

Tribute to Greg Young

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Greg Young

HONORING GREG YOUNG

RICHARD BOLDT* AND JANA SINGER**

In an appreciation for Charles Black published simultaneously in the *Columbia Law Review* and the *Yale Law Journal*, Guido Calabresi referred to his colleague as a “gentle genius.”¹ The word genius gets bandied about too much these days, but I think it is fair to say that there was a sort of genius that surrounded Charlie Black and his work, and I think it is also fair to say that there is a special kind of genius in the way that Greg Young has served as a teacher, scholar, mentor and friend to those of us who have known him over the years here at the University of Maryland.

Our mutual friend Marc Feldman used to say that Greg thinks his way more deeply into a set of ideas that has drawn his attention than anyone else he knew. That seems right to me. Beyond its depth or intensity, I think the most notable thing about Greg’s approach to legal analysis is that it has a kind of three-dimensionality. Where the rest of us draw on a flat surface (or perhaps paint with color, if we’re lucky), Greg sculpts—in the classroom, in print, even in casual conversation in his office or at a workshop. Remarkable.

For those who have not read Greg’s work (or have not read it in a while), I note two examples (among many) that demonstrate this special set of qualities. One piece is recent, Greg’s masterful article on motive in constitutional law,² the other older, his exhaustive study of “Public Rights and the Federal Judicial Power,” published in the 1980s in the *Buffalo Law Review*.³

The motive piece picks up where Elena Kagan’s and Donald Regan’s work leaves off. Kagan, for example, wrote an important article about the

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1. Guido Calabresi, *Charles Black: Gentle Genius*, 111 YALE L.J. 1901 (2002); Guido Calabresi, *Charles Black: Gentle Genius*, 102 COLUM. L. REV. 873 (2002).

2. Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191 (2008).

3. Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765 (1986).

ways in which a concern for illegitimate motive shapes First Amendment law. In her view, First Amendment doctrine functions as a proxy for “hunting” improper government purposes. Greg largely agrees with Dean Kagan, but he goes far beyond her thesis to explore the question of *why* we should be concerned about improper motives animating decisionmaking by the political branches. He considers and then largely rejects the possibility that improper government motive works a deontological harm, concluding instead that we care (and should care) about illegitimate motives because of both the concrete and the expressive consequentialist harms that they produce. The article weaves in (or perhaps cuts in) deeply insightful discussions of what it means to assign a motive to an individual agent or a corporate actor like a legislature; how a concern with motive interacts with the various levels of judicial scrutiny that the Court has developed in the areas of substantive due process, equal protection, the First Amendment, and even the dormant commerce clause; and how we ought to think about government policies that are driven by improper, perhaps hateful, motives, but that could be supported by other entirely adequate public purposes. If all that were not enough for one law review article, Greg then applies this careful, nuanced, three-dimensional assessment of motive in constitutional analysis to some of the most difficult decisions the Court has given us in recent years, the *Cleburne* case,⁴ *Romer v. Evans*,⁵ and *Lawrence v. Texas*.⁶ This is deeply insightful work. Astonishing, actually.

So too is his *Buffalo Law Review* piece on the Court’s accommodation of Article III’s requirement that the federal judicial power be insulated from the political branches with the need to create administrative adjudicatory mechanisms in our modern regulatory state. Where his motive article showcases Greg the wise philosopher, his *Buffalo* piece brings onto the stage Greg the careful historian. He takes his readers from the mid-19th century origins of the public rights doctrine, in *Murray’s Lessee v. Hoboken Land Co.*,⁷ to the early 1930s mess that was *Crowell v. Benson*,⁸ to the then-current state of the law in the *Northern Pipeline*⁹ case that struck down as unconstitutional non-Article III bankruptcy tribunals. Throughout, Greg helps his reader understand that an evolving (and enlarging) conception of the public interest, even in cases nominally involving only claims by one private party against another, has driven the development of the law in this area. In the end, Greg concludes that the problem is not amenable to easy

4. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

5. 517 U.S. 620 (1996).

6. 539 U.S. 558 (2003).

7. 59 U.S. (18 How.) 272 (1855).

8. 285 U.S. 22 (1932).

9. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

(or clear cut) answers, and that a flexible multifactored approach is required. Greg comes through the text as a calm, expert observer helping us to see that we can make our way through this thicket, if we can just manage to avoid panicking, if we realize that life is sometimes complex and messy and that good legal solutions also sometimes are complex and messy.

Greg shows a similar appreciation for history and complexity in his 2002 article on “The Significance of Border Crossings” as an element of Congress’ commerce clause jurisprudence.¹⁰ The article examines the Court’s then-recent decisions in the *Lopez*¹¹ and *Morrison*¹² cases, which were widely viewed as signaling a narrowing of Congress’ Commerce Clause authority. What is striking about Greg’s article is that it focuses on an aspect of the two decisions that most other commentators had ignored: whether Congress had the ability to regulate events that took place entirely within states solely on the ground of interstate border crossings that had preceded those events. In answering that question, Greg engages in an analytic tour de force that engages not only two centuries of commerce clause decisions but also other areas of constitutional law, including the doctrine of unconstitutional conditions—a doctrine that most commentators had considered relevant only in the context of individual rights. I use the article whenever I teach Constitutional Law—not only to help my students understand the Court’s Commerce Clause jurisprudence, but also to emphasize the connection between seemingly discrete areas of constitutional doctrine—even areas that might be covered in two separate courses. I also share with my students Greg’s colorful analogies—from his bemused description of “federal law following materials transported across state lines like bubble gum stuck to a shoe” to his characterization of originalism as “an attempt to hold a séance with the Framers.” Not a particularly promising undertaking, but I am confident that Greg could hold his own at any such event—either awake or asleep.

So what about the “gentle” part? Well perhaps the best way to capture that dimension is to say that Greg always roots for others—his students, his colleagues, his friends. I have experienced this rooting at a very personal level. When I have brought Greg a problem I’m struggling with in class, or a manuscript I’m working on, he has immediately taken on my problem as his problem. It isn’t that he appropriates my work; there is virtually no ego anywhere in sight. It is a kind of intellectual *and* emotional empathy. Where previously I was alone worrying about the miscommunication I was

10. Gordon G. Young, *The Significance of Border Crossings: Lopez, Morrison and the Fate of Congressional Power to Regulate Goods, and Transactions Connected with Them, Based on Prior Passage Through Interstate Commerce*, 61 MD. L. REV. 177 (2002).

11. *United States v. Lopez*, 514 U.S. 549 (1995).

12. *United States v. Morrison*, 529 U.S. 598 (2000).

experiencing in class, or the argument I was having trouble constructing, or the student I was concerned about, now I have the full collaboration of someone whose only goal is to make sure that I succeed, that I make good choices.

I, too, have been the beneficiary of Greg's intellectual empathy, as I suspect many others in this room have as well. A decade ago, I volunteered (perhaps a bit rashly) to teach Constitutional Law I—a course that I had not previously taught, but that I had always hoped to tackle. I saw that Greg was teaching the same course the semester before me, and I asked if I could sit in on his class, thinking that it would be a good way to familiarize myself with the material. Greg, of course, said yes. And sitting in on his class did allow me to familiarize myself with the relevant material. But it provided me with so much more than that. First, I got to see a master teacher at work—a teacher who had high expectations of his students and even higher expectations of himself. Greg viewed it as his responsibility not only to make sure that he taught well, but that his students learned well—and believe me, they did. Beyond that, however, Greg took on the project of helping me prepare to teach constitutional law as part of his own teaching package. The night before most classes, he would send me his teaching notes annotated with explanations of why he had decided to structure the class in a particular way. And, after most class sessions, we would debrief over a cup of coffee and Greg would talk about what he thought had gone well and what he thought he could have done differently. From there, we would often segue way into a substantive discussion of the day's cases and how they fit together—or failed to. In the process, I gained not only a deep understanding of a complex body of material but also a treasure trove of ideas about how to teach that material effectively. And although my students the next semester did not know it, they actually got the benefit of two constitutional law teachers—one, a novice who was just dipping her toe into the subject, and the other, a wise and generous colleague, who had shared his considerable expertise.

There are other ways as well, in which Greg humanizes our community. While many of us are occupied with assessing the intellectual firepower of an appointments candidate, Greg, who surely knows more about intellectual firepower than most, inevitably asks, "So, do you think he is a truly good person?" While many of us conduct business or do work in our offices, Greg does life in his. In this respect, he is indeed very much like Charlie Black. As a student, I remember walking past Professor Black's office, to be drawn in by a kindly voice offering me a photocopy of his latest poem or the opportunity to listen for a moment to an old record by Louis Armstrong. Greg's office works a similar gravitational pull on me. Maybe it is a story about the young person he has befriended in his kick-

boxing class, perhaps a crackling recording of Wallace Stevens reading a poem. Inevitably, I dip my head in, I stay for a while, and when I leave, I leave more centered, more focused—a happier, healthier person.

Greg's humanity and concern for his colleagues extends well beyond the walls of the Law School. Many years ago, Greg and his wife Ruth, and I, and my husband Vince, shared a set of season tickets to the Maryland men's basketball team at College Park. (This was back in the day when Maryland was a basketball powerhouse.) Sometimes, the four of us went to a game together, but more often, Greg and my husband took one or more of our sons, since I wasn't nearly as much of a basketball fan as they all were. When my husband died suddenly in 2002, I thought about dropping our share of the season tickets, but Greg gently suggested that I keep it. And then—quietly and without fanfare—Greg began taking my boys to the basketball games—something that they looked forward to and enjoyed immensely—and not just for the basketball. Somehow, I think Greg sensed (before I did) just how important it would be for them to continue to do something that they had enjoyed doing with their dad and to do it with a man who cared about them and who shared their passion. My older son now makes his living as a sports writer and I think of Greg almost every time I see my son's byline on a basketball story.

I want to conclude with a story. Greg knows that my older daughter, who is a high school senior due to start college in the fall, has a passion for history. A few months ago, casually, he lent me the first DVD of a five-disc series written and presented by Simon Schama on the history of Britain,¹³ and suggested that my daughter and I might enjoy watching it together. Schama is University Professor in Art History and History at Columbia, and is a thoroughly stylish and engaging guy, and the video is both fascinating and beautiful to watch. My daughter and I watched the first disc, nearly three hours worth, and were totally taken in. Then Greg, like a pusher, gave us the remaining discs in the series and told us to take our time working through them. We have been enjoying them periodically, in between visits to colleges, getting ready for the senior prom, and all the other things that families do when a child is about to graduate from high school.

Now the reason I share this story is not just because it shows that Greg is a generous and thoughtful guy who, having enjoyed these videos, wanted to make sure that his friends did as well. It is that, I believe consciously, Greg understood that he was giving me and my daughter a special reason to spend time together doing something that we will remember warmly next year when she is away at college. In his way, Greg, having gone through

13. A HISTORY OF BRITAIN (BBC Home Entertainment 2010).

the challenge of sending a kid off to college, knew how to help us get ready for this transition, and knew how to do so without even mentioning it. His is a gentle hand, a kind hand, and a knowing one. He has contributed to our community in so many ways that remain unseen and yet we all benefit from his special sort of genius. Thank you, Greg, for all that you have done and all that you do.

GREG YOUNG AND COMMUNITY

LEE KOVARSKY*

When we talk about Greg Young and his legacy in the legal academy, we inevitably drift to conversations about communities. Specifically, Greg cultivated, treasured, and contributed to two communities organized around very different things: communities built around ideas, and communities built around friendships. For Greg, the reason that the Law School was so special was because these two communities coexisted in the same physical space.

In his academic community, Greg is the world's foremost expert on *United States v. Klein*,¹⁴ a post-bellum, enigma-coated decision about the power of Congress to manipulate the jurisdiction of Article III courts. No discussion about Greg's legacy is complete without a fairly extensive word about *Klein*. *Klein* is a favored inkblot of federal courts junkies—the “cult of *Klein*” is actually *a thing*. Until *Boumediene v. Bush*,¹⁵ one can fairly argue that *Klein* sat on a somewhat lonely perch in the federal courts canon as the only post-*Marbury* Supreme Court case using Article III to strike down a statutory limit on the jurisdiction of federal courts. *Klein* is a truly delphic opinion, and I suspect that its studied ambiguity is what captivates Greg, a person whose prodigious investment in literary works with that same quality is known to anyone that has talked to him about a book, poem, a play, or lyrics to a favorite song.

Klein involved an act of Congress responding to the Supreme Court's interpretation of a prior statute hemming in the President's Pardon Power. Klein's estate won in the Court of Claims on the ground that Klein's Presidential Pardon showed his loyalty and that he was therefore entitled to the proceeds from the sale of confiscated property. While *Klein* was pending on appeal, Congress passed a statute that required the Supreme Court to dismiss any appeal in which the Court of Claims had determined

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14. 80 U.S. (13 Wall.) 128 (1872).

15. 553 U.S. 723 (2008).

that a Presidential Pardon proved loyalty. The statute also required the Supreme Court to instruct the Court of Claims, upon remand, to dismiss the complaint against the United States. Finally, the statute required federal courts (in most cases) to treat a Presidential Pardon as conclusive proof of disloyalty that, in turn, barred recovery of proceeds. Congress was seeking to get around the Supreme Court's prior interpretation of the Pardon Power by way of jurisdictional specification and evidentiary presumptions.

Klein is about Congress as puppeteer. Congress had withheld some Article III jurisdiction to decide cases in ways it didn't like, attempting to get around constitutional limits on its power to enact substantive rules of decision about pardons. Greg's work is central to understanding *Klein* not just as a case about limits on Congressional authority to manipulate the appellate jurisdiction of the Supreme Court, but as a case about limits on Congressional authority to manipulate the judicial power common to all courts minted under Article III. In fact, one might fairly characterize a substantial body of Greg's work as his *Klein* project writ large—a reckoning with the serious threats to constitutional values that jurisdiction stripping presents, and an attack on the orthodox view that our founding charter places almost no limits on Congressional authority to manipulate the jurisdiction of lower federal courts. If Henry Hart is the *Klein* Cult's godfather, then Greg Young has been its faithful caretaker for over thirty years.

In my personal community, Greg has been my friend only since 2011. In my academic community, Professor Gordon Young has been a luminary for much longer. In 2014, I inherited Greg's Federal Courts class, a curricular succession after which I will try to reproduce the gifts that Greg has been giving our students for decades. And Greg has gifted the rest of us the optimism that our scholarly communities and friendships can share a roof. Greg, after all, always went to work here with his very best friend: his wife Ruth.

Greg gives me advice not entirely unlike the way a favorite uncle imparts wisdom to an impetuous nephew. He shares his more evolved views on art, wine, books, poetry, and, of course, on federal courts. Greg's more of an epicure than I am, but we are still among the only people in the world that simultaneously love Elvis Costello, the Roots, and *United States v. Klein*. Everyone here is part of Greg's family, one way or another, and the relationship that Greg shares with those of us writing in tribute reminds me of a James Baldwin quote: "Children have never been very good at listening to their elders, but they have never failed to imitate them."

A TRIBUTE TO GREG YOUNG

LESLIE MELTZER HENRY*

When Lee Kovarsky told me he was concluding his tribute to Greg Young with the James Baldwin quote about how children never fail to imitate their elders,¹⁶ I remarked that no matter how hard we try, there are some wonderful things about Greg that we may never successfully imitate: The way, for example, Greg seamlessly incorporates Wallace Stevens' poetry into his scholarly work about *United States v. Klein*; the way that Greg closes his eyes when you describe your work to him, so that he can see its contours and possibilities in his mind; or the way that Greg walks the hallway on the fourth floor before each class, quietly contemplating the details of ordinary legal cases with the same careful scrutiny he gives extraordinary art. These qualities are uniquely Greg's, someone who I have come to think of as simultaneously embodying—to use the language of the artistic world he loves—the best qualities of an artistic director, a playwright, and a cast member.

As most of Greg's colleagues know, he does not simply teach a class, like Constitutional Law. Rather, he conceives, develops, and produces it with the passion and commitment of an artistic director. Like all good directors, he is keenly aware of what his audience wants (usually more of the First Amendment), but also committed to giving his audience what he believes they need (at least a word about the Privileges or Immunities Clause). He knows how important uncertainty, suspense, and resolution are to any good story, and so he frequently encourages his students to wander and ruminate through the puzzles he creates, collecting fleeting impressions that gradually, and sometimes only days later, snap together to reveal a pattern of legal significance. I've always thought that the brilliance of Greg's artistic direction—it really is more than teaching—is this subtleness, which invites his audience to continue contemplating the meaning of what they have experienced long after it ends.

In addition to being a talented director, Greg is also a gifted playwright, both as an academic and a dramatist. Much like the Ancient Greeks, who were the earliest known playwrights, Greg the scholar has been inspired to write about Delphic topics. Lee Kovarsky has written about Greg's remarkable work on *United States v. Klein* in this regard,¹⁷ but to that, let me add that one of the things that makes Greg's writing inspiring is his willingness to embrace complexity and ambiguity, even when making

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16. Lee Kovarsky, *Greg Young and Community*, 75 MD. L. REV. 707, 714 (2015).

17. Kovarsky, *supra* note 16, at 712–13 (describing Greg's scholarship as central to understanding *Klein*).

sense of it requires writing more than one act, as the evolution of Greg's work on *Klein* over the years demonstrates.¹⁸ Greg never worried, as is so common these days, about how often or where he published. In fact, he once told me that at its worst, current pressures to publish reminded him of a different sort of King Midas, counting his articles. Does his daughter become Issue 3, pages *x* to *y*?

The full scope of Greg's written work, of course, cannot be highlighted without mention of the fiction, poetry, and plays that he has, to use his words, "dabbled" with over the years. These pieces—into which I have only had the slightest glimpse—are the best of Greg. They are a meeting place for philosophical, literary, and legal ideas to cross-pollinate. I feel so privileged to have read this work, and it is my sincere hope that he continues it, and when ready, shares it more publicly.

Although Greg is a superb artistic director and a skilled playwright, I suspect most of his colleagues know him best as a modest cast member, a central part of our community who does not seek credit for much of what he does. I am fairly certain that Greg's modesty is the reason that he has the shortest faculty biography on the law school's website, and yet, to so many of us, he has played a leading role in making this an academic community of which we are proud to be a part. Regardless of whether we successfully emulate all that is best of Greg, I can assure you we will try. And as we do, Greg, we will anxiously await your next act.

18. See Gordon G. Young, *United States v. Klein, Then and Now*, 44 LOY. U. CHI. L.J., 265 (2012); Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189.