

Originalism and Its Critics

University of Chicago Law School

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Winter 2014

Requirements. Students must write a research paper of 20-30 pages, attend classes, and participate in discussions. The grade will be based mainly on the paper, but attendance and participation count at the margin. You should clear your topic with one of us before writing.

Deadline for graduating students: May 5, 2014

Deadline for non-graduating students: June 23, 2014

Week 1: Introduction to the Method

District of Columbia v. Heller, 554 U.S. 570 (2008)

Barnett/Sunstein debate: http://legalaffairs.org/webexclusive/debateclub_cie0505.msp

Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204. (1980)

Week 2: The Federalist Papers

Printz v. United States, 521 U.S. 898 (1997)

Wesley Campbell, Commandeering and Constitutional Change, 122 Yale L. J. 1104 (2013) (focus on Part II, pp. 1126-1144 and Part IV, 1171-1181)

John Manning, Textualism and the Role of the Federalist in Constitutional Adjudication, 66 Geo. Wash. L. Rev. 1337 (1998)

Optional:

Vasan Kesavan & Michael S. Paulsen, The Interpretive Force of the Constitution's Secret Drafting History, 91 Geo. L.J. 1113 (2003) (pp. 1183-1214)

Week 3: Precedent

Planned Parenthood v. Casey, 505 U.S. 833 (1992)

McDonald v. City of Chicago, 561 U.S. 3025 (2010) (Parts I-III, V; Scalia's concurrence)

Gary Lawson, The Constitutional Case against Precedent, 17 Harv. J. L. & Pub. Pol. 17 (1994)

John McGinnis & Michael Rappaport, Originalism and Precedent, 34 Harv. J.L. & Pub. Pol'y 121 (2011)

Optional:

Remaining opinions in McDonald

Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1 (2001)

Week 4: Non-Originalist Judging

Brown v. Board of Education, 347 U.S. 483 (1954)
Plessy v. Ferguson, 163 U.S. 537 (1896)
Michael McConnell, The Originalist Case for Brown v. Board, 19 Harv. J. L. & Pub Pol. 457 (1996) & The Forgotten Constitutional Moment, 11 Const. Comm. 115 (1994)
Michael Klarman, Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881 (1995)
Jamal Greene, Originalism's Race Problem, 88 Den. U. L. Rev. 517 (2011)

Optional:

Michael McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995)

Week 5: Recess Appointments

Noel Canning, Government's brief, <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/noelcanning.osg.pdf>

Noel Canning, Baude/McConnell brief, <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/Constitutional-Law-Scholars-amicus-brief-NLRB-v.-Noel-Canning-U.S.-Supreme-Court.pdf>

Noel Canning, Ramsey brief, <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/Originalist-Scholars-amicus-brief-NLRB-v.-Noel-Canning-U.S.-Supreme-Court.pdf>

Rappaport, The Original Meaning of the Recess Appointments Clause, 52 UCLA L. Rev. 1487 (2005)

Ed Hartnett, Recess Appointments of Article III Judges: Three Constitutional Questions, 26 Cardozo L. Rev. 377

Optional:

Cass Sunstein, Originalism vs. Burkeanism: A Dialogue Over Recess, 126 Harv. L. Rev. F. 126 (2013)

Week 6: The Case for Originalism

Gary Lawson, On Reading Recipes ... and Constitutions, 85 Geo L. J. 1823 (1997)

Larry Alexander, Telepathic Law, Constitutional Commentary, 27 Const. Comment. 139 (2010)

Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849 (1989)

Stephen Sachs, Originalism as a Theory of Legal Change (draft)

Optional:

Frank Easterbrook, Textualism and the Dead Hand, 66 Geo. Wash. L. Rev. 1119 (1998)

Michael McConnell, Textualism and the Dead Hand of the Past, 66 Geo. Wash. L. Rev. 1127 (1998)

Week 7: What Are the Alternatives?

David Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877 (1996)

Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346 (2006)

Bruce Ackerman, The Living Constitution, 120 Harv. L. Rev. 1737 (2007)

Optional:

Richard Fallon, How to Choose a Constitutional Theory, 87 Cal. L. Rev. 535 (1999)

Mitchell Berman, Originalism is Bunk, 84 N.Y.U. L. Rev. 1 (2009)

Week 8: Accounting for Change

Jack Balkin, Living Originalism (ch. 1)

Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165 (1993)

Christopher Green, Originalism and the Sense-Reference Distinction, 50 St. Louis U. L.J. 555

Optional:

Frank Easterbrook, Abstraction and Authority, 59 U. Chi. L. Rev. 349 (1992).

Week 9: Culture and Amendments

Edwin Meese III, Speech Before the American Bar Association, Washington, D.C. (July 9, 1985)

<http://www.justice.gov/ag/aghistorical/meese/1985/07-09-1985.pdf>

Robert Post & Reva Siegel, Originalism as a Political Practice: The Right's Living Constitution, 75 Fordham L. Rev. 545 (2006)

John McGinnis & Michael Rappaport, Originalism and the Good Constitution (ch. 11)

Jamal Greene, On the Origins of Originalism, 88 Tex. L. Rev. 1 (2009)

Optional:

John Harrison, Forms of Originalism and the Study of History, 26 Harv. J. L. & Pub. Pol'y 83 (2003)