

REVISED Syllabus For

CONSTITUTIONAL LAW SEMINAR: ORIGINAL MEANING RESEARCH

(Course No. 6399-10; 2 credits)

Attorney General William P. Barr
Professor Gregory E. Maggs

Description of the Seminar:

Research into the original meaning of the Constitution plays a major role in the resolution of most constitutional issues. Nearly every Supreme Court opinion addressing constitutional questions cites the Federalist Papers, the records of the Federal Constitutional Convention, or other similar sources. This seminar provides instruction on making and evaluating arguments about the original meaning of the Constitution that rely on these sources.* The readings provide background on the most commonly cited historic materials and critically examine originalist methodology. They also present case studies of actual disputes in which the Supreme Court has decided difficult questions of original meaning. Students must participate actively in class discussions and write a research paper addressing the original meaning of a constitutional provision currently at issue in the courts.

Instructors:

Professorial Lecturer William P. Barr graduated from the George Washington University Law School with highest honors in 1977 and served as the Attorney General of the United States from 1991-1993. Prior to becoming the Attorney General, Professor Barr was the Assistant Attorney General for the Office of Legal Counsel. This Office has responsibility for providing legal advice to the Executive Branch on all constitutional

* The seminar does not cover the interesting, important, but separate question whether (or to what extent) courts must follow the original meaning of the Constitution.

questions and for reviewing pending legislation for constitutionality. He will co-teach the seminar with Professor Gregory E. Maggs.

Class Schedule:

The seminar will meet from 3:50 to 5:50 p.m. on Tuesdays throughout the semester.

Office Hours, Email, Telephone:

Prof. Maggs will hold office hours for the course. His office is in Stuart Hall 416. He will post his office hours on the portal. You may also contact him at (202) 994-6031 or gmaggs@law.gwu.edu.

No Textbook Required:

You do not need to purchase any books for this seminar. You can obtain the text (or links to the text) of all of the reading assignments on the portal <https://my.law.gwu.edu>.

Assignments and Evaluation:

All students must (1) complete the assigned weekly reading; (2) participate regularly in class sessions; (3) co-lead the discussion during one class session; (4) write a research paper that advances and supports a thesis about how a currently litigated constitutional issue should be resolved in accordance with the original meaning of the Constitution; and (5) present a draft of their paper to the class.

The research paper must be between 6,000-9,000 words in length, including footnotes. Papers that are at least 8,000 words long and earn a B- or higher will satisfy the upper level writing requirement. Please see the Law School Bulletin for the complete rules regarding the upper level writing requirement. The final version of the research paper is due on Friday, April 24, 2015, by 5:00 p.m. Please submit your paper by email to Prof. Maggs at gmaggs@law.gwu.edu.

Grades in the course will be determined according to the following criteria:

1. Timely selection of an appropriate, currently litigated constitutional issue to be addressed in the research

- paper (see Syllabus Appendix A for guidance in selecting an issue). [5%]
2. Description of the constitutional issue (i.e., in what context the issue has arisen, why the issue matters, what courts and commentators have already said about the issue, etc.). [10%]
 3. Quality of a thesis statement about how the constitutional issue should be resolved in accordance with the original meaning of the Constitution (see Syllabus B for guidance on the definition of "original meaning"). [5%]
 4. Strength of arguments made in support of the thesis, including completeness and accuracy of historical research, logical reasoning, etc. (see Syllabus Appendix C for guidance on commonly cited sources of the original meaning and how to find them). [30%]
 5. Thoroughness in identifying and addressing potential counter arguments. [15%]
 6. Originality of the research. [15%]
 7. Writing style, tone, diction, grammar, citations, proofreading, etc. [10%]
 8. Class participation, quality of paper presentation, complying with deadlines, word lengths, etc. [10%]

We will discuss these criteria in class so that you have a better understanding of them.

Class Sessions:

Each of the first six class sessions will focus on sources and methods of researching the original meaning of the Constitution. We will read articles describing commonly cited historic materials and the kinds of arguments that writers advance when using them to make claims based on these materials. We will then evaluate the strengths and weaknesses of the reasoning based on these sources in actual Supreme Court cases.

During the seventh, eighth, and ninth class sessions, we will read and discuss scholarly works making claims about the original meaning. In the process, we will attempt to evaluate these works based on the criteria outlined above for grading the research papers to be submitted in this seminar.

In the last four class sessions, students will present draft versions of their own papers. All members of the seminar must read, discuss, and provide constructive feedback on the papers presented.

Professor Barr and Professor Maggs will guide the class discussion the first week. They will then assign teams of students to lead the discussions during the subsequent weeks.

Reading Assignments and Exercises:

Below are the reading assignments and exercises for each class session. All of the materials (or links to them) are available on the portal.

RECOMMENDED BACKGROUND READING

U.S. Department of State, *Outline of U.S. History* 51-80 (2011)

Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 Iowa L. Rev. 891 (1990)

WEEK #1: RECORDS OF THE FEDERAL 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) (selected pages)

WEEK #2: 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)

Ira C. Lupu, *The Most-Cited Federalist Papers*, 15 Const. Comment. 403 (1998)

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

WEEK #3: 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) (selected page)

WEEK #4: DICTIONARIES FROM THE FOUNDING ERA

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)

Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419 (2013)

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

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

Selected Pages from various dictionaries cited in the
cases.

WEEK #5: THE FRAMERS' GENERAL UNDERSTANDING OF GOVERNMENTAL
POWERS AND INDIVIDUAL RIGHTS

Trevor Colbourn, *Lamp of Experience: Whig History and the
Intellectual Origins of the American Revolution* chs. 6 & 9
(1966)

Jack P. Greene, *Constitutional Origins of the American
Revolution* 1-18, 187-190 (2010)

Lee v. Weisman, 505 U.S. 577 (1992) (edited excerpt and
points for discussion)

United States v. Loving, 517 U.S. 748 (1996) (edited
excerpt and points for discussion)

WEEK #6: ACTS OF THE FIRST CONGRESS

Michael Bhargava, *The First Congress Canon and the Supreme
Court's Use of History*, 94 Cal. L. Rev. 1745 (2006)
(excerpt)

David P. Currie, *The Constitution in Congress: Substantive
Issues in the First Congress, 1789-1791*, 61 U. Chi. L. Rev.
775 (1994) (excerpt)

Eldred v. Ashcroft, 537 U.S. 186 (2003) (edited excerpts
from briefs and opinions & points for discussion)

Marsh v. Chambers, 463 U.S. 783 (1983) (edited excerpt &
points for discussion)

Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124

Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70-71

WEEK #7: JOSEPH STORY'S TREATISE AND BLACKSTONE'S COMMENTARIES

H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 Yale L.J. 1285 (1985) (excerpt)

William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 Vt. L. Rev. 5 (1994) (excerpt)

Apprendi v. New Jersey, 530 U.S. 466 (2000) (edited excerpt & points for discussion)

Clinton v. Jones, 520 U.S. 681 (1997) (edited excerpt & points for discussion)

W. Blackstone, *Commentaries on the Laws of England* (1768) (selected pages)

J. Story, *Commentaries on the Constitution of the United States* (1833) (selected pages)

WEEK #8: 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)

WEEK #9: LEGISLATIVE HISTORY OF THE 14TH AMENDMENT

[Readings to be announced.]

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

WEEK #10: EXAMPLES OF SCHOLARLY RESEARCH AND ITS RELEVANCE

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

Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 Geo. L.J. 1057 (2009) (excerpt)

Philip Hamburger, *Privileges or Immunities*, 105 Nw. U. L. Rev. 61 (2011) (excerpt)

WEEKS ##11-13: STUDENT PAPER PRESENTATIONS AND DISCUSSIONS

On each of these three days, four students will present first drafts of their papers. Each presentation should be about 25 minutes in length. Ideally, each presenter will speak for about half this time and entertain questions for the other half.

By the Friday before class, each presenter will distribute to the other members of the class a draft of his or her paper. The other members of the class must read these drafts, come prepared to ask questions and make comments, and offer one written constructive suggestion for improvement.

Appendix A: SELECTING AN ISSUE FOR YOUR RESEARCH PAPER

By the start of the fourth class session, you must identify, and submit to Professor Maggs for approval, a currently litigated constitutional issue about which you will write your research paper. Do not begin writing until you obtain approval from Professor Maggs.

Please note that you cannot write about constitutional provisions in the abstract. On the contrary, you must formulate a thesis about how to resolve a currently litigated issue in a manner consistent with the original meaning of the Constitution. Requiring the issue to be "currently litigated" helps to ensure that your research will be original and useful to others.

You can find potential issues by looking at recent cases in which courts have decided new questions about the meaning of the Constitution. No simple formula exists for identifying the perfect issue. But the best cases are those that go beyond simply applying settled law to particular facts.

A very helpful source for finding interesting, currently litigated issues is Bloomberg/BNA's *U.S. Law Week* publication, available here: <https://www.bloomberglaw.com/law-reports/BNALW>. (All of you should have individual passwords for BLAW. If you do not, simply email eservices@law.gwu.edu with your name, GWID and graduation year to request one). Every month, this newsletter lists new circuit splits, many of which involve constitutional issues. For example, in October 2014, *U.S. Law Week* identified a circuit split on this issue:

"Do laws against spoken requests for immediate donations of money violate freedom of speech under the First Amendment? The District of Columbia, First and Seventh circuits have found such laws valid, but the Fourth, Sixth and Ninth circuits have invalidated them."

A research paper might seek to show how this issue could be resolved in a manner consistent with the original meaning of the Constitution.

If you cannot find a good circuit split, look next for recent constitutional cases with majority and dissenting opinions. Please be careful in selecting cases that involve constitutional amendments. Often there are fewer available sources concerning their original meaning.

Appendix B: Definition of Original Meaning

The Constitution may have more than one "original" meaning, depending on how that term is defined. The "original intent" might be defined as the meaning intended by the Framers who drafted the Constitution. The "original understanding" might be defined as the meaning understood by the delegates at the state conventions that ratified the Constitution. The "original objective" meaning might be defined as the meaning that a reasonable person would have attached to the text. You can read more about these different types of meaning in Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas*, 4 NYU J. L. & Liberty 494 (2009).

Scholars disagree about which type of original meaning is the most important. In writing your research paper, however, you are free to address any or all of the different types of original meaning. The only requirement is that you clearly identify and define the type or types of original meaning that you are seeking to uncover. That said, the most persuasive writings usually attempt to show a convergence of the different forms of original meaning.

Appendix C: Commonly Cited Sources of the Original Meaning

The most commonly cited sources of the original meaning tend to fall into four general categories. In conducting your research, you should investigate whether sources from each of these categories may have relevance to your issue.

The first category are legal documents that predate the Constitution, such as the Declaration of Independence, the Articles of Confederation, and state constitutions adopted after independence but before 1787. Many writers have drawn inferences about the meaning of the Constitution by comparing its terms to these earlier documents.

The second category includes documents arising out of the drafting and ratification of the Constitution. These include the notes from the Constitutional Convention, the Federalist Papers and anti-Federalist Papers, and the records of the state ratifying conventions. They also include the legislative history of constitutional amendments. These documents tend to show what the people involved in the drafting and ratification process intended or understood constitutional provisions to mean.

The third category consists of documents pertaining to the early interpretation of the Constitution by those charged with administering it. These documents include legislative enactments made during the first few sessions of Congress, executive actions taken in the first several presidential administrations, and early judicial decisions interpreting the Constitution.

The final category consists of miscellaneous documents, such as dictionaries and treatises from the Founding Era and letters and speeches of the Founders. These documents may provide additional insight into the meaning of Constitutional provisions. We will discuss all of these different sources in class.

You can find many primary sources at the Library of Congress's "Century of Lawmaking for a New Nation" website <<http://memory.loc.gov/ammem/amlaw/>> or at the Constitutional Sources Project's "Consource" website <<http://www.consource.org>>. The latter website also indexes each constitutional clause to historic documents that may reveal something about the clause's meaning. A similar index is available at The University of Chicago Press and the Liberty

Fund's "The Founders' Constitution" website <<http://press-pubs.uchicago.edu/founders/>>. The assigned readings will discuss other avenues of research.

Reference Librarian Lori Fossum <lfossum@law.gwu.edu> has agree to assist students in this class with their research questions.