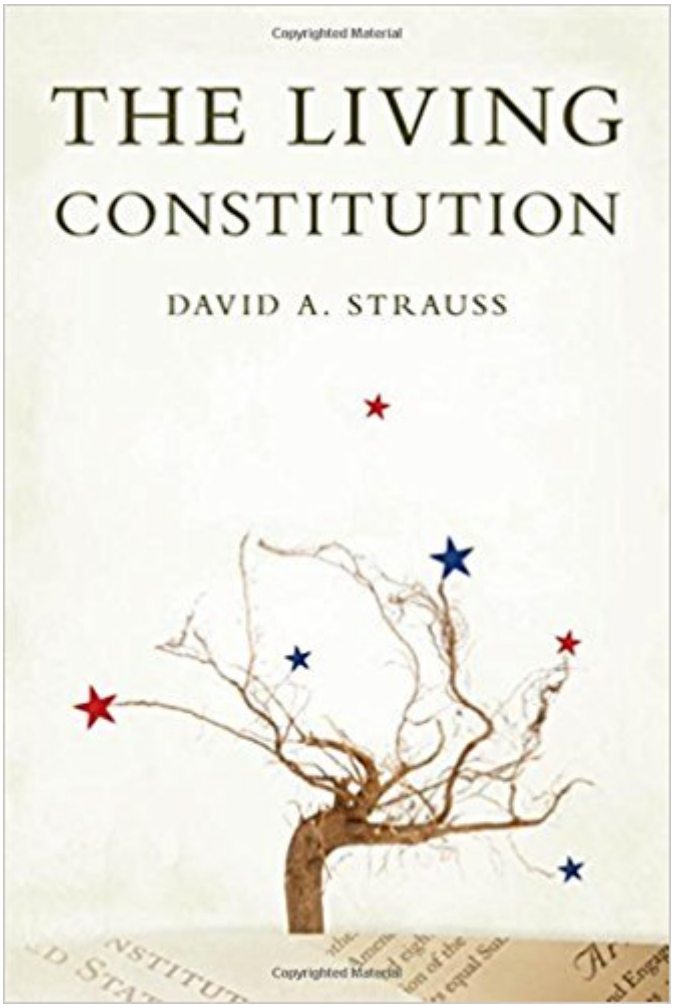
The Living Constitution (INALIENABLE RIGHTS)



Synopsis

Supreme Court Justice Antonin Scalia once remarked that the theory of an evolving, "living" Constitution effectively "rendered the Constitution useless." He wanted a "dead Constitution," he joked, arguing it must be interpreted as the framers originally understood it. In The Living Constitution, leading constitutional scholar David Strauss forcefully argues against the claims of Scalia, Clarence Thomas, Robert Bork, and other "originalists," explaining in clear, jargon-free English how the Constitution can sensibly evolve, without falling into the anything-goes flexibility caricatured by opponents. The living Constitution is not an out-of-touch liberal theory, Strauss further shows, but a mainstream tradition of American jurisprudence--a common-law approach to the Constitution, rooted in the written document but also based on precedent. Each generation has contributed precedents that guide and confine judicial rulings, yet allow us to meet the demands of today, not force us to follow the commands of the long-dead Founders. Strauss explores how judicial decisions adapted the Constitution’s text (and contradicted original intent) to produce some of our most profound accomplishments: the end of racial segregation, the expansion of women’s rights, and the freedom of speech. By contrast, originalism suffers from fatal flaws: the impossibility of truly divining original intent, the difficulty of adapting eighteenth-century understandings to the modern world, and the pointlessness of chaining ourselves to decisions made centuries ago. David Strauss is one of our leading authorities on Constitutional law--one with practical knowledge as well, having served as Assistant Solicitor General of the United States and argued eighteen cases before the United States Supreme Court. Now he offers a profound new understanding of how the Constitution can remain vital to life in the twenty-first century.

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Customer Reviews

The concept of a living Constitution that evolves over time is not a formula for untethered judicial activism but a necessaryÃ¢â ¬â •and venerableÃ¢â ¬â •mode of interpretation, argues this scintillating treatise. University of Chicago law prof Strauss mounts a devastating attack on originalism (the doctrine most vociferously advocated by Supreme Court Justice Antonin Scalia) that constitutional law should hew to the written Constitution and the intent of its framers; such an approach, Strauss argues, is rife with contradictions, fraudulent history (it's often impossible to know what the framers meant or how they might think about modern-day issues), and ideological bias. The more fruitfulÃ¢â ¬â •and historically dominantÃ¢â ¬â •interpretive school of living constitutionalism, he contends, follows a tacit common-law approach focused less on the text than on judicial precedent and changing notions of fairness and sound policy. Strauss offers meticulous accounts of how common-law processes revolutionized the consensus on core constitutional issues like freedom of speech and civil rights; indeed, he insists, they can transform our understanding of the Constitution more profoundly than formal amendments do. Writing in prose that laymen will find lucid and inviting, Strauss makes the usually fuzzy idea of a living Constitution rigorous and substantive. (May)

"If David Strauss's marvelous book doesn't convince Justice Scalia to accept rather than abhor the idea of a living constitution, nothing will." --William Wargo, The Vermont Bar Journal "Writing in prose that laymen will find lucid and inviting, Strauss makes the usually fuzzy idea of a living Constitution rigorous and substantive."--Publishers Weekly"Succinct and elegant"--Steve Chapman, Chicago Tribune "Strauss keeps a low public profile but legal scholars know him to be a first-class mind. This book, written for the general reader, shows that he is also a master stylist, whose prose is Orwellian in the good sense: clear as a pane of glass."--The New Republic"Whatever one may think of these issues, it is clear that Strauss has provided a great service to both academics and the general reading public. He has produced a short, accessible, well-written, thoughtful, and incisive defense of living constitutionalism, one which can also serve as a valuable introduction to foundational debates about the nature of constitutional interpretation."--The Law & Politics Book

Review"Timely and important...a novel and creative contribution to the ongoing debate about the nature of the U.S. Constitution, and will influence the dialogue for years to come."--Harvard Law Review"I regard The Living Constitution to be a tremendous success. It deserves to be widely read by students, lay people, and specialists."--Notre Dame Philosophical Reviews

A wonderfully refreshing argument for "the living constitution". Most surprisingly is that much of the argument is based in the philosophy of Edmund Burke, father of modern conservatism.

Clear, cogent, and illuminating explanation of the difference between two approaches to interpreting the Constitution: originalism and the Living Constitution

There has been a debate over the past several decades on whether the US Constitution is a living document that should be interpreted according to current mores and standards or whether it is a static document that should be interpreted using only the meaning found in the original wording of the document.The author, in this book, makes the case that the Constitution is, in fact, a living document that should be interpreted by modern standards and by using principles of common law. There are examples given that, quite frankly, are very persuasive. For instance, if the Constitution were interpreted using original language, we would not have the freedom of speech that we now enjoy. A careful reading of the First Amendment will show that only Congress was prohibited from making laws that abridged free speech. There were no constraints on the states or on other governmental bodies.Whether or not you agree with the author on how the Constitution should be interpreted, this book will make for some though provoking reading and interesting discussion. The book was well written, fairly easy to understand and should be read by all who are concerned about where the Supreme Court is now and where it is headed.

Good

Great.

Richly informative, especially as to the claim for "originalist" interpretations of the Constitution. Strauss argues hard for "Living Constitution" - one that allows (encourages?) careful updating interpretation.

Strauss demolishes originalism in a concise and accessible volume.

This book does have a few commendable features. It is written in laymen’s language, you don’t have to be a constitutional law scholar like David A. Strauss to comprehend the arguments. And it’s short. Won’t take more than a couple of hours to read. But as a critique of the "originalist" constitutional doctrine, it is hit and miss. For example, Strauss argues that originalism has three major flaws (p.18):1) the impossibility of determining what the understanding of the founding fathers was on a particular issue.2) the impossibility of translating an original understanding so that it addresses today’s problems.3) no answer for Thomas Jefferson’s question about why we, the living, should be governed by the "dead hand" of past generations, including the founders.Of these three, the first is the most telling, because it is indeed sometimes the case that we do not know what the founders would have thought about a particular issue, because that issue simply did not exist at the time of the enactment of the constitution or a particular amendment, or because that original meaning could be lost to history. The patent-ability of new life forms as a result of genetic engineering being a good example (but, other technological examples, like cases related to airplanes and cars, are NOT good examples, since while the founders were unaware of these technological advances, it’s safe to assume they would recognize them as transportation vehicles, so their understanding of ships and horse carriages would apply to them). That’s why i am what Strauss might call a "sometimes originalist" - my view is that IF there is no reasonable doubt about what the enactors of a constitutional provision would have thought about a case, then that should control the decision a court arrives at. But obviously, if the issue was unknown to the enactors, or if their views are forever lost to us due to the passage of time, then there is no "original understanding" of that particular issue, and some other method of constitutional interpretation must be relied on.The second and third objections are far less compelling to me. The second objection is IMO a non-issue. To ask "well, we know that in 1880 the enactors of the 14th amendment did not believe its equal protection clause outlawed employment discrimination against women, but would they believe that if they were living in the year 2000, with all the economic/cultural/technological changes that have developed over those 120 years?" is an irrelevant question. It’s like asking if the 1969 Congress that enacted the Clean Air Act would still enact it if that Congress were to debate the issue in 2010: it’s purely speculative and ungermane, since neither statutes nor constitutional provisions have expiration dates on them.Likewise, the 3rd objection is both shallow and disingenuous. Shallow because Jefferson clearly understood that the constitution, like laws enacted by the legislature, are subject to change by later generations, who can amend the constitution or

pass new legislation to supersede what previous generations have accomplished. Disingenuous, because the invocation of Jefferson seems to be a tactical decision by Strauss, a way to tweak originalists by citing one of the very greatest of our founding fathers. Yet Jefferson can also be quoted to support an originalist view. For example, in 1801 he said:"The Constitution on which our union rests, shall be administered by me according to the safe and honest meaning contemplated by the plain understanding of the people of the United States, at the time of its adoption....These explanations are preserved in the publications of the time, and are too recent in the memories of most men to admit of question." (Writings of Thomas Jefferson, quoted from a letter dated 3/27/1801).The first part of this quote clearly indicates that Jefferson believed that constitutional provisions should be interpreted according to original understanding, not "modern, evolved" standards of meaning as David Strauss would contend. The second part speaks to the need i identified before, that of knowing within the bounds of reasonable doubt what the enactors understood a provision to mean.Beyond all this, though, is David Strauss's contention that a "living constitution", as defined by a common-law like accretion of judicial precedent in constitutional matters that leave the original meaning of the text behind, is necessary because otherwise our constitution would become an archaic relic unable to meet the demands of a changing society, and that the formal amendment process is too slow and cumbersome. Professor Strauss correctly notes that Jefferson believed that our institutions must evolve with the development of society; however, he crucially fails to note that to Jefferson, the primary mechanism of such innovation was to be the actions of the legislature. Constitutional provisions are expounded in broad, general language not to enable future judges to interpret them in light of changing societal conditions, but to permit elected bodies, like legislatures and congress, wide latitude to address the problems of today. Legislative bodies, which directly reflect the ebbs and flows of societal change and are accountable to the people, were Jefferson's preferred vehicle of constitutional innovation, not the decisions of insulated, life-tenured court judges. On this point, unlike on many others, Jefferson was in agreement with John Marshall. As Jean Edward Smith (1996) writes "When (in McCulloch v. Maryland) Marshall spoke of the Constitution as "intended for ages to come" and of the need to adapt it "to the various crises of human affairs", he was alluding to the responsibility of Congress, not the Court. And the limits on Congress were defined by the political process, not the judiciary" (p. 445).Thus, for example, while the enactors of the 14th amendment did not intend for it to ban employment discrimination against women, it also was not intended to prevent Congress or the state legislatures, at the time of the enactment or in the future, from enacting legislation that does protect women from employment discrimination should that type of legislation be deemed necessary

or advisable. Jefferson was far more wary of "innovative" actions by judges, exemplified by his belief that "if federal judges have the final word over its meaning,the Constitution would be a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please". Yet it is exactly this type of judicial activism that Strauss means when advocates a "living constitution".Strauss's fundamental error is revealed on page 103 when he says that "We cannot say that the text of the constitution does not matter ... no (textual) provision of the constitution can be overruled in the way a precedent can, or disregarded the way original understandings often are". What Strauss is saying here (well, he wouldn't put it this way, but this is my view of the matter) is that when a judge wants to be activist, to impose his/her personal policy preferences on a case, it's very important that the judge somehow, through clever verbal gymnastics, no matter how convoluted, "ground" that ruling in some actual constitutional-textual language. This is very important for achieving the political purpose of maintaining respect for the court in the eyes of the public. But to me, Strauss creates a false dichotomy: The text of the constitution is ONE AND THE SAME with its "original understanding". The 'text', the actual words of the constitution, does not exist independent of the original understanding of those words, the text is merely the communicative vessel used to convey that original understanding. That's the way language works. It's a method to convey meaning. Thus, to invoke the Due Process Clause of the 5th amendment to outlaw Federal segregation laws (as the Court did in 1955) when the enactors of the 5th amendment clearly (as Strauss admits) did not intend for it to mean that, is the SAME THING as ignoring the "text" of the constitution, since the text and original understanding are one and the same.Overall, i recommend this book. One will learn alot about constitutional history, and Professor Strauss is surely correct in that the "living constitution" view is in fact the dominant way in which the Court has gone about its business in practice, regardless of what legal theoreticians have thought.But, don't expect to be convinced by much Professor Strauss has to say about why this is a good thing.

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