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It's Alive

Can Elena Kagan save the legal left?

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In Sotomayor's defense, the nation is today a good deal more constitutionally conservative than it was when Ginsburg testified. An undeniable part of the reason for this trend, however, is that members of the legal left have demonstrated insufficient intellectual courage in defending living constitutionalism—and insufficient deftness in attacking originalism. Just as figures in the political world have almost completely rejected the word “liberal,” the legal world has largely abandoned the “living Constitution.” Even left-leaning legal academics, who were not long ago the leading advocates of living constitutionalism, have overwhelmingly forsaken the term and instead have proposed a steady series of would-be successors. (Laurence H. Tribe's *The Invisible Constitution* may be the most widely known contribution to the growing genre.)

The stakes, in other words, at Kagan's upcoming confirmation hearings could hardly be higher. Viewed optimistically, liberals can hope that Kagan seizes the occasion to reassert the legitimacy of living constitutionalism. At a minimum, though, the hearings offer a valuable opportunity to halt the alarming slide toward originalism. If, instead, what one prominent conservative gleefully called “the Sotomayor test” becomes established as the new standard for Court nominees, the hearings will represent yet another failure for the liberal judicial vision.

Contrary to popular understanding, neither Earl Warren nor William Brennan dreamt up the notion of living constitutionalism. Over the years, Scalia has repeatedly emphasized that the metaphor of a living Constitution sniffs of a suspiciously recent vintage. “A change occurred in the last half of the twentieth century, and I'm sorry to say that my Court was responsible for it,” Scalia explained in 2008 in a typically lapsarian narrative. “It was my Court that invented the notion of a living Constitution.” Similarly, Scalia has stated that the “living Constitution stuff has been going on since the Warren Court.”

In fact, the metaphor has a lineage that stretches back long before the Warren Court. In 1914, Justice Oliver Wendell Holmes Jr. wrote an opinion describing constitutional provisions as “organic, living institutions,” and, in 1920, he wrote another opinion stating that the Founding generation “called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.” In 1927, moreover, Howard Lee McBain, a Columbia University professor, wrote a book called *The Living Constitution*. “However unchanging the form, it is the peculiar virtue of our bills of rights that their substance has changed and is changing,” McBain explained.

Although legal liberals have almost universally eschewed the beleaguered label in recent years, not everyone is prepared to discard it. Last month, University of Chicago law professor David A. Strauss published a book he titled—defiantly—*The Living Constitution*, which offers a powerful defense of both the idea and the metaphor. Strauss begins by distilling the case against originalism to its bare essence and then explains how the question becomes not *whether* the Constitution lives, but *how* the Constitution lives. Scalia has said of his occasional willingness to follow judicial precedent that conflicts with unadulterated originalism, “I’m an originalist—I’m not a nut.” “That way of putting it is disarming,” Strauss writes, “but it seems fair to respond: if following a theory consistently would make you a nut, isn’t that a problem with the theory?” Strauss also skewers Scalia’s familiar declaration that he practices a “fainthearted” originalism. “[I]f you’re going to say that originalism is only sometimes the right approach, then you have to answer at least two other questions,” Strauss explains. “What principle determines when it is right to abandon originalism? And, once you decide not to be an originalist in a certain category of cases, what do you do instead?”

Strauss answers his rhetorical question by insisting that originalists, in the breach, adhere to a version of the living Constitution, which he defines as a document “that evolves, changes over time, and adapts to new circumstances, without being formally amended.” And originalists often find themselves in the breach because the Constitution’s most significant provisions frequently provide little textual guidance. How much process, exactly, is due under the due process clause? Strauss suggests that originalists, by transforming generalities into specifics, disrespect the very Framers they purport to valorize.

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