

## **Originalism and Its Foes**

**UNIVERSITY OF FLORIDA LEVIN COLLEGE OF LAW  
FALL 2025 – LAW 6936 – 2 CREDITS**

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Office Hours: Thursday 3:30-5:30

### **Co-instructors:**

Eugene Meyer

**MEETING TIME:** Thursday 1:15-3:15

**LOCATION:** HOL 350

### **COURSE DESCRIPTION AND OBJECTIVES:**

Originalism is now the dominant interpretive theory at the Supreme Court in Washington and in Tallahassee. This course will examine the theory underlying this methodology, study its emergence, and encounter its critics.

### **STUDENT LEARNING OUTCOMES:**

At the end of this course, students should be able to:

- Understand the origins of Originalism in its modern form
- Evaluate concerns leveled by critics.
- Apply the theory to contemporaneous issues.

### **REQUIRED READING MATERIALS:**

ANTONIN SCALIA, A MATTER OF INTERPRETATION  
KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION  
JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM  
Other reading materials will be available on Canvas.

### **COURSE EXPECTATIONS AND GRADING EVALUATION:**

Students will be evaluated based upon class participation and the final paper.

**Class Participation:** This seminar depends upon your careful reading of the texts and your participation in class discussion. Every week, as you do your reading, I expect you to write down at least 3 or 4 questions or issues you would like to cover in class. Bring them with you to class to use as a reference, and then turn them in at the end of each class. You will be expected to participate in class discussion. 40% of your grade will be based on class participation. (NOTE: Class participation is not a competitive enterprise. If you prepare your questions and participate in discussion each week, you will get full credit. I will not grade based on the perceived quality or quantity of your answers, although I will mark you off if it's clear you are not prepared for class.)

**Seminar Paper:** This seminar will require a lot of reading. To encourage students to read carefully and critically, participation will be a significant (roughly 40%) part of the final grade.

The remainder of the course grade will come from the final paper. Consistent with UF policy, papers should be at least 25 pages of double-spaced pages 12-point font. Please use Garamond, keep all margins to 1.25 inches or less, and do not exceed 35 pages.

**CLASS ATTENDANCE POLICY:**

Attendance in class is required by both the ABA and the Law School. Attendance will be taken at each class meeting. Students are allowed three absences during the course of the semester. Students are responsible for ensuring that they are not recorded as absent if they come in late. A student who fails to meet the attendance requirement will be dropped from the course. The law school's policy on attendance can be found [here](#).

**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](#).

Note on AI tools (Chat GPT, etc.). In my view, generative AI tools are going to become like spellcheckers. I have no objection to you using such tools to help with your paper, but you should understand the limitations of these technologies. They may be very helpful to you to get started and to help structure paragraphs or larger sections, but if you leave the actual analysis up to the machine, you should not expect to do well on the final paper.

**INFORMATION ON UF LAW GRADING POLICIES:**

The Levin College of Law's mean and mandatory distributions are posted on the College's website and this class adheres to that posted grading policy. The following chart describes the specific letter grade/grade point equivalent in place:

Letter Grade	Point Equivalent	Letter Grade	Point Equivalent
A (Excellent)	4.0	C (Satisfactory)	2.0
A-	3.67	C-	1.67
B+	3.33	D+	1.33
B	3.0	D (Poor)	1.0
B-	2.67	D-	0.67
C+	2.33	E (Failure)	0.0

The law school grading policy is available [here](#).

**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.

**EXAM DELAYS AND ACCOMMODATIONS:**

The law school policy on exam delays and accommodations can be found [here](#).

## **STATEMENT RELATED TO ACCOMODATIONS FOR STUDENTS WITH DISABILITIES**

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. It is important for students to share their accommodation letter with their instructor and discuss their access needs as early as possible in the semester. Students may access information about various resources on the UF Law Student Resources Canvas page, available at <https://ufl.instructure.com/courses/427635>.

## **MENTAL HEALTH**

The law school has [collected various resources](#) to help students pursue various forms of wellness. I would like to focus attention on the mental health portion of the page:

- The University of Florida operates a Counseling and Wellness Center that provides services and information regarding mental health. [Visit their website for more information](#).
- The University of Florida's [Disability Resource Center's website](#) can connect you with resources if you need special accommodations or services.
- UF's [U Matter, We Care](#) program offers health & wellness programs as well as programs for students in distress.
- [LawLifeline](#) – Law Lifeline is an online mental health resource designed specifically for law students.
- [Lawyers With Depression](#) – Lawyers With Depression is a website that offers information on dealing with depression.
- [Substance Abuse and Mental Health Toolkit for Law School Students and Those Who Care About Them](#) – This toolkit from the American Bar Association provides substance abuse and mental health information and resources tailored for law students.

## **STUDENT 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.bluer.com/ufl/>. Summaries of course evaluation results are available to students [here](#).

## **RECORDINGS OF CLASS**

Students are allowed to record video or audio of class lectures. However, the purposes for which these recordings may be used are strictly controlled. The only allowable purposes are (1) for personal educational use, (2) in connection with a complaint to the university, or (3) as evidence in, or in preparation for, a criminal or civil proceeding. All other purposes are prohibited. Specifically, students may not publish recorded lectures without the written consent of the instructor. A “class lecture” is an educational presentation intended to inform or teach enrolled students about a particular subject, including any instructor-led discussions that form part of the presentation, and delivered by any instructor hired or appointed by the University, or by a guest instructor, as part of a University of Florida course. A class lecture does not include lab sessions, student presentations, clinical presentations such as patient history, academic exercises involving solely student participation, assessments (quizzes, tests, exams), field trips, private conversations between students in the class or between a student and the faculty or guest lecturer during a class session. Publication without permission of the instructor is prohibited. To “publish” means to share, transmit, circulate, distribute, or provide access to a recording, regardless of format or medium, to another person (or persons), including but not limited to another student within the same class section.

Additionally, a recording, or transcript of a recording, is considered published if it is posted on or uploaded to, in whole or in part, any media platform, including but not limited to social media, book, magazine, newspaper, leaflet, or third-party note/tutoring services. A student who publishes a recording without written consent may be subject to a civil cause of action instituted by a person injured by the publication and/or discipline under UF Regulation 4.040 Student Honor and Student Conduct Code.

**ABA OUT-OF-CLASS HOURS REQUIREMENTS:** ABA Standard 310 requires that students devote 120 minutes to out-of-class preparation for every “classroom hour” of in-class instruction. Each weekly class is approximately 2 hours in length, requiring at least **4 hours of preparation**.

## **TENTATIVE COURSE SCHEDULE OF TOPICS AND ASSIGNMENTS**

This syllabus is offered as a guide to the direction of the course. Our pace will depend in part on the level of interest and the level of difficulty of each section and is subject to change.

<b>Readings (subject to change)</b>	
1 8/21	<p><b><i>The Emergence</i></b></p> <p><b><i>Required Readings:</i></b></p> <ul style="list-style-type: none"> <li>• Edward S. Corwin, "Constitution v. Constitutional Theory," American Political Science Review (1925): 290-304</li> <li>• Charles A. Beard, "The Living Constitution," Annals of the American Academy of Political and Social Science (1936): 29-34</li> <li>• William Brennan, "The Constitution of the United States: Contemporary Ratification," Text and Teaching Symposium, Georgetown University (1986) (17pp)</li> <li>• James M. Beck, "The Future of the Constitution," American Bar Association Journal (1933): 493-498, 540</li> <li>• John J. Parker, "Is the Constitution Passing?" American Bar Association Journal (1933): 570-575</li> <li>• Elliott Abrams, "The Chains of the Constitution," Commentary (1977): 84-85</li> <li>• Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 1-12 (1971)</li> <li>• William H. Rehnquist, "The Notion of a Living Constitution," Texas Law Review (1976): 693-706</li> <li>• Raoul Berger, Government by Judiciary (1977), pp. 363-372</li> <li>• Edwin Meese III, "Speech to the American Bar Association" (1985) (8pp)</li> </ul>
2 8/28	<p><b><i>The New Originalists</i></b></p> <p><b><i>Required Readings:</i></b></p> <ul style="list-style-type: none"> <li>• Keith E. Whittington, "Originalism: A Critical Introduction," Fordham Law Review (2013): 375-410</li> <li>• ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997)</li> <li>• Randy Barnett, "An Originalism for Nonoriginalists," Loyola Law Review (1999): 611-654</li> <li>• Balkin, Framework Originalism and the Living Constitution, 103 NW L. Rev. 549, 549-59</li> </ul>
3 9/4	<p><b><i>The Fixation Thesis</i></b></p> <p><b><i>Required Readings:</i></b></p> <ul style="list-style-type: none"> <li>• Paul Brest, "The Misconceived Quest for Original Understanding," Boston University Law Review (1980): 204-238</li> <li>• Lawrence B. Solum, "The Fixation Thesis: The Role of Historical Fact in Original Meaning," Notre Dame Law Review (2015): 1, 20-30</li> <li>• Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. &amp; Pub. Pol'y 817, 817-22, 838-45 (2015)</li> <li>• GIANAPP, AGAINST CONSTITUTIONAL ORIGINALISM (Assumptions and Fixing Fixity) 19-35, 138-54</li> <li>• Evan D. Bernick &amp; Christopher R. Green, What Is the Object of the Constitutional Oath?, 128 Penn St. L. Rev. 1, 1-10, 22-32 (2023)</li> </ul>

4 9/11	<p><b><i>Interpretation vs Construction</i></b></p> <p><b><i>Required Readings:</i></b></p> <ul style="list-style-type: none"> <li>• KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999), pp. 1-16, 195-212</li> <li>• Lawrence B. Solum, “Originalism and Constitutional Construction,” Fordham Law Review (2013): 453, 467-475, 495-503, 524-537</li> <li>• Gary Lawson, “On Reading Recipes . . . and Constitutions,” Georgetown Law Journal (1997): 1823-1836</li> <li>• GIANAPP, AGAINST CONSTITUTIONAL ORIGINALISM (Foreign Country, Before Legalized Constitution) 39-64, 155-71</li> <li>• Balkin, Framework Originalism and the Living Constitution, 103 NW L. Rev. 549, 559-92</li> </ul>
5 9/18	<p><b><i>Precedent (Is Stare Decisis for Suckers?)</i></b></p> <p><b><i>Required Readings:</i></b></p> <ul style="list-style-type: none"> <li>• Henry Monaghan, “Stare Decisis and Constitutional Adjudication,” Columbia University Law Review (1988): 723, 748-755, 767-773</li> <li>• Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. &amp; Pub. Pol’y 23, 23-34 (1994)</li> <li>• Michael Stokes Paulsen, The Irrepressible Myth of Marbury, 101 Mich. L. Rev. 2706, 2706–09 (2003)</li> <li>• William Baude, The Judgment Power, 96 Geo. L.J. 1807, 1807–14, 1844–45 (2008)</li> <li>• John Harrison, The Power of Congress over the Rules of Precedent, 50 Duke L.J. 503, 503–31 (2000)</li> <li>• Caleb Nelson, “Stare Decisis and Demonstrably Erroneous Precedents,” Virginia Law Review (2001): 1, 1-21</li> <li>• H.L.A. Hart, The Concept of Law 124–47 (Penelope A. Bulloch &amp; Joseph Raz eds., 3d ed. 2012)</li> <li>• Jonathan F. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 933–51 (2018)</li> </ul>
6 9/25	<p><b><i>Change Over Time</i></b></p> <p><b><i>Required Readings:</i></b></p> <ul style="list-style-type: none"> <li>• Ronald Dworkin, Comment, in Antonin Scalia, A Matter of Interpretation 115, 115–22; Scalia's Response 144-49</li> <li>• Christopher R. Green, Originalism and the Sense-Reference Distinction, 50 St. Louis U. L. Rev. 555, 555–67, 574–76, 579–90, 594–96, 614–15 (2006)</li> <li>• John F. Stinneford, The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation, 102 Nw. U. L. Rev. 1739, 1739–68 (2008)</li> <li>• Balkin, Framework Originalism and the Living Constitution, 103 NW L. Rev. 549, 592-614</li> <li>• KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999), pp. 110-159</li> </ul>
7 10/2	<p><b><i>Methods</i></b></p> <ul style="list-style-type: none"> <li>• Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 519–20, 527–29, 538–53 (2003)</li> <li>• KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999), pp. 47-61, 88-109, 175-179, 182-195</li> </ul>

	<ul style="list-style-type: none"> <li>• John McGinnis and Michael Rappaport, “Original Methods Originalism,” Northwestern University Law Review (2009): 751-52, 756-780, 786-793</li> <li>• Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. &amp; Pub. Pol’y 817, 874-83 (2015)</li> <li>• Lawrence B. Solum, “Originalist Methodology,” University of Chicago Law Review (2017): 269, 279-293</li> </ul>
8 10/9	<p><b><i>Intentions</i></b></p> <ul style="list-style-type: none"> <li>• Sai Prakash, Spirit, 173 U. Penn. L. Rev. 937, 960-72, 996-1027</li> <li>• GIANAPP, AGAINST CONSTITUTIONAL ORIGINALISM (Written Constitutionalism at Founding) 65-116</li> <li>• Randy E. Barnett and Evan D. Bernick, “The Letter and the Spirit: A Unified Theory of Originalism,” Georgetown Law Journal (2018): 1, 1-6, 14-18, 32-45</li> </ul>
9 10/16	<p><b>*** First Drafts Due ***</b></p> <p><b><i>The Positivist Turn I</i></b></p> <p><b><i>Required Readings:</i></b></p> <ul style="list-style-type: none"> <li>• Dworkin, Is Law a System of Rules?</li> <li>• Scalia, The Rule of Law as the Law of Rules</li> <li>• Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. &amp; Pub. Pol’y 817, 845–83 (2015)</li> <li>• William Baude and Stephen E. Sachs, “The Law of Interpretation,” Harvard Law Review (2017): 1079, 1082-1121</li> </ul>
10 10/23	<p><b><i>The Positive Turn II (It’s a big turn)</i></b></p> <p><b><i>Required Readings:</i></b></p> <ul style="list-style-type: none"> <li>• William Baude &amp; Stephen E. Sachs, Grounding Originalism, 113 Nw. U. L. Rev. 1455, 1455–60, 1464–91 (2019)</li> <li>• William Baude, “Is Originalism Our Law?,” Columbia Law Review (2015): 2349, 2351-53, 2365-2386, 2392-2399</li> <li>• Jeffrey A. Pojanowski and Kevin C. Walsh, “Enduring Originalism,” Georgetown Law Journal (2016): 98-117, 138-153</li> <li>• GIANAPP, AGAINST CONSTITUTIONAL ORIGINALISM (Imposing the Modern on the Past) 226-50</li> </ul>
11 10/30	<p><b><i>Tradition</i></b></p> <ul style="list-style-type: none"> <li>• Sherif Girgis, “Living Traditionalism,” NYU Law Review (2023)</li> <li>• Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 4-21, 44-69 (2019)</li> <li>• Christina Mulligan, “Diverse Originalism, History &amp; Tradition,” Notre Dame Law Review (2024)</li> </ul>
12 11/6	<p><b><i>Originalism and Politics</i></b></p> <ul style="list-style-type: none"> <li>• Robert Post and Reva B. Siegel, “Originalism and a Political Practice: The Right’s Living Constitution,” Fordham Law Review (2006)</li> <li>• Jamal Greene, “Originalism’s Race Problem,” Denver University Law Review (2011)</li> <li>• Rebecca E. Zietlow, “Popular Originalism: The Tea Party Movement and Constitutional Theory,” Florida Law Review (2012)</li> <li>• Logan E. Sawyer III, “Principle and Politics in the New History of Originalism,” American Journal of Legal History (2017)</li> </ul>

	<ul style="list-style-type: none"> <li>• Paul Baumgardner, “Originalism and the Academy in Exile,” Law &amp; History Review (2019)</li> <li>• Michael W. McConnell, “On Reading the Constitution,” Cornell Law Review (1988): 359-363</li> </ul>
13 11/13	<p><b><i>Critics</i></b></p> <ul style="list-style-type: none"> <li>• Ronald Dworkin, A Matter of Principle (1986), pp. 32-57</li> <li>• Richard Posner, “Bork and Beethoven,” Stanford Law Review (1990): 1365-1382</li> <li>• Hadley Arkes, “A Natural Law Manifesto,” Notre Dame Law Review (2011): 1245, 1258-1275</li> <li>• Cass R. Sunstein, “Originalism,” Notre Dame Law Review (2018): 1671-1698</li> <li>• Adrian Vermeule, Beyond Originalism, Atlantic, Mar. 31, 2020</li> </ul>