

Syllabus For

CONSTITUTIONAL INTERPRETATION:
THE DEBATE OVER ORIGINALISM

Instructor: Gregory E. Maggs

Course Coverage:

This one-credit introductory course addresses the leading arguments for and against judicial interpretation of the U.S. Constitution in accordance with its original meaning. The course covers the subject by combining theoretical discussions about originalism with practical examples of how the U.S. Supreme Court uses key historical sources to evaluate claims made about the original meaning of the Constitution.

Class Schedule:

The course will meet on Tuesday, May 28, from 2:00 p.m.-5:00 p.m.; Wednesday, May 29, from 10:00 a.m.-2:00 p.m. (with a one-hour break for lunch); Thursday, May 30, from 10:00 a.m.-2:00 p.m. (with a one-hour break for lunch); and Friday, May 31, from 10:00 a.m.-2:00 p.m. (with a one-hour break for lunch).

Email & Telephone:

Students may contact me either by phone at (202) 761-1458 or email at gmaggs@law.gwu.edu.

Class Participation and Take-Home Examination:

Please read the assigned materials for each class session and participate in all class discussions. Discussion leaders will be assigned for each reading. Students will be evaluated based on their preparation and participation and a short take-home examination. For practice, a copy of the final exam given in 2023 is included in the readings. The final exam in 2024 will have the same format.

Reading Assignments:

Below are the reading assignments and exercises for each class session. All of the assigned materials are available on TWEN.

TUESDAY, MAY 28, 2:00-5:00 p.m.

Review of History

U.S. Department of State, *Outline of U.S. History 68-78* (2011) (chapter on "Formation of a National Government")

Originalist vs. Non-Originalist Methods of Interpretation

Gregory E. Maggs & Peter J. Smith, *Constitutional Law: A Contemporary Approach* 13-22 (6th ed. 2023)

Example: Claims about the Original Meaning Based on Dictionaries from the Founding Era

Introductory Note on Sources of the Original Meaning

Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 *Geo. Wash. L. Rev.* 358 (2014)

National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012) (edited excerpt & points for discussion)

District of Columbia v. Heller, 554 U.S. 570 (2008) (edited excerpt & points for discussion)

Selections from the dictionaries cited in the *NFIB* and *Heller* cases (see entries for "keep," "bear," "arms," and "regulate")

Example: Claims about the Original Meaning Based on The Federalist Papers

Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 *B.U. L. Rev.* 801 (2007)

United States v. Printz, 521 U.S. 898 (1997) (edited excerpt & points for discussion)

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 459 U.S. 813 (1982) (edited excerpt & points for discussion)

Federalist Papers Nos. 27, 44, 78 (find and read the quotations cited in the *Printz* and *Northern Pipe Line* cases)

WEDNESDAY, MAY 29, 10:00 a.m.-12:00 p.m. & 1:00-2:00 p.m.

A Debate Over Originalism vs. Non-Originalism

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

Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. Haw. L. Rev. 385 (2000)

Brief Excerpts from *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* (Christopher J. Scalia & Edward Whelan, eds., 2017) and Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)

Example: Claims about the Original Meaning Based on the Records of the Constitutional Convention

Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as Evidence of the Original Meaning of the U.S. Constitution*, 80 Geo. Wash. L. Rev. 1707 (2012)

I.N.S. v. Chadha, 462 U.S. 919 (1983) (edited excerpt & points for discussion)

United States v. Int'l Bus. Machines Corp., 517 U.S. 843 (1996) (edited excerpt & points for discussion)

Utah v. Evans, 536 U.S. 452 (2002) (edited excerpt & points for discussion)

The Records of the Federal Convention of 1787 (Max Farrand ed., 1911) (find and read passages cited in *I.N.S.*, *IBM*, and *Utah* cases)

THURSDAY, May 30, 10:00 a.m.-12:00 p.m. & 1:00-2:00 p.m.

Originalism and Stare Decisis

Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921 (2017)

John O. McGinnis & Michael B. Rappaport, *Originalism and Precedent*, 34 Harv. J.L. & Pub. Pol'y 121 (2011)

Example: Claims about the Original Meaning Based on the Records of the State Ratifying Conventions

Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the United States Constitution*, 2009 U. Ill. L. Rev. 457

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) (edited excerpt & points for discussion)

Alden v. Maine, 527 U.S. 706 (1999) (edited excerpt & points for discussion)

The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787 (J. Elliot ed., 1827-1830) (find and read the passages cited in the *Term Limits* and *Thornton* cases)

Example: Claims about the Original Meaning Based on the Legislative History of the Bill of Rights

National Archives & Records Administration, Congress Creates the Bill of Rights (2014)

Wallace v. Jaffree, 472 U.S. 38 (1984) (edited excerpt and points for discussion)

United States v. Wilson, 420 U.S. 332 (1975) (edited excerpt and points for discussion)

1 Annals of Congress 440-444, 450-460, 757-579 (May 12 & Aug. 15, 1789) (edited excerpts)

FRIDAY, May 31, 10:00 a.m.-12:00 p.m. & 1:00-2:00 p.m.

Is originalism "camouflage for the imposition of conservative views"?

Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 Harv. J.L. & Pub. Pol'y 5 (2011)

Excerpt from *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* (Christopher J. Scalia & Edward Whelan, eds., 2017)

Example: Claims about the Original Meaning Based on the Legislative History of the 14th Amendment

Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 Conn. L. Rev. 1069 (2017)

McDonald v. City of Chicago, 561 U.S. 742 (2010) (edited excerpt & points for discussion)

City of Boerne v. Flores, 521 U.S. 507 (1997) (edited excerpt & points for discussion)

Excerpt of Speech by Rep. John Bingham (R-OH), on Feb. 28, 1866, 39th Cong. Globe 1083, 1088-1090 (1865)

Originalism and "Corpus Linguistics"

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

James C. Phillips & Josh Blackman, *Corpus Linguistics and Heller*, 56 Wake Forest L. Rev. 609, 659-664 (2021)