AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 10: The Reagan Era—Foundations/Principles

William H. Rehnquist, **"The Notion of a Living Constitution"** (1976)[1]

William Rehnquist operated in the background before his appointment to the U.S. Supreme Court by President Nixon in 1972. A former clerk for Supreme Court Justice Robert Jackson, Rehnquist became a private lawyer and involved in Republican politics in Phoenix, Arizona. In 1964 he actively campaigned for Barry Goldwater. When Nixon captured the White House in 1968, some of Goldwater's Arizona supporters, including Rehnquist, were pulled into the Justice Department. Rehnquist worked closely with the White House in the Office of Legal Counsel, where he distinguished himself as a brilliant and highly conservative constitutional lawyer. As an associate justice, he displayed the same traits. He was the most conservative of the Nixon appointees, and a frequent lone dissenter on the Burger Court.

Rehnquist's speech on the "notion of the living Constitution" was one of his first major "off the bench" articulations of his constitutional and judicial philosophy, and it influenced the growing conservative legal movement and future Reagan administration. For Rehnquist, both constitutional design and historical experience cautioned judges to exercise judicial restraint and defer to elected officials for developing solutions to public problems. As you read this excerpt, notice how Rehnquist invokes arguments generally associated with the New Deal, such as the rejection of Lochner v. New York *(1905).*[2] *How much weight does Rehnquist put on original meaning as an alternative to "a living Constitution"?*

. . . At first blush it seems certain that a living Constitution is better than what must be its counterpart, a dead Constitution. . . . If we could get one of the major public opinion research firms in the country to sample public opinion concerning whether the United States Constitution should be living or dead, the overwhelming majority of the responses doubtless would favor a living Constitution.

If the question is worth asking a Supreme Court nominee during his confirmation hearings, however, it surely deserves to be analyzed in more than just the public relations context. . . .

. . . The phrase is really a shorthand expression that is susceptible of at least two quite different meanings.

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The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live. Those who framed, adopted, and ratified the Civil War amendments to the Constitution likewise used what have been aptly described as "majestic generalities" in composing the fourteenth amendment. Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct. Where the framers of the Constitution have used general language, they have given latitude to those who

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[1] Excerpted from William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (1976): 693. Copyright of the Texas Law Review Association, used by permission.

[2] See also, Keith E. Whittington, "William H. Rehnquist: Nixon's Strict Constructionist, Reagan's Chief Justice," in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl Maltz (Lawrence: University Press of Kansas, 2003); Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building," *Studies in American Political Development* 11 (1997): 191.

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would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.

In my reading and travels I have sensed a second connotation of the phrase "living Constitution". . . . Embodied in its most naked form, it recently came to my attention in some language from a brief that had been filed in a United States District Court on behalf of state prisoners asserting that the conditions of their confinement offended the United States Constitution. The brief argued:

> We are asking a great deal of the Court because other branches of government have abdicated their responsibility. . . . Prisoners are like other 'discrete and insular' minorities for whom the Court must spread its protective umbrella because no other branch of government will do so. . . . This Court, as the voice and conscience of contemporary society, as the measure of modern conception of human dignity, must declare that the [named prison] and all it represents offends the Constitution of the United States and will not be tolerated.

Here we have a living Constitution with a vengeance. Although the substitution of some other set of values for those which may be derived from the language and intent of the framers is not urged in so many words, that is surely the thrust of the message. Under this brief writer's version of the living Constitution, nonelected members of the federal judiciary may address themselves to a social problem simply because other branches have failed or refused to do so. The same judges, responsible to no constituency whatever, are nonetheless acclaimed as "the voice and conscience of contemporary society."

. . . What we are talking about . . . is a suggested philosophical approach to be used by the federal judiciary, and perhaps state judiciaries, in exercising the very delicate responsibility of judicial review. . . . [T]hose who have pondered the matter have always recognized that the ideals of judicial review has basically antidemocratic and antimajoritarian facets that require some justification in this Nation, which prides itself on being a self-governing representative democracy.

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John Marshall's justification for judicial review [in *Marbury v. Madison* (1803)] makes the provision for an independent federal judiciary not only understandable but also thoroughly desirable. Since the judges will be merely interpreting an instrument framed by the people, they should be detached and objective. A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution. A mere temporary majoritarian groundswell should not abrogate some individual liberty truly protected by the Constitution.

. . . The Constitution is in many of its parts obviously not a specifically worded document but one couched in general phraseology. There is obviously wide room for honest difference of opinion over the meaning of general phrases in the Constitution; any particular Justice's decision when a decision arises under one of these general phrases will depend to some extent on his own philosophy of constitutional law. One may nevertheless concede all of these problems that inhere in Marshall's justification of judicial review, yet feel that his justification for nonelected judges exercising the power of judicial review is the only one consistent with democratic philosophy of representative government.

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The brief writer's version [of the living Constitution] seems instead to be based upon the proposition that federal judges, perhaps judges as a whole, have a role of their own, quite independent of the popular will, to play in solving society's problems. Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then are no longer the keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country. Surely there is no justification for a third legislative branch in the federal branch in the federal government, and there is even less justification for a federal legislative branch's reviewing on a policy basis the laws enacted by the legislatures of the fifty states. . . .

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It seems to me that it is almost impossible, after reading the record of the Founding Fathers' debates in Philadelphia, to conclude that that they intended the Constitution itself to suggest answers to the manifold problems that they knew would confront succeeding generations. The Constitution that they drafted was indeed intended to endure indefinitely, but the reason for this very well-founded hope was the general language by which national authority was granted to Congress and the Presidency. The two branches were to furnish the motive power within the federal system, which was in turn to coexist with the state governments; the elements of government having a popular constituency were looked to for the solution of the numerous and varied problems the future would bring. Limitations were indeed placed upon both the federal and state governments in the form of both a division of powers and express protection for individual rights. These limitations, however, were not themselves designed to solve the problems of the future, but were instead designed to make certain that the constituent branches, when *they* attempted to solve those problems, should not transgress those fundamental limitations.

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The second difficulty with the brief writer's version of the living Constitution lies in its inattention to or rejection of the Supreme Court's historical experience gleaned from similar forays into problem solving.

. . .

One reads the history of these episodes in the Supreme Court to little purpose if he does not conclude that prior experimentation with the brief writer's expansive notion of a living Constitution has done the Court little credit. There remains today those . . . who appear to cleave nonetheless to the view that the experiments of the Taney Court before the Civil War, and of the Fuller and Taft Courts in the first part of this century, ended in failure not because they sought to bring into the Constitution a principle that the great majority of objective scholars would have to conclude was not there but because they sought to bring into the Constitution the *wrong* extraconstitutional principle. . . . To the extent that one must, however, go beyond even a generously fair reading of the language and intent of that document in order to subsume these principles, it seems to me that they are not really distinguishable from those espoused in *Dred Scott v. Sandford* (1856) and *Lochner v. New York* (1905).

The third difficulty with the brief writer's notion of the living Constitution is that it seems to ignore totally the nature of political value judgments in a democratic society. If such a society adopts a constitution and incorporates in that constitution safeguards for individual liberty, these safeguards indeed do take on a generalized moral rightness or goodness. . . . It is the fact of their enactment that gives them whatever moral claim they have upon us as a society, however, and not any independent virtue they may have in any particular citizen's own scale of values.

Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments. . . . Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given the sanction of law. . . .

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. . . It is always time consuming, frequently difficult, and not infrequently impossible to run successfully the legislative gauntlet and have enacted some facet of one's own deeply felt value judgments. It is even more difficult for either a single individual or indeed for a large group of individuals to succeed in having such a value judgment embodied in the Constitution. All of these burdens and difficulties are entirely consistent with the notion of a democratic society. It should not be easy for any one individual or group of individuals to impose by law their value judgments upon fellow citizens who may disagree with those judgments. Indeed, it should not be easier just because the individual in question is a judge. . . .

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