

2019

## The Living Constitution and Moral Progress: A Comment on Professor Young's Boden Lecture

David A. Strauss

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Constitutional Law Commons](#), [Law and Race Commons](#), and the [Law and Society Commons](#)

---

### Repository Citation

David A. Strauss, *The Living Constitution and Moral Progress: A Comment on Professor Young's Boden Lecture*, 102 Marq. L. Rev. 979 (2019).

Available at: <https://scholarship.law.marquette.edu/mulr/vol102/iss3/11>

This Response or Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

# THE LIVING CONSTITUTION AND MORAL PROGRESS: A COMMENT ON PROFESSOR YOUNG'S BODEN LECTURE

DAVID A. STRAUSS\*

Professor Ernest Young's Robert F. Boden Lecture is exemplary in any number of ways. It tells an important story, and it tells that story well. It does not shy away from confronting the ugliness in our history. There is no hint of unwarranted self-congratulation. At the same time, Professor Young's account, characteristically for him, is thoughtful and careful. One of his central themes is that there is a serious weakness in the "living constitution" tradition, a weakness illustrated by the way that the promise of the post-Civil War constitutional amendments was compromised—destroyed, really—over the following decades. But he does not go from there to a stump-speech attack on living constitutionalism or a simplistic claim that originalism, the approach that is usually contrasted with living constitutionalism, must be correct. On the contrary: he suggests that some form of living constitutionalism is probably the right way to think about constitutional law.<sup>1</sup> He recognizes that questions about how to understand the Constitution are complicated. But beyond that, he sees that, in the end, deeper cultural forces, rather than theoretical insights, are likely to determine whether we make progress.<sup>2</sup> In both substance and style, Professor Young has a lot to teach us.

Professor Young's lecture highlights two common fallacies in the ways people think about how the law develops—indeed in the ways people think about how history develops. One fallacy is the idea that moral progress is inevitable. Maybe the arc of the moral universe bends toward justice, although, as Professor Young says, we don't even know that.<sup>3</sup> But we do know that, at best, it is a long arc, and in the meantime many lives can be ruined. Professor

---

\* Gerald Ratner Distinguished Service Professor of Law, the University of Chicago Law School. I am grateful to Dean Joseph Kearney of Marquette Law School and to my friend Ernie Young for the invitation to comment on Professor Young's Robert F. Boden Lecture.

1. Ernest A. Young, *Dying Constitutionalism and the Fourteenth Amendment*, 102 MARQ. L. REV. 949, 962–63 nn.76–77 and accompanying text (2019).

2. *Id.* at 974 nn.142–43 and accompanying text.

3. *Id.* at 960 n.69 and accompanying text.

Young suggests that the “living constitution” tradition is associated with the idea that moral progress is inevitable.<sup>4</sup>

The other fallacy is the golden-age myth. It is the idea that things were great at some magical point the past, and if we could only go back, things would be great again. As Professor Young shows, while the past had admirable aspects—the promise of the immediate post-Civil War constitutionalism, for example—there are less admirable aspects as well. Uncritical adulation of the past and the naïve belief that all change is change for the better: both are terribly misguided. If you don’t think so, read Professor Young’s lecture.

For me, though, Professor Young’s account shows not the weakness but the strength of the idea of a living constitution. As I understand it, the idea that we have a living constitution makes two claims. One is a claim about what our constitutional practice has been in fact. The other is a claim about what it should be: how we should think about the constitutional issues that we confront, whether we are judges, or other public officials, or commentators, or citizens.

The descriptive claim—the claim about what we have actually done in the past in deciding constitutional issues—is that the Constitution is “living” in the sense that our understanding of what is required by the Constitution has changed over time. If there were a bar exam in 1868 with a constitutional law section, and you wanted to get credit for your answers, you’d have to give different answers from the ones that would get you (hypothetical) credit in 1896, or 1937, or 1954, or 2019. The answer to the question “What does the Constitution require?”—the answer that would be accepted by the mainstream of the legal profession or even the country generally—has changed over time. Not all of those changes (in fact, relatively few of those changes) were brought about by formal amendments to the Constitution. That is one important sense in which we have a living Constitution.

Those changes over time have not always been for the better. That is exactly Professor Young’s point. But it does not follow that the idea of a living constitution is mistaken. On the contrary: it should not be part of the idea of a living constitution to claim that these evolutionary developments always improve things. That would accept the myth of inevitable moral progress. As Professor Young says, any account of the Constitution and constitutional law has to acknowledge the possibility of retrogression, not just progress. Living constitutionalism can—and must—do so.

It might be tempting to say that this is why the other aspect of living constitutionalism—the prescription for how we should think about the constitutional issues that we confront—is wrong. Evolution in constitutional

---

4. *Id.* at 974 n.142 and accompanying text.

law, the argument would go, is precisely the problem. Instead of allowing, or endorsing, evolution, we should hold fast to the Constitution as an anchor against drift. As often as not, drift will run us aground; evolution will go in a bad direction; a supposedly living Constitution will be a degrading one. That is the argument that originalists make. And a less subtle thinker than Professor Young would draw that lesson from his story.

But that argument just substitutes the golden-age myth for the myth of inevitable moral progress. There is no single time that we can look back to for the solution to our problems, and that includes the time when the Fourteenth Amendment was adopted. Of course, we would have been much better off if the commitments of the generation that adopted the Fourteenth Amendment had been honored in the decades that followed.<sup>5</sup> But by the middle of the twentieth century, the understandings of that generation would have been an obstacle to progress. They were comfortable with racial segregation in many settings, and they had ideas about, for example, women's equality that we would unequivocally reject today.

As I understand it, at least, the prescriptive part of living constitutionalism draws on two sources. One is a version of Professor Young's "stiff-necked" or "grumpy" constitutionalism,<sup>6</sup> although maybe it should be not quite as stiff-necked or grumpy as he envisions. The idea is to approach the past with an attitude of humility and to take the lessons of the past seriously—all the lessons of the past, not just the teachings of the supposed golden age but what has been done by generations since then. This is a familiar idea in the law. It is the idea behind the common law. Law is derived from past practices. Those practices include judicial precedent, and they also include what you might call nonjudicial precedent—the practices of other branches of government and even of society at large.

The other source of living constitutionalism—a crucial source—is moral judgment. Sometimes, of course, the law is clear. But when the law is not clear, the judgment that certain principles are more fair, or more just, or better as a matter of public policy can be part of deciding what the law *is*—along with precedent, tradition, text, and other distinctively legal sources. The common law has always blended moral judgment with other sources of law.

Precedent, for example, even if limited to judicial precedent and certainly if conceived more broadly, does not dictate a single direction for the law. Among the possible paths that precedent leaves open, a judge—or another official or a citizen—has to choose on the basis of a moral judgment of some kind. Sometimes it might even be necessary to depart from the path that

---

5. See, e.g., *id.* at 975–76 nn.146–47.

6. See *id.* at 977 n.149 and accompanying text.

precedent identifies, because, even giving the lessons of the past full credit, they are simply unacceptable. In all of these instances—whether the question is how to understand the multifaceted lessons of the past, or whether to decide to go in a different direction—the basis for the decision will be the kind of moral judgment I have described. What other basis can there be, for such a choice? And, as I said, that kind of evaluation—a moral or policy evaluation within a context defined by precedent—has always been characteristic of the common law.

I think that living constitutionalism, so understood, gives us a way to approach the ugly chapter of our constitutional history that Professor Young describes. Precedent alone, however broadly conceived, is not adequate to that task. Professor Young shows this. He says that the “mechanisms” of living constitutionalism, which he identifies, led to the degradation of constitutional law.<sup>7</sup> Precedent is among those mechanisms, and it alone did not prevent—in some ways, it promoted—the authoritarian and racist regime that Professor Young describes. But I am not sure that Professor Young’s go-slow, stiff-necked constitutionalism would have done better. In many ways, the architects of racial segregation were the small-*c* conservatives, the ones who wanted to go slowly. Racial equality was a radical idea in the mid-nineteenth century. It would not have been surprising if go-slow constitutionalists had resisted it.

It is the other aspect of the living constitution tradition—the candid acknowledgment that moral judgments should play a role in the law—that gives us a way to say what we want to say about the racist regime Professor Young describes. The past left open several paths after the Civil War, as of course it often does. There was a tradition of racism and white supremacy. But there is an American tradition of equality that extends back at least to the Revolution. There was an abolitionist tradition that, during the war years, had moved from the fringe to the mainstream. There was a mainstream acknowledgment that African Americans were entitled to certain rights, even if not full racial equality.

The generation that Professor Young describes had a choice of what to make of those historical currents that it inherited—which ones to promote and extend, and which ones to abandon. They made the wrong choice—the morally wrong choice. The regime of white supremacy was morally evil. Our understanding of the Constitution should accommodate that view. That is not the whole of the law, but it is part of the law.

Two questions naturally arise. To say that living constitutionalism is an amalgam of precedent and moral judgment seems to leave things too indefinite;

---

7. *Id.* at 960–61 nn.69–70 and accompanying text; *see also id.* at 950–51 n.9 and accompanying text.

how can we decide when one should leave off and the other begin? And, maybe most obviously, whose moral judgment? In many ways, the point of a legal system is to resolve issues in a society in which people's moral views differ.

There is no algorithmic answer to the first question. The best we can do is to approach the problem with an attitude of humility—a recognition that we can learn from the past. But humility does not preclude shaping our inheritance from the past in a way that makes it better or even making more radical alterations. Take, for example, the common assertion that *Plessy v. Ferguson* was “wrong the day it was decided” in 1896.<sup>8</sup> It was morally wrong, of course, but as Professor Young says (in addressing originalist claims about *Plessy*), we are kidding ourselves if we think it is an easy question whether *Plessy* was legally wrong.<sup>9</sup> There was substantial support in the usual sources of law—including both precedent and original understandings—for the Court's decision. It is true that some of those usual legal sources (for example, the common-law principle that common carriers may not discriminate among customers) could be used to support the opposite conclusion. But if we don't recognize that moral judgments can sometimes play a role in legal decisions, then it is very hard to make the case that *Plessy* is legally wrong. If we do recognize that role, *Plessy* becomes legally far more questionable. But it's still not a question that can be resolved axiomatically.

As for the final issue—isn't it troubling to allow controversial moral judgments to resolve legal issues?—the answer is that, troubling or not, it is unavoidable. And it is important to acknowledge that it is unavoidable. Distinctively legal materials settle a lot of issues but not every issue, and when more than one path is left open, we must confront the question: How else should we decide what the law requires? Part of the reason that *Brown v. Board of Education* was legally right is that segregation was morally wrong. That is not all of the reason, but that is part of the reason. And part of the reason that the regime described by Professor Young was legally wrong is that it was morally evil. Why shouldn't that be part of the reason, in each instance? And we should admit that it is.

That point, I think, identifies two of the virtues of living constitutionalism. It enforces a duty of candor. Judges (and officials and commentators and citizens) will, in fact, allow their moral views to affect their legal judgments sometimes, and they should admit it. They should expose their views to criticism, rather than hiding behind, for example, the framers. And living constitutionalism, understood in this way, also forces us to recognize the limits

---

8. *Id.* at 974 n.143.

9. *Id.* at 973 n.141.

of the law. As Professor Young's lecture shows,<sup>10</sup> in the end, there is only so much the law can do to save a society from its own moral failings.

---

10. *E.g., id.* at 973–74 nn.141–42.