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Do the meaning and intentions of the constitution change?

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It seems that the constitution is ever changing, having new life every day as the supreme court decides cases. So are these decisions changing how the constitution is viewed?

↑ 5 ↓ · flag

[James Rath](#) Signature Track · 2 months ago 🔗

If the Articles of Confederation was a contract, which could be broken if some of its stipulations were defaulted, why isn't the Constitution a contract? If through faithful adherence to the procedures specified in the Constitution, an amendment were approved reducing the number of Senators allotted to Delaware to ONE, couldn't Delaware secede?

↑ 1 ↓ · flag

[Wang Chao](#) · a month ago 🔗

Do you mean "If the **Articles** of Confederation **were** a contract **that** could be broken **once** some of its stipulations were defaulted, why **shouldn't** the Constitution **be** a contract? If, through faithful adherence to the procedures specified in the Constitution, an amendment were approved reducing the number of Senators allotted to Delaware to ONE, couldn't Delaware secede? "

I am not that picky in grammatical matter, but it truly delays my understanding of your statement.

↑ 0 ↓ · flag

[Anthony Watkins](#) · a month ago 🔗

Apparently not if you feel comfortable rewriting and corrected. In the law, as well as anywhere else where precision is important, such as medicine and engineering, communicating clearly is

a must, but if the communication was clear enough for you to properly correct it, then some might see your actions as being equivocal to those of an ass... So if you are not one, you would do well to not emulate one. I hope I have clearly and properly communicated my exact meaning.

↑ 0 ↓ · flag



Anthony Watkins · a month ago

I might add, in direct response to the original post of the thread, while knowing original intent is HISTORICALLY important, I am not at all sure what a bunch of dead white males thought over 200 yrs ago should have bearing on the world we live in today. We are free people, we are free to take on or cast off whatever we the people of today decide. Original intent is just that, an interesting point of origin, but do we really think the smartest people in the world have all been dead for two centuries?

↑ 1 ↓ · flag

Anonymous · a month ago

"We are free people, we are free to take on or cast off whatever we the people of today decide"

I don't think that anybody disputes that. What I dispute is to change laws outside the process setup in the constitution specifically to do so, including the constitution itself.

Take Obamacare and DOMA.

If representatives intended to pass the Obamacare penalty as a tax, they should have explicitly said it. Now, Obamacare passed the house narrowly. If the Obamacare penalty had not been considered a "tax" the SCOTUS would have not accepted it as valid (ie, the SCOTUS would have not accepted as valid the argument that government can force people to buy products the federal government thinks are good for them). So, what's a constitutional protection against government forcing you to buy products if it is not being enforced by judges who are sympathetic to the product in question (this time it was healthcare insurance, in the future who knows).

The DOMA case is even more egregious. Nothing in the history of the constitution, including the XIVth amendment, makes it indicate that the constitution has a guaranteed right to gay marriage (in fact, a late XIXth century case against some Mormon whose name I forgot explicitly said that religious freedom could not be used as an excuse to justify polygamy). So the constitution is silent on the matter, the legitimate representatives of the people decide through veto proof majorities that the only marriage which shall be considered valid for the federal government will be marriages between one man and one woman and what does the SCOTUS do? Throw the will of the people under the bus and impose gay marriage on the federal government.

These two examples illustrate the SCOTUS "legislating from the bench" with the sole purpose of upholding a law 5 of them liked (Obamacare) and throw under the bus a law that 5 of them disliked. So your "we are free people" gets reduced to "there are 9 free US supreme court justices who decide for the rest of us outside constitutional bounds".

↑ 1 ↓ · flag



Alec D. Rogers · a month ago 🔒

Anthony,

You raise an important question when you ask why "what a bunch of dead white males thought over 200 yrs ago should have bearing on the world we live in today."

I'm not sure if I have a better answer than we've inherited a legal system, which our posterity will inherit from us. There was agreement 200 years ago on how we should govern ourselves.

To the degree there is a consensus today to change a part of it, we're free to do so. Unless and until we do so (and the Constitution provides for the possibility of a new constitutional convention) there's no clear way we can do so under the rule of law. To the degree we ignore what has gone on before, we're just making it up without any agreed upon rules of the road.

Not a completely convincing answer to be sure. But I'm not sure what the alternative is except giving up on Constitutionalism all together.

↑ 3 ↓ · flag

Victor Abbott

Signature Track

· a month ago 🔒

To Anonymous:

I am in accord with you. Here is the way I look at it (of course there are many ways to look at it but for right now I am going to attempt to presented in basic form)

Lets look at the your statement or thought if you will. You said nothing indicate that the constitution has a guaranteed right to gay marriage" Okay. If you are looking at the constitution with eyes of black and white; I can reason why you said the above the statement BUT it does not have to say the word "gay" to be protected. Look at the 4th Amendment. The 4th amendment guarantees you to be secure in your house, your person, did you hear me--YOUR PERSON meaning no matter what belief you have whether you choose to wear your hair in a manner that people may think is improper, or whether you want to wear a dress-- YOUR PERSON is your whole being meaning YOU. Meaning, that no one has a right to dictate your mode of living. This is the reason why the 4th amendment was created because those rights such as being YOU is a RIGHT given by GOD not by the government. If the government infringes that absolute right; then it will be unconstitutional. Simply because is a SUPREME right to be YOU. This is the reason why our founder fathers created a

constitution to protect any one from the government and from any one who would try to tell you other wise. You see, Constitutional law is the Supreme law of the LAND that means if a statute contradicts the SUPREME LAW of the land; meaning making unconstitutional--you have the right to stand for what is rightfully yours. Judges are there to follow the Constitution and be abide by the Constitution-- its a MUST and if they don't is the RIGHT OF THE PEOPLE create a new government.

↑ 2 ↓ · flag

[+ Comment](#)



Bill Camarda · 2 months ago

I think this is a great question. Would it even be possible to be fully "originalist," drawing only on the founders' words and intents, in interpreting the constitution? How originalist is possible? I imagine we'll get into this pretty thoroughly, later in the course...

(I just noticed that Prof. Amar is cited as an originalist in the discussion of the term over at Wikipedia...)

↑ 0 ↓ · flag

Stanley H Kelley · 2 months ago

Intent is hard to determine among a group of people. And is the intent that of those who participated at the Convention or those who voted to ratify it?

↑ -1 ↓ · flag

[+ Comment](#)

marcos antonio de oliveira prado · 2 months ago

The preamble of the US constitution has power as a bill or it's just principles guidance to the Judiciary?

↑ 1 ↓ · flag

[+ Comment](#)

james mark leggett · 2 months ago

We have Supreme Court justices who contend that they are Original Constructionists. Given that our society has changed so much in 220years and there is so little information available re "original intent" how can there be Original Constructionists?

↑ 0 ↓ · flag

David Stephens · a month ago

With all due respect to constitutional minds far greater than mine, I cannot for the life of me understand how the concept of "Originalism" as advocated by ,say, Judge Scalia, can be supported. In my view constitutional law proper finds precious little application in the USSC. With so many 5-4 decisions, the political element is dominant. Sad really because it has weakened the original concept of separation of powers.

↑ 0 ↓ · flag

Joel Kovarsky · a month ago

As usual, it escapes me why Mr. Leggett's remark deserves a down vote. It is the usual stuff of disagreeing with his remark, and that should not be a factor on these boards. People should take a look at Coursera's policy for posting guidelines: <http://help.coursera.org/customer/portal/articles/1220499-forum-code-of-conduct> .

More to the point, you might dislike Justice Scalia's opinion, but do not short-change his legal scholarship and knowledge. He can defend himself, and for those studying the law it is a good idea to try to understand what he says--even if you forcefully disagree--and not simply act in dismissive fashion:

<http://www.bloomberg.com/news/2013-07-01/how-not-to-misunderstand-scalia.html>

http://www.law.virginia.edu/html/news/2010_spr/scalia.htm

<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/interp.html>

And as a disclaimer, I am not an attorney and do not have a "constitutional mind." We tend to focus on those SCOTUS cases that draw a lot of public attention, which, as I understand it, are a distinct minority. The business of individual politics as at the basis for all decisions, that gets tricky: <http://www.utexas.edu/law/journals/tlr/sources/Volume%2091/Issue%205/Schauer/Schauer.fn062.Segal.Ide...> . I tried to get a quick idea of the general history of vote counts, but could not find it. The focus always seems to be on the landmark cases.

↑ 0 ↓ · flag



Alec D. Rogers · a month ago

There's an "original concept of separation of powers," yet its hard to see how originalism can be supported?

Here's my own take:

There are some parts of the Constitution whose original intent we can discern. There are others we cannot. Where we can discern the original intent, it ought to be utilized. Where we cannot, we need to use another tool(s).

For those interested in learning more about how originalists actually view the Constitution, see here:

<http://originalismblog.typepad.com/>

↑ 0 ↓ · flag

[+ Comment](#)

Geraldine Collins · 2 months ago

The Constitution doesn't change, but interpretations do. Meaning is in the eye of the beholder. Example: The 2nd Amendment.

↑ 0 ↓ · flag

Linda McGrady · 2 months ago

Your right I believe Geraldine! The constitution remains as it was written...its the views over time that change...The founding Fathers gave us what was to be our 'Bible' so to speak. A document to live by, just as the Bible is a book to live by...MAN has changed what the Constitution 'MEANS' not what it is!

↑ 0 ↓ · flag



Jennifer cuddy · a month ago

The Constitution has been in a state of updating and clarifications since its inception. That is what the amendments are for. It has to in order to address evolving world issues; especially in regards to National Security.

↑ -1 ↓ · flag

Victor Abbott Signature Track · a month ago

Linda,

I totally agree with you. You are correct! the Constitution is the bible of the land as well is the SUPREME LAW OF THE LAND.

↑ -1 ↓ · flag

[+ Comment](#)

Michael Blanco · 2 months ago

I personally don't believe anyone is an originalist. The point above about the impossibility of divining the intent of a group is just half the point. Even if we go with the more restricted view of originalism, the "original public meaning" theory, who is to say what that meaning was? What was the original public meaning of "cruel and unusual"? In the 1790s, sea changes were occurring in America on the treatment of prisoners. The first penitentiaries were being built, with children and women being housed in the same cells with men. Yet, these practices were considered improvements over some of the previous practices, like branding, nose clipping, and the like. The pillory post was still in play, where ears were nailed to posts and people had to rip their ears out to get free. Does the fact that these practices were common in the late 1700s make them, for constitutional purposes, OK? I can't see anyone thinking this is OK. The original public meaning of the 14th Amendment included school segregation (the Congress that enacted the 14th Amendment also proscribed school segregation for Washington, D.C. If you're an originalist, *Brown v. Board of Education* was decided wrongly.

↑ 3 ↓ · flag



Jeremy Thomas Crowder · 2 months ago

I think the original meaning (in the context I believe you're using) of "cruel and unusual" is irrelevant. If they intended to decide what cruel and unusual would be for eternity, they would have said as much. "Cruel and Unusual," I believe, was intended to have a modifiable interpretation.

↑ 1 ↓ · flag

Michael Blanco · 2 months ago

I agree 100%.

↑ -1 ↓ · flag

Ray Strong · 2 months ago

Jeremy.

Your example is spot on. The professor addresses weakness with originalism using this example late in the 2nd book (and so I suppose in the lectures). He quotes Scalia who says that in some areas even he is not an originalist and cites cruel and unusual punishment as an example. Scalia is quoted stating that if any State reintroduced branding or flogging (common Colonial punishments) that he would rule it unconstitutional.

↑ 0 ↓ · flag



Alec D. Rogers · a month ago

Though I'd note that Amar actually believes that original understanding is an important tool - he does not dismiss it as some do. We are all originalists and living

constitutionalists...something like that. It's just that it's not a sufficient method of interpretation without looking at other things as well.

↑ 4 ↓ · flag



Anthony Watkins · a month ago

Well, not that he needs me to vouch for him:), but I agree with the prof on this point. It is important to know what was written and what it means, as long as we don't treat it like a fundamentalist treats their religious text! These are not divine words handed down by god on a tablet of stone. These are the best thoughts, compromised by the worst politics, both of an age before most modern business practices, technologies and societal norms were even contemplated.

Alec, I agree that it is a good idea to follow the rule of law back to the constitution and even back to English common law, back to the logic of the Greek and Roman philosophers and to some extent back to the laws of the Old Testament, but to say any of these laws are sacrosanct and should not be changed is ignorance! Not saying anyone here is saying that, but to hold that the original document is too important to be amended or reinterpreted is to say the above, at least, in my opinion.

↑ 0 ↓ · flag



Alec D. Rogers · a month ago

Thanks Anthony, but I don't know anyone who thinks that the Constitution is (a) perfect or (b) should never be amended. It's a question of how. It was made by mortal men who had to compromise, compromise, compromise. The Constitution itself has provisions for its own amendment, therefore the notion that the constitution isn't perfect and will need to be changed to suit modern circumstances is, itself, an "originalist" precept.

↑ 0 ↓ · flag

[+ Comment](#)

Danny Townsend STAFF · 2 months ago

Great questions, everyone—these are the kinds of questions that can make Constitutional interpretation both interesting and difficult.

Scarlett—you're definitely correct that the Supreme Court is bringing the Constitution to life all the time. And Bill's question is a very important one: most people agree that considering the founders' words and intentions, and the original public meaning of the Constitution, is an important part of understanding how the Constitution empowers and constrains our government today. But how are we supposed to understand the original intent of the framers in the context of a world that is, today, very different than the world they inhabited?

There's a huge amount to say on this topic—and we'll be covering much more throughout the course, particularly in the second half of the course on America's Unwritten Constitution. But one thing to look at right now, particularly as we consider the text of the document, is to see how consciously open-ended some parts of the Constitution are. The Ninth Amendment, for instance, explicitly says that there are rights "retained by the people" that exist outside of the Constitution itself. We'll see later in the course how the Ninth Amendment might explain how certain rights may be seen as Constitutionally protected even if they are not explicitly in the text. What seems clear from the outset, though, is that the notion of change and development are built into the Constitution. Change has certainly happened both through the amendments process and through the court's decisions, and whether the Court goes "too far" (or not far enough) is often a topic of controversy.

↑ 13 ↓ · flag

Thomas Marshall · 2 months ago

Thank you, Mr. Townsend. I look forward to hearing more about interpretation and how the Constitution has been regarded especailly with relation to big SC decisions such as Roe v Wade and Bush v Gore.

↑ 0 ↓ · flag

Anonymous · a month ago

This answer confirms that both the professors and the TAs are biased towards the "living constitution" view which is not shared by several sitting SCOTUS justices, more prominently Antonin Scalia who wrote a whole book refuting what you just wrote here
<http://www.amazon.com/Reading-Law-Interpretation-Legal-Texts/dp/031427555X> .

I have no problem with your or the professor's bias, but you should acknowledge it instead of presenting your statements above as disputable facts. In fact, this different of opinion is the root of many of the most controversial 5-4 decisions coming from the SCOTUS in recent years.

↑ -3 ↓ · flag



Bill Camarda · a month ago

With respect, Anonymous, I'm going to wait for our professor to speak for himself. He has won awards from the very conservative Federalist Society, so I doubt his worldview is quite what you've stated it to be.

↑ 1 ↓ · flag

Joel Kovarsky · a month ago

So, anonymous, you are arguing that Scalia is in favor of a constitution in suspended animation? He may be your favorite now--that is not entirely clear--but he is, by any standard,

more than a bit quirky: http://www.nytimes.com/2010/01/03/books/review/Rosen-t.html?_r=0 . We could all sit around and cheer those justices who support our favorite positions, cognitive illusions, whatever. We are not infrequently prone to confirmation biases. As a more general proposition, I remain suspicious of too-general labels--originalist or "livingist"--that attempt to cramp the long history of Constitutional interpretation and growth into small and separate quarters.

↑ 0 ↓ · flag

[+ Comment](#)

[María Verónica Brain](#) · 2 months ago 🔒

No, I don't think so!

It has changed, as many facts show, nevertheless meanings and intentions do not change.

What really changes is the interpretation that each case or quote gives to the Constitution.

What it is really very interesting is how this flexibility allowed to be a success through time.

↑ 0 ↓ · flag

[+ Comment](#)

[Brian Wong](#) · 2 months ago 🔒

As written, the Constitution is so flexible and non-specific on so many points, that it seems to be intended to be interpreted and reinterpreted so as to suit the needs of the People in their own times.

↑ 4 ↓ · flag

[Cynthia M Thacker](#) · a month ago 🔒

Well said . . . I guess my concern would be the Interpreter and the Interpretation at the time.
Example # 1 : Slavery Legal . . . Slavery Abolished Example # 2 : Women Could Not Vote . . .
Women Could Vote. Sometimes I think the majority of "We The People" forget that the very small space we inhabit while we are here does not stay the same. Who was in my place one hundred years ago? Who will be in my place one hundred years from now?

↑ 1 ↓ · flag

[+ Comment](#)

[Pedro Ruiz](#) · 2 months ago 🔒

EXPLAINS HOW CONSTITUTIONAL INTERPRETATION IN A FEDERAL STATE AS THE U.S.?

↑ 0 ↓ · flag

[+ Comment](#)

Joseph DeLuca · 2 months ago

Brian,

I agree that the framers left some of the writing to interpretations, but you cannot in theory go to far in interpreting the document without voiding the original intent. Here is an example if the constitution made it illegal let us say to steal \$1 million; however, said it was ok to steal no more than \$1... someone could interpret that to take \$1 from every person in the country and therefore steal \$311 million. So I guess my point is, if it is ok to make minor changes as you go, if you continue long enough are not the many minor changes adding up to one major change which now might be in direct opposition to the original law and intent.

Just food for thought. I would like to think that with all the books, writings, debates that we would have some semblance on what was meant and to try and apply it in today's world. If there is something that is so far out there that no application could be used, then I think It would be up to the legislative branch to either amend the Constitution or create a law and in doing so have to prove to the people it is what the framers would have done given the same opportunities.

↑ 0 ↓ · flag

Brian Wong · 2 months ago

Joseph,

I do agree with your thoughts. My comment failed to define the bounds and extent for "interpretation". It is true that any interpretation that conflicts with original intent can only be addressed through amendment. But I was thinking in much less significant terms and admiring the Document's ability to allow varied interpretation, up to the limits of original intent, according to one's station in time. What is in contention is exactly how much room is reserved for varied interpretation. The Constitution is silent on this matter, leaving it for determination by others, e.g., the Supreme Court, in another time. My point is that the Constitution, as designed, nicely accomodates the imminent changes of society. Flexible, yet rigid, it is indeed a very beautifully written document.

↑ 2 ↓ · flag



Wang Chao · a month ago

<What is in contention is exactly how much room is reserved for varied interpretation.> this point is much more worth discussing than weighing out the whether-or-not-interpretation issue.

↑ 0 ↓ · flag

[+ Comment](#)

David Mellado Signature Track · 2 months ago

The framers were not perfect and what they create was an attempt to correct the issue they were facing at the time, but most of all they gave us the means and the opportunity to change it. It is my believe they did not meant it to be a record that will be aet on stone and to heck with everyone else who did not like it, no... not at all. According to the information if you do not like something all tou have to do is persuaded your fellow citizens and change it, they new things not always happen the way we want them to happen and they also knew times were changing, that is why they provided us with the tools to change it without the necessity to take extreme actions.

↑ 2 ↓ · flag

[+ Comment](#)

Joseph DeLuca · 2 months ago

Dan,

The framers did leave us the procedures on how to change things. Its called Article 5 where a state could call for an amendment convention. Up until now, only Congress has been the ones to change the constitution. The document is the procedure and basic how to and who has the authority to act. When there is something like the first amendment which is a clear cut sentence, then we should take it at its face value. The point is we should do our best with the knowledge of history to act in a way that would be in accordance with how and why our framers acted. The point is to have a constitution which dictated who did what, when, why and how. I personally believe that a lot has changed since the Senate has been popularly elected and the States have lost a lot of the powers granted to them by the great document.

↑ 0 ↓ · flag

[+ Comment](#)

Thomas Marshall · 2 months ago

Great post, Ms. Hilton!

As for what the Constitution is (or how it should be regarded) it would be great if we could ask the nine Justices of the SC. I think though we would know how some of them would answer. Those such as Justice Thomas and Scalia would argue that the Constitution is not a living, breathing thing and since it does not change (especially since it provides the one and only original answer of what interpretation should be afforded) then whatever the framers wrote, it should be ragarded in such as manner,

Then you have those who would say that the purpose of a constitution is to serve the people and as people and society change so too should its laws. So, if a law can change then so can the constitution. And in a way, the constitution has changed what with the number of amendments it has adopted over the years.

Then there is another view, put forward by Justice W. Goldberg of the People's View; perhaps the framers of the Constitution made some mistakes. It was a hot summer in Philadelphia, men used to wear heavy, powdered wigs in those days, perhaps this affected their thinking.

↑ 1 ↓ · flag

[+ Comment](#)

[mwakera mwajefa mndwamrombo](#) · 2 months ago 🔒

Whether the US, the Kenya or any other country's constitution, they are dynamic and change to suit the current requirements. Now that we are in the era of information technology with emerging cyber crime, explosion of social media violation of human rights and "big brother" is watching syndrome, can this cause the review of constitutions worldwide?

↑ 0 ↓ · flag

[+ Comment](#)

[Alfredo Vitolo](#) · a month ago 🔒

I believe we must not forget that the constitution (actually, any country's constitution) is a document that is designed to endure for a long period of time and therefore needs to have at least some clauses open for interpretation as the society evolve, without violating the Framers' intent. As John Marshall has said, "we must never forget that it is *a Constitution* we are expounding" (*McCullough v Maryland*, 17 US (4 Wheat.) 316 (1819), opening the constitutional text to inferences. The same can be said with the US Supreme Court frequently often cited "evolving standards" that justify new interpretations, without necessarily having to support a fully flexible (or "living") constitution. A constitution is not an ordinary law that can be changed at will of a circumstantial majority, but it is neither a rigid and static picture of the past. The tensions between constitutional interpretation (made essentially by the courts, but also by the other branches of government within their authority) and the general perception of "the people" is what makes societies evolve.

↑ 0 ↓ · flag

[+ Comment](#)



[Gabriela Guadalupe Valles Santillán](#)

Signature Track

· a month ago 🔒

I agree with everyone who has posted a comment in here...but i also want to remark the importance of the interpretation, and the written constitution. First, as the professor said in the videos, we have a written constitution, with expressed and explicit faculties given to the powers, but then it is transformed

with the evolution of society, and the document is completed with a practice we denominate interpretation of constitution...i think that's the point...according to the actual social needs

↑ 0 ↓ · flag

[+ Comment](#)



[Lisa Dixon](#) · a month ago

I believe that it is a living and changing document. For starters, the initial text wasn't ratified all at once and it took 2 years to ratify that, then 2 more to come up with the Bill of Rights.

And then onward from there, the amendments themselves are exactly that, changes based on the people and their times. In a country with freedom from monarchy, totalitarianism, dictatorship, etc, that is, in a country in which the government represents the people, it would almost seem like change is necessary.

And for people who hold it to originalist standards, is the 27th ammendment less important than the first or second, based on when it was ratified? Or for that matter any one in between? To me it seemed like a document which obviously changes with time and people.

↑ 0 ↓ · flag



[Alec D. Rogers](#) · a month ago

Elisabeth,

Yours is a classic formulation of proper constitutional change from an originalist point of view.

An originalist would argue that a provision's meaning is determined by the understanding at the time of the constitution's ratification, and is properly adopted to changing circumstances via the amendment process spelled out in the Constitution's text. Originalists have no problem with amending the Constitution.

In contrast, those who support a "living Constitution" argue that the meaning of the Constitution can change organically as courts should reinterpret the document by seeking out its higher purposes and essentially reformulating it in the process of deciding cases to meet such changing circumstances.

Alec

↑ 0 ↓ · flag

[Joel Kovarsky](#) · a month ago

Alec,

Out of curiosity, how many federal appeals court judges can be deemed "originalists," where they believe they hold to the thinking of the Framers--which was diverse--relative to the 18th century understandings of political terms and social circumstances? Maybe I am being unfair,

but it seems to me a source of cognitive illusion (maybe my own?). I understand what you parse above, but in practice is this more a point of academic discussion? That is not to minimize the importance of previous SCOTUS decisions.

↑ 0 ↓ · flag



Alec D. Rogers · a month ago 🔒

Joel, I'm unsure of how many judges should be deemed "originalists." I think the term is much misunderstood. For example, in the above post I responded to there seemed be a notion that originalists opposed ever changing the Constitution.

I agree with Amar that we are all "originalists" in at least a limited sense that where the original understanding of a constitutional provision can be divined, that understanding should govern. Amar himself spends a lot of time parsing the background and history of each provision. Why? Because he believes it's an important tool for him to understand what the text means.

To be clear, it's not the ONLY tool. And sometimes we simply have no clue, e.g. how to make the 9th amendment operational. The fact that originalism isn't **always** a decisive (or even a helpful one in some cases) tool does not mean we should completely discard it. In some cases, it even appears that the original understanding was that future generations would have their own understanding, which explains why certain terms such as "cruel and unusual" appear rather than a specific list of prohibited punishments. It's the "original understanding" that the meaning of these words would change over time.

Is this a point of academic discussion? My sense is that judges are more attuned to this, and I see a lot more constitutional history in briefs arguing that their interpretation has a historical basis. For instance, Heller was a bloody war of legal history. So, I'd say that originalism has grown in importance as a theory of interpretation beyond the academy.

Not sure if I'm answering your question, but I hope this helps explain my views a little better as I'm trying to sort them out myself.

↑ 2 ↓ · flag

Joel Kovarsky · a month ago 🔒

Thanks, Alec. This does help me, particularly since I am an "outsider" to the details being considered. Based on your comments, and what I've read, it appears that many journalists are a bit cavalier in how they handle the phrasing. What the public sees and interprets may often be a thin veneer of the actual conceptual meaning, as discussed by scholars and skilled practitioners. (Having been a medical specialist for many years, the varied problems of what appears in the public press is no surprise to me.)

↑ 0 ↓ · flag

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Do the meaning and intentions of the constitu...

<https://class.coursera.org/conlaw-001/forum/...>