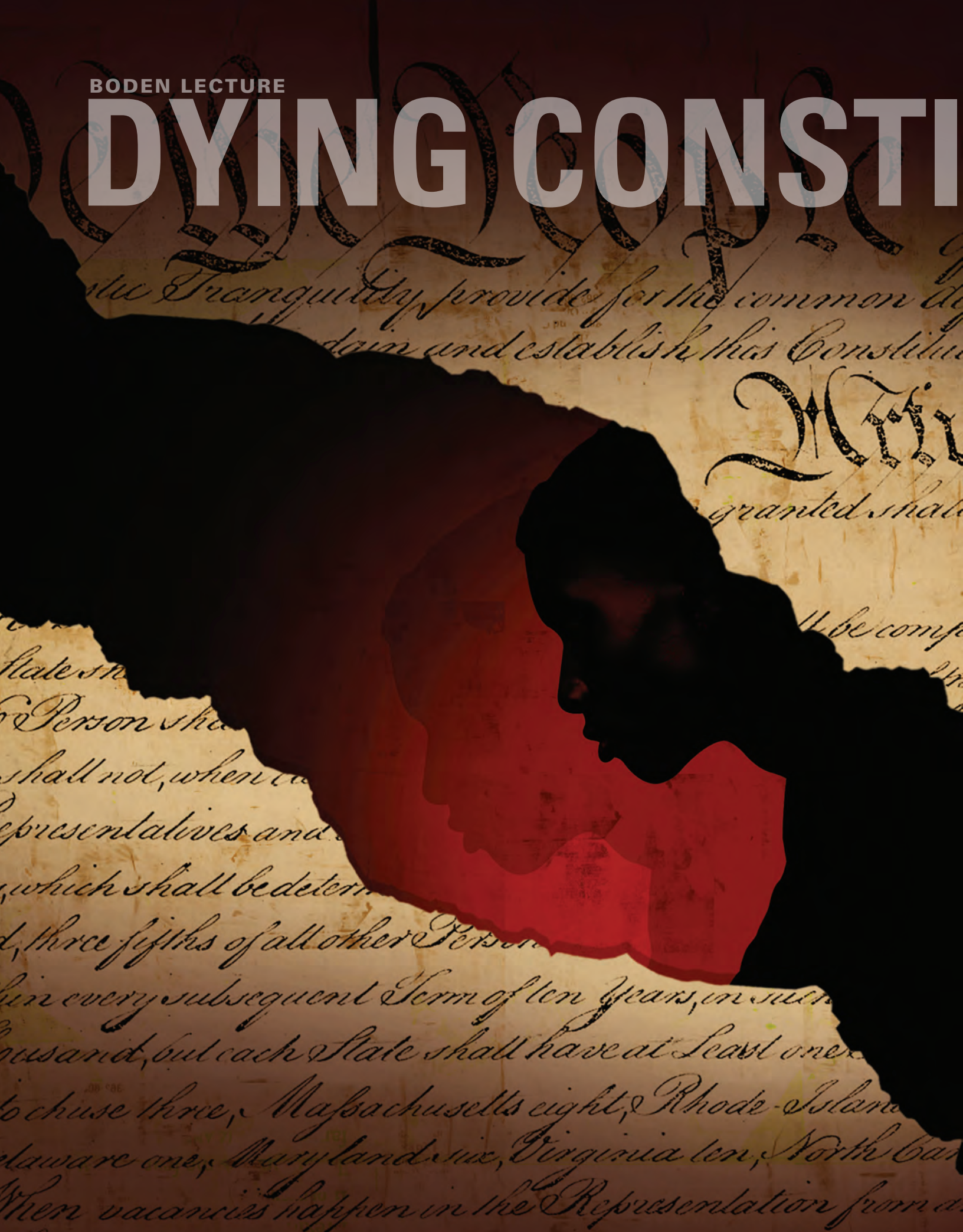
BODEN LECTURE

DYING CONSTI



TUTIONALISM
AND THE FOURTEENTH AMENDMENT

My marching orders from Dean Kearney for this year's Boden Lecture are to commemorate the sesquicentennial of the Constitution's Fourteenth Amendment, which was ratified in 1868. This ought to be a much easier task now than it would have been at the *demi*sesquicentennial—halfway between 1868 and today—because I think it's fair to say that the Fourteenth Amendment largely *failed* to live up to its promise during the first half of its existence. At that halfway mark in 1943, African Americans, who were supposed to be the amendment's primary beneficiaries, suffered under a pervasively authoritarian Jim Crow regime in the South and faced rampant discrimination and hostility in the North. The Supreme Court had begun to chip away at Jim Crow in a few isolated decisions, but these hadn't made much practical difference. Fourteenth Amendment demisesquicentennialists—if there *were* any—would have had very little to cheer about in 1943.

We live in a very different constitutional world today, with a robust and vital Fourteenth Amendment at its center. And so it would be easy to tell you a heartwarming story about the amendment's second act as one of the great comeback sagas in American history. But failures are often more interesting than successes. I want to focus on the Fourteenth Amendment's bad years, because I think that they can tell us something important about constitutional theory.

On the surface, at least, contemporary constitutional theory is dominated by a debate between originalism, which holds that judges should interpret the Constitution in line with the original public meaning of its text at the time that the constitutional provision in question was adopted, and living constitutionalism, which holds that constitutional meaning should evolve over time. The Fourteenth Amendment has been a critical battleground of this debate. In particular, lawyers, scholars, and judges have disagreed about whether the amendment's Equal Protection Clause should be interpreted to prohibit school segregation, as in *Brown v. Board of Education* (1954), even though the amendment's framers probably did not envision this particular reform, and whether the amendment's Due Process Clause can be stretched to include rights of privacy and reproductive freedom that would have surprised the generation that ratified the amendment. In a nutshell, these debates posit that living constitutionalism would allow courts to read what many regard as the moral progress of the last 50 years or so into the Fourteenth Amendment and use that amendment as a vehicle for further reform.

I believe that the Fourteenth Amendment's bad early years put a different spin on this debate. Living constitutionalists identify a number of different mechanisms or modalities by

Ernest A. Young is the Alston & Bird Professor at Duke Law School. His past positions include the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law and service as a law clerk to Justice David H. Souter at the Supreme Court of the United States. This essay is a lightly edited version of the Robert F. Boden Lecture presented at Marquette Law School on September 20, 2018. A version with footnotes appears in the spring 2019 issue of the *Marquette Law Review.*

Illustrations by Taylor Callery

which judges should assess the extent to which constitutional meaning has "evolved" over time. These include broad changes in public opinion, electoral or legislative victories by proponents of a new constitutional interpretation, the achievements of social movements, and the common-law-style development of constitutional meaning through decisions of the judges themselves. I am here to tell you that, in the Fourteenth Amendment's first 75 years, *every one* of these modalities strongly supported the compromise or even abandonment of the amendment's core purpose of freedom and equality for black Americans. Strong social movements supported the end of Reconstruction and the reestablishment of white supremacy in the South, as well as the reunion of North and South predicated on a reinterpretation of the Civil War's meaning. These movements influenced both major political parties, affected electoral outcomes, and then legislated their interpretation of constitutional meaning into law. And the judiciary responded by interpreting the Reconstruction Amendments narrowly and redirecting their concern with racial equality into other channels as a limitation on government regulation of the market.

That is why my title for this lecture is "Dying Constitutionalism." Justice Antonin Scalia used to insist that the Constitution was "dead" in a quite different sense: He meant that constitutional meaning was static, and that the whole point of having a constitution was to lock in particular rights and institutional arrangements and make them nearly impossible to change even if we might want to, later on. Constitutionalism is about tying yourself to the mast; you don't want a loosey-goosey constitution, such that you can slip out of it and throw yourself overboard to meet the pretty Sirens.

But this static model may not fit something like the Fourteenth Amendment very well. That amendment was adopted by men who were themselves caught in an unstable tension between their own racism—the best of them were still products of their times—and the political principles of the Declaration of Independence, which told them that God had created all men equal. It makes sense to view the amendment as aspirational or redemptive, aiming at a state of affairs that had not yet been achieved. And so rather than protecting existing values against future backsliding, the amendment is importantly a source of forward pressure.

This makes the Fourteenth a favorite amendment for living constitutionalists. But progress isn't inevitable, even when a constitutional marker has been laid down. Living things don't always *grow*, *mature*, or *flower*; sometimes they *mutate*, *wither*, or *decay*. It's not hard to think of constitutional provisions that have "evolved" right out of the Constitution—the Contracts Clause in most of its applications, for example, or the Fourteenth Amendment's own protection of national "privileges or immunities." These clauses have been laid low by "dying constitutionalism."

Progress can and does happen, but it is by no means inevitable, and sometimes constitutional law goes to hell in a handbasket. That is what happened in the Fourteenth Amendment's first 75 years.

This potential for constitutional corruption and decay poses a serious problem for any organic model of constitutionalism. But while I certainly don't come to praise living constitutionalism, neither am I here to bury it. At the end of the day, despite it all, I consider myself a living constitutionalist, not an originalist. And as I will explain, even many originalists agree that some sort of evolutionary approach is inevitable, especially for open-ended and aspirational provisions such as the Fourteenth Amendment. But it is essential that living constitutionalists understand the downside risks that come with any evolutionary model of constitutionalism. Living constitutionalism needs a cultural shift, based on a sense of tragedy, to temper its progressive optimism. Progress can and does happen, but it is by no means inevitable, and sometimes constitutional law goes to hell in a handbasket. That is what happened in the Fourteenth Amendment's first 75 years.

I. THE FOURTEENTH AMENDMENT'S LOST YEARS

The Fourteenth Amendment's central aim, as historian Eric Foner has stated, was to confer on black Americans "equality before the law, overseen by the national government." Equality before the law did not exist in 1868, either in the South or in the North. The Fourteenth Amendment was a promise to *create* that equality. Its framers understood that one could not simply write out new rights on paper and expect them to be respected; that is why the Fourteenth Amendment, more than any other amendment in the Constitution, is centrally concerned with institutional mechanisms for its own implementation. Section 2 created strong electoral incentives to let black people vote, with the hope that the franchise would in turn allow them to protect their own interests politically. Section 3

aimed to destroy the existing political class in the South, which had held black people down for so long, by disqualifying ex-Confederates from office. And—most important—Section 5 empowered Congress to implement the amendment's provisions by "appropriate legislation." Congress thus gave itself a primary voice in fleshing out the meaning of Section 1's open-ended phrases.

The Fourteenth Amendment was, in Foner's words, "an effort by Republicans to constitutionalize the 'fruits' of the War." The Civil War had begun as a war for *union*—not *emancipation*, and certainly not *equality*. But by 1863, President Abraham Lincoln's Emancipation Proclamation made official what was already generally acknowledged: that is, that freedom had become a Union war aim. And although there is no "equality proclamation" to go with emancipation, historians argue that equality had become a third Union war aim by Appomattox. Once the guns fell silent, Congress set about following through on that aim with a series of Civil Rights Acts and three constitutional amendments. Southern historian C. Vann Woodward, looking back, concluded that "[s]o far as it was humanly possible to do so by statute and constitutional amendment, America would seem to have been firmly committed to the principle of equality."

"And yet," Professor Woodward noted, "we know that within a very short time after these imposing commitments were made they were broken. America reneged, shrugged off the obligation, and all but forgot about it for nearly a century." White Southerners fought Reconstruction with fraud, deceit, and terroristic violence. Northern Democrats largely opposed black equality, and Republicans mostly gave up on it after 1876. "[T]he evidence" drove Woodward "to the conclusion that the radicals committed the country to a guarantee of equality that popular convictions were not prepared to sustain, that legal commitments overreached moral persuasion."

In the beginning, though, there *was* progress. It is true that, as Professor Michael Klarman has observed, "Reconstruction delivered far less to blacks than they hoped." In particular, the national government disappointed hopes that it would confiscate slaveowners' property and redistribute it to the freedpeople. Nonetheless, with the Fifteenth Amendment soon in the books and the Union Army occupying the defeated Southern states, black people exercised real political power in the South.

But enthusiasm for Reconstruction faded quickly, for both good and bad reasons. The good reason was that Americans have always been profoundly uncomfortable with military rule, and even Republicans worried about the incursions on civil liberties that such rule often entailed. The bad reason is that white Northerners were simply never sufficiently committed to equality for black people to stay the course of Reconstruction in the teeth of Southern violence and recalcitrance. And so, one by one, Southern state governments slipped back into the hands of white supremacist "Redeemers."

An illustrative battle in this long war occurred over Mississippi's election in 1875. White Democrats

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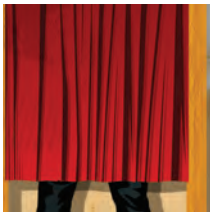

had been forming (and arming) "White Men's Clubs" as a vehicle for restoring white supremacy. When Democrats swept the 1874 congressional elections nationwide, it was widely interpreted as a repudiation of Reconstruction. Mississippi's White Men's Clubs saw it as a green light and vowed to "carry the election [of 1875] peaceably if we can, forcibly if we must." On reflection, they went straight for "forcibly," producing "dead books" with the names of black Republicans, disrupting Republican meetings and running off Republican politicians, and assaulting or murdering black leaders and burning black homes.

As the death toll mounted into the dozens, Mississippi's Republican governor, Adelbert Ames, asked President Ulysses S. Grant for federal troops. Grant responded that the public was "tired out with these annual autumnal outbreaks in the South" and refused to intervene unless Mississippi Republicans first raised their own militia. Well-armed whites were spoiling for exactly that sort of fight and threatened to wipe a black militia "from the face of the earth"; Republicans declined in order to avoid igniting a race war. On election eve, armed white riders drove freedpeople from their homes and threatened to murder them if they voted. It worked. The overwhelmingly black Yazoo County, for example, returned only 7 Republican votes against more than 4,000 Democratic ones. Democrats took control of the legislature, removed the lieutenant governor, and impeached Governor Ames. He fled the state. Mississippi had been "redeemed."

A year later, in 1876, the nation deadlocked over the presidential race between Democrat Samuel J. Tilden and Republican Rutherford B. Hayes. The election came down to three not-yet-redeemed Southern states—Florida, Louisiana, and South Carolina—in which rampant fraud and violence had marred the voting. Republican state election officials decreed Hayes the winner, but Democrats "cried fraud and threatened to march on Washington and reignite the Civil War." A special commission including several Supreme Court justices failed to transcend partisanship and resolve the dispute. But Republicans struck a deal with Southern Democrats, who agreed to support Hayes for president in exchange for the withdrawal of troops from the South. The remaining Republican governments in the South fell as Hayes took office. One Louisiana freedman remarked that "[t]he whole South—every state in the South—had got into the hands of the very men that held us as slaves."

Let's be clear: The failure of the Fourteenth Amendment was not simply a failure to progress far enough or fast enough.

In Eric Foner's judgment, the compromise of 1877 "marked a decisive retreat from the idea, born during the Civil War, of a powerful national state protecting the fundamental rights of American citizens." Blacks' Reconstruction-era gains did not evaporate overnight. But by 1890, race relations in the South "had begun what was to be a long downward spiral." Between 1895 and 1900, lynchings of black Americans averaged 101 per year. Although Southern states generally avoided formally disenfranchising blacks, they adopted poll taxes and literacy tests, which largely prevented blacks from voting. And when this didn't do the trick, there was always fraud—and, especially, mayhem.

In the 1890s, for example, a rare alliance of Republicans and Populists managed to take over the state government in North Carolina, but Democrats resolved to take it back in 1898 under the banner of white supremacy. In Wilmington, a Democratic party leader told his followers that if a black man tried to vote, "kill him, shoot him down in his tracks." The day after the Democrats prevailed in the general election, a large white mob burned down the Wilmington offices of a black newspaper. The mob intimidated white Republican officials into resigning their offices and fleeing the city and then rampaged through black neighborhoods—murdering a dozen black residents and driving nearly 1,400 from the city.

Episodes such as "Bloody Wilmington," as it became known, persuaded many Progressives that legal segregation and disfranchisement were humane alternatives to violence. That—and a fair dose of racism—may explain why Progressives did so little to challenge segregation and sometimes even acted to further it. Restrictions on voting, administered by white officials exercising broad discretion, "virtually eliminated black political participation in the South" early in the twentieth century's first decade. Black voter registration in Louisiana fell from 95.6 percent, before an 1896 registration law, to 1.1 percent in 1904; estimated black voter turnout in Mississippi fell from 29 percent in 1888 to 2 percent in 1892 to 0 percent in 1895.

Formal segregation, which had not been the rule in the decades immediately after Reconstruction, began to increase about the same time. The first wave of railroad-segregation laws, beginning in Florida, passed in the late 1880s and early 1890s; much of the remainder of the South followed beginning in 1898. These laws may have reflected the increased political power of lower-class whites, who valued segregation for boosting

their own precarious status; it also didn't help that in 1883 the Supreme Court struck down the 1875 Civil Rights Act, which would have preempted state segregation laws.

It's important to understand that the deterioration in conditions for black Americans was not simply a Southern phenomenon. As Professor Klarman has explained, "[w]ithout northern acquiescence, southern racial practices could not have become so oppressive." Northern concern for Southern blacks declined for a variety of reasons. The early stirrings of the Great Migration sent increasing numbers of blacks north around the turn of the century, leading there to "discrimination in public accommodations, occasional efforts to segregate public schools, increased lynchings, and deteriorating racial attitudes." The influx of millions of southern and eastern Europeans, beginning in the 1880s and accelerating after 1900, made the situation worse by exacerbating concerns about racial purity in the North; this naturally led some Northerners, especially in New England, to sympathize with Southern racial attitudes. That sympathy was further compounded by national–imperial dilemmas arising from the Spanish-American War in 1898 and the consequent acquisition of Puerto Rico and the Philippines—territories inhabited by peoples that both Northerners and Southerners tended to consider inferior. Finally, a strong desire in both North and South for national reconciliation encouraged the sections to sweep their differences over race under the rug.

As the Great Migration of Southern blacks to the North got underway in earnest at the beginning of the twentieth century, "northern discrimination and segregation proliferated." For example, "[m]any northern public schools became segregated for the first time in decades, even in former abolitionist enclaves such as Boston and Ohio's Western Reserve." Newly arrived in the North, blacks found jobs that traditionally would have been available to them to be going to European immigrants instead; worse, they faced hostility from labor unions, which generally excluded them and feared their use by employers as strikebreakers.

And the North had its own anti-black violence. In Chicago in 1919, for example, a swimming-beach altercation resulting in the death of a black teenager touched off a rampage of white gangs through black neighborhoods; 38 people (23 blacks and 15 whites) were killed, and more than 500 others were injured before the state militia subdued the combatants. As author Isabel Wilkerson has put it, "riots would become to the North what lynchings were to the South . . . . Nearly every big northern city experienced one or more during the twentieth century."

In both North and South, then, social practices became more oppressive after the end of Reconstruction, and those practices were increasingly given legal sanction by state and local officials. This new state of affairs, moreover, was increasingly reflected in federal statutory and constitutional law. As Southern governments moved to disfranchise black voters, Congress failed to invoke Section 2 of the Fourteenth Amendment, which provided for a reduction in the congressional representation of states excluding male voters on

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the basis of race. Section 2 lay dormant even though proponents of the amendment, such as Thaddeus Stevens, had insisted that it was "the most important [section] in the article," because it would "either compel the states to grant universal suffrage or so . . . shear them of their power as to keep them forever in a hopeless minority in the national Government." And when Democrats attained control of both Congress and the presidency in 1893–1894, they repealed much of the federal voting rights legislation enacted during the 1870s to enforce the Fifteenth Amendment; Republicans made no effort to reenact these measures when they regained control in 1897.

And, of course, the Supreme Court significantly affected both the statutory and constitutional landscape by striking down the 1875 Civil Rights Act's prohibition of discrimination in public accommodations in the *Civil Rights Cases* (1883) and upholding state segregation laws in *Plessy v. Ferguson* (1896). There were occasional victories. Most prominently, *Strauder v. West Virginia* (1880) struck down a state law limiting jury service to whites and offered a ringing affirmation that the Fourteenth Amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons." "What is this," Justice William Strong's majority opinion asked, "but declaring . . . that all persons, whether colored or white, shall stand equal before the laws of the States, and in regard to the colored race . . . that no discrimination shall be made against them by law because of their color?"

Strauder's holding seems obvious today, but there were plausible arguments the other way. The Court's holding is thus all the more impressive as a reaffirmation of the Fourteenth Amendment's commitment to equality. But the holding had little practical effect. Few states formally barred blacks from juries, and nothing in *Strauder* foreclosed exclusion based on criteria such as not being on the list of registered voters. Hence, in Professor Klarman's summary, "[a]s whites suppressed black voting, blacks disappeared from juries." Moreover, many states excluded blacks from juries by imposing discretionary criteria administered by white supremacist officials. Although the Supreme Court held that such executive discrimination was actionable, subsequent decisions made such a case nearly impossible to prove. Even civil rights victories such as *Strauder* thus failed to impede the re-entrenchment of racial oppression in the Fourteenth Amendment's early decades.

Let's be clear: The failure of the Fourteenth Amendment was not simply a failure to progress far enough or fast enough. That sort of failure would still be consistent with a Whig history of ineluctable progress: even if we are frustrated at the slow pace of change, it's still always onward and upward. But the arc of the moral universe does not always bend

toward justice—sometimes things get a little better, then take a turn for the worse. Thus, as Professor Woodward related, "racial segregation in the South in the rigid and universal form it had taken by 1954 did not appear with the end of slavery, but toward the end of the century and later." Lynchings and other forms of violence against blacks plainly got worse toward the end of the nineteenth century, and they extended into the North as blacks migrated there after 1900. National authorities' willingness to intervene on blacks' behalf peaked during Reconstruction and dwindled to little or nothing after 1876. W. E. B. DuBois summed it all up in what has to be one of the most heartbreaking lines in American history: "[T]he slave went free; stood a brief moment in the sun; then moved back again toward slavery."

All this went on for some time. Others have charted the Fourteenth Amendment's comeback in the second half of the twentieth century, and while it would be interesting to pin down the key turning points and their causes, that is not my subject. My question is what we can learn from the amendment's initial, long-lasting failure. The first step, I submit, is to realize that the Fourteenth Amendment's lost years can be understood not simply as a *failure* of constitutionalism, but also as a *form* of constitutionalism. The Southern Redeemers who recaptured state governments and implemented Jim Crow; the Northern Democrats who sought to minimize the results of the war and repealed Reconstruction measures when they had the chance; the liberal and moderate Republicans who withdrew federal troops from the South and redirected their agenda away from civil rights; and the judges who narrowly construed the Reconstruction Amendments' terms—all these groups had their own constitutional visions, and their words and actions all contributed to the shaping of the Fourteenth Amendment's meaning over time.

This is living constitutionalism in action. Different theorists of living constitutionalism stress different mechanisms by which changes over time get translated into constitutional meaning. But, as I hope to demonstrate in the next section, the same mechanisms that living constitutionalists rely on to make constitutional meaning better and better over time—social movements, movements of public opinion, electoral and legislative politics, common-law development—all took the Fourteenth Amendment, during the first 75 years of its life, further and further from its noble aspirations.

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II. THE LIVING CONSTITUTIONALIST CASE FOR RE-ENTRENCHED RACIAL OPPRESSION

The resurgence of white supremacy after Reconstruction took place across a wide range of social and political contexts—for example, segregation of public accommodations, schools, transport, and residential neighborhoods; voting and jury service; peonage and other forms of labor relations; and the operation of the criminal justice system. Each of these contexts raised different legal issues, implicated the three Reconstruction Amendments to varying degrees, and was resolved by courts and government officials with varying degrees of plausibility. To oversimplify greatly, courts tended to strike down formal or particularly blatant violations of the amendments, and they sometimes went further when racial equality intersected with key elements of the Court's agenda in other areas, such as the protection of property rights. But courts narrowly construed certain provisions, often ignored discriminatory motives for facially neutral laws, and tended to permit discriminatory administration of the law to do what formal discrimination could not. Other government actors—such as Congress and the President—likewise largely failed to read the Fourteenth Amendment as obliging them to intervene on behalf of black Americans.

The evolving social and political context in which the Court and other officials construed the Reconstruction Amendments could have affected the Court's interpretation, regardless of whether justices of the day considered themselves to be living constitutionalists. A provision such as the Fourteenth Amendment, which purports not to entrench an existing set of rights or institutional arrangements but rather to force reform to achieve some desired future state, is particularly prone to indeterminacy. Different proponents and supporters, after all, may have quite different visions of that future state, and they may or may not express those visions with any degree of precision in the text. To the extent that a provision's original meaning is uncertain, the evolving social and political context is likely to press courts and other interpreters in the direction of one resolution or another. The influence

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of context can be conscious or unconscious, and when it is conscious, judges may be candid or not. In any event, my question is whether standard living constitutionalist arguments could have provided plausible reasons to interpret the Fourteenth Amendment the way that courts interpreted it in this period. If they could have, then we must grapple with the risk that living constitutionalism can be a recipe for constitutional failure.

To be clear, my argument is *not* that this problem of "dying constitutionalism" proves we should reject evolutionary or organic theories of constitutional meaning in favor of some other methodology. I doubt that a better methodology is out there. My point is simply that there is no necessary connection between living constitutionalism and moral progress. Nor do I think we are likely to find a way to build in such a guarantee. I suggest that, rather, we will get better results out of living constitutionalism if we spend more time worrying about the downside risks.

To illustrate those risks, it will help to be more specific about the mechanisms of living constitutionalism. Like constitutional interpretation generally, living constitutionalism has its modalities—that is, its methods of justifying particular propositions of constitutional meaning. From this perspective, constitutional meaning is at least partially a function of evolving public opinion or consensus; the more specific activities of social movements; political events and actions such as elections, landmark legislation, or established official practices; and the evolution of doctrine through common-law processes of judicial reasoning. Different scholars emphasize different modalities, but I want to cast my net broadly. The modalities I have just listed are generally the ones identified as means by which constitutional meaning grows, evolves, and generally becomes more just. My point is that they can also be means by which it mutates, decays, and dies.

Start with public opinion. We lack polling data for the nineteenth and early twentieth century, but there is little question that the proponents of the Reconstruction Amendments and of the civil rights laws passed pursuant to them walked a tightrope between their commitment to some measure of black equality and the residual racism and resistance to change of even the Northern electorate. That electorate had a far more limited conception of equality than would be acceptable today; perhaps more important, it was weary of conflict after four years of war in which 360,000 Union soldiers died. To the extent that the general views of the American public exercise a gravitational pull on constitutional interpretation by the Court, Northern weariness and reluctance, as well as the South's violent recalcitrance, were bound to impede realization of the amendments' redemptive ideals.

The Reconstruction Amendments were especially dependent on the acts of the political branches. The open-ended text of the Fourteenth Amendment's first section needed more detailed legislation to specify and flesh out its meaning. Consequently, the three Reconstruction Amendments were the first to include their own enumerated-powers provisions conferring on Congress the authority to implement their provisions by appropriate legislation. The Civil Rights Act of 1866, for example, has always played a prominent role in construing the Fourteenth Amendment's meaning. Statutes of that sort are important to living constitutionalists who stress the role of political institutions in shaping evolving constitutional meaning.

But constitutional theories according a prominent role to political branch "constructions" of constitutional meaning or the operation of "constitutional politics" in times of foundational political ferment must take account of what happened not just in the 1860s but also in the 1870s, 1880s, and 1890s. The election of 1876, for example, bears many indicia of Professor Bruce Ackerman's "constitutional moments"; it had the highest participation rate in American history (at least among white voters), and fundamental issues about Reconstruction and the propriety of military intervention in the South were on the table. And although the resulting electoral deadlock hardly demonstrated any kind of national consensus, the machinations that resolved the deadlock did effectively shape the implementation and interpretation of the Reconstruction Amendments for generations. Likewise, congressional decisions not to invoke Section 2 of the Fourteenth Amendment for the purpose of reducing Southern representation as a result of black disfranchisement and to repeal much of the Reconstruction-era voting rights legislation reflected a changed sense of Congress's constitutional responsibilities, with profound consequences for the nation. The rules of recognition for constitutional change arising from elections or political-branch actions have never been clear. But if such things are to count toward constitutional meaning, then the actions of the late nineteenth century have a plausible claim on our attention.

What about social movements? The re-entrenchment of racial oppression in the late nineteenth and early twentieth century featured contributions from a variety of mobilized social groups, including white supremacist Redeemers who retook control of Southern state governments; anti-immigrant populists and progressives who came to sympathize with Southern racialism; labor unions fearing competition from black workers; and significant components of the women's movement, which had opposed the Fourteenth and Fifteenth Amendments on the ground that they failed to extend their gains to women. I want to focus, however, on a more seemingly benign social movement: the broad effort to achieve national reunion and heal the wounds left by the Civil War.

A favorite Republican electioneering tactic in the postwar nineteenth century was to "wave the bloody shirt"—that is, to tie Democrats to the late Rebellion and to campaign on Republican loyalty to the Union cause. So the strength of the movement for reunion and reconciliation during the same period may be somewhat surprising. And yet a prominent movement soon developed around decoration days to remember the war dead, a burgeoning and generally nostalgic popular literature telling soldiers' stories, and veterans' organizations and reunions that eventually reached across sectional lines. This movement tended to emphasize the valor and honor of the combatants and to soft-pedal the divisive issues, especially slavery and race, that underlay the war.

Historian David Blight has written that because "race was so deeply at the root of the war's causes and consequences, and so powerful a source of division in American social psychology," it was "the antithesis of a culture of reconciliation." For that reason, "[t]he memory of slavery, emancipation, and the Fourteenth and Fifteenth Amendments never fit well into a developing narrative in which the Old and New South were romanticized and welcomed back to a new nationalism, and in which devotion alone made everyone right, and no one truly wrong, in the remembered Civil War." Hence, in 1913, President Woodrow Wilson gave a commemorative address at Gettysburg, on the fiftieth anniversary of the great battle:

> "How wholesome and healing the peace has been! We have found one another again as brothers and comrades in arms, enemies no longer, generous friends rather, our battles long past, the quarrel forgotten—except that we shall not forget the splendid valor, the manly devotion of the men then arrayed against one another, now grasping hands and smiling into each other's eyes. How complete the union has become . . . . "

On the one hand, the reunion *was* marvelous. No one wants to be Yugoslavia, where people still kill each other over grievances from centuries ago. Reunion not only brought real healing to many, but also permitted the nation to become the preeminent defender of democracy and human rights on the world stage not long after Wilson spoke.

But President Wilson also symbolized the cost of the forgetting that made reunion possible. The first Southern president since the Civil War, he presided over segregation of much of the federal government. And so, as Professor Blight has written, "[i]n the half century after the war, as the sections reconciled, by and large, the races divided."

The reunion movement had another consequence that mattered for constitutional interpretation. Anyone who thinks history is always written by the winners hasn't studied the historiography of the Civil War and Reconstruction. For much of the twentieth century, that historiography was dominated by the "Lost Cause" myth of the war, which held that the South had fought for its freedom, not for slavery, and the Dunning School of Reconstruction history (so called after Professor William A. Dunning, its leading expositor), which insisted that Reconstruction was a malicious attempt by vindictive radicals to punish the South and foist freedom on a black race that was fundamentally unready for it. "The demeaning of black people as helpless, sentimental children and the crushing of their adult rights to political and civil liberty under the Fourteenth and Fifteenth Amendments," as Professor Blight has recounted, were integral parts of this ideology. These interpretations would hold sway until the late twentieth century and inform the Supreme Court whenever it turned to history in its deliberations.

One could, of course, focus on other social movements—the Redeemers, for instance—that challenged the legitimacy of the Reconstruction Amendments, pushed for as narrow an interpretation as possible, and tried (often with considerable success) to block their enforcement. The central point, however, should already be obvious. Living constitutionalists such as Professor Jack Balkin extol social movements as motors of moral progress. "[W]e understand many important social movements in American

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In key decisions, the federal courts read aspects of the amendment narrowly, accorded significant discretion to biased state and local administrators, and refused to provide effective remedies for potential violations.

history," Balkin has written, "as working out the meaning of the Declaration and the Constitution, engaging in popular uprisings that help to redeem their promises." But as Professor Scot Powe has pointed out, "mass movements . . . that have set themselves out to overturn an existing legal order have sometimes been wonderful—the Civil Rights Movement jumps first to mind—but equally as often they have been horrible."

Many living constitutionalists—such as Professor David Strauss—have turned to courts as more-institutionally-regular expositors of evolving constitutional meaning. The extent to which the Republican architects of Reconstruction eschewed reliance on the courts has sometimes been exaggerated. Despite the debacle of *Dred Scott* and continuing concerns that the Court would undermine military Reconstruction, Congress made Section 1 of the Fourteenth Amendment self-executing—that is, directly enforceable by courts. Congress also expanded federal court jurisdiction and created federal civil rights causes of action and federal prosecutorial authority to enforce the amendment's promises. The federal court system as we know it dates from Reconstruction.

But the courts' record in the amendment's early decades would likely have disappointed many of its framers. In key decisions, the federal courts read aspects of the amendment narrowly, accorded significant discretion to biased state and local administrators, and refused to provide effective remedies for potential violations.

Some have accused the Supreme Court of strangling the Fourteenth Amendment in its crib, but that charge is overstated. In the *Slaughter-House Cases*, to be sure, the Court did interpret the amendment more narrowly than it might have done. The New Orleans ordinance challenged in *Slaughter-House* conferred a local monopoly on the owners of a particular abattoir. Some butchers left out by this law challenged it under Section 1 of the Fourteenth Amendment. But the Court insisted that "the one pervading purpose" of the Reconstruction Amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." The majority found little connection between that purpose and the plaintiffs' legal claim. Notwithstanding the broader scope of Republicans' free-labor ideology, it is hard to argue with the Court's conclusion: the Civil War was not fought to uphold the rights of white butchers to defy local sanitation laws.

Critics complain that *Slaughter-House* wrongly construed the Fourteenth Amendment's Privileges or Immunities Clause not to apply the Bill of Rights to the states, but it's hard to see how that would have helped the butchers. And, in any event, that dictum has been readily circumvented since then by incorporating the Bill of Rights into the Due Process Clause. What the butchers needed was for the Court to adopt into the Fourteenth Amendment Justice Bushrod Washington's open-ended formulation of "privileges and immunities," under the similar language of Article IV, from an 1823 case called *Corfield v. Coryell*. Justice Washington's capacious formulation—which included "the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety"—may be broad enough to include the right to dismember animals wherever you want, but it could also include just about any other right one might dream up. That's mostly all right under Article IV, because that provision allows *states* to define which privileges and immunities they actually wish to protect and then simply restricts them from discriminating with respect to those rights between in-staters and out-of-staters. But what the butchers wanted in *Slaughter-House* was for the *Court* to define these broad privileges and immunities and protect them against any encroachment, whether discriminatory or not. That was tantamount to an invitation to write a new constitution, and it is not hard to see why the Court declined.

It's more plausible to point the finger at the *Civil Rights Cases*. Those cases were federal prosecutions, under the 1875 Civil Rights Act, of various operators of public accommodations—including Maguire's Theatre in San Francisco and the Grand Opera House in New York City—for refusing to serve black patrons. The Court struck down the act on the ground that it exceeded Congress's power under Section 5 of the Fourteenth Amendment, which confers legislative authority to prohibit and punish actions that would be unconstitutional under Section 1. The trouble, the Court said, was that *private* discrimination is not unconstitutional under Section 1, which imposes obligations on *states*, and thus Congress had no authority under Section 5 to legislate against such discrimination.

I have never heard a serious argument that the Constitution should not have a state-action

requirement, and that requirement is absolutely basic to modern constitutional law. Without it, I as a private citizen would have to give my son notice and a hearing under the Due Process Clause before grounding him for staying out too late on Saturday night. The better criticism is that the failure of states such as California and New York—and, obviously, the recalcitrant states of the Old Confederacy—to prohibit race discrimination by places of public accommodation *was* state action. After all, "public accommodations" in the law are largely defined by their legal obligation to serve all comers, and the refusal to enforce this preexisting and general requirement on behalf of black people surely denied them the "equal protection of the laws." Public-accommodations laws, however, were subject to an exception for "reasonable" requirements. And in the railroad context, common-law decisions since the 1850s had upheld segregation on the ground that "'repugnancies' between the races arising from natural differences created friction that segregation could minimize." From this perspective, the *Civil Rights Cases* prefigure the Court's later holding in *Plessy v. Ferguson* that separate but equal public accommodations satisfy the reasonableness requirement for valid police-power legislation.

It is fair to say that, in the Fourteenth Amendment's early decades, the common-law development of the amendment's meaning pushed in the same direction as the other modalities of living constitutionalism—that is, to undermine and narrow the amendment's commitment to black equality. It is not clear how much practical impact the courts' decisions had. Michael Klarman has written that "[t]he 1875 [Civil Rights] Act was essentially a dead letter before the Court invalidated it in 1883 . . . . Blacks seeking to enforce their statutory rights of access to public accommodations frequently encountered hostility and violence." It is thus no coincidence that none of the consolidated *Civil Rights Cases* came from the Deep South. But "[e]ven public accommodations laws in northern states had proved inconsequential in practice." More broadly, the Court's decisions in this era likely "reflected, far more than they created, the regressive racial climate of the era."

There is one last modality to consider: violence. Echoing Clausewitz, historian George Rable has written of Reconstruction that "for the South, peace became war carried on by other means." The Fourteenth Amendment's first decades offer a history of violence and death—lynchings, murderous race riots, and other forms of terrorism and intimidation. No one thinks that violence is a legitimate modality of living constitutionalism. But it is equally obvious that violence powerfully affected aspects of history that *are* the raw material of evolving constitutional meaning. Any method of living constitutionalism that takes into account changes in the political and social world offers a route by which the violence that is part of that world can creep into constitutional meaning. Just as the violence of the Civil War settled a long-standing debate about whether the Constitution permitted secession, the violence and terror of whites' rejection of black equality powerfully shaped the political, social, and even legal meaning of the Fourteenth Amendment. As historian James McPherson put it: "The road to redemption was paved with force. Power did flow from the barrel of a gun." I would add that *law* flowed from that barrel, too.

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Violence determined, for example, whether there would *be* litigation invoking the Fourteenth Amendment. Mounting a legal challenge to segregation was frightfully dangerous for African Americans, and until well into the twentieth century they tended to do so only under very special circumstances. Violence also framed the possible judicial resolutions of the cases brought. In *Giles v. Harris*, for example, a black plaintiff alleged that an Alabama law requiring registered voters to be of "good character and understanding" effectively discriminated on the basis of race and demanded an injunction compelling registration of black voters. Writing for the Court in 1903, Justice Oliver Wendell Holmes said that even if the administration of such a requirement could be challenged as discriminatory, the plaintiff would have to seek relief from the national political branches. He explained:

> "[T]he great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the [voting] lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form."

It is instructive to compare *Giles* with the 1958 decision in *Cooper v. Aaron*. *Cooper* held emphatically that Arkansas Governor Orval Faubus's effort to mobilize "the great mass of the white population"—not to mention the National Guard—in order to prevent blacks from attending white schools could *not* be permitted to interfere with a federal injunction under the Fourteenth Amendment. President Dwight D. Eisenhower's deployment of federal troops to Little Rock was a statement that the federal government would no longer tolerate the "autumnal uprisings in the South" that President Grant had been unwilling or unable to suppress. The irony of *Cooper v. Aaron*, then, is that the most categorical statement of judicial supremacy in the *U.S. Reports* depended for much of its power on the Executive's demonstrated willingness to enforce the Court's decree through force if necessary. There was no such willingness during the Fourteenth Amendment's lost decades.

Finally, a word about originalism is in order. As I stated earlier, my critique of living constitutionalism is not an argument for originalism as an alternative mode of constitutional interpretation. I don't really think that originalism can help. The first reason is that many originalists have concluded that the original understanding of the Fourteenth Amendment entails a general and fairly open-ended commitment to equality. Robert Bork, for example, said that the Fourteenth Amendment's framers "intended that the Supreme Court should secure against government action some large measure of racial equality," but that "those same men were not agreed about what the concept of racial equality requires. Many or most of them had not even thought the matter through." Hence a court applying the Equal Protection Clause must fall back on a "core idea of black equality against governmental discrimination," defined at a relatively high level of generality. Bork was comfortable with courts working out this principle in specific cases and untroubled by the prospect that this might entail consequences that the framers themselves did not foresee.

Critics of originalism decry this account as giving away a chief advantage claimed by originalism—constraining unelected judges—by leaving contemporary judges unconstrained as they fill in the meaning of the Equal Protection Clause's open-ended language. That is fair enough, but it hardly means that Judge Bork's reading of the Fourteenth Amendment's original understanding is wrongheaded. That reading strikes me as almost certainly correct. It does mean, however, that originalism cannot rescue us from the perils of living constitutionalism when it comes to the Fourteenth Amendment. If originalism respects the original understanding of constitutional text when that understanding is open-ended, then its prospects will basically dovetail with those of living constitutionalism.

Originalism is unlikely to bail us out for a second reason. The Supreme Court's decisions interpreting the Fourteenth Amendment narrowly rest on plausible—if not indubitably correct—interpretations of the historical evidence of original meaning. Where the legal arguments are close on the merits, the social and cultural forces expressed in the modalities of living constitutionalism tend to play a decisive role. In other words, even if a good originalist case could have been made against the result in *Plessy* or the *Civil Rights Cases*, it would be a lot to expect for a court to buck the forces of contemporary politics on a matter that is admittedly close. Living constitutionalism is not just an alternative

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methodology to originalism; it also sums up a variety of forces operating on courts regardless of the method that they set out to employ.

Neither of these points means that originalism will never have comparative advantages over living constitutionalism in preventing the deterioration of constitutional norms over time. Where the original understanding is clear and specific, originalism will generally do a better job at preserving a constitutional principle intact. But the Fourteenth Amendment's text and history are sufficiently open-ended and uncertain to leave originalists and living constitutionalists in essentially the same leaky boat.

III. THE LESSONS OF CONSTITUTIONAL FAILURE

I promised at the outset that if you walked with me through the dark valley of the Fourteenth Amendment's early decades, we would come out the other side with some insights about constitutional theory. I did not promise, however, that they would be sunny or uplifting. For me, the lessons of the amendment's years of failure are as follows.

To begin, this is at least in part a story about the limits of constitutionalism itself. Importantly, I do not simply mean the limits of *judicial review*. Judicial review doesn't come off that well in my story, but neither do political-branch actions or popular constitutionalism. After what is still the most devastating war in American history, Americans tried to resolve the central issue of that war—the oppression of black Americans—through a flurry of constitutional creativity that had not been seen since the Founding and has not been equaled since. The resulting amendments, in and of themselves, failed to do what their framers set out to do. They could not prevent the condition of the freedpeople from deteriorating radically after the withdrawal of Union troops from the South. And they did not achieve real progress until the country itself had changed, nearly a century later. You cannot change basic social conditions simply by changing the Constitution.

One might think this to be simply a problem with the subset of constitutional principles that purport to be "redemptive" or "aspirational" in nature. And surely it is easier to constitutionally entrench a state of affairs that has already been achieved than it is to move the social mountain by ratifying words on paper. But the story of the Civil War, Reconstruction, and the subsequent reassertion of racial oppression involves a failure not just of the aspirational amendments but of any number of other constitutional principles. For example, the original constitutional structures of federalism and separation of powers, designed to mediate conflict and preserve liberty, failed of that mission both before and after the war. Conflict over race is the central drama of our national story, and when push came to shove, constitutionalism was unequal to it.

To that cheery observation let me add another: This is also a story about the limits of constitutional methodology. Much debate in constitutional law proceeds as if by getting the methodology right, we could perfect American constitutionalism and guarantee good results. But it's hard to see how *any* methodology would have helped all that much in confronting the hostile environment into which the Fourteenth Amendment was born. As I've suggested, originalism offers no solace here. The basic point is that *any* methodology can be conducted well or poorly, and as far as I can tell, interpretive methodologies generally do not themselves do much to ensure excellent rather than miserable application. My aim here is to say something about how the history I've canvassed might encourage living constitutionalists to do their job well rather than poorly.

The first thing that living constitutionalists need to get straight is that there is nothing inevitable about moral progress. The use of organic metaphors such as "evolving meaning" can cause us to confuse constitutional development with natural processes that may have some sort of direction hardwired into them. Sometimes living constitutionalists seem to acknowledge that progress is not inevitable. Jack Balkin, for instance, states that "[a] story of *constitutional redemption* is . . . a story of contingency" that "does not claim that the eventual redemption is assured. It claims only that we should strive to achieve it." Yet most living constitutionalist accounts of our history have an optimistic, onward-and-upward feel to them. Professor Balkin does not seem to recognize that the very title of his book—*Constitutional Redemption*—dovetails precisely with the name that the nineteenth-century Redeemers, who reestablished white supremacy, had for *their* constitutional project.

To overcome this myth of inevitability, living constitutionalism needs a sense of tragedy. This may be the great contribution that the Fourteenth Amendment's lost years can offer to constitutional law. C. Vann Woodward made a similar point about

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[T]he Fourteenth Amendment is the Constitution's South. It's the part of the Constitution that failed (before rising again to something better).

what the South had to offer America more generally. Writing before Vietnam, Professor Woodward proposed Southern history as an antidote to the "American . . . legend of success and invincibility." He noted that "Southern history, unlike American, includes large components of frustration, failure, and defeat":

> "An age-long experience with human bondage and its evils and later with emancipation and its shortcomings did not dispose the South very favorably toward such popular American ideas as the doctrine of human perfectibility . . . . For these reasons the utopian schemes and the gospel of progress that flourished above the Mason and Dixon Line never found very wide acceptance below the Potomac during the nineteenth century."

In this sense, ironically, the Fourteenth Amendment is the Constitution's South. It's the part of the Constitution that failed (before rising again to something better). It brings to constitutional law "[t]he experience of evil and the experience of tragedy" needed to remind us that moral progress is not inevitable, that social forces can push constitutional meaning in bad as well as good directions, that living can turn into dying constitutionalism if we are not very, very careful.

I don't have much to offer beyond this. I doubt that there is some identifiable methodological tweak that can guard constitutional interpretation effectively against the possibility that history may move in the wrong direction. If we let the *movement* of history into interpretation—as opposed to history's state at an originalist snapshot in time—then we let in the contingency that comes with it. What I am suggesting is that constitutional *culture* may be more important than constitutional *method* when it comes to hanging on to constitutional values. I think we need to change the culture of living constitutionalism if we are going to prevent future tragedies, like the *dying* constitutionalism of the Fourteenth Amendment's lost years.

To be more specific, we need not only to keep the downside risks of evolving constitutional meaning firmly in mind, but also to make living constitutionalism a little less lively. There needs to be a bit more locking-in and a little less pushing forward, because forward motion can end up not being forward at all. This is harder when a provision is, like the Fourteenth Amendment, profoundly aspirational. But even there, we might have done better had the amendment's subsequent interpreters held a little more fast to the amendment's central, basic commitment to equality and been a little less willing to modify that commitment in light of more-contemporary imperatives. We need to remember that the Fourteenth Amendment's retrogressive earlier interpreters thought that they, too, *were* shaping constitutional meaning to conform to current notions of justice. If we remember that, we'll subordinate our impulse to keep the Constitution "in tune with the times" to a principle of "first do no harm."

There is a cost to this, of course. A less frisky version of living constitutionalism—we could call it "stiff-necked constitutionalism"—would give up the exciting potential for surprising and inspiring moral growth. The Constitution would still evolve, but more slowly and only in response to very sustained trends over time. It might be harder, for example, to go from the categorical rejection of gay rights in *Bowers v. Hardwick* (1986) to the embrace of that principle in *Lawrence v. Texas* (2003) in just 17 years. That would be a loss. As my friend Professor Marin Levy has observed, "the trouble with tying yourself to the mast is that, sooner or later, you're on the mast." But a stiffer, creakier, even *grumpier* living constitutionalism might also make it harder to go from ratification of a Fourteenth Amendment committed to black equality to the *Civil Rights Cases* in 15 years, or from a Fifteenth Amendment committed to black suffrage to the abandonment of black voters to murderous white supremacist mobs in just 5. ■

THE LIVING CONSTITUTION AND MORAL PROGRESS:

A Comment on Professor Young's Boden Lecture

David A. Strauss

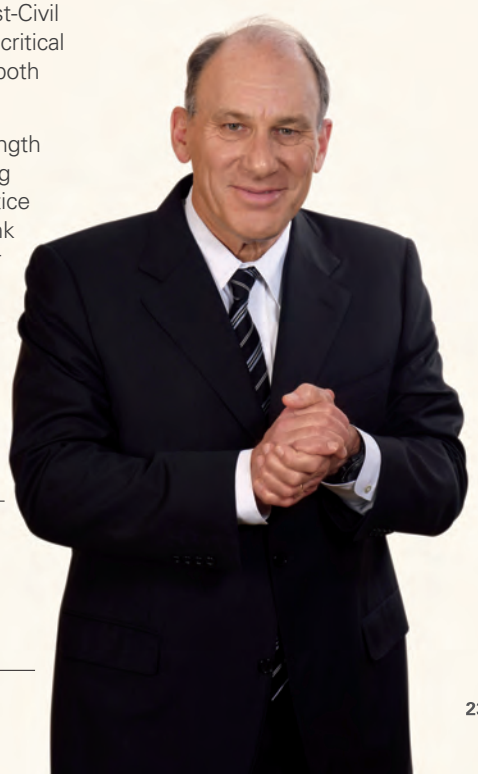
Professor Ernest Young's Robert F. Boden Lecture is exemplary in any number of ways. It tells an important story, and it tells that story well. It does not shy away from confronting the ugliness in our history. There is no hint of unwarranted self-congratulation. At the same time, Professor Young's account, 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. 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. 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. But we do know that, at best, it is a long arc, and in the meantime many lives can be ruined. Professor Young suggests that the "living constitution" tradition is associated with the idea that moral progress is inevitable.

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



David A. Strauss is the Gerald Ratner Distinguished Service Professor of Law at the University of Chicago. He is the author of *The Living Constitution* (Oxford University Press, 2012).

[A]ny account of the Constitution and constitutional law has to acknowledge the possibility of retrogression, not just progress. Living constitutionalism can—and must—do so.

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