Has Originalism Become Second Nature?

di David Fontana

Abstract: ***L'originalismo è diventato una seconda natura?*** – Constitutional theories often have several distinct stages, moving from off the wall to on the wall to second nature. During this last, distinctive stage, many opponents of a theory persist, but other past opponents come to embrace the basic tenets of the theory, by name, and from within the legal academy, and much debate therefore shifts to disagreement about what types of results that theory should generate rather than the basic legitimacy of the theory. This brief Symposium Essay addresses the unique features of this "second nature" stage, and applies it to the context of Professor Lawrence Solum's testimony during the confirmation hearings of Neil Gorsuch to the Supreme Court to examine how originalism has arguably evolved to become second nature in many parts of the academy.

Keywords: Constitutional law, Constitutional interpretation, Originalism.

1. Introduction

Lawrence Solum's testimony before the Senate Judiciary Committee during the confirmation hearings of Neil M. Gorsuch to be a Justice of the Supreme Court provides a clear, compelling and accessible argument for originalism.[1] Other scholars are more equipped to evaluate the merits of what Solum said, so my focus will not be on what Solum said but on what the reaction to what Solum said means. Originalism has been the rare—perhaps only—legal theory that has managed to dominate academic *and* political debates about constitutional law. The fact that Solum's testimony—and Gorsuch's testimony—in favor of originalism did not catalyze intense and pervasive disagreement suggests that we could be in a new stage in the debate about originalism. Originalism has gone from off the wall (if it ever was off the wall[2]) to on the wall to second nature.

Viewing originalism through this lens also sheds a larger light on the progression of constitutional theories. Jack Balkin has helpfully noted that constitutional theories can move from "off the wall" to "on the wall" through the concerted efforts of political and social actors.[3] Balkin does not define these two

[1] Statement of L.B. Solum, *Hearings on the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, Senate Judiciary Committee, March 23, 2017, www.judiciary.senate.gov/imo/media/doc/03-23-17%20Solum%20Testimony.pdf [hereinafter Solum, *Gorsuch Testimony*].

[2] *See infra* Part II.

[3] *See, e.g.*, J.M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 The Yale Law Journal, 2001, 1407, 1444 ("[T]he question of whether a legal argument is "on the wall"

phases, but we can imply an initial definition from his usage of these phases. Theories go from off the wall to on the wall when they start to become acceptable to name and engage with, and from within the legal academy, even if naming and engaging theories is in service of contesting their basic desirability.[4] Theories do not stop their development when they become on the wall. Sometimes they also become second nature, meaning that many actors start to accept the basics of the theory and debate more *how* to use those theories and less *whether* to do so.

A brief caveat for a brief Essay: these stages are meant to be ideal types rather than logically separated categories. Each stage can bleed into the former or next stage, and the evidence of presence in each stage is never absolute or uncontroversial. The goal is merely to identify this additional, later stage of theory development, and to use Solum's testimony to illustrate this concept.

2. Off the Wall

Many constitutional theories never become plausible enough to become the subject of respectable conversation by respectable legal actors. These theories are so outside the mainstream of acceptable constitutional argument that legal actors either do not know of their existence or know of their existence and ignore these theories. Engaging with off the wall theories can discredit those doing the engaging. Constitutional law is meant to be a "constrained conversation," with discourse norms that mark some arguments as necessarily out-of-bounds.[5] If the off the wall theories are engaged with, they might be considered without being named.[6] Engagement with off the wall theories can instead sometimes be a form of extremeness aversion.[7] An off the wall theory is identified and used to distinguish and legitimate another theory.

Scholars have produced an increasing number of detailed histories of originalism.[8] While scholars have increasingly demonstrated that originalism has been more available and more accepted for more periods of time than we used to believe,[9] these histories help illustrate that at least some applications of originalism were considered off the wall at earlier points in time. Chief Justice Warren Burger, for instance, once labeled claims that the Second Amendment provided an

or "off the wall" is a matter of social practice and convention…tied to a series of social conventions.").

[4] *See id.* at 1447 (defining this continuum as being about "what is a good legal argument and what is wholly implausible").

[5] *See* B. Ackerman, *Social Justice in the Liberal State*, 1985, 8-10 ("[P]articular kinds of conversation are often constrained by special rules restricting what may be appropriately said,' and suggesting a framework to define and justify such constraints on 'power talk.'").

[6] *See* D. Fontana, *Cooperative Judicial Nominations During the Obama Administration*, Wisconsin Law Review 2017, 305, 312 ("The act of naming [a] jurisprudential vision…is a crucial part of promoting the success of that jurisprudential vision.").

[7] *See, e.g.*, C. Guthrie, J.J. Rachlinski, A.J. Wistrich, *Inside the Judicial Mind*, 86 Cornell Law Review, 2001, 777, 782-83 and nn. 26-27, 820 (describing this mechanism and providing examples).

[8] *See* L.E. Sawyer III, *Principle and Politics in the New History of Originalism*, American Journal of Legal History (forthcoming 2017) (summarizing the different perspectives of these histories)

[9] *See, e.g.*, W. Baude, *Is Originalism Our Law*, 115 Columbia Law Review, 2015, 2349 ("[O]ur *current constitutional practices demonstrate a commitment to inclusive originalism.").*

individual right to bear arms—a claim derived very much from originalist work—as a "fraud."[10]

3. On the Wall

Constitutional theories transform from off the wall to on the wall when they become an acceptable subject of respectable conversation by respectable legal actors. Legal actors know of the existence of these theories and often feel an obligation to engage with them as part of making their constitutional arguments. These theories have a name that marks them that is also widely known and utilized. A cause and an effect of an on the wall theory is a sufficient acceptance of the theory by high-status actors and institutions that the theory is debated and even supported within the legal academy.[11]

On the wall theories, though, still have their basic legitimacy questioned. Debates about these theories focus just as much—if not more—on whether it is acceptable to use the theory at all, let alone on what using the theory produces. Opponents of the theory will not be universal, but will still use any allegiance to the theory to discredit its adherents. The consequence of this basic skepticism about on the wall theories is that many high-status actors and institutions within the legal academy will still consider these theories illegitimate. Possessing minimal but not sufficient voice within the legal academy, many proponents of the on the wall theory will be forced to exit the academy and seek an institutional home and voice elsewhere.[12] These alternative sources of support provide the resources necessary to generate and promote theoretical advances.

Originalism has certainly been an on the wall constitutional theory for a very long period of time. Almost all of the major constitutional theorists have at one point in time offered their perspective—pro or con—on originalism. Arguments about how to interpret constitutional provisions must engage with originalist arguments, and indeed it is quite common for a law review article proposing a particular interpretation to feature originalist arguments as part of the supportive material enhancing the case for their proposed interpretation. Originalism as a name is not just widely used but widely known.[13] The major theorists of originalism—including Professor Solum—have made their institutional homes in elite law schools.

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[10] The MacNeil/Lehrer NewsHour (PBS television broadcast Dec. 16, 1991) (quoting former Chief Justice Warren Burger). *See generally* R.B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 Harvard Law Review, 2008, 191 (identifying efforts to move these interpretations of the Second Amendment from off the wall to on the wall).

[11] *See* S. Frickel, N. Gross, *A General Theory of Scientific/Intellectual Movements*, 70 American Social Review, 2005, 204, 211 (arguing that theoretical "emergence is conditional upon complaints and doubts being felt and acted upon by high-status intellectual actors, by which we mean actors situated in high-status intellectual networks").

[12] *See id.* at 213 (finding that intellectual movements are "more likely to be successful when…[they have] access to key resources").

[13] *See* D.M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 Harvard Law Review, 2011, 51-54 (describing how originalism became salient enough to become a cultural buzzword).

While originalism has been or became a part of the conversation for some time, it has remained contested enough that labeling it as on the wall—rather than as second nature—rings true. Consider how Senator Ted Kennedy used Supreme Court nominee Robert Bork's support for originalism to decry him so notably and so publicly during debate over his nomination in 1987.[14] Originalism was perceived as illegitimate enough that Justice Thurgood Marshall[15] publicly criticized it. Many—if not most—elite law faculties rejected originalism enough that they did not feature notable supporters of the theory for decades—including Professor Solum's Georgetown.

This continued and substantial skepticism also resulted in originalism requiring crucial life support from outside of the legal academy. With only a few potential homes inside of the legal academy, important originalist scholars like Raoul Berger spent much of their career outside of the academy.[16] Rather than publishing in law reviews, Berger published primary with university presses, a publishing home less controlled by the legal academy.[17] Originalism received crucial support not just from law school research budgets, but from institutions like the Olin Foundation.[18] Supporters of originalism who were not primarily scholars—like Attorney General Edwin Meese—played crucial roles in supporting the theory from outside of the legal academy.[19]

4. Second Nature

Constitutional theories have another stage following their presence as on the wall theories: they can become second nature.[20] Legal actors are obliged to engage with these theories, and by name. By contrast with a theory being at the on the wall stage, high-status theorists previously likely to or actually opposed to the theory begin to embrace the theory. High-status theorists begin to accept the basic

[14] E. Bronner, *Battle for Justice: How the Bork Nomination Shook America*, 1989, 98 (discussing Senator Kennedy's speech referencing "Bork's work," including his originalism work, as the reason why in "Robert Bork's America…women would be forced into back-alley abortions, blacks would sit at segregated lunch counters.").

[15] *See* T. Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harvard Law Review, 1987, 1, 2.

[16] *See* D. Martin, *Raoul Berger, 99, an Expert on Constitution in 2nd Career*, N.Y. Times, Sept. 28, 2000 (explaining Berger's career trajectory), www.nytimes.com/2000/09/28/us/raoul-berger-99-an-expert-on-constitution-in-2nd-career.html.

[17] *See id.* (detailing the influence of Berger's books).

[18] *See* S.M. Teles, *The Rise of the Conservative Legal Movement*, 2008 (providing an excellent summary of the coordination between theorists of originalism and the Reagan Administration).

[19] *See generally id.* (discussing the relationship between originalism as an academic theory and the efforts by the Reagan Administration).

[20] J. Kessler and D. Pozen's recent and important article imagines theorists becoming "adulterated" with time. J.K. Kessler, D.E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 The University of Chicago Law Review, 2016, 1819, 1821 (describing how "intellectual movements or schools…shed many of the core commitments that made the theories attractive in the first place…these theories become…increasingly compromised."). This adulteration can result in broader acceptance of the theory. However, adulteration is neither a necessary nor a sufficient condition for broader acceptance. What moves a theory from one stage to another is a subject for another, longer Essay. The point of this Essay is simply that, roughly speaking, these stages exist.

premises of the theory, and argue about the results it generates in particular contexts. While opposition to the fundamentals of the theory remains,[21] more and more theorists do and/or say they are doing the theory, and fewer and fewer theorists argue about the theory.

Consider the intellectual space that Solum's testimony therefore occupies. When originalism in its modern versions and by name first started to transform the constitutional conversation, it was triggered in part by those like Raoul Berger who existed outside of the legal academy. Now virtually every top law school has a scholar writing explicitly supporting originalism or applying originalism (by name) to the doctrinal issues that interest them. This even includes Solum's home, Georgetown, which in the past appeared to have a faculty as politically liberal and therefore as antagonistic to originalism as possible[22]—and now has Solum (and Randy Barnett[23]).

As the years have passed, more and more other high-status left-of-center theorists have embraced versions of originalism, with a particularly significant burst in the past decade. Justice Sonia Sotomayor notably avoided embracing any explicit alternative to originalism during her confirmation hearings in 2009.[24] Justice Elena Kagan embraced originalism during her confirmation hearings in 2010, provocatively embracing a phrase that had been present in the scholarly debate that "we are all originalists now."[25] Jack Balkin published a landmark book endorsing originalism from the left in 2011.[26] The high-status and high-stakes creation moment for the second nature stage could have come earlier than those moments, whether it was Justice John Paul Stevens using originalism in dissent in *Heller v. District of Columbia* in 2008[27] or even the late Douglas Kendall creating a progressive organization dedicated to progressive originalism in 1997 and even

[21] For a good example of how one version of originalism would mean there is still broader rejection of originalism, see J.E. Fleming, *Are We All Originalists Now? I Hope Not*, 91 Texas Law Review, 2013, 1784. Even Fleming concedes, though, that the broader definition of originalism favored by many would mean that many more are originalists. *See id.* at 1786 ("The answer to the question depends . . . on 'what one means by originalism' and whether we define it exclusively or inclusively.").

[22] *See* J.O. McGinnis, M.A. Schwartz, B. Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 The Georgetown Law Journal, 2005, 1176 (reporting that 92 percent of contributing professors contributed to Democratic Party candidates).

[23] *See, e.g.*, R.E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 The University of Cincinnati Law Review, 2006, 7, 8 (arguing for a version of originalism and contrasting that with Justice Antonin Scalia's originalism).

[24] *See* K. McLand Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 Notre Dame Law Review 2010, 1629, 1647 (noting that the word "empathy" to describe a desirable form of jurisprudence "became so politically charged that Supreme Court nominee Sonia Sotomayor went on record as distancing herself from the approach to judging espoused by the President."). *See also* A. Goldstein, P. Kane, *Liberalism Had Little Presence in Sotomayor Hearings*, WASH. POST, July 19, 2009, www.washingtonpost.com/wp-dyn/content/article/2009/07/18/AR2009071801787.html (summarizing Sotomayor's testimony).

[25] *See The Judiciary Committee Grills Kagan*, WASH. POST, June 29, 2010, www.washingtonpost.com/wpdyn/content/article/2010/06/29/AR2010062902652.html.

[26] J.M. Balkin, Living Originalism, 2011.

[27] 554 U.S. 570, 652-72 (2008) (Stevens, J., dissenting).

more openly in 2008.[28] While originalism might have been on the wall for a very long time—or forever[29]—the explicit embrace of it at the theoretical level and engagement with it in such large numbers among such high-status actors has been more substantial more recently.

Notice, then, the reaction—or absence of controversy in the reaction—to Solum's testimony. As originalism became on the wall, law professors started to write about it, but it was still controversial enough that Senator Kennedy and Justice Marshall gave their speeches denouncing originalism. Solum's important work on originalism represented an unusually explicit and public acceptance of originalism by a law professor not affiliated with the conservative legal movement.[30] Now, in the same context that generated Senator Kennedy's speech thirty years ago, an elite scholar at an elite law school not affiliated with the conservative legal movement can testify in favor of originalism, and the reaction is largely respectful and intellectual, rather than hostile on the basis of first principles.

5. Conclusion

The Senate Judiciary Committee's confirmation hearings for Neil Gorsuch were an incredibly controversial event. The Senate's refusal to consider President Barack Obama's nomination of Merrick Garland just a year later provided the basis for substantial criticism from the political left, and those criticisms increased the intensity of Supreme Court confirmation hearings that have already become quite heated. Notably missing from the public conversation about Gorsuch, though, were substantial and pervasive criticisms of his explicit and extensive advocacy of originalism—or substantial and pervasive criticisms of Solum's testimony in support of originalism. Opponents of originalism mostly wrote and spoke about their problems with what originalism *would do*, not their problems with what originalism *is*. Looking back many years from now, then, the question will be whether the period we are living in now represents a transformation of the status of originalism as a theory of constitutional law.

[28] *See* J. Rosen, *How New is the New Textualism?*, 25 Yale Journal of Law & the Humanities, 2013, 43, 45 (describing Kendall's work). *See generally* J.E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 Virginia Law Review, 2011, 1523 (describing and justifying the progressive case for originalism).

[29] *See, e.g.*, D.A. Strauss, *Common Law Constitutional Interpretation*, 63 The University of Chicago Law Review, 1996, 877, 881 (stating that "[v]irtually everyone agrees" that the text and original meaning matter in constitutional interpretation).

[30] *See* Solum, *Gorsuch Testimony*, *supra* note 1, at 4 ("Originalism can and should be endorsed by both Democrats and Republicans and by progressives and conservatives. This point is especially important to me personally. I am not a conservative or libertarian.").