

Constitutional Originalism
Spring 2020

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Areeda 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)

Edward S. Corwin, "Constitution v. Constitutional Theory," *American Political Science Review* (1925): 290-304

Charles A. Beard, "The Living Constitution," *Annals of the American Academy of Political and Social Science* (1936): 29-34

Arthur Selwyn Miller, "Notes on the Concept of the Living Constitution," *George Washington Law Review* (1963): 881-918

William Brennan, "The Constitution of the United States: Contemporary Ratification," Text and Teaching Symposium, Georgetown University (1986) (17pp)

James M. Beck, "The Future of the Constitution," *American Bar Association Journal* (1933): 493-498, 540

John J. Parker, "Is the Constitution Passing?" *American Bar Association Journal* (1933): 570-575

Elliott Abrams, "The Chains of the Constitution," *Commentary* (1977): 84-85

Further Reading:

Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of 'Living Constitution' in the Course of American State-Building," *Studies in American Political Development* (1997)

G. Edward White, *The Constitution and the New Deal* (2000)

Ken Kersch, *Conservatives and the Constitution* (2019)

Arthur W. Machen, Jr., "The Elasticity of the Constitution," *Harvard Law Review* (1900)

Woodrow Wilson, *Constitutional Government in the United States* (1908)

Roscoe Pound, "Mechanical Jurisprudence," *Columbia Law Review* (1908)

Howard Lee McBain, *The Living Constitution* (1927)

E.F. Albertsworth, "The Federal Supreme Court and the Superstructure of the Constitution," *American Bar Association Journal* (1930)

Stanley Reed, "The Constitution of the United States," *American Bar Association Journal* (1936)

Walter H. Hamilton, "The Constitution – Apropos of Crosskey," *University of Chicago Law Review* (1953)

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)

J.A.C. Grant, "Our Common Law Constitution," *Boston University Law Review* (1960)

Eugene V. Rostow, *The Sovereign Prerogative* (1962)

Charles A. Reich, "Mr. Justice Black and the Living Constitution," *Harvard Law Review* (1963)

Owen Fiss, "The Forms of Justice," *Harvard Law Review* (1979)

Thomas Grey, "Do We Have an Unwritten Constitution?," *Stanford Law Review* (1975)

Thomas Grey, "The Constitution as Scripture," *Stanford Law Review* (1984)

Michael J. Perry, *The Constitution, the Courts, and Human Rights* (1982)

Harry Wellington, "The Nature of Judicial Review," *Yale Law Journal* (1982)

Philip B. Kurland, *Politics, the Constitution, and the Warren Court* (1970)

Willmoore Kendall, "American Conservatism and the 'Prayer' Decision," *Modern Age* (1964)

Willmoore Kendall and George W. Carey, *The Basic Symbols of the American Political Tradition* (1970)

George W. Carey, "Supreme Court, Judicial Review, and Federalist Seventy-Eight," *Modern Age* (1974): 356-368

George W. Carey, *The Federalist* (1989)

George W. Carey, *In Defense of the Constitution* (1989)

Martin Diamond, "Democracy and *The Federalist*: A Reconsideration of the Framers' Intent," *American Political Science Review* (1959)

Martin Diamond, "The Declaration and the Constitution: Liberty, Democracy, and the Founders," *The Public Interest* (1975)

Martin Diamond, "*The Federalist* on Federalism: Neither a National Nor a Federal Constitution, But a Composition of Both," *Yale Law Journal* (1976)

Walter Berns, *The First Amendment and the Future of American Democracy* (1976)

Walter Berns, "Judicial Review and the Rights and Laws of Nature," *Supreme Court Review*, 1982

Walter Berns, *Taking the Constitution Seriously* (1987)

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

Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* (1971): 1-35

William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* (1976): 693-706

Raoul Berger, *Government by Judiciary* (1977), pp. 363-372

Edwin Meese III, "Speech to the American Bar Association" (1985) (8pp)

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

Further Reading:

Robert H. Bork, "Styles in Constitutional Theory," *South Texas Law Journal* (1985)

Robert H. Bork, "The Constitution, Original Intent, and Economic Rights," *San Diego Law Review* (1986)

Henry Monaghan, "Our Perfect Constitution," *NYU Law Review* (1981)

Edwin Meese III, "Address before the DC Chapter of the Federalist Society Lawyer's Division" (1986)

U.S. Department of Justice Office of Legal Policy, *Original Meaning Jurisprudence: A Sourcebook* (1987)

Raoul Berger, "New Theories of 'Interpretation': The Activist Flight from the Constitution," *Ohio State Law Journal* (1986)

Raoul Berger, "'Original Intention' in Historical Perspective," *George Washington Law Review* (1986)

Earl Maltz, "The Failure of the Attacks on Originalism," *Constitutional Commentary* (1987)

Charles Fried, "Sonnet LXV and the 'Black Ink' of the Framers' Intentions," *Harvard Law Review* (1987)

Gary L. McDowell, "The Language of the Law and the Foundations of American Constitutionalism," *William and Mary Quarterly* (1998)

Christopher Wolfe, *The Rise of Modern Judicial Review* (1986)

William Gangi, *Saving the Constitution from the Courts* (1995)

Gregory Bassham, *Original Intent and the Constitution* (1992)

Daniel Farber, "The Originalism Debate: A Guide to the Perplexed," *Ohio State Law Journal* (1989)

Jeffrey Goldsworthy, "Originalism in Constitutional Interpretation," *Federal Law Review* (1997)

Steven D. Smith, *The Constitution and the Pride of Reason* (1998)

Steven D. Smith, *Law's Quandary* (2004)

Johnathan O'Neill, *Originalism in American Law and Politics* (2005)

Walter B. Michaels, "A Defense of the Old Originalism," *Western New England Law Review* (2009)

Joel Alicea, "Originalism and the Rule of the Dead," *National Affairs* (2015)

Week 3: The New Originalism (≈ 98 pages)

Keith E. Whittington, "Originalism: A Critical Introduction," *Fordham Law Review* (2013): 375-410

Antonin Scalia, *A Matter of Interpretation* (1997), pp. 37-47

Randy Barnett, "An Originalism for Nonoriginalists," *Loyola Law Review* (1999): 611-654

Lawrence B. Solum, "The Fixation Thesis: The Role of Historical Fact in Original Meaning," *Notre Dame Law Review* (2015): 1, 20-30

Further Reading:

Keith E. Whittington, "The New Originalism," *Georgetown J. L. & Pub. Pol.* (2004)

Keith E. Whittington, *Constitutional Interpretation* (1999)

Walter B. Michaels, "A Defense of the Old Originalism," *Western New England Law Review* (2009)

Thomas B. Colby and Peter J. Smith, "Living Originalism," *Duke Law Journal* (2009)

Mitchell N. Berman and Kevin Toh, "On What Distinguishes New Originalism from Old: A Jurisprudential Take," *Fordham University Law Review* (2013)

Steven D. Smith, "That Old-Time Originalism," in *The Challenge of Originalism*, eds. Grant Huscroft and Bradley W. Miller (2011)

Larry Alexander, "Simple-Minded Originalism," in *The Challenge of Originalism*, eds. Grant Huscroft and Bradley W. Miller (2011)

Larry Alexander, "Originalism: The Why and the What," *Fordham Law Review* (2013)

Jack M. Balkin, "Framework Originalism and the Living Constitution," *Northwestern University Law Review* (2009)

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

Lee J. Strang, *Originalism's Promise* (2019)

William Baude, "Originalism as a Constraint on Judges," *University of Chicago Law Review* (2018)

Week 4: Interpretation versus Construction (≈ 132 pages)

Keith E. Whittington, *Constitutional Interpretation* (1999), pp. 1-16, 195-212

Keith E. Whittington, *Constitutional Construction* (1999), pp. 1-19

Jack M. Balkin, *Living Originalism* (2011), pp. 21-34, 129-137, 256-273

Lawrence B. Solum, "Originalism and Constitutional Construction," *Fordham Law Review* (2013): 453, 467-475, 495-503, 524-537

Randy E. Barnett and Evan D. Bernick, "The Letter and the Spirit: A Unified Theory of Originalism," *Georgetown Law Journal* (2018): 1, 32-45

Further Reading:

Keith E. Whittington, *Constitutional Construction* (1999)

Keith E. Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses," *North Carolina Law Review* (2002)

Keith E. Whittington, *Political Foundations of Judicial Supremacy* (2009)

Keith E. Whittington, "Constructing a New American Constitution," *Constitutional Commentary* (2010)

Keith E. Whittington, "The Status of Unwritten Constitutional Conventions in the United States," *University of Illinois Law Review* (2013)

Keith E. Whittington, "Originalism, Constitutional Construction, and Faithless Electors," *Arizona Law Review* (2017)

Lawrence B. Solum, "The Unity of Interpretation," *Boston University Law Review* (2010)

Lawrence B. Solum, "The Interpretation-Construction Distinction," *Constitutional Commentary* (2010)

Lawrence B. Solum, "Originalism and the Unwritten Constitution," *University of Illinois Law Review* (2013)

Randy E. Barnett, *Restoring the Lost Constitution* (2004)

Randy E. Barnett, "Interpretation and Construction," *Harvard J.L. & Pub. Policy* (2011)

Randy E. Barnett, "The Gravitational Force of Originalism," *Fordham Law Review* (2013)

Jack M. Balkin, "The Roots of the Living Constitution," *Boston University Law Review* (2012)

Jack M. Balkin, "The New Originalism and the Uses of History," *Fordham Law Review* (2013)

Jack M. Balkin, "The Construction of Original Public Meaning," *Constitutional Commentary* (2016)

Gary Lawson, "Legal Indeterminacy: Its Cause and Cure," *Harvard J.L. & Pub. Policy* (1995)

Christopher R. Green, "'This Constitution': Constitutional Indexicals as a Basis for Textualist Semi-Originalism," *Notre Dame Law Review* (2008)

Michael Stokes Paulsen, "Does the Constitution Prescribe Rules for Its Own Interpretation?," *Northwestern University Law Review* (2009)

Amy Barrett, "The Interpretation/Construction Distinction in Constitutional Law," *Constitutional Commentary* (2010)

Mitchell N. Berman, "Constitutional Constructions and Constitutional Decision Rules," *Constitutional Commentary* (2010)

Lee J. Strang, "Originalism as Popular Constitutionalism? Theoretical Possibilities and Practical Differences," *Notre Dame Law Review* (2011)

Peter J. Smith, "How Different Are Originalism and Non-Originalism?" *Hastings Law Journal* (2011)

John O. McGinnis and Michael B. Rappaport, "The Abstract Meaning Fallacy," *University of Illinois Law Review* (2012)

Antonin Scalia and Bryan A. Garner, *Reading Law* (2012)
Gary Lawson, "Dead Document Walking," *Boston University Law Review* (2012)
James E. Fleming, "The Inclusiveness of the New Originalism," *Fordham Law Review* (2013)
Nelson Lund, "Living Originalism: the Magical Mystery Tour," *Texas A&M Law Review* (2015)
John O. McGinnis, "The Duty of Clarity," *George Washington Law Review* (2016)
Richard S. Kay, "Construction, Originalist Interpretation, and the Complete Constitution," *University of Pennsylvania Constitutional Law Online* (2016)
William Baude, "Constitutional Liquidation," *Stanford Law Review* (2019)
Rebecca E. Zietlow, "Popular Originalism: The Tea Party Movement and Constitutional Theory," *Florida Law Review* (2012)

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

Gary Lawson, "On Reading Recipes . . . and Constitutions," *Georgetown Law Journal* (1997): 1823-1836
Keith E. Whittington, *Constitutional Interpretation* (1999), pp. 47-61, 88-109, 175-179, 182-195
John McGinnis and Michael Rappaport, "Original Methods Originalism," *Northwestern University Law Review* (2009): 751, 758-780, 786-793
Lawrence B. Solum, "Originalist Methodology," *University of Chicago Law Review* (2017): 269, 279-293

Further Reading:

Raoul Berger, "Originalist Theories of Constitutional Interpretation," *Cornell Law Review* (1988)
Richard S. Kay, "Adherence to the Original Intentions in Constitutional Interpretation," *Northwestern University Law Review* (1988)
Earl Maltz, "Some New Thoughts on an Old Problem: The Role of the Intent of the Framers in Constitutional Theory," *Boston University Law Review* (1983)
Keith E. Whittington, "Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation," *Review of Politics* (2000)
Larry Alexander and Saikrishna Prakash, "'Is That English You're Speaking?' Why Intention Free Interpretation is an Impossibility," *San Diego Law Review* (2004)
Larry Alexander, "Telepathic Law," *Constitutional Commentary* (2010)
Stanley Fish, "The Intentionalist Thesis Once More," in *The Challenge of Originalism*, eds. Grant Huscroft and Bradley W. Miller (2011)
Stephen Sachs, "Originalism as a Theory of Legal Change," *Harvard J. L. & Pub. Policy* (2015)
Lawrence B. Solum, "District of Columbia v. Heller and Originalism," *Northwestern University Law Review* (2009)
John O. McGinnis and Michael B. Rappaport, "Unifying Original Intent and Original Public Meaning," *Northwestern University Law Review* (2019)
Richard S. Kay, "Original Intention and Public Meaning in Constitutional Interpretation," *Northwestern University Law Review* (2009)
Vasan Kesavan and Michael Stokes Paulsen, "The Interpretative Force of the Constitution's Secret Drafting History," *Georgetown Law Journal* (2003)
Caleb Nelson, "Originalism and Interpretive Conventions," *University of Chicago Law Review* (2003)
Christopher R. Green, "Originalism and the Sense-Reference Distinction," *Saint Louis University Law Journal* (2006)

John F. Manning, "What Divides Textualists from Purposivists?" *Columbia Law Review* (2006)
Kurt T. Lash, "Originalism All the Way Down?" *Constitutional Commentary* (2015)
Jonathan Gienapp, *The Second Creation* (2018)
Scott Soames, "Deferentialism: A Post-Originalist Theory of Legal Interpretation," *Fordham Law Review* (2013)
Stephen E. Sachs, "Originalism Without Text," *Yale Law Journal* (2017)
Joel Alicea and Donald L. Drakeman, "The Limits of New Originalism," *University of Pennsylvania Journal of Constitutional Law* (2013)

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

Lino A. Graglia, "How the Constitution Disappeared," *Commentary* (1986): 19-27
Robert H. Bork, "Styles in Constitutional Theory," *South Texas Law Journal* (1985): 383-396
Michael W. McConnell, "The Importance of Humility in Judicial Review," *Fordham Law Review* (1997): 1269, 1289-1293
Randy E. Barnett, *Restoring the Lost Constitution* (2004), pp. 253-269

Further Reading:

Keenan D. Kmiec, "The Origin and Current Meanings of 'Judicial Activism,'" *California Law Review* (2004)
Bradley C. Canon, "Defining the Dimensions of Judicial Activism," *Judicature* (1982)
Frank H. Easterbrook, "Do Liberals and Conservatives Differ in Judicial Activism," *University of Colorado Law Review* (2002)
Ernest A. Young, "Judicial Activism and Conservative Politics," *University of Colorado Law Review* (2002)
Richard A. Posner, "The Rise and Fall of Judicial Self-Restraint," *California Law Review* (2012)
Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism," *Harvard J.L. & Pub. Policy* (1996)
Robert H. Bork, "Address at the University of San Diego Law School" (1985)
Earl Maltz, "The Appeal of Originalism," *Utah Law Review* (1987)
Earl Maltz, *Rethinking Constitutional Law* (1994)
Matthew J. Franck, *Against the Imperial Judiciary* (1996)
Matthew J. Franck, "James Bradley Thayer and the Presumption of Constitutionality: A Strange Posthumous Career," *American Political Thought* (2019)
Gary L. McDowell, *Curbing the Court* (1988)
Robert F. Nagel, *Constitutional Cultures* (1989)
Robert F. Nagel, *Judicial Power and American Character* (1994)
Steven G. Calabresi, "Textualism and the Counter-majoritarian Difficulty," *George Washington Law Review* (1998)
Keith E. Whittington, *Constitutional Interpretation* (1999), pp. 34-46, 167-168
Steven G. Calabresi, "The Originalist and Normative Case against Judicial Activism," *Michigan Law Review* (2005)
Richard S. Kay, "Originalist Values and Constitutional Interpretation," *Harvard J.L. & Pub. Policy* (1995)
Clark M. Neily III, *Terms of Engagement* (2013)
Randy E. Barnett, *Restoring the Lost Constitution* (2003)
Randy E. Barnett, "Judicial Conservatism v. a Principled Judicial Activism," *Harvard J.L. & Pub. Policy* (1987)
Randy E. Barnett, "Judicial Engagement Through the Lens of *Lee Optical*," *George Mason Law Review* (2011)
Randy E. Barnett, "The Wages of Crying Judicial Restraint," *Harvard J.L. & Pub. Policy* (2013)
Randy E. Barnett, "The Judicial Duty to Scrutinize Legislation," *Valparaiso University Law Review* (2014)

J. Harvie Wilkinson III, *Cosmic Constitutional Theory* (2011)
Mark Pulliam, "Unleashing the 'Least Dangerous Branch,'" *Texas Review of Law & Politics* (2017)
Nelson Lund, "Two Faces of Judicial Restraint (or are There More) in McDonald v. City of Chicago," *Florida Law Review* (2011)
Douglas W. Kmiec, "Natural Law Originalism for the Twenty-First Century – A Principle of Judicial Restraint, Not Invention," *Suffolk University Law Review* (2006)

Week 7: Democratic Commitments (≈ 70 pages)

Michael W. McConnell, "On Reading the Constitution," *Cornell Law Review* (1988): 359-363
Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* (1989): 849-866
Keith E. Whittington, *Constitutional Interpretation* (1999), pp. 110-159

Further Reading:

Raoul Berger, "Originalist Theories of Constitutional Interpretation," *Cornell Law Quarterly* (1988)
Michael W. McConnell, "Textualism and the Dead Hand of the Past," *George Washington Law Review* (1998)
Lino Graglia, "Interpreting the Constitution: Posner on Bork," *Stanford Law Review* (1992)
Kurt Lash, "Originalism, Popular Sovereignty, and Reverse Stare Decisis," *Virginia Law Review* (2007)
Saikrishna B. Prakash, "The Misunderstood Relationship between Originalism and Popular Sovereignty," *Harvard Journal of Law and Public Policy* (2008)
Randy E. Barnett, "*We the People: Each and Every One*," *Yale Law Journal* (2014)
Andrew G.I. Kilberg, "We the People: The Original Meaning of Popular Sovereignty," *Virginia Law Review* (2014)
Randy E. Barnett, *Our Republican Constitution* (2016)
Thomas B. Colby, "Originalism and the Ratification of the Fourteenth Amendment," *Northwestern University Law Review* (2015)
Timothy Sandefur, *The Conscience of the Constitution* (2015)
Christopher R. Green, "Constitutional Truthmakers," *Notre Dame J. L., Ethics & Pub. Policy* (2018)

Week 8: The Good Constitution (≈ 65 pages)

Randy E. Barnett, "Scalia's Infidelity: A Critique of Faint-Hearted Originalism," *University of Cincinnati Law Review* (2006): 7-24
John O. McGinnis and Michael B. Rappaport, "A Pragmatic Defense of Originalism," *Northwestern University Law Review* (2007): 383-397
John O. McGinnis and Michael B. Rappaport, "Originalism and the Good Constitution," *Georgetown Law Journal* (2010): 1695-1720
Robert J. Delahunty and John Yoo, "Saving Originalism," *Michigan Law Review* (2015): 1081, 1103-1112

Further Reading:

Akhil Reed Amar, "The Document and the Doctrine," *Harvard Law Review* (2000)
John O. McGinnis and Michael B. Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002)
Randy E. Barnett, "Constitutional Legitimacy," *Columbia Law Review* (2003)

Jack M. Balkin, "Original Meaning and Constitutional Redemption," *Constitutional Commentary* (2007)
Frank H. Easterbrook, "Pragmatism's Role in Interpretation," *Harvard J.L. & Pub. Policy* (2008)
Michael B. Rappaport, "The Classical Liberal Constitution: An Originalist Assessment," *NYU J. L. & Liberty* (2014)
Steven G. Calabresi, "On Originalism and Liberty," *Cato Supreme Court Review* (2015)
Gregory Bassham, "How Not to Argue for Originalism," *Journal of College and University Law* (2016)

Week 9: Originalism and Positivism (≈ 65 pages)

William Baude, "Is Originalism Our Law?," *Columbia Law Review* (2015): 2349, 2365-2386, 2392-2399
Jeffrey A. Pojanowski and Kevin C. Walsh, "Enduring Originalism," *Georgetown Law Journal* (2016): 98-117, 138-153
William Baude and Stephen E. Sachs, "The Law of Interpretation," *Harvard Law Review* (2017): 1079, 1097-1121

Further Reading:

William Baude and Stephen E. Sachs, "Grounding Originalism," *Northwestern University Law Review* (2019)
James A. Gardner, "The Positivist Foundations of Originalism: An Account and Critique," *Boston University Law Review* (1991)
Matthew D. Adler, "Interpretive Contestation and Legal Correctness," *William and Mary Law Review* (2012)
Andrew LeDuc, "Paradoxes of Positivism and Pragmatism in the Debate about Originalism," *Ohio Northern University Law Review* (2016)
Charles L. Barzun, "The Positive U-Turn," *Stanford Law Review* (2017)
Richard Primus, "Is Theocracy Our Politics?," *Columbia Law Review Forum* (2015)

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

Henry Monaghan, "Stare Decisis and Constitutional Adjudication," *Columbia University Law Review* (1988): 723, 748-755, 767-773
Gary Lawson, "Stare Decisis and Constitutional Meaning," *Harvard J. L. & Pub. Policy* (1994): 23-34
Caleb Nelson, "Stare Decisis and Demonstrably Erroneous Precedents," *Virginia Law Review* (2001): 1, 52-84

Further Reading:

Keith E. Whittington, *Constitutional Interpretation* (1999), pp. 168-174
Randy E. Barnett, "Trumping Precedent with Original Meaning," *Constitutional Commentary* (2005)
Michael Stokes Paulsen, "The Intrinsically Corrupting Influence of Precedent," *Constitutional Commentary* (2005)
Thomas W. Merrill, "Originalism, Stare Decisis, and the Promotion of Judicial Restraint," *Constitutional Commentary* (2005)
Lee J. Strang, "An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good," *New Mexico Law Review* (2006)
John O. McGinnis and Michael B. Rappaport, "Reconciling Originalism and Precedent," *Northwestern University Law Review* (2009)
John O. McGinnis and Michael B. Rappaport, "Originalism and Precedent," *Harvard J. L. & Pub. Policy* (2011)
Nelson Lund, "Stare Decisis and Originalism," *George Mason Law Review* (2012)
Leslie F. Goldstein, "Original Meaning, Precedent, and Popular Sovereignty," *Fordham Law Review* (2013)

Amy Coney Barrett, "Originalism and Stare Decisis," *Notre Dame Law Review* (2017)
Randy J. Kozel, "Original Meaning and the Precedent Fallback," *Vanderbilt Law Review* (2015)

Week 11: Conservative Critics (≈ 119 pages)

Richard Posner, "Bork and Beethoven," *Stanford Law Review* (1990): 1365-1382
Ernest Young, "Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation," *North Carolina Law Review* (1994): 619, 659-724
Hadley Arkes, "A Natural Law Manifesto," *Notre Dame Law Review* (2011): 1245, 1258-1275
Richard A. Epstein, "Beyond Textualism," *Harvard J.L. & Pub. Policy* (2014): 705-720
Michael S. Greve, "Originalism as Ideology," *Law and Liberty* (2019) 5pp

Further Reading:

Harry V. Jaffa, *Storm over the Constitution* (1999)
Steven D. Smith, "The Writing of the Constitution and the Writing on the Wall," *Harvard J.L. & Pub. Policy* (1995)
Tara Smith, "Originalism's Misplaced Fidelity," *Constitutional Commentary* (2009)
Edward J. Erler, "Don't Read the Constitution the Way Robert Bork Did," *American Greatness* (2019)
Adrian Vermeule, "The Publius Paradox," *Modern Law Review* (2019)
Michael O'Shea, "Normative Foundations of Originalism," *Law and Liberty* (2019)

Week 12: Liberal Critics (≈ 142 pages)

Paul Brest, "The Misconceived Quest for Original Understanding," *Boston University Law Review* (1980): 204-238
H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* (1985): 885, 902-921
Ronald Dworkin, *A Matter of Principle* (1986), pp. 32-57
Mitchell Berman, "Originalism is Bunk," *NYU Law Review* (2009): 1, 59-96
Cass R. Sunstein, "Originalism," *Notre Dame Law Review* (2018): 1671-1698

Further Reading:

Stephen R. Munzer and James W. Nickel, "Does the Constitution Mean What It Always Meant?" *Columbia Law Review* (1977)
Robert N. Clinton, "Original Understanding, Legal Realism, and the Interpretation of 'This Constitution,'" *Iowa Law Review* (1987)
Mark Tushnet, "The U.S. Constitution and the Intent of the Framers," *Buffalo Law Review* (1987)
Ronald Dworkin, *Taking Rights Seriously* (1977), pp. 131-149
Ronald Dworkin, *Freedom's Law* (1997), pp. 261-306
Ronald Dworkin, "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve," *Fordham Law Review* (2015)
Robert W. Bennett, "Objectivity in Constitutional Law," *University of Pennsylvania Law Review* (1984)
Larry G. Simon, "The Authority of the Framers of the Constitution," *California Law Review* (1985)
David Lyons, "Constitutional Interpretation and Original Meaning," *Social Philosophy and Policy* (1986)
David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review," *Philosophy and Public Affairs* (1988)
Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," *Law and Philosophy* (1990)
Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* (1991)

Michael Dorf, "Integrating Normative and Descriptive Constitutional Theory," *Georgetown Law Journal* (1996)

Mark D. Greenberg and Harry Litman, "The Meaning of Original Meaning," *Georgetown Law Journal* (1998)

Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation* (2006)

Stephen M. Griffin, "Rebooting Originalism," *University of Illinois Law Review* (2008)

Andrew Coan, "The Irrelevance of Writtenness in Constitutional Interpretation," *University of Pennsylvania Law Review* (2010)

Christopher J. Peters, "What Lies Beneath: Interpretative Methodology, Constitutional Authority, and the Case of Originalism," *BYU Law Review* (2013)

Thomas Colby, "The Sacrifice of the New Originalism," *Georgetown Law Journal* (2011)

Ian Bartrum, "Two Dogmas of Originalism," *Washington University Jurisprudence Review* (2015)

David A. Strauss, "Does the Constitution Mean What It Says?" *Harvard Law Review* (2015)

Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996)

Cass R. Sunstein, "There Is Nothing that Interpretation Just Is," *Constitutional Commentary* (2015)

Richard H. Fallon, "The Meaning of Legal 'Meaning' and Its Implications for Theories of Legal Interpretation," *University of Chicago Law Review* (2015)

Eric J. Segall, *Originalism as Faith* (2018)

Lawrence Lessig, *Fidelity and Constraint* (2019)

Some Further Topics for Exploration:

Applied Originalism:

Jacobus ten Broeck, "Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction," *California Law Review* (1938)

Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," *Stanford Law Review* (1949)

John P. Frank and Robert F. Munro, "The Original Understanding of 'Equal Protection of the Laws,'" *Columbia Law Review* (1950)

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