THE BIRTH OF THE "LIVING" CONSTITUTION

Eugene W. Hickok, Jr. *

It has become more than commonplace to refer to the Constitution of the United States as a "living" document. Indeed, it has become doctrine. High school students are taught that the Constitution "adapts" to changes in time and circumstance much the way an organism adjusts to changes in its environment. Students enrolled in undergraduate courses in American Government are told that the Constitution remains relevant primarily because of the efforts of politicians and Supreme Court Justices to "interpret" the document and "bend" it to fit modern circumstance. It is a "living" constitution, so it is argued, not only because it "specifies highly technical governmental 'rules of the game,'" but because it also "encompasses implicit norms of custom and usage, which have evolved over the decades in response to important political needs."[1] As Walter Berns has described it, "a living Constitution is first of all a protean constitution, one whose meaning is not fixed."[2]

Those who advocate this understanding of the Constitution point to John Marshall's opinion in *McCulloch v. Maryland* as intellectual support for their position. In *MuCulloch,* Marshall points out that the Constitution is ". . . intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."[3] But Marshall's argument is that the *Congress* is the means through which this *government* is to remain "relevant." Marshall did not say that the Constitution should be adapted to the various crises of human affairs; he said that the powers of Congress are adaptable to meet those crises."[4] Marshall's understanding of the character of the Constitution remains consistent with his statement in *Marbury v. Madison:* "The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, alterable when the legislature shall please to alter it." For Marshall, the Constitution and the principles it embraces, "are deemed fundamental and permanent."[5]

Proponents of a "living" constitution will have to look elsewhere for a spokesman. John Marshall cannot legitimately be considered an advocate for their position. Of course, this is not to say that advocates can't be found. One might turn to Mr. Justice Douglas, for example, who, in his concern to find a way to protect individual privacy, looked to the "emanations" flowing from the "penumbras" of the Constitution to produce a Constitutional "right to privacy." *(Griswold v. Connecticut)* Then there is Mr. Justice Black dissenting in *Adamson v. California,* after finding that the historical purpose of the fourteenth amendment has "never received full consideration" by the Court and that, contrary to what the majority of his colleagues on the bench at the time might think, "the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule" established in *Barron v. Baltimore.* Indeed, advocates of a "living" constitution can find support in the decisions of a number of Justices.

The doctrine of a "living" constitution is a by-product of judicial decision-

---

* Eugene W. Hickok, Jr. is Professor of Political Science at Dickinson College and Co-Director, Center for the Study of the Constitution, Carlisle, PA.

[1] Ira Carmen, *Power and Balance,* (New York: Harcourt, Brace, Jovanovich, 1978), p. 27.

[2] Walter Berns, "Do We Have A Living Constitution?" in *National Forum: Toward the Bicentennial of the Constitution,* a publication of the Honor Society of Phi Kappa Phi, Fall 1984, p. 29.

[3] *McCulloch v. Maryland,* 4 Wheat.316 (1819).

[4] Berns, *op. cit.,* p. 30.

[5] *Ibid.*

making. Ever since Chief Justice Charles Evans Hughes first announced that the "Constitution is what the judges say it is" the doctrine of a "living" constitution has attracted its score of supporters.[6]

The framers of the document never spoke of a "living" constitution. They did speak of a permanent one. For the men who gathered in Philadelphia, words were not simply empty vessels into which one might pour meaning. For the framers, words had meaning and they chose their words carefully to express exactly what the Constitution was intended to provide. They recognized a need to allow for inevitable change in society. But they also saw a need to temper temporary popularity with adherence to permanent principles. They understood the distinction between popular impulse or inclination and the long-term public interest. They recognized the need for a *written* constitution that would provide "the fundamental and paramount law of the nation," *(Marbury v. Madison)*. The very fact that it is a written constitution is important.

It was because certain principles were considered to be of such an important and permanent nature that a revolution was fought and a new government constructed—a new government under a written constitution so that government by men might never stray from those principles. As Walter Berns so aptly puts it, the concern of the framers "was not to keep the Constitution in tune with the times, but, rather, to keep the times, to the extent possible, in tune with the Constitution."[7]

The contemporary doctrine of a "living" constitution is the product of a misguided understanding of the way the framers understood the document and of the early attempts by the Court to interpret it. In addition, it is a by-product of judicial decision-making by activists who, from time to time, have provided the majority on the Court with the authority the Constitution does not provide them. The nourishment for the "living" Constitution, in other words, has been provided by judicial activism. The primary vehicle employed by the activists has been the fourteenth amendment. Indeed, the birth of "our living Constitution" can be traced to the transformation of the Bill of Rights that has transpired through incorporation.

I

Perhaps the most telling evidence of the degree to which the idea of a "living" constitution has come to dominate the study and practice of law in the United States can be found in the way the Bill of Rights has been transformed. What was originally intended to be a check upon the powers of the federal government has been transformed by means of the fourteenth amendment into a vehicle for the aggrandizement and enhancement of federal governing authority. It is surely one of the supreme ironies of our constitutional history that an entire portion of the Constitution dedicated to the preservation of individual liberties through the maintenance of a limited government has produced instead an expansive federal government in the name of protecting individual rights. In retrospect, the fears of the Anti-Federalists—those who opposed the new Constitution and the threat of consolidated government—seem all too prescient.

The idea of a bill of rights, although certainly part and parcel of the revolutionary fervor that so colored the colonies in the 1770's, actually can be traced to the Magna Carta of 1215. Until the Puritan Revolt in Great Britain, that document, along with English common law, provided the primary protection of individual rights. As Robert Rutland has pointed out, "the American Revolution had its seeds in the Puritan Revolt of English forebears, with the avowed goal of giving

---

[6] As quoted in Henry Abraham, *The Judicial Process*, (New York: Oxford Press, 1980), p. 324.

[7] Berns, *op. cit.*, p. 30.

citizens the freedoms won a century earlier in the mother country."[8]

The Bill of Rights to the federal Constitution has its roots in the several bills of rights that were to be found in the constitutions of the states in the 1780's, and can be traced directly to the Virginia Declaration of Rights, written by George Mason and adopted in convention in June of 1776. That document says, in part,

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[9]

The similarities between the Virginia Declaration of Rights and the Declaration of Independence adopted a few weeks later is telling. Both documents served to underscore the degree to which colonists understood the nature of the relationship between the individual and his government. In the words of Edmund Randolph of Virginia,

> In the formation of the bill of rights two objects were contemplated: one, that the legislature should not in their acts violate any of those canons; the other, that in all revolutions of time, of human opinion, and of government, a perpetual standard should be erected, around which the people might rally, and by a notorious record be forever admonished to be watchful, firm and virtuous.[10]

The federal Bill of Rights emerged as the product of political compromise struck during the ratification debates. James Madison, a principal architect of the new Constitution and, in the end, the primary architect of the Bill of Rights, had argued vehemently against attaching a bill of rights to the federal Constitution. According to Madison, "bills of rights" would be both "unnecessary" and "dangerous" in the new Constitution. "They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted."[11] It made very little sense indeed, reasoned Madison, to declare that the federal government shall not do certain things when the government already has no power to do them. For Madison, the issue was quite clear: "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"[12] Moreover, Madison argued,

> the truth is . . . that the Constitution is itself, in every rational sense, and to every useful purpose, a BILL OF RIGHTS. The several bills of rights in Great Britain form its Constitution, and conversely the constitution of each state is its bill of rights.[13]

---

[8] Robert Rutland, *The Birth of the Bill of Rights,* (Chapel Hill: University of North Carolina Press, 1955), p. 3.

[9] See Robert Rutland, *op. cit.,* p. 35-40.

[10] From "Randolph's Essay," *Virginia Magazine of History,* 44 (1936), p. 47, as quoted in Rutland, *op. cit.,* p. 39.

[11] See *Federalist* No. 84.

[12] See *Federalist* No. 84.

[13] *Ibid.*

According to Madison, attaching a bill of rights to the new Constitution seemed an unwarranted act that in all probability would make the process of ratification even more arduous than already anticipated. But to those in the states who looked upon Mr. Madison's constitution with some concern, a bill of rights seemed a necessary protection against the threat imposed by the construction of a strong and "energetic" central government. As one ardent Anti-Federalist put it, "For universal experience demonstrates the necessity of the most express declarations and restrictions to protect the liberties of mankind, from the silent powerful and ever active conspiracy of those who govern."[14] In response to the Federalist argument that Americans were already so enlightened as to make it almost inconceivable that individual freedoms, such as freedom of religion, would ever be denied, "An Old Whig" replied,

> They are idiots who trust their future to the whim of the present hour . . . What is there in the new proposed Constitution to prevent his [a conscientious objector] being dragged like a Prussian soldier to the camp and there compelled to bear arms?[15]

As Raoul Berger has pointed out, then, "it was not fear of State mismanagement but distrust of the remote federal newcomer that fueled the demand for a federal Bill of Rights which would supply the same protection against the federal government that State constitutions already provided against the States."[16] Perhaps more importantly, it was a fear that worked to the political advantage of the Anti-Federalists. Here was an issue that "transcended sectional interests" and struck to the very root of those principles that had produced the Revolution and the Articles of Confederation, and which, allegedly, underwrote the proposed new Constitution as well. In the end, the supporters of the federal Constitution recognized that political necessity required that a bill of rights be attached to the document. James Madison himself, while campaigning for the new Congress, advanced the argument that

> the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c.[17]

Initially, the Federalists could take some solace in the fact that the Bill of Rights was added by the new Congress upon the ratification of the states, rather than through another constitutional convention that might have led to other, perhaps more far reaching reforms. But perhaps more importantly, the political leaders of the time, men such as James Madison and Thomas Jefferson, eventually came to recognize that a federal bill of rights had a value in its own right, in addition to the purpose it had served in the struggle for ratification of the Constitution. They developed an appreciation for "the salutary effects of a federal Bill of Rights as a benchmark in the American experience in self-government."[18]

---

[14] Rutland, *op. cit.*, p. 135.

[15] Rutland, *op. cit.*, p. 137.

[16] Raoul Berger, *Government by Judiciary*, (Cambridge: Harvard University Press, 1977), p. 135.

[17] Rutland, *op cit.*, p. 196.

[18] Rutland, *op cit.*, p. 218.

The Bill of Rights emerged from the struggle for ratification then as the product of political compromise. But it was a principled compromise. As Robert Rutland has argued, the Bill of Rights "clearly demonstrated that the American Revolution had a broad ideological base and that it was not only a military, political and social upheaval—but also a legal rebellion," that "served notice for all the world that national independence, without personal liberty, was an empty prize."[19]

II

For the first generation of Americans to live under the Constitution of 1789, the purpose of the Bill of Rights remained clear: to place demonstrably far-reaching restraints upon the central government.[20] The Supreme Court gave its blessings to this doctrine with *Barron v. Baltimore* in 1833. Here, in one of the last decisions written by Chief Justice John Marshall, the Court made it clear that the federal government could not interpose itself between the individual and the state. Marshall reasoned that the "Constitution was ordained and established by the people of the United States for themselves, and not for the government of the individual states." Because of this, the Bill of Rights must be understood as placing restraints upon "the power of the general government, not as applicable to the states." For Marshall the issue was not a difficult one to resolve:

> Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and expressed that intention.
> . . . These amendments contain no expression indicating an intention to apply them to the State governments. This Court cannot so apply them.[21]

The first major challenges to the Court's ruling in *Barron* came after the ratification of the fourteenth amendment to the Constitution in 1868. The amendment itself did not overturn *Barron*. But the stream of Supreme Court decisions that has flowed from this, "the most controversial and certainly the most litigated of all amendments adopted since the birth of the Republic," has served to transform the Bill of Rights, as Justices, in their attempt to fashion "just" solutions to political and constitutional problems, breathed "life" into the Constitution.[22]

Whether the framers of the fourteenth amendment looked upon it as a vehicle for applying the Bill of Rights to the states does not really concern us here. Regardless of the framers' intent, the Court indeed has found that the amendment calls for the "incorporation" of the Bill of Rights. It does not seem to matter, in other words, that even a cursory glance at the historical record surrounding the introduction of the amendment and the debates leading up to its ratification might lead one to question how Mr. Justice Black could argue, as he does in his dissent in *Adamson v. California,* that the framers of the amendment intended "to make the Bill of Rights applicable to the States."[23]

The evidence supporting "incorporation" is not as compelling as Justice Black would have one believe. For example, while Henry Abraham argues, on the one

---

[19] Rutland, *op. cit.*, p. 218.

[20] Henry Abraham, *Freedom and the Court,* (New York: Oxford University Press, 1967), p. 26.

[21] *See Barron v. The Mayor and the City Council of Baltimore,* 32 U.S. (7 Pet.) 243 (1833).

[22] Abraham, *Freedom and the Court, op. cit.*, p. 28.

[23] *See Adamson v. California,* 332 U.S. 46 (1947).

hand, that "there seems relatively little doubt that the A mendment's principal framers and managers, . . . if not every member of the majority in the two houses of Congress, did indeed believe the Bill of Rights to be made generally applicable to the several states via one or more segments of section 1 [of the amendment]," Charles Fairman, in an exhaustive study appearing in the *Stanford Law Review,* finds the opposite to be true.[24]

According to Fairman, Justice Black is wrong.

> In his contention that Section 1 was intended and understood to impose Amendment I to VIII upon the States, the record of history is overwhelmingly against him.[25]

And in a companion article to Mr. Fairman's, Stanley Morrison finds that "in the absence of any adequate support for the incorporation theory, the effort of the dissenting judges in *Adamson v. California* to read the Bill of Rights into the Fourteenth Amendment amounts simply to an effort to put into the Constitution what the framers failed to put there."[26]

Putting the controversy aside (much as Justice Black did!), however, it may be the better part of wisdom to recognize that there is precious little profit to be found in dwelling upon the integrity of a theory that has acquired the status of "constitutional truth" over the years, no matter how questionable that integrity may be. After all, whether or not the framers of the fourteenth amendment intended the "incorporation" of the Bill of Rights, the Bill of Rights has been incorporated. And the doctrine of "incorporation" has changed the rules of the constitutional game. But what should trouble the advocates of constitutionalism is not so much the wisdom of the idea of "incorporation" but the kind of thinking that produces such controversial and questionable constitutional law. It is not enough that Justice Black was seeking to establish a rule of law for civil rights and liberties that would be "both drastic and simple and that would guarantee certainty for all future litigation."[27] For as Stanley Morrison points out, the problem with this is that "no matter how desirable the results might be, it is of the essence of our system that the judges stay within the bounds of their constitutional power."[28] Lino Graglia puts it well:

> The use of improper methods in reaching decisions has its own results that detract from any good to be achieved, and the use of proper methods lends some assurance that the good results desired will in fact be achieved and, if achieved, will come to be seen as good.[29]

The decisions by the Court that gradually have led to the "incorporation" of almost the entire Bill of Rights through the fourteenth amendment represent, as a class, decisions aimed at bringing the Constitution into line with the egalitarian

---

[24] Abraham, *Freedom and the Court, op. cit.,* p. 39.

[25] Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 *Stanford Law Review,* (December 1949), p. 139.

[26] Stanley Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation," 2 *Stanford Law Review,* (December 1949), p. 173.

[27] Abraham, *Freedom and the Court, op. cit.,* p. 37.

[28] Morrison, *op. cit.,* p. 173.

[29] Lino Graglia, *Disaster by Decree,* (Ithaca: Cornell University Press, 1976), p. 260.

and democratic tendencies that color contemporary society. They reflect the desire of members of the Court to adjust the Constitution to meet particular demands of the times. That members of the Court might act on such a desire is to be expected to a certain extent. Under a republican constitution, public opinion matters, and the Court, as one of the three political institutions, has always, after a fashion, reflected prevailing public sentiment. But the institution devised by the framers for insuring that public opinion influences government is the legislature, not the Court. Moreover, the ability of the legislature to respond to public opinion is limited by the constraints found in the Constitution. And the only way to get around those constraints is to alter the Constitution, through amendment.

The mechanism exists for bringing the Constitution into line with contemporary society. But it is a cumbersome and time-consuming mechanism to employ, and for good reason. The hallmark of good government, so the framers believed, is its ability to respond to the "permanent and aggregate interests of the community" rather than the "transient opinions" and "inclinations" that might from time to time infect the people and inflame the passions. The Constitution, in other words, was not designed to become a flexible barometer of prevailing public sentiment. The document instead forces us to put public sentiment into perspective. It speaks to permanent principles and outlines a government that is designed to act upon those principles when responding to the public will.

Attempts on the part of the Court to bring the Constitution into line with contemporary society represent something of an "end run" around the Constitution; accomplishing constitutional change without having to adhere to the document's own procedures for providing for change. Playing fast and loose with a written constitution is being defended as interpreting a "living" constitution. The transformation of the Bill of Rights illustrates the extent to which the Court has been able to "breathe" into the Constitution whatever "life" it wishes. It challenges all thoughtful students of the Constitution to reaffirm the integrity of what Thomas Jefferson once referred to as "our peculiar security"—a written constitution.