THE ILLUSORY MORAL APPEAL OF LIVING CONSTITUTIONALISM

SAMUEL IZZO*

INTRODUCTION

Two prominent theories of constitutional interpretation are originalism and living constitutionalism.[1] One common argument for living constitutionalism over originalism is that living constitutionalism better avoids morally unjustifiable results. This Note will demonstrate that this argument is flawed because living constitutionalism lacks a definitive enough prescriptive claim as to how to interpret the United States Constitution.

Proponents of originalism assert that courts should interpret constitutional provisions in accordance with the public meaning of those provisions at the time of their enactment.[2] One criticism of originalism is that if the Supreme Court were to faithfully apply the theory, such application leads morally unjustifiable outcomes.[3] This criticism has two components: (1) had the Supreme Court subscribed to originalism as its interpretive method *in the past*, then certain outcomes, such as the banning of racial segregation in public schools in *Brown v. Board of Education*,[4] would not

* Samuel Izzo is a graduate of the University of Southern California Gould School of Law, class of 2022, and served as an editor on the *Southern California Law Review*. He is currently an associate attorney for PARK LLP, a litigation firm based in Los Angeles.

1. *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019).

2. *Id.* at 1251. Originalist proponent Randy Barnett distinguishes between "old originalism," which was the idea that the Constitution should be interpreted in accordance with the "intentions of the framers," and "new originalism," which is "premised on determining the original public meaning of . . . the Constitution." Randy E. Barnett, *Welcome to the New Originalism: A Comment on Jack Balkin's* Living Originalism, 7 JERUSALEM REV. LEGAL STUD. 42, 43–45 (2013). For the purposes of this Note, I use "originalism" to mean "new originalism" (that is, public meaning originalism).

3. Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867, 2880 (2007) (noting that a "central objection to originalism is that it would produce morally unacceptable outcomes").

4. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (finding statutes of several states requiring racial segregation in public schools to be a violation of the Fourteenth Amendment).

have occurred;[5] and (2) if the Supreme Court employs originalism *in the future*, the Court might issue rulings contrary to contemporary moral sensibilities.[6] Moreover, some critics of originalism maintain that when confronted with this problem, proponents of originalism deny that its application would lead to those outcomes and stretch the theory's meaning beyond its capacity for any meaningful constraint on interpretation,[7] or, alternatively, they admit that they would find the morally objectionable practice unconstitutional, even if such holding would be inconsistent with the originalist method.[8] Thus, the claim is that originalists are "faint-hearted;"[9] that is, they either tailor the definition of originalism to conform to morally required decisions or abandon originalism when it is too much to bear.[10] This, critics of originalism assert, indicates that originalism is not viable as a constitutional method and should be abandoned, some argue, in favor of living constitutionalism.[11]

This Note will demonstrate the flaws in the above argument. The argument is flawed, not because it can necessarily be proven that originalism leads to more morally justifiable results than living constitutionalism, but because living constitutionalism lacks a definitive prescriptive claim to make such a comparison between the two theories possible. That is, it is impossible to identify past or hypothetical future outcomes of cases as being consistent or inconsistent with living constitutionalism. Moreover, because *it is possible* to do so with originalism, and thus, posit how implementing

5. *See* Ronald Turner, *The Problematics of the* Brown*-is-Originalist Project*, 23 J.L. & POL'Y 591, 593 (2015) (stating that "[t]he *Brown* Court did not employ originalism"); Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457, 457 (1995) (noting that major constitutional and legal scholars such as "Alexander Bickel, Laurence Tribe, Richard Posner, Mark Tushnet, Raoul Berger, Ronald Dworkin, and Walter Burns" have concluded that *Brown* is inconsistent with "the original understanding of the Fourteenth Amendment"). Although McConnell concurs that many scholars find the result in *Brown* incompatible with originalism, he disagrees with such scholars and argues in his article that *Brown* can be justified under an originalist approach. *Id. passim.*

6. For example, the Court might let stand a state law prescribing flogging or lashing as a form of criminal punishment. *See* Craig S. Lerner, *Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, 42 HARV. J.L. PUB. POL'Y 91, 112–14 (2019).

7. *See* Turner, *supra* note 5, at 596 (arguing that originalism cannot be said to "meaningfully constrain interpreters who are and remain free to fashion and shape the methodology in ways that yield a *Brown*-is-originalist conclusion").

8. *See id.* at 627.

9. See *id.* at 626 (quoting Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989)).

10. Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 958 (2002) (stating that originalists "concoct implausible accounts of the Reconstruction Era understanding of segregation" to reconcile originalism with *Brown*).

11. *See* David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 978 (2011) [hereinafter Strauss, *Do We Have a Living Constitution?*].

originalism could lead to morally undesirable results, living constitutionalism has an illusory moral superiority over originalism.

I. PART ONE

Former Supreme Court Justice Antonin Scalia, a principal proponent of modern originalism,[12] raised the question of whether an originalist, such as himself, would find a law mandating lashing as punishment for certain criminal offenses contrary to the Eighth Amendment's ban on "cruel and unusual punishment."[13] Because originalists hold that the Constitution should be interpreted in accordance with its original "public meaning,"[14] and because lashing existed as a form of punishment at the time the Eighth Amendment was enacted,[15] it follows that the prohibition on "cruel and unusual punishment" likely did not encompass lashing at the time it was enacted. Thus, for Justice Scalia, the dilemma was whether to be faithful to originalism and uphold the hypothetical lashing law (that is, if such a law were to be enacted in the twenty-first century)—which most agree today would be a morally egregious outcome—or abandon originalism and find such a law unconstitutional. Justice Scalia's position on that issue was unclear, as he suggested at one point that he likely would find a law mandating lashing for certain crimes unconstitutional, only to leave the question open later.[16]

Justice Scalia's lashing example regards a hypothetical future case. However, one could argue against originalism in a similar manner with *past* Supreme Court cases. In fact, another common criticism of originalism is that its faithful application could not have justified the Supreme Court's decision in *Brown*.[17] In *Brown*, the Supreme Court faced a similar question

12. Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 11, 22 (Grant Huscroft & Bradley W. Miller eds., 2011) (noting that Justice Scalia had a "key role" in the origin of originalism).

13. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861–62 (1989).

14. Barnett, *supra* note 2, at 44–45.

15. *See* Lerner, *supra* note 6, at 113 (noting that flogging as a punishment was prevalent in America in 1791).

16. *See* Scalia, *supra* note 13, at 864 ("I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging."). In a 2013 interview with New York Magazine, Justice Scalia reversed his opinion on this question, stating, "[I]f a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional." Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), https://nymag.com/news/features/antonin-scalia-2013-10 [https://perma.cc/VGS7-4TNZ].

17. *See* Turner, *supra* note 5, at 646–47.

to the one it confronted a half-century earlier in *Plessy v. Ferguson*,[18] that is, whether state laws could permit or require segregation of persons according to race. In the case of *Plessy*, the Court dealt with the question of racial segregation in the context of public transportation, specifically, railway cars,[19] while in *Brown*, the Court dealt with segregated public schools.[20] Applying the Equal Protection Clause of the Fourteenth Amendment, the Court found racial segregation of public schools unconstitutional.[21]

Opponents of originalism have argued that the Court could not have struck down racial segregation in *Brown* had the Court applied an originalist conclusion because the "public meaning" of the Fourteenth Amendment at the time of its enactment, critics hold, likely would not have proscribed the segregation of public schools.[22] Therefore, since most would likely agree that racial segregation is a profound moral wrong, it follows that the Court subscribing to an originalist methodology would have led to a morally unjustifiable result.

The *Brown* and Eighth Amendment flogging examples clearly pose a challenge for proponents of originalism, but what critics of originalism overlook is that this challenge exists for originalism because the theory takes the form of a prescriptive claim regarding how courts should interpret the Constitution. A "prescriptive" claim, also known as a "normative" claim, is a "should" statement, that is, one that "recommend[s] . . . a particular course of action."[23] Conversely, a "descriptive" claim is a statement that merely describes something, without judging its merit.[24] Therefore, a theory of how courts *should* interpret the Constitution naturally must be prescriptive. The constitutional theory referred to as "originalism"—that one should interpret the Constitution in accordance with its original public meaning—takes the form of a prescriptive statement.

This is a strength of originalism because it allows for both identifying *past* cases and positing *future* cases and, in turn, for evaluating the results of applying originalism in accordance with one's value system, yet it becomes

18. In *Plessy v. Ferguson*, 163 U.S. 537, 540, 552 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), the Court upheld a Louisiana state statute mandating that railway companies provide "separate but equal" accommodations for white and Black patrons, rejecting the argument that the statute violated the Thirteenth and Fourteenth Amendments.

19. *Plessy*, 163 U.S. at 540, 552.

20. *Brown*, 347 U.S. at 487–88.

21. *Id.* at 495.

22. *See* Turner, *supra* note 5, *passim*.

23. *See* Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 812 (1991). Here, I use prescriptive in the same sense as the word "normative" is used.

24. *Id.*

its weakness in the context of the morally-objectionable-results problem. In other words, because originalism makes a claim in the form of, *the meaning of the Constitution should always be interpreted in X way*, thus making it a prescriptive statement, it is possible for both originalist proponents and, crucially, critics, to question both whether originalism is actually being applied in a situation and, then, whether that result is morally acceptable. For this reason, a debate can exist in which opponents of originalism argue, or are likely to argue, that originalism faithfully applied could not justify *Brown*, and why some proponents of originalism, in turn, feel inclined to argue that it could.

Debates on whether originalism can justify *Brown* can only exist if both sides agree that we can identify what the originalist prescriptive claim is and if that method is being properly applied. If it is impossible to determine when a particular constitutional method of interpretation is being properly applied because it lacks a prescriptive statement, then proponents of such a method will never have to confront the argument that the application of that method would lead to a bad result or could not justify a particular case. Living constitutionalism suffers precisely from this flaw, which is also the source of its illusory moral strength.

The next Part of this Note will expand on this argument, addressing living constitutionalism and the morally-objectionable-results problem.

II. PART TWO

Living constitutionalism asserts that the text of the United States Constitution should be interpreted in light of contemporary understandings, values, and policy concerns, rather than be restricted to its original public meaning.[25] On its face, living constitutionalism implies no specific set of policies and rests on no particular moral code,[26] making it value-pluralistic.[27] Indeed, were living constitutionalists to hold a particular set of values as

25. Solum, *supra* note 1, at 1259.

26. *See* Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 965 (2018) (stating that living constitutionalism is a "pluralistic . . . interpretive method but generally concerned to construe the Constitution in a manner that safeguards canonical precedents and supports contemporary needs and values"). *Contra* Solum, *supra* note 1, at 1269 (noting that "one might think that *living constitutionalism* is inherently liberal or progressive").

27. "Value pluralism" is the view that while the "distinction between good and bad . . . is objective and rationally defensible[,] . . . [o]bjective goods cannot be fully rank ordered" and that the "relative importance" of those objective goods "will depend on circumstances." William A. Galston, *What Value Pluralism Means for Legal-Constitutional Orders*, 46 SAN DIEGO L. REV. 803, 804 (2009).

permanently authoritative and binding on all future generations, they would commit the same error of inflexibility that they ascribe to originalists.[28]

Since its origins in the early twentieth century, living constitutionalism has been fairly consistently associated with constitutional interpretations and Supreme Court decisions that have resulted in the expansion of government regulation and increased recognition of the civil rights of certain historically marginalized groups.[29] One might argue that by adhering to that specific set of values in interpreting the Constitution, living constitutionalism suffers, perhaps ironically, from a lack of value pluralism. Such an argument would be misplaced. The theory of living constitutionalism holds that Constitutional interpretation should, in some sense, adapt with society, and American society has, in fact, become more supportive of many of the values and commitments underlying many Supreme Court decisions associated with American liberalism or progressivism.[30] Thus, there is no necessary contradiction between living constitutionalists' claim to values and interpretive flexibility and the fact that living constitutionalism in its application has resulted in an expansion of government and increased recognition of rights for marginalized groups.

The claim that living constitutionalism is flexible with respect to values and adaptable to changing circumstances,[31] however, is difficult to reconcile with the argument that, unlike originalism, its application could not lead to morally unjustifiable results.[32] Recalling that one of the criticisms of originalism is that its faithful application could not have justified *Brown*, this argument implies that for the living constitutionalism argument to stand, it must also avoid results that uphold racial segregation, or at least lead to fewer morally egregious outcomes. If it did not, then the moral argument against

28. *See* Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 359–62 (2007) (arguing that the key difference between living constitutionalism and originalism is that originalists accept the inherent bindingness of the Constitution before application of interpretive mechanics, whereas living constitutionalists believe that "[they] need to update and affirm the document's underlying principles if it is to be binding on anyone living today").

29. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 43 (1996) (noting that the Warren Court "expanded civil liberties and civil rights . . . by using liberalism's language of individuals rights and freedom to help children, the disenfranchised, non-Christians, suspected criminals, minorities, and the poor.").

30. *See* Michael Hout, *America's Liberal Social Climate and Trends: Change in 283 General Social Survey Variables Between and Within US Birth Cohorts, 1972–2018*, 85 PUB. OP. Q. 1009, 1010 (2021) (finding that "new and extended evidence shows that change in both the social climate and social weather in the United States have been mostly liberal over the last half century").

31. *See* Fishkin & Pozen, *supra* note 26, at 965 (asserting that " 'living constitutionalism' . . . is pluralistic as to interpretive method but generally concerned to construe the Constitution in a manner that safeguards canonical precedents and supports contemporary needs and values").

32. Sunstein, *supra* note 3, at 2880.

originalism would be spurious because the critique of originalism based on a moral evaluation of its probable results presupposes that such a criterion is at least one of the important measures of a constitutional theory. However, if one of the central premises of living constitutionalism is that constitutional interpretation should be flexible and value-pluralistic, one can question how living constitutionalists can criticize originalism on the basis that it can lead to morally unacceptable results without at least committing to certain outcomes and values as permanently essential, regardless of the prevailing values and circumstances that exist in America at any given time. Indeed, experts such as Jack Balkin and Sanford Levinson, constitutional law scholars at Yale Law School and the University of Texas Law School, respectively, note that living constitutionalism is premised on the idea of an "antifoundationalist canon, [which] if not an oxymoron, must at least create a perpetual state of intellectual tension."[33]

This is not to say that it would be contradictory for a value pluralist constitutional theory like living constitutionalism to make moral claims. Value pluralism holds that while valid moral claims exist, certain moral goods may require balancing depending on the circumstances.[34] Nevertheless, if the premise of living constitutionalism is that constitutional change is justified because constitutional interpretation must adapt to society's changing circumstances and values, then it follows that the moral correctness of decisions such as *Brown* is contingent on those changing circumstances. It also suggests that Supreme Court decisions such as *Plessy*, which upheld segregation as constitutional,[35] were correct at the time they were decided, as this was before whatever societal conditions that made *Brown* correctly decided took place. Thus, living constitutionalist proponents confront a similar problem as originalists, which is that the method's application seems to lead to morally unjustifiable results, such as *Plessy* being upheld as constitutional if certain circumstances exist at the moment of the decision.

Constitutional theorist Jack Balkin discusses the tension in living constitutionalist theory, that is, how the theory seems to justify morally unacceptable past cases, which follows from the fact that living

33. J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 997 (1998) (noting the irony of the fact that while one might usually expect conservatives in the academy to defend great canonical works of the past against deconstruction by the left that in the case of constitutional theory "it is liberals who defend the academic theory canon against the 'barbarians' on the right").

34. *See* Galston, *supra* note 27, at 804.

35. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

constitutionalism seems to not repudiate past precedent.[36] Balkin notes that "living constitutionalism arose as a constitutional theory during the Progressive Era . . . to explain why the courts could overturn settled precedents" that upheld an extremely narrow and laissez-faire view of federal and state power.[37] For example, early arguments against upholding precedents, such that in *Lochner v. New York*,[38] were generally that the principles upholding *Lochner* had become out-of-date, not necessarily that *Lochner* was inconsistent with existing precedent.[39] A common argument for overturning *Lochner*, and in favor of more government intervention in the economy in general, was that an expansive view of freedom of contract may have been liberty-enhancing in its day but over time had *become* bad policy.[40] In other words, living constitutionalists argued that *Lochner* and similar decisions were appropriate when America was an agrarian or early industrial economy, but changing conditions justified the Court in reconsidering *Lochner*.[41]

Balkin explains the crucial distinction between, on one hand, the Supreme Court's overturning past precedent, finding such precedents to be legally flawed on the day they were decided, and on the other hand, the Supreme Court's overturning past precedent (while still considering such past precedent correct) as follows:

> "[Traditional notions of] *stare decisis* apply most clearly to cases that were initially wrongly decided. . . . [However, i]n order to justify overruling a decision correctly decided at a previous time, one must do more than justify overturning settled precedent; one must also have compelling reasons why the *meaning of the Constitution itself* has changed in the interim."[42]

As Balkin points out, the rationale advanced by early living constitutionalists for the overruling of *Lochner* seems inappropriate when

36. *See* Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 677–78 (2005).

37. *Id.* at 698–99 ("Earlier decisions were not necessarily wrong at the time they were decided, but they had become wrong in light of changing social facts.").

38. Lochner v. New York, 198 U.S. 45, 64 (1905) (holding that a New York State statute limiting the employees of bakeries to a maximum of sixty hours of work a week and ten hours a day was an arbitrary interference with the freedom of contract guaranteed by the Fourteenth Amendment, and thus, not a valid exercise of police power).

39. Balkin, *supra* note 36, at 678, 698–99.

40. Notable progressive John Dewey argued that classical liberalism was, in its opposition to feudalism, correct to focus on freedom of contract and free-market values generally, but that it had become out-of-date in its dogmatic opposition to government intervention in economic matters. *See* JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 4–11, 56–62 (1935).

41. Balkin, *supra* note 36, at 698–701.

42. *Id.* at 698 (emphasis added).

applied to *Plessy*.[43] Living constitutionalists justified overturning *Lochner* because societal conditions and values had changed. On the other hand, why, Balkin asks, for living constitutionalists, was *Plessy* "wrong the day it was decided?"

In sum, the challenge for living constitutionalists is to explain how the theory could be superior to originalism for better avoiding morally egregious results when the theory seems to validate morally egregious decisions like *Plessy*. I posit that there are three possibilities—a trilemma—all of which are difficult to square with living constitutionalism's alleged superiority with regard to avoiding morally unjustifiable results.

A. *PLESSY* WAS CORRECTLY DECIDED BUT HAD TO BE OVERTURNED AFTER CHANGING CIRCUMSTANCES MADE IT WRONG

As recently discussed, this option makes it difficult to argue that living constitutionalism is superior to originalism at avoiding morally unacceptable results because racial segregation could be constitutional under a living constitutionalist regime, as long as certain conditions are present.

B. *PLESSY* WAS WRONG ALL ALONG BECAUSE THE ORIGINAL PUBLIC MEANING OF THE CONSTITUTION AND FOURTEENTH AMENDMENT WOULD HAVE SUPPORTED A FINDING THAT SEGREGATION WAS UNCONSTITUTIONAL

If this is true, originalists could claim that they, too, could have supported the result in *Brown*, and the argument that originalists will support morally unjustifiable results would largely evaporate, at least with respect to issues of racial segregation.

C. *PLESSY* WAS WRONGLY DECIDED IN ITS TIME BECAUSE THERE ARE CERTAIN VALUES TO WHICH THE SUPREME COURT SHOULD ADHERE, REGARDLESS OF WHETHER SUCH VALUES ALIGN WITH THOSE OF THE MAJORITY OF AMERICANS; HOWEVER, THESE VALUES DO NOT NECESSARILY ARISE FROM THE ORIGINAL PUBLIC MEANING OF THE CONSTITUTION

With this latter justification, the argument that originalists could not justify *Brown* still stands, but in contrast to the former justification, living constitutionalists do not sacrifice justifying *Brown* for justifying *Plessy*. This

43. *Id*. at 707 (noting that while many "scholars on both the left and the right . . . acknowledge that *Lochner* may have been rightly decided in its own time, it is still very difficult for most scholars to make the same claim about *Plessy*").

conclusion, however, seemingly sacrifices the idea of value pluralism—one of the stated hallmarks of living constitutionalism—in favor of a view that permanent moral values should drive constitutional meaning, regardless of society's circumstances or values. Thus, this view can hardly be called a species of living constitutionalism.

In sum, living constitutionalism faces a trilemma regarding *Brown* and *Plessy*. One of the following must be true under the approach: (1) *Plessy* was rightly decided, but *Brown* was also rightly decided because of changing circumstances; (2) *Plessy* was wrongly decided because it violated the Fourteenth Amendment's original meaning; or (3) *Plessy* was wrongly decided for reasons other than the fact that it violated Fourteenth Amendment's original meaning, such as the fact that racial segregation violates a permanent moral value.

The only option that maintains both the consistency of the living constitutionalist method and the claim that it is superior to originalism at avoiding morally egregious results is the first one. Therefore, to evaluate the claim that living constitutionalism is superior to originalism with respect to the morality of its results, one must evaluate a species of living constitutionalism that to some degree agrees with option one. For this reason, the next Part of this Note will examine a species of living constitutionalism that is held to satisfy the above criteria. This species of living constitutionalism, espoused by constitutional theorist David Strauss, is called *common law constitutionalism*. The next Part will explain common law constitutionalism and evaluate whether the theory has a definite enough prescriptive claim and consider whether one can argue that, when faithfully applied, the theory leads to fewer or less morally egregious results than does originalism.

III. PART THREE

Common law constitutionalism[44] is the theory that the Constitution should be interpreted not in accordance with its original meaning but in accordance with the common law tradition.[45] For the purposes of this Note, the most relevant aspect of the approach is how it justifies constitutional change with respect to moral considerations.

44. *See* Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1482–83 (2007) ("Common law constitutionalism is a theory [that] . . . . includes the idea that courts . . . should develop the meaning of general or ambiguous constitutional texts by reference to tradition and precedent, rather than original understanding . . . .").

45. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 *passim* (1996) [hereinafter Strauss, *Common Law Constitutional Interpretation*].

Strauss addresses directly the question of how common law constitutionalism, as a species of living constitutionalism, can address the problem of morally undesirable results and constitutional change.[46] Strauss asserts that *Plessy* was " 'wrong the day it was decided' in 1896," but also that "we are kidding ourselves if we think it is an easy question whether Plessy was legally wrong."[47] In Strauss's view, this is because there was "substantial support in the usual sources of law . . . for the Court's decision [in *Plessy*]."[48] Strauss concludes that *Plessy* shows that unless moral judgment can "sometimes play a role in legal decisions," it is difficult to argue that *Plessy* is legally wrong or at least that it is "still not a question that can be resolved axiomatically."[49]

Strauss's conclusion regarding the legal versus moral correctness of *Plessy* and the role of moral reasoning in justifying constitutional decisions might appear contradictory when examining his views on *Brown*. While maintaining that *Plessy* may not have been legally wrong, Strauss nonetheless asserts that one reason *Brown* was *legally* correct was that "segregation was morally wrong."[50] However, if moral concerns are part of the reason for the legal correctness of *Brown*, then why it is necessary to make the distinction between the legal correctness versus moral correctness of *Plessy*? Why not argue that *Plessy* was legally wrong in 1896 because segregation is, and was, morally wrong, just as with *Brown*?

The reason why Strauss may confidently say that *Brown* was both legally and morally correct, but not that *Plessy* was legally wrong is evident from his theory of common law constitutional change. He explicitly addresses his view of how common law constitutionalism can justify *Brown* and how *Brown* is an "example of the common law approach in action and of why that approach is superior to originalism."[51] Strauss states: "[T]he best justification of *Brown* is that it followed from a line of precedents that had steadily eroded 'separate but equal'; *Brown* was just the last step in a progression. This is how the common law works."[52] He then cites a series of

46. *See* David A. Strauss, *The Living Constitution and Moral Progress: A Comment on Professor Young's Boden Lecture*, 102 MARQ. L. REV. 979, 981–82 (2019) [hereinafter Strauss, *The Living Constitution*].

47. *Id.* at 983 (citing Ernest A. Young, *Dying Constitutionalism and the Fourteenth Amendment*, 102 MARQ. L. REV. 949, 974 n.143 (2019)).

48. *Id.*

49. *Id.*

50. *Id.*

51. Strauss, *Do We Have a Living Constitution?*, *supra* note 11 ("The question is how *Brown*—now universally accepted—can possibly be a legitimate decision when it rejected an understanding of the Fourteenth Amendment that was held when that amendment was adopted.").

52. *Id.*

decisions regarding the "separate but equal" doctrine, showing how the Warren Court's decision in *Brown*, while certainly "much more controversial than any of the earlier decisions[,] . . . had solid grounding in precedent" and was "but just the final step in a common law development."[53]

According to Strauss, then, common law constitutionalism *does* hold that courts may use moral reasoning to guide decisions, meaning that moral correctness is a factor in legal correctness. Nevertheless, common law constitutionalism, Strauss asserts, restrains a judge's moral discretion because "[i]n the common law approach, the role of those judgments is limited by the demand that [such] decisions be justified by reference to precedent."[54] In other words, Strauss proposes that through the mechanism of common law constitutionalism, one can get from *Plessy* being legally correct to *Brown* being legally correct, even though the decisions arrive at opposite conclusions regarding the constitutionality of state-sanctioned racial segregation, through a series of decisions which individually are slight, incremental modifications of previous precedent guided by moral considerations. Therefore, the key constraint of common law constitutionalism, according to Strauss, is that when constitutional precedent is modified on the basis of moral concerns, it must be within some reasonable range of slight modification and in some way based on past precedent.

If the premise of common law constitutionalism is that slight modifications of past precedent motivated by moral judgments are allowed, but only if they are within some reasonable range of previous precedent, then presumably a leap from *Plessy* to *Brown* (that is, one with no incremental steps between) would be inconsistent with common law constitutionalism. This is likely why Strauss could say that part of the reason *Brown* was rightly decided was that segregation was morally wrong but did not definitively assert that *Plessy* was "axiomatically" legally wrong, even though he believes that it was certainly morally wrong. Finding *Plessy* unconstitutional due to the moral wrongness of segregation would have required too great a leap in legal precedent. In other words, Strauss seems to be suggesting leaping directly to *Brown* from *Plessy* would not have been reasonable within the common law constitutionalism framework, but that it is reasonable within the common law constitutional framework to get to *Brown* from *Missouri ex rel. Gaines v. Canada*,[55] and to *Gaines* from *McCabe v.*

53. *Id.* at 978–83.

54. *Id.* at 984.

55. In *Gaines*, the Supreme Court found that the law school of the University of Missouri had violated the Fourteenth Amendment rights of Lloyd Gaines—a Black American—by denying him admission to the school and that the State of Missouri had to either admit Black students to the University

Atchison, Topeka and Santa Fe Railway Co.,[56] even though *Brown* and *Plessy* reached the opposite result because those steps were within a reasonable range of precedent.

IV. PART FOUR

Strauss's attempt to show how *Brown* is justifiable under common law constitutionalism, despite *Plessy* being, perhaps, legally correct under the approach, shows that common law constitutionalism lacks a definitive prescriptive claim that could allow for identifying when it is being properly applied. The theory's lack of a definitive prescriptive claim manifests itself in three ways.

First, the theory distinguishes between legitimate and illegitimate morally driven legal constitutional changes in a circular fashion. Recall that with originalism, even if one does not subscribe to the theory, one can still identify or posit cases that originalism could or could not justify.[57] Therefore, one can debate whether *Brown* was consistent with originalism. Strauss asserts that common law constitutionalism can justify *Brown* and supports this by defining legitimate versus illegitimate common law constitutional change in a circular fashion; that is, by defining as legitimate those changes that, in fact, took place.[58]

That the Supreme Court did do as Strauss described in slowly eroding segregation is to be celebrated. State-sanctioned racial segregation could not have ended soon enough; however, Strauss's account, which he labels common law constitutionalism in action, is a mere historical description of a series of decisions that include *Brown*. For example, in answering the question of how *Brown* "can possibly be a legitimate decision when it rejected an understanding of the Fourteenth Amendment that was held when that amendment was adopted," Strauss writes that "the best justification of *Brown* is that it followed from a line of precedents that had steadily eroded 'separate but equal'; *Brown* was just the last step in a progression. This is how the common law works."[59] That *is* what happened, but to identify a

or provide Black students in the state with their own school. Missouri *ex rel*. Gaines v. Canada, 305 U.S. 337, 349–52 (1938).

56. McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 161–62 (1914) (finding that a state could not justify allowing railroad cars to provide fewer accommodations to Black than white Americans on the basis that they expected less demand from Black Americans). Strauss suggests that the seeds of the reasoning behind the Court's decision in *Brown* can be found in the Court's reasoning in *McCabe*. Strauss, *Do We Have a Living Constitution?*, *supra* note 11, at 979–80.

57. *See supra* notes 18–24 and accompanying text.

58. *See* Strauss, *Do We Have a Living Constitution*, *supra* note 11, at 981–84.

59. *Id.* at 978.

series of decisions that lead to a result and then characterize those changes as legitimate under a theory of common law constitutionalism is circular reasoning.

Why is it circular reasoning? Common law constitutionalism intends to solve the inevitable tension between the legal and moral correctness of constitutional interpretation; it purports to limit the discretion of the interpreter by prescribing that morally driven legal changes are only legitimate if they are within some reasonable, slight range. This is just trying to square the circle. There must be a legal difference *in kind* and not degree between two decisions, like *Plessy* and *Brown*, that come to opposite legal conclusions. Dividing the problem into small steps[60] does not make the problem disappear. One can always still ask why changes in precedent in the intermediary decisions, even if slight, were justified if legal correctness is distinct from moral correctness. That such changes are slight does not mean that they have a *basis* in past precedent or that they are not merely morally driven, just that they are slight.

The second defect of common law constitutionalism that results from its lack of a definitive prescriptive claim is that it leaves the moral values that justify legal changes undefined, yet it is, paradoxically, superior to originalism on the premise that it leads to fewer morally unacceptable results. Even if one believes that the premise of common law constitutionalism—that changes to past precedent are justified for moral reasons if the changes are slight—is sufficient to count as a definitive prescriptive claim, Strauss does not specify the moral principles that would justify these slight changes.[61] This, perhaps, would not be fatal to the theory, but if the argument is that common law constitutionalism leads to *better* results than originalism, then such moral principles must be defined so that one can evaluate them.

60. *See id*. at 983 (arguing that the "kind of shaping—treating precedents as sometimes, to some degree, malleable, but far from totally manipulable—is a part of the common law approach"). Strauss, here, uses logic similar to the coach in an old football joke. An injured and bedridden football player calls his coach on the phone and asks if he can sit out tonight's game because of a severe injury he had received that afternoon. The coach says to the player, "Listen, son, if you can lie down, you can sit up. If you can sit up, you can stand. If you can stand, you can walk. If you can walk, you can run. And if you can run, you can play football!"

61. Strauss seems to even concede that under common law constitutionalism the application of moral values in constitutional interpretation is solely to be determined by the judge. Strauss, *Common Law Constitutional Interpretation*, *supra* note 45, at 901 ("Sometimes, of course, the proper interpretation of a command is that the interpreter *should do what is best by the interpreter's own lights*." (emphasis added)).

To explain this point, imagine person A explaining to person B why common law constitutionalism is superior to originalism because it better avoids morally unacceptable results. A explains to B that the only legitimate morally driven legal changes are those with a basis in precedent. If A then further restricts those morally driven legal changes by defining what those moral values should be, B now must either accept or reject those values. However, if A does not define those moral values, then B has nothing to accept or reject. Nevertheless, B might assume that those moral values to be applied under common law constitutionalism are B's own values. If A and B both accept common law constitutionalism but do not share moral values, then we are left with the paradoxical result that A and B both appear to accept the same constitutional theory, but the application of the theory as they understand it would lead to different results. This must be so because common law constitutionalism involves the application of moral values to legal decision-making.

The A and B example shows why living constitutionalism can appear to have an illusory moral superiority over originalism. Because originalism has a prescriptive claim, one can identify the probable results of its application. Thus, although originalism does not endorse any moral value system, it does require certain results, which, in turn, one can then morally evaluate. Originalism then has a sort of *implicit* set of moral values, arising from whatever results one believes that applying the original public meaning of a provision would entail. For example, if one believes that the original public meaning of the Eighth Amendment does not preclude lashing, then originalism implicitly endorses lashing. However, with common law constitutionalism, this type of exercise is impossible.

So far, I have argued that common law constitutionalism does not coherently define what sorts of decisions would be legally acceptable, and then, I argued that even if one disagrees with that first criticism, common law constitutionalism does not coherently define what sorts of decisions would be morally acceptable. Now, I will argue that even if one rejects these first two criticisms (and thus, holds that common law constitutionalism *does* have a prescriptive claim), common law constitutionalism can only be said to be morally superior to originalism if one assumes the inevitability of moral progress.

Strauss contends that his method of common law constitutionalism, and living constitutionalism generally, rejects both the notion of inevitable

progress[62] and any sort of "mystical component."[63] He also doubts the idea that "the arc of the moral universe bends towards justice."[64] But can the theory do without that assumption? Strauss makes several statements suggesting that the decisions that culminated in *Brown* were, in fact, part of an inevitable progression:

> *Brown* was just the last step in a progression. . . . [T]he Court began to sow some of the seeds of the common law development that eventually did away with "separate but equal." . . . There is a logical succession from *McCabe* . . . to *Brown* . . . . [T]he decision in *Brown* . . . was no revolution but just the final step in a common law development. . . . In concluding that separate could never be equal, the Warren Court was, at most, taking one further step in a well-established progression . . . .[65]

The idea that progress is inevitable seems perhaps too sentimental for a serious theory of constitutional interpretation. Earlier, I noted that common law constitutionalism seems to define legitimate morally driven constitutional change descriptively, that is, as change that occurred, and thus, seems to lack any prescriptive content as to what *should* occur or *should have* occurred. Yet, if one implicitly assumes that moral progress realized in the judicial process is inevitable, a description of that process does have a sort of normative quality to it, and is, therefore, quasi-prescriptive. In other words, a descriptive statement, that is, one that merely describes something without passing judgment regarding its merit, can become a sort of implicit prescriptive statement when one assumes that what is occurring is part of a sort of imminent process of moral progress.

If common law constitutionalism is both a prescriptive and descriptive theory, meaning that it describes both what happens and what should happen by implicitly positing these as the same statement, then it would not be unique in American constitutional practice. Stephen Siegel has noted the common tendency among American social theorists and jurists in the nineteenth century to cross the is-ought boundary, that is, the boundary between prescriptive and descriptive inquiry, by positing that "vital forces immanent in society . . . drove society towards what it should be."[66] The

62. Strauss, *The Living Constitution*, *supra* note 46, at 979–80 ("[I]t should not be part of the idea of a living constitution to claim that these evolutionary developments always improve things.").

63. Strauss, *Common Law Constitutional Interpretation*, *supra* note 45, at 894.

64. Strauss, *The Living Constitution*, *supra* note 46, at 979.

65. Strauss, *Do We Have a Living Constitution?*, *supra* note 11, at 979, 981, 983–84.

66. Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1447 (1990). Historism is not a commonly used word and is sometimes referred to as a species of "historicism," but it is distinct from the general contemporary understanding of what "historicism" is. Historism has been described elsewhere as "historico-politics." G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 504 (2002) (describing "historico-

historist movement in American social science, for example, was a philosophy of history that asserted that the appropriate application of legal doctrines and moral values for a society could be found in studying the development of society itself.[67] Ironically, this sort of circular reasoning was frequently used in constitutional practice often to justify legal decisions associated with nineteenth-century laissez-faire constitutionalism.[68] Historist reasoning, also, was convenient in the nineteenth century to often justify why the traditional American Republican legal practices and values were legitimate in a climate of growing intellectual skepticism towards the idea of transcendent and self-evident truth.[69]

In sum, while common law constitutionalism describes very well how constitutional interpretation has changed, it does not provide a definitive prescriptive statement that asserts how one should interpret the Constitution. Unlike with originalism, one cannot ask if a statute upholding lashing, for example, would be constitutional under common law constitutionalism. This is because common law constitutionalism, while purporting to separate legal and moral correctness of constitutional interpretation, does not provide a coherent explanation of when one may and may not apply moral considerations to legal decisions. Thus, one cannot compare it with originalism regarding which of the two theories leads to better results.

CONCLUSION

Strauss's common law constitutionalism is not the only alternative to originalism. For example, Ronald Dworkin advocated for a "moral reading" of the Constitution.[70] Dworkin's theory holds that the nature of many provisions of the U.S. Constitution, such as the First Amendment's protection of the "right" to free speech, the Fifth Amendment's guarantee of "due process," and the Fourteenth Amendment's protection of "equal" rights, suggest that a broad moral reading of certain constitutional provisions

politics" as "an effort to employ the empirical methods of 'scientific' historical investigation . . . in the service of deriving fundamental principles of political economy and social organization"); DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 60–61 (1990).

67. *See* Siegel, *supra* note 66, at 1436–38.

68. *Id.* at 1435; David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L. J. 1, 12 (2003) (noting that "[t]he [*Lochner* era] Justices had a generally historicist outlook, seeking to discover the content of fundamental rights through an understanding of which rights had created and advanced liberty among the Anglo-American people"). Bernstein uses the word "historicist," in the historist sense, not in the modern sense of the word.

69. *See* Bernstein, *supra* note 68, at 13.

70. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–12 (1997).

is appropriate.[71] What about scenarios, such as with the Fourteenth Amendment, where although the amendment itself suggests a broad moral reading, there is still, some argue, sufficient historical evidence that the original intent behind the Fourteenth Amendment was not to outlaw racial segregation, and thus seems morally inadequate? In these situations, Dworkin holds that it is wrong to restrict a moral reading to the mere intent of those who enacted it.[72] This is because, as Dworkin proposes, it makes more sense to try to interpret "what [the drafters] intended to *say*, not the different question of what *other* intentions they had . . . [or] how they themselves would have interpreted those principles or applied them in concrete cases."[73]

Dworkin's moral reading also requires that "[j]udges may not read their own convictions into the Constitution . . . unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretations by other judges."[74] In this sense, Dworkin's moral reading is similar to public meaning originalism, as opposed to original intent originalism (or "old originalism");[75] however, the moral reading also focuses on constitutional structure and does not use practice at the time of enactment as evidence of how modern-day interpreters should interpret it. Recalling that the third option in the trilemma of living constitutionalism was that *Plessy* was legally wrong and *Brown* was legally right, but not because the original understanding of the Fourteenth Amendment was to bar racial segregation, rather because of permanent moral concerns that are not necessarily evinced from the original understanding of the Constitution, Dworkin's moral reading provides a strong candidate for meeting the criteria of the third option. However, it cannot be said to be a species of living constitutionalism in the sense of allowing changes in precedent on the basis that the true meaning of the Constitution has somehow changed.

The *Plessy* trilemma for living constitutionalism might seem similar to the Justice Scalia dilemma regarding lashing and the Eighth Amendment, which is the question of "faint-heartedness" with respect to an interpretive method. What about "faint-hearted" living constitutionalism? Could the same be said for a living constitutionalist, for example, regarding whether they would have remained faithful to their interpretive method and upheld

71. *Id.* at 7–8.
72. *Id.* at 9–10.
73. *Id.* at 10.
74. *Id.*
75. *See* Barnett, *supra* note 2, at 44–45 (distinguishing old and new originalism).

Plessy as constitutional in accordance with precedent and values of that time? Or, for an example of something that could theoretically occur in the future, if American society largely began to accept practices, such as lashing, as a legitimate form of criminal punishment and case law began evolving in that direction, would proponents of living constitutionalism be willing to uphold a law enacting lashing as a criminal punishment as constitutional? Justice Scalia made precisely this same point in his University of Cincinnati address, asking, "[W]hy, one may reasonably ask—once the original import of the Constitution is cast aside to be replaced by the 'fundamental values' of the current society—why are we invited only to 'expand on' freedoms, and not to contract them as well? . . . Nonoriginalism, in other words, is a two-way street that handles traffic both to and from individual rights."[76]

The concern that a living constitution could just as well lead to negative results as positive ones is not merely a "gotcha!" originalist talking point based on an implausible doomsday scenario. Ernest Young has described the phenomenon of when constitutional interpretation changes towards the restriction of rights as "dying constitutionalism," noting that "there is no necessary connection between living constitutionalism and moral progress."[77] As evidence, Young points out how populist social movements during the Reconstruction Era in the South pushed courts to interpret the Fourteenth Amendment towards interpretations that further entrenched white supremacy, rather than eroded it.[78]

It is not necessarily unfair or illogical to ask a proponent of living constitutionalism, if there was a massive resurgent racist social movement that led to constitutional case law re-entrenching white supremacy, for example, whether they would be faithful to their theory and interpret the Constitution in accordance with the evolving case law or be "faint-hearted" and abandon their professed view. Nevertheless, this hypothetical may seem absurd on some level because it would be so contrary to the political commitments generally associated with living constitutionalism's modern-day proponents. However, what Young's "dying constitutionalism" example and the above hypothetical show is the problem with living constitutionalism's lack of a definitive prescriptive claim. It might seem in bad faith to ask a living constitutionalist whether they would remain faithful

76. Scalia, *supra* note 13, at 855–56.

77. Ernest A. Young, *Dying Constitutionalism and the Fourteenth Amendment*, 102 MARQ. L. REV. 949, 963 (2019).

78. *Id.* at 971 ("It is fair to say that, in the Fourteenth Amendment's early decades, the common-law development of the amendment's meaning pushed in the same direction as the other modalities of living constitutionalism—that is, to undermine the amendment's commitment to [B]lack equality.").

to their theory and rule in accordance with evolving cases trending towards re-entrenching white supremacy, or towards corporal criminal punishments, given that the critic posing the question probably knows that a proponent of living constitutionalism in the early twenty-first century would likely oppose such movements. Nevertheless, even if this argument seems absurd, living constitutionalism does not provide a clear answer for why doomsday hypothetical arguments can apply to originalists, such as with Justice Scalia and the lashing hypothetical, but not to living constitutionalists.

This lack of clarity is precisely the advantage of living constitutionalism. Because the theory posits that morals should play a role in constitutional decision-making yet does not define them, one is always free to imagine that its application would entail the morals and values that one hopes future generations of Americans adopt. Additionally, suppose one adopts a cynical, realist view of judicial decision-making, that judges merely rationalize their own pre-adopted political and moral commitments, which, in turn, are inevitably determined by one's place in history and society. Then, suppose you combine this cynical view of judicial interpretation with the idealistic assumption that there is a moral arc to history bending society towards justice. Now, living constitutionalism has become a virtually unassailable theory of constitutional interpretation on account of its apparent objective and moral appeal. This is because the theory defines legitimate legal change as that change that actually occurs and is driven by an immanent moral force.

This shows that living constitutionalism is, in some ways, a quasi-prescriptive theory disguising itself as a descriptive theory. It defines itself at such a high level of generality that it is, in essence, a mere description of how judges *do* interpret the Constitution instead of a statement of how judges *should* interpret the Constitution. But, if one believes in a sort of collective intelligence or an inevitable historical process of moral improvement at work in the operations of constitutional interpretation, then a description of how judges have and likely will interpret the Constitution can also function as a statement of how one should interpret the Constitution. Thus, living constitutionalism, despite having no definite prescriptive claim, can nevertheless have an illusory moral appeal.