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## Chief Justice Rehnquist's Enduring Democratic Constitution

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# IN MEMORIAM: WILLIAM H. REHNQUIST

## CHIEF JUSTICE REHNQUIST'S ENDURING, DEMOCRATIC CONSTITUTION

RICHARD W. GARNETT\*

We have all heard, read, and (probably) argued a good deal lately about the “judicial philosophy” of nominees to and Justices of the Supreme Court of the United States.<sup>1</sup> Senate staffers, pundits, “big media” journalists, and bloggers have scoured the sources, including college research papers, job applications, appellate briefs, opinions, and even thank-you notes<sup>2</sup> looking for clues (or smoking guns). What would really be useful, though, are more documents like Chief Justice William H. Rehnquist’s essay *The Notion of a Living Constitution*.<sup>3</sup>

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1. See, e.g., Mike Allen & R. Jeffrey Smith, *Judges Should Have “Limited” Role, Roberts Says*, WASH. POST, Aug. 3, 2005, at A5 (“Roberts echoed the views of President Bush in describing his judicial philosophy. Roberts said that he views the role of judges as ‘limited’ and that they ‘do not have a commission to solve society’s problems, as they see them, but simply to decide cases before them according to the rule of law.’”); Peter Baker & Shailagh Murray, *Bush Defends Supreme Court Pick*, WASH. POST, Oct. 5, 2005, at A1 (“A day after tapping White House counsel Harriet Miers for associate justice, Bush appeared in the Rose Garden to reject charges of cronyism, criticism of her scant constitutional background and suspicion of her judicial philosophy.”); Senator Charles Schumer, News Conference on the Nomination of Judge Alito to the Supreme Court, *Transcript: Sen. Schumer’s Remarks on the Alito Nomination*, WASH. POST, Oct. 31, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100707.html> (“A preliminary review of his record raises real questions about Judge Alito’s judicial philosophy and his commitment to civil rights, workers’ rights, women’s rights, the rights of average Americans which the courts have always looked out for.”).

2. See Charles Babington, *Miers Hit on Letters and the Law*, WASH. POST, Oct. 15, 2005, at A7.

3. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976), reprinted in 29 HARV. J.L. & PUB. POL’Y 401 (2006).

This short piece was delivered as the Will E. Orgain Lecture and then published thirty years ago, back when Rehnquist was still the “Lone Ranger”<sup>4</sup>—“the Boss,” and not “the Chief,” to his clerks—and a relatively junior Associate Justice. And, not taking anything away from Princeton graduate Samuel Alito’s senior thesis on the Italian Constitutional Court,<sup>5</sup> or now-Chief Justice Roberts’s article exploring the limits on statutory standing imposed by Article III,<sup>6</sup> Rehnquist’s article is about as clear, succinct, and coherent a statement of judicial philosophy as one could want. The members and editors of the *Harvard Journal of Law & Public Policy* and the *Texas Law Review* deserve our thanks for their initiative and generosity in reproducing this important, provocative, and—to many of us—compelling document.

Now, it is a challenge for anyone—even one of the great Chief Justices of the United States<sup>7</sup>—who ventures into the “Living Constitution” debate to identify with reasonable precision just what it is that one is defending or debunking, if only to avoid the unenviable, “necrophil[ia]c” position of playing partisan for a “dead” Constitution.<sup>8</sup> After all, as Rehnquist was happy to concede, there seems no reason to resist what he called in his essay the “Holmes version” of the Living Constitution, that is, the observation that, in many cases, “[t]he framers of the Constitution”—like those who “framed, adopted, and ratified the Civil War amendments”—“wisely spoke in general

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4. “When Richard Nixon appointed Rehnquist to the court in 1971 at the age of 47, he was a young firebrand, with bushy sideburns, loud clothes, a cocksure manner, and fiercely conservative views. He quickly became a bomb-thrower on the court, launching provocative dissents and staking out solitary terrain on the court’s right wing. His clerks in those years famously gave him a ‘Lone Ranger’ doll in recognition of his role on the court.” Cliff Sloan, *Whatever Happened to the Lone Ranger?*, NEWSWEEK, Nov. 15, 2004, available at <http://www.msnbc.msn.com/id/6495396/site/newsweek/from/RL.2/>.

5. Chanakya Sethi, *Nominee’s Missing Thesis Recovered*, DAILY PRINCETONIAN, Nov. 8, 2005 (quoting Professor Walter Murphy’s statement that “Alito’s thesis was one of only about a half-dozen he kept over the years because of the quality of its scholarship”).

6. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993).

7. The former acting Solicitor General, Professor Walter Dellinger, has concluded, “William H. Rehnquist will likely be seen as one of the three most influential chief justices in history, surpassed perhaps only by John Marshall and Earl Warren.” Walter Dellinger, *In Memoriam*, SLATE, Sept. 4, 2005, <http://www.slate.com/id/2125685/>.

8. Rehnquist, *supra* note 3, at 693 (“At first blush it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution.”).

language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live."<sup>9</sup> He might even have agreed (over a "Miller's Lite," perhaps)<sup>10</sup> with his longtime judicial sparring partner, Justice William Brennan, that "the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers."<sup>11</sup> And although we can be sure he would have rolled his eyes at Justice Louis Brandeis's image of the Constitution as a "living organism," he probably would have agreed readily that the Constitution "is not a straight-jacket."<sup>12</sup>

For then-Justice Rehnquist, the "Notion of a Living Constitution" was not to be resisted out of pious reverence for the Founders' insight into the moral, economic, and social challenges facing late-twentieth-century society.<sup>13</sup> Nor did his critique purport to be the product of a tight deduction from

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9. *Id.* at 694.

10. When eating lunch with his law clerks—with this law clerk, anyway—the Chief often ordered a cheeseburger and (what he called) a "Miller's Lite."

11. *Marsh v. Chambers*, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting); see also William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985) ("[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.").

12. William J. Brennan, Jr., *Why Have a Bill of Rights?*, 9 OXFORD J. LEGAL STUD. 425, 426 (1989) (quoting and citing Justice Brandeis). I can only imagine the temptations Rehnquist resisted during his 1986 confirmation hearings when he was asked, "How can you not acknowledge that the Constitution is a living, breathing document?" *Nomination of Justice William H. Rehnquist to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 354 (1986) (question of Sen. Joseph R. Biden, Member, S. Comm. on the Judiciary).

13. See, e.g., Rehnquist, *supra* note 3, at 699 ("It seems to me that it is almost impossible . . . to conclude that [the Founders] intended the Constitution itself to suggest answers to the manifold problems that they knew would confront succeeding generations."); cf. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting) ("Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.").

premises relating to the very nature of a written constitution. He was not—to use Professor Sunstein’s term<sup>14</sup>—a “fundamentalist,” or even a thoroughgoing, principled “originalist.” He did not fail to observe and absorb the obvious fact that ours is a very different world from that of the Framers.

To understand Rehnquist’s critique of the Living Constitution—and, more generally, his judicial philosophy—it is essential to understand that his aim was not to deny or resist constitutional change, but instead to insist and, to the extent possible, ensure that the people—“We the People,” the “ultimate source of authority in this Nation”<sup>15</sup>—acting through their politically accountable representatives, retain the right to serve (or not) as the agents of and vehicles for that change. What animates Rehnquist’s essay—and, indeed, his career on the Court—is not a misplaced attachment to stasis, or a slavish adherence to ideological formulae, but a clear-eyed appreciation for the tension that can exist between the “antidemocratic and antimajoritarian facets” of judicial review—a power that, he reminded us, “require[s] some justification in this Nation, which prides itself on being a self-governing representative democracy”<sup>16</sup>—and the “political theory basic to democratic society.”<sup>17</sup>

So, then—Justice Rehnquist contended, it is one thing to note that the Constitution is, in many places, “not a specifically worded document” and that “[t]here is . . . wide room for honest difference of opinion over the meaning of general phrases in the Constitution.”<sup>18</sup> It is another, though, to authorize “nonelected members of the federal judiciary,” functioning as “the voice and conscience of contemporary society” and “as the measure of the modern conception of human dignity,”<sup>19</sup> to serve as a “council of revision”<sup>20</sup> armed “with a roving commission to second-guess Congress, state legislatures, and state

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14. See generally CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005).

15. Rehnquist, *supra* note 3, at 696.

16. *Id.* at 695–96.

17. *Id.* at 705; see also *id.* at 706 (concluding that the Living Constitution is “a formula for an end run around popular government” and is “genuinely corrosive of the fundamental values of our democratic society”).

18. *Id.* at 697.

19. *Id.* at 695.

20. *Id.* at 698.

and federal administrative officers concerning what is best for the country."<sup>21</sup>

About ten years after Rehnquist's Orgain Lecture, Justice Brennan responded to Rehnquist's assertion that "because ours is a government of the people's elected representatives, substantive value choices should by and large be left to them."<sup>22</sup> Justice Brennan acknowledged that although this view "has appeal under some circumstances . . . it ultimately will not do." After all, "[f]aith in democracy is one thing, blind faith quite another. . . . It is the very purpose of our Constitution . . . to declare certain values transcendent, beyond the reach of temporary political majorities."<sup>23</sup>

Justice Brennan's argument is important, and it should be emphasized that, throughout his career, Rehnquist engaged and responded to it. Certainly, the notion that the powers and the authority of the government should not wax and wane with the whims of "temporary political majorities" is one that Rehnquist readily and enthusiastically endorsed.<sup>24</sup> He recognized that the People, in and through the Constitution, imposed limits on government "in the form of both a division of powers and express protection for individual rights."<sup>25</sup> In Rehnquist's view, though, the constraints on majoritarianism are and should be limited to those that the People have imposed on themselves and authorized judges to enforce.

Now, it is no small problem for anyone thinking of taking on the Living Constitution that, in Professor Jack Balkin's words, "[w]e are all living constitutionalists now." After all, he insisted, "Nobody, and I mean nobody, whether Democrat or Republican, really wants to live under the Constitution accord-

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21. *Id.*; see also *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) ("[T]his Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass 'arbitrary,' 'illogical,' or 'unreasonable' laws."); cf. *Texas v. Johnson*, 491 U.S. 397, 435 (1989) (Rehnquist, C.J., dissenting) ("The Court's role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government.").

22. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 436 (1986).

23. *Id.* at 436-37.

24. See, e.g., *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

25. Rehnquist, *supra* note 3, at 699.

ing to the original understanding once they truly understand what that entails." Put bluntly, "[N]o one truly believes in a dead Constitution."<sup>26</sup> True enough, but neither did Rehnquist. His position, expressed in the essay that follows and developed in his judicial work, was not that the Nation's Constitution is dead, but that it lives and endures through the enactments of its elected and accountable legislators and the debates and votes of its People rather than through the "enlightened" updating of its federal judges.<sup>27</sup>

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26. Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE, Aug. 29, 2005, <http://www.slate.com/id/2125226/>.

27. See Rehnquist, *supra* note 3, at 699 (contending that the "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").