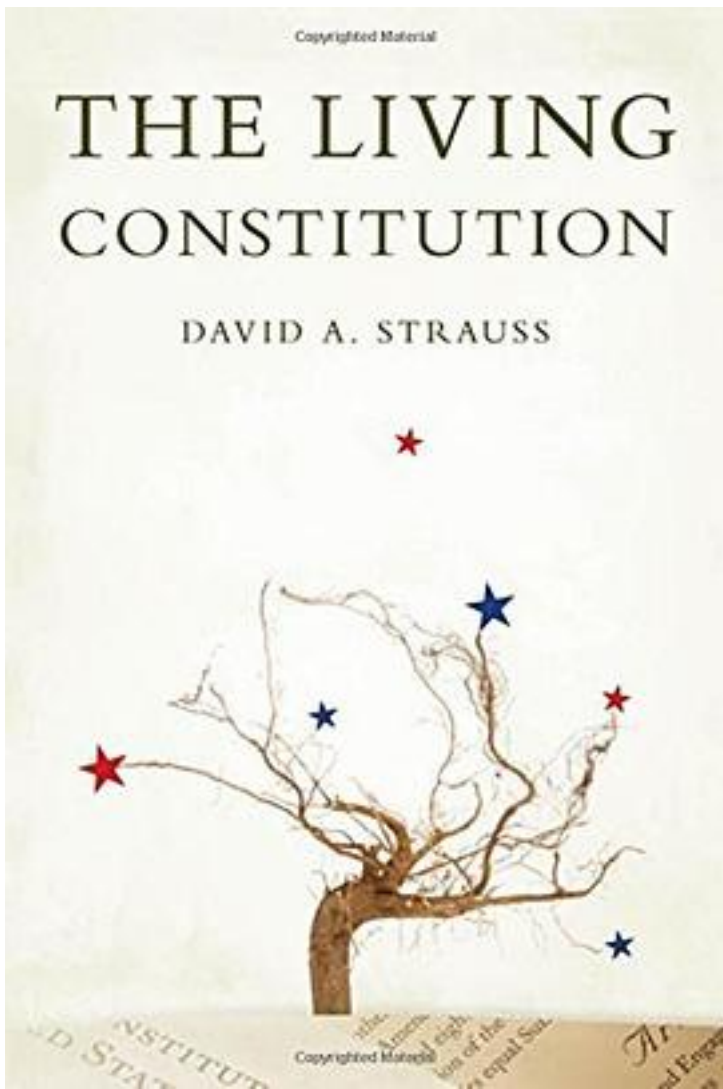


The Living Constitution



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著者:David A. Strauss

出版者:Oxford University Press

出版时间:2010-5-19

装帧:Hardcover

isbn:9780195377279

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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山东海阳人，本科就读于中国青年政治学院，后于北京大学获法学硕士和博士学位。现任教于北京航空航天大学法学院。学术兴趣领域为行政法、政法理论、法律与公共治理等。

目录:

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标签

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评论

(1) 最大的democracy问题被绕过了：common law可以被立法机关废弃，Con Law不行，这一点与民主的冲突如何回应呢？Jefferson问题自然是对originalism最致命的一击。然而这个问题的回答为什么要掌握在九个人手中呢？如果不回答清楚与民主关系，这一解答并不能满意——九个人能代表某一世代全体民众的意见吗？(2) Common Ground这一点不错，可是只有某些技术性问题可以绝对参照，真正争议大的问题，就变成道具了。大家都明白是道具的情况下，纷争很大的情况下，怎么能作为common ground呢？也就是说，在最需要共识的问题上，反倒起不到共识的作用了。(3) 修正案其实是现实的正当化，可是现实如何并不改变某些原则的法律地位，未经修宪程序，原则的宪法地位仍是没有的。

反原旨主义是没啥问题，但要把living constitution说清楚就不那么容易了

试图用伯克的理论为进步主义左派的法学观点做辩护，也是够奇特了。为了让伯克为进步主义者说话，作者似乎走私进了一种伯克不具备的进步主义历史哲学，这使得其普通法理论预设了一种单一走向（在为布朗案辩护中尤为明显）。

FedSoc presents — Halloween party: the living constitution

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书评

《美利坚合众国宪法》可能是世界上最短的宪法之一了，仅仅用了4543个词语。即使将修正案算上，我猜语词也不足一万。但如果这样就认为，宪法学就是美国法学界最简单的学科，那就大错特错了。关于宪法的论争比其他任何一门学科都要激烈、复杂，随手翻开各大法律评论，几乎每一期...

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