

Litigating the Lessons of History 7460-102
Professor Christine Chabot (“shuh-BOE”) (she/her)
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Course Logistics

Location: Room 455. The syllabus and course materials for this course are maintained on D2L. Classes will meet in person and shift to remote learning as necessary. **Day and Time:** Tues. 2:00-3:40 p.m. **Recording:** Our class meetings may be recorded. Please see page 2 of the Syllabus for more information.

Office Hours: By appointment. My office is in Room 202D. I’m also happy to take your questions or requests for a meeting time via email: christine.chabot@marquette.edu.

Course Description This seminar explores how originalist and historical arguments shape judicial resolution of hotly contested matters of constitutional law, with particular emphasis on recent separation of powers disputes arising in federal courts of appeals and the Supreme Court. The course will require students to read and provide oral and written analysis of briefs, primary and secondary historical sources, and judicial opinions. Students will gain a critical understanding of the role that originalist and historical arguments play in shaping constitutional decisions. *Please see p. 2 of the Syllabus for a list of relevant course deadlines and pp. 3-6 of the Syllabus for a breakdown of topics and reading assignments.*

Class Attendance Policy Regular and punctual attendance is mandatory as required by the ABA and Marquette and will be recorded for each session of the course. You may take up to *two* unexcused absences to cover general illnesses, work obligations, moot court, interviews, weddings, and similar circumstances requiring you to miss class. Students who must miss class due to COVID should seek an excused absence from the instructor. Students with inadequate attendance (more than two unexcused absences or more than three absences for any reason) may have their participation grade lowered or be precluded from submitting a final paper.

Grades

Participation: 50 points (25 points, regular participation in every class; 25 points, presentation of moot argument in Class 6 or 9). Students should come to class with questions about reading materials and be prepared to be active participants in class discussions. Each student will start with full credit for regular participation in class; I will deduct points for students who do not pull their weight in class discussions.

Paper: 50 points (10 points, meeting all deadlines; 35 points, content of paper; 5 points, self/peer evaluation, solo authors will evaluate themselves and co-authors will be evaluated by their peers). Papers will analyze which brief, article, or case had the best/worst use of history and why. To better approximate writing in law practice, students will have the choice of co-authoring or solo authoring their papers. Co-authors need only agree on the paper topic; they may present arguments pro and con a particular position in their papers. Length will be 10 pages for solo-authored papers and 15 pages for co-authored papers.

Responsible and Respectful Participation and an Inclusive Classroom

This class requires responsible and respectful participation in class discussions. Responsible class participation requires regular and punctual attendance, as well as the use of the internet and social media only as a tool to assist in the learning that takes place in the class. Respectful class participation requires students to be open to the ideas and viewpoints expressed by others in the class, and to engage in a conversation that challenges those viewpoints and ideas without personal attacks or demeaning comments. I intend to create a learning environment that supports a diversity of thoughts, perspectives, and experiences and honors your identities (including race, gender, class, sexual orientation, religion, abilities, etc.)

Deadlines:

1/30	Class 3.	Co-Author/Opt-Out Choices Due; Presentation Groups Assigned
3/26	Class 10.	Paper Topic Due (you should discuss the topic with me the week of Class 9 or before Class 10)
4/2	Class 11.	Outline Due
4/16	Class 13.	Draft Paper Due
5/6	Monday.	Final Paper Due

Educational Goals, Objectives, and Student Learning Outcomes

Marquette University Law School has developed its academic program and classes so that its students achieve a specific set of educational goals, objectives, and student learning outcomes. Students in this class will ***gain essential knowledge*** of how originalism and history shape constitutional decisions in leading separation of powers disputes; ***practice written and oral communication skills*** needed to advocate for resolution of pressing constitutional problems; and ***employ legal reasoning strategies*** to identify and analyze contested matters of constitutional law.

Recording of Class Meetings/Availability of Recordings to Students

In this class software may be used to record live class discussions. As a student in this class, your participation in live class discussions may be recorded. These recordings will be made available only to students enrolled in the class and only to assist those who cannot attend the live session due to COVID, medical emergencies, or a death in the family. ***If you will miss class for one of these reasons, please notify me as early as possible that day so that I can record the class.*** All recordings will become unavailable to students in the class when the course has concluded.

Reading Assignments. Note: The pages indicated in **bold underline** are required reading assignments. Reading the full article is always optional. All reading materials are either linked below or posted on the D2L website. There is no required textbook for this course.

Class 1. Introduction: Why Look to History, and How Should Courts Go About Resolving Historical Questions? These materials provide a basic introduction to originalism and use of historical evidence in constitutional litigation. Materials touching on originalism under the Second Amendment/*Bruen* will provide background for our study of how courts will apply originalism in ongoing separation of powers disputes.

Background on originalism (blog entry plus 5 pages): [Legal Theory Blog: Originalism](#); Lawrence B. Solum, [Originalism and Constitutional Construction](#), 82 Fordham L. Rev. 453, **462-67** (2014)

The role of history and tradition (5 pages): Lawrence B. Solum & Randy E. Barnett, [Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition](#), 118 Northwestern U. L. Rev. 433, **Abstract; pp. 440-445** (2023)(Section on History and Tradition as Constitutional Concepts); (6 pages) *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111, **2122, 2129-2134** (2022) (posted)

Problems of ascertaining original intent (18 pages): Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, **204-222** (posted); Challenges for judges and lawyers (6 pages): [U.S. v. Bullock \(J. Reeves\)](#)

Class 2. What History? (Primary Sources on the Unitary Executive Debate) The backdrop of English practice and the creation and ratification of the U.S. Constitution:

Background: U.S. Const. Art. II; (5 pages) Jack N. Rakove, [Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism](#), 48 San Diego L. Rev. 575, **588 (first full para.) - 593** (2011); (5 pages) Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, **856-861** (1989) (para. beginning “Let me turn next to originalism” (posted); (6 pages; introduction) Jed Handelsman Shugerman, [Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism](#), 33 YALE J.L. & HUMAN. 125, **126-32** (2022)

Primary Sources: (35 pages) THE RECORDS OF THE FEDERAL CONVENTION OF 1787 ((Max Farrand ed., 1911) (hereinafter “Farrand”) (As a primary historical source this reading will be messy and difficult to understand. Do your best to read through and see what the records do/do not show.): [1 Farrand 20-21](#) (Virginia Plan); **64-69; 96-104, 110-114; 138-140; 2 Farrand 52-54; 171-72; 342-44; 493-95; 538-43**

Ratification: The Federalist Papers [No. 39](#) (**first four paragraphs**)(Madison); [No. 70](#) (Hamilton); [No. 77](#) (**first paragraph**)(Hamilton)

Class 3. What History? (Primary Sources on the Unitary Executive Debate, continued)

Contemporaneous State Constitutions and Laws (6 pages) Jane Manners & Lev Menand, [The and the Statutory Limits of Three Permissions: Presidential Removal Agency Independence](#), 121 COLUM. L. REV. 1, **39-45** (2021); (5 pages) Peter Shane, [The Myth of the Unitary Executive](#), 19 Pa. J. of Const. L., 323, **334-339** (2016)

The Decision of 1789 and Early Congressional Debates, Background: (8 pages) Saikrishna Prakash, [New Light on the Decision of 1789](#), 91 Cornell L. Rev. 1021, 1034-42 (2006); (10 pages) Jed Shugerman, [Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity](#), 171 U. Pa. L. Rev. 753, **774-779; 819-24** (2023)

Congressional Debates Preceding the Decision of 1789, Primary Materials: (9 pages) 1 Annals of Congress **455-464** (through end of Madison's statement) (posted)

Early Executive and Congressional Practice: (7 pages) Steven Calabresi & Christopher Yoo, [The Unitary Executive During the First Half Century](#), 47 Case W. Rsrv. L. Rev. 1451, **1472-1479; 1486-1490** (1997); (10 pages) Cass R. Sunstein & Lawrence Lessig, [The President and the Administration](#), 94 Columbia Law Review 1, **14-22, 29-30** (1994), (3 pages) Christine Kexel Chabot, [Interring the Unitary Executive](#), 98 Notre Dame L. Rev. 129, **172-75** (2022)

Deadline: Co-Author Groups/Opt-Out Decisions Due Before Class on 1/30

Class 4. History in the Supreme Court: Myers, Morrison, and Judicial Opinions on the Unitary Executive Debate. (36 pages) Myers v. U.S., 272 U.S. 52, **106-39** (1926), *id.* at **240-41** (Brandeis, J., dissenting); **295** (Holmes, J., dissenting) (posted); (10 pages) Morrison v. Olson, 487 U.S. 654, **697-706, 723-24 (first four paras. of Part IV)** (1988) (Scalia, J., dissenting)(posted); (6 pages) Andrea Scoseria Katz & Noah Rosenblum, [Becoming the Administrator-in-Chief: Myers and the Progressive Presidency](#), 123 Columbia L. Rev. 2153, **2153 (abstract); 2183-88** (2023)

Class 5. Seila Law, History and Novelty. [Brief Amici Curiae of Separation of Powers Scholars](#), pp. **1-23**; [Brief Amici Curiae Harold H. Bruff et. al As Amici Curiae](#), pp. **1-20**; Seila Law LLC v. Consumer Financial Protection Bureau, 140 S.Ct. 2183, **2191-92; 2197-2200, 2205-2206** (2020) (posted)

Class 6. Moot argument: SEC v. Jarkesy. [5th Cir. Opinion](#), pp. 2, 25-30; [Brief of Amicus Curiae Professor Ilan Wurman in Support of Neither Party](#), pp. 12-26; [Brief of Amicus Curiae Professor Jed Shugerman in Support of Petitioner](#), pp. 2-16; [Brief of Constitutional Originalists Edwin Meese III, Steven G. Calabresi, and Gary S. Lawson as Amici Curiae in Support of Respondents](#), pp. 16-28.

Students should address originalist arguments for and against an indefeasible general removal power as well as originalist arguments for and against an indefeasible removal power with respect to inferior officers who serve as Administrative Law Judges. Students in support of Petitioner SEC will argue for 10 minutes and then have 30 minutes of Q & A; Students in support of Respondent Jarkesy will argue for 10 minutes and then have 30 minutes of Q & A.

Class 7. Scraps of History: Reinvigorating the Nondelegation Doctrine. *Gundy v. United States*, 139 S. Ct. 2116, 2131-2139 (2019) (Gorsuch, J., dissenting) (posted);

Objections to a more rigorous nondelegation doctrine: Julian Davis Mortenson & Nicholas Bagley, [Delegation at the Founding](#), 121 Colum. L. Rev. 277, 301-313, 332-34 (Delegations by the First Congress) (2021); Christine Kexel Chabot, [The Lost History of Delegation at the Founding](#), 56 Georgia Law Review 81, 113-118, 123-125 (2022); Nicholas R. Parrillo, [A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s](#), 130 Yale L. J. 1288, 1293-94, 1301-1305 (2021).

Supporters of a more rigorous nondelegation doctrine: Philip Hamburger, [Delegating or Divesting?](#) 115 Northwestern U. L. Rev. Online, 88, 88-100 (2020); Ilan Wurman, [Nondelegation at the Founding](#), 130 Yale L. J. 1490, 1490 (abstract); 1506-1512 (2021).

Class 8. History Avoided? [West Virginia v. EPA](#), slip op. at pp. 1-2; Gorsuch, J., concurring at pp. 16-19 & n.6; Kagan, J., concurring at pp. 28-33 (2022); [Brief of Julian Davis Mortenson as Amicus Curiae in Support of Respondents](#), pp. 1-22; [Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Petitioners](#), pp. 1-22.

Spring Break

Class 9. Moot argument: Nondelegation challenge to OSH Act. [Brief of Professors Julian Davis Mortenson and Nicholas Bagley as Amici Curiae in Support of Appellees](#), pp. 1-28; [Brief of the National Ass’n of Homebuilders and National Federation of Independent Business as Amici Curiae in Support of Appellant and Reversal](#) p. 1-21

Students should address originalist arguments for and against a more rigorous nondelegation doctrine and the OSH Act’s constitutionality. Students in support of Appellant Allstates will argue for 10 minutes and then have 30 minutes of Q & A; Students in support of Appellee Secretary of Labor will argue for 10 minutes and then have 30 minutes of Q & A.

Upcoming deadline: Meet to discuss paper topic before next week’s class.

Class 10. Reliability of historical evidence and competing constitutional methodologies: Critiques: [Review of Madison’s Hand: Revising the Constitutional Convention](#), a book by Mary Sarah Bilder; Richard H. Fallon, Jr., [The Chimerical Concept of Original Public Meaning](#), 107 Virginia L. Rev. 1421, 1423-1433 1483-88 (2021); Christine Chabot, [The Founders’ Purse](#), pp. (21-27) (section labeled “Unconstrained Originalism”).

Defenses: Michael McConnell, [Time, Institutions, and Interpretation](#), 95 Boston U. L. Rev. 1745, **1755-1763** (2015); William Baude & Stephen E. Sachs, [Originalism's Bite](#) (pp. **1-6**); John O. McGinnis, [Bruen's Originalism](#)

Originalism avoided or abhorred? Amy Coney Barrett, [Originalism and Stare Decisis](#), 92 Notre Dame L. Rev. 1921, **1921-22**; **1928-33** (2017); Stephen Rohde, [An Obituary for Originalism: On Erwin Chemerinsky's "Worse Than Nothing"](#)

Deadline: Paper topic due 3/26.

Class 11. Selective originalism: Christine Chabot, [The Founders' Purse](#), pp. (**1-6**; **10-13**); *Consumer Financial Protection Bureau v. All American Check Cashing*, 33 F.4th 218, **221-241** (J. Jones, concurring) (2022) (posted); [Brief of Professors of History and Constitutional Law as Amici Curiae in Support of Petitioners](#), at pp. **11-24**.

Deadline: Paper outline due 4/2.

Class 12. U.S. Const. Amend. XIV, section 3 and disqualification from office. Materials TBA.

Class 13. Present and discuss papers.

Deadline: Draft paper due 4/16.

Class 14. U.S. Const. Amend. XIV, section 3 and disqualification from office. Materials TBA.

Deadline: Final paper due Monday May 6