

Spring 2024

# Originalism and Its Discontents

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*Harvard Law School*

**HLS 2766**

TH 10:15–12:15  
(Room TBA)

<https://bit.ly/3H3EJQU>

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Welcome! Originalism is a major school of constitutional interpretation and an important field of study. Legal discussions and public debates regularly feature originalist arguments and criticisms of originalism. To engage these arguments, lawyers and citizens need to weigh the merits of a variety of originalist theories. This two-hour weekly seminar, focused on class discussion of the readings and response papers, is designed to acquaint you with originalist and nonoriginalist arguments; to enable you to assess their strengths; and to give you an opportunity to sharpen your own views.

**SESSIONS**

This course meets on **Thursdays**, starting promptly at **10:15 a.m.** Please have the assigned readings with you. The **first response paper**, discussed below, is due from each student by **11:59 p.m.** on the evening before the first class session. After that class session, you should also schedule your remaining response papers by **11:59 p.m.** that evening.

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## MATERIALS

Readings are listed at the end of this syllabus. There's a coursepack, but no textbook. Electronic copies of the readings are posted online.

The readings are rather extensive, averaging roughly 103 law review pages per class. I've included approximate page counts for each week to help you plan your workload. A few readings are marked “*(skim)*”; you only need to skim these.

Optional readings are listed at the end of the syllabus. These are truly optional; they may help you gain a broader perspective on the course, but they're purely enrichment, for reading in your copious free time. (Preferably in a good armchair by the fire, a snifter of brandy and your loyal spaniel at your side.) On the other hand, if you do read most of the pieces on this list, you'll have a pretty terrific education in originalism.

You can find discussions of current developments in originalism on the *Originalism Blog*, <http://originalismblog.typepad.com/>. New papers relating to originalism are regularly featured on Lawrence Solum's *Legal Theory Blog*, <http://lsolum.typepad.com/>.

## RESPONSE PAPERS

As mentioned above, each student is to submit a response paper, uploaded the “Discussion” section of the website, by **11:59 p.m. on the evening before the first class**.

Response papers shouldn't just summarize the assigned readings—which everyone will already have read, including me! Rather, each paper should present a *single sustained argument* for or against some position expressed in that week's readings. Write your papers as straightforwardly as you can: citations, Bluebooking, footnotes, and so on are strictly forbidden.<sup>1</sup>

To standardize length and appearance, as well as to help with semi-anonymous grading at the end of the semester, please use the **template available online** (under “Files”), filling the appropriate information into the header.

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<sup>1</sup> Seriously, no footnotes.

Your response papers should be **750 to 1000 words long**, roughly three to four pages. Longer or shorter papers will be returned for resubmission.

Each student will then write eight more response papers—seven elective papers tied to a particular week’s readings, and one summary paper at the end—for a total of nine papers over the entire semester.

To select which seven weeks you’d like to write your elective papers, please use the Doodle poll that’s linked from the website **by the evening of the first class day**. (Please *don’t* use the “if-need-be” option, which might take up slots for others; just sign up for the seven classes you most prefer.)

Each paper after the first is then due by **11:59 p.m. on the evening before class**. You are, of course, free to turn them in early! Your papers will be available for your classmates to read online and will serve, along with the assigned readings, as a basis for that week’s discussion.

Half credit is available for late papers uploaded within a day of the deadline, and one-quarter credit is available for papers submitted before the end of the exam period. (If you have any technical problems with submission, or any other extraordinary circumstances, just email me.)

The final response paper discussing the course materials as a whole—or any other originalism-related subject of interest to you—is due by **4:30 p.m. on Friday, May 3**, the last day of the upper-level exam period.

Please consult the Registrar’s Office regarding eligibility if you’d like this series of response papers to satisfy a written work requirement.

#### **CLASS PARTICIPATION**

Each student is expected to participate in the discussion; class participation will be part of your grade. At times, I may choose to cold-call. To encourage free-flowing discussion and to avoid distractions (including, but not limited to, <https://goo.gl/0L9Wzy>), laptops aren’t to be used during class.

For emergencies or other special circumstances, just contact me. In particular, no one should feel obliged to come to class unwell, so just let me know if you’re feeling ill. (Make sure to contact the Dean of Students’ Office to see if your absence qualifies for a class recording.) Also, if you have a conflict with a Friday makeup session, just email me in advance to explain the nature of the conflict and you’ll be excused.

## **OFFICE HOURS**

This semester, my office hours are on **Tuesdays and Wednesdays, 9–10 a.m.** Office hours will be held via Zoom. A sign-up sheet with 20-minute blocks is linked from the website. If no one has signed up for a particular slot, feel free to add your name! Or if you'd like to arrange an appointment at another time, just email me. You should also feel free to sign up in groups, invite other students to join you during your block, and so on.

Please don't worry about a question sounding silly. If it's troubling you enough for you to send an email or to sign up for office hours, it's worth asking and getting cleared up!

(Also: HLS will pay for lunches for faculty members and groups of four students or more. While you should feel no obligation to see any more of me than is required by the prescribed number of credit-hours, I'm always happy to meet for lunch. Just email me to propose a time.)

## **GRADING**

Grades for the course will be based on your written work and class participation, following the Law School's standard grading rules.

# Originalism and Its Discontents

Syllabus ..... 1

## INTRODUCTION

**1 Jan. 25: What is the Constitution?** (106 pp.)

*“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”* —Art. VI, cl. 2

1.1 Constitution of the United States ..... 5

1.2 Magna Carta (1215) (excerpts)..... 19

1.3 *Griswold v. Connecticut*, 381 U.S. 479 (1965)..... 23

1.4 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 1–12 (1971) ..... 29

1.5 William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 43 Guild Prac. 1 (1986)..... 41

1.6 David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 877–91, 903–06, 919–23 (1996)..... 57

1.7 Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol’y 599 (2004) ..... 81

1.8 Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J.L. & Pub. Pol’y 817, 817–22, 838–45 (2015) ..... 97

2 **Feb. 1: Change over time** (90 pp.)

*“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” —Amend. VIII*

2.1 Ronald Dworkin, *Comment*, in Antonin Scalia, *A Matter of Interpretation* 115, 115–22 (1997).....111

2.2 Adrian Vermeule, *Common Good Constitutionalism* 95–99 (2022) .....121

2.3 Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. Chi. L. Rev.* 519, 539–47 (2003) .....127

2.4 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) .....137

2.5 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).....171

**CONCEPTUAL ARGUMENTS**

3 **Feb. 8: Original meaning, original intent** (78 pp.)

*“When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.” —Amend. XVII, para. 2*

3.1 Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *Geo. L.J.* 1823 (1997) .....201

3.2 Lawrence B. Solum, *We Are All Originalists Now*, in Robert W. Bennett & Lawrence B. Solum, *Constitutional Originalism: A Debate* 1, 13–16 (2011) .....215

3.3 James Grimmelman, *Parsing the Seventeenth Amendment*, *Laboratorium* (Jan. 2, 2009, 9:44 P.M.).....221

3.4	Jeffrey Goldsworthy, <i>The Case for Originalism</i> , in <i>The Challenge of Originalism</i> 42, 42–44, 46–51 (Grant Huscroft & Bradley W. Miller eds., 2011) .....	223
3.5	Larry Alexander & Saikrishna Prakash, “ <i>Is That English You’re Speaking?</i> ” <i>Why Intention Free Interpretation is an Impossibility</i> , 41 <i>San Diego L. Rev.</i> 967 (2004) .....	233
3.6	Unicorn News Article .....	263
3.7	Larry Alexander, <i>Telepathic Law</i> , 27 <i>Const. Comment.</i> 139, 139–45 (2010) .....	265
3.8	Larry Alexander, <i>Originalism, the Why and the What</i> , 82 <i>Fordham L. Rev.</i> 539 (2013) .....	273
4	<b>Feb. 15: Original methods, original law</b> (128 pp.)	
	“ <i>The eighteenth article of amendment to the Constitution of the United States is hereby repealed.</i> ” —Amend. XXI, § 1.	
4.1	Caleb Nelson, <i>Originalism and Interpretive Conventions</i> , 70 <i>U. Chi. L. Rev.</i> 519, 519–20, 527–29, 538–39, 549–53 (2003) .....	279
4.2	John O. McGinnis & Michael B. Rappaport, <i>Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction</i> , 103 <i>Nw. U. L. Rev.</i> 751, 751–52, 756–58, 761, 765–72 (2009).....	291
4.3	H. Jefferson Powell, <i>The Original Understanding of Original Intent</i> , 98 <i>Harv. L. Rev.</i> 885, 887, 889–90, 894–913 (1984) .....	305
4.4	Samuel L. Bray, <i>The Mischief Rule</i> , 109 <i>Geo. L. J.</i> 967, 967–76, 992–93, 997–99, 1002–07 (2021).....	329
4.5	Stephen E. Sachs, <i>Originalism Without Text</i> , 127 <i>Yale L.J.</i> 156 (2017).....	351
4.6	William Baude & Stephen E. Sachs, <i>The Law of Interpretation</i> , 130 <i>Harv. L. Rev.</i> 1079, 1082–1107, 1118–20 (2017).....	365
4.7	Stephen E. Sachs, <i>Originalism as a Theory of Legal Change</i> , 38 <i>Harv. J.L. &amp; Pub. Pol’y</i> 817, 874–83 (2015) .....	395

**NORMATIVE ARGUMENTS**

**5 Feb. 22: Reasons and responses** (118 pp.)

*“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .” — Art. VI, cl. 3*

- 5.1 Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo. Wash. L. Rev. 1119 (1998) .....407
- 5.2 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) .....415
- 5.3 John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 Geo. L.J. 1693, 1695–1705, 1741–47 (2010) .....433
- 5.4 Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 Geo. L.J. 713, 713–16, 744–55, 760–64 (2011) .....451
- 5.5 David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 891–97, 906–13, 925–34 (1996) .....461
- 5.6 Richard A. Posner, *Bork and Beethoven*, 42 Stan. L. Rev. 1365 (1990) .....487
- 5.7 Evan D. Bernick & Christopher R. Green, *What Is the Object of the Constitutional Oath?*, 128 Penn St. L. Rev. 1, 1–9, 22–32 (2023) ..... 505

**POSITIVE ARGUMENTS**

**6 Feb. 29: Legal disagreement** (94 pp.)

*“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” —Amend. VI*



6.1	Daniel A. Farber & Suzanna Sherry, <i>Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations 1–4</i> (2002).....	525
6.2	Richard H. Fallon, Jr., <i>Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence</i> , 86 N.C. L. Rev. 1107, 1107–18, 1126–50 (2008) .....	529
6.3	Matthew D. Adler, <i>Interpretive Contestation and Legal Correctness</i> , 53 Wm. & Mary L. Rev. 1115 (2012) .....	565
6.4	Stephen E. Sachs, <i>The “Constitution in Exile” as a Problem for Legal Theory</i> , 89 Notre Dame L. Rev. 2253, 2253–78, 2290–95 (2014) .....	587
7	<b>Mar. 7: The “positive turn”</b> (108 pp.) <i>“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” —Art. VII</i>	
7.1	Stephen E. Sachs, <i>Originalism as a Theory of Legal Change</i> , 38 Harv. J.L. & Pub. Pol’y 817, 822–38, 846–74 (2015) .....	619
7.2	William Baude, <i>Is Originalism Our Law?</i> , 115 Colum. L. Rev. 2349, 2351–53, 2370–86 (2015) .....	667
7.3	William Baude & Stephen E. Sachs, <i>Originalism’s Bite</i> , 20 Green Bag 2d 103 (2016) .....	687
7.4	William Baude & Stephen E. Sachs, <i>Grounding Originalism</i> , 113 Nw. U. L. Rev. 1455, 1455–60, 1464–91 (2019).....	693

**Mar. 14: Spring Break**

**FURTHER DEBATES**

**8 Mar. 21: Originalism and precedent (124 pp.)**

*“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” —Art. III, § 1*

- 8.1 H.L.A. Hart, *The Concept of Law* 124–47 (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012) .....727
- 8.2 Gary Lawson, *The Constitutional Case Against Precedent*, 17 *Harv. J.L. & Pub. Pol’y* 23 (1994) .....753
- 8.3 Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 *Mich. L. Rev.* 2706, 2706–09 (2003) .....765
- 8.4 William Baude, *The Judgment Power*, 96 *Geo. L.J.* 1807, 1807–14, 1844–45 (2008) .....769
- 8.5 John Harrison, *The Power of Congress over the Rules of Precedent*, 50 *Duke L.J.* 503, 503–31 (2000) .....779
- 8.6 Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 *Va. L. Rev.* 1, 1–21 (2001) .....809
- 8.7 Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 *Va. L. Rev.* 933, 933–51 (2018) .....831

**9 Mar. 28: History, uncertainty, construction (134 pp.)**

*“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . .” —Art. I, § 10, cl. 2*

- 9.1 Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 *Fordham L. Rev.* 957 (2015) .....851
- 9.2 Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 *San Diego L. Rev.* 575, 575–88 (2011) .....863

9.3	William Baude & Stephen E. Sachs, <i>Originalism and the Law of the Past</i> , 37 <i>Law &amp; Hist. Rev.</i> 809 (2019) .....	877
9.4	Jack M. Balkin, <i>The Construction of Original Public Meaning</i> , 31 <i>Const. Comment.</i> 71 (2016) .....	889
9.5	Gary Lawson, <i>Dead Document Walking</i> , 92 <i>B.U. L. Rev.</i> 1225, 1225–26, 1231–36 (2012) .....	917
9.6	Randy E. Barnett & Evan Bernick, <i>The Letter and the Spirit: A Unified Theory of Originalism</i> , 107 <i>Geo. L.J.</i> 1, 1–6, 14–18, 33–35 (2018) .....	925
9.7	Stephen E. Sachs, <i>Originalism: Standard and Procedure</i> , 135 <i>Harv. L. Rev.</i> 777, 777–819, 828–30 (2022) .....	939
10	<b>Apr. 4: Originalism and Politics</b> (80 pp.)	
	“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” —Amend. XV, § 1	
10.1	Earl Maltz, <i>The Coming of the Fifteenth Amendment: The Republican Party and the Right to Vote in the Early Reconstruction Era</i> , 82 <i>La. L. Rev.</i> 395, 395–96, 440–43 (2022) .....	985
10.2	Robert Post & Reva Siegel, <i>Originalism as a Political Practice: The Right’s Living Constitution</i> , 75 <i>Fordham L. Rev.</i> 545, 545–49, 554–61, 569–74 (2006) (2006) .....	991
10.3	Jamal Greene, <i>Originalism’s Race Problem</i> , 88 <i>Denver U. L. Rev.</i> 517 (2011) .....	1011
10.4	Jack Balkin, <i>Abortion and Original Meaning</i> , 24 <i>Const. Comment.</i> 291, 291–311 (2007) .....	1017
10.5	Jeffrey Schmitt, <i>Slavery and the History of Congress’s Enumerated Powers</i> , 74 <i>Ark. L. Rev.</i> 641, 641–44, 675–88 (2022)	1039
10.6	Adrian Vermeule, <i>Beyond Originalism</i> , <i>Atlantic</i> , Mar. 31, 2020 .....	1057

11 **Apr. 11: Commerce** (144 pp.)

*The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . —And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .” —Art. I, § 8, cls. 3, 18.*

- 11.1 Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 847–51, 856–62 (2003)..... 1065
- 11.2 Jack M. Balkin, *Commerce*, 109 Mich. L. Rev. 1, 1–2, 20–29 (2010)..... 1077
- 11.3 Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers*, 128 Penn St. L. Rev. 643, 643–79 (2023).. 1089
- 11.4 Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. 413, 413–14, 419–20, 426–27, 438–39, 464–74, 479–81 (2021)..... 1127
- 11.5 *Gonzales v. Raich*, 545 U.S. 1, 15–22 (majority opinion), 33–38 (Scalia, J., concurring in the judgment), 57–59, 66–71 (Thomas, J., dissenting) (2006) ..... 1149
- 11.6 William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1746–55 (2013) ..... 1173
- 11.7 Samuel L. Bray, “Necessary and Proper” and “Cruel and Unusual”: *Hendiadys and the Constitution*, 102 Va. L. Rev. 687, 687–92, 733–50 (2016) ..... 1185

**12 Apr. 18: The Fourteenth Amendment (122 pp.)**

*“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” —Amend. XIV, § 1*

- 12.1 Cong. Globe, 39th Cong., 1st sess., at 2764 (May 23, 1868) ... 1209
- 12.2 *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 65–66, 74–80 (1873) ..... 1217
- 12.3 John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 Yale L.J. 1385, 1387–97 (1992)..... 1227
- 12.4 Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Civil Rts. L.J. 1, 1–3, 12–15 (2008) ..... 1239
- 12.5 Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit*, at xiii–xviii, 128–55 (2021) ..... 1247
- 12.6 Christopher R. Green, *“Law,” “Citizens,” and 1868*, *Law & Liberty* (Dec. 14, 2021)..... 1283
- 12.7 Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 Geo. L.J. 329, 332–37 (2011)..... 1291
- 12.8 William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 Stan. L. Rev. (forthcoming 2024) (manuscript at 1–32) ..... 1299

<b>May 3 (F): Final response paper due by 4:30 p.m.</b>
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## Optional readings:

### 1 Cases

- 1.1 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
- 1.2 *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).
- 1.3 *Cooper v. Aaron*, 358 U.S. 1 (1958).
- 1.4 *Reynolds v. Sims*, 377 U.S. 533 (1964).
- 1.5 *Roe v. Wade*, 410 U.S. 113 (1973).
- 1.6 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).
- 1.7 *District of Columbia v. Heller*, 554 U.S. 570 (2008).
- 1.8 *McDonald v. City of Chicago*, 561 U.S. 742 (2010).
- 1.9 *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).
- 1.10 *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
- 1.11 *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

### 2 Books

- 2.1 Akhil Reed Amar, *America's Constitution: A Biography* (2005).
- 2.2 Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998).
- 2.3 Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* (1998).
- 2.4 Jack Balkin, *Living Originalism* (2011).
- 2.5 Jack Balkin, *Memory and Authority: The Uses of History in Constitutional Interpretation* (forthcoming 2024).
- 2.6 Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (rev. ed. 2013).
- 2.7 Raoul Berger, *Government by Judiciary* (1977).

- 2.8 Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (2017).
- 2.9 Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982).
- 2.10 Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005).
- 2.11 Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (2017).
- 2.12 Josh Chafetz, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions* (2007).
- 2.13 *The Challenge of Originalism: Theories of Constitutional Interpretation* (Grant Huscroft & Bradley W. Miller eds., 2011).
- 2.14 David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* (1997).
- 2.15 David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* (1985).
- 2.16 Richard Ekins, *The Nature of Legislative Intent* (2012).
- 2.17 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).
- 2.18 1–5 *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987).
- 2.19 Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (2018).
- 2.20 Christopher R. Green, *Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause* (2015).
- 2.21 Philip Hamburger, *Law and Judicial Duty* (2008).
- 2.22 Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

- 2.23 H.L.A. Hart, *The Concept of Law* (3d ed. 2012).
- 2.24 *The Heritage Guide to the Constitution* (David F. Forte & Matthew Spalding eds., 2d ed 2014).
- 2.25 Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* (2016).
- 2.26 Randy J. Kozel, *Settled Versus Right: A Theory of Precedent* (2017).
- 2.27 Gary Lawson et al., *The Origins of the Necessary and Proper Clause* (2010).
- 2.28 Gary Lawson & Guy Seidman, *The Constitution of Empire: Territorial Expansion & American Legal History* (2004).
- 2.29 Goodwin Liu, Pamela S. Karlan & Christopher H. Schroeder, *Keeping Faith with the Constitution* (2009).
- 2.30 Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (2010).
- 2.31 Michael W. McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution* (2020).
- 2.32 John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* (2013).
- 2.33 Michael D. Ramsey, *The Constitution's Text in Foreign Affairs* (2007).
- 2.34 *The Rule of Recognition and the U.S. Constitution* (Matthew D. Adler & Kenneth Einar Himma eds., 2009).
- 2.35 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997).
- 2.36 Eric J. Segall, *Originalism as Faith* (2018).
- 2.37 Lee J. Strang, *Originalism's Promise: A Natural Law Account of the American Constitution* (2019).
- 2.38 David A. Strauss, *The Living Constitution* (2010).



- 2.39 Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (2006).
- 2.40 Ilan Wurman, *A Debt Against the Living: An Introduction to Originalism* (2017).

### 3 Journal articles

- 3.1 Matthew D. Adler, *Interpretive Contestation and Legal Correctness*, 53 *Wm. & Mary L. Rev.* 1115 (2012).
- 3.2 Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 *Const. Comment.* 97 (2003).
- 3.3 Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 *Notre Dame L. Rev.* 1245 (2012).
- 3.4 Mikołaj Barczentewicz, *The Illuminati Problem and Rules of Recognition*, 38 *Oxford J. Legal Stud.* 500 (2018).
- 3.5 Mikołaj Barczentewicz, *The Limits of Natural Law Originalism*, 93 *Notre Dame L. Rev. Online* 115 (2018).
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