Book Review – David A. Strauss' The Living Constitution (2010)

By Artour Rostorotski[*]

[DAVID A. STRAUSS, THE LIVING CONSTITUTION (Oxford University Press, 2010); ISBN13: 978-0-19-537727-9; 176 pp. $21.95 Hardcover]

Abstract

David Strauss' *The Living Constitution* addresses the issues of constitutional interpretation and judicial activism in the United States. The book supports the practice of Living Constitutionalism and attempts to demonstrate its advantages over Originalism. It presents general arguments as well as accounts of landmark decisions in order to demonstrate the superiority of Living Constitutionalism. *The Living Constitution* also argues for common law as the all-but-exclusive method for constitutional change in the modern United States. Overall, the book presents a well-organized and concise case for Living Constitutionalism.

A. Introduction

David Strauss'[1] *The Living Constitution* is a new contribution to the ongoing debate regarding constitutional interpretation and judicial activism in the United States. Although his views may not neatly fit into a single school of thought, Strauss may be generally classified as a proponent of Living Constitutionalism. He has previously written on this topic in the *Harvard Journal of Law & Public Policy*, where he argued that conservatives should not support Originalism.[2] Many conservatives have been attracted to Originalism because of its reverence for the thoughts and intentions of the founding fathers. Strauss has attempted to "convert" them to the side of Living Constitutionalism by arguing that Originalism may be (and has been) used by judges to successfully challenge the *status quo.*[3]

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[1] THE LIVING CONSTITUTION (2010). David A. Strauss is the Gerald Ratner Distinguished Professor of Law at the University of Chicago. He served as Special Counsel to the United States Senate Judiciary Committee and as Assistant Solicitor General of the United States.

[2] David Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J. L. & PUB POL'Y 969 (2008).

[3] *Id.* at 975.

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Strauss has argued in the *Harvard Law Review* that if the judiciary follows Living Constitutionalism, constitutional amendments become all but obsolete.[4] This argument does much to endorse Living Constitutionalism, because it states that while constitutional amendments were primarily intended to aid a new and unstable government, Living Constitutionalism is ideal for a well-grounded and stable regime.[5] In *The Living Constitution*, Strauss re-examines the arguments from the supporters of Originalism and Living Constitutionalism and concludes that a "middle ground" approach would be best for constitutional interpretation by the judiciary.

Part B of this book review will provide a brief synopsis of *The Living Constitution*. Part C will examine the soundness of the main arguments of the book, and attempt to place them within the context of the ongoing debate on constitutional interpretation.

B. The Living Constitution – A Brief Synopsis

The Living Constitution is divided into six chapters, each one examining a unique topic connected to constitutional interpretation. In *Chapter 1, Originalism and its Sins*, Strauss examines and rejects the basic principles of Originalism. This chapter can be broken down into three basic parts. First, Strauss describes the flaws of Originalism. He argues that if Originalism was adopted by the courts, the United States would have to give up many essential principles of government that most Americans consider to be sacred (*e.g.* equality of gender and race).[6] Furthermore, while Originalism requires us to interpret the US constitution according to the original intentions of its drafters, it would be almost impossible to determine what the drafters were actually trying to convey.[7] Even if we did know the exact thoughts of the Founding Fathers, we would have to speculate about how their principles should properly be applied to modern issues that did not exist two centuries ago.[8]

Chapter 1 also contains a critique of what Strauss calls "Moderate Originalism," a theory of constitutional interpretation that emphasizes the importance of adhering to the general principles that the Founding Fathers enshrined in the constitution.[9] Strauss argues that

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[4] David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2000-2001).

[5] *Id.* at 1460-1461.

[6] STRAUSS, *supra* note 1, at 12-17.

[7] *Id.* at 18.

[8] *Id.*

[9] *Id.* at 25.

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Moderate Originalism is self-contradictory because while trying to protect the views of the Founding Fathers, it allows their principles to be interpreted as broadly as the judiciary sees fit. This effectively gives the judiciary complete freedom to contradict the Founding Fathers and to arbitrarily interpret the Constitution.[10]

Strauss concludes *Chapter 1* by explaining why Originalism may be an appealing school of thought. He states that in general, it is natural to assume that a text should be interpreted in accordance with the author's intent.[11] Originalism may also be easily utilized as a rhetorical tool when attempting to advocate alternative views.[12] Finally, Originalism is appealing because it does not seem to have an established competitor; Living Constitutionalism is seemingly vulnerable to attack because it makes the Constitution too flexible.[13]

In *Chapter 2, the Common Law*, Strauss describes the advantages of relying on common law in constitutional interpretation. Unlike Originalism, common law does not require judges to rely on their knowledge of non-legal history.[14] Common law is also more practical than Originalism for two reasons. First, it usually combines precedent and abstract ideals, thus ensuring greater objectivity.[15] Second, it anticipates and deals with the presence of bias in the judiciary by allowing judges to continuously revisit and analyze past decisions.[16] Strauss argues that Common Law is an ideology that promotes humility (i.e. respect for precedents) and pragmatism (i.e. consideration for practical implications of a given law), and may benefit society greatly if adhered to properly.[17]

While *Chapters 1 and* 2 deal primarily with constitutional interpretation in general, *Chapters 3 and 4* contain a number of specific examples from the history of constitutional interpretation in the United States. These examples are used to provide concrete evidence of the usefulness of Living Constitutionalism on the one hand, and of the ineffectiveness of Originalism on the other. In *Chapter 3, Freedom of Speech and the living Constitution*, Strauss explains how the history and current role of the 1st Amendment contradict the principles of Originalism. He lists three principles created by the courts that have been

[10] *Id.* at 27-29.

[11] *Id.* at 29.

[12] *Id.*

[13] *Id.* at 31.

[14] *Id.* at 43.

[15] *Id.*

[16] *Id.* at 45.

[17] *Id.* at 41-42.

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"read into" this Amendment. The principles include the right to criticize the government, and the belief that some violations of freedom of speech made by individuals or the legislature are more justifiable than others.[18] Strauss uses these and other reasons to demonstrate that interpretation of the 1st Amendment has now far surpassed the literal meaning of its text.[19] He also provides an extensive list of important precedents in order to demonstrate the courts' changing interpretation of the Amendment.[20]

Chapter 4, Brown v. Board of Education and Innovation in the Living Constitution (with a Note on Roe v. Wade) [hereinafter "*Brown v. Board*"] contains (as its name suggests) an analysis of two landmark decisions. *Brown v. Board* is now a widely accepted decision that greatly contributed to the elimination of segregation in the United States.[21] Strauss argues that proponents of Originalism cannot justify this decision, as it contradicts the original intent behind the 14th Amendment.[22] However, his critique is only effective if Moderate Originalism is assumed to be self-contradictory (as Strauss argues in *Chapter 1*). If Moderate Originalism is in fact a valid school of thought, it could justify the court's decision in *Brown v. Board* by referring to the general intent (as opposed to specific intent) behind the 14th Amendment (i.e. the general intent behind "liberty" and "equal protection"). This will be further discussed in part C of this review.

In the second part of *Chapter 4*, Strauss defends the *Roe v. Wade* decision against critique from proponents of Originalism. This controversial case has been the cause for much of the support for Originalism since the 1970s,[23] and is therefore important. Strauss argues that good criticisms of the decision should be based on precedent, not on the original text of the Constitution.[24] This is because the fact that a controversial case like *Roe v. Wade* contradicts Originalism is a mere coincidence; there are many accepted decisions that do as well.[25] Here Strauss seems to suggest that Originalism behaves like a pseudoscience because it bases its general principles on a few examples that are mere coincidences.

Chapter 5, the Role of the Living Constitution: Common Ground and Jefferson's Problem, addresses the problem of reconciling common law with an inflexible text of the

[18] *Id.* at 52.

[19] *Id.* at 56-62.

[20] *Id.* at 63-76.

[21] *Id.* at 78.

[22] *Id.*

[23] *Id.* at 93.

[24] *Id.* at 94.

[25] *Id.* at 93.

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Constitution.[26] While Strauss believes that common law should serve as the primary foundation for judicial decisions, he recognizes several important functions for the written constitution. On a basic level, the Constitution provides explicit answers to certain important issues, resolving them once and for all (*e.g.* the Constitution is clear about the president's term in office, the number of senators per state, the necessity for jury trials in criminal cases, *etc.*).[27] Even when it is not explicit, the Constitution's text narrows the range of possible judicial decisions by restricting them to reasonable interpretations of the words contained therein.[28] This causes the Constitution to act as a "middle ground" in disagreements about laws, where both parties always agree that their views should be somehow connected to the words or the principles enshrined in it. While the Supreme Court is more likely to rely on common law (for greater maneuverability) when the stakes of a decision are high, it makes use of the "middle ground" approach when the specific outcome is not as important.[29]

The final chapter of the book, *Constitutional Amendments and the Living Constitution*, focuses on the problem of reconciling the amendment process and the common law as two alternative ways of altering the meaning of the Constitution.[30] Strauss believes that common law is the "all-but-exclusive" way of constitutional change in the modern United States. He gives several examples of common law being preferred to constitutional amendment. These include change occurring through common law after being rejected as an amendment, amendments merely ratifying existing common law and amendments evaded by the courts until common law catches up.[31]

C. The Living Constitution – A Critical Analysis

First, it is worth noting that *The Living Constitution* has practically no conclusion. After discussing the last few examples of constitutional amendments, *Chapter 6* simply ends with a half-page statement about the benefits of a Living Constitution and the common law.[32] Considering the landmark decisions and the concrete issues covered in the last four chapters of the book, it would perhaps have been useful to finish the book with a detailed

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[26] *Id.,* at 99.

[27] *Id.* at 102.

[28] *Id.* at 105.

[29] *Id.* at 110-111.

[30] *See* Strauss, *supra* note 2, for a more detailed analysis of this topic.

[31] STRAUSS, *supra* note 1, at 116-117.

[32] *Id.* at 139.

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conclusion that explicitly reconnects the specific victories of Living Constitutionalism into a single whole.

Some commentary about the content and clarity of the book is also in order. *The Living Constitution* is clear and concise, and its content will be accessible to many readers regardless of their level of familiarity with the debate on constitutional interpretation in the United States. This book can serve as a good introduction to the topic for several reasons. First, it uses few special terms and contains clear explanations of Originalism and Living Constitutionalism. Second, the first two chapters cover most basic issues of constitutional interpretation, while the rest of the book covers some (but not all) more specific issues. Third, the book contains examples of cases for most of the issues that are discussed. The cases are described in their historical context, and therefore the book does not require any knowledge of American case law.

While it is concise, *The Living Constitution* considers Originalism and Living Constitutionalism as the only valid theories about constitutional interpretation. A more inclusive analysis could include such relevant schools of thought as Textualism, Consensualism, Structuralism, Minimalism, Doctrinalism, Pragmatism and Ronald Dworkin's fusion of constitutional law and moral philosophy.[33] Many of these theories do overlap with Living Constitutionalism or Originalism in some way. Nevertheless, Strauss' arguments would perhaps be more defensible if they took into consideration other points of view.

Strauss' critique of Originalism could also be more complete. For example, Strauss assumes that the ambiguities of the Constitution were intended to be used (and are best used) by the judiciary.[34] However, this role could as easily be primarily fulfilled by the United States Congress, or a different decision-making body.[35] Strauss also argues that Originalism diminishes the intended power of the Constitution by taking general provisions and interpreting them as specific.[36] Proponents of Originalism make a similar accusation towards Living Constitutionalism for two reasons that Strauss does not address. First, it is argued that the judiciary broadens the meaning of certain parts of the Constitution far beyond their intended purpose.[37] Second, the judiciary sometimes completely severs

[33] For a more detailed analysis of these schools of thought, *see* SOTIRIOS BARBER & JAMES FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (2007). For Dworkin's important contributions to the debate, *see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). See also RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

[34] STRAUSS, *supra* note 1, at 101, 105.

[35] CHRISTOPHER WOLFE, HOW TO READ THE CONSTITUTION 28 (1996).

[36] STRAUSS, *supra* note 1, at 113.

[37] WOLFE, *supra* note 35, at 86.

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provisions from their origins and fills the void with new meaning.[38] In general, *the Living Constitution* only analyzes and refutes the basic arguments for Originalism.[39]

As mentioned, Strauss rejects Moderate Originalism on the grounds that it is self-contradictory: it is essentially a theory based on the principles of Living Constitutionalism that claims to be a branch of Originalism.[40] This criticism seems to be solely based on a particular definition of Originalism, which is not shared by all of its proponents. For example, Christopher Wolfe (an avid proponent of Originalism) argues that the ambiguity and enduring quality of the constitution is a testament to the Founding Fathers, and therefore to Originalism.[41] Originalism, like Living Constitutionalism, may therefore be a moderate theory (on a spectrum between complete judicial anarchy on the one end and enforcement of a literal reading of the Constitution on the other). Both schools of thought may allow the Constitution to be flexible, and both schools promote respect for the drafters of the document and the great significance of the document itself. Contrary to Strauss' binary conception of Originalism, it may only differ from Living Constitutionalism in terms of its limits of judicial interpretation. For example, Wolfe refers to an example of the Due Process Clause in the Constitution, where the courts put a variety of significant principles into an explicitly written clause where they did not belong.[42]

Other parts of *the Living Constitution* are also vulnerable to criticism. One of Strauss' key arguments against Originalism in *Chapter 1* finds two practical flaws with the theory. First, the judges are ill equipped to rely on the intentions of the Founding Fathers because no one in the court normally possesses sufficient knowledge of American history.[43] Second, adequate knowledge of this subject is practically unattainable.[44] The first part of this argument does not stand up to scrutiny because judges routinely invite experts in various fields to testify in court, and use these testimonies to support their decisions. There is therefore nothing preventing the Supreme Court from inviting the country's leading scholars in American history to testify as to the Founding Fathers' intentions, beliefs, etc. As to the availability of adequate knowledge, that is a matter of relative standards. Edwin Meese, the former Attorney General of the United States, argued that due to the nation's comparatively young age, we actually have a very good understanding of the Founding

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[38] WOLFE, *supra* note 35, at 97.

[39] For a collection of more complex arguments in defense of Originalism, *see e.g.* OURSELVES AND OUR POSTERITY: ESSAYS IN CONSTITUTIONAL ORIGINALISM (Bradley Watson ed., 2009).

[40] STRAUSS, *supra* note 1, at 25-29.

[41] WOLFE, *supra* note 35, at 22.

[42] WOLFE, *supra* note 35, at 28.

[43] STRAUSS, *supra* note 1, at 18.

[44] *Id.*

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Fathers' intentions. Meese believed that this knowledge is more than sufficient to interpret the Constitution as it was meant to be read.[45]

Perhaps the most significant landmark decision given in *The Living Constitution* as an example of Originalism's shortcomings is the *Brown v. Board* case. As mentioned, Strauss believes that this widely accepted decision cannot be justified using the principles of Originalism.[46] However, according to Edwin Meese, this case is simply an undoing of the mistakes made by a previous court decision in *Plessy v. Ferguson.*[47] Thus, by ruling as it did in *Brown*, the court simply returned to the original principles of the Founding Fathers. This interpretation provides at least one way in which Originalism is compatible with *Brown*, thus potentially disproving Strauss' argument.

D. Conclusion

Most of the faults in *The Living Constitution* arise from the book's limited scope, not from inherent inconsistencies in Strauss' arguments. While some important critiques of Originalism may have been expanded upon, the book generally accomplishes its intended goal of showing the flaws of (narrow) Originalism and making strong arguments in defense of Living Constitutionalism. The United States Constitution indeed consists of explicitly clear and ambiguous parts. Its flexibility has arguably been derived directly from the fundamental principles of Federalism.[48] *The Living Constitution* makes clear and valid arguments, describes a number of relevant American landmark decisions, and presents a well-organized and concise case for Living Constitutionalism.

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[45] Edwin Meese, *Interpreting the Constitution, in* THE US CONSTITUTION AND THE SUPREME COURT 157 (Steven Anzovin & Janet Podell eds., 1988).

[46] STRAUSS, *supra* note 1, at 78.

[47] MEESE, *supra* note 45, at 162.

[48] EDWARD PURCELL, ORIGINALISM, FEDERALISM AND THE AMERICAN CONSTITUTIONAL ENTERPRISE 17, 69, 190 (2007).

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