The Structural Constitution and the Rehnquist Court

By Eric R. Claeys*

Most retrospectives about the Rehnquist Court frame its legacy in terms of a debate between "the living Constitution" and the "original Constitution." This contrast captures an important and rich debate on the Rehnquist Court. Chief Justice William Rehnquist, after all, created a name for himself by railing early in his judicial career against "the notion of a living Constitution."[1] Thus, some retrospectives aggressively criticize the Rehnquist Court for straying from the living Constitution and mistakenly trying to return to the dead, original Constitution.[2] Others portray the Rehnquist Court as a seesaw struggle between the living and original Constitutions, in which some of the Court's more conservative members surprise all by embracing moderation and preserving the living Constitution.[3]

Although all of these portraits are accurate to an extent, they obscure many important details that provide an ultimately more satisfying explication of the Rehnquist Court's work. In this essay, I mean to focus on the differences among the members of the Rehnquist Court's 5-vote moderate-to-conservative majority. One gap relates to Justices O'Connor and Kennedy. Previous retrospectives have (correctly) identified them as conservative and (again correctly) somewhat less conservative than the Chief Justice and Justices Scalia and Thomas. However, these retrospectives have not satisfactorily explained how closely Justices O'Connor and Kennedy have followed the conventional wisdom emanating from Supreme Court precedent and the legal academy over the last half-century. The other difference is between Justices Thomas and Scalia. In most retrospectives, Justices Scalia and Thomas are lumped together as the Rehnquist Court's two most extreme conservatives; in a few, Justice Thomas is blithely dismissed as a second-rate imitator of Justice Scalia. In reality, each represents in fairly pure form one important tendency of "judicial conservatism" as it has been understood since the Warren Court. These tendencies and their differences need to be explored in greater detail—especially because the Roberts Court seems to be slightly more conservative than the Rehnquist Court.

To demonstrate these suggestions, I will focus in particular on case examples from the non-delegation doctrine and Commerce Clause federalism. I will give a brief survey of the main highlights of twentieth-century constitutional development, accentuating especially the emergence of modern judicial conservatism, and then situate each of the Rehnquist Court's conservatives within that course of development. I will conclude with some brief observations about the Roberts Court.

Many of the deepest transformations in American constitutionalism—including in federalism and separation of powers—started in the academy between roughly 1880 and 1920. Although this period is not understood nearly as well as it deserves to be,[4] a few broad themes suffice for our purposes here. Leading academics in political and social sciences developed a new and (in their view, at least) more rigorous understanding of the scientific study of human behavior. In this understanding, political reality was understood not to be organized around higher-law principles, as previous generations had assumed, but rather around forces like "progress," "evolution," "society," or "the will of the American people." These background assumptions encouraged theorists to speak for the first time of a "living Constitution;" Woodrow Wilson, for one, frequently described the Constitution as a social entity, the "the charter of a living government" and "the vehicle of a nation's life."[5]

Theorists who subscribed to the new "living Constitution" political science also tended to conclude that the American constitutional order needed to be revised substantially to accommodate more interventionist regulation. In structural constitutionalism, they concluded that Congress's powers needed to reach deeper into local affairs, and they also concluded that Congress needed to assign broader regulatory powers to apolitical agencies similar to the civil services in European bureaucracies.[6] In part, these prescriptions were influenced by academics' "living Constitution" political theory. In federalism, some academics believed that the American people's will was more representative and less parochial than the wills of the peoples of the several states. In separation of powers, they believed that bureaucratic government would help specialize both politics—the process of identifying the popular will—and administration—the rational implementation of that will. Separately, however, some academics insisted that these changes would have desirable policy consequences, on the ground that larger and more centralized national government would more efficiently satisfy the desires of American voters.

That general architecture took hold in American law and political practice during the New Deal, as these theorists' students took positions of prominence in the Roosevelt Administration. In seminal federalism and separation of powers cases, the New Deal Court upheld many New Deal agencies from Commerce Clause and separation of powers challenges. At the same time, the Court used legal logic slightly different from Progressive political-theory arguments. To be sure, in many cases, the Court used Progressive efficiency-based policy arguments to uphold new schemes from challenge. But the New Deal Court downplayed heavily talk of a "living Constitution." Indeed, some Justices claimed that the original meaning of the Constitution *encourages* Congress to construe its powers vigorously, and that federal courts had engaged in improper judicial activism by suggesting otherwise; Robert Jackson even wrote a book demonstrating this thesis.[7] No case illustrates both sides of the trend better than the 1942 case of *Wickard v. Filburn*, which cemented the New Deal transformation of the Commerce Clause into place.[8] Justice Jackson started his analysis of the Commerce Clause with an appeal to originalist authority: "At the beginning Chief Justice Marshall described the Federal commerce power with a breadth never yet exceeded."[9] He ended it with an appeal to political-science comparative institutional analysis: "The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom,

workability, or fairness, of the plan of regulation we have nothing to do."[10]

During the Warren Court, the Court lost interest in structural constitutional law and property cases and focused instead on racial equality, the rights of criminal defendants, free speech, and individual privacy. That shift forced the New Deal's constitutional settlement to fracture. The "conservative" wing of the Warren Court consisted of New Deal liberals who, mindful of the crisis of 1937, never again wanted to see courts substituting their policy expertise for that of legislators. The "progressive" wing of the Warren Court, by contrast, assumed that the Court could intervene to do good in individual-rights law as long as it left alone the New Deal settlement of structural constitutional law and property rights. That wing, led by Chief Justice Warren and Justice Brennan, made the notion of a "living Constitution" respectable in legal argument and used it as a standard around which federal courts could rally to rectify violations of privacy and equality.

But also during the Warren Court, political conservatives began to develop their own brand of judicial conservatism, substantially different from the conservatism of "go slow" New Deal liberals like Justice Frankfurter. Substantial segments of the American populace objected to the Warren Court's forays into school busing, criminal law-enforcement, and state and local morals legislation. Richard Nixon and subsequent Republican presidential nominees used these issues to distinguish the Republican Party from the cultural liberalism of the Democratic Party. Nixon and subsequent nominees used the term "strict construction" as a signal that they would nominate judges who would not engage in the kinds of interpretive and enforcement practices associated with the Warren Court.[11]

However, it is one thing to bash "living Constitutionalism" and tout "strict construction" in a set campaign speech, and quite another to develop coherent theories of constitutional interpretation and judicial behavior around those themes. In many important respects, this effort has been a work in progress among judicial conservatives for more than 40 years. Nixon's appointees to the Burger Court highlighted a few early problems. For one thing, many Republican lawyers were then (and still are now) culturally more liberal than the religious voters and grass-roots activists who favor strict constructionism. For another, Nixon tended to favor sitting judges and practitioners. Whatever their virtues, judges and practitioners tend not to be theoretical, as one would need to be to develop a program of constitutional interpretation outside the mainstream of two generations of legal development. But other problems have surfaced even among more theoretically oriented lawyers. Some prominent judicial conservatives understand "judicial conservatism" to require judges to follow the original meaning of the Constitution; others understand the project to require judges to develop rules that maximize the policy-making power of the political branches and minimize the policy-making power of judges. (Gary Lawson has explained this tension in a clear and mercifully short essay.[12]).

This quick survey helps situate the different conservatives on the Rehnquist Court. Consider first Justices O'Connor and Kennedy. They are best understood as holdovers from the Burger Court. Both were successful and accomplished lawyers. Both were loyal and politically active Republicans. Neither had time or inclination during their professional careers to test out different theories of constitutional interpretation to a degree that would satisfy serious intellectuals or constitutional scholars. As Mark Tushnet has perceptively noted, in the culture wars associated with the Warren Court, both sympathized more with "establishment" Republicans (who tended to support some measure of federal-court intervention) and not "grass-roots" and "movement" Republicans (who opposed federal courts more vigorously).[13] Both were politically conservative enough to break from the accumulated wisdom of the New Deal and Warren Courts to reflect the new conservative leanings the American populace started to reflect in the late 1970s. At the same time, both bought into most of the substantive and interpretive commitments locked into the Court's precedent, and both therefore wanted to preserve the old while making space for the new.

Justices O'Connor and Kennedy illustrate these tendencies in the Rehnquist Court's separation of powers and federalism cases. As I have explained elsewhere, separation of powers may be the biggest *non*-event during the Rehnquist Court. The Burger Court left the Rehnquist Court with several excellent originalist precedents to use in separation of powers, and the Rehnquist Court limited most of them substantially.[14] Justices O'Connor and Kennedy's substantive commitments go a long way in explaining why. For all intents and purposes, they subscribed to the same theory of bureaucratic government as leading Progressives and New Dealers. To take one of many examples, in one routine non-delegation case, Justice O'Connor reaffirmed for a unanimous Rehnquist Court "our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed, no delegation of legislative authority trenching on the principle of separation of powers has occurred."[15] Here, Justice O'Connor accepted as conventional wisdom the view that modern political life would descend into anarchy unless federal courts enforced the non-delegation doctrine extremely permissively.

The same tendencies also limited the scope of the Rehnquist Court's New Federalism, as I am explaining in scholarship to be published shortly.[16] Even in *United States v. López*, the case that launched the New Federalism and resuscitated the Commerce Clause, Justice Kennedy wrote a separate opinion (joined by Justice O'Connor), warning that *López*'s holding, while "necessary," was "limited."[17] He assumed that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."[18] Here, Justice Kennedy assumed as conventional wisdom that modern political life would descend into anarchy unless Congress can regulate manufacturing and agriculture on the same terms as interstate trade; he also casually assumed that the views of "we" the American people *must* take priority over the voices of 50 parochial state "we's." Kennedy's substantive attachments help explain why he switched votes from *López* to *Gonzales v. Raich*, the June 2005 decision in which he sided with the Rehnquist Court's liberals to reject a *López* challenge to a federal prosecution of two Californians who were home-growing marijuana.[19]

More intriguing, in the last five years of the Rehnquist Court, Justices Thomas and Scalia have parted in subtle but

unmistakable and important ways. Justices Thomas and Scalia are staking out differences about how post-1960 "judicial conservatism" should be understood. Justice Scalia stands for the "minimalists," the conservatives who believe that the Warren Court's main sin was to usurp control over legislative policy-making. Justice Thomas, by contrast, stands for the "originalists," the conservatives who believe that the Warren Court's main sin was to disregard the original meaning of the Constitution.

Even if Justice Scalia's and Justice Thomas's preferences dovetail in most cases, they do not always dovetail, especially not in the most revealing cases. The non-delegation doctrine highlights the difference. For a minimalist like Justice Scalia, the constitutional language "legislative powers" is too open-ended a phrase to generate a manageable, bright-line rule. Thus, in the 1989 non-delegation case of *Mistretta v. United States*, Justice Scalia agreed not to enforce the non-delegation doctrine—even though he conceded that the Constitution requires it—because he regarded the doctrine as "not. . .readily enforceable by the courts."[20] By contrast, the originalist Justice Thomas wondered, in the 2001 non-delegation case *Whitman v. American Trucking Ass'ns*, whether a century's worth of "delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[21]

The same tension explains why Justices Scalia and Thomas split in the 2005 Commerce Clause decision of *Gonzales v. Raich.* As fellow judicial conservatives, they agree that if the federal government has constitutional power to prosecute the growing of marijuana, that power comes from the Necessary and Proper Clause, "which the founding generation called the Sweeping Clause,"[22] and not the Commerce Clause. Both agree that "commerce among the several states" refers to interstate trade and therefore excludes the growing of a crop in a state. But they disagree whether the federal government may limit the growing of marijuana as a "necessary and proper" adjunct to its power to control interstate trade in marijuana. As I have explained elsewhere,[23] in *Raich,* Justice Scalia preferred, for good minimalist reasons, to leave Congress to decide what was "proper;"[24] Justice Thomas, for good originalist reasons, insisted that the term "proper" requires federal courts to review whether acts of Congress remain faithful to the "'letter and spirit' of, the Constitution," including Article I's broad substantive divisions between enumerated federal and reserved state powers.[25]

And what about Chief Justice Rehnquist himself? Surprisingly, he was more enigmatic as Chief Justice of the Rehnquist Court than he was as an Associate Justice on the Burger Court. On the Burger Court, he developed a reputation as a "Lone Ranger" who broke from two generations of accumulated conventional legal wisdom. As Chief Justice, however, Rehnquist often submerged his own individual views for the corporate views of the Court or the faction of the Court he led.

These tendencies come out in Rehnquist's cases on non-delegation and the Commerce Clause. As for the Commerce Clause, in the 1981 case *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, then-Justice Rehnquist caustically observed that "one could easily get the sense from this Court's [Commerce Clause] opinions that the federal system exists only at the sufferance of Congress."[26] Here, Rehnquist found some traction when he took over as Chief Justice. In *Lopez*, he found four willing contributors to a project to resuscitate the Commerce Clause, and he relied substantially on the argument he had developed in *Hodel* to read the Commerce Clause more narrowly than at any time since 1937.[27] By contrast, Rehnquist never tried as Chief Justice to resuscitate the non-delegation doctrine. This comes as a surprise after the 1980 *The Benzene Cases*, in which Rehnquist cited John Locke's *Second Treatise* to argue for resuscitating the non-delegation doctrine.[28] As Chief Justice, Rehnquist never renewed this argument; he instead joined many lopsided and unanimous or near-unanimous opinions brusquely rejecting non-delegation challenges.

Not only are these portraits important for understanding the Rehnquist Court, but they also help to highlight important features and trends leading into the Roberts Court. For one thing, they help explain how far the center of gravity has shifted within the Republican Party and within the ranks of lawyers and politicians who help Republican Presidents pick Supreme Court nominees. Judged by the standards of 1970, Justices O'Connor and Kennedy were par for the course—if anything, they had stronger paper credentials and seemed more conservative than most of President Nixon's nominees. Both, however, would attract considerable criticism if nominated in today's climate. The best confirmation of this shift, of course, is President Bush's abortive attempt to nominate Harriet Miers to replace Justice O'Connor. Miers' nomination collapsed for a variety of reasons. Her paper credentials were unusually thin, she did not impress Senators in face-to-face meetings, and (probably the clincher) she had given speeches in 1993 suggesting that she was pro-choice. All the same, her nomination would not have seemed nearly as surprising or disappointing in the climate of Republican conservatism in 1970 as it did in the climate of 2005. Social conservatives and "movement" legal conservatives have developed a considerably more sophisticated and focused understanding of their commitments and priorities in 35 years.

Two of those conservatives, of course, are new Chief Justice John Roberts and Associate Justice Samuel Alito. As of now, most Rehnquist Court retrospectives—indeed, most constitutional scholarship—lack the tools needed to appreciate the subtle differences between a Roberts or an Alito and the conservatives on the Rehnquist Court. The portrait presented here, however, highlights some of the questions to ask: How do Roberts and Alito understand precedent? What is the first instinct of each when presented with an open-ended constitutional clause, like the Legislative Vesting Clause or the Sweeping Clause? Around 1960, when New Deal judicial liberalism fractured, Court watchers needed to develop a new tool kit to appreciate the differences between different species of judicial liberals. Today, Court watchers may need to develop a similar set of questions to ask of modern-day judicial conservatives.

* Eric R. Claeys is Assistant Professor of Law at Saint Louis University. He clerked for Chief Justice William H. Rehnquist in the 1995–1996 Term, and is writing a retrospective on the Rehnquist Court. He may be reached at claeyser@slu.edu.

Footnotes

[1] William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976).

[2] *See, e.g.*, Cass R. Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America (Basic Books, 2005); The Rehnquist Court: Judicial Activism on the Right (Herman Schwartz ed., 2002).

[3] *See, e.g.*, Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism (University Of Chicago Press 2004); Tinsley E. Yarbrough, The Rehnquist Court and the Constitution, (Oxford University Press 2000); James F. Simon, The Center Holds: The Power Struggle Inside the Rehnquist Court (1995).

[4] For helpful studies, consider G. Edward White, The Constitution and the New Deal (2000); Dennis J. Mahoney, Politics and Progress: The Emergence of American Political Science (2004); David M. Ricci, The Tragedy of Political Science: Politics, Scholarship, and Democracy (1984); Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value (1973).

[5] Woodrow Wilson, Constitutional Government in the United States 167 (1908).

[6] I develop these themes at greater length in Eric R. Claeys, *The National Regulatory State in Progressive Political Theory and Twentieth-Century Constitutional Law*, *in* Modern America and the Legacy of the Founding (Ronald J. Pestritto & Thomas G. West eds., forthcoming 2006) (manuscript on file with author).

[7] *See* Robert H. Jackson, The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics (1941).

[8] Wickard v. Filburn, 317 U.S. 111 (1942).

[9] *Id.* at 120.

[10] *Id.* at 129 (footnote omitted).

[11] *See, e.g.*, *Vice President Gore and Governor Bush Participate in Presidential Debate* (Oct. 3, 2000), http://www.cnn.com/ELECTION/2000/debates/transcripts/u221003.html.

[12] Gary Lawson, *Conservative or Constitutionalist?*, 1 Geo. J.L. & Pub. Pol'y 81 (2002).

[13] *See* Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law 49–70 (W.W. Norton & Company 2005).

[14] *See* Eric R. Claeys, *Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts*, 21 Const. Comment. 405 (2004).

[15] Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989) (citation and internal quotation marks omitted).

[16] Eric R. Claeys, Sabri, Lane, *and* Raich: *The Progressive Limits on the Rehnquist Court's Federalism Revival* (forthcoming 2006) (unpublished manuscript, on file with author).

[17] United States v. López, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring).

[18] *Id.* at 574.

[19] Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[20] Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

[21] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

[22] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1234 (1994).

[23] *See* Eric R. Claeys, Raich *and Judicial Conservatism at the Close of the Rehnquist Court*, 9 Lewis & Clark L. Rev. 791, 812–15 (2005).

[24] *Raich*, 125 S. Ct. at 2219–20 (Scalia, J., concurring in the judgment).

[25] *Id.* at 2233 (Thomas, J., dissenting) (quoting McCulloch v. Maryland, 31 U.S. (4 Wheat.) 316, 421 (1819)).

[26] Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring in the judgment).

[27] *Compare id.* at 309 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)), *with López*, 514 U.S. at 556–57 (same).

[28] *See* Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 672–73 (1980) (Rehnquist, J., concurring in the judgment) (quoting John Locke, Second Treatise of Civil Government ¶ 141, at 244 (M. Mayer ed., 1957)).