continuing in the present and the future.

We turn to memory as a way of articulating heuristic principles because of the belief that there is a commonality between the principles of people who lived in the past and our principles today. Even if they didn't know what gay people were, even if they wouldn't have thought for a minute that this legislation is caste legislation, I claim that I am connecting their commitments to my commitments, and I am using those commitments to appeal to you now in the present.

This is a kind of political argument that is worked into law. But it's not the kind of argument that you would use in other venues. I think that it is characteristic of a lot of constitutional argument.

I think that's why memory and history are used in constitutional argument. But I also think that attempts to ground those forms of argument in *commands* [as opposed to resources], and to say "this is what they wanted, therefore we must do it" is just not going to work, it's just not going to make any sense. On the other hand, if we understand history and memory as producing tools for understanding – attempting to meet people in a common space, appealing to common commitments, appealing to a common history and memory – then this use of the past makes sense. It also suggests why if you went to another country and started to argue about the French Constitution by quoting Jacob Howard, they would look at you as if you were a crazy American. It's because that is not an appropriate heuristic from the standpoint of the French constitutional tradition.

I think we must try to understand the nature of the arguments that people make when they offer constitutional constructions.

On the other hand – and here I return to David's point – there are some contexts in which it might be entirely appropriate to forego all of those heuristics and appeals to memory and go straight to arguing about what justice requires. Then we ask the philosophers what they think. The question, though, is whether those arguments will be particularly persuasive in the arena in which they are posed. This is, of course, the point of the debate about the Philosophers' Brief in *Glucksberg*[18]: Did the people who wrote the

[18] Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110).

Philosophers' Brief misunderstand the nature of the enterprise when they tried to make a constitutional argument by making a philosophical argument? On one account, it was a misunderstanding; on another, it was entirely appropriate, but it was not the only way to argue the case.

David's other question concerns the idea of faith. I talk a lot about [William Lloyd] Garrison in *Constitutional Redemption*. The reason why Garrison could not be understood as a faithful interpreter of the Constitution does not have anything to do with whether or not a majority of people agreed with his views. The reason, rather, has to do with the following question: Was he attempting to further the constitutional project? Was he putting himself on its side? Was he trying to make it work? Or, rather, was he attempting to jettison it? Was he trying to exit? Was he saying, "It's not worth it; I wash my hands of it"?

The claim I make in *Constitutional Redemption*, and also in this book, is that constitutional interpretation involves participation in an ongoing trans-generational project of politics and that it requires at least this much of us: it requires us to put ourselves on the side of the document and say, "No, I'm not trying to interpret the U.N. Charter. I'm trying to interpret the United States Constitution, and I really want it to work. I really want to make it succeed as a plan for politics. And I'm going to do my best to make it succeed."

When Dworkin says that we should make the law "the best it can be," this is not a claim about the *self*, it's a claim about the *object* of interpretation. By contrast, I'm making a claim about the self, and the self's participation in the project. The faithful interpreter says, "I'm on its side. I want it to work. You are trying to do something terrible to my Constitution, but I want to protect my Constitution." Fidelity is not simply a property of an object, but a relationship between the interpreter and what is being interpreted.

This point has connections to the way that we talk about infidelity. Faithlessness and infidelity are connected: if you are faithless to another person, they cannot rely on you. To be faithful is to be the sort of person who can be relied upon. A faithful person says, "I'm on your side, I'll take care, I'll do my best for you." So when we talk about fidelity in interpretation, we are talking about a relationship between ourselves and something else, and that is why the word "fidelity" borrows from or builds on the notion of faith in interpersonal relationships. The two kinds of fidelity are not the same thing, but they come from the same root, especially when we're talking about political commitment.

David asked, In what sense was Douglass faithful to the Constitution? Well, here's the puzzle. Douglass makes two kinds of arguments. First he argued that Congress could, if it wanted to, abolish slavery in the United States – not only in the territories, but even in the States. Second, he argued that, read appropriately, the Constitution could make slavery unconstitutional in the next generation. He pulled out the Constitution and said, "It says here no person – not 'no citizen' – but no person, shall be denied life, liberty or property without due process of law." When somebody is made a slave, they're denied their

liberty. Yet they're not charged with any crime. They don't have the right to an attorney. They don't have any process to defend themselves against being made into a chattel. How can it be that this is consistent with due process of law? Nobody denies that a slave is a person. Therefore, slavery violates the clear meaning of the Fifth Amendment, that no person shall be deprived of life, liberty, or property without due process of law. What more do you want? What part of the text don't you understand?

Now, this isn't just an idiosyncratic view of Frederick Douglass. This is the view of the Free Soil Party in the late 1840s. It's the view of the Republican Party in 1856 and 1860; and it's in their platform. By the time we're in the middle of the Civil War, it is the view of the dominant party in the United States, the Republicans. That's what happens to this so-called crazy view: "What part of due process of law don't you understand" becomes the dominant view, and it leads to the passage in 1862 of a law that abolishes slavery, first in the District of Columbia and then later in the federal territories.

Part of the reason why we have difficulty deciding whether Douglass is being faithful is that we assume his view is "off the wall." But if we suddenly were to imagine that this view is no longer off the wall but is entirely mainstream, as it is by 1862, then it's not so difficult to see Douglass as being faithful to the Constitution. In fact, it seems entirely appropriate.

So the point of talking about fidelity is to get you to stop thinking about it in terms of the question of what's on the wall and off the wall and instead ask the question of whether or not you're committing yourself to the constitutional project and trying to redeem it. This is a different way of thinking about fidelity than most people think about it. But I think it's very helpful, especially when we consider the question of fidelity in the context of social mobilizations.

I had one question to ask about Gary's very interesting paper. Gary, are you engaged in construction when you engage in this burden-shifting move?

GARY LAWSON: Yes, I have a little point at the very end of the paper where I pose that question. And so, you could phrase this as a form of construction, and my answer to that is, fine. I don't think so only because I think that if you want to call it a construction, it's one that emerges from ascertainment.

JACK BALKIN: But what part of the text, what clear statement in the text gives you the idea that this burden-shifting rule is part of the original meaning?

GARY LAWSON: The construction comes from a basic principle of epistemology that is external to the Constitution, but that is part of, I would say, language and rational thought. And that's the basic proposition that he who asserts must prove. That's the element that is constructed, if you will. But I don't think it's constructed in the sense of built up. I think it's implicit in basic epistemology, which is necessary to formulate any proposition about the Constitution at all.

So that's why I don't really care whether one calls it a construction or not. I don't think it's the kind of construction that you or Randy Barnett or Larry Solum would be talking about. It's a different category. No more than the Aristotelian laws of logic are constructions.

JACK BALKIN: Now I can see what my disagreement would be. I would classify your burden-shifting proposal as a construction just like anything that you find in *McCulloch v. Maryland*.[19] I don't find the burden-shifting rule in the text, on a fair reading of the text. And I also don't regard it as a requirement of logical necessity. My proof for this – it's not much of a proof – is that generations of jurists and commentators about the Constitution have not seen this burden-shifting move as a matter of logical necessity. If it were a matter of logical necessity, I suspect lots of people would have pointed this out.

GARY LAWSON: What's a matter of logical necessity is the proposition that he who asserts must prove. It requires a number of inferential steps to connect that to the Constitution. You first have to go, okay, the federal government is one of enumerated powers. Ah, that means anyone asserting a federal power must be asserting. Ah, but once they've asserted, someone who then asserts the First Amendment in response to them, they're now asserting, so the burden shifts to the last asserter There's a series of inferential steps necessary to construct a full-blown adjudicatory theory. That's not logically necessary, or even necessarily obvious. But the things on which that is built, I think, are logically necessary.

JACK BALKIN: Thank you.

UNIDENTIFIED: You talk about commands and resources. My question is how foreign law would be able to be a resource in interpreting the Constitution.

JACK BALKIN: I don't see why foreign law couldn't be a resource in interpreting the Constitution. The Constitution itself speaks of the law of nations. The early debates about interpretation asked what was the best analogy to a federal constitution. Is the best analogy a treaty? If so, state powers should be interpreted broadly and federal power narrowly. Or should it be understood as analogous to a statute, in which case it should be interpreted remedially to benefit its purposes.

Many features of international law and the law of nations could be relevant to constitutional construction. The only problem I see – and it's in the nature of the debate that people are now having – is whether you can get a significant number of people in the public sphere to treat these resources as ones that they

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[19] 17 U.S. 316 (1819).

take seriously and care about.

This goes back to the discussion that David and I were having: What are the rhetorical tools available in the public sphere at a particular time? Ironically, the United States was involved in the creation of many of these international human rights obligations. And then, as a result of domestic politics in the '40s and '50s, the use of these kinds of claims was basically banished, because of politics. It was tied to anti-communism and, I should also say, race relations. These ideas were banished from American constitutional discourse.

But there's no particular reason why they couldn't become a part of American constitutional discourse again. It's unlikely that courts will be the leading actors in getting people to take seriously arguments from foreign law and international human rights law. It's likely, rather, that people in public life, in the public sphere, will insist that this is an appropriate kind of argument to make, and that their opponents have to meet it. And at that point, courts would be only too happy to follow along.

GARY LAWSON: From the standpoint of ascertaining meaning, it's essentially impossible to come up with a plausible theory of ascertainment that doesn't involve some reference to foreign law, if only the law of England as of 1788, because there are provisions of the Constitution that make no sense without reference to the grounding in English law. In addition to the Law of Nations Clause, the Piracy Clause, there are various other provisions that draw their grounding from foreign law.

So if you're ascertaining meaning by asking what a reasonable hypothetical observer in 1788 would have thought, well, yes, foreign law is going to play a large role, at least with respect to some provisions. Where you're getting the controversy today doesn't come from those provisions, it comes from the construction, if you will, that has a lot of provisions drawing their application meaning from evolving social values. And the reaction is, "Well, heck, if we're going to do that, might as well be my social values and not those of Portugal."

But that goes to the particular construction in which those arise. If you're thinking about ascertainment of meaning, it's a clause-by-clause, provision-by-provision assessment, and there are going to be lots of them for which foreign law of various sorts, or international law broadly understood, are absolutely indispensable.

And the only other thing I'll say is, Jack, the Constitution is neither a treaty nor a statute. It's an agency instrument, an agency document. That's for another time.

JAMES FLEMING: David, do you have a view on this question? Common-law interpretation often is comparative. And, if I recall, *Winterbottom*,[20] an

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[20] Winterbottom v. Wright (1842) 10 M&W 109.

English case, was the precedent in your discussion of *MacPherson*[21] in your book.

DAVID STRAUSS: In principle, there's no reason not to draw on foreign law. It's a source of other people's views. It's a source of latent wisdom. All the things you'd say about American precedent, you could say about foreign precedent, in principle.

The difficulty is really understanding it. And I think there are prudential reasons to be careful about drawing on foreign law. It's embedded in a different system, and I think it's very difficult for anyone to have good intuitions about a foreign system and really understand how it works – this principle makes sense only because there's another principle over here, and it's the interaction of the two that makes sense out of it. It's very hard to know that unless you're really immersed in that system. And to pluck one thing out is dangerous. But that's really a matter of prudence, rather than a matter of principle.

When you see a consensus on certain matters among foreign countries, it's kind of remarkable that some Justices think that shouldn't matter at all. I mean, if they want to explain it away, that's fine, but there are lots of things that other countries do that we don't do, and there's some of them liberal, some of them conservative, and we should pay attention to that.

And maybe the explanation's going to be, "Yes, but there are many, many conditions there that make those sensible things to do that don't operate here," and then that would be an answer.

But I would say those two things. In principle, it seems fine. In practice, you have to be wary. But there are occasions on which I think we should at least think about it.

NAMRATA KOTWANI: This is a clarificatory question for Professor Lawson. So if you're an originalist, it seems like what you're saying is, there is this anti-construction presumption. You try to ascertain meaning, and it's like constitutional avoidance in some sense; you avoid that question because you can adjudicate it without having to go into constructing anything. But at some point, construction must be inevitable, right? And what would an originalist do then? Do you have a view on that?

GARY LAWSON: Well, no, I don't think it's inevitable at all. And when I say I'm an originalist, I'm an originalist with respect to the ascertainment of meaning. I think that's the way you figure out what this particular document means, exactly the same way that you would figure out what the Rhode Island charter of 1620 means, or whenever the Rhode Island charter was. You'd use exactly the same interpretative tools to figure out what that means. What you do with that meaning once you have it is a totally different question.

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[21] MacPherson v. Buick Motor Co., 111 N.E. 1050 (1916).

Construction gets into the realm of adjudication. And to have a theory of adjudication – a theory about what people ought to do when presented with a choice about, are you going to tell the federal marshals to shoot this person or not – at that point ascertainment of meaning by itself can't tell you what to do. You have to make a normative decision to take that ascertainment of meaning and make it the foundation of your judgment. At that point, you're in the realm of moral and political theory, and the humble lawyer here – and I'm barely a lawyer – stops talking.

My only point is that it is possible to have a theory of adjudication that doesn't rely at all on construction. Whether you would choose that particular theory of adjudication, rather than one that is based on any particular construction, is – like any choice about when to tell federal marshals to shoot at people – ultimately a normative one.

So I'm not saying that's what I would do. I'm saying only that it's not inevitable that that's what you have to do. There is an ascertainment – in fact, if what you are doing is basing as much as you can on the ascertainment of meaning, you wouldn't construct. That's all.

RESPONSE AND COLLOQUY CONCERNING THE PAPERS BY ABIGAIL MONCRIEFF AND LARRY YACKLE

DAVID STRAUSS: My warm thanks to both Abby and Larry for these comments, which are tremendously helpful and very kind. Having taught Abby constitutional law, I'm going to take full credit for her success and her excellence. I just want to get that on the videotape in case there are any issues about that.

Let me first address Abby's thoughts, which I think are very important, about how very often constitutional law gets made by deflecting things to the political branches. This is a role courts play. She says this is inherently political, and that the theory of constitutional law that I put forward doesn't really have room for this, doesn't really account for this.

Abby's clearly right, that there are instances in which the courts effectively allow law to be made by the other branches. But this is done in different ways, and I want to separate them out in a slightly different way from the way Abby separated them out, although I think in a way that's consistent with her typology.

There are some doctrines in constitutional law that simply mandate deference to the other branches of government. Those are very familiar ideas. That in "economic and social legislation," the Supreme Court applies a very lenient standard of review, and that's routinely upheld. And that is a way of deferring important decisions to Congress.

A second category of doctrines – and Abby was right to focus on these – don't quite work like that. The courts will decide an issue, but they'll do it in a way that allows for pushback from the other branches, so that if the other branches are very dissatisfied, or the states perhaps are very dissatisfied, with what the court has done, the court has an opening in the doctrine to reverse

ground.

The decisions on capital punishment in the mid-1970s were actually an example of this. It's not clear the court understood what it was getting itself into, but this is what it got itself into. It said capital punishment, as then practiced in the United States, was unconstitutional – this was the common denominator majority view – because it allowed too much discretion. Whereupon, a large number of states enacted laws providing for the death penalty that eliminated a lot of discretion, and the court upheld them. The court, by saying, "The problem is you're allowing too much discretion," opened the door for this kind of pushback.

I think there are a number of doctrines that actually work that way, either obviously or subtly, essentially saying, "We're going to strike down what you've done, but if you come back and rethink, and come back with it maybe in a different form, we will uphold it." I actually think a lot of that's going on in the area of sex discrimination, for example. I think what the court wants to see in that area is laws that reflect current views about the role of women. And if it thinks the law reflects an overbroad and archaic generalization, as they say, it will strike it down. But if the law reflects something rethought, I think they're inclined to uphold it. That's not obvious, but I think that kind of thing goes on. I think it's important. I think Abby's right to flag it.

Those two things, I wanted to say, are not particularly problematic for my view, because the question whether doctrines like that should be adopted, I would just fold into the common-law inquiry. I'd say it's a combination of what do the precedents say and what makes sense. To the extent you're concerned, either for reasons of precedent or for reasons of political morality, that the court shouldn't be doing too much because it's undemocratic, these kinds of doctrines will be congenial to you. To the extent you don't have those concerns, you'll be less inclined to adopt these sorts of doctrines. But I think these are straightforward constitutional doctrines, and you should think about them the way you think about any others. So that's the way I would incorporate those into the view.

Now, there are other things going on, too. This is where Abby began, really, in her account. I think Henry Monahan is more like my second category. The person I associate with this third category is Alexander Bickel and the so-called passive virtues. And here, the idea is not an official doctrine that leaves the door open for legislative pushback, but some device of avoidance that is in some ways lawless. Denying certiorari in a case where otherwise certiorari would be granted might be such a thing. Or manipulating doctrines of mootness or standing, or other doctrines of justiciability, in order to avoid deciding an issue, as the Court notoriously did with the issue of laws forbidding interracial marriage in the immediate wake of *Brown against the Board.* It refused to decide the issue, really lawlessly at that time, because the case was in a category of cases the court was legally required to decide. The court ducked it, thinking it would be too inflammatory to strike the law down. Totally unprincipled to uphold the law forbidding interracial marriage in the

wake of *Brown*, so it just avoided the issue for a decade.

Those devices, I think, are problematic, hard to square with a view like the common-law understanding of the Constitution. I think, as I said, they are in some ways lawless. Maybe not pejoratively so, but it is a political function, not a legal function, to say of gay marriage today, as the court might say, "It's just too inflammatory, we're going to figure out a way to duck it."

And then the fourth way the court engages in the political process, in Abby's terms, you might think of as just sheer political maneuvering. "Okay, we've gotten into a lot of trouble with the left lately on our rulings on campaign finance, affirmative action, and gun rights, so let's beef up the restrictions on abortion and that'll make sure nobody really gets too angry at us." I don't know if they do that; I doubt they do it consciously. It could very well be some of them at least do it unconsciously. That's also a kind of political maneuvering. I also see that as something that a common-law approach to the Constitution does not justify. That's not the exercise of common-law power.

What I would say, though, is those last two things, the avoidance and the maneuvering, are more or less inevitable. This is something a court's going to do. You're going to have people on the court who are politically astute; that's how they got there. They didn't get there by writing books like Jack's. Not that he won't get there, but the book probably won't help him. Or mine.

These are people who got where they got by having a degree of political astuteness. They've been through the political process. They're to some degree political animals. They're working in a charged political environment. They know what's going on. And it is really too much to expect them not to do things like this, I think. However much we might lament them. Or maybe we don't lament them. But in any event, I think as a practical matter, they're going to do it.

And it's possible, I suppose – Abby wasn't quite going in this direction, I don't think, although I think it's maybe one reading of her remarks – that some sort of originalism would put more of a limit on that, that there's more flexibility in the common-law view, and that would allow for more of this maneuvering. I think that is possible, and I think that's a potential criticism of the view. I actually think originalism, as it's practiced at least, is very, very flexible, and I'm not sure at all that it would put up more of a barrier to this kind of maneuvering. But maybe it would. Maybe the common-law view gives more cover to that kind of maneuvering.

But my basic answer to Abby is, yes, it goes on. Yes, it's inconsistent with the common-law view. It's going to go on under any view more or less to the same extent. It's in the nature of the role that the court plays in our society.

So that degree of confession and avoidance to her arguments.

As for Larry's remarks, I'll begin at the end, with the flag. I think the monarch actually plays that role in a lot of countries. There's your symbol of unity, you have the queen, and that's what holds you together. You don't need a document when you've got the queen. So I don't know that that's totally

unrealistic.

Two thoughts. One of this question of the Constitution playing a coordinating role in laying out points of agreement. I think I heard Larry say, look, there are lots of documents, like the Massachusetts Vehicular Code, that have this function of giving us these focal points that people can coordinate around, because they need to coordinate. Why do we treat the Constitution as the Constitution when there are lots of documents that serve this function?

I think what I want to say is that the causation runs the other way. Here is the way I would think about this. Supposing you were addressing a skeptic who said to someone who is not an originalist, like me, "Listen, you have already discarded the specific judgments that the Framers made when those were not encoded in clear text. You don't care about those, or at least you're willing to override them. Why do you care about them when they're encoded in text? It's just arbitrary that some stuff they happened to write down, and some stuff they meant but didn't write it down, maybe because they thought no one could mistake what they were trying to accomplish.

"When they don't write it down, you're willing to interpret your way around it, or common law your way around it. So what's so sacred about the stuff they wrote down? Why don't you treat that the same way? It could be the present-day Constitution in New Zealand, et cetera. So what's so great about the text?"

That's the skeptic's challenge to non-originalists. It's not that easy to meet, I think. The way I would meet it is to say, well, it happens to be the case that people accept the Constitution. That's a sociological fact. It doesn't have to be that way. They could accept some other document, or no document. It happens to be the case they accept this. It's very, very useful that they accept it, because there are provisions in there that settle things that need to be settled. So we might as well take advantage of that happy sociological fact.

So the causation runs from the acceptance to its usefulness in resolving these issues, rather than the other way around, which is what I think Larry was saying about the Massachusetts Code. And I think that is basically the whole story. My answer to the skeptic would be that story, and it is a way of preserving the point Larry began with, which is you just don't have a plausible theory if you discard the text of the Constitution. That's just not acceptable to do. That's not part of our culture.

The second question, about how should a constitution be drafted, or should it be drafted at all, given the way ours has evolved away from the text, is a great question. I've been thinking about it since I read Larry's draft. I don't have a very good answer. Let me give you the first cut – which I now think is not quite right, but may be illuminatingly wrong – and then say something weaker that I think might be right.

The first cut would be to say, well, here's what you want to do in the written constitution. You want to pin down as many things as you can pin down that are relatively uncontroversial. You definitely want to get some rules of the road down, some procedures down so that the government can get going and

people won't be fighting over basics. You want to empower a legislature and say how it's going to be constituted, and you want to set up some version of an executive branch, and you want to set up courts and whatever other institutions you need. Try to get that stuff down to the extent that it's something that people say, "Oh, it's not my optimal solution, but it's good enough," so that some things are settled, and particularly the institutional machinery is settled and it can get going.

And as to other things – this was my first take on this, based on our experience – what you really want to do is make sure you don't hem in your successors with language that is going to be a real problem for them.

So if, for example, the drafters the Fourteenth Amendment, in drafting Section One with the Privileges or Immunities and Equal Protection Clauses had said what they thought – "Nothing in this provision, however, shall impair the right of the states to establish racially segregated schools" – had they written that in there, it would have been a terrible problem for us. Or, "Nothing in this provision shall require the elimination of disabilities of married women." They didn't think they were eliminating the disabilities of married women, but they didn't write it down. Had they written it down, it would have been a big problem for us.

So for the first cut, I'd say, leave as much open as you can, because later generations might disagree with you, and you don't want to create a real problem by boxing them in. So only pin down the stuff that's relatively uncontroversial.

The reason I think that in the end that's not right is, I think constitutions can sometimes resolve things. And if you think about the experience of slavery, that is what they did with slavery. They kind of kept it out of the picture. The slave trade they entrenched until 1808. Otherwise, they facilitated it in some ways with the Fugitive Slave Clause. But they kicked the can down the road, and that turned out to be disastrous. It's hard to see how things could have been worse than the resolution they worked with slavery, the way things turned out.

So that's why I hesitate with the prescription that seems to follow from the common-law view. What I would say, though, is what Framers of a written constitution have to be very attentive to is what means of change are available in your society? How does your society go about changing things? We happened to inherit this common-law tradition from England, and we knew how to work it. And it was built into our legal, political, and even popular culture, that the judges would do this, and there was an element of maintaining continuity with the past. And even the American Revolution itself purported to maintain continuity with the ancient liberties of Englishmen. So we are pretty good at changing things in this way. And you should be attuned to that, because the way you prescribe changes in your document is not going to be the only way the society will change.

Now, if you have a society that doesn't have those traditions – let's say it has a very robust tradition of markets, and the markets are vibrant and means

of change and changing social relations – and that's the way your society often changes things, you should be aware of that, take advantage of that, and structure the constitution in a way that allows for that means of change.

Or, if your society is relatively small, and there are cohesive social networks, and they provide a means of change, leave that door open. But, drafters of the Constitution, don't think that you're able to monopolize the means of change in your equivalent of Article V. Because that, I think, is a lesson from our experience.

It's a great question. That's inadequate, but the best I can do. And again, I thank both of you for being very kind and very instructive.

HUGH BAXTER: I wonder if you could say a few words about *Griswold*,[22] whether it's in your view any kind of an exemplary decision. It's an odd one to pick for the point of view of common-law theory. It has the penumbras and emanations – not emanating from case law, but emanating from textual provisions. I don't remember reading anything about *Griswold* in your book, and I was curious if you would have a comment on it.

DAVID STRAUSS: It's a case purporting to be based on text. That's a hard case to make. I think there was a set of cases in the late '60s and early '70s that were, at first glance, hard to fit together, but in retrospect seem to be explicable. They were about "privacy and about sex discrimination." And I think they went together. I think one way to understand *Griswold* is it's part of the same package as the revolution in women's roles that was going on at the time.

If you look at women's workforce participation, starting in the early 1960s it shoots up. And various other things were changing in the status of women. You were getting some employment discrimination laws. You're getting changes in the patterns in the workplace. And I think you can see *Griswold* and, to some extent, *Roe*[23] – although *Roe* is complicated by the state interest on the other side – as related to this. As well as the sex discrimination cases that begin coming out of the Supreme Court in the early 1970s.

You can see the Court picking up on this development, a little bit in the cases, but more in other forces in society. And picking up on that and gradually working its way toward developing a doctrine.

The reason *Griswold* was a logical place to begin ties into something Jack said before: the statute in *Griswold* was a complete outlier and barely enforced. It was in fact enforced against clinics, but otherwise not enforced. The statute in *Griswold* forbade anyone, including married couples, from using contraceptives. So a really wild statute, or the opposite of wild.

So think of a court thinking, okay, here is something that's breaking through in society, society's moving in this direction, here is a real outlier; this is a

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[22] Griswold v. Connecticut, 381 U.S. 479 (1965).

[23] Roe v. Wade, 410 U.S. 113 (1973).

good place for us to start. We'll put our toe in the water – I'm mixing metaphors – we'll begin here and see how far we can go. Abby talks about pushback, I think they left the door open for pushback.

If you talk to clerks who clerked in the term that *Roe* was decided, or read the papers, you see that they underestimated how big a deal *Roe* was. They thought that was the next incremental step. They just didn't understand the issue. They didn't understand how difficult a moral issue this is, period, and certainly for a lot of people.

But I think that's what you see them doing, picking up on currents expressed through legal and non-legal means, and moving the doctrine in that direction.

HUGH BAXTER: You sound a lot like Jack.

DAVID STRAUSS: Well, I don't think this has anything to do with the Framers of the Fourteenth Amendment. Zero.

HUGH BAXTER: The social movements point.

DAVID STRAUSS: Well, there are social movements, and there are social movements. The fact that some people in society are agitating for something, that's a very small piece of evidence. When you start to see legal changes and changes in other relationships in society, that counts for something. But in a society like ours, there are always going to be some people out there agitating, and the number of times the courts should take that on, as opposed to letting legislatures deal with it, or letting economic forces deal with it, or just letting it die out, that's the difficult question.

UNIDENTIFIED: In retrospect, should a constitution include a provision for a rule for its interpretation?

DAVID STRAUSS: The economists ask you this question whenever you have a paper on interpretation. They say, "Why doesn't the legislature just enact a code to govern statutory interpretation and save us all this anguish?" And I'm not sure I know the answer, except it doesn't happen, and it doesn't seem like it would work.

You could say you just get a regress. You enact this provision governing interpretation. Then you've got to interpret that. That, I think, is a piece of the problem.

I think another part of it might just be that these interpretative approaches just don't lend themselves to codification. And if you tried to codify them, you would either accomplish nothing, or you'd screw things up, because you'd get it wrong enough so now you had another hurdle to overcome.

But other than that, I don't know the answer. We do know that there are a couple of instances of it, but by and large, you don't see these things. You don't see useful canons of interpretation enacted into law.

UNIDENTIFIED: Well, we see the problem, that if originalism were to be the rule in the Constitution, we've seen what's happened to what is originalism, how it started and how it's gone on and may continue to go on. So even if there were a rule of interpretation, perhaps over time there would be the common-law approach to be taken because of changed circumstances.

DAVID STRAUSS: Yes, that's a version of the regress problem. Suppose they enacted a provision that said, "This Constitution shall be interpreted according to the original public meaning of the document." Well, then you have a body of law on what constitutes the original public meaning, and that could easily take on a common law-ish turn.

GARY LAWSON: There are academics who would suggest both constitutional rules for constitutional interpretation and codes of statutory interpretation; it's not unknown.

UNIDENTIFIED: You talked a little bit about places in the Constitution where originalism has been defeated, i.e., the Equal Protection Clause. It didn't contemplate women being beneficiaries of the Clause. How would you give advice to someone trying to resurrect a provision of the Constitution that has been deemed, I guess, dead, or without doctrine, i.e., the Thirteenth Amendment?

DAVID STRAUSS: Let me do one small clarification at the risk of being pedantic, because this actually came up in another conference. What the Framers of the Equal Protection Clause did not specifically envision was that women would be free of discrimination, which is different from their not being beneficiaries. They would be beneficiaries, they could make a claim under the Equal Protection Clause, they just couldn't claim to be free of discrimination.

If it were a purely common-law system, the fact that there is a Thirteenth Amendment there, and it hasn't been used much, it wouldn't matter. You would revive it by generating a new body of doctrine, which would respond to various needs, and you would assemble a precedential basis for doing it.

In our actual system, you do get a boost out of the text, but I think that's because some people in our system, either out of confusion or out of their own commitment or out of opportunism, are textualists and originalists. The recent example of that is the Second Amendment. The Second Amendment seemed to be dead, as far as imposing judiciable rights, until 20 years ago. Then this movement arose, let's mobilize around the Second Amendment, and the opinion in *Heller*[24] at least is written strictly in the terms that your question envisions – Here's this amendment. Here's what it said. Let's enforce it. End of story.

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[24] District of Columbia v. Heller, 554 U.S.570 (2008).

That way of doing constitutional law makes no sense to me. I don't understand why we should resolve an issue about gun control laws that way. They might be good, they might be bad, but the idea that we're going to resolve it by trying to figure out what they were up to in the late eighteenth century, I don't understand why a society would do that.

I also don't think that was in fact what was going on. I think it's a combination of political commitments and some culture war stuff – which really shouldn't have been in the picture – maybe combined with a sense of, "There really is a societal consensus about this." I don't believe there was, but that would be the legitimate piece of it on a common-law view.

The view I would have taken of that case is, since the Industrial Revolution hit America, you don't see any evidence in the cases of anyone suggesting that the Constitution posed a barrier to gun control laws until quite recently. As recently as 1990, Chief Justice Burger said it's a fraud to read the Second Amendment that way. Elite opinion was united against it. There was massive lot of gun control legislation. No litigation. That's a pretty strong common-law story, and if you want to chip away it, okay. But then you've got to tell the story in those terms and not simply say, "Yeah, what do you know? We have this constitutional provision." That's the heart of the common-law view.

JACK BALKIN: Can I say something about these matters? I have some advice and a little counterhistory. The counterhistory is that women actually were considered to be protected by the Fourteenth Amendment's Equal Protection Clause. The problem was that married women weren't. So a *femme sole*, as unmarried women were then called, had civil equality with men. The problem was, everybody assumed that this was a very small class of people – women were either living in their father's house or they got married and lived in their husband's house. The common-law rules of coverture meant that a woman surrendered all of her common-law rights upon marriage because the wife's legal identity was merged into that of her husband's. The doctrine of marital unity is a fiction. This was the source of the problem. It wasn't that women weren't entitled to civil equality. It's just that the Framers of the Fourteenth Amendment didn't believe that the new amendment would change the common-law coverture rules.

The story of the Second Amendment is actually a little more complicated. There's some, but not much, evidence of an individual right to bear arms in self-defense around 1791 – as opposed to a republican duty to bear arms to defend the country from tyranny. The evidence for such a right grows increasingly strong through Reconstruction. And by the time of Reconstruction, lots of people think that the right to bear arms is an individual right of self-defense. But this would have been a civil right, not a political right. The right to serve in the militia to defend the republic and overthrow a tyrannical government is a political right. But a right of individual self-defense is a civil right. And the latter is fairly well established around the time of Reconstruction.

The Labor movement, and then later, Prohibition – which led to the rise of bootleggers and gangsters – changed people's minds about the role of the Second Amendment. The key case, the *Miller*[25] case, arises out of the problems created by Prohibition. Basically gangsters and bootleggers are running around with guns, and people think "we can't have this, we have to clamp down."

So it's during the 20th century that gun control is increasingly widely accepted, and that's largely because people are afraid of labor activists and they're afraid of gangsters.

The modern movement for gun rights occurs in the wake of the assassinations of Martin Luther King and Robert Kennedy, which led to new federal gun control laws. Those laws stoke a political reaction, which eventually leads to the modern movement for gun rights, which eventually – in common-law fashion, you might even say – leads to the recognition by the Supreme Court in *Heller*.

So belief in an individual right to bear arms in self-defense has waxed and waned throughout American history.

A note on the Thirteenth Amendment. It could have been a far more powerful source of rights. Certainly the people who framed it thought it would have this effect. But the Fourteenth Amendment kicks it to the curb, so to speak. Once you have the Fourteenth Amendment, the Thirteenth becomes less important, for a number of overlapping reasons.

There's an attempt to revive it, especially around the turn of the twentieth century. There are a few cases decided by the Supreme Court. And then there's a further attempt to revive it in the '30s and '40s in order to protect migrant workers and blacks in low-skilled occupations. But the NAACP's litigation strategy is focused on schools, and especially professional schools, and they believe that the Fourteenth Amendment is a better vehicle. As a result, the Thirteenth Amendment strategy for black equality is de-emphasized.

But of course, why this happens is a question of what were people trying to do, how they tried to use the resources that were available to them. If you wanted to revive the Thirteenth Amendment today – especially if you were thinking of the Thirteenth Amendment as a means of attacking political powerlessness, domination, and economic inequality – you would have to start again, and get a lot of people to talk in terms of the Thirteenth Amendment and to take seriously Thirteenth Amendment-style claims.

I just want to point out that it can be done. Before December of 2000, nobody took seriously the kinds of arguments that George W. Bush's lawyers made in *Bush v. Gore*.[26] Then, suddenly, because a lot of influential people got behind them and started pushing them, these arguments became serious constitutional arguments. They moved from off the wall to on the wall.

So if you want the Thirteenth Amendment to rise again, I would advise that

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[25] United States v. Miller, 307 U.S. 174 (1939).

[26] 531 U.S. 98 (2000).

you follow the example of the NRA and make a big deal about it, start putting bumper stickers on your car, and start talking about how important your Thirteenth Amendment rights are. You should form social mobilizations and get a political party to agree that what you think about the Constitution is very important. And then eventually get the Attorney General of the United States to assert your views in a brief – that's what Attorney General Ashcroft did when he asserted that the individual right to bear arms is a right recognized by the U.S. government. Then you should work to appoint a bunch of Justices who agree with you. And then, poof, you have a case like *Heller*. The same thing might happen someday with the Thirteenth Amendment.