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## Observation

### The Notion of a Living Constitution†

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At least one of the more than half-dozen persons nominated during the past decade to be an Associate Justice of the Supreme Court of the United States has been asked by the Senate Judiciary Committee at his confirmation hearings whether he believed in a living Constitution.<sup>1</sup> It is not an easy question to answer; the phrase "living Constitution" has about it a teasing imprecision that makes it a coat of many colors.

One's first reaction tends to be along the lines of public relations or ideological sex appeal, I suppose. At first blush it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution. It would seem that only a necrophile could disagree. 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.

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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. While it is undoubtedly true, as Mr. Justice Holmes said, that "general propositions do not decide concrete cases,"<sup>2</sup> general phrases such as this have a way of subtly coloring the way we think about concrete cases.

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1. See *Hearings on Nominations of William H. Rehnquist and Lewis F. Powell, Jr., Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 87 (1971).

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

Professor McBain of the Columbia University Law School published a book in 1927 entitled *The Living Constitution*.<sup>3</sup> Professor Reich of the Yale Law School entitled his contribution to a book-length symposium on Mr. Justice Black *The Living Constitution and the Court's Role*.<sup>4</sup> I think I do no injustice to either of these scholars when I say that neither of their works attempts any comprehensive definition of the phrase "living Constitution." The phrase is really a shorthand expression that is susceptible of at least two quite different meanings.

The first meaning was expressed over a half-century ago by Mr. Justice Holmes in *Missouri v. Holland*<sup>5</sup> with his customary felicity when he said:

... When we are dealing with words that also are 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 to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.<sup>6</sup>

I shall refer to this interpretation of the phrase "living Constitution," with which scarcely anyone would disagree, as the Holmes version.

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<sup>7</sup> to the Constitution likewise used what have been aptly described as "majestic generalities"<sup>8</sup> 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 would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.

3. H. MCBAIN, *THE LIVING CONSTITUTION* (1927).

4. Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT 133 (S. Strickland ed. 1967).

5. 252 U.S. 416 (1920).

6. *Id.* at 433.

7. U.S. CONST. amends. XIII, XIV, XV.

8. *Fay v. New York*, 332 U.S. 261, 282 (1947) (Jackson, J.).

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In my reading and travels I have sensed a second connotation of the phrase "living Constitution," however, one quite different from what I have described as the Holmes version, but which certainly has gained acceptance among some parts of the legal profession. 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 urged:

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 the 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 of government have failed or refused to do so. These same judges, responsible to no constituency whatever, are nonetheless acclaimed as "the voice and conscience of contemporary society."

If we were merely talking about a slogan that was being used to elect some candidate to office or to persuade the voters to ratify a constitutional amendment, elaborate dissection of a phrase such as "living Constitution" would probably not be warranted. What we are talking about, however, 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. Under the familiar principle of judicial review, the courts in construing the Constitution are, of course, authorized to invalidate laws that have been enacted by Congress or by a state legislature but that those courts find to violate some provision of the Constitution. Nevertheless, those who have pondered the matter have always recognized that the ideal 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.

All who have studied law, and many who have not, are familiar with John Marshall's classic defense of judicial review in his opinion for the Court in *Marbury v. Madison*.<sup>9</sup> I will summarize very briefly the thrust of that answer, with which I fully agree, because while it supports the Holmes version of the phrase "living Constitution," it also suggests some outer limits for the brief writer's version.

The ultimate source of authority in this Nation, Marshall said, is not Congress, not the states, not for that matter the Supreme Court of the United States. The people are the ultimate source of authority; they have parceled out the authority that originally resided entirely with them by adopting the original Constitution and by later amending it. They have granted some authority to the federal government and have reserved authority not granted it to the states or to the people individually. As between the branches of the federal government, the people have given certain authority to the President, certain authority to Congress, and certain authority to the federal judiciary. In the Bill of Rights they have erected protections for specified individual rights against the actions of the federal government. From today's perspective we might add that they have placed restrictions on the authority of the state governments in the thirteenth, fourteenth, and fifteenth amendments.

In addition, Marshall said that if the popular branches of government—state legislatures, the Congress, and the Presidency—are operating within the authority granted to them by the Constitution, their judgment and not that of the Court must obviously prevail. When these branches overstep the authority given them by the Constitution, in the case of the President and the Congress, or invade protected individual rights, and a constitutional challenge to their action is raised in a lawsuit brought in federal court, the Court must prefer the Constitution to the government acts.

John Marshall's justification for judicial review 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

9. 5 U.S. (1 Cranch) 137 (1803).

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not change the meaning of the Constitution. A merely temporary majoritarian groundswell should not abrogate some individual liberty truly protected by the Constitution.

Clearly Marshall's explanation contains certain elements of either ingenuousness or ingeniousness, which tend to grow larger as our constitutional history extends over a longer period of time. 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 question 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.

Marshall was writing at a time when the governing generation remembered well not only the deliberations of the framers of the Constitution at Philadelphia in the summer of 1787 but also the debates over the ratification of the Constitution in the thirteen colonies. The often heated discussions that took place from 1787, when Delaware became the first state to ratify the Constitution,<sup>10</sup> until 1790, when recalcitrant Rhode Island finally joined the Union,<sup>11</sup> were themselves far more representative of the give-and-take of public decisionmaking by a constituent assembly than is the ordinary enactment of a law by Congress or by a state legislature. Patrick Henry had done all he could to block ratification in Virginia,<sup>12</sup> and the opposition of the Clinton faction in New York had provoked Jay, Hamilton, and Madison to their brilliant effort in defense of the Constitution, the *Federalist Papers*.<sup>13</sup> For Marshall, writing the *Marbury v. Madison* opinion in 1803, the memory of the debates in which the people of the thirteen colonies had participated only a few years before could well have fortified his conviction that the Constitution was, not merely in theory but in fact as well, a fundamental charter that had emanated from the people.

One senses no similar connection with a popularly adopted constituent act in what I have referred to as the brief writer's version of the

10. 2 F. THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 18 (1901).

11. *Id.* at 191.

12. *Id.* at 81, 87, 91-95.

13. *Id.* at 134-39.

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living Constitution. The brief writer's version 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 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 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. Even if one were to disagree with me on this point, the members of a third branch of the federal legislature at least ought to be elected by and responsible to constituencies, just as in the case of the other two branches of Congress. If there is going to be a council of revision, it ought to have at least some connection with popular feeling. Its members either ought to stand for reelection on occasion, or their terms should expire and they should be allowed to continue serving only if reappointed by a popularly elected Chief Executive and confirmed by a popularly elected Senate.

The brief writer's version of the living Constitution is seldom presented in its most naked form, but is instead usually dressed in more attractive garb. The argument in favor of this approach generally begins with a sophisticated wink—why pretend that there is any ascertainable content to the general phrases of the Constitution as they are written since, after all, judges constantly disagree about their meaning? We are all familiar with Chief Justice Hughes' famous aphorism that "We are under a Constitution, but the Constitution is what the judges say it is."<sup>14</sup> We all know the basis of Marshall's justification for judicial review, the argument runs, but it is necessary only to keep the window dressing in place. Any sophisticated student of the subject knows that judges need not limit themselves to the intent of the framers, which is very difficult to determine in any event. Because of the general language used in the Constitution, judges should not hesitate to use their authority to make the Constitution relevant and useful in

14. C. HUGHES, ADDRESSES 139 (1908).



but this "popular" approach  
A Living Constitution has issues ~

solving the problems of modern society. The brief writer's version of the living Constitution envisions all of the above conclusions.

At least three serious difficulties flaw the brief writer's version of the living Constitution. First, it misconceives the nature of the Constitution, which was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times. Second, the brief writer's version ignores the Supreme Court's disastrous experiences when in the past it embraced contemporary, fashionable notions of what a living Constitution should contain. Third, however socially desirable the goals sought to be advanced by the brief writer's version, advancing them through a freewheeling, non-elected judiciary is quite unacceptable in a democratic society.

It seems to me that it is almost impossible, after reading the record of the Founding Fathers' debates in Philadelphia, to conclude 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. These 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 that the future would bring. Limitations were indeed placed upon both 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 these fundamental limitations.

Although the Civil War Amendments<sup>15</sup> were designed more as broad limitations on the authority of state governments, they too were enacted in response to practices that the lately seceded states engaged in to discriminate against and mistreat the newly emancipated freed men. To the extent that the language of these amendments is general, the courts are of course warranted in giving them an application coextensive with their language. Nevertheless, I greatly doubt that even men like Thad Stevens and John Bingham, leaders of the radical

15. U.S. CONST. amends. XIII, XIV, XV.

Republicans in Congress, would have thought any portion of the Civil War Amendments, except section five of the fourteenth amendment,<sup>16</sup> was designed to solve problems that society might confront a century later. I think they would have said that those amendments were designed to prevent from ever recurring abuses in which the states had engaged prior to that time.

The brief writer's version of the living Constitution, however, suggests that if the states' legislatures and governors, or Congress and the President, have not solved a particular social problem, then the federal court may act. I do not believe that this argument will withstand rational analysis. Even in the face of a conceded social evil, a reasonably competent and reasonably representative legislature may decide to do nothing. It may decide that the evil is not of sufficient magnitude to warrant any governmental intervention. It may decide that the financial cost of eliminating the evil is not worth the benefit which would result from its elimination. It may decide that the evils which might ensue from the proposed solution are worse than the evils which the solution would eliminate.

Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.

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.

Although the phrase "living Constitution" may not have been used during the nineteenth century and the first half of this century, the idea represented by the brief writer's version was very much in evidence during both periods. The apogee of the living Constitution doctrine during the nineteenth century was the Supreme Court's decision in *Dred Scott v. Sanford*.<sup>17</sup> In that case the question at issue was the status of a Negro who had been carried by his master from a slave state into a territory made free by the Missouri Compromise. Although thereafter taken back to a slave state, Dred Scott claimed that upon previously reaching free soil he had been forever emancipated. The

16. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

17. 60 U.S. (19 How.) 393 (1857).



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Court, speaking through Chief Justice Taney, held that Congress was without power to legislate upon the issue of slavery even in a territory governed by it, and that therefore Dred Scott had never become free.<sup>18</sup> Congress, the Court held, was virtually powerless to check or limit the spread of the institution of slavery.

The history of this country for some thirty years before the *Dred Scott* decision demonstrates the bitter frustration which that decision brought to large elements of the population who opposed any expansion of slavery. In 1820 when Maine was seeking admission as a free state and Missouri as a slave state, a fight over the expansion of slavery engulfed the national legislative halls and resulted in the Missouri Compromise,<sup>19</sup> which forever banned slavery from those territories lying north of a line drawn through the southern boundary of Missouri.<sup>20</sup> This was a victory for the antislavery forces in the North, but the Southerners were prepared to live with it. At the time of the Mexican War in 1846, Representative David Wilmot of Pennsylvania introduced a bill, later known as the Wilmot Proviso,<sup>21</sup> that would have precluded the opening to slavery of any territory acquired as a result of the Mexican War.<sup>22</sup> This proposed amendment to the Missouri Compromise was hotly debated for years both in and out of Congress.<sup>23</sup> Finally in 1854 Senator Stephen A. Douglas shepherded through Congress the Kansas-Nebraska Act,<sup>24</sup> which in effect repealed the Missouri Compromise and enacted into law the principle of "squatter sovereignty": the people in each of the new territories would decide whether or not to permit slavery.<sup>25</sup> The enactment of this bill was, of course, a victory for the proslavery forces in Congress and a defeat for those opposed to the expansion of slavery. The great majority of the antislavery groups, as strongly as they felt about the matter, were still willing to live with the decision of Congress.<sup>26</sup> They were not willing, however, to live with the *Dred Scott* decision.

The Court in *Dred Scott* decided that all of the agitation and debate in Congress over the Missouri Compromise in 1820, over the

18. *Id.* at 452.

19. Act of March 6, 1820, ch. 22, 3 Stat. 545.

20. See 2 F. THORPE, *supra* note 10, at 366-77, 433.

21. Act of June 19, 1862, ch. 111, 12 Stat. 432.

22. 2 F. THORPE, *supra* note 10, at 430.

23. *Id.* at 430-32.

24. Act of May 30, 1854, ch. 59, 10 Stat. 277.

25. See 2 F. THORPE, *supra* note 10, at 518-21.

26. See *id.* at 524-36.

Wilmot Proviso a generation later, and over the Kansas-Nebraska Act in 1854 had amounted to absolutely nothing. It was, in the words of Macbeth, "A tale told by an idiot, full of sound and fury, signifying nothing."<sup>27</sup> According to the Court, the decision had never been one that Congress was entitled to make; it was one that the Court alone, in construing the Constitution, was empowered to make.

The frustration of the citizenry, who had thought themselves charged with the responsibility for making such decisions, is well expressed in Abraham Lincoln's First Inaugural Address:

[T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.<sup>28</sup>

The *Dred Scott* decision, of course, was repealed in fact as a result of the Civil War and in law by the Civil War amendments. The injury to the reputation of the Supreme Court that resulted from the *Dred Scott* decision, however, took more than a generation to heal. Indeed, newspaper accounts long after the *Dred Scott* decision bristled with attacks on the Court, and particularly on Chief Justice Taney, unequalled in their bitterness even to this day.

The brief writer's version of the living Constitution made its next appearance, almost as dramatically as its first, shortly after the turn of the century in *Lochner v. New York*.<sup>29</sup> The name of the case is a household word to those who have studied constitutional law, and it is one of the handful of cases in which a dissenting opinion has been overwhelmingly vindicated by the passage of time. In *Lochner* a New York law that limited to ten the maximum number of hours per day that could be worked by bakery employees was assailed on the ground that it deprived the bakery employer of liberty without due process of law. A majority of the Court held the New York maximum hour law unconstitutional, saying, "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their

27. Shakespeare, *Macbeth*, V.v. 19.

28. First Inaugural Address by Abraham Lincoln, March 4, 1861, in A. LINCOLN, SPEECHES AND LETTERS 171-72 (M. Roe ed. 1894).

29. 198 U.S. 45 (1905).

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living, are mere meddlesome interferences with the rights of the individual. . . .”<sup>30</sup>

The fourteenth amendment, of course, said nothing about any freedom to make contracts upon terms that one thought best, but there was a very substantial body of opinion outside the Constitution at the time of *Lochner* that subscribed to the general philosophy of social Darwinism as embodied in the writing of Herbert Spencer in England and William Graham Sumner in this country. It may have occurred to some of the Justices who made up a majority in *Lochner*, hopefully sub-consciously rather than consciously, that since this philosophy appeared eminently sound and since the language in the due process clause was sufficiently general not to rule out its inclusion, why not strike a blow for the cause? The answer, which has been vindicated by time, came in the dissent of Mr. Justice Holmes:

[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.<sup>31</sup>

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 remain today those, such as wrote the brief from which I quoted, who appear to cleave nevertheless 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. This school of thought appears to feel that while added protection for slave owners was clearly unacceptable and safeguards for businessmen threatened with ever-expanding state regulation were not desirable, expansion of the protection accorded to individual liberties against the state or to the interest of “discrete and insular” minorities,<sup>32</sup> such as prisoners, must stand on a quite different,

30. *Id.* at 61.

31. *Id.* at 75-76 (Holmes, J., dissenting).

32. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

more favored footing. To the extent, of course, that such a distinction may legitimately be derived from the Constitution itself, these latter principles do indeed stand on an entirely different footing. 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* and *Lochner*.

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. They assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone's idea of natural justice but instead simply because they have been incorporated in a constitution by the people. Within the limits of our Constitution, the representatives of the people in the executive branches of the state and national governments enact laws. The laws that emerge after a typical political struggle in which various individual value judgments are debated likewise take on a form of moral goodness because they have been enacted into positive law. 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. There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. 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.

As Mr. Justice Holmes said in his famous essay on natural law:

Certitude is not the test of certainty. We have been cocksure of many things that were not so. . . . One cannot be wrenched from the rocky crevices into which one is thrown for many years without feeling that one is attacked in one's life. What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys

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that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means skepticism.<sup>33</sup>

This is not to say that individual moral judgments ought not to afford a springboard for action in society, for indeed they are without doubt the most common and most powerful wellsprings for action when one believes that questions of right and wrong are involved. Representative government is predicated upon the idea that one who feels deeply upon a question as a matter of conscience will seek out others of like view or will attempt to persuade others who do not initially share that view. When adherents to the belief become sufficiently numerous, he will have the necessary armaments required in a democratic society to press his views upon the elected representatives of the people, and to have them embodied into positive law.

Should a person fail to persuade the legislature, or should he feel that a legislative victory would be insufficient because of its potential for future reversal, he may seek to run the more difficult gauntlet of amending the Constitution to embody the view that he espouses. Success in amending the Constitution would, of course, preclude succeeding transient majorities in the legislature from tampering with the principle formerly added to the Constitution.

I know of no other method compatible with political theory basic to democratic society by which one's own conscientious belief may be translated into positive law and thereby obtain the only general moral imprimatur permissible in a pluralistic, democratic society. 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

33. O.W. HOLMES, *Natural Law*, in COLLECTED LEGAL PAPERS 310, 311 (1920).



is a judge. We all have a propensity to want to do it, but there are very good reasons for making it difficult to do. The great English political philosopher John Stuart Mill observed:

The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feeling incident to human nature, that it is hardly ever kept under restraint by anything but want of power. . . .<sup>34</sup>

The brief writer's version of the living Constitution, in the last analysis, is a formula for an end run around popular government. To the extent that it makes possible an individual's persuading one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution, the brief writer's version of the living Constitution is genuinely corrosive of the fundamental values of our democratic society.

34. J.S. MILL, ON LIBERTY, in 43 GREAT BOOKS OF THE WESTERN WORLD 273 (R. Hutchins ed. 1952).