

Comparative Perspectives on Originalism Foreword

di Andrea Pin

Why would a comparative public law review based in Italy publish a symposium on such a distinctive matter of American constitutional culture like the issue of originalism? Well, if there is a place in which the issue of interpreting law metaphorically belongs, it is Italy.

One of the most famous loci of Blackstone's Commentaries on statutory interpretation is the Italian city of Bologna, the cradle of European universities and still an important outpost of comparative constitutional law studies. Quoting Pufendorf, Blackstone notes that the medieval Bolognian law that commanded "that whoever drew blood in the streets ... be punished with the utmost severity," "was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit." Blackstone's example on how a written rule should be interpreted – and how much controversy such a small norm could spark – did not only make Bologna famous to common law lawyers worldwide. It also connected it perpetually with the issue of interpreting written laws.

The task of interpreting laws is of paramount importance for today's democracies. This is why Georgetown Law Professor Lawrence Solum recently encouraged the United States Senate to adhere to an originalist reading of the United States Constitution. Thanks go to Professor Solum's willingness to republish a footnoted version of his Statement in this Journal, as well as to the generosity of the contributors from the four corners of the earth who agreed to comment on it.

Professor Solum submitted his Statement on originalism during the confirmation process that brought now-Justice Neil Gorsuch to the U.S. Supreme Court. Gorsuch was a natural replacement for the late Justice Antonin Scalia because of his reputation of being a faithful observant of the originalist and textualist doctrines of constitutional and statutory interpretation.

Originalism stands alongside many other doctrinal alternatives in the United States. Although it ties back to the original meaning of the more-than-two-centuries-old Constitution, as the Statement vividly elucidates, it is probably the doctrine that has "rocked the boat" in American constitutional controversies for decades now, like no other has done. After subsiding during the Civil Rights

Revolution Era, originalism re-surfaced again in the Supreme Court's case law of the Eighties, with the appointment of Antonin Scalia. Some years ago, the first Italian-American justice (another good reason for hosting the debate here) acknowledged that, when he started working, there was only a handful of originalists, while now the number of its expounders either in scholarly works or from the bench have multiplied exponentially.

There is hardly another country that debates originalism as hotly as the United States has done. In America, the topic has gone well beyond the perimeter of legal academia, invading the realm of politics: Larry Solum's Statement itself addresses politicians and couches its ideas in a way that invites non-experts of legalese to tackle the subject. Yet, the issues surrounding the constitutional interpretation for which scholars fight around the globe resonate with much of the American debate. It is no surprise, then, that this symposium gathers voices from Australia, Canada, Chile, Ireland, Israel, and New Zealand, and not just from the United States.

American originalism – and Prof. Solum's statement – is of interest for anyone who is interested not just in constitutional interpretation, but in many more topics that lie at the core of the rule of law, human rights, and democracy. Among many other issues, originalism is about the scope of the judiciary, respect for political bodies and their elected representatives, and faithfulness to the constitution. The type of originalism described in the Statement raises questions that one cannot dodge, whether he or she disagrees on the method or the outcome of the originalist interpretation of the constitution.

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Of the many issues that the participants raise in this Symposium, five stand out as particularly challenging either for originalism or for its enemies both within and outside the United States.

The first issue is whether it is possible to freeze the meaning of the constitution to when it was drafted for interpretive purposes. Solum's assumption is that the U.S. Constitution deserves such treatment, as the people of the United States gave their consent to the text as they understood it. But what if the people of a certain country never gave explicit consent to the text, but simply elected a constituent assembly that drafted and enacted the text, as happened with the Italian Constitution? How can the reader determine the exact meaning of the text, since its Framers agreed on the wording but did not exactly clarify what they meant by it? And how can scholars and judges build their theories on an idea of public consent to a text, since such consent never took place?

The second issue is: what scenario justifies freezing a constitutional text to the time of its drafting, and is that decision good or bad? Is it preferable to conceive the constitution as a historical process, which expands over time to cover more and new rights and rules instead? This issue has to do with the scope of constitutional law itself. Some EU law scholars have identified one of the main problems of the EU in the expansive role of its Court. The Court of Justice, they say, has over-constitutionalized the legal framework of the EU, disempowering the democratically elected institutions, shrinking their role, and blessing EU law with a constitutional chrism to the extent that it has become extremely hard now to distinguish between constitutional issues and policy issues.

The third issue is whether originalism – or textualism, which is originalism’s equivalent in statutory interpretation – is enough. If it is intended to inhibit judicial discretion, it may not be sufficient. Depending on the constitutional infrastructure, and on the demands of justice that arise in a given society, judges may be pushed to render judgments for which there is no crisp and bright legal provision, and all they can do is draw inspiration from the text.

The fourth issue is what originalism says about the role of legal scholarship in civil law systems. Such legal settings do not treat their legislation as common law systems do theirs. Their written laws do not float on the surface of a deep ocean of law. The connecting tissue of code systems traditionally is legal scholarship: this means that when a legal text is silent, the legal doctrine which surrounds it may still call the shots. Maybe in such legal scenarios an originalist framework cannot foster a narrow reading of a written legal rule, but can rather encourage judges seeking guidance to resort to the legal scholarship that shaped the system.

The fifth issue is whether it is advisable to have one official doctrine of the constitution. Do pluralistic democracies perish, survive, or flourish under the pressure of conflicting theories of how the constitution should be interpreted and applied? If originalism is good, is it also good to have *only* originalism as the constitutionally entrenched legal doctrine?

The symposium echoes much more than the aforementioned issues. After Professor Solum’s footnoted Statement, Section I explores the rationales for originalism and illustrates the ramifications of this doctrine within American academia and beyond. Section II gathers significant reflections on originalism beyond the United States, and reflects on whether it can be reconciled with other judicial styles of interpretation. Section III hosts two theoretical criticisms of originalism, at the intersection between philosophy and politics. In Section IV two essays challenge the claim that originalism can be a coherent, sufficient, and effective judicial method of constitutional interpretation. The *Journal* is deeply grateful to such an impressive group of distinguished scholars for their participation in the symposium.