History in American Constitutional Interpretation
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NYU School of Law, Fall Term 2005
Furman Hall 110

This seminar will explore the role of history in the effort to establish the meaning of the Constitution. It will examine questions such as whether and how history can be a source of authority or of normative value; whether and how history is itself a matter of value that is struggled over in constitutional discourse; what characters, events, or decisions are properly part of the rubric of constitutional law; and what the appropriate roles of various institutions or non-institutional actors are in shaping or contesting constitutional history. An introductory course in constitutional law is a prerequisite.

This seminar will normally meet on Wednesdays from 4:05 to 5:55 p.m., with a ten-minute break in the middle. The class will not meet, however, on September 7 (legislative Monday), October 5 (Rosh Hashana), or October 12 (Yom Kipur Eve). A special make-up session of the seminar will be held on Friday, October 7, from 1:05 to 2:55 p.m. A second make-up session will also be scheduled, but as of this writing the date and time of that session remain matters of mystery.

Students can fulfill the writing requirements of this seminar in either of two ways. Students choosing Option A can earn Part A writing credit (hence the name). Students choosing Option B can earn Part B writing credit. Students needing neither kind of writing credit may fulfill the requirements of the course through either option, as they choose. The options are as follows:

Option A: During the course of the semester, the student will write one reaction paper, not more than five pages long, addressing a particular week’s reading. These papers will be due 24 hours before the seminar session at which the reading is discussed. The student will also write a paper of between 30 and 35 pages, exclusive of footnotes. This longer paper must be original work, by which I mean that it must either contain an original argument or else support a known argument in a new way. (Ask yourself: Would a fellow student in this seminar who had conscientiously done the reading and participated in the discussions learn or confront something new by reading your paper? If and only if so, the paper qualifies under this option.) Students choosing this option must submit outlines of their proposed longer papers by December 1, 2005; first drafts by January 31, 2006; and final drafts by April 1, 2006.

Option B: During the course of the semester, the student will write three papers, each not less than 8 nor more than 10 pages long, inclusive of footnotes, addressing the readings on three separate weeks. These papers should not be mere summaries; they should demonstrate conversance with at least some portion of the reading but should also make an argument about that material. These papers will be due 24 hours before the seminar session at which the reading is discussed.
Assigned Readings

Week 1: History, Democracy, and Originalism

U.S. Department of Justice, Office of Legal Policy, Guidelines on Constitutional Interpretation (1988)
Antonin Scalia, A Matter of Interpretation (1997)

Week 2: Originalism: A Case Study


Week 3: Advocacy and Accuracy


Week 4: Originalism Gone Plural

Bruce Ackerman, We The People: Foundations (1991) (selections)
Bruce Ackerman, We The People: Transformations (1998) (selections)

Week 5: Yes, But…

Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165 (1993)
Week 6: Narrative and Memory


Week 7: The Greatest Story Never Told

George P. Fletcher, *Our Secret Constitution* (2001)

Week 8: Tradition


Week 9: Tradition?

*Scott v. Sanford*, 60 U.S. 393 (1857) (selections)

Week 10: A Puzzle about Printz

The Federalist Papers, Nos. 27 & 44
Week 11: Keeping Faith and Giving Up

Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 Fordham L. Rev. 1587 (1997)

Week 12: Losers


Week 13: Redeemers

Reva B. Siegel, *She the People*, 115 Harv. L. Rev. 948 (2002)

Week 14: Fire Away