GEORGETOWN
Center *for the* Constitution

Student Fellows Program Fall 2020

All events require an advance registration with your GU email.

The Historical Origins of Judicial Religious Exemptions

Professor Stephanie Barclay, Notre Dame Law
Friday September 4th
3:00 PM EST
ADVANCE REGISTRATION REQUIRED

The Supreme Court has recently expressed a renewed interest in the question of when the Free Exercise Clause requires exemptions from generally applicable laws. Conventional wisdom holds that judicially created exemptions would have been a new or extraordinary means of protecting religious exercise. This Article, however, questions that assumption. Though the judiciary did not always use modern language of exemptions, this was functionally what judges were doing on a large scale throughout the country and across a host of personal rights. The mode of analysis courts used to create these equitable exemptions also provides an important historical antecedent for modern strict scrutiny analysis.

Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court

Ilya Shapiro, CATO Institute
Wednesday September 23rd
3:00 PM EST
ADVANCE REGISTRATION REQUIRED

Ilya Shapiro, director of the Cato Institute's Center for Constitutional Studies, takes readers inside the unknown history of fiercely partisan judicial nominations and explores reform proposals that could return the Supreme Court to its proper constitutional role. Confirmation battles over justices will only become more toxic and unhinged as long as the Court continues to ratify the excesses of the other two branches of government and the parties that control them. Only when the Court begins to rebalance constitutional order, curb administrative overreach, and return power back to the states will the bitter partisan war to control the judiciary finally end.

Decryption Originalism: The Lessons of Burr

Professor Orin Kerr, Berkeley Law
Friday September 25th
2:00 PM EST
ADVANCE REGISTRATION REQUIRED

The Supreme Court is likely to rule soon on how the Fifth Amendment privilege against self-incrimination applies to compelled decryption of a digital device. During the 1807 treason trial of Aaron Burr, with Chief Justice John Marshall presiding, the government asked Burr's private secretary if he knew the cipher to an encrypted letter Burr had sent to a co-conspirator. Burr's secretary pled the Fifth, leading to an extensive debate on the meaning of the privilege and an opinion from the Chief Justice. The Burr dispute presents a remarkable opportunity to unearth the original understanding of the Fifth Amendment and its application to surprisingly modern facts.

Diverse Originalism

Professor Christina Mulligan, Brooklyn Law

Wednesday September 30th

3:00 PM EST

ADVANCE REGISTRATION REQUIRED

Originalism has a difficult relationship with race and gender. People of color and white women were largely absent from the process of drafting and ratifying the Constitution. Today, self-described originalists are overwhelmingly white men. In light of these realities, can originalism solve its "race and gender" problems while continuing to be originalist? This Article argues that originalists can take several actions today to address originalism's race and gender problems, including debiasing present-day interpretation, looking to historical sources authored by people of color and white women, and severing originalism and the Constitution's text from their historical associations with racism and sexism. Taking these steps will not only make originalism more inclusive, but also help originalists become better at accessing the original meaning of the Constitution.

Originalism's Promise: A Natural Law Account of the American Constitution

Professor Lee Strang, Toledo Law

Wednesday October 14th

3:00 PM EST

ADVANCE REGISTRAION REQUIRED

The foundation of the American legal system and democratic culture is its longstanding written Constitution. However, a contentious debate now exists between originalists, who employ the Constitution's original meaning, and Nonoriginalists, who argue for a living constitution interpretation. The first natural law justification for an originalist interpretation of the American Constitution, Originalism's Promise presents an innovative foundation for originalism and a novel description of its character. The book provides a deep, rich, and practical explanation of originalism, including the most-detailed originalist theory of precedent in the literature. Of interest to judges, scholars, and lawyers, it will help all Americans better understand their own Constitution and shows why their reverence for it, its Framers, and its legal system, is supported by sound reasons. Originalism's Promise is a powerful contribution to the most important theory in constitutional interpretation.

Framing the Constitution: The Impact of Labels on Constitutional Interpretation

Professor Donald Kochan, George Mason Law

Friday October 16th

12:00 PM EST

ADVANCE REGISTRATION REQUIRED

In his forthcoming book, Framing the Constitution: The Impact of Labels on Constitutional Interpretation (Cambridge University Press, 2020), the Center's Visiting Scholar Donald Kochan applies interdisciplinary social science research to constitutional labels. His research examines whether the choice of labeling text in the Constitution affects a receptor's perception. In other words, because language matters—and first impressions do too—a person's first interaction with a constitutional label matters. Extra-textual labels, a shorthand affixed to a specific right, power or other concept in the Constitution, according to Kochan, may impact how a person interprets the purpose and meaning of the Constitution's text to which that label attaches. Kochan says his book aims to "make people more sensitive to label choices" and apply "more consideration in decisions to adopt or use labels."

Judicial Deference: How Do I Defer to Thee? Let Me Count the Ways

Mark Chenoweth, New Civil Liberties Alliance

Wednesday October 28th

3:00 PM EST

ADVANCE REGISTRATION REQUIRED

Mark Chenoweth of the New Civil Liberties Alliance will discuss the topic of Judicial Deference using NCLA cases to provide examples of the different varieties.

Who Are 'Officers of the United States'

Professor Jennifer Mascott, George Mason Law

Friday November 6th

12:00 PM EST

ADVANCE REGISTRATION REQUIRED

For decades courts have believed that only officials with "significant authority" are "Officers of the United States" subject to the Constitution's Article II Appointments Clause requirements. But this standard has proved difficult to apply to major categories of officials. This Article examines whether "significant authority" is even the proper standard, at least as that standard has been applied in modern practice. To uncover whether the modern understanding of the term "officer" is consistent with the term's original public meaning, this Article uses two distinctive tools: (i) corpus linguistics-style analysis of Founding-era documents and (ii) examination of appointment practices during the First Congress following constitutional ratification. Both suggest that the original public meaning of "officer" is much broader than modern doctrine assumes—encompassing any government official with responsibility for an ongoing governmental duty. This historic meaning of "officer" would likely extend to thousands of officials not currently appointed as Article II officers, such as tax collectors, disaster relief officials, customs officials, and administrative judges. This conclusion might at first seem destructive to the civil service structure because it would involve redesignating these officials as Article II officers—not employees outside the scope of Article II's requirements. But this Article suggests that core components of the current federal hiring system might fairly readily be brought into compliance with Article II by amending who exercises final approval to rank and hire candidates. These feasible but significant changes would restore a critical mechanism for democratic accountability and transparency inherent in the Appointments Clause.

The Misunderstood Eleventh Amendment

Professor Stephen Sachs, Duke Law

Wednesday November 18

3:00 PM EST

ADVANCE REGISTRATION REQUIRED

The Eleventh Amendment might be the most misunderstood amendment to the Constitution. Both its friends and enemies have treated the Amendment's written text, and the unwritten doctrines of state sovereign immunity, as one and the same — whether by reading broad principles into its precise words, or by treating the written Amendment as merely an illustration of unwritten doctrines. The result is a bewildering forest of case law, which takes neither the words nor the doctrines seriously. The truth is simpler: the Eleventh Amendment means what it says. It strips the federal government of judicial power over suits brought against states, in law or equity, by diverse plaintiffs. It denies subject-matter jurisdiction in all such cases, to federal claims as well as state ones, and in only such cases. It cannot be waived. It cannot be abrogated. It applies on appeal. It means what it says. Likewise, the Amendment does not mean what it does not say: it neither abridges nor enlarges other, similar rules of sovereign immunity, derived from the common law and the law of nations, that limit the federal courts' personal jurisdiction over unconsenting states.

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