ASSISTED LIVING FOR THE CONSTITUTION

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I. INTRODUCTION

The Living Constitution is an inspiring metaphor and supplies an elegant argument.[1] With grace and courage, the book embraces the Constitution as an organism whose very dynamism has enabled it to animate the privileges and commitments we as a people hold dear.[2] This embrace takes courage because it is a position contrary to that taken by many who have chosen to ridicule the notion that our national charter *could* have a life force. Justice Rehnquist, for one, scorned that such an idea puts the elected branches "in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution."[3] Justice Scalia, too, has sardonically rejected any notion of evolving societal commitments on the ground he is unable to tell the difference between the maturing of a society and its rotting; better to eschew change altogether, he has urged.[4]

But David Strauss celebrates the living quality as a great and

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1. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION (Geoffrey R. Stone ed., 2010).

2. *See generally id.*

3. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 700 (1976).

4. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40–41 (Amy Gutmann ed., 1997).

redeeming feature of our constitutional architecture,[5] and I celebrate him for doing so. He accomplishes two very important objectives for constitutional theory. First, he offers a compelling dispatch to the false temptations of originalism.[6] He shows us the promise of originalism—the promise of determinate and objective solutions to profound societal moral problems—has three fatal defects: it is elusive as a practical matter, undesirable as a normative matter, and not our practice as a descriptive matter.[7] The other complementary accomplishment of the book is the presentation of a strong affirmative case for why we should have accepted and continue to accept a Constitution defined by evolution, not coercion.[8] The evolution keeps the Constitution alive, argues Professor Strauss, through the common law method of reasoning from precedent.[9]

The analogy to common law appeals to common sense. Clearly Professor Strauss is right to say we think of the body of constitutional law as being at least as much about the cases as about the text or other features of the Constitution, which establishes an immediate resemblance to the common law.[10] At confirmation hearings for Supreme Court Justices, one of the most popular lines of questioning centers around the nominee's due regard for precedent—which is the characteristic issue in the common law method of decision making.[11] Nominees of all political stripes proclaim with pride their commitment to "stare decisis" in constitutional interpretation—fidelity to the cases that have come before.[12] Professor Strauss's analogy to the common law grounds this widespread intuition in theory because precedent is the means by which the principles of common law have evolved incrementally over time and responded to the needs of

5. *See* STRAUSS, *supra* note 1, at 3–4, 139.

6. *See id.* at 7–31.

7. *See id.*

8. *See id.* at 51–97 (discussing the evolution of the free speech doctrine and the significance of *Brown v. Board of Education* in American constitutional theory (citations omitted)).

9. *See id.* at 35–36; *see also generally id.* at 36–49 (providing Professor Strauss's broader discussion of the evolutionary role of the common law).

10. *See id.* at 33–35.

11. Lori A. Ringhand & Paul M. Collins, Jr., *May It Please the Senate: An Empirical Analysis of the Senate Judiciary Committee Hearings of Supreme Court Nominees, 1939–2009*, 60 AM. U. L. REV. 589, 617 (2011).

12. *See* Jason J. Czarnezki, William K. Ford & Lori A. Ringhand, *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 137–41 (2007) (putting in order the nine Justices in the sample by their expressed commitment, as nominees, to stare decisis).

society as it changes.[13] Precedent is the lifeblood of the common law. Accordingly, there is a plausible goose–gander claim that what is good for the common law is good for constitutional law.

In addition, the common law anticipates a complex interaction between social practice and the courts—an interaction that is always changing, always evolving, and in that sense, living.[14] Social practice gives rise to customs. Courts recognize customs and memorialize them in legal decisions. These legal decisions in turn influence social practice, and as that practice continues to change, eventually the legal decisions adapt to reflect it.[15] Each of the two forces in this exchange—social practice and the law—is a cause and an effect of the other. Unquestionably, Professor Strauss taps into strong intuitions with his claim that the Constitution, like the common law, derives its animating principle from the same type of symbiotic exchange.

In the context of the Constitution, however, the "pas de deux"—a dance for only two—is an incomplete account. A critical third player in the dynamic interaction, not involved in the common law, is what keeps the Constitution alive. That third player is political principle, which is an extrinsic force in the give-and-take between the courts and the community, and not part of the common law endeavor. A core feature of the common law, indeed, is its backward-looking attention to the way things have been and the way things are. With the Constitution, in contrast, the process of interpretation must also contain an assessment of how things ought to be.

In order to sustain the Living Constitution, the Supreme Court needs assistance that common law courts do not—the assistance that comes from principle. The living that we celebrate at the heart of our constitutional jurisprudence requires the continual engagement with constitutional principle in light of changed circumstances. Principle is the Constitution's life support.

The distinctions separating common law from constitutional law, while perhaps small in relation to the commonalities between the two methods, still have serious implications for the important question of

13. *See* STRAUSS, *supra* note 1, at 37–40.

14. *See id.* at 33–36 (analogizing the use of precedent in constitutional interpretation to the common law, which was established through evolution of precedents shaped by "notions of fairness and good policy").

15. *See* John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1334 (1990) (discussing how law incorporates social norms and expectations).

democratic legitimacy. Professor Strauss conscripts the similarity between the two systems into arduous service: he argues that, because the two systems are so similar, the established legitimacy of the one—common law—can serve to provide democratic legitimacy to the other, more vulnerable one—constitutional interpretation.[16] I worry, however, that this holds only at the view from thirty thousand feet. When we drill down to examine exactly how the two methods produce law and the goals each method seeks to accomplish, at its best, we see that the theoretical foundations supplying each with its legitimacy must necessarily be distinct. Thus, the leveraging of legitimacy through the common law may leave dynamic constitutional interpretation vulnerable in a way that it need not be.

To elaborate on this concern, I will discuss what I see as the core characteristics of, first, common law and second, constitutional law. I will bring my point home by probing the example Professor Strauss provocatively offers regarding the twin overrulings in *MacPherson v. Buick Motor Co*. and *Brown v. Board of Education*.[17]

II. THE CHARACTERISTIC ATTRIBUTES OF THE COMMON LAW METHOD

Both common law and constitutional law are systems that articulate and enforce, in legal rules, a set of moral norms by means of a decision method that boasts adherence to precedent as a central commitment. Professor Strauss demonstrates in his book several ways in which common law and constitutional law can be understood as serving similar needs in society. Both have developed over centuries into a system "in which precedents evolve, shaped by notions of fairness and good policy."[18] For both, it can be said that

> the authority of the law comes not from the fact that some entity has the right, democratic or otherwise, to rule. It comes instead from the law's evolutionary origins and its general acceptability to successive generations. Legal rules that have been worked out over an extended period can claim obedience for that reason alone.[19]

In both cases, "[t]he content of the law is determined by the evolutionary

16. *See* STRAUSS, *supra* note 1, at 46–49.

17. Brown v. Bd. of Educ., 347 U.S. 483 (1954); MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

18. STRAUSS, *supra* note 1, at 36.

19. *Id.* at 37–38.

process that produced it."[20]

Benjamin Cardozo, one of the greatest theoreticians of the common law and one of its most able practitioners, understood the common law as "the codification of norms of conduct that are customarily recognized" by members of a community.[21] The idea is that practices and, more importantly, expectations, evolve regarding what people reasonably owe to one another in different contexts.[22] These expectations are influenced, of course, by changing social conditions.

Cardozo uses the example of an old "principle that A. may conduct his business as he pleases, even though the purpose is to cause loss to B., unless the act involves the creation of a nuisance."[23] This is the case of the spite fence.[24] "Such a rule," reasoned Cardozo, "may have been an adequate working principle to regulate the relations between individuals or classes in a simple or homogeneous community."[25] The inadequacy of that rule was revealed, however, with "the growing complexity of social relations."[26] Later, by the time Cardozo offered the example, he had observed that "what was once thought to be the exception is the rule, and what was the rule is the exception."[27] Because of intervening changes, the rule had been reformulated so that "A. may never do anything in his business for the purpose of injuring another without reasonable and just excuse."[28] Thus, Cardozo illustrated the genesis of a new principle that "yields results more in harmony with past particulars, and, what is still more important, more consistent with the social welfare."[29]

It is important the changes occur in society first before they are recognized in law and restated as a legal principle. The judge is to "restate that which is already being expressed by the community, albeit

20. *Id.* at 38.

21. Goldberg, *supra* note 15, at 1330; *see generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) (discussing the use and role of common law in the judicial process).

22. *See* Goldberg, *supra* note 15, at 1330–34.

23. CARDOZO, *supra* note 21, at 24 (citations omitted).

24. *See id.* (citations omitted) (stating a "spite fence" was "the stock illustration, and the exemption from liability in such circumstances was supposed to illustrate not the exception, but the rule").

25. *Id.*

26. *Id.*

27. *Id.* at 25.

28. *Id.* (citations omitted).

29. *Id.*

cryptically."[30] The law, thus derived, can serve to articulate what the members of a community share, "even as the content of what they share changes over time."[31] The change moves incrementally—"inch by inch," as Cardozo recognized—with "the power and the pressure of the moving glacier."[32] This reiterating function is a key component of the common law's claim to democratic legitimacy. Judicially created law is democratically legitimate—despite its articulation by an unelected judiciary—precisely because the judiciary acts as a voice that restates and makes coherent the practice that has already gained popular acceptance as a societal custom. The law is not handed down to the people; it is handed up from the people.

To the extent that the quest requires the judiciary to resort to principle, the principle percolates up from the practices, expectations, and customs of people, and ultimately finds its way into the law, which continues to be reevaluated and reassessed. In the common law, it is important that there is no notion of a principle or universal maxim that is separate from custom. Sir William Blackstone affirmed the identity between established rules and maxims, on the one hand, and established customs on the other:

> I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it.[33]

For the common law, then, a principle exists only if it captures an established practice.

Precedent is important to the process of identifying such principles precisely because it is a good source of information about the development of moral norms or customs.[34] Precedent is not iconic, nor is it valuable simply because it came before, but it adds evidentiary value as a judgment

30. Goldberg, *supra* note 15, at 1344.

31. *Id.* at 1345.

32. CARDOZO, *supra* note 21, at 25.

33. 1 WILLIAM BLACKSTONE, COMMENTARIES *68.

34. *See, e.g.*, MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 14–15 (1988) (citations omitted) (offering examples of three legal rules whose development involved consideration of moral norms: the rule on enforceability of contract modifications that are fair and equitable in light of unanticipated circumstances; the rule requiring payment for a past benefit if there already existed a moral obligation to pay; and the defense of unconscionability to a contract claim).

of another common law judge seeking to ascertain the moral norms of the community on a related issue. As Professor Strauss explains, the process reflects a "combination of normative reasoning and a reliance on the lessons of the past . . . ."[35] I would add this clarification: the normative reasoning in the common law is a direct *result* of an inquiry into the lessons of the past, and *that* is the hallmark of the common law. Its normative dimension comes from within.

This clarification makes sense of one of Cardozo's otherwise strange views—that fairness and justice are interchangeable with utility and social welfare.[36] In the world of common law adjudication, the ideas of fairness and justice develop as community expectations about how individuals will treat one another, which is a part of the social understanding of what will make a community better off.[37] Because of the endogenous nature of the derived principles, they can be viewed as both fair and efficient; indeed it is difficult to distinguish the two. "In the common law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution."[38]

Precedent is in some loose way "authority" in the sense it is a conclusion about the expectations or social norms at the time of its decision. But precedent is not a command in the sense that it articulates, in its own time, a static truth to be followed for all time.[39] Rather, a prior decision is, in some sense, the best available evidence of the then-existing set of expectations. Precedent thus serves as both authority for continuity and evidence of the correct approach. "The Common Law judge . . . works from within the *law*, which is the repository of the experience of the community over the ages."[40] Both of these characteristics are subject to adjustment if the current court identifies reasons why the prior case may no longer accurately reflect the object of the inquiry, which is the current set

35. STRAUSS, *supra* note 1, at 84.

36. *See* Goldberg, *supra* note 15, at 1335–36.

37. *See id.* at 1334.

38. A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE 77, 79 (A.W.B. Simpson ed., 1973).

39. *See* STRAUSS, *supra* note 1, at 36–37 (explaining how the common law does not represent the "command theory" of regulation—the theory that "the law is binding on us because the person or entity that commanded it had the authority to issue such a binding command").

40. GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 32 (Tony Honoré & Joseph Raz eds., 1986).

of norms on the issue. A judge is always free to test a previous articulation of the law against the judge's own tradition-shaped judgment of the law's reasonableness.[41] Precedent contributes to the legitimacy of the common law because the "established law rests on and derives its authority form [sic] a shared sense of its reasonableness."[42]

This is why precedent is rarely overruled outright, but much more often simply shifts incrementally to include a changing flavor or attitude on the topic. "Judges have made worthy, if shamefaced, efforts, while giving lip service to the rule, to riddle it with exceptions and by distinctions reduce it to a shadow."[43] Professor Strauss artfully discusses this process with regard to the *Winterbottom* rule barring manufacturers' liability to consumers, unless the product was considered "inherently dangerous."[44] Over time, the courts had expanded the reach of the "'inherently dangerous'" exception, until it was no longer meaningfully an exception at all.[45] The courts were thus gradually gravitating toward a new rule, which recognized expanding duties of a manufacturer to the persons who were placed at risk by its product.[46] Still, however, these interim courts operated within the shell of the old rule.[47] Thus, the process of reasoning in hindsight about the rule, the precedents, the social understandings, and the policy operated within an internal framework and indicated the need for a formal change that was made explicit in *MacPherson v. Buick Motor Co.*[48]

The change to new obligations of care in *MacPherson* was not a sudden change of heart about the right social policy for regulating manufacturers' relations with consumers.[49] Rather, Judge Cardozo, the author of *MacPherson*, identified and accepted "[t]he moral idea, embedded in negligence law, that actors owe due care to others, applied in light of the evolving social understanding of the role of the manufacturer, [which] enabl[ed] Cardozo to identify a legal duty of due care running from manufacturers to certain product users."[50] Professor Strauss documents a

41. *See* BLACKSTONE, *supra* note 33, at *69–71.
42. POSTEMA, *supra* note 40, at 195.
43. CARDOZO, *supra* note 21, at 155 (citations omitted).
44. *See* STRAUSS, *supra* note 1, at 81–85 (citations omitted).
45. *Id.* at 81–82 (citations omitted).
46. *Id.*
47. *See id.*
48. *Id.* 82–83 (citing MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916)).
49. *See id.* at 82–84 (citing *MacPherson*, 111 N.E. 1050).
50. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson,

slow process whereby people began to expect more from the companies that held some power over a means of harm to them.[51] This application of the obligation of care, while newly articulated in *MacPherson*, was already "inchoate in the public culture of the day," and required the overruling of *Winterbottom* to maintain consistency between the law and societal expectations.[52] Thus, the common law "transformed a social and moral norm into an enforceable legal norm."[53]

Notice the very idea of "law" in the common law sense is an emanation from "widely shared expectations of how one ought to behave in certain circumstances," which means that "[u]nexcused departures from expected behavior will be condemned as wrong, and perhaps even deserving of punishment."[54] The common law process, accordingly, produces profoundly majoritarian outcomes and derives its legitimacy from doing so.

III. THE CHARACTERISTIC ATTRIBUTES OF CONSTITUTIONAL INTERPRETATION

Constitutionalism, by contrast, represents the effort of a polity "to lay down and hold itself, over time, to its own political and legal commitments, apart from or *even contrary to the popular will* at any given moment."[55] Constitutional interpretation does not purport to reflect shared expectations. Rather, the interpretation of the Constitution seeks to assist the community in adapting its particular acts of the moment to conform to an external, more timeless standard that the people aspire to meet.

With constitutional interpretation, the first place to look is to the text.[56] Professor Strauss makes the fair point that text rarely plays a pivotal role in constitutional adjudication.[57] Nevertheless, it does not necessarily follow that the text is insignificant in the entire realm of constitutional interpretation. Rather, the text represents the nation's commitment to perpetual self-government, offering both a starting point and a set of

146 U. PENN. L. REV. 1733, 1816 (1998).

51. *See* STRAUSS, *supra* note 1, at 81–84 (citations omitted).

52. *See* Goldberg & Zipursky, *supra* note 50, at 1816.

53. *See id.* at 1816–17.

54. *See* Goldberg, *supra* note 15, at 1330.

55. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 183 (2001) (emphasis added).

56. *See* STRAUSS, *supra* note 1, at 33.

57. *See id.*

boundaries for the identification of the principle that will decide each case. Even for the many theorists who do not believe that the text alone can resolve difficult constitutional issues, the text provides an important framework in which to resolve the issues in the case. Even Ronald Dworkin, who is arguably one of the least textualist of interpreters, places critical importance on the language used in the abstract provisions of the Constitution, including the two guarantees discussed in Professor Strauss's book: the freedom of speech and the equal protection of the laws.[58] According to Dworkin's moral reading, "[T]hese clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power."[59]

Accordingly, although only a very few words will ever be at issue in a given case, the words do inform the inquiry. The Courts in *Plessy v. Ferguson* and *Brown v. Board of Education*, for example, were charged with the task of deciding whether racially segregated facilities denied the "equal protection of the laws" to those excluded.[60] In order to approach that task with any sort of rigor, an interpreter must gain an understanding of the moral principles to which that constitutional language commits us.[61] Can the principle of equality embodied in those words tolerate a system of forced separation of the races under the circumstances of 1896 or 1954 America, respectively? The big point is that however one answers that question, all can likely agree that there is a coherent claim to be made that the Constitution has a meaning to be derived and applied in each case—a meaning that stands apart from social practice.

For the constitutional interpreter, several different sources of guidance can offer assistance in attaining that meaning. The history of the text, its original understandings, the subsequent history of relevant social practices and moral norms, and prior decisions interpreting the same words can all be relevant to the understanding of how the principle embodied in the text would best be applied to the case at hand. But those sources of guidance are only that; they are helpful to the task and carry varying weights in the calculation depending on the case. Not one of those sources,

58. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (1996).

59. *Id.*

60. Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954); Plessy v. Ferguson, 163 U.S. 537, 543 (1896), *overruled by Brown*, 347 U.S. 483.

61. *See* DWORKIN, *supra* note 58, at 7–12. "Many of [the Constitution's] clauses are drafted in exceedingly abstract moral language." *Id.* at 7.

however, is itself the *object* of the quest. For those who believe in the Living Constitution, the search is not for the original understanding of the text, for the social practices that have evolved around the text, or for a popular consensus on how the text should be applied. The search is for the best meaning of the principle embodied in the text.

Therein lies a core attribute of constitutional interpretation that differs in a profound way from common law reasoning. For the constitutional judge, the examination of past and present practices is a means to ground abstractions such as "liberty" and "equality" in shared experience and value in order to ascertain current meaning. The trajectory of this judgment is not backward-looking or descriptive, but forward-looking and normative. Judges must take some account of the constitutional ideals in resolving a hard constitutional question, even if social morality is unclear or divided, or even if it leans the other way at the time of the decision.[62] Such an elevation of aspiration over custom would be incoherent, I believe, in the common law tradition.

The legitimacy of the Living Constitution is not dependent on the process by which Justices resolve cases, but rather the substance of their decisions in an effort to implement principle.[63] The process of relying on precedent, for example, is critical to the common law, while it serves another function in constitutional law.[64] An interesting empirical study of the statements made by the Justices on the Rehnquist Court at their confirmation hearings regarding precedent revealed not one who said following precedent was critical to the legitimacy of the judicial role.[65] Perhaps Justice Ginsburg and Justice Souter came the closest with their respective statements that following precedent was important as a constraint "against a judge infusing his or her own values into the interpretation of the Constitution," and "some such doctrine or . . . rule is a bedrock necessity if we are going to have in our judicial systems anything that can be called the rule of law as opposed simply to random decisions on a case-to-case basis."[66] These concerns could perhaps be relevant to legitimacy or the correctness of decisions. But most of the reasons offered

62. *See* STRAUSS, *supra* note 1, at 77–78 (noting the controversial nature of *Brown* and the reality that most desegregation did not take place for a decade after Congress passed the Civil Rights Act of 1964 (discussing *Brown*, 347 U.S. 483)).

63. *Id.* at 53.

64. *See id.* at 37–45 (discussing the role of precedent in the common law system).

65. Czarnezki, Ford & Ringhand, *supra* note 12, at 174–85.

66. *Id.* at 182–83.

by nominees dealt with predictability,[67] impartiality,[68] and getting the benefit of the judgments of prior courts regarding the correct answer to constitutional questions.[69] All said if they became convinced the prior court got it wrong, the case should clearly be overruled.[70] Several Justices agreed the presumption in favor of following precedent should be significantly weaker in constitutional cases than in other kinds of cases.[71] Ultimately, for constitutional law, it is highly important to get the answer right because the existence of constitutional ideals means that there is, at least in theory, a right answer to be had. If precedent helps in that endeavor, it is followed.[72] If it does not, it is jettisoned.[73]

These differences between common law and constitutional interpretation emerge in the intriguing example Professor Strauss develops in his book when he compares the erosion of the no-liability doctrine after

67. *E.g.*, *id.* at 182 (reprinting Justice Ginsburg's statements from her confirmation hearing, including her statement that the "predictability of the law is important" and her reiteration of Justice Brandeis's statement that "some things are better settled than settled right"); *id.* at 180 (reprinting Justice O'Connor's confirmation hearing statement that "predictability of the law [is a] vitally important concept[].").

68. *E.g.*, *id.* at 176 (reprinting Justice Kennedy's statements from his confirmation hearing, where he stated, "Stare decisis ensures impartiality. That is one of its principle uses.").

69. *E.g.*, *id.* (reprinting Justice Kennedy's statements from his confirmation hearing, where he stated, "You look to see how the great Justices that have sat on the court for years have understood and interpreted the Constitution, and from that you get a sense of what the Constitution really means.").

70. *See id.* at 174–83.

71. *Id.* Justices Thomas, Rehnquist, O'Connor, Ginsburg, and Souter all indicated constitutional precedent may be weaker. *Id.* at 175, 179–80, 182, 184. Justices Breyer, Stevens, and Scalia made no mention of a weaker standard for constitutional issues. *See id.* at 177, 179–81. Justice Kennedy acknowledged arguments for a weaker standard, but said precedent in constitutional cases was "entitled to very great weight." *Id.* at 176.

72. *See id.* at 177. In his confirmation hearing, Justice Breyer noted, "I cannot say that precedent always answers the question, but it is terribly important to refer to the precedent, and the opinion grows out of prior precedent." *Id.*

73. *See id.* In his confirmation hearing, Justice Kennedy noted, "And so stare decisis is very important, but, obviously, if a case is illogical, if it cannot be reconciled with all the parallel precedent, if it appears that it is simply out of accord with the purposes of the Constitution, then it must be overruled." *Id.* However, in Justice Thomas's confirmation hearing, he said, "A judge that wants to reconsider a case and certainly one who wants to overrule a case has the burden of demonstrating that not only is the case indirect, but that it would be appropriate, in view of stare decisis, to make that additional step of overruling that case." *Id.* at 174.

Winterbottom v. Wright to the erosion of the separate-but-equal doctrine after *Plessy v. Ferguson*.[74] Professor Strauss nicely draws out the dual nature of what Cardozo did in *MacPherson v. Buick Motor Co.*[75] Cardozo keenly read the decisions of the past to reflect values other than those that were explicitly articulated in the decisions,[76] demonstrating how the reading of precedent is more an art than a science.[77] At the same time, perhaps aided by this insight, Cardozo adopted what he viewed as the better rule.[78] Thus, he fulfilled what has been described as the core objective of the common law judge: "'not to transform civilization, but to regulate and order it.'"[79]

When we think of *Brown v. Board of Education*,[80] I suggest we see a decision that transformed civilization rather than one that merely regulated and ordered it. Professor Strauss very insightfully shows the incremental erosion of some of the theoretical premises of separate-but-equal before *Brown*.[81] He demonstrates that once the notion of "equality" had expanded to include even the intangible aspects of one's treatment by the state, including the stigma of being forced into a separate facility, then the separate-but-equal principle became nearly impossible to maintain, at least in a society that was racially stratified.[82] One could always imagine totally stigma-free separation, but only in the wholly idealized world in which the separation is not a tool for imposing racial hierarchy and all agree to it. That not being even close to the case in mid-20th century America, the expanding notion of equality revealed in the pre-*Brown* cases put pressure on the separate-but-equal doctrine.[83] This, of course, is what the litigation strategists at the NAACP had in mind when they brought the cases in the order in which they did.[84]

74. *See* STRAUSS, *supra* note 1, at 79–82 (citations omitted).

75. *See id.* at 82–85 (citing MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916)).

76. *See MacPherson*, 111 N.E. at 1051–52 (citations omitted).

77. *See id.* at 1054–55; *see also* STRAUSS, *supra* note 1, at 83–85 (discussing Cardozo's opinion in *MacPherson* (citing *MacPherson*, 111 N.E. 1050)).

78. *See* STRAUSS, *supra* note 1, at 83–85.

79. Goldberg, *supra* note 15, at 1342 (quoting BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 286 (1928)).

80. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

81. *See generally* STRAUSS, *supra* note 1, at 85–92 (citations omitted).

82. *See id.* at 91–92 (citations omitted).

83. *See id.* at 85–92 (discussing the history of the *Brown* decision (citing *Brown*, 347 U.S. 483)).

84. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V.*

Even with this preparatory erosion, however, the outright rejection of separate but equal as a correct equality principle was still anything but a minor tweak. Even weakened, the words "separate but equal" played a validating role in all kinds of pervasive racial segregation. They articulated the *principle* that forced separation could still be considered equality under the law.[85] That legitimating effect of the "separate but equal" principle had not weakened before *Brown* in the way that the doctrinal underpinnings had weakened; storefront signs throughout many parts of the country unapologetically proclaimed, "Whites Only."[86] This was not only permitted, but it was justified—legally and morally—by its equation with the *principle* of equality.

When the Supreme Court rejected the legitimacy of separation as a form of equality,[87] the change in governing principle was viewed as a dramatic upheaval of law and practice.[88] To the NAACP lawyers who decided with great concern and trepidation to ask for the overruling of *Plessy*, the victory was certainly no mere formality.[89] There had been concern that the strategy would fail because it entailed asking the Court to make such a dramatic change in the principles defining the states' obligation to accord equal protection.[90] Amidst worry over adopting the more aggressive position and potentially losing, Thurgood Marshall sought to persuade his colleagues that the decision to challenge segregation directly, on the basis of a newly framed principle, was necessary:[91]

BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 520–40 (1976) (providing a detailed history of the strategy and events leading up to *Brown* and the subsequent appeals).

85. *See, e.g.*, STRAUSS, *supra* note 1, at 86 (discussing the Supreme Court's decision to strike down a segregation law in Oklahoma because it did not require equal facilities, but implying the law would have been constitutional had it required equal facilities (citing *McCabe v. Atchison, Topeka & Santa Fe Railway*, 235 U.S. 151, 161–62 (1914)).

86. *See, e.g.*, *Separate is Not Equal:* Brown v. Board of Education, SMITHSONIAN NATIONAL MUSEUM OF AMERICAN HISTORY, http://www.americanhistory.si.edu/brown/history/1-segregated/jim-crow.html (last visited June 2, 2011) (displaying photos of such signs leading up to *Brown*).

87. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

88. *See* KLUGER, *supra* note 84, at 709–11 (describing the initial variety of reactions to the *Brown* decision after being released (citing *Brown*, 347 U.S. 483)).

89. *Id.* at 520–21 (discussing the difficult debate among NAACP advisors regarding whether to confront the *Plessy* doctrine (citing Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483)).

90. *Id.*

91. *See id.* at 524 (discussing the unanimity in deciding to attack the *Plessy*

> It is completely unrealistic to believe that the South will voluntarily . . . equalize school facilities or any other governmental facilities. . . . [I]f we do not continue the challenge to segregated schools, we will get the same thing we have been getting all these years—separate but never equal.[92]

Even some who sympathized with the cause of integration worried that a judicial end to *Plessy* would be attacked because *Plessy* had "a certain nagging 'intellectual strength'" and interpretative legitimacy.[93] It was not a foregone conclusion. Indeed, the overruling of *Plessy* drew public attention as well. The famous *New York Times* front page bearing the photo of Thurgood Marshall standing on the steps of the Supreme Court below the huge banner headline, "High Court Bans School Segregation; 9-to-0 Decision Grants Time to Comply," suggests that the decision was not understood as an incremental or ceremonial acquiescence in a practice already adopted in all but name.[94] Rather, reversing *Plessy* was socially jarring and jurisprudentially vulnerable; the Court invalidated a norm that had persisted for decades, and did so on the basis of a principle that could not plausibly have claimed to enjoy widespread acceptance before it was embraced in *Brown*.

This is not to suggest Professor Strauss is trivializing *Brown* when he situates it in the common law tradition. The concern, however, is that by seeking legitimacy for *Brown* in a comparison to *MacPherson*, the analogy inadvertently strips *Brown* of its greatest claim to both distinction *and* legitimacy.[95] That is its reliance on the principle of justice even in the face of much popular disagreement.

This example illustrates why the common law metaphor cannot provide legitimacy to constitutional adjudication. The definitional interdependence of common law and custom, which gives the common law its elegant democratic pedigree, is not part of our conception of constitutional adjudication. While any particular constitutional interpretation could align with majoritarian beliefs or practice, that result is not endemic; there certainly will be times when the best application of a constitutional provision will not follow current popular expectations or

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doctrine head-on (citing *Plessy*, 163 U.S. 537)).

92. *Id.*

93. *Id.* at 529.

94. *See* Luther A. Huston, *High Court Bans School Segregation; 9-to-0 Decision Grants Time to Comply*, N.Y. TIMES, May 18, 1954, at 1.

95. *See* STRAUSS, *supra* note 1, at 85–92 (citations omitted).

sympathies. If the process of constitutional adjudication is to be considered democratically legitimate, therefore, it will be for another reason.

The Living Constitution gains its democratic legitimacy by virtue of the very quality that distinguishes it from the common law: its reliance on principles of justice. The Constitution exists to establish the conditions of democracy, which in turn exist to enable self-government. Interpreting the Constitution as a living document is a practice that derives its legitimacy from the active engagement of judges with the exogenous commitments in the Constitution, refined and grounded in the evolving practices and values of our polity.

While the common law equates fairness or justice with custom, constitutional law is profoundly committed to distinguishing the two. Tradition and custom do play a role in constitutional interpretation. Some of our liberties are determined by reference to tradition. The key difference, however, is that tradition in the constitutional setting must always be measured against the overarching principles of equality and justice to which we have committed ourselves in the Constitution. Our traditions do not always reflect these defining principles; indeed, they include a repertoire of practices that we find unsavory today as we evolve in our understandings of liberty and equality. For that reason, a key element of constitutional interpretation is a judgment about which traditions or current social practices we think *are* consistent with our quest to achieve our enduring ideals and which are not. To put it differently, when Judge Cardozo concluded that the common law no-liability rule was unjust, it meant something very different from what it meant when the Supreme Court pronounced racial segregation to be unjust.

In the end, the metaphor of the common law does a great deal of good work toward increasing the acceptance and understanding of the Living Constitution. It just needs a little assistance.