

## It's a Wonderful Originalism! Lawrence Solum and the Thesis of Immaculate Recovery

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**Abstract: It's a Wonderful Originalism! *Lawrence Solum e la tesi dell'Immaculate Recovery*** – This essay criticizes the “thesis of immaculate recovery” implied by Lawrence Solum’s account of originalism, which presupposes that constitutional meaning exists in the past as an object that can be recovered wholly untouched by concerns of the present. Using a classic American film to illustrate its points, the essay argues that the meaning produced by originalist method is neither immaculate nor even a recovery, and that present concerns are not obstacles to understanding the past, but the very ground of that understanding.

**Keywords:** Gadamer, Heidegger, Hermeneutics, It's a Wonderful Life, Originalism.

1. – In Lawrence Solum’s telling, constitutional interpretation is a matter of judicial integrity and correct method. A judge should conscientiously investigate the Constitution’s original public meaning fixed in the past, and then apply it to the case before her. Professor Solum is confident that judges can do this, so long as evidence is plentiful and they “subordinate their own political and ideological preferences to the law.”<sup>1</sup>

Solum’s argument implies what I will call the Thesis of Immaculate Recovery. It holds that (i) original public meaning is an object existing in the past independent of the present, and (ii) the conscientious interpreter can recover original public meaning in the pristine state of this existence, unsullied by any present preference, prejudice, or influence of the interpreter or her life and times. Neither originalist method nor Solum’s unsparing criticism of nonoriginalist judges is justified unless Immaculate Recovery is possible.

Alas, it is not. Original public meaning does not lie around the past like a rock, waiting only to be picked up and carried into the present. Immaculate Recovery of past meaning is neither immaculate nor a recovery. The meaning originalists purport to recover does not exist until they look for it, because it is partially constituted by present concerns. These concerns, moreover, are not a “corruption” of the past, but the very means by which we understand it.<sup>2</sup>

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<sup>1</sup> Statement of Lawrence Solum, *Hearings on the Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court*.

<sup>2</sup> This argument is based on Heideggerian ontology and Gadamer’s adaptation of it to textual interpretation, though extended discussion and citation are not practical here. See generally M. Heidegger, *Being and Time*, trans. J. Macquarrie, E. Robinson, (New York: Harper & Row, 1962) (1927), especially 31-41; H.G. Gadamer, *Truth and Method*, rev. trans. J. Weinsheimer,

The problem of Immaculate Recovery is not epistemological. It is not that the process of recovery is fraught with difficulty and sometimes fails.<sup>3</sup> Rather, there is nothing in the past to recover that is not created and marked by the present. The problem is ontological, not epistemological.

I will illustrate this argument with a classic American film, *It's a Wonderful Life*. I use the storyline to show the implausibility of Immaculate Recovery, and the film's ubiquitous sexism to show that contemporary commitments to gender equality are not obstacles to understanding the film, but precisely the means of doing so. I conclude with some observations about the dubious distinction between virtuous originalists and irresponsibly corrupted others which grounds Solum's argument.

2. – *It's a Wonderful Life* is a 1946 comedy/drama produced and directed by Frank Capra, starring James Stewart, Donna Reed, Lionel Barrymore, and Henry Travers. Despite its sentimentality and sexism, the film is on every American critic's "best-movies" list and remains immensely popular in the United States. It tells the life story of the bright and talented George Bailey (Stewart), who is thwarted at every turn in his burning ambition to leave the provincial "Bedford Falls" of his youth for fame and fortune elsewhere. He settles down with a local girl, Mary Hatch (Reed), and raises a family. Instead of college, he is trapped into running his father's financially beleaguered "Bailey Building and Loan," which grants home mortgages to working class folks who cannot qualify anywhere else. In the course of the story the Building and Loan is left as the only humane institution standing in Bedford Falls after the wealthy and pitiless Henry Potter (Barrymore) absorbs everything else.

All this is played mostly for laughs until the plot reaches its dramatic climax. George's serially incompetent Uncle Billy, kept on at the Building and Loan as a family kindness, loses \$8,000 of its funds (between € 85,000 and € 90,000 in current euros). Unable to replace the missing money and facing bankruptcy and ruin, George brings himself to the edge of suicide, despairing at the meaninglessness of his pitiful life and wishing he had never been born.

The conceit of the film is a bevy of guardian angels keeping close watch over George and his troubles. They send Clarence, a kindly though befuddled junior angel (Travers), to "earn his wings" by saving George from the mortal sin he is about to commit. Clarence does so by half-granting George's wish, giving him a tour of Bedford Falls as if George had never been born. (George is physically present during this tour and interacts with the inhabitants, but as a stranger rather than their family, friend, or neighbor.) The town in these visions—called "Pottersville" because in George's absence Potter has taken over everything in town—is bereft of all the good George would have done and all the people he would have saved had he lived. So horribly grim is the world without him in it that George begs to return to his real life in Bedford Falls, a wish Clarence readily grants. The film ends happily, with all the people George touched pitching in to make good the Building and Loan's shortfall, and Clarence earning his wings. Surrounded by family and friends, George realizes that despite all, his is a wonderful life.

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D.G. Marshall 2<sup>nd</sup> rev. ed. (New York: Bloomsbury Academic, 2013) (1960), especially chaps. 3 & 4.

<sup>3</sup> E.g., L. Solum, *Originalist Methodology*, 84:1 University of Chicago Law Review, 2017, 269, 278.

3. – The Pottersville world-without-George is a strikingly depressing contrast to his actual world of Bedford Falls. George himself cannot make sense of Pottersville: scores of friends and family are in prison, or insane, or trapped in grinding poverty because George was not there to help them to overcome their situations. His children don't exist because he was not there to father them with Mary, who instead never married (and to whom George is a total stranger). By removing George from the scene, Clarence has not provided an "objective" rendering of George's life in Bedford Falls, but the entirely different world of Pottersville.

Since Descartes, objectivity is reflexively understood as the absence of subjectivity, as if the "objective" world were Pottersville—a movie one could watch with all one's own scenes edited out. But like George, we can only know the world in which we actually live. There is never a point of pure transparency from which the "objective" world is visible to us "as it really is." The only world that exists is the one in which at every moment we are already entangled in relationships with other people and things. Any other world is unintelligible, Robert Solomon observed,<sup>4</sup> and George learned. It is precisely the utter incomprehensibility of the world of Pottersville that drives George back into the real world of Bedford Falls whence he came—the only world he can know because it is the only world in which he exists.

3.1. – The denouement of *It's a Wonderful Life* exposes the impossibility of Immaculate Recovery. If George can only find the meaning of his life in the world in which he actually lives, then he must examine his life himself—he must interpret *himself*. There is no objective George-life meaning which George can recover as a fact, resting in the past unaffected by who George is and where and when he lives. Whatever meaning he recovers is historical and temporal, his present understanding of his past as that past has affected his life down to the moment when he stands on the edge of suicide.

Though the meaning of his life is not objective, George is not free to make anything he wishes of it. George finds himself in a world with particular possibilities rather than others.<sup>5</sup> His interpretive possibilities are constrained by the "facticity" of the situation into which he has "fallen" or been "thrown"—the entangling relationships and physical and cultural priors of Bedford Falls with which he is already involved at every moment.<sup>6</sup> He enjoyed a middle-class upbringing (not an impoverished one); he is a white male (not the African American woman who is his family's maid); he lives in a small town (not an urban center); his childhood hearing loss disqualified him from military service (so he could never have become the war hero his younger brother was); he and Mary have children and build a life together (which eventually make leaving Bedford Falls impossible); and so on.

There remain plenty of interpretive possibilities within the constraints of George's situation. He does not "discover" the meaning of his life as a fact, as if it were there all along before he tried to find it. Rather, this meaning is constantly made both for him and by him in the choices he makes from among the possibilities

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<sup>4</sup> *Continental Philosophy since 1750: The Rise and Fall of the Self*, 1988, 162.

<sup>5</sup> I owe this formulation of the point to Jim Faulconer.

<sup>6</sup> Heidegger, *Being and Time* 188-93, 235-39.

he has. Every day George must confront both what his past has made him and what he still might choose to be.<sup>7</sup>

This circularity of interpretation constrains others, too. There is no Mary without George; the meaning of her life is partially defined by the meaning of his. Mary's examination of George's life would thus also be an examination of her own. Nor can someone wholly unconnected with George and Mary and their intertwined lives interpret them objectively—say, one of us in the present. In the more than 70 years since *It's a Wonderful Life* was released it has become embedded in a tradition which necessarily shapes how even an apparently disconnected person in the present can approach its meaning. It is almost universally acclaimed, a classic, Capra's (and Stewart's) favorite film and possibly Capra's best; it captures all the crises and courage of the "greatest generation" which survived the flu epidemic after World War I, suffered the hardship of the Depression, and then endured even more in the war against fascism; it is a powerfully nostalgic representation of a simpler and more faithful America. All of this predetermines how one can engage the film, whether to praise or to criticize.

We in the present cannot see the film and George's life as either pure Cartesian objects or pure Cartesian subjects, because we are already involved with the tradition of the past that surrounds the film and shapes our present understanding of it. Only the angels can watch the movie "as it really is."<sup>8</sup>

3.2. – In the physical and biological sciences, the object of investigation is an "object" in a meaningful way. Science has its own hermeneutic challenges,<sup>9</sup> but whatever the being of a rock, it is surely not human being. But "human sciences" like law, humanities, and the social sciences investigate human action; they are humanity investigating itself. Thus the metaphor of circularity, the "hermeneutic circle."<sup>10</sup> The various parts or kinds of human action take their meaning from their relationship to the whole of humanity, but the meaning of the whole is constituted by the meaning of its parts. In textual interpretation, the problem is insuperable, as Charles Taylor pointed out:

What we are trying to establish is a certain reading of text or expressions, and what we appeal to as our grounds for this reading can only be other readings. The circle can also be put in terms of part-whole relations: we are trying to establish a reading for the whole text, and for this we appeal to readings of its partial expressions; and yet because we are dealing with meaning, with making sense, where expressions only make sense or not in relation to others, the readings of partial expressions depend on those of others, and ultimately of the whole.<sup>11</sup>

<sup>7</sup> Cf. Richard Polt, *Heidegger: An Introduction*, 1999, 66–67.

<sup>8</sup> Cf. H. Putnam, *Reason, Truth and History*, 1981, 49–50 (criticizing metaphysical realism's "God's eye point of view").

<sup>9</sup> E.g., T. Kuhn, *The Structure of Scientific Revolutions*, 1962.

<sup>10</sup> Solum has elsewhere relied on Gadamer's account of the hermeneutic circle to refute an idiosyncratic argument against original semantic meaning and the fixation thesis. *Semantic Originalism*, Illinois Public Law & Legal Theory Research Papers Series, No. 07-24 (unpub. ms. Nov. 22, 2008), 106, [papers.ssrn.com/abstract\\_id=1120244](https://papers.ssrn.com/abstract_id=1120244). He does not consider the broader, negative implications of the circle for originalism.

<sup>11</sup> *Interpretation and the Sciences of Man*, 25:1 Review of Metaphysics, 1971, 6.

To understand the past is to understand ourselves, embedded in prior relationships and traditions that link past and present before we engage in any act of interpretation. We can only understand the past, therefore, from a certain, present point of view that is constituted both by the people we are and the past we have inherited. There is neither past without the present, nor present without the past.

4. – Heidegger expressed the hermeneutic circle in terms of ontology. We understand all meaningful human action in terms of both who we are and whom we might become.<sup>12</sup> Gadamer transformed the circle from an apparent negative—loss of objectivity—to the positive condition of understanding: our prejudices and preconceptions are precisely the means by which we understand any text from the past.<sup>13</sup> Prejudices are not obstacles to understanding the past but the very ground of this understanding.

This is evident in the portrayal of Mary in *It's a Wonderful Life*. The film reflects (what we today call) the sexist assumptions of seven decades past. Mary's success in life rests on her marriage to some successful man; her mother is dismayed when Mary rejects a wealthy, politically connected suitor to drop out of college and marry the broke and impractical George. But marriage fulfills all of Mary's dreams—mother, homemaker, helpmeet; at one point she declares only half-jokingly that she married George to “keep from becoming an old maid” (which is precisely what she is in Pottersville: a fearful spinster librarian who faints in horror at the insistence of George, a complete stranger, that together they had children, and thus sex.) Mary is the nurturing, virtuous, domestic, mother devoted to home, husband, and children, naturally unsuited for life in the real world of aggression, competition, and conflict—the world of men.

The 1946 reviews did not note these stereotypes,<sup>14</sup> not even reviews in the urban liberal press.<sup>15</sup> Mary's character apparently so captured the tenor of the times that its sexism was invisible, the unconsciously accepted picture of how women naturally are, assumed even by cultural elites. The gender stereotypes are recognizable to us because we live in a radically different world in which gender roles are matters of choice rather than destinies of Nature. It is precisely gender equality that brings into being Mary's portrayal as stereotypical and unnatural. Without this contemporary “prejudice,” the film's portrayal of Mary would pass as an unremarkable reflection of Nature, as it did in 1946.

A double irony is that gender equality also gives meaning to the several moments when Mary acts against type. It is Mary, not George, who offers their honeymoon savings to rescue the Building and Loan during the Depression. (Potter compliments George for this, but Mary volunteered the capital.) It is Mary, not George, who buys the dilapidated mansion they fix up as their home. And it is Mary—and certainly not George, who by now is off wallowing in self-pity—who raises the missing \$8,000 to rescue George and the Building and Loan from ruin.

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<sup>12</sup> *Being and Time* 194–95.

<sup>13</sup> *Truth and Method* 282–96.

<sup>14</sup> E.g., B. Briller, *Review: It's a Wonderful Life*, *Variety* 1946, [variety.com/1946/film/reviews/it-s-a-wonderful-life-1200414860/](http://variety.com/1946/film/reviews/it-s-a-wonderful-life-1200414860/); “It's a Wonderful Life,” *The Hollywood Reporter* (Dec. 19, 1946), [www.hollywoodreporter.com/news/a-wonderful-life-1946-movie-754681](http://www.hollywoodreporter.com/news/a-wonderful-life-1946-movie-754681).

<sup>15</sup> E.g., J. Agee, *Films*, *The Nation* 163:26 (Dec. 28, 1946), 766; “Current Cinema: Angel of Whimsey,” *The New Yorker* (Dec. 21, 1946), 87. *The New Yorker* did manage to work in a reference to female sexual frigidity. *Idem.* 88.



In fact, Mary seems to be the only one besides Potter who initiates profitable financial transactions.<sup>16</sup>

By “objectively” removing commitment to gender equality and every other contemporary prejudice, Immaculate Recovery (were it possible) would remove the very way we understand *It's a Wonderful Life*, extinguishing both its gender stereotyping and its recognizably proto-feminist moments.

4.1. – But don't take my word for it—Professor Solum himself provides compelling evidence. He declares that originalism would not require abandonment of *Brown v. Board of Education* (1954), an assertion nearly as unsupported as it is irrelevant.<sup>17</sup> A Supreme Court with originalist integrity would reverse many of its prior decisions; why pick *Brown* off the pile to save, and on such flimsy grounds?

No theory of constitutional interpretation is viable in the United States unless it accounts for *Brown*. As Robert Bork lamented, even the great Professor Wechsler was attacked for his suggestion that *Brown* lacked a neutral doctrinal justification.<sup>18</sup> *Brown* is worshipped by liberals and conservatives alike; questioning its holding guarantees a one-way ticket to oblivion. If originalism permits a return to the Jim Crow regime of “separate-but-equal” laws, then there will be very few originalists.

Solum takes the pro-active step of insulating originalism from fatal, *Brown*-based criticisms. But the canonization of *Brown* occurred long after the enactment of the 14<sup>th</sup> Amendment, which makes it methodologically beside the point. *Brown* instead generates a *present* concern: how to defend originalism in the face of a “prejudice” for full racial equality that no reasonable person today would dispute, but most people in 1868 probably did.

The original public meaning of the 14<sup>th</sup> Amendment is unavoidably bound up with the contemporary imperative that any theory of constitutional interpretation account for *Brown*. Even so committed an originalist as Professor Solum betrays the problematics of Immaculate Recovery.

5. – Just as the contemporary commitment to gender equality creates the understanding of gender-stereotyping in *It's a Wonderful Life* that few possessed in 1946, the contemporary commitment to racial equality symbolized by *Brown* demands an original understanding of the 14<sup>th</sup> Amendment that includes an historically implausible warrant for desegregating public schools. The semantic expressions that compose both film and decision have remained literally unchanged

<sup>16</sup> Cf. R. Beuka, *Imagining the Postwar Small Town: Gender and the Politics of Landscape in It's a Wonderful Life*, 51:3/4 *Journal of Film and Video*, 1999-2000, 41.

<sup>17</sup> Solum relies on a revisionist argument by M. McConnell, *The Originalist Case for Brown v. Board of Education*, 19:2 *Harvard Journal of Law & Public Policy*, 1995, 457, itself a shortened version of M.W. McConnell, *Originalism and the Desegregation Decisions*, 81:4 *University of Virginia Law Review*, 1995, 947. Legal historians praised McConnell's work for the new light it shed on school segregation during Reconstruction, but rejected his claim that the original meaning of the 14<sup>th</sup> Amendment precluded racially segregated public schools. E.g., M.J. Klarman, *A Response to Professor McConnell*, 81:7 *Virginia Law Review*, 1995, 1881; E.M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13:1 *Constitutional Commentary*, 1996, 223.

<sup>18</sup> *The Tempting of America: The Political Seduction of the Law*, 1990, 78-79 (discussing H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73:1 *Harvard Law Review*, 1959, 1, 31-35).

through the intervening decades; there has been no “linguistic drift.” Nevertheless, each now means something different than it did in the past.

*It's a Wonderful Life* and *Brown v. Board of Education* have passed down to the present encased in traditions which affect how we understand our present concerns, at the same time that our present concerns affect how we understand the past that generated these traditions. The task of interpretation is to connect this present with this past, to “fuse their horizons,” to use Gadamer’s metaphor.<sup>19</sup> We cannot abandon the present for the past as originalism presupposes, because the present is already baked into the past. Nor can we cut loose the present from the past like those ubiquitous bogeys, the “living constitutionalists,” because the present is always already affected by the past. This inquiry is neither normative (“How *should* we interpret the constitution?”) nor epistemological (“How *can* we interpret the constitution?”), but ontological (“What *is* interpretation of the Constitution?”). Constitutional interpretation circles among past and present; it necessarily combines, *cannot do other than combine*, the effect of the past through history and tradition on our present concerns, and the shaping exerted by those same present concerns on our search for the past.

Why does this matter? The rhetorical power of originalism is its claim that originalists are applying objective method, while nonoriginalists are tainted by subjectivity. But “fixity,” “constraint,” and the other “objectivities” in which originalist wrap their theory are no less touched by interpretive subjectivity. Like all human inquiries into proper action in particular situations, interpretation is a matter of judgment not subject to governance by rule or method, as Aristotle concluded long ago,<sup>20</sup> and even some originalists concede.<sup>21</sup> Any interpretive approach is compounded of both objectivity and subjectivity, past and present.

Constitutional interpretation is neither Immaculate Recovery of past and pristine objective meaning, nor ignorance or distortion of it. It is rather a negotiation of past and present in which both make their claims and are reconciled, at least for a time.

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<sup>19</sup> *Truth and Method* 313-17.

<sup>20</sup> *Nichomachean Ethics* vi.1-13 1138b18- 45a11, trans. W.D. Ross, rev. J.O Urmson, in *The Complete Works of Aristotle*, vol. 2, ed. J. Barnes, 1984, 1797-808. See also Gadamer, *Truth and Method* 322-33 (discussing the relevance of the *Ethics* to interpretation).

<sup>21</sup> E.g., K. Whittington, *The New Originalism*, 2:2 Georgetown Journal of Law & Public Policy, 2004, 599, 611.