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Do We Have a Living Constitution?

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One of the most fundamental facts about American constitutional law is that it changes. Some answers that would be marked correct in the constitutional law part of the bar exam in 1900 (if there were bar exams then), or 1930, or 1950 would be marked incorrect today. Some arguments that would have been dismissed as frivolous in those years are uncontroversially correct today and vice versa: some claims that would have been immediately accepted in those years would not be offered by any serious lawyer today.

For example, in 1900, Congress lacked the power to regulate relations between labor and management; in 1930, the claim that Congress had such power would have been, at most, intensely controversial; today it is taken for granted that Congress has that power.[1] Even in 1950—and certainly before then—states could pass laws that forbade women from working in certain occupations; today those laws are paradigm examples of unconstitutionality.[2] In 1900, the power of states to enforce racial segregation in public schools was beyond serious dispute; today, of course, the unconstitutionality of that kind of segregation is one of the fixed points of constitutional law.[3] In 1900 or 1930, the idea the Constitution might

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1. *Compare* United States v. E.C. Knight Co., 156 U.S. 1, 10–18 (1895) (discussing Congress's commerce power and holding the Sherman Antitrust Act could not prevent "creation of a monopoly in the manufacture of a necessary of life"), *and* Carter v. Carter Coal Co., 298 U.S. 238, 309–10 (1936) (noting Congress does not have the power to regulate employee wages and hours and holding Congress lacked power under the Commerce Clause to regulate coal), *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36–37 (1937) (holding power to regulate commerce is "plenary" and Congress may regulate intrastate commercial activities "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions").

2. *Compare* Goesaert v. Cleary, 335 U.S. 464, 466–67 (1948) (holding the Equal Protection Clause did not invalidate a state law prohibiting women working as bartenders), *with* United States v. Virginia, 518 U.S. 515, 543–44, 556–58 (1996) (discussing disapproval of past efforts to exclude women from law and medicine and holding the Virginia Military Institute's admission policy excluding women violated the Equal Protection Clause).

3. *Compare* Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) ("[W]e cannot say that a law which authorizes or even requires the separation of the two races in

require every member of a state's legislature to represent the same number of people—what we refer to today as "one person, one vote"—was unheard of; in the early 1960s, when that principle was established by the Supreme Court, it was intensely controversial; today, it is taken for granted as a core principle of American constitutional law.[4]

These changes, and many others like them, have at least two things in common. The first is that they concern important matters; they are not trivial or technical details. American constitutional law has changed not just in its periphery but in its core: the scope of federal power, the treatment of minorities and women, the composition of state governments, and other comparably important issues.[5] The second is that these changes in the law were not the result of formal amendments to the Constitution. No constitutional amendment authorized Congress to regulate labor relations; in fact, an amendment that would have authorized Congress to ban child labor was rejected.[6] There was a constitutional amendment about sex discrimination, but it guaranteed women only the right to vote.[7] The Supreme Court's decisions on school segregation relied on the Fifth and Fourteenth Amendments, which were adopted long before those decisions and were the governing texts during the period when segregation was not considered problematic.[8] No change in the text of the Constitution

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public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954), *with Brown*, 347 U.S. at 495 ("Separate educational facilities are inherently unequal.").

4. *Compare* Baker v. Carr, 369 U.S. 186, 208–10 (1962) (finding justiciable equal protection claim under the Fourteenth Amendment for state malapportionment), *and* Reynolds v. Sims, 377 U.S. 533, 565–66 (1964) ("Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."), *with* Colegrove v. Green, 328 U.S. 549, 552–56 (1946) (plurality opinion) (declining to intervene in case of claimed malapportionment because "the Constitution . . . precludes judicial correction").

5. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964) (holding the First Amendment limits states' power to award damages for defamation to public officials).

6. *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 257, 307–13 (1996).

7. U.S. CONST. amend. XIX.

8. *See Brown*, 347 U.S. at 493–95 (holding the Fourteenth Amendment prohibited school segregation in the states); Bolling v. Sharpe, 347 U.S. 497, 499–500

explains the Court's decision to invalidate state districting practices that had been in effect since the early days of the Republic.[9]

If having a "living" Constitution means having a Constitution that changes over time in ways other than by formal amendment, then in a fundamental way there is only one plausible answer to that question. We can debate whether the changes I mentioned mean "the Constitution" has changed, or "constitutional law" has changed, or our "understanding" of the Constitution has changed. But that is mostly a debate about terminology; it is not clear that anything important or controversial turns on those different verbal formulations. What is clear is that even when the text does not change, answers to the question "what does the Constitution require" do change.

The real point of dispute about the nature of American constitutional law, I believe, concerns the question of what justifies such a change. We have to answer that question not just out of curiosity but because we have to know when changes in constitutional law will be appropriate in the future. On this question, there does seem to be genuine disagreement. One possible view, which I will call "originalism" (even though there are professed "originalists" who might not accept this view) is that changes in constitutional law can be justified only by some new discovery about what the relevant provision of the Constitution was taken to mean when it was adopted. On this view, the true requirements of the Constitution have never changed; we were just mistaken about what they were. And, crucially, we correct our mistakes by historical inquiry: by uncovering the original meaning of the provision in question.

There are several well-known problems with this account of constitutional change. Unearthing the original meanings of constitutional provisions will often be an impossible task, just as a matter of history: evidence of those meanings may be inconsistent, or it may simply not exist.[10] People might have disagreed about the meanings at the time the provision was adopted. Even if they agreed then, there can be serious questions about how to adapt or translate their understandings into today's world: can we really make confident claims about how the Constitution,

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(1954) (holding the Fifth Amendment prohibited school segregation in the District of Columbia).

9. *See Brown*, 347 U.S. at 493–95; *Bolling*, 347 U.S. at 499–500.

10. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 7–10 (2010) (describing problems that arise in attempting to unearth original meaning of constitutional text).

interpreted according to its original understandings, applies to video games or the Internet?[11]

But for present purposes, the more important problem with the originalist account of constitutional change is that it cannot explain the changes that have happened. The Supreme Court's rulings on school segregation, sex discrimination, "one person, one vote," and many other subjects—rulings that are universally accepted today—simply cannot be reconciled with what the people who drafted, adopted, or ratified the relevant constitutional provisions believed those provisions accomplished.[12] Many originalists, to their credit, candidly admit as much.[13] But they do not really explain why they continue to adhere to a theory that provides such an inadequate explanation of a central feature of our constitutional system. Some originalists seem to want to quarantine the principles they cannot explain—to say, in effect, that while the prohibition against sex discrimination, the present-day extent of federal power, or the "one person, one vote" principle cannot be justified on originalist grounds, we should accept those doctrines just because they have become so well-established.[14] But this approach amounts to denying that these decisions—and their universal acceptance—can illustrate anything about how our system should work. How are we to know ahead of time when it is lawful to reach a result that is inconsistent with the original understandings? The judges who decided the cases on school segregation, sex discrimination, and the other issues could not have known that their rulings were destined for universal acceptance; even if they had, that alone would not have been a good reason for the decisions.

That leaves us with a puzzle: when are changes of this kind justified? The critics of the idea of a living constitution say that living constitutionalism is just a warrant for judges to do what they want.[15] That

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11. These objections have been made, in various forms, by many people. *See id.* at 18–23.

12. *See id.* at 12–18 (discussing originalism's failure to account for accepted and essential constitutional changes).

13. *See, e.g.*, Michael W. McConnell, Book Review, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2417 (2006).

14. *See id.* ("[M]any decisions . . . have become part of the fabric of American life . . . .").

15. *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976) ("Judges . . . are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state

criticism has to be taken seriously. But I believe there is an answer. The answer is the common law—a form of law that has been central to the American legal system from the start and to the English system for hundreds of years before that. The common law is a system that emphasizes precedent and tradition but that allows for innovation—in carefully circumscribed ways.[16] Many of the central doctrines of the law of torts, contracts, and property are the product of common law reasoning; my claim is that many of the central doctrines of American constitutional law are the product of the same kind of reasoning.[17] The living constitution of the United States is a common law constitution in the sense that the principal mechanism of change is the evolution of the law through the development of precedent. The answer to the critics who say living constitutionalism is just an excuse for judicial fiat or whim is that the common law has been restraining judges for centuries in areas like contracts and property.[18]

It is important to be clear on what the common law approach can and cannot provide. The common law is not an algorithm; it does not dictate results with mathematical certainty.[19] When the precedents are clear—which is often true—the common law approach leaves no room for reasonable disagreement.[20] But in the exceptional cases, when the precedents do not dictate a result, the common law approach does leave some room for judgment. That approach is best seen as resting on a set of attitudes: attitudes of humility, distrust of abstractions, and a willingness to accept arrangements that seem to have worked tolerably well for a long period of time.[21] Crucially, the common law approach recognizes that considerations of fairness and good policy are a legitimate part of making a decision about what the law is.[22] When the precedents do not dictate a result, the result can be shaped partly—but only partly—by those kinds of

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and federal administrative officers . . . .").

16. *See, e.g.*, STRAUSS, *supra* note 10, at 62–76 (discussing common law development of the American doctrine of free expression).

17. *See id.* at 33–49.

18. *See id.*

19. *See id.* at 40–42.

20. *See id.* at 39 ("[M]ost potential cases do not even get to court, because the law is so clear . . . .").

21. *See id.* at 40–42.

22. *See, e.g.*, *id.* at 80–85 (discussing the policy considerations embedded in Justice Cardozo's opinion in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916)).

considerations.[23]

The most famous Supreme Court decision of the twentieth century, *Brown v. Board of Education*, is an example of the common law approach in action and of why that approach is superior to originalism.[24] *Brown* relied on the Equal Protection Clause of the Fourteenth Amendment to strike down racial segregation in public schools.[25] It is widely accepted that when the Fourteenth Amendment was adopted, it was not thought to outlaw racial segregation in public schools.[26] The amendment was understood to require a kind of racial equality, but segregation was not seen as inconsistent with equality, at least in public education—hence the notorious doctrine of "separate but equal."[27]

The question is how *Brown*—now universally accepted—can possibly be a legitimate decision when it rejected an understanding of the Fourteenth Amendment that was held when that amendment was adopted.[28] The common law approach gives us an answer.[29] That might seem surprising, because *Brown* is thought of as a decision that overturned a precedent—*Plessy v. Ferguson*, the decision identified with "separate but equal."[30] But the best justification of *Brown* is that it followed from a line of precedents that had steadily eroded "separate but equal"; *Brown* was just the last step in a progression.[31] This is how the common law works.[32]

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23. *See id.* at 40–42 (discussing how attitudes shape common law when precedent does not govern).

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

25. *Id.* at 495.

26. *See, e.g.*, Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955) ("[S]ection I of the fourteenth amendment . . . as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation.").

27. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (affirming the constitutionality of the "separate but equal" doctrine), *overruled by Brown*, 347 U.S. 483.

28. *Compare* Bickel, *supra* note 25, at 58 (concluding the Fourteenth Amendment was not originally understood to apply to segregation), *with Brown*, 347 U.S. at 495 (holding racial segregation in schools violated the Fourteenth Amendment's Equal Protection Clause).

29. *See* Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 708 (1992) ("Given what came before, the real question is why *Brown* needed to be decided at all." (citing *Brown*, 347 U.S. 483)).

30. *Plessy*, 163 U.S. 537. Technically, *Brown*, a decision about public schools, did not overrule *Plessy*, a decision about public transportation. But for all practical purposes *Brown* marked the end of the *Plessy* era.

31. *See* Seidman, *supra* note 29, at 707–08 (citations omitted) (summarizing

Plessy, decided in 1896, upheld a state law requiring railroads to provide "'equal but separate accommodations for the white[] and colored races . . . .'"[33] In the three decades following *Plessy*, the Court applied the "separate but equal" principle in two cases involving education without reconsidering its validity.[34] But at the same time, the Court began to sow some of the seeds of the common law development that eventually did away with "separate but equal."

McCabe v. Atchinson, Topeka, & Santa Fe Railway Co. was a challenge to an Oklahoma law requiring "separate but equal" railroad facilities.[35] This law permitted a railroad to have sleeping, dining, and chair cars for whites even if it did not have similar cars for blacks.[36] The State argued that the law made sense because there was not enough demand from blacks for these kinds of cars.[37] The Court rejected that argument:[38]

> It is the individual who is entitled to the equal protection of the laws, and if he is denied . . . a facility or convenience in the course of his journey which under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.[39]

But this explanation by the Court did not really answer the State's argument. If there were limited demand for certain kinds of passenger cars on a particular route, or on particular days of the year, and the railroad shifted the cars to other routes or other days to satisfy the greater demand, no one would think that the railroad had denied anyone equal treatment in any culpable sense. The only way to explain the decision in *McCabe* is to suppose that the Supreme Court understood that the different treatment of African-Americans presented special issues: that differences that would be unobjectionable or even benign in a nonracial context become

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the decisions eroding the "separate but equal" doctrine).

32. *See* STRAUSS, *supra* note 10, at 85–92; David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 862–68 (2007).

33. *Plessy*, 163 U.S. at 540 (citation omitted).

34. *See* Gong Lum v. Rice, 275 U.S. 78, 86–87 (1927); Cumming v. Cnty. Bd. of Educ., 175 U.S. 528, 545 (1899).

35. McCabe v. Atchison, Topeka, & Santa Fe Ry. Co., 235 U.S. 151, 158–59 (1914).

36. *Id.* at 161.

37. *See id.*

38. *Id.* at 161–62.

39. *Id.*

objectionable when racial equality is at stake.[40] This is a glimmering recognition that "separate but equal" might be very hard to maintain, even in principle—a recognition that ultimately was at the heart of the decision in *Brown*.

Three years later, in *Buchanan v. Warley*, the Court invalidated a statute that forbade whites from living in a block where a majority of the homes were occupied by blacks and vice versa.[41] The suit was brought by a white seller seeking specific performance of a contract to sell to a black person.[42] The Court's reasoning emphasized the seller's right to dispose of his property as he saw fit, rather than any right to be free from racial discrimination.[43] But the State had defended the law as a permissible regulation of property.[44] That defense made the tension with *Plessy* apparent: if "separate but equal" is a reasonable form of regulation of one kind of economic transaction—the purchase of a railroad ticket—why is the checkerboard law, arguably a version of "separate but equal," not a reasonable regulation of real property?

Twenty years later, after the NAACP's legal campaign against Jim Crow laws had begun, those seeds sown in *McCabe* and *Buchanan* bore fruit. In *Missouri ex rel. Gaines v. Canada*, an African-American student was denied admission to the all-white University of Missouri Law School.[45] Missouri operated an all-black state university, Lincoln University, that did not have a law school.[46] Instead, Missouri gave black law school applicants what was, in effect, a voucher: state law authorized state officials to arrange for blacks to attend law school in neighboring states and to pay their tuition.[47]

The Court ruled that this scheme did not satisfy "separate but equal."[48] The Court refused to address arguments that out-of-state opportunities for the student were equal to those in Missouri.[49] "The basic consideration is not as to what sort of opportunities other States provide,

40. *See id.*
41. Buchanan v. Warley, 245 U.S. 60, 81–82 (1917).
42. *Id.* at 69–70.
43. *Id.* at 80–82.
44. *Id.* at 73–74.
45. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 342 (1938).
46. *Id.* at 342.
47. *Id.* at 342–43.
48. *See id.* at 349–52.
49. *Id.* at 349.

or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to [blacks] solely upon the ground of color."[50] Because a black resident, but not a white resident, would have to leave the state for a legal education, the Court concluded there was a denial of equal protection of the laws.[51] The Court also relied on *McCabe* to dismiss Missouri's argument that few African-Americans in Missouri sought a legal education (Gaines was, apparently, the only one who ever had).[52]

There is a logical succession from *McCabe*, decided in 1914, to *Gaines*, decided in 1938, and from *Gaines* to *Brown*, decided in 1954.[53] Theoretically, after *Gaines*, a state might still have been able to satisfy the Constitution by establishing a separate law school for blacks.[54] Given the limited number of black applicants, however, that was impractical—a circumstance *McCabe* and *Gaines* said was irrelevant.[55] So, as a practical matter, *Gaines* left many states with no choice but to admit blacks to graduate school.[56] Perhaps more important, by refusing to consider the argument that out-of-state law schools were as good as Missouri's, the Court was, in effect, holding that the provision of tangibly equal educational opportunities was not enough to satisfy "separate but equal."[57] The state had to treat blacks and whites equally in some way that went beyond tangible equality.[58] In this way, *Gaines* suggested, symbolism mattered, not just tangible equality. That principle was ultimately incompatible with "separate but equal."

In the sixteen years after *Gaines*, the Court did not decide any more "separate but equal" cases, but it did invalidate racial discrimination in jury selection,[59] hold the whites-only primary unconstitutional,[60] and rule that

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50. *Id.* at 349.

51. *See id.* at 351–52.

52. *Id.* at 350–51 (citations omitted).

53. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); *Gaines*, 305 U.S. 337; McCabe v. Atchison, Topeka, & Santa Fe Ry. Co., 235 U.S. 151 (1914).

54. *See Gaines*, 305 U.S. at 349–51 (citations omitted).

55. *See id.* at 350 (citations omitted) (holding a limited demand for education among African-Americans does not excuse discrimination against African-Americans); *McCabe*, 235 U.S. at 161–62 (holding a limited demand for certain railroad accommodations among African-Americans does not excuse discrimination against African-Americans).

56. *See Gaines*, 305 U.S. at 352.

57. *See id.* at 349–50.

58. *See id.*

59. Akins v. Texas, 325 U.S. 398, 403–04 (1945).

segregation in interstate transportation facilities violated the Commerce Clause.[61] In 1948, the Court in *Shelley v. Kraemer* held that the Constitution forbade the enforcement of racially restrictive covenants.[62] Also in 1948, in *Sipuel v. Board of Regents of the University of Oklahoma*, the Court held that Oklahoma violated the Equal Protection Clause when it excluded an African-American from the University of Oklahoma law school because she was black.[63] The Court ruled that the case was controlled by *Gaines*.[64]

Then, two years later, the Court effectively took away whatever breathing room *Gaines* left for "separate but equal." In *Sweatt v. Painter*, the Court held a law school Texas established for African-Americans was not equal to the University of Texas Law School.[65] The Court identified the substantial tangible inequalities between the two schools but went out of its way to say that "those qualities which are incapable of objective measurement but which make for greatness in a law school" were "more important."[66] The newly established school could not possibly match the University of Texas in those respects.[67]

McLaurin v. Oklahoma State Regents for Higher Education, decided the same day as *Sweatt*, turned entirely on intangible factors.[68] It held that "separate but equal" was not satisfied when an African-American was admitted to a previously all-white graduate school but was required to sit in a certain seat in the classroom, alone in the cafeteria, and at a special table in the library.[69] The Court explained that these conditions harmed the student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[70] After *Sweatt*, a state could not satisfy "separate but equal" by establishing a new all-black graduate school, because any such school, however tangibly equal,

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60. Terry v. Adams, 345 U.S. 461, 469–70 (1953).
61. Morgan v. Virginia, 328 U.S. 373, 385–86 (1946).
62. Shelley v. Kraemer, 334 U.S. 1, 21–23 (1948).
63. Sipuel v. Bd. of Regents, 332 U.S. 631, 632–33 (1948).
64. *Id.* at 633.
65. Sweatt v. Painter, 339 U.S. 629, 635–36 (1950).
66. *Id.* at 634.
67. *See id.*
68. McLaurin v. Okla. State Regents, 339 U.S. 637, 639–41 (1950) (noting the intangible factors "handicapped [the African-American student] in his pursuit of effective graduate instruction").
69. *Id.*
70. *Id.* at 641.

could not possibly match the intangible assets the white school had.[71] After *McLaurin*, a state could not segregate African-Americans within the established white school.[72] What was left? "Given what came before, the real question is why *Brown* needed to be decided at all."[73]

Of course, *Brown* was not received as merely the formal, more or less inevitable culmination of a common law evolution. The justices themselves apparently did not think of *Brown* that way. *Brown* was much more controversial than any of the earlier decisions. There are many possible reasons for this—*Brown* involved grade schools and high schools, not postgraduate education, and the explicit rejection of separate but equal had tremendous symbolic significance. But on the question of the justification of *Brown*—as opposed to the symbolic or political effect it had on the South and the nation—*Brown* had solid grounding in precedent.[74]

This is not to say that *Brown* was dictated by the earlier cases.[75] The Court in *Brown* was, without question, shaping the law in a way that reflected its views about the immorality of racial segregation.[76] But that kind of shaping—treating precedents as sometimes, to some degree, malleable, but far from totally manipulable—is a part of the common law approach. At the same time, the decision in *Brown* could rely on the earlier cases to show, in effect, that the formal abandonment of the old doctrine was no revolution but just the final step in a common law development.[77] The Court's views about the morality of segregation were buttressed by the lessons of the past, which is consistent with the common law's demand for humility.[78] Earlier Courts, trying to apply separate but equal, kept coming to the conclusion that the particular separate facilities before them were not equal. In concluding that separate could never be equal, the Warren Court was, at most, taking one further step in a well-

71. *See* Sweatt v. Painter, 339 U.S. 629, 634–36 (1950).

72. *See McLaurin*, 339 U.S. at 638–39.

73. Seidman, *supra* note 29, at 708.

74. STRAUSS, *supra* note 10, at 91.

75. *Id.* at 92.

76. *See* Brown v. Bd. of Educ. 347 U.S. 483, 494 (1954) ("To separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone."); *see also* STRAUSS, *supra* note 10, at 92.

77. STRAUSS, *supra* note 10, at 92.

78. *Id.*

established progression—it was acting as a common law court.[79]

In fact, *Brown* illustrates an important way in which the common law approach is superior to approaches that claim simply to be discovering original meanings.[80] The common law approach allows courts to be candid. Of course the immorality of segregation played a role in *Brown*.[81] For a court to claim that a moral judgment about segregation played no role in the decision—or for a commentator, after the fact, to try to justify *Brown* without acknowledging that moral judgments played a role—would almost certainly be disingenuous. The important point is that moral judgments are not the only factor. In the common law approach, the role of those judgments is limited by the demand that decisions be justified by reference to precedent.

This is, I believe, the way the Constitution changes—or, if you prefer, the way constitutional law or the requirements imposed by the Constitution change—in our system. This is the form our "living Constitution" takes. To say this is not to disparage the role played by the text, which is absolutely crucial.[82] But anyone who tries to understand change in our constitutional system has to look beyond the text to precedents, traditions, and the methods of the common law. Our living Constitution is a common law Constitution.

79. *Id.*; *see also, e.g.*, McCabe v. Atchison, Topeka, & Santa Fe Ry. Co., 235 U.S. 151, 161–62 (1914) (finding that, with respect to railroad transportation, "substantial equality of treatment of persons traveling under like conditions cannot be refused").

80. *See* STRAUSS, *supra* note 10, at 78–80.

81. *See id.* at 77 (noting some Justices were opposed to segregation but were initially unsure that they could declare it unconstitutional).

82. *See generally id.* at 99–114 (discussing the pivotal role of the written Constitution in the development of the living Constitution).