

ADVANCED CONSTITUTIONAL INTERPRETATION: ORIGINALISM AND ITS FOES

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FALL 2022

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 sitting United States District Judge, 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 as well as 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. In-Class Meetings and Student Participation

This seminar will meet certain weeks, see Canvas. Students in the seminar will be expected to read the assigned materials each week and engage in classroom discussion. Because this seminar is designed to be collaborative, each student is expected to attend every class. Attendance will be taken at the start of every class. 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.

C. Reflection Papers

In the weeks in which the class does **not** meet – See Canvas– students will have reading assignments and may be required to write short, reflection papers of no more than 800 words on the readings listed for that week. These days are indicated in **RED** on the syllabus. 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.

D. Final Papers

Students will also be required to write a final paper. 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 receive our approval on a paper topic by Friday November 11, 2022. 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. Final papers will be due on Thursday, December 15, at 11:59 p.m. EST. Papers will be graded based on the degree of difficulty and the excellence of execution. Borderline grades will be adjusted upwards to recognize especially productive contributions to class discussion.

E. Grades

Grades will be based 20% on class participation, 20% on reflection papers, and 60% on final papers. The course will not be graded on a curve. This course follows the Levin College of Law's grading policies found [here](#).

F. Required Materials

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

G. Office Hours & Communications

- Office Hours will be provided for two hours per week.
- In-person office hours will be held for one hour prior to each scheduled class and for at least one hour on Friday via video conference (Zoom or Teams) at 10am.
- The instructors also hold additional office hours by appointment via video conference (Zoom or Teams) or phone.
- In addition to in-class announcements, the instructors will email and/or post on Canvas any modifications of assignments or due dates.

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](#).

IV. Reading Assignments

(subject to modification based on seminar's progress)

Part I

Class 1: Legitimacy of a Democratic Constitution; Constitutional Underpinnings of Federalism, Separation of Powers, & The Role of an Article III Judge.

- Wurman, Ch. 1
- *The Federalist* Nos. 1, 10, 39, 62
 - *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803)
 - *Luther v. Borden*, 48 U.S. 1 (1849)
- *The Federalist* Nos. 47, 78, 79, 80
- *Antifederalist Papers* Nos. XI, XII, XIII, XIV, XV, XVI
- *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).
- SCOTUS cases
 - *Mistretta v. United States*, 488 U.S. 361 (1989)
 - *Morrison v. Olson*, 487 U.S. 654 (1988)
 - *Optional*: *Miranda v. Arizona*, 384 U.S. 436 (1966)
 - *Optional*: *Mapp v. Ohio*, 367 U.S. 643 (1961)

Part II

Class 2: Origins of Originalism

- Wurman, Ch. 3, 4
- Letter from Thomas Jefferson to James Madison (Jan. 9, 1790)

<https://founders.archives.gov/documents/Madison/01-12-02-0248>.

- Response Letter from James Madison to Thomas Jefferson (Feb. 4, 1790) <https://founders.archives.gov/documents/Madison/01-13-02-0020>.
- 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).
- *Optional*: Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

Off Week 1: Early Debates on Originalism

- Calabresi, at 83-94; Robert H. Bork, Speech at the University of San Diego Law School (Nov. 18, 1985).
- Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).
- *Optional*: Henry Monaghan, *Our Perfect Constitution* 56 N.Y.U. L. REV. 353 (1981).
- *Optional*: Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

Week 3: Original Intent Originalism

- Wurman, Ch. 5, 6, 7.
- 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).

Off Week 2: Original Methods Originalism

- Wurman, Ch. 3, 4
- James Madison, Speech on the Bank Bill (Feb. 2, 1791), available at: https://cptl.asu.edu/sites/default/files/2021-06/Q87%20Madison%20on%20the%20Bank%20%281791%29_CPTL.pdf.
- Stephen E. Sachs, *Originalism Without Text*, YALE L.J. 156 (2017).
- *Optional*: 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*: Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

Week 4: Original Meaning Originalism

- Calabresi, at 199-252.
- Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).
- Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).
- Jeffrey Goldsworthy, *The Case for Originalism, in The Challenge of Originalism* 42–51 (Grant Huscroft & Bradley W. Miller eds., 2011).
- SCOTUS Cases:
 - *District of Columbia v. Heller*, 554 U.S. 570 (2004)
 - Optional: Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. Rev. 923 (2009).
 - *Crawford v. Washington*, 541 U.S. 36 (2006)
 - *Apprendi v. New Jersey*, 530 U.S. 466 (2000)
 - Optional: *Blakely v. Washington*, 542 U.S. 296 (2004)

Part III

Off Week 3: Originalism's Legitimacy

- John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010).
- 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).

Part IV

Week 5: Originalism & Stare Decisis

- Amy Coney Barrett, *Originalism and Stare Decisis*, 92 N.D. L. REV. 1921 (2017).
- Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139 (2010).
- SCOTUS Cases:
 - *Plessy v. Ferguson*, 163 U.S. 537 (1896) & *Brown v. Board of Educ.*, 347 U.S. 483 (1954)
 - Stephen G. Calabresi & Michael Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429 (2013).
 - Optional: Michael W. McConnell, *The Originalist Case for Brown v. Board of Ed.* 19 Harv. J.L. Pub. Pol'y 457, 459 (1995).
 - *Roe v. Wade*, 410 U.S. 113 (1973) & *Dobbs v. Jackson Women's Health Org.* (2022)

- J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022) <https://www.city-journal.org/dobbs-abortion-ruling-is-a-triumph-for-originalists>.
- David H. Gans, *This Court Has Revealed Conservative Originalism to Be a Hollow Shell*, THE ATLANTIC (July 20, 2022) <https://www.theatlantic.com/ideas/archive/2022/07/roe-overtured-alito-dobbs-originalism/670561/>.
- *Optional*: William M. Treanor, *Why This ‘Originalist’ Supreme Court Would Disappoint the Founders*, SLATE (July 19, 2022) <https://slate.com/news-and-politics/2022/07/originalist-supreme-court-would-disappoint-founders.html/>.

Off Week 4: Reflection Paper TBD

Week 6: Original Meaning in Statutes—Applied Statutory Textualism

- SCOTUS Cases
 - *McBoyle v. United States*, 238 U.S. 25 (1931).
 - *Optional*: Steven Wisotsky, *How to Interpret Statutes – Or Not: The Phantom of Plain Meaning*, 83 FLA. B.J. 43 (Jan. 2009).
 - *Bond v. United States*, 572 U.S. 844 (2014).
 - *Optional*: Stephen Stich, *Bond v. United States Illustrates Why the Supreme Court’s Statutory Interpretation Doctrine Has Constitutional Problems* PAC. LEGAL. FOUND. (June 13, 2014) <https://pacificlegal.org/bond-v-united-states-illustrates-supreme-courts-statutory-interpretation-doctrine-constitutional-problems/>.
 - *Yates v. United States*, 574 U.S. 528 (2015).
 - *Optional*: Stephen F. Smith, *Yates v. United States: A Case Study in Overcriminalization*, 163 U. PENN. L. REV. ONLINE 147 (2014).
 - *Bostock v. Clayton County*, 140 U.S. 1731 (2020).
 - *Optional*: Steven D. Smith, *The Mindlessness of Bostock*, L. & LIBERTY (Jul. 9, 2020) <https://lawliberty.org/bostock-mindlessness/>.
 - *Optional*: Mark Tushnet, *Bostock and Originalism*, YALE UNIV. PRESS (July 15, 2020) <https://yalebooks.yale.edu/2020/07/15/bostock-and-originalism/>.

Part V

Week 7: Criticisms of Originalism

- Mitchell Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009).
- Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC, Mar. 31, 2020.
- Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).
 - William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).
- David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).
- Optional: Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Y.L.J. 1346 (2006).
- Optional: Stanley Fish, *There Is No Textualist Position*, 42 S.D. L. REV. 629 (2005).

TBD-Flex Day (may or may not meet based on seminar's progress)

Part VI

Week 8:

New Strands of Originalism

- William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019).
- Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 817–874 (2015).
- Optional: *Symposium: Originalism 2.0*, 42 HARV. J.L. & PUB. POL'Y (2019).
- Optional: Steven D. Smith, *Meanings or Decisions? Getting Originalism Back on Track* L. & Liberty (Dec. 2, 2014) <https://lawliberty.org/forum/meanings-or-decisions-getting-originalism-back-on-track/>.
 - Optional: William Baude, *Originalism and the Positive Turn*, L. & LIBERTY (Dec. 12, 2014) <https://lawliberty.org/forum/originalism-and-the-positive-turn/>.