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THE CONSTITUTION MEANS WHAT THE  
SUPREME COURT SAYS IT MEANS

*Eric J. Segall\**

[T]he Constitution requires not following the dictates of the document but working out, over time, a complex balance among institutional interests. That is how we do constitutional law . . . .

[I]t is never acceptable to announce that you are ignoring the text.

— David Strauss<sup>1</sup>

INTRODUCTION

Just a few days before this journal published Professor David Strauss's excellent Foreword suggesting that constitutional text matters little to constitutional law, Judge Richard Posner, the most cited legal scholar of our generation,<sup>2</sup> shocked many academics attending a constitutional law conference at the Loyola University Chicago School of Law. Judge Posner said that when he decides cases, he does not care what people in the late eighteenth century thought about today's legal issues or even what the constitutional text says about those problems.<sup>3</sup> He remarked that following the Constitution does not mean adhering to its text but instead respecting Supreme Court interpretations of that text. Constitutional law as made by judges, Judge Posner emphasized, is much more about creating rules that make sense today than interpreting an old and often obsolete document. He concluded the following:

If you look at the entire body of constitutional law, that body of law bears very little resemblance to the text of the Constitution in 1789, 1791, and 1868. . . . That's the reality. The only useful way to advocate with regard to constitutional law is to give a good contemporary argument for or against a particular interpretation.<sup>4</sup>

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\* Kathy & Lawrence Ashe Professor of Law, Georgia State University College of Law. I'd like to thank Judge Posner, David Strauss, and Kurt Lash for helpful comments on a prior draft of this Response.

<sup>1</sup> David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 61 (2015); *id.* at 4.

<sup>2</sup> Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 tbl.6 (2000) (listing Judge Posner as the most cited legal scholar of the twentieth century).

<sup>3</sup> Josh Blackman, *Judge Posner on Judging, Birthright Citizenship, and Precedent*, JOSH BLACKMAN'S BLOG (Nov. 6, 2015), <http://joshblackman.com/blog/2015/11/06/judge-posner-on-judging-birthright-citizenship-and-precedent> [<https://perma.cc/K5SE-FYC5>]. Professor Blackman, who was in attendance that night (as was this author), posted a blog entry just a few hours after Judge Posner's remarks faithfully transcribing them. I have checked with Judge Posner and he agrees, at least for the parts of his talk used in this essay, that he was correctly quoted.

<sup>4</sup> *Id.*

Judge Posner's remarks created significant controversy that night (and on social media),<sup>5</sup> possibly because he said exactly what Strauss warns is "never" appropriate: that it is perfectly fine (even desirable) for judges to "ignore" constitutional text.

Despite this difference between Judge Posner and Strauss, they do agree substantially on how the Supreme Court decides constitutional law cases. In his Foreword, Strauss persuasively details how the Supreme Court follows a common law approach to constitutional decisionmaking in which the Justices rely primarily on the Court's prior decisions when deciding cases. He argues that constitutional text is usually irrelevant to constitutional outcomes, and he presents specific examples of decisions completely at odds with what appears to be unambiguous language. Strauss's article eloquently supports Judge Posner's antitextual remarks.

But Strauss does not go quite far enough in his article and certainly not as far as Judge Posner. Judge Posner explicitly argued that the text is irrelevant to Supreme Court Justices when they decide constitutional questions. It is well past time that more academics openly embrace that position as well, and Strauss should be one of the first given his longstanding description of constitutional law as common law.

Although the differences between Judge Posner and Strauss are relatively slim (but important), many other academics and judges emphatically deny that constitutional law is nontextual and nonhistorical. For example, Judge Posner made his Chicago remarks when responding to a talk by Professor Randy Barnett describing his soon-to-be-published book, *Our Republican Constitution*.<sup>6</sup> Barnett told the audience that he believes the text of the Constitution sets forth a "republican" and not "democratic" model of government in which individuals, not majorities, are sovereign and where rights precede government.<sup>7</sup> Barnett argued that judges need to enforce this "original meaning" of the text when deciding constitutional cases.

In Chicago, Barnett also criticized Judge Posner's willingness to marginalize constitutional text and its history, and even (politely) suggested that a judge who practiced what Judge Posner was preaching would violate his oath of office. Barnett also stated that a judicial nominee who openly and expressly disavowed the relevance of consti-

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<sup>5</sup> See, e.g., Michael Ramsey, *Josh Blackman on Judge Posner on Constitutional Interpretation*, ORIGINALISM BLOG (Nov. 9, 2015, 6:33 AM), <http://originalismblog.typepad.com/the-originalism-blog/2015/11/josh-blackman-on-judge-posner-on-constitutional-interpretation-michael-ramsey.html> [https://perma.cc/F4UF-3ZEN].

<sup>6</sup> See RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION* (forthcoming 2016).

<sup>7</sup> Professor Barnett was clear that he did not intend those labels to be partisan in any way.

tutional text to constitutional law is unlikely to be confirmed by the Senate.<sup>8</sup>

Part I of this Response argues that Judge Posner's pragmatic constitutionalism and Strauss's common law constitutionalism have more descriptive and normative force than Barnett's original meaning constitutionalism. Part II suggests that Strauss's article mistakenly urges judges "never" to admit that constitutional text should be "ignored" because that concession undercuts in meaningful ways the rest of his fine argument and also masks that, in constitutional litigation at least, the Constitution means what judges say it means.

## I. COMPETING THEORIES

### A. Judge Posner's Pragmatic Constitutionalism

Judge Posner, in his talk in Chicago, described his view of constitutional interpretation as follows:

I'm a pragmatist. I see judges as trying to improve things within certain bounds. There are practical restrictions on the exercise of one's moral views. There are specific laws that are deeply entrenched. Where the judges are free, their aim, my aim, is to try to improve things. My approach with judging cases is not to worry initially about doctrine [and] precedent . . . [,] but instead, try to figure out, what is a sensible solution to this problem, and then having found what I think is a sensible solution, without worrying about doctrinal details, I ask "is this blocked by some kind of authoritative precedent of the Supreme Court"? If it is not blocked, I say fine, let's go with the common sense . . . solution.<sup>9</sup>

Judge Posner conceded that the Constitution provides general guidelines that he must respect, such as vague preferences for freedom of speech and religion and against unreasonable searches and seizures and cruel and unusual punishments. Those vague preferences, however, while perhaps important to the public at large, do not decide litigated cases:

What would the framers of the [Fourth Amendment] have thought about [n]ational security surveillance of people's emails[?] That is a meaningless question. *It is not an interpretive question, it is a creative question. . . .* The [Constitution] cannot resolve it . . . by thinking about the intentions, the notes of the constitutional convention, [or] other sources from the 18th century. This seems to be the standard problem for judges . . . . It is not interpretation, it is just trying to find . . . a solution to a question that has not been solved by the legislature.<sup>10</sup>

<sup>8</sup> Professor Barnett has confirmed the accuracy of this summary of his comments in an e-mail to the author.

<sup>9</sup> Blackman, *supra* note 3.

<sup>10</sup> *Id.*

Judge Posner went so far as to argue that even constitutional provisions that are clear, such as the requirements that people have a right to a jury trial where the amount in controversy is over twenty dollars or that the President must be thirty-five, might be ignored by judges if the provisions make no sense in modern times. Judges might accomplish this transformation of the text by finding certain constitutional provisions judicially unenforceable or by creative argumentation. Either way, Judge Posner was clear that judges should veer away from, or even ignore, clear text if modern conditions so require.

*B. Strauss's Common Law Constitutionalism*

Professor Strauss's Foreword builds upon his previous writings describing Supreme Court constitutional interpretation as being more similar to common law decisionmaking than a body of jurisprudence based on text and history.<sup>11</sup> According to Strauss, constitutional interpretation "usually has little to do, in practice, with the words of the text. In most litigated cases, constitutional law resembles the common law much more closely than it resembles a text-based system."<sup>12</sup>

Professor Strauss points to numerous examples of constitutional "anomalies" that most people take for granted today where Supreme Court decisions are completely inconsistent with or at great odds with constitutional text. For example, the First Amendment applies to the President even though it refers exclusively to Congress, the Equal Protection Clause of the Fourteenth Amendment applies to the federal government even though it mentions only the states, and the word "another" in the Eleventh Amendment limiting suits against states to plaintiffs from "another" state has been interpreted by the Supreme Court to somehow mean the "same" state.<sup>13</sup>

Strauss provides many more examples that demonstrate the persuasiveness of his thesis that "the text of the Constitution routinely plays only a token role in litigated cases."<sup>14</sup> For him, constitutional text does not settle matters definitively but is treated by judges more like judicial precedents that are "expanded or contracted, over time, in the same way that the principle of an earlier decision might be."<sup>15</sup> Strauss's analogy between text and precedent is provocative and appealing.

To the extent that Strauss argues that prior cases, not text, drive constitutional decisions, his analysis mirrors Judge Posner's pragmatic constitutionalism. Although Strauss perhaps stresses prior cases more than Judge Posner does, the difference is not important for present

<sup>11</sup> See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

<sup>12</sup> Strauss, *supra* note 1, at 4.

<sup>13</sup> See *id.* at 28–52 (describing these and other "anomalies").

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Id.* at 60.

purposes because the precedent that Strauss points to is invariably not based on text or history (as he demonstrates), but on policy considerations of the kind preferred by Judge Posner.<sup>16</sup> Moreover, Judge Posner agrees that judges must wrestle with precedent in a serious manner. Therefore, whether a case is based on explicit or implicit policy concerns, or on prior cases that were based on policy concerns, both Strauss and Judge Posner agree that neither text nor history plays an important role.

There are, however, some differences between the rhetoric used by the two men to describe this nontextual, nonhistorical analysis, and those will be discussed in Part II.

### C. *Barnett's Construction Zone*

Professor Barnett's views on constitutional interpretation could not be more different than Strauss's and Judge Posner's. Barnett believes that the meaning of the words of the Constitution must be derived by judges through an "empirical" analysis of what the text actually meant to the people who ratified it.<sup>17</sup> That "core meaning" does not change over time unless the Constitution is formally amended pursuant to Article V.<sup>18</sup> For Barnett, the text is no mere symbol, but the centerpiece of constitutional adjudication.

The "core" meaning of the constitutional text, however, according to Barnett, will at times fail to tell judges how to apply vague constitutional provisions to unanticipated facts. To complete that enterprise, judges must "construct" rules of interpretation that guide them. For Barnett, "[o]riginalism is not a theory of what to do when original meaning runs out [and] [t]his is not a bug; it is a feature. Were a constitution too specific, its original meaning probably would become outdated very quickly."<sup>19</sup>

Barnett's preferred rule of construction is that the text of the Constitution is republican in character and should be interpreted by judges as strongly protecting the rights of the individual against majority rule.<sup>20</sup> He believes the constitutional text and its history support such a rule but other rules may also be valid as long as they conform to the actual text and history of the constitutional language at issue in any given case.

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<sup>16</sup> See, e.g., Strauss, *supra* note 1, at 20 (describing the Supreme Court's refusal to visit the constitutionality of "'longstanding prohibitions[.]" such as laws forbidding felons . . . from possessing firearms" as "sensible" (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008))).

<sup>17</sup> Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 69-70.

<sup>20</sup> See, e.g., BARNETT, *supra* note 6; *supra* text accompanying note 7.

It would be a mistake to think that Barnett's views on the crucial importance of text and history to constitutional interpretation make him an outlier. Not too long ago, one constitutional theorist wrote that "[n]early everyone believes that the text of the Constitution — the four corners of the document as amended — is the necessary beginning place of constitutional interpretation. An argument that the text need not be consulted or should be ignored ought to be looked upon with some suspicion."<sup>21</sup> Justices Scalia and Thomas, of course, also claim to follow a text-and-history approach to constitutional litigation and even believe other methods of interpretation are illegitimate.<sup>22</sup>

In light of the numerous judges and scholars who still believe that text and history do and should drive constitutional interpretation, it is not surprising that Judge Posner's views as he articulated them in Chicago would be so shocking to those in attendance. Moreover, that Strauss felt it important to devote his Foreword to the thesis that text and history do not and should not generate constitutional decisions also demonstrates that the role text and history play in constitutional law is genuinely controversial and contestable.

#### D. *Do Text and History Matter?*

As a descriptive account of our current practice, Judge Posner, Strauss, and Barnett agree that the original meaning of the text by itself cannot resolve most contemporary litigated questions of constitutional law. The issue then becomes how judges should act when confronted with such cases. Judge Posner and Strauss focus on current policy concerns and prior cases whereas Barnett argues that judges should "construct" constitutional meaning by identifying and then applying background rules consistent with their best account of the text and history of the Constitution. Furthermore, Barnett argues that, although constitutional interpreters will have different "underlying normative commitments,"<sup>23</sup> those commitments cannot "spur the information *embedded in the text* in favor of meanings wholly supplied or constructed by the purported interpreter."<sup>24</sup>

As a descriptive matter, Judge Posner and Strauss are more accurate. The Justices care much less about constructing constitutional rules according to the written Constitution and its history than overtly balancing contemporary costs and benefits and examining prior cases. I have documented before how the Justices have dramatically changed constitutional doctrine across broad areas of constitutional law even

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<sup>21</sup> Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 70 (2004) (footnote omitted).

<sup>22</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626–31 (2015) (Scalia, J., dissenting).

<sup>23</sup> Barnett, *supra* note 17, at 70.

<sup>24</sup> *Id.* at 71 (emphasis added).

though there have been no changes in the constitutional text or judicial discoveries of new, relevant historical evidence.<sup>25</sup> Similarly, I have written about the lack of any serious historical analysis in many of the Court's most important cases.<sup>26</sup> To the best of my knowledge, Barnett has not and would not argue to the contrary. Rather, he argues for a significant change in how judges decide constitutional law cases. In fact, he stated that fostering such a change (to text and history and away from subjective judicial values) partly motivated him to write his new book.<sup>27</sup>

These descriptive accounts that constitutional text and history currently matter little to judges do not tell us whether text and history *should* matter to judges. As a normative question, what should judges do in litigated constitutional cases? Do we want judges constructing rules based mostly on their interpretative judgments about what the constitutional text and its history "really mean" or based primarily on a careful and prudential analysis of modern-day costs, benefits, and likely consequences (as well as how prior judges conducted that balancing)? This writer prefers Judge Posner's and Strauss's methods for several reasons, although I can only sketch the beginning of that argument here.<sup>28</sup>

There is no indication from either the text of the Constitution or its history that judges are supposed to interpret the document using backward-looking principles of textual construction. By using so many vague and open-ended words and phrases and not providing *any* rules of interpretation in the document itself, it is likely that the Framers knew and wanted judges to look forward not backward.<sup>29</sup> This absence of guidance may also partially explain why in virtually every litigated area of constitutional law, the Court has reversed itself and altered prior doctrine.<sup>30</sup>

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<sup>25</sup> See Eric J. Segall, *Constitutional Change and the Supreme Court: The Article V Problem*, 16 U. PA. J. CONST. L. 443 (2013).

<sup>26</sup> See Eric J. Segall, Commentary, *The Constitution According to Justices Scalia and Thomas: Alive and Kickin'*, 91 WASH. U. L. REV. 1663 (2014).

<sup>27</sup> See Randy E. Barnett, *Popular Sovereignty and Judicial Review*, U. CHI. L. SCH. (Feb. 6, 2014), <http://www.law.uchicago.edu/audio/randy-barnett-popular-sovereignty-and-judicial-review>.

<sup>28</sup> Some may argue that this description of text and policy presents a false choice and that constitutional decisionmaking is properly a blend of the two (along with precedent). My thesis, which is consistent with the accounts of Judge Posner and Strauss, is that while the Justices may write about text (and its history) in the explanation of their decisions, neither text nor history generates results in cases where they are inconsistent with the Justices' values writ large. There are also cases where the Justices rely on prior cases if those cases do not present strong conflicts with the Justices' values.

<sup>29</sup> See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902-21 (1985).

<sup>30</sup> See *supra* p. 181.

Judge Posner persuasively argued in Chicago that there is little sense in asking what eighteenth- or nineteenth-century people believed about modern problems. Whether judges have to decide on the constitutionality of lethal injections, NSA spying of emails, bans on same-sex marriage, or laws requiring government workers to contribute to public sector unions, constitutional text and the history of that text simply run out before any useful result can be reached.

The Second Amendment provides a useful and powerful example of why current conditions should be deemed by judges to be much more important to constitutional law than text and history. Obviously the Framers were not aware of either small, powerful guns that could do great damage or assault-type weapons that could spray hundreds of bullets without reloading. Therefore, even if one believes, as Barnett does, that the core meaning of the Second Amendment protects the individual right to own guns apart from militia service,<sup>31</sup> many kinds of gun regulations other than total prohibition still require constitutional analysis in his construction zone.

Barnett argues that the resolution of these kinds of Second Amendment issues should be guided by a strong presumption in favor of individual liberty and freedom. But even *Justice* Barnett would not protect under the Second Amendment the private possession of nuclear weapons, nor would he invalidate all measures designed to make sure guns don't fall into the hands of dangerous criminals. For most gun regulations that are actually likely to be passed by legislatures and then litigated, however, the devil will be in the details, and a background presumption of liberty won't do the real work.

Judge Posner and Strauss would not indulge theoretical posturing and generalizing about the role of guns in the eighteenth century. They would look to see what purposes the law is trying to serve; whether those purposes are likely to be achieved; what consequences result from either upholding or invalidating a particular gun measure; and whether prior cases block the preferred result.<sup>32</sup> Their method would take into account current conditions and be more transparent, more sensible, and more suited (than Barnett's) to an ever-changing society that has accepted that judges will play a strong role in resolv-

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<sup>31</sup> See Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411 (2013).

<sup>32</sup> In fact, Judge Posner adopted exactly that analysis in a decision striking down an Illinois ban on carrying guns outside the home. See *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), *reh'g en banc denied*, 708 F.3d 901 (7th Cir. 2013); see also James B. Kelleher, *Appeals Court Strikes Down Illinois Ban on Handguns in Public*, *REUTERS* (Dec. 11, 2012, 5:59 PM), <http://www.reuters.com/article/2012/12/11/us-usa-courts-illinois-guns-idUSBRE8BA1EL20121211> [https://perma.cc/NGQ9-AMPT].



ing many of our most difficult social, political, economic, and legal controversies.

As I have written elsewhere, my personal preference is for a constitutional system where unelected, life-tenured judges only strike down laws when there is an “irreconcilable variance” between a law and the Constitution.<sup>33</sup> In that system, judges have much less discretion, and most cases would be resolved by my particular background rule of almost-complete judicial deference to the political branches. In that hypothetical government, a strong presumption of constitutionality would perform most of the work and we wouldn’t have to battle over the relative importance of text, history, prior cases, and real-life consequences. But that is not now — and unlikely to be anytime in the future — how our system of judicial review works.

Given that in our current system, judges often interfere with the political decisions of other governmental officials even where the Constitution does not provide clear answers, Judge Posner’s and Strauss’s transparent efforts to reach the best results by looking at facts on the ground and anticipated consequences (and prior cases), without regard to the rules and values of yesteryear, describe current practice more accurately and will lead to better decisions than Barnett’s original-meaning emphasis, which even he admits runs out in most litigated cases. Barnett’s backward-looking construction zone simply hides from the public the real reasons judges and academics favor one side or the other in difficult cases.

## II. SHOULD WE ADMIT THAT THE CONSTITUTIONAL TEXT IS IRRELEVANT?

Although Strauss demonstrates in his Foreword the irrelevance of text and history to constitutional cases, he also repeatedly asserts that “it is never acceptable to announce that you are ignoring the text.”<sup>34</sup> Why not? Did Judge Posner say something that was not “acceptable” when he told his Chicago audience that text does not matter in constitutional cases and even clear text should be ignored by judges if modern conditions so require?<sup>35</sup>

The closest Strauss comes to providing an answer to the question is his belief that there are some structural issues of government that need to be settled regardless of whether the settlement is optimal (such as the age of the President, the date of presidential succession, and the

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<sup>33</sup> ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* 176 (2012) (citing *THE FEDERALIST* NO. 78 (Alexander Hamilton)).

<sup>34</sup> Strauss, *supra* note 1, at 4.

<sup>35</sup> See Blackman, *supra* note 3.

rule that there must be two senators from every state).<sup>36</sup> He argues that this “feature of the text — its ability to settle matters that should be settled — has more general effects. In particular, it explains the taboo against explicitly ignoring the text. If it were sometimes acceptable explicitly to ignore the text, then it might be more difficult to rely on the text to settle issues like the date on which the President leaves office.”<sup>37</sup>

His explanation for the “taboo against explicitly ignoring the text” is the least persuasive aspect of Strauss’s article. The issues that Strauss points to as being “settled” are not settled because of a belief by judges in the primacy or importance of constitutional text but because no one has successfully litigated those settlements. The age of the President, the date he leaves office, or the malapportionment of the Senate (which violates the Court’s “one person, one vote” rule for other legislatures absent the express constitutional authorization in Article I) simply have not been challenged by creative lawyers on behalf of injured plaintiffs who have standing to challenge those settlements. If they were, and the Court believed that policy reasons were strong enough, the Justices would in fact ignore the text as they did in the numerous examples Strauss sets forth in his article. If the word “another” can mean the “same,” or if the word “Congress” can mean the “President,” then any and all text is up for grabs if the current stakes are high enough (exactly as Judge Posner describes).

Perhaps Strauss believes that judges should not admit text can be ignored because that would be incorrect in the sense that our general societal commitments to free speech, freedom of religion, bans on cruel and unusual punishments, and so forth, are taken more seriously because of the text. Judge Posner said something similar to this in Chicago,<sup>38</sup> and it is no doubt true. Rights that are explicitly recognized in the text seem to be generally easier for judges and scholars to justify than non-enumerated rights. For example, the right of women to choose to terminate their pregnancies and the rights of states to be immune from lawsuits brought by citizens of the same state seem more controversial than the right to free speech or the right to equal protection. Moreover, there is an entire literature devoted to supporting the very idea of non-textually based constitutional rights,<sup>39</sup> whereas most

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<sup>36</sup> See Strauss, *supra* note 1, at 56–57.

<sup>37</sup> *Id.* at 56.

<sup>38</sup> See Josh Blackman, *Judge Posner on Judging, Birthright Citizenship, and Precedent*, JOSH BLACKMAN’S BLOG (Nov. 6, 2015), <http://joshblackman.com/blog/2015/11/06/judge-posner-on-judging-birthright-citizenship-and-precedent> [<https://perma.cc/VA9Z-ZN6A>].

<sup>39</sup> See, e.g., LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* (2012).

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judges and scholars take for granted the existence of enumerated rights.

But the existence of nontextual rights, whether found in substantive due process, the Privileges or Immunities Clause, the Ninth Amendment, or for that matter in natural law, is now virtually universally accepted by judges and scholars. The real debate is over which specific rights judges should recognize. Here, the constitutional text provides little or no help.

Moreover, Judge Posner was not talking philosophically in Chicago about rights in general but about actual litigation, and Strauss's Foreword concerns how the Supreme Court decides real cases. Vague commitments to free speech or non-establishment of religion tell judges nothing about how to decide specific free speech and religion cases. When deciding what level of protection judges should provide to hate speech, obscenity, or commercial speech, for example, or whether legislative prayer or aid to parochial schools amount to unlawful establishments of religion, the text, as Strauss shows, does no work. Whether or not citizens and scholars debating grand theories of constitutional law should declare constitutional text irrelevant, judges deciding cases can truthfully do so.

But why should they? There are a number of benefits that would flow from judges fully accepting the descriptive accounts set forth by Judge Posner and Strauss (even if Strauss himself is unwilling to go all the way). I can't set forth a comprehensive argument here but can sketch a few ideas for further discussion and debate.

First, simply as a matter of governmental transparency, if Judge Posner and Strauss are right that policy considerations and prior cases truly generate results in most constitutional cases, judges should not hide behind textual and historical considerations that do not drive decisions and are merely window dressing.

Second, if policy considerations do drive decisions, judges and lawyers should openly debate them without the veneer of textual and historical considerations that marginalize a comprehensive and open debate. For example, Barnett argues for a libertarian reading of the Constitution that limits government regulation and calls into question much of the New Deal. Whether his views prevail in litigation will inevitably depend on whether his assessment of the public good is shared by the Justices. Better to have that debate directly than to hide it using technical and largely irrelevant legal jargon.

Third, public acknowledgement and acceptance that ambiguous text and contested history do not and should not resolve modern problems might lead to more transparent judicial confirmation hearings where the nominees are asked truly hard questions about their policy

views, and both the Senate and the public demand truthful answers. As I've written elsewhere,<sup>40</sup> the public embarrassment that is our current nomination process needs to be changed dramatically. Recognizing how little text and history matter to modern constitutional problems might start to shake up that process, even if just a little bit.

Finally, if more judges were as open and candid as Judge Posner about the irrelevance of text and history to modern constitutional litigation, Strauss's critique of text would likely make a much bigger impact. When Judge Posner told approximately one hundred law professors in Chicago that he does not care about constitutional text when deciding cases, the room went suddenly still. Had he simply said that in his experience text is often unhelpful when deciding difficult constitutional questions, there would have been a collective yawn. Moreover, Barnett's accusation (though respectfully spoken) that Judge Posner was violating his oath to uphold the Constitution by saying he ignores the text dramatically demonstrates the difference between the standard legal realist account that formal legal rules do not breed results and Judge Posner's frank admission that the text of the Constitution simply doesn't matter to him.

Is Judge Posner violating his oath of office by saying that he does not care about constitutional text when deciding hard cases (as Barnett politely suggested)? Of course not, because, as Strauss demonstrated, our constitutional law is not about the text of the document but about Supreme Court interpretations of that text. And, neither Strauss nor Judge Posner is the first legal scholar to make that observation. Professor Laurence Tribe's book, *The Invisible Constitution* and Professor Akhil Amar's book *America's Unwritten Constitution* are just two of many examples of explicit admissions by influential scholars that the constitutional text barely begins to explain the United States Constitution.<sup>41</sup>

In the end, Strauss's title question to his Foreword has no answer until judges declare the Constitution's meaning. And, as Strauss and Judge Posner recognize, that answer cannot be derived by examining the text. Therefore, it is past time that judges, scholars, and the American people accept that, in constitutional litigation at least, the Constitution means what judges say it means and the text just doesn't matter.

### III. CONCLUSION

Within a few days of each other, one of our leading constitutional law scholars and one of our most prominent federal judges announced

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<sup>40</sup> See Eric J. Segall, Commentary, *What Elena Kagan Could Have and Should Have Said (And Still Have Been Confirmed)*, 88 WASH. U. L. REV. 535 (2010).

<sup>41</sup> See *supra* note 39.

publicly that constitutional law is about judicial lawmaking, not textual interpretation. The similarities in their accounts are much more important than their differences. Moreover, as long as academics like Professor Barnett, and jurists like Justice Scalia and Justice Thomas, continue to argue strongly that text and contested history should drive judicial decisions, we need jurists and scholars like Judge Posner and Professor Strauss to remind us that difficult and controversial constitutional problems are best decided by debating today's values and priorities, not contested interpretations of vague and often outdated constitutional text.