

Reading Group (DACPVPO3), spring 2021

## Constitutional Interpretation

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This is a course designed primarily for PhD students but open also to motivated students of other programmes, including Mgr., Bc., or Erasmus. Every semester we read either a selected book or a set of articles, book chapters or other texts dedicated to a given topic. We gradually read our weekly portions of assigned readings and then meet to discuss the content of the readings and our follow-up thoughts and ideas. The atmosphere of this course will (hopefully) be informal, creative, and intellectually stimulating.

In the spring of 2021, we will read texts about constitutional interpretation.

The course will run online, in a virtual classroom in MS Teams (code: cc4mdoi).

Would you like to join?  
You will be most welcome!

### ❖ Main Readings

Antonin Scalia, *A Matter of Interpretation: An Essay* (Princeton UP 1997)

Aharon Barak, *Purposive Interpretation in Law* (Princeton UP 2005)

Brian Tamanaha, *Beyond the Formalist-Realist Divide* (Princeton UP 2010)

Mark Tushnet, *Taking Back the Constitution: Activist Judges and the Next Age of American Law* (Yale UP 2020)

## Syllabus for spring 2021

(subject to minor changes during the semester)

### ❖ Non-Compulsory Prelude: Reading Antonin Scalia (and his critics)

Officially, the semester only starts on 1 March. Yet, for those who want, reading an absolute classic can be a nice a prelude to the course. Do join us! ☺

8. 2. 2021: Scalia, *A Matter of Interpretation*, p. 3-47 (the essay itself)

What is Scalia's position? In the preface, Amy Gutmann (the editor) writes: "*Laws mean what they actually say, not what legislators intended them to say but did not write into the law's text for anyone (and everyone so moved) to read. This is the essence of the philosophy of law that Justice Scalia develops here in more detail. The philosophy is called **textualism**, or **originalism**, since it is the original meaning of the text - applied to present circumstances - that should govern judicial interpretation of statutes and the Constitution.*

*Justice Scalia criticizes two alternatives to textualism - judicial decision making according to **subjective intent** and judicial creation of a **"living" or "evolving" Constitution** - as indefensible ways of interpreting (or failing to interpret) the law. But he also goes well beyond criticism; he develops and defends the merits of his philosophy of textualism."*

15. 2. 2021: **Scalia**, A Matter of Interpretation, p. 49-127 (the critics)

Scalia's essay received **reactions** from four prominent thinkers, a liberal historian Gordon S. Wood, a liberal constitutional lawyer Laurence H. Tribe, a conservative constitutional lawyer Mary Ann Glendon, and a famous liberal legal philosopher Ronald Dworkin. In case you don't have time to read all four responses, feel free to pick any two of them (for now).

22. 2. 2021: **Scalia**, A Matter of Interpretation, p. 129-149 (the response)

Scalia **responds** to all his critics. In case you haven't read all the critical reactions yet, please do so for this class, since Scalia's response is quite brief and responds to all critics at once.

## 🔗 Legal Interpretation and Constitutional Interpretation

1. 3. 2021: **Barak**, p. 3-60 (Ch 1: What Is Legal Interpretation?)

(Lots of pages, but rather easy reading! If you don't need the intro, read **at least p. 31-47** where Barak introduces various systems of INT in law.)

Barak claims that the goal of his book is *"to convince the reader that purposive interpretation ... is superior to other systems of interpretation."* **If you are not familiar with Barak's concept of purposive interpretation, read p. xiii-xv of the Introduction where he briefly explains the notion.**

Barak also writes: *"Many existing systems of interpretation – most notably intentionalism and textualism – assume that the rules of interpretation inexorably direct the interpreter toward resolution of every interpretive problem, without the need for him or her to exercise discretion. I find these systems to be fundamentally flawed. It is impossible to construct a valid system of interpretation without recognizing **judicial discretion** as a critical component. The drawback of most existing systems of interpretation is that they use judicial discretion without admitting it. Purposive interpretation tells the truth. It acknowledges the existence of judicial discretion, regarding it, along with language and purpose, as a critical component of the system."*

8. 3. 2021: **Barak**, p. 61-82 (Ch 2) & p. 370-393 (Ch 15)

(Yes, we are cheating, skipping most of the book. But Barak deals with all kinds of legal INT and we are only interested in constitutional INT. We might come back to some of the chapters later in the semester, though.)

15. 3. 2021: **Tushnet**, p. vii-x (Intro) & p. 1-18 (1: Calling Balls and Strikes)  
**Tamanaha**, p. 1-26 (1: Introduction & 2: The Myth about Beliefs)

22. 3. 2021: **Tamanaha**, p. 27-43 (3: The "Mechanical Jurisprudence" Myth)  
& p. 44-63 (4: The Holes in the Story about Legal Formalism)

29. 3. 2021: **Tushnet**, p. 19-43 (2: Originalisms)  
**Sachs**, 'Originalism Without Text' (Yale Law Journal 2017), p. 156-168

5. 4. 2021: **Easter Monday, no class, take a well-deserved break!**

Before the Easter break, we will have a strategic talk about "what is next": on the basis of our impression from the texts, we will decide which of the books we want to continue reading (Tushnet, Tamanaha, Barak, or a completely different text). We will also schedule two or three meetings with a guest and adapt the syllabus accordingly.

Looking forward to our meetings!