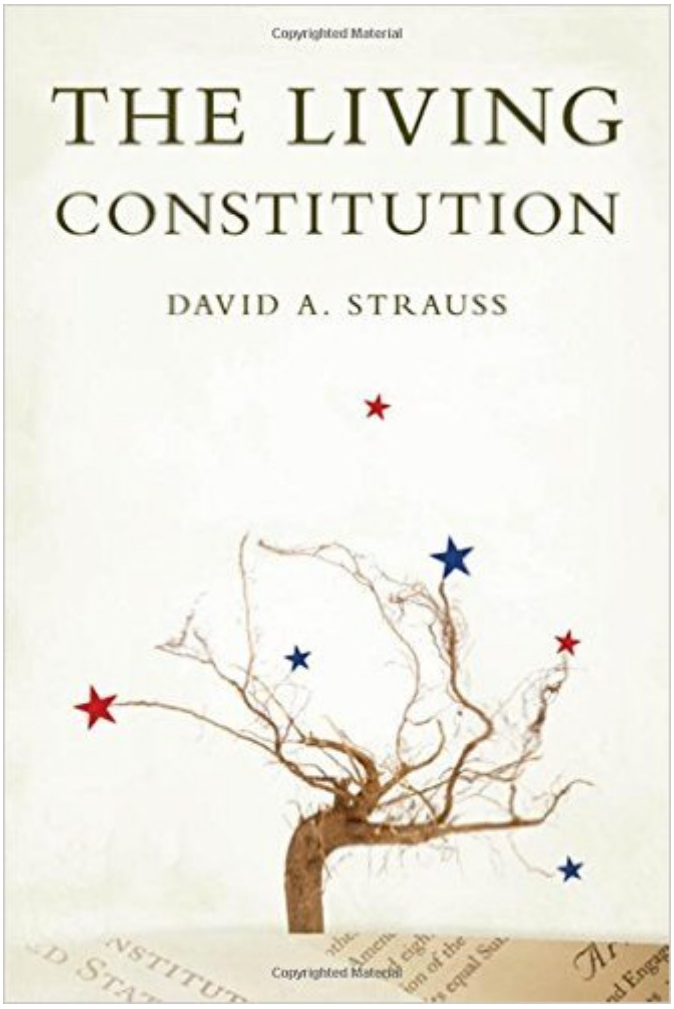
The Living Constitution (INALIENABLE RIGHTS)



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.

Book Information

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Customer Reviews

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.

If you read the other reviews you will think that this book is mostly a critique of originalism. It isn't--and that's what makes it new and exciting. Rarely does the reader come across an actual defense of living constitutionalism. If you read legal scholarship, you will see that a division of labor has sprung up over the last 20 years. Specifically, conservatives critique living constitutionalism and defend originalism; liberals critique originalism. Apparently liberals believe that if they henpeck originalism to death, living constitutionalism will somehow emerge, as if by default, as an acceptable mode of interpretation. Accordingly, liberals rarely go further. (I recently reviewed Mark Tushnet's new book which purportedly explores "competing visions" of the constitution but which, in reality, throws jabs at originalism while completely sidestepping any explanation of the liberal "vision" of the

constitution.)Here, Strauss does go further. He offers the standard issue criticisms of originalism. But he also argues that living constitutionalism can provide answers to the two normative questions that originalists have introduced into the debate over constitutional interpretation during the past 30 years: (1) that judges should cabin their individual discretion and (2) that constitutional decisions must be "legitimate." Whereas originalists find restraint in the "original public meaning" of the document and legitimacy in its democratic adoption, Strauss finds both restrain and legitimacy in the common law. Specifically, the common law has "authority" because its rules "have been worked out over an extended period" of time (38) and it restrains judges because of its incremental approach which is "cautious" and "humble.

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