

## DAVID A. STRAUSS

University of Chicago Law School  
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Chicago, IL 60637  
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### **Employment:**

The University of Chicago Law School, 1985-present

Gerald Ratner Distinguished Service Professor of Law, 2007-present

Faculty Director, Supreme Court and Appellate Clinic, 2015-present

Harry N. Wyatt Professor of Law, 1992-2007

Professor of Law, 1989-1992

Assistant Professor of Law, 1985-1989

Visiting Professor of Law, Harvard Law School, 2017 (fall semester)

Felix Frankfurter Visiting Professor of Law, Harvard Law School, 2011 (fall semester)

Special Counsel, Committee on the Judiciary, United States Senate, 1990

Visiting Professor of Law, Georgetown University Law Center, 1989-90

Assistant to the Solicitor General of the United States, 1981-1985

Attorney-Adviser, Office of Legal Counsel, United States Department of Justice, 1979-1981

Law Clerk to Judge Irving L. Goldberg, United States Court of Appeals for the Fifth Circuit, 1978-79

### **Education:**

J.D. magna cum laude, Harvard Law School, 1978

Editor, Harvard Law Review, 1976-78; Developments Editor, volume 91

B. Phil. in Politics, Magdalen College, Oxford University, 1975

Marshall Scholarship

A.B. summa cum laude, Harvard College, 1973

Phi Beta Kappa

## **Publications:**

### **Books:**

The Living Constitution (Oxford University Press, 2010) (Chinese translation 2012)

### **Professional journals and edited volumes:**

Editor, The Supreme Court Review, 1989-present

*Fisher v. University of Texas and the Conservative Case for Affirmative Action*, 2016  
Supreme Court Review 1

*The Plain Language Court*, 38 Cardozo Law Review 651 (2016)

*In Memoriam: Abner J. Mikva (1926-2016)*, 83 University of Chicago Law Review 1753  
(2016)

*The Supreme Court, 2014 Term – Foreword: Does The Constitution Mean What It Says?*, 129  
Harvard Law Review 1 (2015)

*Does Meaning Matter*, 129 Harvard Law Review Forum 94 (2015) (online)

*The Equality Taboo*, 2015 University of Chicago Legal Forum 509

*Is Constitutional Law Really Law?*, in The Oxford Handbook of the U.S. Constitution  
(Tushnet, Graber, & Levinson, eds., Oxford Univ. Press, 2015).

*Constitutional Fundamentalism and the Separation of Powers: The Recess Appointments  
Case*, 83 University of Cincinnati Law Review 347 (2014) (The Taft Lecture)

*The Neo-Hamiltonian Temptation*, 123 Yale Law Journal 2676 (2014)

*Not Unwritten, After All?*, 126 Harvard Law Review 1532 (2013)

*We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 Texas  
Law Review 1969 (2013)

Book Review (of Jack Balkin, *Living Originalism*), 32 Law and Philosophy 369 (2013)

*Legitimacy, Constitutional Patriotism, and the Common Law Constitution*, 126 Harvard  
Law Review Forum 50 (2013) (online)

*“Recognizing Race” and the Elusive Ideal of Racial Neutrality*, 113 Columbia Law Review  
Sidebar 1 (2013) (online)

*Commerce Clause Revisionism and the Affordable Care Act*, 2012 Supreme Court Review 1

*Can Originalism Be Saved?* 92 Boston University Law Review 1161 (2012)

*Do We Have a Living Constitution?*, 59 Drake Law Review 973 (2011)

## Publications in professional journals, continued:

*Originalism, Conservatism, and Judicial Restraint*, 34 *Harvard Journal of Law and Public Policy* 137 (2011)

*Statutes' Domains and Judges' Prerogatives*, 77 *University of Chicago Law Review* 1261 (2010)

*Is Carolene Products Obsolete?*, 2010 *University of Illinois Law Review* 1251

*The Modernizing Mission of Judicial Review*, 76 *University of Chicago Law Review* 859 (2009)

*Lessons Learned: The Death of Judicial Conservatism*, 4 *Duke Journal of Constitutional Law & Public Policy* 1 (2009)

*Little Rock and the Legacy of Brown*, 52 *Saint Louis University Law Review* 1065 (2008)

*On the Origin of Rules (With Apologies to Darwin): An Essay on Antonin Scalia's The Rule of Laws as a Law of Rules*, 75 *University of Chicago Law Review* 997 (2008)

*Why Conservatives Shouldn't Be Originalists*, 31 *Harvard Journal of Law and Public Policy* 969 (2008)

Review of Ronald Dworkin, *Justice in Robes*, 119 *Ethics* 175 (2008)

*The Common Law Genius of the Warren Court*, 49 *William & Mary Law Review* 845 (2007)

*The Anti-Formalist*, 74 *University of Chicago Law Review* 1885 (2007)

*Legitimacy and Obedience*, 118 *Harvard Law Review* 1854 (2005)

*Originalism, Precedent, and Candor*, 22 *Constitutional Commentary* 299 (2005)

*On Having Mr. Madison as a Client*, in *Arguing Marbury v. Madison* 38-44 (Mark Tushnet ed., Stanford Univ. Press 2005)

*Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 *Stanford Law Review* 761 (2004)

*Common Law, Common Ground, and Jefferson's Principle*, 112 *Yale Law Journal* 1717 (2003)

*Why was Lochner Wrong?*, 70 *University of Chicago Law Review* 373 (2003)

*What's the Problem? Ackerman and Ayres on Campaign Finance Reform*, 91 *California Law Review* 723 (2003)

*"Group Rights" and the Problem of Statistical Discrimination*, in *Issues in Legal Scholarship: The Origins and Fate of Antisubordination Theory* (2003), <http://www.bepress.com/ils/iss2/art17>

## Publications in professional journals, continued:

*The Irrelevance of Constitutional Amendments*, 114 *Harvard Law Review* 1457 (2001)

*Bush v. Gore: What Were They Thinking?*, 68 *University of Chicago Law Review* 737 (2001) and in *The Vote: Bush, Gore, and the Supreme Court* (Cass R. Sunstein and Richard A. Epstein, eds., Univ. of Chicago Press 2001)

*Freedom of Speech and the Common Law Constitution*, in *Eternally Vigilant: Free Speech in the Modern Era* (Lee Bollinger and Geoffrey Stone, eds., Univ. of Chicago Press 2001).

*The False Comfort of the First Amendment*, in *Unsettling "Sensation": Arts-Policy Lessons from the Brooklyn Museum of Art Controversy* (Lawrence Rothfield, ed., Rutgers University Press, 2001).

*Miranda, the Constitution, and Congress*, 99 *Michigan Law Review* 958 (2001).

*Constitutions, Written and Unwritten*, 21 *Law and Philosophy* 451 (2000)

*What Is Constitutional Theory?*, 87 *California Law Review* 581 (1999)

*First Amendment Entitlements and Government Motives*, 93 *Northwestern University Law Review* 1205 (1999)

*The Independent Counsel Statute: What Went Wrong?*, 51 *Administrative Law Review* 651 (1999)

*The New Textualism in Constitutional Law*, 66 *George Washington Law Review* 1153 (1998)

*The Solicitor General and the Interests of the United States*, 61 *Law and Contemporary Problems* 165 (1998)

*Why It's Not Free Speech Versus Fair Trial*, 1998 *University of Chicago Legal Forum* 109

*The Illusory Distinction Between Equality of Opportunity and Equality of Result*, in *Redefining Equality* (Neal Devins and David Douglas, eds., Oxford Univ. Press 1998) (originally published in 44 *William and Mary Law Review* 171 (1992))

*Tragedies Under the Common Law Constitution*, in *Constitutional Stupidities, Constitutional Tragedies* (William Eskridge and Sanford Levinson, eds., NYU Press 1998)

*Principle and its Perils*, 64 *University of Chicago Law Review* 373 (1997)

*Why Plain Meaning?*, 72 *Notre Dame Law Review* 1565 (1997)

*Common Law Constitutional Interpretation*, 63 *University of Chicago Law Review* 877 (1996)

## **Publications in professional journals, continued:**

- Affirmative Action and the Public Interest*, 1995 Supreme Court Review 1
- What is the Goal of Campaign Finance Reform?*, 1995 University of Chicago Legal Forum 141
- Equality, Corruption, and Campaign Finance Reform*, 94 Columbia Law Review 1369 (1994)
- State Action After the Civil Rights Era*, 10 Constitutional Commentary 409 (1993)
- Presidential Interpretation of the Constitution*, 15 Cardozo Law Review 119 (1993)
- Rights and the System of Freedom of Expression*, 1993 University of Chicago Legal Forum 197
- Abortion, Toleration, and Moral Uncertainty*, 1992 Supreme Court Review 1
- The Liberal Virtues*, in *Nomos XXXIV: Virtue* (Chapman and Galston, eds. 1992)
- The Role of a Bill of Rights*, 59 University of Chicago Law Review 539 (1992), reprinted in *The Bill of Rights in the Modern State* (Geoffrey Stone, et al., eds., Univ. of Chicago Press 1992)
- The Senate, the Constitution, and the Confirmation Process*, 101 Yale Law Journal 1491 (1992) (with Cass R. Sunstein)
- Biology, Difference, and Gender Discrimination*, 41 DePaul Law Review 1007 (1992)
- On Truisms and Constitutional Obligations: A Reply*, 71 University of Texas Law Review 669 (1992) (with Cass R. Sunstein)
- Persuasion, Autonomy, and Freedom of Expression*, 91 Columbia Law Review 334 (1991)
- The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 Georgetown Law Journal 1619 (1991)
- Precedent, Tradition, and Justice Scalia*, 12 Cardozo Law Review 1699 (1991)
- Article III Courts and the Constitutional Structure*, 65 Indiana Law Journal 307 (1990)
- Constitutional Protection for Commercial Speech: Some Lessons from the American Experience*, 17 Canadian Business Law Journal 45 (1990)
- Discriminatory Intent and the Taming of Brown*, 56 University of Chicago Law Review 935 (1989)
- Due Process, Government Inaction, and Private Wrongs*, 1989 Supreme Court Review 53
- Legality, Activism, and the Patronage Case*, 64 Chicago-Kent Law Review 585 (1989)
- The Ubiquity of Prophylactic Rules*, 55 University of Chicago Law Review 190 (1988)

## **Publications in professional journals, continued:**

Review of Jerry Mashaw, *Due Process in the Administrative State*, 98 *Ethics* 893 (1988)

*The Myth of Colorblindness*, 1986 *Supreme Court Review* 199

*Why Be Tolerant?*, 53 *University of Chicago Law Review* 1485 (1986)

## ***Selected other publications:***

"Toil and Trouble in Media-Land" (review of *The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press*, by Amy Gajda), *The New Rambler* (May 18, 2015), available at <http://newramblerreview.com>.

"What the 'Religious Freedom' Controversy Is Really About," *Washington Post* (April 10, 2015), available at [http://www.washingtonpost.com/opinions/a-new-wave-of-equality/2015/04/10/87e1a378-dc80-11e4-a500-1c5bb1d8ff6a\\_story.html](http://www.washingtonpost.com/opinions/a-new-wave-of-equality/2015/04/10/87e1a378-dc80-11e4-a500-1c5bb1d8ff6a_story.html)

"Yes, the Health Care Mandate is About Liberty," *Bloomberg View* (May 4, 2012) (with Jonathan Cohn), available at <http://www.bloomberg.com/news/2012-05-03/yes-the-health-care-mandate-is-about-liberty.html>

"The Last Liberal Justice," *Democracy: A Journal of Ideas* (Summer 2011), p. 114.

"Why Elena Kagan Should Drop the 'Kagan Standard'," *Washington Post* (June 27, 2010) (with John F. Manning), available at <http://www.washingtonpost.com/wpdyn/content/article/2010/06/25/AR2010062504153.html>

*Memo to the President (and his opponents): Ideology Still Counts*, 102 *Nw. U. L. Rev. Colloquy* 49 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/22/>

"Supreme Swings," *University of Chicago Magazine* (October 2005), p. 28.

"The Myth of the Unpredictable Supreme Court Justice," *Chicago Tribune*, August 7, 2005, p. 9.

"Pop Con," *Legal Affairs* (March/April 2005), p. 60.

"Kerry's Even Keel," *Legal Affairs* (September/October 2004), p. 28.

"Affirmative Action: A Conservative Victory," *Chicago Tribune*, June 27, 2003, p. 27.

"Indicting the President," *New York Times*, February 2, 1999, p. A25.

"After the Clinton Storm," *New York Times*, August 6, 1998, p. A23.

"Patriotism Without Hypocrisy," *Boston Review*, vol. XIX, no. 5 (October/November 1994), p. 20.

"Whose Confirmation Mess?," *The American Prospect*, no. 18 (summer 1994), p. 91

**Selected other publications, continued:**

"The Peril of Religious Segregation: A Comment on the Kiryas Joel Case," 40 University of Chicago Law School Record 6 (1994).

"Why Conservatives (Not Progressives) Should Be Disappointed with Justice Thomas," *Reconstruction*, vol. 2, no. 1, p. 62 (1992).

"Bush's Losing Judicial Philosophy," *Chicago Tribune*, October 28, 1992, Section 1, page 19 (with Geoffrey R. Stone).

"Is Judge Bork's Ideology Off-Limits?," *Chicago Tribune*, July 22, 1987, Section 1, p. 15.

**Works in progress:**

The Common Law Constitution (book ms.)

*Law and the Slow-Motion Emergency*

*New Reasons for Old Rules*

*Adaptive Preferences*

*Do It But Don't Tell Me*

*Must Like Cases Be Treated Alike?* (available at [http://ssrn.com/abstract\\_id=312180](http://ssrn.com/abstract_id=312180))

*Disability and Discrimination*

**Teaching:**

Courses:

Constitutional Law

Federal Jurisdiction

Administrative Law

Civil Procedure

Torts

University of Chicago Law School Graduating Students' Award for Teaching Excellence from the Classes of 1996, 1998, 2000, 2005, and 2011

**Academic Honorary Societies:**

Fellow, American Academy of Arts and Sciences

**Litigation:****Oral arguments before the United States Supreme Court:**

*Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004)

*Thomas v. Chicago Park District*, 534 U.S. 316 (2002)

*Ricci v. Village of Arlington Heights*, 523 U.S. 613 (1998)

*The Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998)

*City of Milwaukee v. Cement Div., United Gypsum Co.*, 515 U.S. 189 (1995)

*United States v. Albertini*, 472 U.S. 675 (1985)

*United States v. Bagley*, 473 U.S. 667 (1985)

*NAACP v. Hampton County Bd. of Elections*, 470 U.S. 166 (1985)

*Franchise Tax Board v. U.S. Postal Service*, 467 U.S. 512 (1984)

*New York v. Quarles*, 467 U.S. 649 (1984)

*United States v. Jacobsen*, 466 U.S. 109 (1984)



## **Oral arguments before the United States Supreme Court (continued):**

*Minnesota v. Murphy*, 465 U.S. 420 (1984)  
*Michigan v. Long*, 463 U.S. 1032 (1983)  
*Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983)  
*Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87 (1983)  
*Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982)  
*American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982)  
*Ralston v. Robinson*, 454 U.S. 201 (1981)

## **Briefs on the merits filed in the United States Supreme Court (principal author of all or part):**

*Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004)  
*Thomas v. Chicago Park District*, 534 U.S. 316 (2002)  
*Ricci v. Village of Arlington Heights*, 523 U.S. 613 (1998)  
*The Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998)  
*Clinton v. Jones*, 520 U.S. 681 (1997)  
*Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997)  
*City of Milwaukee v. Cement Div., United Gypsum Co.*, 515 U.S. 189 (1995)  
*CSX Transportation Inc. v. Easterwood*, 507 U.S. 658 (1993)  
*General Motors Corp. v. Romein*, 503 U.S. 181 (1992)  
*Webster, Attorney General of Missouri v. Reproductive Health Services*, 492 U.S. 490 (1989)  
*Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)  
*City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989)  
*Morrison, Independent Counsel v. Olson*, 487 U.S. 654 (1988)  
*Local 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986)  
*Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986)  
*United States v. Bagley*, 473 U.S. 667 (1985)  
*United States v. Shearer*, 473 U.S. 52 (1985)  
*National Labor Relations Board v. International Longshoremen's Assn.*, 473 U.S. 61 (1985)  
*United States v. Albertini*, 472 U.S. 675 (1985)  
*Central Intelligence Agency v. Sims*, 471 U.S. 159 (1984)  
*Oregon v. Elstad*, 470 U.S. 298 (1985)  
*NAACP v. Hampton*, 470 U.S. 166 (1985)  
*New York v. Quarles*, 467 U.S. 649 (1984)  
*Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512 (1984)  
*Hishon v. King & Spalding*, 467 U.S. 69 (1984)  
*United States v. Jacobsen*, 466 U.S. 109 (1984)  
*Minnesota v. Murphy*, 465 U.S. 420 (1984)  
*Colorado v. Nunez*, 465 U.S. 324 (1984)  
*Michigan v. Long*, 463 U.S. 1032 (1983)  
*Dirks v. SEC*, 463 U.S. 646 (1983)  
*Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983)  
*Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983)  
*Chappell v. Wallace*, 462 U.S. 296 (1983)

**Briefs on the merits filed in the United States Supreme Court, continued:**

*Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)  
*Bush v. Lucas*, 462 U.S. 367 (1983)  
*Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983)  
*United States v. Grace*, 461 U.S. 171 (1983)  
*United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983)  
*Ford Motor Co. v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982)  
*Pullman-Standard v. Swint*, 456 U.S. 273 (1982)  
*American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982)  
*Ralston v. Robinson*, 454 U.S. 201 (1981)

I have also been the principal author of approximately 250 certiorari petitions and oppositions to certiorari petitions filed with the United States Supreme Court.

**Community service, bar associations, etc.:**

Board of Directors, American Constitution Society, Member (2013- )

Board of Trustees, University of Chicago Laboratory Schools, Member (1999- 2009), Chair (2003-2009)

Board of Governors, Chicago Council of Lawyers, Member (1986-89)

Member, Bar of the Supreme Court of the United States; Bar of the United States Courts of Appeals for the District of Columbia Circuit, Seventh Circuit, and Tenth Circuit; Bar of the District of Columbia

David A Strauss. Footnote four in the Supreme Court's opinion in *United States v. Carolene Products Co.* is the most famous footnote in the Court's history. The footnote embraces an attractive theory of judicial review: that the role of the Court is to correct defects in the democratic political process but otherwise to allow important decisions to be made by the elected branches of government. 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. [Show more.](#) [The Living Constitution.](#) [David A. Strauss.](#) [Inalienable Rights.](#) [Table of Contents.](#)