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Political Development and the Origins of the “Living Constitution”

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Howard Gillman*

I. Introduction

Debates surrounding our so-called “living Constitution” have a specific historical and political origin. Historically they emerged during the late-nineteenth century and reached an initial fever pitch during the New Deal constitutional battles. Politically the theory of the living Constitution was originally constructed, not for the purpose of identifying innovative *rights* that reflected developing conceptions of decency and justice, but to support the adoption of innovative government *powers* that could address new social and economic challenges arising out of industrialization.

Stephen Skowronek has famously declared that the emergent political order of the late-nineteenth century amounted to “a new American state” in the sense that it required the dismantling of “already well-articulated governing arrangements” in favor of “national governmental capacities that were foreign to the existing state structure and that presupposed a very different mode of governmental operations.”¹ The central components of the transformation were the expansion of federal legislative authority and the establishment of a modern, regulatory executive establishment. However, many of these features were difficult to reconcile with prevailing understandings of the “original intent” of the scope and structure of federal power. Thus, the pressure of political development generated a corresponding jurisprudential development. Drawing on intellectual currents that were not available to the framers’ generation—including Darwinism, historicism, and pragmatism—progressives and their allies argued that the provisions of the Constitution were designed to adapt to changing environments and social purposes.

In the decades leading up to the battle over the New Deal, opposing political camps embraced opposing jurisprudential visions of constitutional stability and change. Conservatives insisted that the very idea of constitutionalism precluded an acceptance of an evolutionary conception of constitutional meaning. Reformers countered that constitutional adaptation was a natural and inevitable feature of any enduring constitutional system, especially in the face of rapid and deep social change. The defeat of traditional constitutional conservatism in the wake of the 1936 presidential election represented the collapse of what was perceived to be an anachronistic “horse and buggy” theory of constitutional meaning. Until the rise of the “new originalism” in the 1990s, almost all post-New Deal constitutional theorists—liberals and conservatives alike—embraced some form of the theory of the living Constitution. However, to see this, we need to go back to the origins of the tradition.

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¹ STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at 4, 9 (1982).

II. Nineteenth Century Understandings

From the time of the Founding through most of the nineteenth century, there was an overwhelming consensus that the only appropriate methodology of constitutional interpretation was originalism, and (consequently) it was assumed that constitutional meaning was fixed until amended. Actually, consensus is not quite the right word, because at the time there was really no argument about it. During this period there was no cottage industry of constitutional theorists arguing about the meta-theoretical question of how one should approach the task constitutional interpretation. There were simply important but conventional disagreements about what the Constitution meant.

This understanding about nineteenth century beliefs may appear to be inconsistent with the modern view that Chief Justice John Marshall advocated a conception of the “living Constitution” when he declared in *McCulloch v. Maryland* that “we must never forget that it is a *constitution* we are expounding,” one that was “intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.”² However, this interpretation of *McCulloch* is a twentieth century invention. For Marshall’s contemporaries, adaptation might be permissible with respect to “the necessary means for the execution of the powers conferred on the government” but not with respect to the scope of Congress’ delegated powers. As Justice Story put it in his *Commentaries*, the “means” by which the government pursues its enumerated and fixed objects “must be subject to perpetual modification, and change; they must be adapted to the existing manners, habits, and institutions of society, which are never stationary; to the pressure of dangers, or necessities; to the ends in view; to general and permanent operations, as well as to fugitive and extraordinary emergencies.”³ At the same time, “a rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. . . . [T]he policy of one age may ill suit the wishes, or the policy of another. The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever.”⁴

Thomas M. Cooley similarly declared that “A cardinal rule in dealing with written instruments is that they shall receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable.”⁵ This is because “A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. . . .

² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

³ JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 143, §192 (1833).

⁴ *Id.* at 409-10, §192.

⁵ THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 54 (1868).

The meaning of the constitution is fixed when it is adopted, and it is not different any subsequent time when a court has occasion to pass upon it.”⁶

During this era, Supreme Court justices frequently disagreed on the proper understanding of the Constitution, but they agreed on how one should attempt to interpret the document. For example, Chief Justice Taney wrote in *Dred Scott* that “The duty of the court is, to interpret the instrument [the founders’] have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted. . . . If any of [the Constitution’s] provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.”⁷ Writing in dissent, Curtis also expressed the view that “When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who, for the time being have the power to declare what the Constitution is, according to their own views of what it ought to mean.”⁸

One of the reasons why it was possible to sustain the view that constitutional meaning would be anchored to original meanings was the relative stability of original institutional arrangements during the first three-quarters of the nineteenth century. However, this changed in the later part of nineteenth century, when industrialization created demands by progressives for unprecedented expansion in federal governing authority (as illustrated, for example, by the attempt in the Sherman Anti-Trust Act to assert national power over presumptively intra-state activities such as production, manufacturing, and agriculture). When critics complained about the unprecedented nature of these assertions of power their opponents countered that the country was facing unprecedented experiences and challenges. From their point of view, it was just common sense that the Constitution had to be made adequate to these new exigencies. As explained by Woodrow Wilson, while the framers believed that politics “was a variety of mechanics” and the Constitution a “display [of] the laws of nature,” we have since come to realize that “Society is a living organism and must obey the laws of life, not of mechanics”;⁹ “government is not a machine, but a living thing . . . It is accountable to Darwin, not to Newton.”¹⁰

Just as the notion of a permanent Constitution was made possible by larger cultural assumptions associated with Protestantism and Newtonian science, so too did the emerging assault on that tradition draw support and inspiration from larger cultural changes in the late nineteenth century. In addition to Darwinism, late-nineteenth century reformers could draw on: the assumption in antiformalism that concepts were imperfect and indeterminate social constructs rather than stable, determinate principles; the emphasis in historicism on the inevitability of development in social life; pragmatism’s insistence that habits of thought

⁶ *Id.* at 54.

⁷ *Dred Scott v. Sandford*, 60 U.S. 393, 405, 426 (1857).

⁸ *Id.* at 621 (Curtis, J., dissenting).

⁹ WOODROW WILSON, *THE NEW FREEDOM* 46-48 (1913).

¹⁰ WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 22, 56 (1908).

arise and become efficacious in the context of practical social problems; and legal positivism's suggestion that law is a product of political power and is not a disembodied presence. In time, these various strands were woven together in support of the view that constitutional meaning had to be adaptive to changing social circumstances.

III. The Two Traditions of the Living Constitution

This innovation in constitutional theorizing manifested itself in two distinct traditions in twentieth-century constitutional law and theory, corresponding to familiar conservative arguments about judicial restraint and familiar liberal arguments about judicial protection for new understandings of civil rights and liberties.

The first tradition, originating with Oliver Wendell Holmes but then carried on by Felix Frankfurter and his supporters, emphasized the need for judges to get out of the habit of imposing anachronistic constraints on contemporary officeholders, and embracing instead an ethic of judicial restraint and a tolerance for political adaptation through legislative innovation. In 1880, Holmes remarked, "as it embodies the story of a nation's development over centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs."¹¹ For Holmes, it was the accommodation of social pressure, rather than the stable regulation of social change, that characterized the relationship between law and society; as he put it in *The Common Law*, "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."¹²

For Holmes, what was true about the common law was also true about constitutional law. In his dissent in *Lochner v. New York*, he took the position that the Constitution should not be used to prevent the "natural outcome of a dominant opinion" from prevailing in legislation, except in extraordinary circumstances.¹³ This famously minimalist conception of constitutional constraint was almost anti-constitutional in its commitment to legislative supremacy and the sovereignty of elected officials. But this position makes sense in light of Holmes' belief, expressed in another opinion, that "the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil," and their significance "is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."¹⁴ As he put it in *Missouri v. Holland*, "[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or hope that they had created an organism; it has taken a century and has cost their successors much sweat and

¹¹ G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 147 (1993).

¹² OLIVER WENDELL HOLMES, THE COMMON LAW 1-2 (1881).

¹³ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

¹⁴ *Gompers v. United States*, 233 U.S. 604, 610 (1914).

blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”¹⁵

However, Holmes’ view of the living Constitution as mere judicial deference was not the only tradition to develop. A second, non-originalist tradition can be associated with the jurisprudence of Louis Brandeis and, later, civil libertarians such as Chief Justice Stone. These justices argued that it was unthinkable to adapt our understandings of constitutional *powers* without also adapting our understanding of constitutional protections for *rights and liberties*. For example, in his dissent in *Olmstead v. U.S.*, Brandeis insisted that the Fourth Amendment had to be interpreted in a way that was responsive to new threats to civil liberties, such as tapping phones, since the alternative was for that amendment to become an anachronistic irrelevancy in light of new technologies. The Constitution may have been adopted to address certain evils, but “its general language should not . . . be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.”¹⁶ From Brandeis’ perspective, the Constitution’s provisions embodied general principles of political morality, and it was the obligation of each generation to decide how best to realize these principles in light of contemporary experiences and circumstances. After all, the alternative to viewing the Fourth Amendment as a living commitment to “vital” principles (such as privacy or a right to be let alone) was that it would become a dead letter, relevant to eighteenth century questions but silent on twentieth century questions.

IV. The New Deal and the Collapse of Constitutional Originalism

By the 1920s, the traditional conception of a Constitution whose meaning was fixed and immutable was under siege by the aforementioned versions of the living Constitution. In 1921, Cardozo formally joined the ranks of the non-originalists when he wrote in *The Nature of the Judicial Process* that, “The great generalities of the constitution have a content and significance that vary from age to age.”¹⁷ More than a decade later this view was threatening to become the accepted wisdom of a Court majority. When in *Home Building & Loan Association v. Blaisdell* the Court decided to uphold the constitutionality of a government effort to provide debtor relief through the form of moratory laws, Chief Justice Hughes wrote that “It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provisions of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.”¹⁸

¹⁵ *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

¹⁶ *Olmstead v. United States*, 277 U.S. 438, 475-76, 472 (1928) (Brandeis, J., dissenting).

¹⁷ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 17 (1921), cited in Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 54 (1993).

¹⁸ *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 442-43 (1934).

It was an argument for innovative powers to meet innovative challenges—but the traditionalists were not impressed. Justice Sutherland responded on their behalf, arguing that it is “hardly necessary to say” that a “provision of the Constitution . . . does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.”¹⁹ In contrast to Holmes and Cardozo, he insisted that “Constitutional grants of power and restrictions upon the exercise of power are not flexible as the doctrines of the common law are flexible. . . . The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it.”²⁰ He argued that there was no doubt but that the contract clause “was meant to foreclose state action impairing the obligation of contracts *primarily and especially* in respect of such action aimed at giving relief to debtors *in time of emergency*. . . . If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.”²¹

However, by the mid-1930s, it was becoming increasingly difficult to sell the argument that our institutions were limited to the powers imagined and authorized in 1787. As one of the foremost spokesmen for the new theory of the living Constitution, Edward Corwin argued that “the Constitution’s founders could never have had an intention as to something—social conditions of 1933, to wit—which they could not have imagined or foreseen,” and he insisted “that the Constitution must mean different things at different times if it is to mean what is sensible, applicable, feasible.”²² Elsewhere, he explained that the Constitution should be considered “a living statute, to be interpreted in the light of living conditions. Resistance it offers to the too easy triumph of social forces, but it is only the resistance of its words when they have been fairly construed from a point of view which is sympathetic with the aspirations of the existing generation of American people, rather than that which is furnished by concern for theories as to what was intended by a generation long since dissolved into its native dust.”²³

The theory of the living Constitution gained prominence, and then preeminence, because it was *the* alternative to the increasingly untenable conservative jurisprudence of the Four Horsemen during the battles over the New Deal. The choice between old and new conceptions was best summarized in 1936 by James Hart, a political science professor from Johns Hopkins and a member of one of the NRA’s Regional Labor Boards. “Whoever would be consistent in his thinking about the Constitution,” he wrote, “must choose between two fundamentally different philosophies. . . . The one assumes a dynamic universe in which new factors and hence new problems emerge. The other postulates a universe whose very changes take place in accordance with a few unchanging principles. The first recognizes the necessity

¹⁹ *Id.* at 448-49 (Sutherland, J., dissenting).

²⁰ *Id.* at 451-53 (Sutherland, J., dissenting).

²¹ *Id.* at 465 (Sutherland, J., dissenting).

²² Edward S. Corwin, *Moratorium over Minnesota*, 82 U. PA. L. REV. 311 (1934), reprinted in CORWIN, CORWIN ON THE CONSTITUTION, VOLUME TWO: THE JUDICIARY 331-36 (Richard Loss ed.) (1987).

²³ Edward S. Corwin, *Constitution v. Constitutional Theory: The Question of the States v. the Nation*, 19 AMERICAN POLITICAL SCIENCE REVIEW 290 (1925), reprinted in CORWIN, CORWIN ON THE CONSTITUTION, VOLUME TWO: THE JUDICIARY 183-93 (1987).

of choice in the application to new situations of the lessons of the past, and hence regards principles as [quoting John Dewey's *Human Nature and Conduct*] 'methods by which the net value of past experience is rendered available for present scrutiny of new perplexities.' The second treats principles as the unambiguous axioms from which the answer to every problem may be automatically deduced."²⁴ As applied to the Constitution, the alternatives are that it is either "a charter meant to endure for ages to come, and hence to be adapted to the circumstances and the dominant purposes of each succeeding generation" or "it is the enactment for all time of principles of fixed meaning and universal validity."²⁵ Hart believed that, "Other things being equal, readaptation by interpretation is far preferable to readaptation by amendment," since it was worse to suffer "an intolerable rigidity" than risk promoting "disrespect for the law."²⁶

V. Conclusion: The Legacy of the Living Constitution

The political defeat of the conservatives in 1937 represented a triumph of the theory of the living Constitution. For the next few decades there was no serious legal or political constituency advocating a return to the jurisprudence of the Four Horsemen. Any controversy that might have erupted over the Brandeis/Stone civil libertarian version of the living Constitution (as manifested in the Footnote Four doctrine and the theory of "preferred freedoms") was quickly vanquished by President Truman after Murphy and Rutledge left the Court in 1949 and were replaced by the deferential Clark and Minton.

The modern controversy over the living Constitution was (re)ignited by the Warren Court's interpretations of the religion clauses, due process, and privacy rights in the 1960s. However, while conservative critics of these decisions sometimes claimed to represent an originalist sensibility, it is important to note that their invocation of originalism was limited to a critique of judicial protection for new rights rather than an advocacy of a jurisprudence of traditional enumerated powers; in other words, these conservatives were heirs of Holmes and Frankfurter, not Sutherland. As Rehnquist characterized it, the essential "nature of the Constitution" is "to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times."²⁷ Through the 1980s, debates in constitutional theory remained bounded by the Holmes and Brandeis versions of the living Constitution argument. Presidents might have found some Supreme Court nominees who were willing to advocate the language of "strict construction," but one would be hard pressed to find justices in the modern era who were willing to publicly commit themselves to a theory of constitutional interpretation that was limited to the meaning of the words at the time they were ratified.

In order for the theory of the living Constitution to face a real challenge it would be necessary to re-open the question of the legitimacy of the New Deal revolution, and it would be necessary to give advocates for that position some reason to believe that the judiciary had

²⁴ James Hart, *A Unified Economy and States' Rights*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 102-14 (1936).

²⁵ *Id.* at 102-03.

²⁶ *Id.* at 107.

²⁷ William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

been made safe for neo-Sutherland-like judicial activism. As it turned out, the legitimacy of the New Deal revolution was called into question by the Reagan Revolution and by Gingrich's "Contract with America" in 1994. Moreover, the concerted efforts of the Reagan and Bush (I and II) administrations resulted in the ideological transformation of the federal judiciary. Consequently, in the 1980s and 1990s, we have witnessed the rise of the so-called "New Originalism," which is an originalism that (like Sutherland's) focused more on traditional, libertarian understandings of the scope of delegated powers than on complaints about school prayer, criminal procedure, and *Roe v. Wade*. It is an approach to constitutional interpretation that can claim a legitimate pedigree in American constitutional history.

Then again, it remains to be seen whether practitioners and politicians will be willing to embrace and defend this previously discredited approach, with all its implications for the exercise of judicial power, the maintenance of the (generally popular) canon of contemporary constitutional law, and the sustainability of the familiar scope and structure of federal authority. It is hard to see how the stubborn refusal to allow constitutional powers and rights to adapt to changing circumstance and historical experiences will be any more popular today than it was when it was rejected the first time around.