

Constitutional Theory Today

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My panel contribution will constitute a brief discussion of three areas of constitutional theory where I think interesting work is being done. This is necessarily an incomplete survey and reflects my own biases.

I. Interpretation: Originalism Lives!

Despite the suggestion in the AALS program, the debate over originalism is still going on.

A. Attacking and Defending Originalism

Some scholars are still engaged in what I think of as the classic originalist/living constitution argument. Mitch Berman argues, for instance, that “Originalism is Bunk.” Richard Primus argues that it is a useful interpretive methodology in only a very narrow range of cases. Stephen Griffin and Thomas Colby and Peter Smith also attack what they call the new originalism. Larry Solum, fortunately here on this panel and therefore able to do his position more justice than I could, offers a straightforward and persuasive argument for what he calls “Semantic Originalism.”

B. Domesticating Originalism

Others are pursuing a vision of originalism that in practice will lead to results conventionally associated with the living constitution. If the drafters choose general language, it is possible that they intended, and the ratifiers understood, that application of that language would be performed by future generations in light of future facts and circumstances. Jack Balkin is the most notable figure here, although I and others have made the same argument. Lest one think that this is merely a living constitutionalist attempt to co-opt the originalist label, true originalist Randy Barnett appears to have signed on as well in “The Misconceived Assumption About Constitutional Assumptions.”

II. Beyond Interpretation: Meta-Doctrinalism

The area in which I’ve been doing the most work is what could be called meta-doctrinalism. Rather than focusing on the task of extracting meaning from the Constitution, meta-doctrinalism focuses on the process of crafting workable doctrine to implement that meaning. A view of the Constitution that separates meaning from doctrine has implications for many areas of constitutional law and theory, including the question of judicial activism, stare decisis, and retroactivity. Richard Fallon,

Mitchell Berman, Calvin Massey, Adam Winkler, and Brannon Denning are all doing interesting work in this area, and there are also many who've done earlier similar work.

III. Just the Facts: Empirical Work

Empirical work is hot right now generally, and its application to constitutional theory should prove very interesting. It can tell us things like how significant methodology is in constitutional decisionmaking as compared to ideology. It can also give us concrete measures of how assertive or deferential different Justices and Courts are in different contexts: dealing with state or federal laws, and with different constitutional doctrines. This might actually allow for what Frank Cross and Stefanie Lindquist have called "The Scientific Study of Judicial Activism." Others working in this area include Lori Ringhand and the four authors whose papers were selected for presentation at this meeting: Brad Joondeph, Robert Mikos, Tom Ginsburg, and Robert Anderson.