



Written by [Selwyn Duke](#) on July 8, 2011

Trashing the Constitution: The Living Document Con

Whatever you call them, they're more visible and brazen than ever. Writing in *Time* magazine recently, Richard Stengel insisted that our Constitution "must accommodate each new generation and circumstance." Georgetown professor Michael Dyson said recently, "When I talk about the document being living and vital, I'm talking about the interpretation of it." And these appeals are buttressed by the notion that our founding document is fatally flawed. For example, Harvard Law School professor Michael Klarman wrote, "For the most part, the Constitution is irrelevant to the current political design of our nation." And CNN's Fareed Zakaria recently opined, "The United States Constitution was ... drafted in a cramped room in Philadelphia in 1787 with shades drawn over the windows" — which, presumably, is worse than an idea coming out of his cramped head.



Of course, it sounds oh-so sophisticated to speak of a "living, breathing document." But if someone is trying to sell us on the idea that our national rulebook shouldn't matter, we should ask two questions: Who benefits from ignoring the rules? And what is the alternative to following them?

The best way to answer the first question is to apply the relevant concepts to something everyone will understand. So imagine that we're going to have a baseball game and I tell you I want "living" rules. Furthermore, while you're going to be a player in the game, I'm going to be an umpire. Thus, you'll have to live under the rules; I'll decide *how* they live. Wouldn't this give you reason to suspect that I was being self-serving?

Now, in addition, let's say you find out that I really want the team in the left-field dugout to win. Would you trust me to determine how the rules lived? Or would you suspect that I was pulling a con job designed to benefit my side?

Some might think that the problem here is the umpire's bias, but this is secondary at best. All human beings have biases; they just have to be tempered. And one way we do this is with *adherence to rules*.

In our legal system, the "umpires" are the judges, and the rules are the Constitution and laws that accord with it. And it doesn't matter if the judges dislike them; it's *not their place* to make the rules "live" anymore than it's the place of a baseball umpire to forbid base-stealing because one team has faster runners.

Of course, any set of rules could be lacking. But whether the arena is baseball or law the recourse is the same: The relevant ruling body should be petitioned to make a change. And in the case of the government, this means our legislators. Judges, however, are not lawmakers. And when they behave as



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such, they become lawbreakers.

What is so ironic about the living-document con is the presupposition that without enlightened lawyers to massage (and sometimes give a chiropractic adjustment to) the Constitution's meaning, we'll all be at the mercy of a "dead" two-century-old document. This is nonsense, however, as the Founders gave us something called the Amendment Process. This lawful way — and it is the *only* lawful way — to alter the Constitution ensures that it is the people, through their elected representatives, who decide when and how our founding document should come alive.

And it is the only way our Republic can continue to live. Constitutions aren't for show; rather, they're usually fixtures of modern republics because people are prone to fits of emotion and flights of fancy, and a constitution can temper the passions of the times with the timeless. For such a document will often be a better guide than the moment's majority will because, to paraphrase G.K. Chesterton, a constitution is democracy extended through time. It represents not just the "votes" of those who created it but of all those who subsequently altered it and allowed it to stand.

Of course, many have regard only for their time because of its unique characteristic: They happen to be in it. Just like a know-it-all teenager who thinks his parents old-fashioned dummies, these people fancy themselves the very flower of enlightenment and consider previous generations somewhat troglodytic. But a wise man understands that fallacies can become fashions; every great mistake in history, from eugenics to communism, was fueled by intelligent people who were sure that they, the sons of modernity, had finally cracked the utopian code. If they had looked more toward tradition, however, they would have realized it was their heads that were cracked.

But it's no secret why the Left pushes the living-document con, and it isn't just that many of their fellow travelers have become "umpires." It is also that almost everything prescribed by our Constitution — a limited central government, states' and gun-ownership rights, etc. — is contrary to the Left's agenda. In fact, a progressive is a natural enemy of a constitution. Why? Well, the one consistent definition of "conservative" involves a desire to maintain the status quo. And a constitution is a document that, by enshrining certain principles in hard-to-change law, does perpetuate a status quo. In other words, it is a *conservative* document.

So now let's answer the second question: What is the alternative to following constitutional rules? Well, Chesterton once said, "There are only two ways of governing: by a rule and by a ruler." And by undermining the rule, the living-document con gives us the latter in the form of a judicial oligarchy; it would have us trade the rule of law for the rule of lawyers. Of course, this isn't acknowledged. Instead, we hear blather about interpreting law to suit the "times." But even if we accept that we should be slaves to fashions — which would reduce us to a democracy, rather than a Republic — how would the times' "will" be determined? The times, unless it's the *New York Times*, cannot give one-minute speeches on the House floor and express its intentions; it cannot take the stand and testify. The closest we could come to gauging the times would be to have the citizenry vote on every matter of law. This isn't what is done, however, is it? Rather, before judges can interpret the Constitution to suit the times they have to interpret the times, and this interpretation, curiously, always sounds an awful lot like a statist agenda. Thus, when Californians did vote for Proposition 187, a federal court overturned it; and thus do judges divine a "right" to faux marriage in state constitutions even when the majority is against it. In reality, living-document judges don't feel beholden to a mythical entity called the "times." Their rulings simply reflect what *they think the times should be*.

The living-document con is not a legitimate legal theory — it is judicial criminality. And we'd better take



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it seriously because we can either have a living document or a living republic. We cannot have both.



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