University of Chicago
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Originalism and Its Discontents

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Jan. 17: 1:30–3:30
Jan. 31: 1:30–3:30
Feb. 3, 4, 5: 6:10–8:10

OVERVIEW

Originalism is a major school of constitutional interpretation and an important field of study. Legal discussions and public debates regularly feature originalist arguments or criticisms of originalism. To engage these arguments, lawyers and citizens need to weigh the merits of a diverse set of originalist theories. This course is designed to acquaint you with originalist and nonoriginalist arguments; enable you to assess their strengths; and give you an opportunity to sharpen your own views.

SESSIONS

This seminar meets in five sessions, in which we'll discuss the readings and response papers. Please bring the relevant day's readings to class with you. Each student is expected to attend regularly and to take part in the discussions; for emergencies, illnesses, or other special circumstances, just let me know.

(In light of the seminar format, laptops will not be used. If you have particular reasons for needing a laptop, please contact me.)

RESPONSE PAPERS

Response papers for the first two sessions are due by **11:59 p.m.** on the evening before the session. (So the first paper is due on the evening of Thursday, Jan. 16.) Response papers for the last three sessions are due at **3 p.m.** on the afternoon of

class. Your papers shouldn't try to summarize the readings; rather, they should take and defend a position on at least one of the issues discussed. They should be **500–750 words long**, which is roughly 2–3 pages. To standardize length and appearance, please use the **template available online** (under "Files"), filling the appropriate information into the header.

Papers will be available for your classmates to read and will serve as a basis for that week's discussion. To that end, they're intended to be informal. Please write them in as straightforward a way as possible. Footnotes, citations, Bluebooking, and the like are strictly prohibited.[1]

The papers should be submitted online, as attachments to replies in the appropriate thread of the "Discussions" section of the website. Half credit is available for unexcused late papers uploaded the day after the deadline; one-quarter credit is available for unexcused papers uploaded after that day but before the end of exams. (If you have any technical problems or other unusual circumstances, just email me.)

OFFICE HOURS

Because I'll be in Chicago only irregularly during the winter term, I won't be holding regular office hours. But you should feel free to email me to make an appointment, and to send questions via email as well.

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

MATERIALS

The readings for the course have been assembled into a coursepack and are also available online. (Some, marked `[www]`, are exclusively online.) Though aggressively excerpted, the readings are still rather extensive, averaging 88 law review pages per session. I encourage you to read ahead. Some readings are marked "*(skim)*"; you really only need to skim these.

Optional readings are listed at the end of the syllabus. These are truly optional; they are included only for further enrichment in your copious free time.

GRADING

Grades for the course will be based on your written work and class participation. I will follow the Law School's standard grading policies for courses of this size.

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[1] Seriously, no footnotes.

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Syllabus 1

INTRODUCTION

1 **Jan. 17: Change over time** *(108 pp. + 24 pp. skim-only)*

1.1 Constitution of the United States *(skim)* 3

1.2 *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) *(excerpts)* *(skim)* 17

1.3 Magna Carta (1215) *(excerpts)* *(skim)* 23

1.4 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 1–12 (1971) 27

1.5 Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 204–05, 208–09, 218–24 (1980) 39

1.6 David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 877–80, 889–90, 903–06, 916–24 (1996) 51

1.7 Ronald Dworkin, *Comment*, *in* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 115, 115–22 (1997) 71

1.8 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) 81

1.9 John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1739–47 (2008) 115

1.10 Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 539–47 (2003) 125

CONCEPTUAL ARGUMENTS

2 **Jan. 31: Original what?** *(120 pp.)*

2.1 Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol'y 599, 599–613 (2004) 135

2.2 Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 Geo. L.J. 1823 (1997) ..... [www]

2.3 Lawrence B. Solum, *We Are All Originalists Now*, *in* Robert W. Bennett & Lawrence B. Solum, Constitutional Originalism: A Debate 1, 13–16 (2011) 151

2.4 Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility*, 41 San Diego L. Rev. 967, 967–93 (2004) 157

2.5 Larry Alexander, *Telepathic Law*, 27 Const. Comment. 139, 139–45 (2010) ..... [www]

2.6 John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. Rev. 751, 751–52 (2009) 185

2.7 Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 519–23 (2003) 187

2.8 H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 885–890, 894–913 (1984) 193

2.9 Stephen E. Sachs, *Originalism Without Text*, 127 Yale L.J. 156 (2017) 219

NORMATIVE ARGUMENTS

3 Feb. 3: Reasons and responses *(58 pp.)*

3.1 Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo. Wash. L. Rev. 1119 (1998) ..... [www]

3.2 John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 Geo. L.J. 1693, 1695–1705, 1741–47 (2010) 233

3.3 Richard A. Posner, *Bork and Beethoven*, 42 Stan. L. Rev. 1365 (1990) ..... [www]

3.4 Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 Geo. L.J. 713, 714–15, 744–45, 760–63 (2011) 251

3.5 Evan D. Bernick & Christopher R. Green, What is the Object of the Article VI Oath? 3–7, 25 (Aug. 22, 2019) 259

POSITIVE ARGUMENTS

4 Feb. 4: The positive turn *(68 pp.)*

4.1 Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J.L. & Pub. Pol'y 817, 817–45, 849–52, 864–68 (2015) 265

4.2 William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349, 2351–53, 2370–86 (2015) 303

4.3 William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 Nw. U. L. Rev. 1455, 1464–73 (2019) 323

FURTHER DEBATES

5 Feb. 5: Precedent and politics *(62 pp.)*

5.1 Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23 (1994) ..... [www]

5.2 John Harrison, *The Power of Congress over the Rules of Precedent*, 50 Duke L.J. 503, 503–13 (2000) 333

5.3 Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 1–4, 14–21 (2001) 345

5.4 Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 Fordham L. Rev. 545, 545–49, 554–61, 569–74 (2006) 357

5.5 Jamal Greene, *Originalism's Race Problem*, 88 Denver U. L. Rev. 517 (2011) ..... [www]

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).

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 Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (rev. ed. 2013).

2.6 Raoul Berger, Government by Judiciary (1977).

2.7 Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1982).

2.8 Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005).

2.9 Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers (2017).

2.10 Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions (2007).

2.11 The Challenge of Originalism: Theories of Constitutional Interpretation (Grant Huscroft & Bradley W. Miller eds., 2011).

2.12 David P. Currie, The Constitution in Congress: The Federalist Period, 1789–1801 (1997).

2.13 David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888 (1985).

2.14 Richard Ekins, The Nature of Legislative Intent (2012).

2.15 John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

2.16 1–5 The Founders' Constitution (Philip B. Kurland & Ralph Lerner eds., 1987).

2.17 Jonathan Gienapp, The Second Creation: Fixing the American Constitution in the Founding Era (2018).

2.18 Christopher R. Green, Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause (2015).

2.19 Philip Hamburger, Law and Judicial Duty (2008).

2.20 Philip Hamburger, Is Administrative Law Unlawful? (2014).

2.21 H.L.A. Hart, The Concept of Law (3d ed. 2012).

2.22 The Heritage Guide to the Constitution (David F. Forte & Matthew Spalding eds., 2d ed 2014).

2.23 Michael J. Klarman, The Framers' Coup: The Making of the United States Constitution (2016).

2.24 Randy J. Kozel, Settled Versus Right: A Theory of Precedent (2017).

2.25 Gary Lawson et al., The Origins of the Necessary and Proper Clause (2010).

2.26 Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion & American Legal History (2004).

2.27 Goodwin Liu, Pamela S. Karlan & Christopher H. Schroeder, Keeping Faith with the Constitution (2009).

2.28 Pauline Maier, Ratification: The People Debate the Constitution, 1787–1788 (2010).

2.29 John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution (2013).

2.30 Michael D. Ramsey, The Constitution's Text in Foreign Affairs (2007).

2.31 The Rule of Recognition and the U.S. Constitution (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

2.32 Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997).

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

2.34 Lee J. Strang, Originalism's Promise: A Natural Law Account of the American Constitution (2019).

2.35 David A. Strauss, The Living Constitution (2010).

2.36 Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation (2006).

2.37 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, *Originalism, the Why and the What*, 82 Fordham L. Rev. 539 (2013).

3.3 Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 Const. Comment. 97 (2003).

3.4 Jack Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291 (2007).

3.5 Jack M. Balkin, *The Construction of Original Public Meaning*, 31 Const. Comment. 71 (2016).

3.6 Mikołaj Barczentewicz, *The Illuminati Problem and Rules of Recognition*, 38 Oxford J. Legal Stud. 500 (2018).

3.7 Mikołaj Barczentewicz, *The Limits of Natural Law Originalism*, 93 Notre Dame L. Rev. Online 115 (2018).

3.8 Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* 2012 U. Ill. L. Rev. 623.

3.9 Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 Nw. U. L. Rev. 615 (2009).

3.10 Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611 (1999).

3.11 Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001).

3.12 Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 Geo. L.J. 1 (2018).

3.13 Charles L. Barzun, *The Positive U-Turn*, 69 Stan. L. Rev. 1323 (2017).

3.14 William Baude, *Constitutional Liquidation*, 71 Stanford L. Rev. 1 (2019).

3.15 William Baude, *The Judgment Power*, 96 Geo. L.J. 1807, 1807–14 (2008).

3.16 William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738 (2013).

3.17 William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1 (2017).

3.18 William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 Law & Hist. Rev. 809 (2019).

3.19 William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 Green Bag 2d 103 (2016).

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

3.21 Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960).

3.22 Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 Yale L.J. 502 (2006).

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

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

3.25 Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 Notre Dame L. Rev. 483 (2014).

3.26 Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994).

3.27 Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246 (2017).

3.28 Jud Campbell, *The Invention of First Amendment Federalism*, 97 Tex. L. Rev. 517 (2019).

3.29 Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672 (2012).

3.30 Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. Pa. L. Rev. 1025 (2010).

3.31 Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas*, 82 Fordham L. Rev. 721 (2013).

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

3.33 John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe *v.* Wade, 82 Yale L.J. 920 (1973).

3.34 Richard Ekins, *Objects of Interpretation*, 32 Const. Comment. 1 (2017).

3.35 Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. Rev. 1107 (2008).

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

3.37 Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. Chi. L. Rev. 1235 (2015).

3.38 Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523 (1995).

3.39 Jeffrey Goldsworthy, *The Case for Originalism*, *in* The Challenge of Originalism 42 (Grant Huscroft & Bradley W. Miller eds., 2011)

3.40 Christopher R. Green, *Constitutional Truthmakers*, 32 Notre Dame J.L. Ethics & Pub. Pol'y 497 (2018).

3.41 Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 Notre Dame L. Rev. 1607 (2009).

3.42 Mark Greenberg, Response, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 Harv. L. Rev. F. 105 (2017).

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

3.44 Jamal Greene, *Rule Originalism*, 116 Colum. L. Rev. 1639 (2016).

3.45 Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 Mich. L. Rev. 239 (1989).

3.46 John Harrison, Executive Power (June 15, 2019), https://ssrn.com/id=3398427.

3.47 John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. Chi. L. Rev. 375 (2001).

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

3.49 John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992)

3.50 Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 Fordham L. Rev. 957 (2015).

3.51 Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 Cal. L. Rev. 291 (2002).

3.52 Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L.J. 1113 (2003).

3.53 Michael J. Klarman, *Antifidelity*, 70 S. Cal. L. Rev. 381 (1997).

3.54 Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995).

3.55 Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 Vand. L. Rev. 105 (2015).

3.56 Larry Kramer, *Two (More) Problems with Originalism*, 31 Harv. J.L. & Pub. Pol'y 907 (2009).

3.57 Kurt T. Lash, *The Constitutional Referendum of 1866: Andrew Johnson and the Original Meaning of the Privileges or Immunities Clause*, 101 Geo. L.J. 1275 (2013).

3.58 Kurt T. Lash, *Originalism All the Way Down?*, 30 Const. Comment. 149 (2014).

3.59 Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 Stan. L. Rev. 895 (2008).

3.60 Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 Ave Maria L. Rev. 1 (2007).

3.61 Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 Fla. L. Rev. 1551 (2012).

3.62 Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise,* 23 Const. Comment. 47 (2006).

3.63 Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. Pa. L. Rev. 261 (2019).

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

3.65 Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995)

3.66 John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419 (2005).

3.67 Michael McConnell, *The Originalist Case for* Brown *v.* Board, 19 Harv. J.L. & Pub. Pol'y 457 (1996).

3.68 Michael McConnell, *The Forgotten Constitutional Moment*, 11 Const. Comment. 115 (1994).

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

3.70 John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw. U. L. Rev. 803 (2009).

3.71 Bernadette A. Meyler, *Towards a Common Law Originalism*, 59 Stan. L. Rev. 551 (2006).

3.72 Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169 (2019).

3.73 Christina Mulligan, *Diverse Originalism*, 21 U. Pa. J. Const. L. 379 (2019).

3.74 Caleb Nelson, *Preemption*, 86 Va L. Rev. 225 (2000).

3.75 Caleb Nelson, *A Response to Professor Manning*, 91 Va. L. Rev. 451 (2005).

3.76 Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559 (2002).

3.77 Caleb Nelson, *What Is Textualism?*, 91 Va. L. Rev. 347 (2005).

3.78 Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 Yale L.J. 677 (1993).

3.79 Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 Yale L.J. 1535 (2000).

3.80 Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 Nw. U. L. Rev. 857 (2009).

3.81 Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 Const. Comment. 289 (2005).

3.82 Jeffrey A. Pojanowski, *Why Should Anyone Be an Originalist?*, 31 Diritto Pubblico Comparato ed Europeo Online 583 (2017).

3.83 Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 Georgetown L.J. 97 (2016).

3.84 Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable, Part I*, 19 Green Bag 2d 187 (2016).

3.85 Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable, Part II*, 19 Green Bag 2d 257 (2016).

3.86 Richard A. Posner & Eric J. Segall, *Faux Originalism*, 20 Green Bag 2d 109 (2016).

3.87 Saikrishna Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 Geo. L.J. 1613 (2008).

3.88 Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 Harv. J.L. & Pub. Pol'y 485 (2008).

3.89 Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021 (2006).

3.90 Saikrishna Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231 (2001).

3.91 Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 San Diego L. Rev. 575 (2011).

3.92 Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. 299 (2016).

3.93 William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976).

3.94 Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 Notre Dame L. Rev. 2253 (2014).

3.95 Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813 (2012).

3.96 Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201 (2009).

3.97 Stephen E. Sachs, *Pennoyer Was Right*, 95 Tex. L. Rev. 1249 (2017).

3.98 Stephen E. Sachs, *Precedent and the Semblance of Law*, 33 Const. Comment. 417 (2018).

3.99 Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. Ill. L. Rev. 1797.

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

3.101 Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987).

3.102 Steven D. Smith et al., *The New and Old Originalism: A Discussion* (San Diego Legal Studies Paper No. 15-178, Feb. 9, 2015).

3.103 Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 Yale L.J. F. 57 (2016).

3.104 Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1 (2015).

3.105 Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 Va. L. Rev. 1111–64 (2015).

3.106 Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453–537 (2013).

3.107 Joshua Stein, Note, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 Yale J.L. & Hum. 359 (2013).

3.108 John F. Stinneford, *The Original Meaning of 'Cruel,'* 105 Geo. L.J. 441 (2017).

3.109 David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1 (2015).

3.110 Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 Const. Comment. 193 (2015).

3.111 Cass R. Sunstein, *Formalism in Constitutional Theory*, 31 Const. Comment. 27 (2017).

3.112 Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth *v.* Viriginia *Was Rightly Decided, and Why* INS *v.* Chadha *Was Wrongly Reasoned*, 83 Tex. L. Rev. 1265 (2005).

3.113 David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 Hastings Const. L.Q. 213 (2015).

3.114 Ryan C. Williams, *The "Guarantee" Clause*, 132 Harv. L. Rev. 602 (2018).

3.115 Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 Colum. L. Rev. 498 (2011).