



## The Living Constitution (INALIENABLE RIGHTS)

By David A. Strauss

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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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## **Editorial Review**

From Publishers Weekly

The concept of a living Constitution that evolves over time is not a formula for untethered judicial activism but a necessary—and venerable—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 fruitful—and historically dominant—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*)  
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### **Review**

"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*

#### About the Author

**David A. Strauss** is the Gerald Ratner Distinguished Service Professor of Law at the University of Chicago, and one of the nation's leading constitutional law scholars. He has also served as Special Counsel to the United States Senate Judiciary Committee and Assistant Solicitor General of the United States, and argued eighteen cases before the United States Supreme Court. David Strauss is an editor of the *Supreme Court Review*.

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