Originalism and Its Discontents

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LAWS 53250/01
Laird Bell Quadrangle D Jan. 17: 1:30–3:30
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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, Blue-book, 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.

¹ Seriously, no footnotes.
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Syllabus

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) (extracts) (skim) ............. 17
1.3 Magna Carta (1215) (extracts) (skim) ................................................. 23
1.4 Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 1–12 (1971) ...................................................... 27
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.)

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


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


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.)


3.5 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.)


**FURTHER DEBATES**

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


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


Optional readings:

1 Cases


2 Books


2.11 The Challenge of Originalism: Theories of Constitutional Interpretation (Grant Huscroft & Bradley W. Miller eds., 2011).
2.16 1–5 The Founders’ Constitution (Philip B. Kurland & Ralph Lerner eds., 1987).
2.18 Christopher R. Green, Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause (2015).
2.25 Gary Lawson et al., The Origins of the Necessary and Proper Clause (2010).
2.28 Pauline Maier, Ratification: The People Debate the Constitution, 1787–1788 (2010).
2.31 The Rule of Recognition and the U.S. Constitution (Matthew D. Adler & Kenneth Einar Himma eds., 2009).
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).


3.39 Jeffrey Goldsworthy, The Case for Originalism, in The Challenge of Originalism 42 (Grant Huscroft & Bradley W. Miller eds., 2011)
3.41 Christopher R. Green, “This Constitution”: Constitutional Indexicals as a Basis for Textualist Semi-Originalism, 84 Notre Dame L. Rev. 1607 (2009).


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


