

ADVANCED CONSTITUTIONAL INTERPRETATION:
ORIGINALISM AND ITS FOES

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FALL 2023

Thursdays from 4:00 p.m. to 6:55 p.m.
Holland Hall 285A

I. SUMMARY

This seminar will explore the constitutional interpretive theory and practice of Originalism—the idea that the text of the Constitution should be interpreted as those words were thought to mean when the people adopted it. In recent decades, Originalism has emerged as a key force both in the academy and in the courts. In fact, six of the sitting United States Supreme Court justices have repeatedly invoked originalist techniques in their opinions, making the understanding of this mode of interpretation crucial to examining and applying the Court’s opinions.

This seminar, which will be taught by a United States District Judge and an Adjunct Professor of Law, will explore Originalism’s historical underpinnings and normative justifications, its content, its criticisms, and its deployment in legal advocacy and judicial opinions. Readings will include selected historical writings from the founding era, such as the Federalist Papers and Anti-Federalists Papers. Readings will also include contemporary scholarly arguments for and against Originalism, which examine various views of an appropriate Originalism analysis, such as original public meaning, original intent of the Framers, and others. This seminar will also assess the foundational principles of Federalism and separation of powers through the lens of Originalism, focusing on the role of a federal judge under Article III of the Constitution.

II. COURSE OUTCOME

Upon completion of this seminar, students should be able to:

- i. Describe Originalism’s historical underpinnings and normative justifications, its content, and its criticisms;
- ii. Utilize historical writings from our Country’s founding era, such as the Federalist Papers and Anti-Federalists Papers to explain how one ascribing to Originalism would explain the meaning of the text of the Constitution;

- iii. Demonstrate application of Originalism and textualism principles in analyzing the text of the Constitution and federal statutes;
- iv. Describe the differences between various iterations of Originalism, such as original public meaning, original intent of the Framers, and new strands of Originalism;
- v. Explain an Originalist's constitutional view of Federalism and separation of powers;
- vi. Describe an Originalist's view of the role of a federal judge under Article III of the Constitution;
- vii. Describe contemporary scholarly arguments for and against Originalism; and
- viii. Analyze Supreme Court opinions and identify the various justices' application of Originalism principles and other justices' criticisms of the application of originalism principles.

III. REQUIREMENTS

A. Class Meetings, Attendance, and Student Participation

This seminar will meet the following Thursdays from 4:00pm to 6:55pm on 8/24, 9/7, 9/14, 9/21, 10/5, 10/26, 11/2, 11/9 (Flex Day, if needed), 11/16.

Students in the seminar will be expected to read the assigned materials prior to each class meeting and engage in classroom discussion. Because this seminar will have relatively few class meetings and is designed to be collaborative, each student is expected to attend every class. If a student **has a known conflict** for any of the scheduled class dates before the expiration of the drop/add period, the student may consider the impact of missing classes for such planned absences.

Unplanned absences from class related to illnesses will be addressed by the course instructors on a case-by-case basis. Attendance will be taken at the start of every class and each student's participation during each class will be noted. Please kindly bring your hardcopy of the Constitution to every class.

B. Weekly Course Preparation

Students should expect to spend at least two hours outside of class reading and preparing for every hour of class. And students should expect to spend at least two hours reading and/or writing for weeks the class does not meet. It is strongly suggested that students utilize non-class meeting weeks to read as far ahead as they can.

C. Reflection Papers

In selected weeks in which the class does **not** meet, students are expected to continue with the readings for the next class meetings and may be required to

write short, reflection papers of no more than 800 words on an assigned reading. Students will be given notice both in-class and electronically (email and/or Canvas) as to which weeks a reflection paper will be required, and the specific writing assignment based on those readings. Two reflection papers are currently specified in the syllabus. Please note that reflection papers weeks (non-meeting weeks) are noted in **RED** below.

D. Final Papers

Students will also be required to write a final paper. The outline of the final paper and final paper itself comprise a significant portion of the seminar grade. **As such, it cannot be waived for students who may have already completed their graduation writing requirement.** The final paper may address a particular aspect of Originalism, the proper mode to discern the original meaning of the Constitution, or critique existing scholarship or a federal court opinion employing an Originalist analysis. You must submit a summary/outline on your paper topic by **November 1, 2023**. The final paper must be 8000 to 10,000 words, and the document must be double spaced in Times New Roman, 12-point font with one-inch margins on all sides. **It must be submitted in MS WORD (.doc) format, utilizing Bluebook footnote citations.** Final papers will be due on **Wednesday, December 13, at 11:59 p.m. EST.** Papers will be graded based on the degree of difficulty, utilization of the course's readings, and the excellence of execution. Borderline grades will be adjusted upwards to recognize especially productive contributions to class discussion. No extensions will be granted absent extraordinary circumstances. As such, please kindly plan accordingly.

E. Grades

Grades will be based 25% on class participation, 10% on reflection papers, and 65% on final papers. The seminar will not be graded on a curve. This seminar follows the Levin College of Law's grading policies found [here](#).

F. Required Materials (all available on Amazon and also available at other book retailers)

- THE CONSTITUTION OF THE UNITED STATES (hardcopy, pocket size)
- ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM (2020).
- STEPHEN B. CALABRESI, ORIGINALISM: A QUARTER CENTURY OF DEBATE (2007).

G. Office Hours & Communications

- Canvas will be the principal mode of communication. Any modification of assignments, class meetings, office hours, or due dates will be posted on Canvas.
- In-person office hours will be held for at least one hour prior to each scheduled class and for one hour on Fridays via video conference (Zoom or Teams) at 12pm. For students unable to attend these scheduled office hours due to a class conflict, the instructors will make every effort to accommodate schedules.

H. Accommodations

Students requesting accommodations for disabilities must first register with the Disability Resource Center (<https://disability.ufl.edu/>). Once registered, students will receive an accommodation letter, which must be presented to the Assistant Dean for Student Affairs (Assistant Dean Brian Mitchell). Students with disabilities should follow this procedure as early as possible in the semester.

I. Online Course Evaluations

Students are expected to provide professional and respectful feedback on the quality of instruction in this course by completing course evaluations online via GatorEvals. Click [here](#) for guidance on how to give feedback in a professional and respectful manner. Students will be notified when the evaluation period opens and may complete evaluations through the email they receive from GatorEvals, in their Canvas course menu under GatorEvals, or via <https://ufl.bluera.com/ufl/>. Summaries of course evaluation results are available to students [here](#).

J. COMPLIANCE WITH UF HONOR CODE:

Academic honesty and integrity are fundamental values of the University community. Students should be sure that they understand the UF Law Honor Code located [here](#). The UF Law Honor Code also prohibits use of artificial intelligence, including, but not limited to, ChatGPT and Harvey, to assist in completing quizzes, exams, papers, or other assessments unless expressly authorized by the professor to do so.

K. OBSERVANCE OF RELIGIOUS HOLIDAYS:

UF Law respects students' [observance of religious holidays](#).

- Students, upon prior notification to their instructors, shall be excused from class or other scheduled academic activity to observe a religious holy day of their faith.
- Students shall be permitted a reasonable amount of time to make up the material or activities covered in their absence.
- Students shall not be penalized due to absence from class or other scheduled academic activity because of religious observances.

IV. READING ASSIGNMENTS (subject to modification)

PART I

August 24, 2023: Legitimacy of a Democratic Constitution: Constitutional Underpinnings of Federalism and Separation of Powers + The Role of an Article III Judge.

- Wurman, Ch. 1
- *The Federalist* Nos. 1, 10, 78, 79, 80
- *Antifederalist Papers* Nos. XI, XII, XV
- *Optional*: Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's Moral Reading of the Constitution*, 65 *FORDHAM L. REV.* 1269 (1997).

PART II

September 7, 2023: Origins of Originalism

- Letter from Thomas Jefferson to James Madison (Sept. 6, 1789) <https://founders.archives.gov/documents/Madison/01-12-02-0248>.
- Response Letter from James Madison to Thomas Jefferson (Feb. 4, 1790).
- Calabresi, at 47-55; Edwin Meese III, Speech Before the American Bar Association, Washington, D.C. (July 9, 1985).
- Calabresi, at 55-70; William J. Brennan, Speech to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985).
- Wurman, Ch. 5 —The Presumption of Constitutionality (Justice Brandeis and Robert Bork) and Presumption of Liberty (Randy Barnett).

September 14, 2023: Early Debates on Originalism (Reflection Paper)

- Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).
- Calabresi, at 83-94; Robert H. Bork, Speech at the University of San Diego Law School (Nov. 18, 1985).
- Optional: Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

September 21, 2023: Original Intent Originalism & Original Methods Originalism

- Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004).
- H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1984).
- John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 N.W. U. L. REV. 751 (2009).
- Optional: Stephen E. Sachs, *Originalism Without Text*, YALE L.J. 156 (2017).

October 5, 2023: Original Public Meaning Originalism + Originalism and Stare Decisis

- Wurman, ch. 6.
- *District of Columbia v. Heller*, 554 U.S. 570 (2004).
- *Justice Scalia’s majority opinion vs. Justice Stevens’s dissenting opinion*
o Optional: Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. Rev. 923 (2009).
 - Amy Coney Barrett, *Originalism and Stare Decisis*, 92 N.D. L. REV. 1921, 1929–42 (2017).
 - *Roe v. Wade*, 410 U.S. 113 (1973) & *Dobbs v. Jackson Women’s Health Org.* (2022).

Part III

October 26, 2023: Originalism’s Legitimacy + Originalism and Stare Decisis + Criticisms of Originalism & Alternatives to Originalism

- Wurman, ch. 6.
- Scott Soames, *Originalism and Legitimacy*, 18 GEO. J. L. & PUB. POL’Y 241 (2020).

- J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022).
- David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877–91 (1996).
- Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020) (Common Good Constitutionalism)
- William H. Pryor, *Against Living Common Goodism*, 23 FED. SOC'Y REVIEW (April 5, 2022), available at: <https://fedsoc.org/commentary/publications/against-living-common-goodism> (Response to Vermuele's Common Good Constitutionalism).

November 1, 2023: REFLECTION PAPER ASSIGNMENT: Provide a summary and outline of your proposed FINAL PAPER. It is STRONGLY recommended that you send the summary of your topic to the instructors via Canvas at least two weeks prior to this November 1 due date. The more detailed the topic summary and outline submitted, the more meaningful feedback the instructors can provide you for the preparation of your final paper.

November 2, 2023: Alternatives to Originalism (cont'd) + 2022-2023 SCOTUS TERM

- Wurman, ch. 8.
- RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1–38 (1996).
- Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).
- *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).
 - *Note Justice Jackson's response (dissent) to Chief Justice Roberts's majority opinion.*
- *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023).

November 9, 2023: FLEX DAY (may cancel based on seminar's progress)

Part IV

November 16, 2023: Discerning Original Meaning of Statutes—Applied Statutory Textualism

- *Yates v. United States*, 574 U.S. 528 (2015).
- *Bostock v. Clayton County*, 140 U.S. 1731 (2020).

- **OPTIONAL READINGS**
 - Steven D. Smith, *The Mindlessness of Bostock*, L. & LIBERTY (Jul. 9, 2020) <https://lawliberty.org/bostock-mindlessness/>.
 - Mark Tushnet, *Bostock and Originalism*, YALE UNIV. PRESS (July 15, 2020) <https://yalebooks.yale.edu/2020/07/15/bostock-and-originalism/>.

- **Students Present on Their Final Papers**

December 13, 2023, 11:59 p.m. (EST)—Final Papers must be submitted via Canvas. Papers will not be accepted via email.