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Reason, the Common Law, and the Living Constitution (review of The Living Constitution by David Strauss)

Matthew Steilen

University at Buffalo School of Law, mjsteile@buffalo.edu

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REASON, THE COMMON LAW, AND THE LIVING CONSTITUTION

Matthew Steilen*

State University of New York University at Buffalo

Abstract

This article reviews David Strauss's recent book, *The Living Constitution*. The thesis of Strauss's book is that constitutional law is a kind of common law, based largely on judicial precedent and commonsense judgments about what works and what is fair. In defending this claim, Strauss argues that central constitutional prohibitions of discrimination and protections of free speech have a common-law basis and that the originalist should consequently reject them. The review disputes this contention. It examines Strauss's account of the common law and argues that it cannot support our First Amendment protections of subversive advocacy, as Strauss says it does. The review then offers an alternative account of the common law based on the "classical" common-law theory associated with Coke and Hale. The latter account does support our protections of subversive advocacy but is much less appealing to those distrustful of ambitious and large-scale judicial action.

> Reason is the life of the law.
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> —Edward Coke

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* I thank reviewer Michael Dorf for his helpful suggestions.

In *The Living Constitution*, David Strauss argues that constitutional law is a kind of common law. For Strauss, this means that constitutional law is based on judicial precedent as well as broader social and political traditions, shared understandings, and judgments about what is fair and what works.[1] Our "living Constitution," says Strauss, is this body of constitutional common law, along with the written constitutional text. It is "living" in the sense that it changes in response to changes in our world.

The Living Constitution is an important book, despite being largely adapted from Strauss's earlier work.[2] It is aimed at and appears to have succeeded in reaching a wider audience than Strauss's academic publications.[3] It arrives at an important time in the history of our country, when there is a sense that politically conservative judges have become more willing to strike down legislation they view as unconstitutional, complicating the long-standing association between judicial activism and the political left. And for the most part, *The Living Constitution* is well written and well argued. Strauss undoubtedly succeeds in lending an air of plausibility to the idea of a "living"

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[1] DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010), at 35.

[2] *See, e.g.*, David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 846 (2007); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

[3] *See, e.g.*, Stanley Fish, *Why Bother with the Constitution?*, N.Y. TIMES, May 10, 2010.

Constitution. This is a significant accomplishment, given that the term has largely functioned as a legal epithet for the past fifteen years. Originalism has been ascendant.

This review focuses on Strauss's account of the common law. While considerable attention has been directed at the book's criticisms of originalism, very little attention has been paid to its account of the common law, which Strauss styles as the great competitor to originalism and its parent theory, legal positivism. Yet there is much to say about Strauss's views on the common law, even from the perspective of one persuaded of the merits of common-law constitutionalism. Originalism, Strauss tells us early in the book, cannot account for many of our most cherished constitutional protections. It cannot account for the First Amendment protections of subversive advocacy, whose contours are derived from the line of cases ending in Brandenburg v. Ohio and not from original understandings or bare constitutional text. Original understandings are at best unclear and at worst would have permitted punishment of subversive advocacy as seditious libel. In Strauss's view, this poses a serious problem for originalism and provides reason to embrace the idea of a "living" Constitution. As it turns out, however, there is a problem with this story: Strauss cannot justify our protection of subversive advocacy either. The common law, as he describes it, is far too weak.

I will have much more to say about what I mean by "weak," but here is a first approximation of the issue. Strauss is keen to present the common law as a "conservative" decision-making method. By "conservative," I do not mean politically conservative but a kind of disposition or attitude that involves caution, moderation, humility about one's own understanding, and a focus on what has worked in experience. Some have called this "Burkean" conservatism, after the British statesman Edmund

Burke, and indeed, Strauss draws heavily on Burke's views in describing the common law. There are good reasons for Strauss to take this approach, not the least of which is that he is trying to appeal to those distrustful of ambitious and large-scale judicial action. A Burkean common law—cautious, moderate, empirical—should strike these individuals as sensible. The problem is that the common law is not that tame. A fair look at its history in our own country shows that it has been at times courageous, experimental, and highly abstract and theoretical. As I describe below, subversive advocacy protections are case in point.

Moreover, this behavior cannot be attributed to the isolated decisions of rogue judges. It has long been part of the *theory* of the common law itself. Burke's predecessors—primarily the great English jurists Edward Coke and Matthew Hale, fathers of what has been called the "classical" theory of the common law—wrote pointedly about the role of *reason* in common-law adjudication. "Reason," Coke famously quipped, "is the life of the law." The use of reason to examine and evaluate the prevailing legal rule has occasioned many of the remarkable moments of creativity in the history of the common law. In this sense, it is *reason* that gives life to the "living" Constitution, since it is reason that enables the common law to change.

To put a label on this contrast, we might say that Strauss's account of the common law is "empiricist" whereas mine is "rationalist." Using those labels, my thesis is that a rationalist account of the common law is superior to an empiricist one but much less attractive to Strauss's target audience, who would, all things considered, prefer Mr. Edmund Burke. In Section I of what follows, I present the central claims of Strauss's book, paying special attention to those relevant to my thesis. Section II examines the

development of First Amendment protections of subversive advocacy and defends the rationalist account of the common law.

I. ORIGINALISM, THE COMMON LAW, AND CHANGE

There are three central claims in *The Living Constitution*. The first claim is that originalism is an unworkable and undesirable account of how courts ought to decide the cases before them. According to Strauss, judges cannot actually abide by the commands of originalism, and even if they could, we would not like the results. The second claim is that in contrast, the common-law process provides a workable and desirable method for resolving constitutional controversies. Judges can follow common-law methods—indeed, they have been doing so for hundreds of years—and the results are largely desirable. Fundamental liberties regarded as essential to modern society, such as equal-protection prohibitions against discrimination by the government, are products of the common-law process. Finally, the third claim is that common-law constitutionalism does not imply that the written Constitution is superfluous, as Strauss's critics might suggest. The written Constitution creates a kind of "common ground" for settling disputes. Where its language leaves a range of alternatives open, it is the common-law process—not the formal amendment process—that gives our constitutional law determinate content.

Above all this and of importance in evaluating the three central claims is the theme of *change*. Change, says Strauss, creates a kind of false puzzle or paradox about the Constitution. Since the time the written Constitution was adopted more than two

hundred years ago, the world has changed "in incalculable ways."[4] The United States has experienced revolutions in demographics, economy, and technology. These changes have necessitated fundamental legal changes. Yet only a "handful" of changes have been made to the Constitution using the mechanisms in Article V.[5] It would seem, then, that there must be another means of changing constitutional law—at least, if we are to justify the full range of today's constitutional doctrine. But it is unclear that there *could* be another means of changing constitutional law. If constitutional law could be changed outside the strictures of Article V, it would seem to undercut the written Constitution's basic function. The Constitution, Strauss says, is supposed to embody "our most fundamental principles," which remain unchanged and provide a kind of check against the vicissitudes of popular government. Moreover, if constitutional law were amendable by judges in the exercise of their discretion, then it would begin less to resemble a body of law and look more like a kind of fact-finding (in which judges decide what government action is and is not "reasonable").[6]

The common law is the solution to the paradox. The requirements of *change* and *constitutionality* or *principledness* (to coin an unfortunate term) are both met. The common law can adapt to changing circumstances more readily than Article V permits; but it is not, Strauss insists, something "that judges (or anyone else) can simply

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[4] STRAUSS, *supra* note 1, at 1.

[5] *Id.* at 34.

[6] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180–1182 (1989).

manipulate to fit their own ideas."[7] This is why the common-law Constitution is a *living* Constitution. It is an honest-to-goodness body of *law*—in the full sense of the term—that serves the basic function of a constitution *and* adapts to the changes we experience. That a body of law can do both is not a simple thing to understand.[8] But it is, in Strauss's eyes, the distinguishing feature of the common law and its fundamental advantage over originalism.

Change thus serves as a convenient measure for assessing the first two of *The Living Constitution*'s central claims: that originalism fails, and that the common law succeeds, in providing a workable and desirable approach to judicial decision-making.

Originalism

The criticisms of originalism in *The Living Constitution* are not new.[9] The first chapter of the book, which discusses originalism, reads a bit like an old laundry list; in several places Strauss actually resorts to using bullet points rather than the formality of full paragraphs. The approach contributes to a larger confusion about what originalism actually is and what it is meant to do.

The target in the chapter is what Strauss calls "the core idea of originalism." The core idea of originalism, he says, "is that when we give meanings to the words of the

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[7] STRAUSS, *supra* note 1, at 3.

[8] *See* Fred Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 455–456 (1989) (reviewing MELVIN EISENBERG, THE NATURE OF THE COMMON LAW (1988)).

[9] Strauss himself acknowledges this. *See* STRAUSS, *supra* note 1, at 29.

Constitution, we should use the meanings that the people who adopted those constitutional provisions would have assigned."[10] Strauss presents the core idea as the solution to a problem affecting a primitive form of *textualism*. According to this version of textualism, interpreting the Constitution requires that one just "do what the words say."[11] There are cases, Strauss says, where it is possible just to do what the words of the Constitution say. Article II, Section 1 restricts eligibility for the office of President to those who "have attained the Age of thirty-five Years." The Twentieth Amendment states that the "terms of the President and Vice President shall end at noon on the 20th day of January . . . and the terms of their successors shall then begin."

Primitive textualism is so primitive that it is obviously a foil. There are a number of provisions of the Constitution whose meaning does occasion reasonable doubt. Strauss's pet example—a subject he returns to throughout *The Living Constitution*—is the First Amendment's Free Speech Clause. The relevant text states that "Congress shall make no law . . . abridging the freedom of speech." What this provision permits and what it forbids is not immediately obvious, in the sense that it is obvious that Article II forbids a thirty-three-year-old from assuming the office of President. The word "speech" describes a range of behavior, only some of which is reasonably understood as deserving of constitutional protection. The expression "freedom of speech," says Strauss, surely cannot include the freedom to solicit a crime, deliberately to publish falsehoods, or to

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[10] *Id.* at 10.

[11] *Id.* at 7.

distribute pornography to children. But if "freedom of speech" excludes this conduct, it is hard to see why the text requires such a result.

According to Strauss's narrative, originalism is meant to fill the interpretative gap left open in this primitive version of textualism. The gap can be filled, says the originalist, by consulting the understandings of those who adopted the relevant constitutional provision. Those who adopted the provision had a concrete sense of what practices it included and to whom it applied. A stock example, which Strauss duly cites, is the Eighth Amendment, prohibiting the infliction of "cruel and unusual punishments." We know, says Strauss, that when the Eighth Amendment was adopted as part of the Bill of Rights, no one regarded it as prohibiting the death penalty. If that is the case, then "it follows that the death penalty cannot ever be 'cruel and unusual.'"[12] Resort to original understandings thus helps us to answer the question about what punishments count as "cruel and unusual."

This is originalism as a *gap-filling* thesis. "Gap-filling" is not Strauss's term, but it captures, I think, the significance of his narrative about textualism and originalism. The gap-filling thesis is obviously an interpretative one. Its focus is on the practice of understanding a piece of text and determining the conduct to which it refers. The thesis faces several well-known difficulties that principally grow out of the fact that originalism attempts to fill the interpretative gap by resort to *history*. As Strauss reminds us, the necessary historical inquiry "can be brutally hard."[13] There may be little known about the

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[12] *Id.* at 10.

[13] *Id.* at 19.

original understanding of the provision in question. Few statements of relevance from the adopters or their peers may have been preserved. What was preserved may be conflicting, indeterminate, or otherwise hermetic. Indeed, it is possible (and perhaps likely) that no single original understanding of the constitutional provision in question ever existed.[14] In this setting, determining the original understanding is difficult, if not impossible. Judges are poorly suited to take on the task; most lack both the necessary expertise and the necessary resources (principally time) to carry out the inquiry in a responsible manner.

Moreover, the judge must be an *applied* historian. It is not enough for her to determine the original understanding; she must apply it to the case before her to adjudicate the dispute. This may be difficult given the radical changes in historical context. To take Strauss's example, the founders may have believed they had a right to keep the firearms *with which they were familiar* for self-defense *in a society like theirs*; but that does not imply they believed the Second Amendment protected a right to keep *modern* weapons in a society like *ours*.[15] The original understanding must be "translated" to our historical context if it is to help close the interpretative gap left open by the text alone.[16] This is not a trivial task.

These are the primary problems affecting the gap-filling thesis. Significantly, originalism is not merely a gap-filling thesis; it is also closely related to a set of ideas

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[14] *See* JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1997), at 8–11.

[15] STRAUSS, *supra* note 1, at 21.

[16] *See* Larry Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1174–1182 (1993).

about the proper function of a written constitution, the rule of law, and the role of the courts.[17] The Constitution is supposed to embody our fundamental law. It is written to establish its authority and to prevent any mistake about what that fundamental law is. Generally speaking, it is hard to understand how the adoption of fundamental law by a democratic authority is consistent with that law's successive transformation by unelected officers whose role is to resolve specific disputes. Originalism appears sensitive to this concern. The "core idea" requires the court to honor the intentions of the adopting authority, as we might reasonably imagine both democracy and the rule of law to require. This is, without a doubt, part of what makes originalism so compelling to so many people; the theory fits naturally within a broader view about how law is made and what makes it authoritative.

This is originalism as a *jurisprudential* thesis, not a gap-filling thesis. As it turns out, the bulk of *The Living Constitution* is actually aimed at the jurisprudential thesis. Strauss never cleanly separates the two ideas, and the book introduces originalism in gap-filling terms—as the solution to a problem about interpretation. Yet the two theses are clearly different: the gap-filling thesis concerns whether it is possible to "close the interpretative gap" by resort to original understandings, while the jurisprudential thesis concerns whether it is desirable to do so in light of our broader commitments to constitutional democracy and the rule of law. Strauss is certainly aware of the

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[17] *See* Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 311 (1995). These ideas also animate the apparent paradox surrounding constitutional change and Article V discussed above.

jurisprudential dimension to originalism. In a subsequent chapter, he connects originalism to an early version of legal positivism known as the "command theory"—the view that law is essentially a command from the sovereign—and argues that two form a natural pair.[18] If law is a command from the sovereign, Strauss says, then to interpret the law, one should do what one normally does when interpreting a command: examine the evidence of what the issuer meant by the command. This points to original understandings.

It should be noted that in leaving the matter at this, Strauss forgoes the resources of Hartian legal positivism, which may in fact *support* common-law constitutionalism.[19] Hart rejects the view that law is simply "a command from the sovereign," and in its place develops the idea of "primary" and "secondary" social rules governing human conduct.[20] Of importance here are the secondary rules—including the famous "Rule of Recognition"—which, according to Hart, indicate when a social rule is law, how law can be changed, and who determines whether a law has been broken.[21] Hart argues that these

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[18] STRAUSS, *supra* note 1, at 36–37. The "command theory" is associated with the legal positivism of John Austin.

[19] *See, e.g.*, Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 52–54 (Matthew Adler & Kenneth Einar Himma eds., 2009).

[20] H.L.A. HART, THE CONCEPT OF LAW (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994), at 79–81.

[21] *Id.* at 94–99.

secondary rules ultimately consist in "social facts," in the sense that they are equivalent to shared practices of regarding certain rules as authoritative.[22] Now, it seems right to say that our own society has a shared official practice of regarding judicial precedent as authoritative. In Hart's terms, we have a "secondary rule" that judicial precedent is law and that, in some circumstances, it is *constitutional* law and enjoys a concomitant degree of authority.[23] If this is correct, then the Hartian legal positivist would seem compelled to acknowledge that there is a "living" body of constitutional law, just as Strauss maintains. Strangely, Strauss himself does not make this argument—perhaps because he thinks of originalism primarily in gap-filling terms.

Strauss's principal argument against the jurisprudential thesis and the core claim of the book is that originalism requires us to give up too much.[24] The "originalist's America," Strauss observes, is one in which: (1) the states and the federal government may racially segregate public schools; (2) the government may discriminate against women; (3) the federal government may discriminate against the protected classes; (4) the Bill of Rights does not apply to the states; and (5) vast portions of federal law governing labor, the environment, and consumer protections exceed Congress's power. Central First Amendment protections would also not exist. In each of these crucial areas,

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[22] *See id.* at 110.

[23] *See* Fallon, *supra* note 19, at 52–54.

[24] *See also* Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 231–234 (1980); Tom Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710–714 (1974).

the law depends on a landmark case or line of cases that the originalist must reject, including not only Brown v. Board of Education,[25] but Frontiero v. Richardson[26] and its progeny, Bolling v. Sharpe,[27] Wickard v. Filburn,[28] Gitlow v. New York[29] and the family of incorporation cases, and Brandenburg v. Ohio.[30] The originalist, it turns out, must do without wide swaths of our current law, which are largely inconsistent with what is known about original understandings.

The example of racial segregation is especially painful for the originalist. As Strauss observes of *Brown*, "it is clear that when the Fourteenth Amendment was adopted, it was not understood to forbid racial segregation in public schools. At that time, even northern states segregated their schools, if they did not simply exclude African-American children outright."[31] It would seem to follow, then, that the originalist must reject *Brown*. But *Brown* is regarded as a good decision, and today its holding is almost certainly nonnegotiable; society has changed too deeply to contemplate a return to express racial segregation in the public schools. Similar things could be said for other constitutional protections that the originalist must jettison.

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[25] 347 U.S. 483 (1954).

[26] 411 U.S. 677 (1973).

[27] 347 U.S. 497 (1954).

[28] 317 U.S. 111 (1942).

[29] 268 U.S. 652 (1925).

[30] 395 U.S. 444 (1969).

[31] STRAUSS, *supra* note 1, at 12.

What, then, of Strauss's alternative? It is clear that if the living Constitution is to succeed where originalism fails, the theory must be able to explain why our core constitutional protections are legitimate. As it turns out, this depends on the account of the common law embedded within it.

The Common Law

The common law, says Strauss, "is a system [of law] built not on an authoritative, foundational, quasi-sacred text . . . [but] out of precedents and traditions that accumulate over time."[32] Its method, as Strauss describes it, is essentially the familiar process of argument by analogy: identifying prior cases of relevance, determining their holdings, applying those holdings to the instant case, and employing judgments of fairness and best policy where some aspect of the outcome remains in question.[33] It should be noted that there is a considerable body of literature about "argument by analogy," some of which challenges the idea that it is a sui generis form of logical inference.[34] Strauss skips over the issue entirely. As he sees it, the common-law process should not be understood as "algorithmic" but as resting on judicial "attitudes" of humility about the power of

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[32] *Id.* at 3.

[33] *Id.* at 38.

[34] *See, e.g.*, LARRY ALEXANDER, LEGAL RULES AND LEGAL REASONING (2000), at 211–226; Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 934–936 (1996).

individual reason and a preference for following what has worked in practice. It is these attitudes that form the basis of Strauss's account of the common law.

The judicial attitudes emerge out of a story Strauss tells about the origin and validity of the common law. The common law is an "ancient" system, he says (a point Strauss seems especially fond of), that has "deep roots, medieval roots, according to some accounts."[35] The judges and lawyers of this early period regarded the common law as a kind of custom. This meant that common-law rules did not originate as commands from the sovereign, as (early) legal positivism conceived of law. Common-law rules originated "in the way that customs often emerge in a society": by developing over time and with no specific origin.[36] The point about origin is connected to a second point about authority. If law is a command from the sovereign, then the authority of a law would seem to depend on the authority of the sovereign to issue the command. But, as Strauss points out, this way of conceptualizing authority makes little sense when applied to custom. Customs have authority even though the sovereign has not commanded them.

Strauss acknowledges, as he must, that the common law is no longer regarded as a kind of custom. He attributes the change to a rise in the complexity of law. "Legal systems are now too complex and esoteric," he says, "to be regarded as society-wide customs."[37] The explanation is somewhat unsatisfying; complexity has long been an outstanding feature of the common law (just ask anyone forced to study the Rule Against

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[35] STRAUSS, *supra* note 1, at 3, 37.

[36] *Id.* at 37.

[37] *Id.*

Perpetuities).[38] Nor it is clear why customary law should have to be simple, as Strauss evidently believes. In any case, Strauss does conclude that the common law retains features of customary law, even if it is not itself a kind of custom. Chiefly, the common law relies on precedent. Precedent, like custom, is *evolutionary*; it develops slowly over time.

The point about evolution is a key one for Strauss. Recall that custom not only explains the origin of the common law but its authority as well. Strauss looks to the evolutionary character of the modern common law to replace the classical account of authority. The story he tells has elsewhere been referred to as the "wisdom of the ages" view of the common law.[39] "Legal rules that have been worked out over an extended period," Strauss says, "can claim obedience for that reason alone."[40] Why? A rule acceptable to successive generations is likely to work going forward. It has survived the test of time. It likely rests on something like common sense or a shared experience of what works. In Strauss's mind, this explains the distinctive "attitude" of common-law judges to seek out what has worked in practice. Common-law rules are evidence of what has worked in practice and for that reason can serve as an authoritative basis for legal decision-making.

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[38] *See, e.g.*, Jeremy Bentham, *Papers Relative to Codification and Public Instruction*, in 4 THE WORKS OF JEREMY BENTHAM 459–460, 498 (John Bowring ed., 1962) (1811).

[39] GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1989), at 63–65.

[40] STRAUSS, *supra* note 1, at 38.

A corollary to the emphasis on experience is a distrust in abstraction and the power of individual human reason. Here Strauss's inheritance from Burke becomes apparent. In Burke's judgment, the wisdom of any particular individual cannot compare favorably with that of many individuals over time. This means that when faced with a choice about how to proceed, we should be disposed to follow extant, time-tested practices. Strauss quotes Burke's famous remark in *Reflections on the Revolution in France* that "[w]e are afraid to put men to live and trade each on his own stock of reason, because we suspect this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations."[41] As it happens, Burke was not engaged in a defense of the common law when he made this remark; he was defending traditional social and political arrangements he perceived to be under attack in revolutionary France. But Strauss sees the same view of individual human reason in the common-law judge's devotion to precedent. The common-law judge, says Strauss, is modest about his own capacity for reason and the capacities of the lawyers before him, preferring to follow what has been time-tested. "It is an act of intellectual hubris," Strauss says, describing the view of the common-law judge, "to think you know better than that accumulated wisdom [in precedent]."[42] Thus, even if precedent cannot be justified "in theoretical abstractions," its history is evidence of its value.

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[41] Edmund Burke, *Reflections on the Revolution in France*, *in* 3 THE WRITINGS AND SPEECHES OF EDMUND BURKE 346 (2008). The quotation appears on page 41 of STRAUSS, *supra* note 1.

[42] STRAUSS, *supra* note 1, at 41.

Together, the attitudes of distrust in reason and a preference for what has worked in practice make up Strauss's "empiricist" account of the common law. So described, Strauss believes that the common law is preferable to originalism on a number of fronts. It is, he argues, "more workable" than originalism, since it does not require judges to be historians. The common law requires judges to analyze precedent and to make basic judgments about fairness and social policy, which they have been doing for hundreds of years. (Whether they have been doing so in cases involving *constitutional* law is less clear.)[43] The common law is also "more justifiable" than originalism. It does not run into what Strauss calls "Jefferson's Problem" (a familiar problem apparently given a political rebranding), which is a puzzle about why the law of prior generations ought to bind the present generation.[44] The common law answers Jefferson's Problem by its reliance on judicial precedent, which is justifiable for having stood the test of time.[45]

But most important, argues Strauss, is that the empiricist account of the common law succeeds where originalism primarily failed: in accounting for our core constitutional protections. Strauss defends this claim by exploring the protection of political speech under the First Amendment and the prohibition against racial segregation in public schools under the Fourteenth and Fifth Amendments. Next, I consider whether Strauss's argument about the First Amendment succeeds.

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[43] *See* Jeffrey Goldsworthy, *The Myth of the Common Law Constitution*, *in* COMMON LAW THEORY 207–229 (Douglas Edlin ed., 2007).

[44] "Jefferson's Problem" is usually referred to as the problem of the dead hand.

[45] STRAUSS, *supra* note 1, at 43–44.

II. THE COMMON LAW AND THE FIRST AMENDMENT

The problem the First Amendment poses for originalism is well known. "To put the point bluntly but accurately," Strauss writes, "the text and the original understandings of the First Amendment are essentially irrelevant to the American system of freedom of expression as it exists today."[46] This system of freedom of expression enjoys broad support. Unlike protections rooted in Fourteenth and Fifth Amendments, there is at present little disagreement across the political spectrum that much of First Amendment doctrine is good law.[47] This obviously raises the cost of failing to explain its development. The originalist cannot shrug his shoulders when it comes to political speech; he must show why it is rightly protected.

To that end, there have been assertions that the system of freedom of expression is actually rooted in the original understanding of the First Amendment. Strauss cites the example of Zechariah Chafee, the influential First Amendment scholar of the early twentieth century, who casually characterized the Supreme Court's decision in Schenck v. United States as being "in accord with the purposes of the framers of the Constitution."[48] Justice Brandeis made similar remarks in his concurrence in Whitney v. California, where he wrote at length about the speech-protective beliefs of "[t]hose who

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[46] *Id.* at 55.

[47] The recent uproar over the Court's decision in Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), is an important exception.

[48] ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES (1941), at 82.

won our independence by revolution."[49] Yet the evidence of what the adopters of the First Amendment understood is at best unclear.

One of the chief problems is reflected in the text of the amendment itself, which refers only to Congress. As Strauss points out, a narrow interpretation of this language would fit naturally with the adopters' known concerns about balancing power between federal and state governments. But the larger difficulty, of course, is making sense of the English tradition of punishing seditious libel, which arguably continued in the United States with Congress's enactment of the Sedition Act in 1798 as well as similar state laws. The meaning of the Sedition Act and whether it accorded with the original understanding of the First Amendment have been heavily disputed. Yet it was hardly Congress's only effort to punish seditious libel. As we will see, Congress criminalized much the same activity 120 years later in the Espionage Act of 1918.[50] There can be "little doubt," Strauss says, that early Americans would have permitted forms of censorship that we now consider incompatible with the First Amendment.[51]

Strauss thus sets out to tell a common-law story about the evolution of the First Amendment principles protecting speech. He identifies three such principles: (1) the protection of the right to criticize the government and advocate radical reform (sometimes called "subversive advocacy"); (2) the distinction between so-called high-value speech and low-value speech, such as incitement, obscenity, defamation, and

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[49] 274 U.S. 357, 377 (1927).

[50] HARRY KALVEN, JR., A WORTHY TRADITION 139 (1988).

[51] STRAUSS, *supra* note 1, at 61.

commercial speech; and (3) the distinction between content-based speech restrictions, content-neutral speech restrictions, and incidental restrictions of speech.[52] These principles were developed largely in the last hundred years by the Supreme Court. According to Strauss, they developed according to a common-law process, which was evolutionary, was based on precedent, and, he says, exhibited "an unmistakable concern with what kinds of First Amendment principles would make sense and achieve good results."[53] This, of course, is the empiricist account of the common law.

Subversive Advocacy

If we isolate the first principle—the protection of the right to criticize the government—then the story begins with World War I. Strauss focuses on Justice Holmes's opinion for the Court in Schenck v. United States.[54] *Schenck* involved a prosecution under the 1917 Espionage Act, which criminalized a wide variety of activity judged subversive of the war effort, including willfully causing or attempting to cause "insubordination, disloyalty, mutiny, or refusal of duty" and willfully obstructing recruitment or enlistment in the armed services.[55] Mr. Schenck was a Socialist Party official. He had participated in the distribution of a leaflet that urged conscripts to join the Socialist Party "in its campaign for the repeal of the Conscription Act" and to recognize their right to resist the

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[52] *Id.* at 53–55.

[53] *Id.* at 62.

[54] Schenck v. United States, 249 U.S. 47 (1919).

[55] 40 Stat. 217 (1917).

draft.[56] As one scholar has pointed out, the leaflet was "[b]y modern standards . . . startlingly mild."[57] Nevertheless, Schenck was convicted and sentenced to six months in prison for violating the Espionage Act.

The Supreme Court affirmed the conviction. Writing for the Court, Justice Holmes reasoned that Congress had the power to prevent efforts to interfere with military recruitment, even if those efforts were carried out using words. While the particular words Schenck used might have been constitutionally protected in a time of peace, they could not be protected, said Holmes, in a time of war, given the "hindrance" they threatened to create for the war effort. The scope of constitutional protection was thus context-dependent. As Holmes put it, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[58]

Despite Holmes's language, most indications were that the Supreme Court did not develop a new "clear and present danger" test in *Schenck*. The phrase itself was novel; as Strauss points out, it did not come from the text of the Constitution or the "original understanding" of the First Amendment. Nor did the *Schenck* Court offer an extended analysis of the phrase, as one might suppose. It was difficult to see what conduct such a test would have protected, given the mild language of the leaflets at issue. Significantly,

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[56] *See* KALVEN, *supra* note 44, at 131.

[57] *Id.*

[58] *Schenck*, 249 U.S. at 52.

the Court omitted the words entirely from its opinion in an Espionage Act case decided one week later, Debs v. United States, which involved the prosecution of a politician who had publicly praised individuals resisting the draft.[59] The politician, Eugene Debs, was a major figure in America at the time; he had run for President on multiple occasions and received hundreds of thousands of votes. His conviction and sentencing to a ten-year prison term for making a political speech was, as Harry Kalven has rightly pointed out, "so alien to American expectations that it clamor[ed] for a close look by the Court."[60] Yet Holmes again wrote an opinion for the Court affirming the conviction and failing even to *mention* "clear and present danger." A companion case, Frohwerk v. United States, also omitted the phrase and also affirmed the petitioner's conviction.[61]

What followed *Schenck*, *Debs*, and *Frohwerk* was, by every measure, a startling act of revisionist history by Justices Holmes and Brandeis. Abrams v. United States, decided later in 1919, was a prosecution under the 1918 Espionage Act.[62] The 1918 Act amended the 1917 Act to add penalties for publishing "disloyal, scurrilous and abusive language about the form of Government of the United States," or language "intended to

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[59] Debs v. United States, 249 U.S. 211 (1919).

[60] KALVEN, *supra* note 44, at 135.

[61] Frohwerk v. United States, 249 U.S. 204 (1919). Both opinions do contain notions akin to "proximate cause," which Justice Holmes may have understood to be equivalent to "clear and present danger." *See* KATHLEEN SULLIVAN, FIRST AMENDMENT LAW (2d ed. 2003), at 23.

[62] Abrams v. United States, 250 U.S. 616 (1919); 40 Stat. 553 (1918).

bring the form of Government of the United States into contempt, scorn, contumely and disrepute"—offenses which were classic examples of seditious libel. Abrams himself was a Russian immigrant who had published leaflets criticizing the United States for its military involvement in Russia after the revolution and calling for a strike of workers at munitions and defense factories. The leaflets contained language typical of the utopian revolutionaries of the time ("Workers of the World! Rise!"), but Abrams's cause was a decidedly minority one; he distributed some of the leaflets by dropping them out his apartment window in New York City.[63]

Unsurprisingly, the majority of the Court affirmed Abrams's conviction under the 1918 Act and offered in defense of its ruling a reading of the leaflet's incendiary rhetoric, designed to show that Abrams in fact intended to interfere with the United States' war effort and to criticize its form of government.[64] In what must have seemed an inexplicable move to his associates, Justice Holmes dissented. As others have noted, the dissent he authored is highly uneven in quality; it comprises in large part a rambling discussion of the government's failure to prove intent.[65] Near the end of the dissent—almost as an afterthought—Holmes turns abruptly to the language from *Schenck* (altering it slightly to "clear and imminent danger"). One has the unmistakable sense that Holmes is grasping for something. Yet it is difficult to see what use the orphaned phrase could be, given the affirmance in *Schenck* and the *Debs* and *Frohwerk* decisions. Despite all this,

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[63] KALVEN, *supra* note 44, at 139.

[64] *Abrams*, 250 U.S. at 619–623.

[65] *See id.* at 624–629.

what makes *Abrams* the first great Supreme Court decision on subversive advocacy is what Holmes does to give the expression content. He offers what Zechariah Chafee later called a "magnificent exposition of the philosophic basis of this article of our Constitution."[66] Here is Holmes, whose eloquence is worth quoting at length:

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> If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and

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[66] CHAFEE, *supra* note 42, at 136.

> pressing purposes of the law that an immediate check is required to save the country.[67]
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Nothing in this passage draws on or is responsive to the Supreme Court's earlier decisions on subversive advocacy and the First Amendment. Indeed, Holmes's "philosophic" exposition of what he calls the "theory of our Constitution" can only fairly be regarded as a startling departure from the Court's previous decisions under the Espionage Acts. Nothing in those decisions betrays Holmes's apparent belief that the First Amendment was designed to promote truth by encouraging free exchange in a marketplace of ideas.

If there is a predecessor for the *Abrams* dissent, it was the decision in Masses Publishing Co. v. Patten, decided two years before *Schenck* and in a different court.[68] Strangely, Strauss skips over *Masses* entirely. The case was another prosecution under the 1917 Espionage Act. The plaintiffs published a Socialist political magazine called, naturally, "The Masses." Regulations promulgated under the 1917 Act empowered the Postmaster General to refuse to deliver materials he judged to be in violation of the law. On instruction from the Postmaster General, New York Postmaster Patten advised the plaintiffs that he would not permit their magazine to be mailed, and the plaintiffs sought an injunction preventing this. Judge Learned Hand granted the injunction. As his opinion shows, what Hand understood—and what Holmes apparently did not until *Abrams*—was

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[67] *Abrams*, 250 U.S. at 630.

[68] Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).

that the government's decision to suppress *political* dissent could not be analyzed like run-of-the-mill incitement or solicitation of a crime.[69] Space had to be created for political agitation, which had a special value to free government. As Hand put it, "to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government."[70]

To be sure, Hand's attempt to locate the relevant distinction differed from Holmes; Hand focused on the language used, while Holmes focused on the context in which the language was used. Yet what Hand did in *Masses* was to show why radical criticism of the government should be distinguished from pure incitement. This was the key insight from which the First Amendment's rules against the punishment of seditious libel emerged.

Still, Justice Holmes's opinion in *Abrams* was a dissent, and the real story of the development of the law in this area concerns how the opinion moved from a minority view to a majority view. Strauss, of course, is keen to emphasize this development. Yet his description feels oddly hollow; Holmes's approach, he says, was gradually adopted because it "had broad cultural resonance and, ultimately, it seemed to work well."[71] While the approach certainly came to have broad cultural resonance, it is not clear that it did in 1919, and Strauss cites no support for such a view. Moreover, it is unclear what

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[69] KALVEN, *supra* note 44, at 139.

[70] *Masses*, 244 F. at 535.

[71] STRAUSS, *supra* note 1, at 64.

Strauss could mean by the suggestion that "Holmes's approach . . . seemed to work well." What worked well? The idea that there should be a marketplace of ideas? The "clear and present danger" test? Specifically, how did these ideas work well? What confirmed their effectiveness? There is nothing in the chapter to tell us the answer to these questions, and this is because they are largely misplaced. Just as the story of *Masses* and *Abrams* is not the story of the Court making a modest adjustment to established precedent, the story of what followed *Abrams* is not a story about the empirical verification that the Court's approach "seemed to work well." It is, at least in the early stages, a story about two brilliant justices whose stature and argumentative force worked a change in the law—despite being consistently in the minority.

The tactic taken by Justices Holmes and Brandeis was a brash one. It was to insist, although the Court knew otherwise, that "clear and present danger" *was the First Amendment test*, and that the content of this test was described not by the actual holdings of the relevant cases (*Schenck*, *Debs*, *Frohwerk*, and *Abrams*, which were hostile to speech) but by the justices' own theoretical perorations on the value of free speech and its vital role in political society. The merit of such arguments could not have been measured by whether they "worked"—they were not even *law*—but was confined to ordinary judgments about the value of protecting speech in the midst of the vast social changes and political instability of the times.

The formative exchange in this evolution occurred between Justices Sanford and Brandeis. Gitlow v. New York, decided in 1925, concerned the conviction of a political leader under New York's criminal syndicalism statute, which prohibited advocating the

violent overthrow of the government.[72] Benjamin Gitlow had participated in printing a pamphlet, the *Left Wing Manifesto*, that indeed advocated overthrow through "mass political strikes and revolutionary mass action."[73] Like the pamphleteers of World War I, Gitlow filled the *Left Wing Manifesto* with turgid revolutionary prose that generally advocated strikes and other forms of collective resistance but did not call for any specific acts. The Court nonetheless affirmed his conviction. Writing for the majority, Justice Sanford argued that the legislature's decision to criminalize such a category of speech could only be subject to rational-basis review. He reasoned:

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> [T]he immediate danger [from advocacy of overthrow] is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.[74]

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[72] Gitlow v. New York, 268 U.S. 652 (1925).

[73] *Id.* at 658.

[74] *Id.* at 669.

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At least where a statute expressly criminalized speech, Justice Sanford would permit the legislature to prohibit pamphlets like Gitlow's, which only generally advocated overthrow. The danger that such advocacy could cause disorder was real, and the legislature had to be permitted to address it preemptively.[75]

Sanford's reasoning captured the majority of the Court in the cases that followed *Gitlow*. But in Whitney v. California, decided two years later, Justice Brandeis offered a direct rejoinder that eventually gained the upper hand.[76] *Whitney* involved another conviction of a political figure under a state criminal syndicalism statute. In this case, the target was Anita Whitney, a well-known society figure and advocate for the poor. After Whitney attended a convention of the California Communist Labor Party, she was tried and convicted for joining an organization that advocated forceful overthrow of the government.[77] The Court again affirmed the conviction. Writing for the majority, Justice Sanford repeated his argument that the state legislature could, within the limits of due process, "punish those who abuse this freedom [of speech] by utterances inimical to the

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[75] Holmes dissented from the Court's opinion and, as he had done in Abrams, cited the "clear and present danger" language from *Schenck*. *Id.* at 672–673. Justice Sanford avoided *Schenck* entirely by narrowing its application to statutes that did not criminalize speech as such, like the 1917 Espionage Act. *Id.* at 670–671.

[76] Whitney v. California, 274 U.S. 357 (1927).

[77] *Id*. at 363–366.

public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government."[78]

Justice Brandeis concurred in the result, but used his opinion to rebut the majority. Citing the language of "clear and present danger" from *Schenck*, Brandeis argued that permitting the legislature to silence political criticism preemptively would actually interfere with the mechanisms by which a free society digested political criticism.[79] The actual effect of syndicalism statutes was thus not to prevent "conflagration," as Sanford had imagined, but to "breed repression [and] hate," which ultimately would "menace[] stable government."[80] What the "clear and present danger" test meant, said Brandeis, was that "fear of serious injury alone cannot justify suppression of free speech." Only a serious emergency would qualify. Brandeis then remarked:

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> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the

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[78] *Id.* at 356.

[79] *Id.* at 375.

[80] *Id.*

incidence of evil apprehended is so imminent that it may befall before there is opportunity for full discussion.[81]

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I quote these passages at length not simply because they are some of the most remarkable and beautiful writing produced by the Supreme Court. What the passages show is that subversive-advocacy doctrine was not formed in a Burkean fashion, by making modest adjustment to precedents whose efficacy had been demonstrated over time. Rather, the decisions of the 1910s and 1920s evidence a kind of *sustained theoretical argument* about the value of free speech by judges who did not have time-tested precedent to cite. Instead, the arguments were injected into what was essentially a throwaway phrase in *Schenck*: "clear and present danger." Yet by the late 1930s, the arguments had garnered a majority.[82] In the 1943 case of West Virginia State Board of Education v. Barnette, which dealt with the issue of compelled speech, the Court was comfortable enough to describe the "clear and present danger" standard as "commonplace" and to suggest that it required "immediate and urgent grounds" for suppression, just as Brandeis had recommended in his *Whitney* concurrence.[83]

This is the sense in which the empiricist account of the common law is too weak to explain the legal developments that lead to our First Amendment protections of

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[81] *Id.* at 376–377.

[82] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Thornhill v. Alabama, 310 U.S. 88 (1940); De Jonge v. Oregon, 299 U.S. 353, 364–365 (1937).

[83] *Barnette*, 319 U.S. at 633–634.

subversive advocacy. While Strauss is surely correct that the process was "evolutionary" and had little to do with the constitutional text or the original understandings, his suggestion that the developments were based largely on the Court's own precedent and a concern with "what worked in practice" does not seem accurate. What is distinctive about this moment in our constitutional history is precisely the opposite: that it was based largely on ambitious theoretical arguments about the value of protecting free speech that were repeated in dissent by a handful of judges. This is the process we have to thank for our First Amendment right to criticize the government.[84]

The Rationalist Common Law

If an empiricist account of the common law cannot fully explain the development of our constitutional protections of subversive advocacy, what account of the common law can? Or can *no* account of the common law explain these developments?

A rationalist account of the common law begins by rejecting the Burkean distrust of reason. Instead, the rationalist account draws on an older tradition of thinking about

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[84] I do not mean to imply that the 1940s were the end of the development of subversive-advocacy law. This, of course, is not true. The *Brandenburg* decision was still some thirty years off when *Barnette* was handed down, and the World War II period saw another wave of suppression-friendly cases in the high court. *See* Dennis v. United States, 341 U.S. 494 (1951). Yet, just as Strauss notes, *Brandenburg* rejected this regression, and using different language, sought to recapture the principles articulated by Holmes and Brandeis.

the common law, associated with several prominent English common-law jurists who preceded Burke: Edward Coke and Matthew Hale. This tradition, which has been called the "classical" account of the common law, can be read to emphasize the role of reason in common-law adjudication.[85] Indeed, the classical account gave a special name to the reason employed by lawyers and judges in adjudication—"artificial reason"—to distinguish it from the natural capacity to reason with which each individual was born ("natural reason").[86] One acquired artificial reason by long and painstaking study of the common law, which revealed how the community went about resolving disputes. Artificial reason was then used in the course of adjudication to identify, evaluate, and apply the rule of law.[87]

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[85] *See, e.g.*, MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND: DIVIDED INTO TWELVE CHAPTERS WRITTEN BY A LEARNED HAND 26 (1713) ("The Common Law does determine what of those Customs are good and reasonable . . . and gives to those Customs that it adjudges reasonable, the Force and Efficacy of their Obligation."); *see* A.W.B. SIMPSON, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE, SECOND SERIES 79 (A.W.B. Simpson ed., 1973) ("In the common law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution.").

[86] Gerald Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 1 (2003).

[87] POSTEMA, BENTHAM, *supra* note 33, at 70–75.

In short, the classical account of the common law emphasized that adjudication involved public deliberation about the law and how it should be applied to the case at hand. It should be noted that this collective process differs from the individual exercise of reason that Burke so distrusted. While Burke may have been right to suspect that the "stock of reason . . . in each man is small," the classical jurists did not regard common-law adjudication as involving individuals working in isolation from each other. As they understood it, adjudication was a collective process of deliberation between the judge and the parties, represented by their lawyers. This process of collective reasoning naturally checks and corrects individual reason. Indeed, the collective nature of common-law adjudication was part of the reason classical jurists were at pains to distinguish "artificial reason" from the individual capacity of "natural reason."[88]

The rationalist account of the common law parts ways from the classical account in rejecting the idea that the common law is a kind of custom. The common law is judge-made law. It is not, as the classical jurists argued, "discovered" by judges in examination of our shared customs.[89] Yet this is not a reason to reject the authority of the common law. A common-law rule shown reasonable in the process of adjudication has a natural claim of authority over those before the court. The parties have an opportunity to offer their views of what the law is and how it ought to apply to their case. Where the result reached by the court joins their arguments, it provide the parties a basis for regarding the result as being reasonable, fair, and appropriate. This contrasts with the empiricist

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[88] *See* Postema, *Classical Common Law*, *supra* note 80, at 8–9.

[89] *See, e.g.*, HALE, *supra* note 79, at 24.

account of the common law's authority, which rested on the fact that precedent is subject to the test of time.[90] On the rationalist account, the common law is authoritative because it is subject to the test of public deliberation.

The developments in First Amendment law sketched above show plain traces of the rationalist common law at work. As we saw, the development of a speech-protective "clear and present danger" test was driven by the ambitious theoretical arguments of Justices Holmes and Brandeis. Their arguments were offered as a basis for rejecting the approach taken in *Schenck*, *Debs*, *Frohwerk*, and *Abrams*, which largely permitted punishment of wartime "seditious libel." During the 1910s and the 1920s, these arguments were confined to dissents. They inspired countertheories from Justice Sanford in *Gitlow* and afterwards. But as the arguments of Holmes and Brandeis percolated through the Court and through larger political society, they began to gain traction. This was not a process of empirical verification. There was nothing to verify or disconfirm. It was a process, at least in part, of public deliberation in which the Court engaged in an open dispute over the merit of protecting radical criticism of government, which was quite prevalent at the time. By the time of De Jonge v. Oregon and *Barnette*, the deliberation had concluded in favor of Holmes and Brandeis.

The rationalist account also illuminates an important theme in *The Living Constitution* that I discussed at the beginning of the review. To recall, Strauss introduced the common law as the solution to a false paradox about change and constitutional law. The paradox was that the pace of social change seemed to require the Constitution to be

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[90] STRAUSS, *supra* note 1, at 38.

amendable in ways other than those permitted by Article V. Yet the possibility of making such changes to the Constitution threatened to undermine its status and the broader rule of law. Now we can see, I believe, how common-law changes to the Constitution do not undermine its status as fundamental law. When change occurs as the result of a process of public deliberation like the one described above, it is change *by law*. The change is not made on an arbitrary basis according to the fiat of those in power but proceeds from a principled extension of our existing legal framework. In the case of subversive advocacy, the principles in question concerned the necessity of permitting radical criticism in a free society with a popular government. Our form of government requires such criticism, and it is for that reason that the First Amendment should distinguish it from workaday incitement to a crime.[91]

Arguably, the written Constitution was drafted in a way to encourage this kind of legal change. I discuss above the distinction between those provisions of the Constitution whose meaning is obvious and those whose meaning is not obvious. Strauss argues that the latter provisions create a difficulty for textualism. Yet there is a deeper point to be made about this distinction and the rationalist common law. The provisions whose meaning is obvious are largely those for which public deliberation brings little value; disputing when the term of one Congress should end and the next begin could only invite a breakdown in the peaceful transfer of power. The same cannot be said for the provisions whose meaning is not obvious. Public deliberation over the meaning of, for

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[91] *See* Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 850–860 (1987).

example, the Free Speech Clause has direct value for our constitutional democracy.[92] The language of these provisions thus encourages deliberation over the basic structure of political society. This deliberation is the engine of legal change.

Judges play a leading role in this process but they are not the only actors. The suggestion is not that those who adopted the written Constitution intended, by approval of its abstract language, to bestow on judges the privilege of determining our fundamental law. Abstract language does not entail so-called judicial "supremacy." The suggestion is, however, that the Constitution's adopters intended to provide judges *a* role in this process; given the adopters' familiarity with the English common law, they could have scarcely imagined a different result.[93] The rationalist common law provides a sensible account of what that role is. It draws on the institutional strengths of the court and of the judicial office. And it admits of articulable limits and a fair balance with the other institutions of government and the people themselves. There is much to say about the details of this role, but it comes, in short, to this: that good judges shape the law in response to the concerns articulated by the parties before the court, whose arguments in

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[92] *Cf.* STRAUSS, *supra* note 1, at 112; RONALD DWORKIN, FREEDOM'S LAW 2 (1997) (describing the "moral reading" of the Constitution).

[93] The attitude toward judicial review (i.e., judicial "nullification" of an unconstitutional law) in the 1780s appears to have been mixed, but there is no question that the founding generation was familiar with the judicial role in developing common-law precedent. *See* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 52 (2004).

turn call to attention the concerns of the broader public.[94] In the constitutional setting, the judge connects these concerns to constitutional principles, thereby giving the principles determinate content and contributing to the development of constitutional law. All of this is carried out in public under procedural norms that require an exchange of reasons and a justification for the end result. This puts the court in the service of the people in carrying out the task of self-government.[95]

III. CONCLUSION

The Living Constitution is an important book. Its account of the common law offers a viable alternative to originalism. Yet in an apparent effort to make the common law palatable to a wide audience, Strauss hobbles it. Judges have an active and creative role to play in common-law adjudication. Part of that role involves evaluating and shaping the law as it is applied to new circumstances, sometimes in accordance with theoretical argument. By attempting to avoid this result, Strauss leaves his theory unable to account for our core constitutional protections, as he claims—principally, First Amendment protections of subversive advocacy. The lesson is that we cannot build protection from judicial "activism" into the common-law process. The proper way to address such a concern is to choose our judges with care.

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[94] *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 5 (1949).

[95] For an exploration of this idea, *see* Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 73–76 (1985).