The Constitution as a living document

You are subscribed. Unsubscribe

No tags yet. + Add Tag

Sort replies by: Oldest first Newest first Most popular

Casey K. Tjang Signature Track · 2 days ago

I truly enjoy Professor Amar's lectures. He gives students an enlightenment of important document in the history of mankind after the Magna Carta the Constitution of the United States in plain language and logical manner without the legal jargon (Latin that is). After I took Professor Amar's lectures, I came to realize that the difference of Magna Carta's Habeas Corpus being perpetual but not living where as America's Constitution is a living document due to inter-generational project. She will survive for generations to come. Professor Amar's theory of having another Constitution as "Unwritten" is brilliant. Oliver Wendell Holmes' legal theory of "Legal Realism" may further strengthen my belief.

0 · flag

Casey K. Tjang Signature Track · 2 days ago

Article III, Section 3

Understood that Article III is the shortest text amongst the 3 major Articles in the Constitution. I would appreciate it if anyone could explain the original intent of the framers on Section 3 of the last paragraph where it reads “The Congress shall have power to declare ……..” ending with “ .....the Life of the Person attained” in the Philadelphia convention? Thank you.

0 · flag

Ray Strong · a day ago

Casey:

The Kings of England (esp. the Tutors and Stuarts) freely and loosely used treason to eliminate their political enemies, seize their property and punish the children and other relatives for the crimes of the original person convicted of treason. The Property and Titles of convicted persons were usually siezed and given to another political favorite of the King. This clause was to prevent punishment being passed down to the children of the convicted person.

Any other words, the crime and the punishment stopped with the original offender.

I tried to find a better explaination than mine online and find this from the Free Legal dictionary:

Corruption of Blood
In English Law, *the result of attainder, in that the attainted person lost all rights to inherit land or other hereditaments from an ancestor, to retain possession of such property and to transfer any property rights to anyone, including heirs, by virtue of his or her conviction for* Treason *or a felony punishable by death, because the law considered the person's blood tainted by the crime.*

http://legal-dictionary.thefreedictionary.com/Corruption+of+blood

↑ 0 ↓ · flag

Joel Kovarsky · 20 hours ago

Casey,

There are also reasonable explanations regarding treason here:

http://www.heritage.org/constitution/#!/articles/3/essays/120/punishment-of-treason and

http://www.law.cornell.edu/anncon/html/art3frag60_user.html#art3_sec3 .

The second link specifically refers back to the 1351 English Treason Act:

http://www.legislation.gov.uk/aep/Edw3Stat5/25/2 .

↑ 0 ↓ · flag

+ Comment

Devin Watkins · a day ago

Why do you think the Magna Carta's is not a living document, but the constitution is? Now maybe you mean the constitution is a living document as we can (and do) amend it from time to time. That I would agree with, but usually the term "living document" is meant to mean that its meaning can be changed outside the amendment process. That I disagree with.

↑ 0 ↓ · flag

Ray Strong · 11 hours ago

Devin. There was/is a very long discussion on this issue a month ago. I am providing the link. both Sides aired the issue. One should pay particular interest in the Comment made by the **Staff TA Danny Townsend**. He suggests we will be discussing this topic at length during the next six weeks. I commend that message and thread to your reading.

Do the meaning and intentions of the constitution change?
https://class.coursera.org/conlaw-001/forum/thread?thread_id=1559#post-3239

As for me, I see problems in most all the theories of reading the Constitution, and originalism fails in several places. Cruel and Unusual Punishments is the one most often discussed. Look at Amendments 8 and 5

Amendment 8
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
Amendment 5
nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

Today, no one would expect that typical punisments from 1789 such as flogging, branding, stocks, notching of ears or removal of a finger to be declared Constitutional.

Scalia and Burger argue that capital punishment is legal as the framers recognized it in the Constitution. Burger argued a person can be deprived of his/her life as long long as a person recieves due process of law because it was originally recognized as a valid punishment by the founders and mentioned in the 5th Amendment.

But wait, the 5th Amendment recognizes the jeopardy of a limb in the same way. Do we think that if a state instituted a law removing a finger or hand for theft that the Supreme Court would uphold that as constitutional using the same 8th and 5th amendment logic? I suggest they would not.

Textualism, originalism and the so-called "living Constitution" theory which may include judicial activism each has its own problem in specific areas.

I think we will be better able to discuss this when Prof. Amar put some thoughts on the table for us to think about in the next six weeks.

The other thread has several useful thoughts on these issues.

↑ 0 ↓ · flag

Devin Watkins · 9 hours ago

Isn't it possible that "cruel and unusual punishments inflected" at the time the constitution was ratified meant that it was "cruel and unusual" in comparison to what society thought of at the time the punishment was inflected? If that was the original meaning, then the facts of what

society consiters to be cruel and unusual would change, and the original meaning as applied to those facts would be consistently applied. Surely this would be valid originalism without any change in the meaning of the original words.

As for the 9th amendment TA Danny Townsend mentioned, it talks about rights "retained by the people". Clearly this is talking about what the founders called "natural rights," those rights that pre-exist government such as our inalienable right to life. All of this can be defined based on the original meaning of the words, and then applied to the circumstances today.

0 · flag

Ray Strong · 10 minutes ago

Devin.

I appreciate what you are saying. In many ways we agree. Look back over my post. The different theories of interpretation all work in certain circumstances and not in others. the ideas often bleed into each other.

The argument that contemporaneous society should be taken into account when interpreting key constitutional phrases is normally a basis for the living constitution argument. But here you use it to justify original meaning. And I agree with you.

Also I agree with your endorsement of the 9th Amendment. I don't buy the arguments there is no right to privacy (as the anti-Roe foes argue) because the word "privacy" is not in the orignal documents. I think you arrive at that conclusion thru the 9th amendment (also amdts. 3 and 4) using the logic you and Danny propose. Using natural law to arrive at conclusions not found in the text of the constitution usually falls into the "Living Constitution" area of debate.

I often refer people to a terrific book by historian Jack Rakove -- *Original Meanings* -- which is a thorough treatment of the themes in this course and a critical look at the dangers of fulling embracing original meaning in all circustances.

And people who have read my other posts know I am a great admirer of the Common Law. so I recommend this U of Chicago paper which offers this alternative to a strictly natural law interpretation:

Our constitutional system, without our fully realizing it, has tapped into an ancient source of law, one that antedates the Constitution itself by several centuries. That ancient kind of law is the common law.
http://www.law.uchicago.edu/alumni/magazine/fall10/strauss

0 · flag

+ Comment

Anonymous · 20 hours ago

Your hypothesis is that there is one and only one meaning of a set of words, and that meaning is constant over time, regardless of who is reading that set of words.

Real life is very different. Look at how the interpretation of religious texts has changed over time. For example, back in the day 'an eye for an eye' was a very literal thing. Nowadays it is interpreted to mean that the punishment must fit the crime. I don't recall anyone rewriting (amending) the old Testament; it's just that the meaning of the words has changed over time.

0 · flag

Devin Watkins · 19 hours ago

I assume you were talking to me. There is only one meaning of the words to the common man at the time it was made law. That is the only meaning that matters. The meaning of the original constitution at the time that it was ratified, and the meaning of each of the amendments at the time they were ratified. Those meanings are constant, and the newest dictionary writer cant change the meaning of our constitution and make an act of congress unconstitutional. The dictionary writer was never elected to anything.

0 · flag

Joel Kovarsky · 19 hours ago

Devin,

As someone more liberal, I prefer Ronald Dworkin's take (and likely several others) to your "scriptural" approach:

"The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve," Fordham Law Review, 1997

http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3328&context=flr

Your implication that people two centuries in the future can interpret and apply the meanings and contexts of those before is open to serious question on many fronts. People of all political stripes have always attempted to interpret the past to their own advantage.

0 · flag

Devin Watkins · 19 hours ago

And you think people haven't tried to change the meaning of words to their own advantage?

I don't agree with either of what he is claiming originalist believe: "Some scholars will argue that we should try to discover, not what those who wrote or ratified the Constitution and its

various amendments meant to say, but what they expected or hoped would be the consequence of their saying what they did, which is a very different matter. Others will argue that we should ignore the text itself in favor of how most people understood its import over most of our history"

I believe the constitution (or any law or amendment) means what a reasonable person would have thought it meant at the time it became law. So at the time the constitution was ratified what would the people have thought it meant. That is NOT what the writers or even ratifiers "expected or hoped would be the consequence" nor is it how "most people understood its import over most of our history." It only matters at the moment of progmulation (the time it was announced to the people that it had become law) what the common man would have thought it meant.

0 · flag

Joel Kovarsky · 19 hours ago

I am not sure about the reason for your opening remark. I had just stipulated that people did try to interpret historical meanings to their advantage. I am not arguing that you are not entitled to your opinion. The Constitution itself was a compromise scaffolding resulting from a variety of perspectives. As to your own beliefs about the document, fine. They are not mine, and an enormous literature indicates that it is not so simple to parse.

0 · flag

Anonymous · 19 hours ago

Devin, you say
>means what a reasonable person would have thought it meant at the time it became law

The fact that a 'reasonable person' at the time the Constitution was written was a middle-aged white landowner does not give you pause? And I believe even at the time of writing there was disagreement about what certain clauses actually meant (see Federalist papers, for example).

0 · flag

+ Comment

Casey K. Tjang Signature Track · 18 hours ago

@Ray Strong, Joel Kovarsky, Devin Watkins and Anonymous,
Thank you for your confirmation on my understanding. You are agreeing with my part where the Constitution as a living document but disagreeing with my part on the Magna Carta's. Again, my understanding on "legal positivism" of English law where the principle of "antiquity" and "precedent" do apply, but not by "new" interpretation and amendment thereof?

0 · flag

Joel Kovarsky · 18 hours ago

Casey,

There is an interesting conversation on the Magna Carta here: http://magnacarta800th.com/tag/magna-carta/ . I do not personally have the skills to parse its place in the history of the law. Two paragraphs from that site struck me:

"We venerate the idea of the Magna Carta — that freedom is secured under the rule of law and that no person is above the law — even though the Magna Carta or The Great Charter as it later came to be called, was literally nullified within weeks of its sealing. The creation of the Magna Carta was a revolutionary response by a ruling class of barons who were not much different from the despotic monarch they despised. The Magna Carta gave life to the concept that individuals had rights against the previously unlimited power of the state. On June 15, 1215, on a beautiful meadow in Runnymede, halfway between London and the still royal palace at Windsor, 25 of England's most powerful barons presented a document to King John essentially requiring the King to follow certain rules in dealing with English nobility and, especially, with their property. As was the custom with royal edicts, the King "sealed" the document, signifying approval.

Within days, seven copies of the document sealed by King John were issued from Runnymede and circulated throughout the kingdom; within weeks, six more were issued from Oxford. Even as these Magna Carta copies were being circulated, King John dispatched his envoys to Rome to complain to Pope Innocent III that he had been compelled by "force and fear" to seal the document. By mid-September, 1215, King John's envoys had returned with papal edicts declaring the Magna Carta contract to be null and void. The Magna Carta had been in effect less than 90 days. Although reissued three times during the reign of John's son, Henry III, and confirmed by the Crown more than 30 times thereafter, the provisions of the 63 specific "chapters" of the 1215 Magna Carta have largely been repealed and, in any event, never again existed in precisely the form presented to King John at Runnymede in June, 1215. "

0 · flag

+ Comment

Casey K. Tjang Signature Track · 16 hours ago

Joel, thank you again for mentioning the Magna Carta's background. I am aware that the 25 barons at the time were merely to protect their properties and rights not be infringed by the King's absolute authority. Since then radical reforms were introduced by the Long Parliament, King Charles responded by charging a number of members of the House Commons with treason. The ensuing Civil War pitted

the forces of Parliament (the Roundheads) against the forces of the King (the Cavaliers). The parliamentary forces, under Oliver Cromwell), defeated the royalists and executed Charles in 1649. The Britain was then governed under Cromwell as a republic not a monarch. The impact of the English Civil War on the Courts, especially on the Anglo-Saxon law implemented throughout British Empire, including her colonies was significant and lasting. Nineteenth-Century Reforms resulted in the establishment of the Court of Chancery to redress injustices done by the King's Courts. The Constitution of the United States was born not only under the spirit of Declaration of Independence but also crafted by the framers who were scholars deep-rooted with English Legal System. Joel, since you are on the forums online. Could you explain what is the difference between MOOC Court and Moot Court? Understood the latter referred to U.S. Law School students practicing law before graduate. In U.K. for a barrister at law (after graduated from law schools or Inns of Courts) before a full-fledged barrister, one must take a pupilage with a barrister with highest tile or honors e.g. Q.C. at his or her chamber, and for becoming a solicitor one must take an Article Clerkship with a solicitors firm before one can practice in the Magistrate or County Courts..

↑ 0 ↓ · flag

Joel Kovarsky · 16 hours ago

Casey,

The "MOOC Court" is simply a play on "MOOT Court." The former is just playing off MOOC (Massive Open Online Course). Your understanding of MOOT Court is correct. You can google the phrase and find a basic explanation.

Since I am not an attorney, others are better suited to explain various training elements.

As to your earlier remarks about habeas corpus, several recent books on the subject are reviewed here: http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2757&context=tlr . You may have already been aware of these, but I thought I would at least mention it.

↑ 0 ↓ · flag

+ Comment

Casey K. Tjang Signature Track · 10 hours ago

Ray:

Thank you for showing the link that TA Danny Townsend had discussed the subject at length, I shall look at it. Apologize for my late participation and oversight on the course discussion due to my works.

↑ 0 ↓ · flag

+ Comment

New post

To ensure a positive and productive discussion, please read our forum posting policies before posting.

B | I | Link | <code> | Pic | Math | Edit: Rich | Preview

Make this post anonymous to other students

Subscribe to this thread at the same time

Add post