Constitutional Originalism  
Spring 2020

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Areada 133  
Office Hours: T 10:30-11:30am

Harvard Law School  
WCC B015  
T 1:10-3:10pm

This course will explore the scholarly debate surrounding originalism as a theory of constitutional interpretation. There will be some consideration of prominent criticisms of originalism, but the class will mostly focus on the internal developments and debates within the originalism literature. Topics will include the normative justifications for originalism, the role of precedent within originalism, the interpretation/construction distinction, and the relationship between originalism and judicial deference.

One book is available for purchase: Keith E. Whittington, Constitutional Interpretation (Lawrence: University Press of Kansas, 1999). The remaining materials are all available on the course website and also available in hard copy form from the copy center. It would be useful to have access to that day’s materials during each class.

The course grade will primarily be based on the take-home exam at the end of the semester. Some marginal adjustments will be made to reflect course participation. If you would like to pursue a research paper option in lieu of the take-home exam, please let me know and we can make appropriate arrangements.

Week 1: Living Constitutionalism and Conservative Constitutionalism before Originalism (≈ 86 pages)


Further Reading:
Ken Kersch, Conservatives and the Constitution (2019)
Woodrow Wilson, Constitutional Government in the United States (1908)
Howard Lee McBain, The Living Constitution (1927)
Thomas Reed Powell, “Changing Constitutional Phases,” Boston University Law Review (1939)
C. Perry Patterson, “The Supreme Court as a Constituent Convention,” Tulane Law Review (1949)
Eugene V. Rostow, The Sovereign Prerogative (1962)
Philip B. Kurland, Politics, the Constitution, and the Warren Court (1970)
Willmoore Kendall, “American Conservatism and the ‘Prayer’ Decision,” Modern Age (1964)
Walter Berns, Taking the Constitution Seriously (1987)

Week 2: The Rise of Originalism (= 92 pages)

Robert H. Bork, Tempting of America (1990), pp. 133-160

Further Reading:
Edwin Meese III, “Address before the DC Chapter of the Federalist Society Lawyer’s Division” (1986)


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**Week 3: The New Originalism** (≈ 98 pages)


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**Further Reading:**


Ilan Wurman, *A Debt Against the Living* (2017)


**Week 4: Interpretation versus Construction**


**Further Reading:**

**Week 5: Intentionalism versus Original Public Meaning versus Original Methods** (≈ 108 pages)


**Further Reading:**

Week 6: Judicial Activism versus Judicial Restraint (= 41 pages)

Randy E. Barnett, Restoring the Lost Constitution (2004), pp. 253-269

Further Reading:
Robert H. Bork, “Address at the University of San Diego Law School” (1985)
Earl Maltz, Rethinking Constitutional Law (1994)
Matthew J. Franck, Against the Imperial Judiciary (1996)
Gary L. McDowell, Curbing the Court (1988)
Robert F. Nagel, Constitutional Cultures (1989)
Robert F. Nagel, Judicial Power and American Character (1994)
Keith E. Whittington, Constitutional Interpretation (1999), pp. 34-46, 167-168
Clark M. Neily III, Terms of Engagement (2013)

**Week 7: Democratic Commitments (≈ 70 pages)**

Keith E. Whittington, *Constitutional Interpretation* (1999), pp. 110-159

**Further Reading:**

**Week 8: The Good Constitution (≈ 65 pages)**


**Further Reading:**

**Week 9: Originalism and Positivism** (≈ 65 pages)


**Further Reading:**

**Week 10: Stare Decisis and Originalism** (≈ 56 pages)


**Further Reading:**

**Week 11: Conservative Critics** (≈ 119 pages)


**Further Reading:**

**Week 12: Liberal Critics** (≈ 142 pages)


**Further Reading:**
Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation* (2006)
Lawrence Lessig, *Fidelity and Constraint* (2019)

Some Further Topics for Exploration:

Applied Originalism:

Alfred H. Kelly, “Clio and the Court: An Illicit Love Affair,” in *Supreme Court Review, 1965*
Charles Miller, *The Supreme Court and the Uses of History* (1969)


Donald Drakeman, *Church, State, and Original Intent* (2011)


### The Politics of Originalism:


