**Assisted Living for the Constitution**
**(Forthcoming in DRAKE LAW REV. (2011))**

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Assisted Living for the Constitution

Forthcoming Drake Law Review (2011)

by Rebecca L. Brown*

"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. This embrace takes courage because it demurs to the 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."[2] Justice Scalia, too, has sardonically rejected any notion of evolving societal commitments, on the ground that he is unable to tell the difference between the maturing of a society and its rotting.[3] Better to eschew change altogether, he urges.

But David Strauss celebrates the living quality, as a great and redeeming feature of our constitutional architecture, 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. He shows us that 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. The other,

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

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

[3] ANTONIN SCALIA, A MATTER OF INTERPRETATION 40-41 (1997).

complementary, accomplishment of the book is the presentation of a strong affirmative case for why we should accept and have accepted a Constitution defined by evolution, not coercion. The evolution keeps the Constitution alive, argues Professor Strauss, through the common law method of reasoning from precedent.

The analogy to common law appeals to common sense. Clearly Professor Strauss is right to say that 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. At confirmation hearings for Supreme Court justices, one of the most popular lines of questioning always is the candidate's due regard for precedent—which is the characteristic issue in the common law method of decision-making. Nominees of all political stripes proclaim with pride their commitment to "*stare decisis*" in constitutional interpretation—fidelity to the cases that have come before.[4] Professor Strauss's analogy to the common law grounds this widespread intuition in theory, because precedent is the means by which the principles of the common law have evolved incrementally over time and responded to the felt needs of society as it changes. Precedent is the life-blood of the common law. There is, accordingly, a quite 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, always changing, always evolving, and in that sense living. Social practice gives rise to customs, courts recognize customs and memorialize them in legal decisions, the legal decisions in turn influence social practice, and as that practice continues to change, eventually the legal decisions adapt to reflect it. Each of the two forces in this exchange, social practice and the law, is both a cause and an effect of

[4] 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, 137-141 (ordering the 9 Justices in the sample by their expressed commitment, as nominees, to s*tare decisis*).

the other. Unquestionably, Professor Strauss taps into strong intuitions with his claim that so, too, the Constitution derives its animating principle from the same type of symbiotic exchange.

But it seems to me that in the context of the Constitution, 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, in fact, keeps the Constitution alive. That third player is political principle: an extrinsic force in the give-and-take between the courts and the community not part of the common law endeavor. My sense is that a core feature of the common law, in fact, is its backward-looking attention to the way things have been and the way things are. With the Constitution, in contrast, I suggest that the process of interpretation must also contain a forward-looking assessment of how things ought to be. In order to sustain the Living Constitution, I want to press the possibility that the Supreme Court needs assistance that the 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 the light of changed circumstances. That is its life support.

The distinctions that separate 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 *democratic legitimacy*. Professor Strauss conscripts the similarity between the two systems into very arduous service: He argues that because the two systems are so similar, then the established legitimacy of the one--common law--can serve to provide democratic legitimacy to the other, more vulnerable one--constitutional interpretation. I worry, however, that this holds only at the view from 30,000 feet. When we drill down to examine exactly how the two methods produce law, and the goals that each seeks to accomplish at its best, we will see that the theoretical foundations supplying each with its legitimacy must necessarily be distinct. Thus, the leveraging of legitimacy through the common law, I think, 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 then constitutional law, and bring my point home by probing the example Professor Strauss provocatively offers of the twin overrulings in *MacPherson v. Buick Motor Co*. and *Brown v. Board of Education*.

I. 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." For both, it can be said that "[t]he 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." In both cases, "[t]he content of the law is determined by the evolutionary process that produced it."[5]

Benjamin Cardozo, one of the greatest theoreticians of the common law, as well as one of its most able practitioners, understood the common law as the codification of norms of conduct that are recognized as custom by members of a community.[6] The idea is that practices evolve, and, more importantly, *expectations* evolve, regarding what people reasonably owe to one another in different contexts. These expectations are influenced, of course, by changing social conditions.

[5] Strauss at 37-38.

[6] John C.P. Goldberg, *Community and the Common Law Judge*: *Reconstructing Cardozo's Theoretical Writings*, 65 NYU L. REV. 1324, 1330 (1990) [hereinafter Goldberg, *Community*]; see BENJAMIN CARDOZO, THE NATURE OF JUDICIAL PROCESS (1921).

Cardozo uses the example of an old principle that A may conduct his business as he pleases, even if the purpose is to cause loss to B, unless the act involves creation of a nuisance. This is the case of the spite fence. "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. With the growing complexity of social relations, its inadequacy was revealed."[7] Later, then, by the time of Cardozo's observation, "what was once thought to be the exception is the rule, and what was the rule is the exception. A. may never do anything in his business for the purpose of injuring another without reasonable and just excuse." Thus he illustrated the genesis of "results more in harmony with past particulars, and, what is still more important, more consistent with the social welfare."[8]

It is important that the changes occur in life first, then 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 cryptically."[9] 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."[10] It moves incrementally, "inch by inch," as Cardozo put it, with the "power and the pressure of the moving glacier."[11] 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 custom. The law is not handed down to the people; it is handed up from the people.

[7] Id. at 24.

[8] Id. at 25.

[9] Goldberg, *Community*, at 1344.

[10] Id. at 1345.

[11] Cardozo at 25.

To the extent that the quest involves resort to principle, the principle percolates up from the practices, expectations and customs of people, and ultimately finds its way into articulation in the law, which continues to reevaluate and reassess. It is important that, in the common law, there is no notion of a principle, or universal maxim, separate from established customs. "I take these to be one and the same thing," Blackstone wrote. "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."[12] So a principle exists only if it captures an established practice.

Precedent is important to the process of identification of such principles precisely because it is a good source of information about the development of moral norms or customs.[13] Precedent is not iconic, nor is it valuable simply because it came before, but adds evidentiary value as a judgment 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 reliance on the lessons of the past".[14] I would add this clarification: that the normative reasoning in the common law is a direct *result* of an inquiry into the lessons of the past, and that *that* is the hallmark of the common law. Its normative dimension comes from within.

This makes sense of an otherwise strange view of Cardozo's, that fairness and justice are interchangeable with utility and social welfare. In the world of common law adjudication, the ideas of fairness and justice develop as community expectations about how individuals will treat one another,

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[12] Sir William Blackstone, 1 Commentaries on the Laws of England 66.

[13] See, e.g., MELVIN ARON EISENBERT, THE NATURE OF THE COMMON LAW 15-16 (Harvard 1988) (offering examples of three legal rules whose development involved consideration of moral norms: the rule on enforceability of contract modifications that are fair and reasonable in light of unanticipated circumstances; the rule requiring payment for a past benefit if there was already a moral obligation to pay; and the defense of unconscionability to a contract claim).

[14] Strauss at 84.

which is a part of the social understanding of what will make a community better off. Because of the endogenous nature of the principles derived, 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."[15]

Precedent is in some loose way, "authority," in the sense that it is a conclusion about the expectations or social norms at the time of its decision. But it is not a command in the sense that it articulated, in its own time, a static truth to be followed for all time.[16] 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 and the experience of the community over the ages."[17] Both of these characteristics are subject to adjustment as the current court identifies reasons that the prior case may no longer reflect accurately the object of the inquiry, which is the current set of norms on the issue. A judge is always free to test a previous articulation of the law against his or her own tradition-shaped judgment of its reasonableness.[18] Precedent contributes to the legitimacy of the common law because the established law "rests on and derives its authority from a shared sense of its reasonableness."[19]

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

[15] A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE 79 (Second Series) (A.W.B. Simpson ed. 1973).

[16] See Strauss at (explaining how the common law does not represent a "command theory" of regulation).

[17] GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 32 (Oxford 1986).

[18] Blackstone, 1 Commentaries 69-71.

[19] Postema at 195.

shamefaced, efforts, while giving lip service to the rule, to riddle it with exceptions and by distinctions reduce it to a shadow."[20] Professor Strauss artfully discusses this process with regard to the *Winterbottom* rule barring manufacturers' liability to consumers, unless the product was considered "inherently dangerous." Over time, the courts had expanded the reach of the "inherently dangerous" exception, until it was no longer meaningfully an exception at all. The courts were thus, over time, gravitating toward a new rule, which recognized expanding duties of a manufacturer to the persons who were placed at risk by its product. Still, however, these interim courts operated within the shell of the old rule. 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*.

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. Rather, Justice Cardozo, the author of *MacPherson*, identified an accepted moral idea—the idea that actors owe due care to others—and applied it in light of the evolving social understanding and expectations of the societal role of manufacturers in light of the harm that their products may potentially cause to consumers. Professor Professor Strauss documents a slow process whereby people began to expect more from the companies that held some power over a means of harm to them. 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. Thus, the common law transformed an existing social and moral norm into an enforceable legal norm.[21]

Notice that 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. Unexcused departures from

[20] Cardozo at 155.

[21] John C.P. Goldberg, *The Moral of MacPherson*, 146 U. PENN. L. REV. 1733, 1816-17 (1998).

expected behavior will be condemned as wrong, and perhaps even deserving of punishment."[22] The common law process, accordingly, produces profoundly majoritarian outcomes, and derives its legitimacy from so doing.

II. 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."[23] Rather than a reflection of shared expectations, 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. Professor Strauss makes the fair point that text rarely plays a pivotal role in constitutional adjudication.[24] Nevertheless, it does not necessarily follow that the text is insignificant in the entire realm of constitutional interpretation. Rather, in my view, the text represents the nation's commitment to perpetual self-government, and offers both a starting point and a set of boundaries for the identification of the principle that will decide each case. Even for those 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, probably considered 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 the book, the freedom of speech and the equal protection of the laws. According to Dworkin's moral reading, "these clauses must be understood in the way their language

[22] Goldberg, *Community*, at 1330.

[23] Jed Rubenfeld, Freedom and Time 183. (emphasis added).

[24] Strauss at 33.

most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power."[25]

Accordingly, although only a very few words will ever be at issue in a given case, the words do inform the inquiry. The Court 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. In order to approach that task with any sort of rigor, an interpreter must gain an understanding of the moral principle to which that constitutional language commits us. 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 seem to agree that there is a coherent claim to be made that the Constitution has a meaning, to be derived and applied in each case. That meaning 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—sources of guidance, helpful to the task, and having varying weights in the calculation depending on the case. None of those sources, however, is itself the *object* of the quest. For the believer 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

[25] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (Harvard 1996).

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. 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. The process of relying on precedent, for example, is critical to the common law, while it serves another function in constitutional law. An interesting empirical study of the statements of all the justices on the Rehnquist Court at their confirmation hearings on the subject of precedent reveals that not one of them said that following precedent was critical to the legitimacy of the judicial role.[26] Perhaps the closest was Justice Ginsburg's statement that following precedent was important as a constraint against a judge infusing his or her own values into the interpretation. This could perhaps be relevant to legitimacy, or perhaps to the correctness of decisions. But most of the reasons offered by nominees had to do with predictability, impartiality, and getting the benefit of the judgments of prior courts regarding the correct answer to constitutional questions.[27] All said that if they became convinced that the prior court had gotten it wrong, then the case should clearly be overruled. All agreed that the presumption in favor of following precedent should be significantly weaker in constitutional cases than in other kinds of cases. That is, 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 will be followed. If it does not, it is jettisoned.

[26] See Empirical Analysis, at 174-183.

[27] See id at 175 (Anthony Kennedy saying that precedent helps him get a sense of what the Constitution means by the great judges, teaching by example).

These differences between common law and constitutional interpretation emerge in the intriguing example that Professor Strauss develops in his book, comparing the whittling away of the no-liability doctrine after *Winterbottom* to the whittling away of the separate- but- equal doctrine after *Plessy*. Professor Strauss nicely draws out the dual nature of what Cardozo did in *MacPherson*. Cardozo used keen judgment in reading the decisions of the past as reflecting values other than those that were explicitly articulated in the decisions, demonstrating how the reading of precedent is more an art than a science. At the same time, or even perhaps aided by this insight, Cardozo adopted what he viewed as the better rule. 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."[28]

When we think of *Brown v. Board of Education*, I suggest that it seems much more like a decision that transformed civilization rather than merely regulating and ordering it. I am very interested in the way that Professor Strauss shows the incremental erosion of some of the theoretical premises of separate-but-equal before *Brown*. 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 did become nearly impossible to maintain, at least in a society that was racially stratified. One could always imagine a totally stigma-free separation, but only in the wholly idealized world in which all agree to it and it is not a tool for imposing racial hierarchy. That not being anything close to the case in mid-20th century America, I agree that the expanding notion of equality revealed in the pre-*Brown* cases put pressure on the separate-but-equal doctrine. 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 brought them.

But it seems to me that, even with this preparatory erosion, the outright rejection of separate-but-equal as a correct equality principle was still anything but a minor tweak. Even weakened, the

[28] Goldberg, Community, at 1342

words "separate but equal" played a validating role in all kinds of pervasive racial segregation. It articulated a principle that forced separation could still be considered equality under the law. That legitimating effect of the principle had not weakened before *Brown*; storefront signs throughout many parts of the country unapologetically proclaimed "Whites Only". 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, the change in governing principle was viewed as a dramatic upheaval of law *and* practice. Certainly to the NAACP lawyers who, with great concern and trepidation, had ultimately come to a decision to ask for the overruling of *Plessy*, their victory was no mere formality. There had been great fear that the strategy would fail, because it involved asking the Court for such a dramatic change in the principles defining the satisfaction of the state's obligation to accord equal protection. Amidst worry over the risk of pressing the 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.

"It is completely unrealistic," he wrote, "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."[29] Even many sympathizers with the cause of integration nonetheless worried that a judicial end to *Plessy* would be subject to attack both on its intellectual strength and on its interpretative legitimacy.[30] Moreover, the famous *New York Times* front page bearing the photo of Marshall on the steps of the Supreme Court below the huge banner headline, "High Court Bans School Segregation; 9-0 Decision Grants Time to Comply" suggests that this was not understood as an incremental or ceremonial acquiescence in a practice already adopted in all but name. Rather, it was a socially jarring and

[29] Richard Kruger, Simple Justice 524.

[30] Id at 529 (discussing concerns of Louis Pollak and Herbert Wechsler about overruling Plessy).

jurisprudentially vulnerable reversal of a norm that had persisted for decades, on the basis of a principle that could not plausibly have claimed to enjoy widespread and shared acceptance beforehand.

I do not at all mean to suggest that Professor Strauss is trivializing *Brown*. I think he is seeking to strengthen it by situating it in another tradition. But I do worry 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. That is its reliance on the principle of justice even in the face of much popular disagreement.

This is why the common law metaphor cannot provide legitimacy to constitutional adjudication. The deep definitional interdependence of common law and established custom, which gives to the common law its elegant democratic pedigree, is not part of our conception of constitutional adjudication. While any particular constitutional interpretation could certainly be in accord with majoritarian beliefs, that result is not definitional, and certainly there will be times when the best application of a constitutional provision will not follow current popular expectations or sympathies. So if the process of constitutional adjudication is to be considered democratically legitimate, it will have to be for some other reason.

I argue that it is the very reliance on principles of justice that give our Living Constitution its legitimacy as a democratic institution. The Constitution exists to establish the conditions of democracy, which in turn exist to enable self-government and strive for a just society. The practice of interpreting the Constitution as a living document 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 primarily to tradition. But the key

difference 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 include such unsavory practices as allowing a husband freely to beat his wife as long as the stick was no bigger than his thumb. We have a tradition of slavery that occupied nearly half of our life as a nation. We have a tradition of putting people in jail for voicing political opinions. And so there is a key element in constitutional interpretation that requires judgment about which traditions or current social practices we think *are* consistent with our quest to achieve our enduring ideals and which are not. In other words, for a common law judge like Cardozo to conclude that a no-liability rule is unjust means something very different from what it means when the Supreme Court pronounces that racial segregation is unjust.

In the end, I love the metaphor of the common law as a way to increase acceptance and understanding of the vital idea of a Living Constitution. I just think it needs a little assistance.