

ADVANCED CONSTITUTIONAL INTERPRETATION: ORIGINALISM AND ITS FOES

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Thursdays from 4:00 p.m. to 6:55 p.m.
Holland Hall 355A

I. SUMMARY

This seminar will explore the constitutional interpretive theory and practice of Originalism—the idea that the text of the Constitution is fixed and should be interpreted as those words were thought to mean when the people adopted it, which results in constitutional constraints on its interpretation. In recent decades, Originalism has emerged as a key force both in the academy and in the courts. Six of the sitting United States Supreme Court justices have repeatedly invoked originalist interpretative principles 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 relatively new strands of Originalism;
- v. Explain an Originalist's constitutional view of Federalism and separation of powers under the Constitution;
- 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 is scheduled to meet the following Thursdays from 4:00pm to 6:55pm on 8/22, 8/29, 9/12, 9/19, 10/3, 10/17, 11/7, and 11/14. Attendance in class is required by both the ABA and the Law School. Attendance will be taken at each class meeting. Situations may occur that could result in the need for one of the instructors to facilitate the class via Zoom during an in-person class meeting. Regardless, at least one of the instructors of this seminar will be physically present for class meetings.

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 drop/add period expires, the student may consider the impact of missing classes for such *planned* absences. The course instructors will address unplanned absences from class related to illnesses and extraordinary circumstances 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. ABA Out-of Class Course Requirement:

ABA Standard 310 requires that students devote 120 minutes to out-of-class preparation for every "classroom hour" of in-class instruction. As such, 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 semester 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 notified 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. One reflection paper is currently specified in the syllabus. The subject matter for any additional reflection papers, as well as the due date for the reflection paper, will be announced via Canvas.

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 Constitution's original meaning, 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 7, 2024**. The final paper must be 8000 to 10,000 words, and the document must be double-spaced in Century, 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 **Monday, December 16, at 11:59 p.m. EST.** Papers will be graded based on the degree of difficulty of the subject matter, 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 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 from 2:00 p.m. to 4:00 p.m. prior to each scheduled class. For students unable to attend the in-person office hour(s) due to a class conflict, the instructors will make every effort to accommodate schedules and meet via Zoom or Teams.

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 22, 2024: Legitimacy of a Democratic Constitution; Constitutional Underpinnings of Federalism and Separation of Powers + The Role of an Article III Judge, & Original Intent Originalism

- Wurman, Ch. 1
- *The Federalist* Nos. 1, 10, 78, 79, 80
- *Antifederalist Papers* Nos. XI, XII, XV

PART II

August 29, 2024: 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). <https://founders.archives.gov/?q=Correspondent%3A%22Jefferson%2C%20Thomas%22%20Correspondent%3A%22Madison%2C%20James%22&s=1111311113&r=304>.
- 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).

September 12, 2024: Early Debates on Originalism. Original Intent vs. Original Public Meaning (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).
- Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

September 19, 2024: Original Public Meaning Originalism (Cont'd) + Original Methods Originalism

- Wurman, ch. 6.
- Gary S. Lawson, *Equivocal Originalism*, 27 TEXAS REVIEW OF LAW & POLITICS 309 (2022).
- 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).
- *District of Columbia v. Heller*, 554 U.S. 570 (2004).
 - Justice Scalia's majority opinion vs. Justice Stevens's dissenting opinion
- *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
- Optional: Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. Rev. 923 (2009).

PART III

October 3, 2024: Originalism's Legitimacy + Criticisms of Originalism & Alternatives to Originalism

- Wurman, ch. 8, at 117–25.
- 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-commongoodism> (Response to Vermeule's Common Good Constitutionalism).

October 17, 2024: (FLEX DAY—Readings TBA)

October 31, 2024: 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 before this October 31 due date (October 17, 2024). The more detailed the topic summary and outline submitted, the more meaningful feedback the instructors can provide you to prepare your final paper.

November 7, 2024 Alternatives to Originalism (cont'd)

- Wurman, ch. 8, at 125–31. (Note: Dworkin’s Moral Reading)
- 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).
- *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.

PART IV

November 14, 2024: Applied Statutory Textualism & Discerning Original Meaning of Statutes / STUDENTS PRESENT PAPERS!

- *Yates v. United States*, 574 U.S. 528 (2015).
- *Bostock v. Clayton County*, 140 U.S. 1731 (2020).
- **Students Present on Their Final Papers**

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/bostockand-originalism/>.

December 16, 2024, 11:59 p.m. (EST)—Final Papers must be submitted via Canvas. Papers will not be accepted via email.