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The Living Constitution: Origins and Rhetorical Implications of the Constitution as Agent

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The use of the "living" metaphor, the organizing concept around which public debate has revolved for several centuries, is a reflection of political, legal, scholarly, and lay desires to enable the Constitution to adapt to shifting social needs. Rather than view the text of the Constitution as the means through which the U.S. governmental system was constructed, the Constitution became an agent which acts as guardian on the people's behalf. As the public at large accepted the "living" metaphor, a rhetorical shift occurred, deflecting public understanding of the Constitution as a static document not easily altered and ignoring judicial discretion to adjudicate the law. Rhetorically construing the Constitution as "living" liberates the people from enacting government, being knowledgeable about political processes or controversies, and being responsible for governmental failings or wrongdoings.

Metaphors guide our lives. Metaphors are the vehicle through which we communicate our understanding of our existence; the metaphors we use construct our reality. This statement is not news; George Lakoff and Mark Johnson's work, which argue metaphors are "pervasive in everyday life, not just in language but in thought and action," is widely accepted.[1] Metaphors persuade through their linguistic depictions of perceived reality. Paul Ricoeur contends that metaphor is "the rhetorical process by which discourse unleashes the power that certain fictions have to redescribe reality."[2] The metaphors employed shape our understanding of events, people, and contexts. Bob Ivie agrees, "The act of literalizing the metaphor . . . is the defining of reality itself."[3] Yet metaphors cannot reflect a context in its fullness; rather, metaphors direct auditors' attention toward certain elements of a situation while simultaneously guiding their attention away from other elements. As Kenneth Burke tells us, "Men seek for vocabularies that will be faithful reflections of reality. To this end, they must develop vocabularies that are selections of reality. And any selection of reality must, in certain circumstances, function as a deflection of reality."[4] The deflection may not be intentional, Burke explains, but is a product of the symbolic nature of language. The work of these scholars illuminates how we think, communicate, and interact with one another in metaphorical terms, as well as how metaphors create and shape our lived reality.

Two metaphors commonly guide historic understanding of political structures: machine metaphors and body metaphors.[5] Political philosopher Giuseppa Saccaro-Battisti tells us that the machine metaphor is based upon the conception of government as efficient and rational and the organic metaphor upon the inherent goodness of natural law. Speech professor Hermann G. Stelzner locates the power of the machine metaphor in nineteenth century Newtonian theory and the influence of the body metaphor in twentieth century Darwinian theory.[6] The machine metaphor is passive; it is the mechanical operation of government set in motion. The body metaphor is active; it is the organic intentional action of government. The Constitution has been interpreted using both machine and body metaphors.[7]

The machine metaphor pervaded discussions about the Constitution and government early within U.S. history. Many examples of the government-as-machine metaphor relate to how the government operates. Diplomat James Russell Lowell characterized the Constitution as "a machine that would go of itself" in an address given in 1888.[8] Government needs to be "set in motion." The "wheels of government" turn slowly and can "grind" to a halt. Government can be "broken" or "inefficient." Policies need to be "fixed." Policy makers "engineer" policy. A "political machine" is a group of political insiders who are given preferential treatment. The political "pendulum swings" in a particular direction. When Congress experiences "gridlock," it does not accomplish anything. The economy "loses steam" when it begins to falter.

After the turn of the twentieth century, public figures began to criticize the machine metaphor. In "A Preface to Politics" in 1914 Walter Lippman contends, "Government is not a machine running on straight tracts to a desired goal. It is a human work which may be facilitated by good tools."[9] In his protest of government, Henry David Thoreau encouraged, "If the machine of government is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law."[10] Viewing government through a mechanistic lens sees it as a machine that can run on its own but will have problems.

Although other metaphors such as the machine metaphor are used, the organic body metaphor dominates current metaphoric representations of the United States.[11] The President is the "head of state." Citizens are the "body politic." We talk about the "birth" of a nation. The United States is personified as "Uncle Sam." Liberty is a "lady." The geographic center of the country is referred to as the "heartland." To be successful or to own a home is the American "dream." Every year the state of the union is described as "healthy" or "strong." Social ills are a "cancer" on society. Elected officials should have the "pulse" of the nation or his community. Proponents of capital punishment claim that society has not "set its face" against it. Justice is "blind." The court has a "reach" and the law has an "arm." We can "vote with our feet." Our nation has an "identity," a "moral foundation," and a "conscience." When government intrudes into our lives it acts as "Big Brother." All of theses organic metaphors construct the government, its representatives, its symbols, and its historic development as a living, embodied person.

Our understanding of government in terms of the body metaphor extends to our conception of the Constitution as "living." Rather than portrayed as a judicial philosophy counter to originalism, the "living" constitution philosophy frequently is presented to schoolchildren, college students, and the public as the uncontested material reality of our constitutional government.[12] Starting in the nineteenth century and continuing into twenty-first century, the organic body metaphor has been the organizing concept around which public debate about constitutionalism has revolved.

The intentional selection of the metaphor of a "living" constitution is a reflection of political, legal, scholarly, and lay desires to enable the Constitution to adapt to shifting social needs. The "living" constitution transcends the written document ordained by the people to become a self-determining entity that possesses the agency to become whatever it wishes. This essay argues that as the public at large accepted the "living" constitution metaphor, a rhetorical shift occurred in how the public understood its role in the political process. Rather than view the text of the Constitution as the means through which the U.S. governmental system was constructed, the Constitution became the agent which acts as guardian on the

people's behalf.[13] By transforming the text into an agent, the text becomes an autonomous entity that can change and evolve. The organic metaphor of a "living" constitution personifies the document, representing the text as self-determining rather than as a static document that created a democratic republic.

Construing the text as "living" has multiple implications regarding how we understand the role of our founding texts, our elected and appointed officials, and ourselves in the implementation of our governmental systems. The reference to a "living" constitution performs more work than merely actualizing an expansive interpretation of the Constitution, however. The construction of a "living" constitution deflects public understanding of it as a static document not easily altered, as well as from the role justices and judges play in altering the document through judicial interpretation. The "living" constitution also liberates the people from enacting government, from being knowledgeable about political processes or controversies, and from being responsible for governmental failings or wrongdoings.

Debates about the "Living" Constitution

Public discourse about a "living" constitution dates back more than a century, as politicians, judges, legal scholars, and historians began to consider the organic metaphor. The conversation appears to have been introduced in 1912 by then-progressivist presidential candidate Woodrow Wilson. According to Wilson, government and society both are organic; in order for the system to work, we need to view the constitutional text as organic as well. Early academic understandings of the concept disagreed as to the nature of the "living" Constitution. Some scholars deferred to Wilson's metaphor, allowing for an awareness of the role of the judge in saying what the law means. Other scholars personified the Constitution, arguing the document has the power to change itself. Over the years the metaphor's meaning changed as the public abandoned the role of the judge in the interpretive process, understanding the metaphor rather as the ability of the constitutional text to alter itself. The perception shift regarding the relationship of the judge to the text, as well as the intersections of the political and the juridical is important. Debates over

constitutional interpretation, constitutional scholar William F. Harris II tells us "most paradigmatically represents the connection between law and politics—actualized in verbal and governmental practices."[14] Namely, how we talk about the Constitution expands or restricts the role of the judges in our democratic republic, as well as constitutes the rights and liberties of our citizens.[15]

In his 1912 campaign speech entitled, "What is Progress?" Wilson presents both the machine and the body metaphors of constitutionalism, rejecting the former in favor of the latter. Wilson's speech performs the rhetorical work of justifying the constitutional text as an organic text, requiring his auditors to rethink how they understand the functioning of government. Wilson explains:

> Politics in [the Founders'] thought was a variety of mechanics. The Constitution was founded on the law of gravitation. The government was to exist and move by virtue of the efficacy of "checks and balances." The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life. No living thing can have its organs offset against each other, as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Government is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day, of specialization, with common task and purpose. Their cooperation is indispensable, their warfare fatal. There can be no successful government without the intimate, instinctive coordination of the organs of life and action. This is not a theory, but fact, and displays its force as fact, whatever theories may be thrown across its track. Living political constitutions must be Darwinian in structure and in practice. Society is a living organism and must obey the laws of life, not of mechanics; it must develop.[16]

Wilson argues that the founder's thought that the Constitution, which created the government, is a machine is not consistent with the practical demands the functioning of governance places upon the document. Government must respond to problems and developments quickly. Wilson articulates a shift in thinking from government as a machine to government as a living organism. Since he seeks to alter contemporary thinking, Wilson has a heightened rhetorical burden to convince his audience that the status quo—which at the time was the conception of government-as-machine—is not

valid. As Wilson tells it, the mechanical metaphor is at odds with the organic metaphor because the government cannot persist if it cannot adapt to different environmental conditions. Since humans command the operation of government, and society is a living entity, the document that establishes and guides our lives must be organic as well. According to Wilson, the Constitution is not held captive to the thinking of the founders nor governed by the rule of law; thus, it is not a static document difficult to amend. Wilson's claim creates a rhetorical space for the Constitution as a changeable document, able to facilitate progressivist ideology and to protect the body politic.

Wilson's idea that the Constitution is organic found its way somewhat into Supreme Court Justice Oliver Wendell Holmes' opinion in *Gompers v. United States* (1914) two years later. Holmes' assertion that the Constitution has meaning beyond previous textual constructions has rhetorical force because, as a sitting Supreme Court justice, his job is to say what the law is. In his opinion, Holmes claims that the machine metaphor cannot apply in judicial cases; rather, each case must be considered in light of how the area of law has evolved. "The provisions of the Constitution are not mathematical formulas having their essence in their form," Holmes asserts, "they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."[17] Holmes' words, however, cannot be understood to justify loose readings of the Constitution, as the text of the Constitution—for Holmes—is not organic. Rather, the *products* of its enumerations live and take shape beyond its textual boundaries. Although Holmes does not adopt Wilson's view that the Constitution itself is organic, Holmes' ethos as a judge authorizes the rhetorical move to perceive the law as evolving. Holmes' argument facilitates the shifting of the Constitution's identity, as auditors soon would forget that the Constitution itself is not organic.

Other judges quickly followed and extended Holmes' line of thought regarding constitutional interpretation. In his landmark *Olmstead* (1928) dissent (which argued wiretapping was a form of illegal search and seizure), citing the *Weems v. United States*

(1910) case (which held that legislatures cannot create new forms of punishment that would violate the Cruel and Unusual Punishment Clause), Justice Louis Brandeis opined the language of the Constitution "should not . . . be necessarily confined" to earlier legal applications.[18] According to Brandeis, the Constitution contains aspirational principles that must be given new effect within each generation, according to the needs and experiences of that time period. Prior to joining the High Court, Benjamin Cardozo agreed, writing in *The Nature of the Judicial Process*, "The great generalities of the constitution have a content and significance that vary from age to age."[19] Although these great legal minds concur that the constitutional text needs to be read according to contemporary standards, they do not make the intellectual leap that the Constitution is "living" *per se*. Upon the latitude of acceptance regarding constitutional interpretation, these remarks indicate that within the first part of the 20th century several judges shifted their thinking away from the Constitution having a fixed, static meaning to allowing that the Constitution could be interpreted more expansively than it had been in the past.

The idea that the Constitution contains broad premises that can be applied to a variety of contexts was brought before the public again in President Franklin Delano Roosevelt's 1932 Inaugural Address. In his remarks FDR states, "Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form."[20] Through his remarks, the public heard the President, who just took an oath to uphold and to maintain the Constitution, tell them that the Constitution has the ability to respond to contemporary social needs. Although he did not characterize the Constitution as "living," his statement nevertheless allows for the document to change, adapting to new social conditions. Not everyone agreed with him; the Supreme Court struck down New Deal policies advanced by Roosevelt in an effort to protect workers until 1937, when it upheld a minimum wage law in *West Coast Hotel Co. v. Parrish* (1937).[21] Nevertheless, Roosevelt's Inaugural indicated that the Constitution could be altered through a loose interpretation to respond to "extraordinary needs." Although the debate over the "living" Constitution would take place mostly within academic circles,

the oppressive economic conditions of the Great Depression created a rhetorical situation in which the discursive construction of the Constitution as "living" and able to respond to their suffering would have been appealing to a large percentage of Americans.

Constitutional scholars began to discuss Wilson's idea that the Constitution is "living" as they offered pragmatic justifications for how a document, perceived as unchanging for more than a century, can be applied to new contexts and circumstances. In his 1927 work, *The Living Constitution*, Columbian Law professor Howard Lee McBain considers the rule of law and how even the provisions that the founders implemented, such as the written text, division of powers, the federal system, and the Bill of Rights, necessitate interpretation.[22] McBain recognizes different means through which the constitutional text can be altered: customs (practices developed early in our nation's history), nullification (officially invalidating law), legislation (passing new law), and judicial interpretation. According to McBain, the contemporary Constitution is not the document that was adopted at the time of the founding; it has changed. Examples McBain uses include the increased prominence of the Bill of Rights in American society and the enhanced legislative power of the president. McBain's claim is a simple one: because the document has changed it is, therefore, "living." He makes no claims about the nature of the document itself or about the acceptable vehicles of change. He merely uses the organic metaphor to *identify* change.

In 1930 James M. Beck, former Solicitor General to President Warren G. Harding and congressional representative from the state of Pennsylvania, delivered an address to the *American Philosophical Society* about "The Changed Conception of the Constitution."[23] In his remarks Beck traces the origin of the shift to the debate between Robert Y. Hayne and Daniel Webster about the Foote Resolution, which limited the sale of public lands, in January of 1830. During this debate Hayne used John C. Calhoun's nullification doctrine to argue that the Constitution was a compact between the various state governments, as well as the national government and the state governments. Hayne also argued that the states could, if they desired, nullify a

law that violated the compact. Webster disagreed, determining that the Union must be preserved and cannot be split apart by sectional rivalry. Although Hayne and Webster differed as to the nature of the Constitution, "none of the speakers," Beck tells us, "had any conception of the Constitution as a living organism. All regarded it as a static instrument, whose letter was as unyielding as the stone upon which the Ten Commandments were graven."[24] Nevertheless, Beck identifies different forms of law as the point of tension between the two men's thoughts. Two forms of law exist in constitutional law: written law and unwritten law. Certain laws are expressed (written) and self-determining; others are not. He explains that the Due Process Clause means nothing in and of itself; the clause requires knowledge of legal precedent and context. Therefore, full understanding of the written law necessitates knowledge of the unwritten law, or law outside the text. Such unwritten law can include legal precedent and common law.

Regardless of the Hayne-Webster understanding of Constitution as a static document, Beck himself views the Constitution as an organic document consistent with current thinking. He declares, "The Constitution is something more than a written and definitive contract. It is a living organism, susceptible [to] adaptation and, therefore, [to] increasing growth, and its vitality depends upon its correspondence with the necessities and spiritual tendencies of the American people."[25] Beck's understanding of the Constitution as a "living" document differs from McBain's or Hayne's and Webster's. Beck personifies the document as its own agent, which can "adapt" and "grow." Although he recognizes that earlier thinkers did not understand the Constitution in such a fashion, he nevertheless opines that the Constitution extends beyond its textual boundaries. Beck's opinion invites the contemporary "living" viewpoint of the Constitution as able to realize its own aspirational will.

Other scholars writing during Beck's time temper his call for an organic Constitution, recognizing the role of the judge in saying what the law is. In his 1934 article, "The Elasticity of the Federal Constitution," legal practitioner and scholar Horace H. Hagan promotes a "living" constitution, asking, "is it not true that our federal Constitution is capable of growth by the orderly processes of development and

interpretation so that the government may efficiently cope with new problems, situations and complexities and carry out its true and noble purposes as expressed in the Preamble of our national organic law?"[26] Hagan advocates the ability of judges to respond to new political and social issues, abiding by shifting notions of morality and social needs. He cites examples of Supreme Court cases in which the Court ruled according to the health, welfare, and security of the nation. Hagan refuses to abandon the agency of judges in the interpretation of the constitutional text.

The idea of a "living" Constitution became increasingly difficult to refute as scholars provided pragmatic justifications for non-originalist readings. Constitutional scholar Edward Corwin claims that a malleable constitution is both rational and reasonable. In a 1934 law review essay he wrote, "The fact of the matter is [] that the constitution must mean different things at different times if it is to mean what is sensible, applicable, feasible."[27] James Hart presents a bifurcated argument, asserting that observers either think that the Constitution is unchanging or it is adaptable.[28] In 1936 historian Charles A. Beard published an article entitled, "The Living Constitution," in which Beard acknowledges the role of the judge in interpreting the constitutional text. Beard explains, "Since most of the words and phrases dealing with the powers and the limits of government are vague and must in practice be interpreted by human beings, it follows that the Constitution as practice is a living thing. . . . It is the living word and deed of living persons, positive where positive, and subject to their interpretation where open to variant readings."[29] Beard's conception of the Constitution follows McBain's, arguing that the Constitution cannot be understood on its own accord; a text can only be given meaning when a human being—namely a judge—interprets it.

Apparent in McBain's, Hagan's, and Beard's analysis of the Constitution is an awareness of the judge's role in determining what the law is. The Constitution itself is not "living"; the judicial *interpretation* of the Constitution changes to respond to contemporary social needs. The Constitution is not self-determining; the judges, through their judicial opinions, alter the meaning of the document. Moreover, judges can expand the contemporary meaning of the Constitution by using unwritten law.

During this era, the constitutional document was unchanging but supported by additional forms of law such as statutory law, civil law, and common law—in addition to various legal traditions. The substance of the Constitution largely was immutable, altered only through the amendment process.

Interested in the ways in which judges interpret the law to construe new meaning, rhetorical theorist Kenneth Burke finds in his 1945 work, *A Grammar of Motives*, that the Supreme Court justices altered their form of interpretation to become consistent with FDR's political ideology. "The Court, as finally affected by the New Deal psychology, was more inclined to grant the rights to the government as a person which it had once restricted to private individuals and business corporations as persons," he contends.[30] Burke cites Justice Owen Robert's vote in *West Coast Hotel Company v. Parrish* (1937)—the first time the Court upheld New Deal legislation, referred to as the "switch in time that saved nine"—as an example of the High Court allowing contemporary political issues to influence their adjudication of the law and, thus, their use of a loose form of interpretation.[31] The "living" Constitution, brought into material reality in the *West Coast Hotel* (1937) decision, altered the legal landscape by personifying the text that founded the nation. Importantly, however, Burke acknowledges that the *judges* made the decision to interpret the law differently; the law did not constitute *itself* as an organic being.

Rhetorically constructing the Constitution as "living" enabled Supreme Court justices to be the most important determiners of social policy in the nation, obfuscating the role of the judge in deciding the law. A practice that began in earnest in the 1950s when the Warren Court's reading of the Constitution expanded individual civil rights and civil liberties in significant ways.[32] Constitutional scholar Lino A. Graglia argues that the Court has been more influential than elected officials, locating the shift in the *Brown v. Board of Education* (1954) decision.[33] By perpetuating the idea that the Constitution is "living," judges are not held accountable for legal interpretations that violate majority will and historic practices. Judges hence force could assert that their interpretation of the document remained consistent with the spirit of the law, if not the letter of the law.

In 1976 William Rehnquist revisited the question of a "living" constitution in a speech delivered at the University of Texas School of Law, which was then printed in the school's law review[34] and reprinted in the *Harvard Journal of Law and Public Policy* following his death.[35] In his remarks Rehnquist identifies two meanings of "living" constitution: the Holmes version and what he calls the "brief version." The former is consistent with early uses of "living" and the latter is in line with contemporary uses of the phrase. The Holmes version, derived from Justice Holmes' opinion in *Missouri v. Holland* (1920),[36] claims that the framers used general language when writing the Constitution, language which must be enacted in different contexts in order to be understood. The "brief version" Rehnquist offers as an example of another form of "living" constitution that has become more prominent in recent years. Rehnquist tells us that the brief version encourages the idea that "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."[37] The brief version allows a non-democratic, counter-majoritarian body to determine public policy when the political process fails to do so. Rehnquist addresses Marshall's defense of judicial review in *Marbury v. Madison* (1803), concluding that Marshall aligned with Holmes' version of a "living" constitution.[38] Considering previous and contemporary uses of the "living" constitution enables Rehnquist to argue that neither Holmes nor Marshall, with their "loose" interpretations of the Constitution, empowered the document (or the judiciary) to extend beyond its accepted textual boundaries. To wit, present uses of the "living" constitution concept lack historic basis, adopting an unsubstantiated perspective regarding judicial interpretation.

One of the foremost critics of the "living" constitution is sitting Associate Justice Antonin Scalia who speaks frequently against the notion and in favor of originalist forms of interpretation that link constitutional meaning to the public's understanding of the text at the time of ratification. In a 1997 speech entitled, "On Interpreting the Constitution," delivered to The Manhattan Institute for Policy Research as part of their Wriston Lecture series, Scalia summarizes the "living" Constitution as the idea that the Constitution "is a document that morphs from

decade to decade so as to be the embodiment of the most profoundly held beliefs of society."[39] Lamenting that judges and the public alike adopt a personified understanding of the Constitution, Scalia refutes the idea that a static document cannot respond to change. Changing the document, however, should be initiated by the public through the political process—not via judicial adjudication of the law.

Today the debate over constitutional interpretation revolves around the same questions: Is the Constitution static or elastic? Does an unwritten Constitution exist? What is the role of the judge in constitutional interpretation? Great legal minds differ in their responses to these questions. Former Attorney General Edwin Meese,[40] Justice Antonin Scalia,[41] Judge Robert Bork,[42] Judge Richard Posner,[43] and Professor John Ely[44] all agree that judicial interpretation should be limited to the constitutional text, a perspective constitutional scholar Thomas Grey terms "interpretive."[45] On the other hand, Justice William Brennan,[46] Justice Stephen Breyer,[47] and constitutional scholars James Boyd White,[48] Thomas Grey,[49] and Jack M. Balkin[50] all are of a mind that judicial interpretation should be allowed to utilize extra-constitutional sources, which Grey calls "non-interpretive." Since the Constitution does not offer guidance as to how it should be read, scholars do not have a definitive answer as to whose opinion is correct.

The adoption of the organic metaphor demonstrates how, although the text of the Constitution does not change (unless amended), the texture of its meaning has shifted from that of a static document to that of a "living" document. The survey of the historical and contemporary public discourse regarding the "living" constitution reflects experts well versed in legal theory, with judges and legal scholars acknowledging the role of the judge in altering the constitutional text. Legal language and principles, however, require an expertise that excludes the majority of U.S. citizens from entrance into the debate. The constitutional text says, more or less, what it did when it was adopted more than 200 years ago. The texture of the document, however, is radically different, as its texture relies upon the relationship of the text with its auditor to derive its textual meaning. As politicians advocated for change and as judges interpreted the law differently, the texture of the Constitution altered. From

my rhetorical history of the "living" metaphor, we can see that the Constitution was understood as a machine prior to becoming an organic document, able to be influenced by experts before obtaining its own agency. Throughout the past century the document transformed from a scenic document, which contained articles that constituted our national government and amendments that protected our rights and liberties through the act of its ratification to an agent whose purpose is to fulfill the aspirational goals set forth in the Preamble and to resolve any contemporary social problems.

Burke's Pentad: From Agency to Agent

In *A Grammar of Motives*, Kenneth Burke contends that humans communicate using a dramatist framework. Burke's concept of the pentad contains five elements: act (what was done), scene (where and when it was done), agent (who did it), agency (how the agent did it), and purpose (why the agent did it). Clarke Rountree concludes Burke's pentad can be most beneficial to rhetorical critics that use the terms in ratios to establish the motive of a speaker.[51] This essay, however, considers the origin and implications of single metaphor, as asynchronous discursive appeals abandoned the government-as-machine metaphor in favor of the government-as-organic metaphor, which allowed for the Constitution-as-"living" metaphor. I rely upon the terms of Burke's pentad to illuminate other ways of knowing the relationship of the Constitution to the people, judges, and the governmental system. Burke's concept informs the rhetorical implications of the metaphorical "living" constitution.

The Burkean act of constitutional ratification created a democratic republic. When the states voted to accept the founder's document, they signified their approval for the new form of government as crafted by the founders. When trying to understand the motive of the Constitution, it is appropriate to examine the Preamble, because a preamble is an introductory statement that explains the purpose of the document to follow. The Preamble states:

> We the people of the United States (agent), in order to form a more perfect union (purpose), establish justice (purpose), ensure domestic tranquility (purpose), provide for the common defense (purpose), promote the general

> welfare (purpose), and secure the blessings of liberty to ourselves and posterity (purpose), do ordain and establish (act) this Constitution (agency) for the United States of America (scene).[52]

Although the Preamble does not prescribe the means by which to interpret the document that follows, it nevertheless explains its motives for existence. Political figures and judicial scholars, similarly, have been overt about their motive for adopting the organic metaphor: to respond to changing social conditions. I turn next to analyze the Preamble to the U.S. Constitution using the elements of Burke's pentad.

The People as Agent; The United States as Scene; the Constitution as Agency

In the Preamble, the people-as-agent come together for the purposes listed. Without the people, no union can be formed.[53] The people are the agents of the Constitution and of the government that it created. Yet within the text of the document additional agents are identified: the legislature, the executive, and the courts. Different groups of people act in different capacities. The people authorize the legislature and states to craft laws to amend the laws. The people also grant judges power in any case arising under the Constitution. Judges are agents of the judicial process, with the jurisdiction to alter the constitutional document as they determine. The executive branch acts as agent to enforce the laws. All branches of government, in their various capacities as agents empowered via the people, can alter the constitutional text—through the creation of laws, the interpretation of laws, or the execution of laws.

The Preamble mentions the scene: the United States of America.[54] The amendments to the Constitution establish the branches of government and their operating protocols. The amendments tell us that the legislature that will create the laws, the executive that will enforce the laws, and the judiciary that will resolve any disputes between parties.[55] Our Constitution creates two types of scenic spaces: physical spaces and conceptual spaces.

The physical space of the national and state capitols, courthouses, and administrative buildings is one aspect of our constitutional scene. The marble temples located in state capitals create a physical space for the citizens to walk into, to petition their government, or view the functioning of government. Our Constitution created a need to devise material spaces in which we can enter the government constituted. Every person is situated within a web of material government. Every town has a city hall, a municipal building, or a county seat. If a person moves, a new web is created. The physical landscape shifts, but other governmental structures enter into the scene to fill the gaps.

Scene also is the conceptual landscape in which we exist. The scene of government is not just a building, but also the environmental spirit of the nation. In the United States our country allows for peaceful disputation. Our country grants its people the freedom to participate, or not to participate, in government. The United States also allows for rights and liberties created by government and the courts, such as an eight-hour workday or the ability to obtain an abortion. Moreover, the scene as conceptual landscape creates the timing of the scene, which is the present. Rights and liberties continually are guaranteed within this constitutional scene. The "when?" of the scene begins with the ratification of the Constitution and continues through the present time.

Within the Burkean pentad, the Constitution is the agency of the founders—the means through which the founders acted. The Constitution did not call itself into being nor did it did establish the scene in which it occurred or the purpose for which it was created. The Constitution resulted from the deliberation of the founders. Within its textual parameters the Constitution does not draw attention to its agency, for the people would be familiar with the generic function of a constitution. The people would understand, as they voted in the various states to adopt the Constitution as a legally binding document, the ways in which the text constituted the United States a particular form of scene; they had engaged in a similar action a decade prior when they adopted the Articles of Confederation. They would recognize themselves, and their states, as the authorizing agents. They would understand the purpose of the

document and the ways in which this document enacted a unique form of government. They would know how the scenic elements of liberty, justice, and equality were written differently in a document that centralized power and employed majoritarian rule (and if they did not, they were informed through the *Federalist Papers*). The agency of the Constitution points to its written-ness, the text and texture of its meaning.

The "Living" Constitution as Agent

Contemporary society crafts the Constitution metaphorically as "living." By talking about a "living" constitution, we anthropomorphize the Constitution, giving it human characteristics. By doing so, we transform it from the Burkean agency that created our governmental system and established the relationship of agents to one another into an autonomous agent. We construct the Constitution as an organic being that is living, changing, and evolving. When the interpretation of the text is removed from the agents who perform the interpretation, the text becomes a self-determining agent. Public discourse crafts the text as acting on its own behalf to serve the needs of contemporary society.

The adoption of the organic metaphor evidences the influence of Darwinian thought in the legal realm. Rights and liberties expand through the process of natural selection. According to constitutional Darwinism,[56] legal results that work in the best interest of contemporary society are allowed, as outdated ideologies do not survive in future legal opinions. Working from this form of progressive ideology, the Constitution can only improve and become a stronger, healthier entity.

The "living" constitution is a natural extension of other organic metaphors to construct public understanding of political systems. We can understand how the text possesses agency when one reads the document. With the exception of the Preamble, the Constitution reads as if it sets forth its own proclamations. For example, Article 1, section 1 declares, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[57] Beyond the Preamble to the Constitution, the reader is not reminded "We the people

of the United States" do ordain and establish our governmental system. The Constitution speaks forth the government and our rights without the people's authorization within the articles and the amendments. To the reader, the constitutional parchment holds our rights and determines our liberties.

What has resulted from our acceptance of the "living" constitution largely is an organic, unwritten constitution. We have the written Constitution, which includes the articles and the amendments setting forth our governmental structures, as well as protecting our rights and liberties through clauses such as the Establishment and Free Exercise Clauses, the Due Process and Equal Protection Clauses, and the Cruel and Unusual Punishment Clause. We also have the unwritten constitution, which includes the incorporation of the amendments to the States, Substantive Due Process, and the Right to Privacy. The unwritten constitution allows the courts to uphold or to overturn legislation. Examples include the Court determining that a "right to contract" (limiting the ability of Congress to craft legislation protecting workers) and a "right to privacy" (creating a trimester system protecting abortion rights and forbids society to legislate based upon morality) exists.[58] Consequently, the lay public, as well as certain judges and legal scholars, understand the Constitution to mean more than the text of the document affirms. Framing the Constitution as "living" reflects users' desire for a government that is responsive to contemporary public needs, deflecting criticism from challengers who disagree with the means by which the Constitution is changed.[59]

Interpreting the constitution through an organic metaphor results in a variety of implications. Metaphors hide and deflect just as much as they illuminate and direct. Speaking about the Constitution as a "living" document exposes it to the frailties of humanity, grants it agency to act of its own accord, and frames the document as able to enact heroic measures. Doing so also ignores actual human agency and the legal context in which events occur.

Implications of a "Living" Constitution

The characterization of the Constitution as a "living" document carries with it many rhetorical implications. A "living" constitution: (1) can become ill, corrupted, or die; (2) is self-determining; (3) becomes an agent, removing the people as the agent of the United States; (4) acts as hero in the constitutional drama; (5) neglects the power of the judges to act as agents to alter the document; and (6) makes the scene indeterminable. These implications are derived from an understanding of Kenneth Burke's notion of the pentad.

The Living Constitution Can Become Ill, Corrupted, or Die

The organic metaphor constructed merely as "living" means that we do not know what sort of entity the "living" constitution is. The text might be as simple as an amoeba or as complex as a human; it could be a plant or an animal. Although most people appear to anthropomorphize the document, as they do government in general, the possibilities for an organic entity are vast.

Moreover, we also do not know at what stage of living the document is. Is it in its infancy, toddler years, adolescence, young adulthood, middle age, or old age? Is it still learning how to speak and to function in the world? Is it going through the growing pains that occur during the teenage years? Or is it on life support about to call in hospice care? The vagueness of the term allows each auditor to develop his or her own conception of what constitutes "living," not allowing for a uniform understanding of the constitutional text.

An implication of the metaphor is that a living thing necessarily becomes ill and dies. The lifespan of a living thing arcs; it grows before it breaks down. Although Jefferson thought that the nation would need to adopt a new constitution every generation, our particular Constitution has remained in effect for more than 200 years, and could persist indefinitely. Moreover, a living entity can be corrupted; it can develop an illness, obtain a disease, or develop psychopathic tendencies. Therefore, following the uncertainty about what stage of development we find ourselves in our

national lifespan; are we still growing and expanding as a nation or entering into the dying stage?

The Living Constitution is Self-Determining

When we construct the Constitution as "living," we transform the document from a scenic document into an agent document. No longer is the Constitution a framework in which our government exists; the document has the power to determine its own course of action. The Constitution as scene, or a resulting act, is passive; it responds to the agents—including judges, the legislature, or the people of the United States—that act upon it. The Constitution as agent transforms it into an active document that acts in its own interests without the advice and consent of the people it governs.

When the document has the power to be self-determining, forces outside the document—such as the American people—do not understand agency. When the people are the agents, or even when the judges and justices are the agents, the body politic understands the agency of the government—through altering the constitutional document through the amendment process when the people act as agents, and through judicial interpretation when the judges act as agents. But when the Constitution acts as its own agent, the process by which it determines its reality is left unaccounted. Knowing who is responsible for actions is important in a democratic republic, a governmental system whose authority and power is derived from the people. They themselves, or their elected representatives, should be the agent in this constitutional drama.

A self-determining constitution is unpredictable. The United States supposedly operates under the rule of law, which means that laws are established and legal outcomes can be predicted based upon the established law. The *Oxford English Dictionary* tells us "in order to control the exercise of arbitrary power, the latter must be subordinated to impartial and well-defined principles of law." When the Constitution is "living," or able to change, it is arbitrary and not well defined; the notion of a "living" constitution that can alter its own meaning defies the principles of

the rule of law. The established text assures guarantees certain rights and liberties, which the text determines can only be altered through democratic constitutionalism—the act of the people through deliberative democracy.

The Living Constitution Becomes the Agent, Removing the People as Agent

In the drama in which the Constitution acts as agent, the sovereign people are moved outside the scene of text. The people do not have to constitute the government or our rights and liberties in a system in which the Constitution is self-determining. In the English system the unwritten constitution is perpetuated by the traditions of Parliament. In the United States the people can remove themselves from participation in the political process. The people crafted the document, which then transcended textual form to create material realities for its people external to the people. The people are subsumed under the Constitution. Instead of the people constituting the government and determining our rights within the textual parameters of the Constitution, the Constitution now determines the people's reality. What rights and liberties the people have are determined by the "living" constitution, not by the people themselves.

Removing the people as agents in the constitutional drama facilitates the forgetting in a variety of ways. The people no longer are aware of their rights and liberties; their rights are whatever someone else—a judge who serves as a prophet of the constitutional deity—tells them their rights are. Democratic constitutionalism does not exist; the people either are not empowered to alter the constitutional text or do not feel the need to do so. As the document follows along its progressivist path, it will evolve into a stronger document via judicial selection sans the aid of the body politic. No need for deliberation exists; the people abdicate their sovereignty to the text. More importantly, however, when the people disappear, the only agents who exist are the ones created by the document itself: the legislature, the executive, and the judiciary. The union is perpetuated through its own processes established in its articles. The guardians of that process are not the citizens, but the representatives and administrators of the laws.

The Living Constitution Acts as Hero in the Constitutional Drama

When the Constitution itself becomes the agent, the text becomes the hero in our national drama. But what type of hero? This hero is not a normal man with extraordinary abilities and talents, for such would be a constitution that relied on the written-ness of its document. In an earlier essay I argue, "In the United States, the Constitution is heroic, imbued with special powers to rescue, to save, and to redeem."[60] Via the organic "living" metaphor, this hero has superhuman abilities; it can change on its own volition outside the parameters of its textual body. The Constitution is the focal point of the drama in which we exist; it can resolve all of our conflicts and save us from potential destruction. In the construction of the Constitution as hero, the document is greater than itself.

Some legal scholars argue that the law is violent. Law professor Robert Cover maintains that law inflicts violence because when one person's liberties are increased another person's liberties are necessarily decreased.[61] Communication scholar William Lewis encourages us to apply a tragic framework to our consideration of legal struggles because a "tragic mythos could provoke a deeper and more diverse investigation of human freedoms by recognizing the limitations and contradictions of the law."[62] In both questions of fact and questions of law, petitioners and defendants stand against one another; winners and losers exist in every legal interaction. Yet when we employ the framework of the Constitution as a heroic figure, as "the guardian of the rights and liberties of citizens,"[63] we neglect its power to harm the people who authorized its existence. We also disregard the people's ability to protect their own rights and liberties, and to use their discretion to elect and to appoint persons who will advance the freedom, liberty, and justice of their constituents.

The Living Constitution Neglects the Power of the Judges to Act as Agents to Alter the Document

Early debate regarding the nature of the Constitution acknowledged the role of the judge in the interpretation of the constitutional text. Constitutional scholars and historians such as McBain, Hagan, and Beard recognized that the Constitution does

not alter itself but rather is modified by judicial understanding of the text. The current manifestation of the "living" metaphor, however, neglects the power of the judge to alter constitutional meaning. When the text becomes its own agent, the judge disappears as an agent in the scene.

Although the constitutional text does not give judges the power to interpret the document, that right was established with John Marshall's opinion in *Marbury v. Madison* (1803). In his landmark opinion that clarified the separation of powers between the judicial and the executive branches of government, Marshall declared, "It is emphatically the province and duty of the judicial department to say what the law is."[64] According to Marshall, the document does not itself declare what it is; the courts do.

Challengers will recognize that many who observes Senate confirmation hearings of judicial appointments and persons concerned with the presidential election are aware of: the power of the judge to direct legal precedent through judicial interpretation. Although there is no denying that persons appointed to the bench affect legal outcomes, discourse about a "living" constitution obfuscates that knowledge by directing auditor's attention away from the judge. The metaphor of the "living" constitution invites the public to forget the role of the judge in determining the material reality of citizens.

The Living Constitution Makes the Scene Indeterminable

When we shift our understanding of the Constitution from agency to an agent, we confuse the means through which our government is enacted into the entity that ratifies change. Doing so throws off the rest of the pentadic structure. The scene becomes no longer fixed but mutable. When document is agency, rather than the agent, the place in which our government is established and our rights and liberties are protected is known—the people can seek redress of our grievances through our institutions of government. When the document becomes the agent, however, we are no longer able to ascertain the scene in which our constitutional democracy is played. The institutions and the amendments operate as the constitutional scene, but one that

can shift and evolve at any time. The scene has little stability; the agency is absent, shrouded in the mysterious ability of the document to act. Moreover, the people do not seek resolution of our political issues through the political process, but through the action of the constitutional persona.

The scene is unclear because we create a false dichotomy between the written and the unwritten document when we juxtapose a "living" constitution with the written constitution. We force our understanding of what the Constitution constitutes into separate spheres when both the written and the unwritten exist. If we construct the Constitution as "living," we give preference to the unwritten text. Yet this unwritten text is not the common law or Blackstone's commentaries on law; this unwritten text is text that has yet to be created. The unwritten text has no tradition upon which we can rely; it is the product of whatever shifting social ideology may produce. Moreover, this new unwritten text is dependent upon the political process; whoever is elected to office can therefore appoint a judge that will reflect his or her political ideology. Historically, however, the unwritten text of the Constitution is the English common law and tradition which our system was modeled after and the foundation upon which our written Constitution rests. Although the unwritten English law remains viable in constitutional interpretation, the "new" unwritten law (such as substantive due process or privacy rights) is not supported historically. The scene is unpredictable because we do not know how the "living" document will change as it ages.

Conclusion

In the landmark case *McCulloch v. Maryland* (1819), which determined that Congress's powers extend beyond those enumerated in the Constitution, Chief Justice John Marshall stated, "we must never forget it is a constitution we are expounding."[65] Within the context of this particular opinion, as well as Marshall's other opinions, it is easy to understand that Marshall intended this constitution—the Constitution of the United States—to be a document that judges could interpret loosely. Over the past thirty years the biggest question for constitutional scholars has been whether the

Constitution should be interpreted in a strict or a loose fashion. During that time many have adopted the language of a "living" constitution.

I.A. Richards tells us that metaphor needs to be understood within the context in which it occurs.[66] The "living" constitution metaphor first occurred within the context of the end of the nineteenth century, during a time period dominated by Darwinian thought that allowed for substantive readings of the constitutional text. Legal Darwinism contends that rights are not merely procedural rights; they also are substantive rights that evolve. For example, the legal right to "be let alone"—free from governmental intrusion—led to the legal "right to privacy." The right to privacy led to the vernacular right to an abortion, which in turn led to a right to choose. Abortion rights demonstrate the ways in which the Constitution evolves: one right precedes another and another as the cases either are distinguished from, or identified with, earlier cases. Our organic understanding of the Constitution occurs within the present ideological context of evolving rights.

The "written-ness" of the Constitution, however, points to its agency quality. The text of the Constitution serves as the means through which we construct our government, elect our officials, and perverse our rights and liberties. Liberty, freedom, equality, and justice are the material effects of the Constitution, established through the articles and the amendments. Symbolically the Constitution is the document that brought about the creation of our nation. Yet the Constitution is not organic. The Darwinian theory of natural selection traces the evolution of species. Such evolution can be observed through external means, over the course of generations: animals alter color or become faster, human beings grow taller. The Constitution, however, remains the same. If I examine the document as it was adopted in 1787, it largely reads the same as it did then; the only changes have been the adoption of the amendments and small alterations to certain articles. Yet the rhetorical meaning and force of the document has shifted.

So far we have acknowledged mechanical and organic metaphors, focusing on the latter. Proponents of the "living" constitution claim, as Woodrow Wilson did in his 1908 book, *Constitutional Government in the United States*:

> The Constitution cannot be regarded as a mere legal document, to be read as a will or a contract would be. It must, of the necessity of the case, be a vehicle for life. As the life of the nation changes so must the interpretation of the document which contains its change, by a nice adjustment, determined, not by the original intention of those who drew the paper, but by the exigencies and the new aspects of life itself.[67]

According to Wilson, the document cannot be read as a legal text because it must respond to shifting social needs. Regardless, our understanding of the Constitution through the metaphor of a "living" constitution carries with it problematic rhetorical implications.

The Constitution does not have to be forced into a diametric opposition of being "living" or never changing. The Constitution can be amended and thus change and evolve. Moreover, we can acknowledge the role of the judiciary in interpreting the Constitution without granting the document the power of self-determination. Within popular dialogue the notion that the Constitution is a "living" document exists. Such a perception collapses the text with the act of interpretation. Yet the two are distinct; the text is a document with written and unwritten aspects and the act of interpretation is determined by the ideological or juridical philosophies of judges.

It is possible to argue, as Kenneth Burke might, that the Constitution is a symbolic document from the perspective that the language it uses relies upon accepted symbols that necessitate interpretation of those symbols. Yet to make that particular rhetorical move neglects the aims of the rule of law. In the United States we presume that law is established prior to an event and that law is objective. Although the objectivity of the law might be a legal fiction, it nevertheless is one that is perpetuated by the legal system that the Constitution establishes. We have certain rights and liberties that are enumerated. In this case, the legal is distinct from the political.

Since metaphors shape our lives, it is prudent to ask what other metaphor we could use to conceptualize the constitution. Several are available. We could consider the Constitution as a sacred text, a compact, a convent, a machine, or a contract. If we use a mechanistic metaphor, as members of the early republic did, the Constitution could be compared to a "vehicle," an "engine," or a "machine" of

government. If we adopt the legal document metaphor, the Constitution could be considered a "contract," "compact," or "covenant," as discussed earlier. Yet any metaphor we adopt comes with its own rhetorical problems. A machine can "break" and a legal covenant can be "broken." A machine is impersonal and can have structural problems. A legal document can have "loopholes" and be manipulated. Adopting a different metaphor will not resolve the rhetorical implications the use of metaphor brings; it merely creates new rhetorical implications.

The construction of the Constitution as a "living" document is a rhetorical choice with rhetorical implications. A "living" constitution can become ill or die; is self-determining; becomes the agent, and removes the agent of the people; acts as hero in the constitutional drama; neglects the power of the judges to act as agents to alter the document; and it makes the scene indeterminable. The Constitution cannot be both agency and agent. The person of the constitutional drama cannot be the means through which the drama takes place. The Constitution is not sovereign; the people are sovereign in the United States' political system. Nevertheless, the presentation of the "living" constitution in United States public address re-presents the document as agent, rather than as the scenic location for the people's rights and liberties.

Notes

[1] George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1962): 2.
[2] Paul Ricoeur, *The Rule of Metaphor*, trans. Robert Czerny (Toronto: University of Toronto Press, 1977), 7.
[3] Robert L. Ivie, "The Metaphor of Force in Pro-war Discourse: The Case of 1812," *Quarterly Journal of Speech* 68 (1982): 253.
[4] Kenneth Burke, *A Grammar of Motives* (Berkeley: University of California Press, 1945), 59.
[5] See Giuseppa Saccaro-Battisti, "Changing Metaphors of Political Structure," *Journal of the History of Ideas* 44 (Jan-Mar 1983): 33-54; Hermann G. Stelzner, "Analysis by Metaphor," *Quarterly Journal of Speech* 51 (1965): 52-61; Saul K. Padover, *The Living U.S. Constitution* (New York: Meridian, 1953); Howard Lee McBain, *The Living Constitution* (New York: The Macmillan Company, 1927); and Michael Kammen, *A Machine That Would Go of Itself: the Constitution in American Culture* (New York: Alfred A. Knopf, 1986).
[6] See Stelzner, "Analysis by Metaphor."
[7] See, for example, Padover, *The Living U.S. Constitution*; McBain, *The Living Constitution*; and Kammen, *A Machine That Would Go of Itself*.

[8] James Walter Lowell, "The Place of the Independent in Politics," in *The Works of James Russell Lowell:* 190-211 at 207.
[9] Walter Lippman, *A Preface to Politics* (New York: Mitchell Kennerley, 1914). Availabe at http://www.gutenberg.org/files/20125/20125-h/20125-h.htm. Accessed December 26, 2014.
[10] Henry David Thoreau, "Civil Disobedience" in *The Thoreau Reader*. Available at http://thoreau.eserver.org/civil2.html. Accessed December 26, 2014.
[11] Other metaphors are used. See, for example, Michael Osborn, "Archetypal Metaphor in Rhetoric: The Light-Dark Family," *Quarterly Journal of Speech* 53 (1967): 115-126; Kathleen Hall Jamieson, "the Metaphoric Cluster in the Rhetoric of Pope Paul VI and Edmund G. Brown, Jr.," *Quarterly Journal of Speech* 66 (1980): 51-72; J. Vernon Jenson, "British Voices on the Eve of the American Revolution: Trapped by the Family Metaphor," *Quarterly Journal of Speech* 63 (1977): 43-50; William Gribbin, "The Juggernaut Metaphor in American Rhetoric," *Quarterly Journal of Speech* 59 (1973): 297-303; Ronald H. Carpenter, "America's Tragic Metaphor: Our Twentieth-Century Combatants as Frontiersmen," *Quarterly Journal of Speech* 76 (1990): 1-22; Roger C. Aden, "Entrapment and Escape: Inventional Metaphors in Ronald Reagan's Economic Rhetoric," *Southern Communication Journal* 54 (1988): 384-400; Suzanne M. Daughton, "Metaphorical Transcendence: Images of the Holy War in Franklin Roosevelt's First Inaugural," *Quarterly Journal of Speech* 79 (1993): 427-446; Thomas B. Ferrell and G. Thomas Goodnight, "Accidental Rhetoric: The Root Metaphors of Three Mile Island," *Communication Monographs* 48 (1981): 271-300"; Robert L. Ivie, "Fire, Flood, and Red Fever: Motivating Truman Doctrine Speech," *Presidential Studies Quarterly* 29 (1999): 570-591; Robert L. Ivie, "The Ideology of Freedom's 'Fragility' in American Foreign Policy Argument," *Journal of the American Forensic Association* 24 (1987): 27-36; Ben Voth, "The Wall Separating Church and State: A Longitudinal Analysis of Metaphor as Argument," *Argumentation & Advocacy* 34 (1998): 127-139.
[12] Multiple books and textbooks have "living Constitution" in the title. Examples include Donald A. Ritchie, *American History: The Early Years 1877* (New York: McGraw-Hill, 1996); John W. Compton, *The Evangelical Origins of the Living Constitution* (Cambridge: Harvard University Press, 2014); Herman Belz, *A Living Constitution or Fundamental Law?: American Constitution in Historical Perspective* (New York: Rowman & Littlefield, YEAR, 1998); Jerry Aten, *Our Living Constitution: Then and Now* (Greensboro, NC: Carson Dellosa Publishing Company Incorporated, 1986); Denny Schillings, *Living Constitution* (New York: McGreaw Hill Education, 1997); Bradley C.S. Watson, *Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence* (Wilmington, DE: ISI Books, 2009); Saul Kussiel Padover, *The Living U.S. Constitution* (New York: Meridian, 1995).
[13] See Kenneth Burke, *A Grammar of Motives* (Berkeley: The University of California Press, 1969).
[14] William F. Harris II, *The Interpretable Constitution* (Baltimore: The John Hopkins University Press, 1993), 30.
[15] See James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago, IL: The University of Chicago Press, 1984); White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, WI: University of Wisconsin Press, 1985); and White, *The Edge of Meaning* (Chicago, IL: The University of Chicago Press, 2001).

[16] Woodrow Wilson, "What is Progress?" in *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* (New York: Doubleday, Page, and Company, 1913), 33-54. Available at *The Gutenberg.org*, September 16, 2014, http://www.gutenberg.org/files/14811/14811-h/14811-h.htm.
[17] *Gompers v. United States*, 233 U.S. 604 (1914) at 610.
[18] *Olmstead v. United States*, 277 U.S. 438 (1928) at 473, citing *Weems v. United States* 217 U.S. 349 at 373.
[19] Benjamin Nathan Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 17.
[20] Franklin Delano Roosevelt, "'Only Think We Have to Fear Is Fear Itself': FDR's First Inaugural Address," *History Matters*, September 11, 2014, http://historymatters.gmu.edu/d/5057/.
[21] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
[22] Howard Lee McBain, *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law* (New York: The Workers' Education Bureau Press, 1927).
[23] James M. Beck, "The Changed Conception of the Constitution," *Proceedings of the American Philosophical Society* 69 (1930): 99-115.
[24] James M. Beck, "The Changed Conception of the Constitution," *Proceedings of the American Philosophical Society* 69 (1930): 102.
[25] Beck, "The Changed Conception of the Constitution," 105.
[26] Horace H. Hagan, "The Elasticity of the Federal Constitution," 20 *Virginia Law Review* 4 (Feb 1934): 391-401, 393.
[27] Edward S. Corwin, "Moratorium over *Minnesota*," 82 *University of Pennsylvania Law Review* (1934), 311-16, 314.
[28] James Hart, "A Unified Economy and States' Rights," *Annals of the American Academy of Political and Social Science* 185 (May 1936), 102-14.
[29] Charles A. Beard, "The Living Constitution," *Annals of the American Academy of Political and Social Science* 185 (May 1936), 29-34, 31.
[30] Burke, *A Grammar of Motives*, 1969.
[31] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
[32] See Cass Sunstein, "Justice Breyer's Democratic Pragmatism," 115 *Yale Law Journal* 1719 (2006): 1719-1743.
[33] Lino A. Graglia, "Does Constitutional Law Exist?" *National Review* (June 26, 1995): 31-35.
[34] William H. Rehnquist, "The Notion of a Living Constitution," 54 *Texas Law Review* 693 (1976):
[35] William H. Rehnquist, "The Notion of a Living Constitution, 29 *Harvard Journal of Law & Public Policy* 401 (Spring 2006): 401-415.
[36] *Missouri v. Holland*, 252 U.S. 416 (1920).
[37] Rehnquist, "The Notion of a Living Constitution," 403.
[38] *Marbury v. Madison*, 5 U.S. 137 (1803).
[39] Antonin Scalia, "On Interpreting the Constitution," *Manhattan Institute for Policy Research*, November 17, 1997, http://www.manhattan-institute.org/html/wl1997.htm.
[40] Attorney General Edwin Meese, "Address" House of Delegates, American Bar Association, Washington, D.C., July 9, 1985.

[41] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997).
[42] Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990).
[43] See, for example, John Hart Ely's *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Harvard University Press, 1980).
[44] See John Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Review* 82 (1973): 920-949.
[45] Thomas C. Grey, "Do We Have an Unwritten Constitution?" *Stanford Law Review* 27 (1975): 703-718.
[46] Associate Justice William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," Address delivered at Text and Teaching Symposium, Georgetown University, Washington, D.C., October 12, 1985.
[47] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Knopf, 2005).
[48] James Boyd White, *When Words Lose Their Meanings: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984).
[49] Grey, "Do We Have an Unwritten Constitution?"
[50] J.M. Balkin, "A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason," in *Law's Stories: Narrative and Rhetoric in the Law*, eds. Peter Brooks and Paul Gewirth (New Haven, CT: Yale University Press, 1996): 211-224.
[51] J. Clarke Rountree, III, "Coming to Terms with Kenneth Burke's Pentad," *American Communication Journal* 1(3) (Spring 1998), August 13, 2014, http://ac-journal.org/journal/vol1/iss3/burke/rountree.html.
[52] "Preamble to the U.S. Constitution," *Legal Information Institute*, September 25, 2014, http://www.law.cornell.edu/constitution/preamble.
[53] The people, however, is an ideal. Not all persons were physically present when the Constitution was written, nor when it was passed into law. In fact, only two-thirds of states needed approve the document. Hence the force of the Constitution over the Articles of Confederation: not *all* persons needed to accede to the document in order for it to be ordained. Moreover, certain individuals have more power in the drama constituting the nation: the white, the wealthy, the knowledgeable and informed, and the politically involved. Over the life of the nation the ideal increasingly has become true. With the passage of the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments more individuals became enfranchised. Yet all persons still are not enfranchised as illegal aliens, prisoners, mentally challenged, and minors cannot vote. See Vanessa R. Beasley, *You, the People: American National Identity in Presidential Rhetoric* (College Station: Texas A&M University Press, 2004) for further consideration of how the American people have been constructed in presidential rhetoric since 1855.
[54] Where and when was the Constitution ordained and established? This question resulted in the rending of the nation during the Civil War. Some, such as Lincoln, believed that the people existed prior to the nation and it was the people that empowered the nation to come into existence. Others, such as John Calhoun, believed that states had the power to secede from the Union since the Constitution was not adopted until two-

thirds of the thirteen states ratified the document. Our present discourse reflects our acceptance of Lincoln's construction of the people as the agents that en-acted the nation. Historian Gary Willis tells us that prior to the Civil War, the vernacular to refer to the United States was in "the United States are." See Gary Willis, *Lincoln at Gettysburg: The Words that Remade America* (New York: Simon & Schuster, 1993). Presently we refer to the United States "is." The shift from "are" to "is" is a shift from emphasis on "States" to "United." The Civil War and the Reconstruction that followed reconstituted the nation from the United *States* into the *United* States.

[55] It is interesting to note that the Constitution does not provide that the judiciary will "interpret" the laws; the ideal that the judiciary could do so was accepted only after Chief Justice John Marshall created the right in *Marbury v. Madison*.

[56] See Joseph Frazier Wall, "Social Darwinism and Constitutional Law with Special Reference to *Lochner v. New York*," *Annals of Science 33* (1976): 465-476 and Katie L. Gibson, "Judicial Rhetoric and Women's 'Place': The United States Supreme Court's Darwinian Defense of Separate Spheres," *Western Journal of Communication 29* (2006): 133-164.

[57] U.S. Const. art 1, § 1.

[58] *Roe v. Wade*, 410 U.S. 113 (1973) and *Lawrence v. Texas*, 539 U.S. 558 (2003).

[59] The most vocal critic of the living Constitution is Supreme Court Justice Antonin Scalia. See Antonin Scalia "Constitutional Interpretation the Old Fashioned Way," *CFIF.org* (March 14, 2005). Available at http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf. Accessed July 15, 2014. See also Scalia, "A Theory of Constitutional Interpretation," The Catholic University of America (October 18 1996). Available at http://www.courttv.com/archive/legaldocs/rights/scalia.html. Accessed June 12, 2003. Scalia, "On Interpreting the Constitution," *Manhattan Institute for Policy Research* (November 17, 1997). Available at http://www.manhattan-institute.org/html/wl1997.htm. Accessed June 12, 2003. Scalia, "God's Justice and Ours," *PewForum.org* (January 2, 2002). Available at http://pewforum.org/deathpenalty/resources/transcript3.php3. Accessed June 12 2003.

[60] Catherine L. Langford, "Appealing to the Brooding spirit of the Law: Good and Evil in Landmark Judicial Dissents," *Argumentation and Advocacy 44* (2008): 121.

[61] See, for example, Robert Cover, "Violence and the Word," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, eds. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: The University of Michigan Press, 1995) and "Nomos and Narrative," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, eds. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: The University of Michigan Press, 1995): 95-172.

[62] William Lewis, "Of Innocence, Exclusion, and the Burning of Flags: The Romantic Realism of the Law," *The Southern Communication Journal* 60 (1994): 11.

[63] Langford, "Appealing to the Brooding Spirit of the Law," 122.

[64] *Marbury v. Madison*, 5 U.S. 137 (1803) at 177.

[65] *McCulloch v. Maryland*, 17 U.S. 316 (1819) at 407.

[66] I.A. Richards, *The Philosophy of Rhetoric* (New York: Oxford University Press, 1965).

[67] Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 69, 157, 192. Several scholars consider Wilson's perspective on constitutional interpretation. See Kammen, "A Vehicle for Life" and Christopher Wolfe,

"Woodrow Wilson: Interpreting the Constitution," *The Review of Politics* 41 (January 1979), 121-142.