

Politics all the way down: originalism as rhetoric

di David Kenny

Abstract: *Politica, fino in fondo: l'originalismo come retorica* – This paper argues that, contrary to Professor Solum's statement, originalism is an interpretive technique that is political, and cannot be adopted or applied in isolation from political considerations. However, the paper suggests "political" judging is not totally unrestrained, and is not as dangerous as Solum fears; all judging is restrained by the common conventions and suppositions of the legal community. The paper concludes with the suggestion that originalism is a rhetoric, one that attempts - despite its claims to transcend politics - to persuade people to adopt one judicial politics over others.

Keywords: Originalism; Living constitutionalism; Rhetoric; Anti-formalism; Judicial politics.

1. Introduction

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."¹

Professor Solum's statement is an exceptionally clear and cogent case for originalism. But I think Solum underestimates the pervasiveness of politics in judging and overestimates its dangers, and I would argue against adopting this account of judging in legal academia.² I take the term "political" to mean a stance that is angled, partisan, partial, biased – leaning towards one particular ideology or vision of what society should be. It is not based on neutral, procedural, or universal standards, but on contested and contestable views of the world.³ Solum argues that living constitutionalism is a political standard, while originalism is neutral and apolitical. I wish to argue that, contrary to Solum's wishes, originalism is political too; that political judging is not as bad as Solum thinks; and that theories of

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

² In this forum, I am treating Solum's account as an academic argument. An interesting question is whether – notwithstanding academic misgivings – it is useful to persuade the US Senate to be less partisan.

³ See D. Kenny, *Merit, Diversity, and Interpretive Communities: The (Non-Party) Politics Of Judicial Appointments And Constitutional Adjudication* in Cahillane et al. (eds.) *Politics, Judges, and the Irish Constitution*, 2017 137; S. Fish, *The Trouble with Principle*, 1999, 94.

judging are just rhetorical techniques used to advance different sorts of judicial politics. I will argue this with a variation on Solum's structure. While debunking myths about originalism, Solum is perpetuating the foundational myths of originalism. When we delve into these, they show originalism to contain the very politics it claims to avoid.

2. The Myths of Originalism

2.1. Myth Number One: originalism can be applied apolitically

That originalism can excise the politics from interpretation and judging is premised on the notion that meaning can be derived by an interpreter from text and history without ideology or political bias. But for this to be true, the original intention of text and the meaning of history would have to be self-declaring, with no room for interpretation or dispute, and we know this is not the case.

Originalists have to answer many questions before meaning can be found: where exactly we look for intention, and how we unpack it hard cases? Which sources of history are valid and venerated and which are disparaged and ignored? How do we draw inferences from incomplete and contested information? What new viewpoints on historical meaning might we be willing to consider about what principles the Constitution originally embraced, or what those principles mean today?

Solum does not answer these questions in his statement, and if he did, we would see that people could reasonably disagree with his answers. History is not fixed: sources disagree, falling in and out of fashion, and as they do, our understanding of history changes. New understandings are suggested, new evidence is found (or previously discarded evidence is reconsidered), and minds change. History is always in the process of being contested. As Stanley Fish puts it: "To say that one must always consult history does not prevent – but provokes – disagreement about exactly what history is, or about whether or not this piece of information counts as history".⁴

This contest about historical meaning is not politically neutral, because it will always be infected by contemporary influences that are themselves a product of your experience: assumptions, beliefs, and biases about all sorts of politically contested or contestable matters. Your beliefs about government, about history, about truth will lead you to prefer some sources over others; see some views as credible and some as absurd; see some parts of history as clear and settled and others as murky and disputable. But your experience is not neutral; your experience forms (perhaps it *is*) your politics, because it shapes your vision of the world in which some ends are good and others fraught with death, in which some actions of government are natural and right and some are mistaken and wrong. That experience gives you a sense of what to *expect* from history, will render some historical interpretations absurd or unthinkable, when – to a person of another experience – they might be plausible or obviously true. We know this because all

⁴ S. Fish, *Fish v Fiss*, 36 Stanford Law Review, 1984, 1325, 1327.

sorts of meanings can be plausibly wrung from history by dedicated, well-meaning people, who – without (conscious) bias – ask a question about historical meaning and reach opposite conclusions.⁵

The choice to be originalist in principle does not give you answers, which are a product of how originalism is fleshed out in the reading of history.⁶ And the reading of history is not insulated from politics, but a product of it. To put it another way, originalism is not a complete methodology of interpretation, because “the past can appear to us only in an interpreted form, in the form of a constructed intention that can always be constructed *again* in light of whatever evidence from whatever source seems relevant”.⁷

If it ever seems otherwise, this is a result of temporary agreement between originalists on a particular question of historical meaning for a particular purpose.⁸ This agreement is conversational objectivity;⁹ something appears objective because the participants in the current discussion agree on it, but new discussants or new circumstances reveal differences and create disputes, and the appearance of objectivity disappears. Indeed, conversational objectivity occurs when opponents of originalists for the most part reject its premise and do not engage in historical dispute, preferring to argue differently. If – as Solum wants – we all became originalists, he would not find markedly more agreement between us, but new and bitter disagreements about historical meaning and sources, as we contest our politics on the playing field of history.

2.2. Myth Number Two: the choice to be originalist is apolitical

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Solum’s belief is that at least the *choice* to be an originalist can be made without politics. But this too is a myth.

We are not born originalists. We are *persuaded* to become originalists, and this is done in the context of our experiences: of life, of the law, of politics, of history. There are two important consequences that flow from this. First, we cannot step behind a veil of ignorance when choosing what interpretative tools we will use in our legal lives. Anyone choosing to be an originalist does not do so in a vacuum, with only the question: how should I interpret constitutions? Answering this question demands a huge amount of prior knowledge: about constitutions, courts, politics, rights, power, history. Without this knowledge, the question would be nonsensical. But this knowledge cannot be imparted or acquired neutrally; it demands answers to contested political and historical questions about the purpose and role of the state, the nature of constitutions and constitutionalism, the proper role of judges etc. The choice of interpretive tool is biased by all sorts of preconceived

⁵ The meaning of the Second Amendment is a clear and ongoing example of this. See P. Brookes, *The Rhetoric of Constitutional Narrative: A Response to Elaine Scarry*, 2 *Yale Journal of Law and Humanities*, 1990, 129. There are many others.

⁶ S. Fish, *There’s No Such Thing as Free Speech and It’s a Good Thing Too*, 1994, 185.

⁷ Fish (no. 6) 183.

⁸ The prevailing disciplinary rules of history, law or legal history may also stabilise some debates for a time, but they are not apolitical: they have political origins, they have to be interpreted, and they change over time. See generally Fish (n 4).

⁹ See R. Posner, *The Problems of Jurisprudence*, 1990, 31.

views about what courts can and should do; the proper role of each branch of government; the meaning of history. Your consideration of the legitimacy and desirability of a method of interpretation is coloured by your experiences and your politics.

Secondly, you cannot choose to be an originalist without a sense of what this will mean for your views on the law and your actions as a judge. You will consider an interpretative technique while considering (or being told) that it will make you more likely to favour some results and disfavour others.¹⁰ You will know if it will lead you towards results that will be, by your lights, acceptable or necessary, or wrong and intolerable. If being an originalist would lead you to results that your experience told you to be wrong, then you would not be persuaded by originalism. The choice to be an originalist will always be made in the shadow – impossible to ignore – of the kind of world we see around us, and how originalism would preserve or change it.¹¹ That is, any attempt to persuade someone to be an originalist will be made in a context where the consequences of this will – consciously or subconsciously – have a persuasive effect.

Becoming an originalist – just like practicing originalism – is not insulated from politics; it is a product of your politics, your views on how the world should be that constitute your deepest beliefs and aspirations.

2.3. Myth Number Three: judicial restraint is neutral and apolitical

The third myth that Solum perpetuates is that judicial restraint is neutral and apolitical when compared with a judicial tendency to intervene. This could be true only if the *status quo* was without political consequence, and if you could draw an apolitical line between when to be restrained and when to act, and neither of these things is so.

First, to be restrained is to maintain things as they are, to decide that things will be acceptable if left well-enough alone. But maintaining the *status quo* is not apolitical. The *status quo* is the product of the political choices of the past, and in the American judicial system, a judge is usually only presented with a case where reasonable people think there is cause to dispute that politics. Siding with the *status quo* then, is just picking one politics, which won a persuasive battle some time ago, over another. There will always be inertia, a sense that doing nothing is the default, but this hides that the choice not to act when you could is a political choice. There is politics in doing nothing.

Secondly, restraint can only be sensible when combined with other, more obviously political, views. Restraint means judges should “do as little as possible”,

¹⁰ Here, you are either being persuaded to that certain results go hand-in-hand with originalism, or originalism as seen by you is suggesting a set of results based on your view of history, politics and judging.

¹¹ Any belief to the contrary is the critical self-consciousness fallacy. We all like to think that we are open to following a path of inquiry to any conclusion on, say, original intention of the Constitution, but this is not the case. Open-mindedness is formed by and limited by – not outside of and beyond – our biases. See D. Kenny, *Conventions in Judicial Decisionmaking: Epistemology and the Limits of Critical Self Consciousness*, 38 *The Dublin University Law Journal*, 2015, 432.

but as little as possible to achieve *what?* To decide cases, but not in any which way. It must mean: “do as little as possible to decide cases correctly, justly etc”, and in these terms we find the politics that restraint is said to exclude.¹² Restraint inevitably runs out, and this point where intervention becomes necessary is determined by your beliefs about the Constitution’s underwriting principles – what conduct or circumstances the Constitution will and will not tolerate. It is your politics – your contestable views on what is needed for a good society – that draws the line. A sense of restraint comes from the same repository of internal values, experiences, suppositions that any instinct toward activism comes from; differences in experiences and beliefs that set these positions apart.

But Solum is most worried about a much more extreme politics: the politics that motivates unrestrained judges, who pursue their primary political goals, even when these are outside the widest bounds of the judicial process. However, there is no such person; every judge is constrained and restrained by the community conventions and suppositions of judging.

2.4. Myth Number Four: there is such a thing as an unconstrained judge

Solum continually juxtaposes the originalist judge to the unconstrained judge, who believes it is acceptable to ignore constitutional text and history and impose their own values. But this villain is not real. All judge are constrained by their enterprise-specific politics of judging, their views on the proper role of the judiciary that are a product of their experiences in the legal community.

Solum wants a judge have a different view of what she should do as a judge than what she would do were she, say, a legislator or a president – that is, if she were in some other way at large, free to act on issues without the usual limitations and restraints of the judiciary. You should have different goals for judging – respect for the rule of law, maintenance of the constitutional order – and these should not be subordinated to achieving your primary political aims, be they progressive change or limiting of the scope of government. You should have a distinct sense of what judging is for, and this should be different from one’s general political aspirations.

But has there ever been a judge that thought that she should directly implement her primary political goals through judging? Has there ever been a judge who did not think that she was upholding the rule of law and maintaining the constitutional order, but instead executing primary political aspirations in the teeth of these values? I highly doubt it, because that would be a judge that had no distinctive view of judging as opposed to any other activity, and would have no internalised sense of the legal and political community’s view of judging.¹³

Judges have spent a professional lifetime as lawyers in law firms, government, academia. They have undergone significant legal training and immersed themselves in our systems of government, our traditions, our values, and our community’s vision of judging. From this, they will have a sense of what judges should and should not do, where the judicial powers ends and other political

¹² See Kenny (no. 3).

¹³ This is what Fish calls an Interpretive Community; see Fish (no. 4).

branches take over. Judges are always already restrained by a deep-seated sense of their enterprise which they derive from being enmeshed in a community.

This means that even the living constitutionalist Solum fears does not think that anything goes. She will only do what she thinks the Constitution allows judges to do, and that will not be everything she might want to do politically. A judge might politically desire outcome A, but her *judicial* politics – the politics that she has acquired about what judging should be – will suggest that it should not be achieved by judicial means for reasons of legitimacy, efficacy, institutional limitations etc. Judges subordinate their primary politics to their judicial politics while they are judging, and their judicial politics will include a sense of restraint. The details of this judicial politics will be, in part, a product of their broader politics, and so the sense of restraint varies (it is political), but these are variations within certain community-defined boundaries. Judges are always constrained by the perceived limits of the judicial enterprise.

The only way a judge would not have these limits is if she saw no difference between judges and legislators, presidents, or dictators. This view could only be held by someone who fundamentally rejected the premises and precepts of our legal and political system. Would this person go to law school and spend her life hiding her true feelings in order to be made a judge? Could she keep up this ruse well enough to be appointed to the US Supreme Court? If she did, what would she accomplish?¹⁴ She would issue fringe dissents, calling for whatever radical political agenda she desired, and probably be impeached, so universal would be the sense that she was simply not acting judicially as we understand the term. I would suggest to such a person that there are better ways to advance her revolutionary agenda than through appointment to the bench.

All judges have what Solum says he desires: a distinct sense of what should or should not be advanced in the courts.¹⁵ The problem is that this comes from an enterprise-specific *politics*, and Solum wants something more: a judge restrained by apolitical, historical meaning, not community understandings, conventions about judging that can and do change over time and vary with politics. But there is no such restraint; there is only political restraint.

A sense of historical restraint felt by an originalist judge is just the same as the sense of restraint felt by the living constitutionalist: both come from a sense of the purpose of the enterprise of judging that they acquired from the practices, standards and conventions of legal community, and open to change in just the same way over time. The difference lies in their politics, which has led them to embrace views that are on different political wings of their community, and provokes disagreement on what restraint should mean. Solum's quarrel is not, as he would have it, that one group is apolitical and the other political; it is that former has an enterprise-specific politics that matches his preferred vision of judging, while the latter has one that does not.

¹⁴ She could only have success if she managed to persuade her judicial colleagues and the legal and political community more broadly that her approach was right. This would be the legal and political community changing its view of judging. This is always possible in principle, but it does not generally come from one extremist judge; it happens very gradually over time, driven by myriad factors.

¹⁵ See Fish (no. 4) 1336.

This internalised sense of restraint does not depend for its efficacy on your belief about where it comes from. If you could somehow convince Judge Gorsuch that originalism was not coherent, he probably¹⁶ would not change his mind about what judges can and can't do, because his restraints do not follow from his theory. They come but from his experience of the law and the legal community, which convince him of the need for certain judicial limits, and these experiences would not have changed. That is, his originalism is an articulation of restraints already internalised; it is not generative of restraints, and its absence would not be destructive of them.

3. Conclusion: Originalism as rhetoric

What, then, is originalism?⁹ Since originalism claims to say only “look to history”, and history is politically interpreted, originalism should be empty and devoid of consequence. But it is not, because originalism, as current practiced, actually says look to *a particular vision of history*, and judge accordingly. This is a judicial politics, one that favours restrained, (small “c”) conservative judging, and uses apolitical original intent as its rhetorical strategy. Originalism is not a theory of judging, but a narrative about the origins of this judicial politics, designed to persuade people of various things: to think about law and judging in a certain way; to embrace only certain judicial outcomes; to appoint only judges who proclaim that thinking.¹⁷

Solum's statement is another salvo in a (very) long political fight to persuade people – students, lawyers, judges, academics, Senators – to embrace one judicial politics over another. Originalism attempts this by promising redemption from politics, which these days is a great rhetorical strategy if you can make it work. But there is no redemption; the world will never be populated by judges committed to apolitical theories of interpretation, reaching apolitical results, bound by objective restraints that grip them like a vice. Nor, however, do we need redemption, because the world will also never be populated by judges who are free and unrestrained, implementing their primary politics with complete disregard for the conventions and boundaries of the legal system. Judging is political, but politics in judging just isn't that bad.

I am not trying to persuade you here to embrace any particular judicial politics, but to embrace the *inevitability* of judicial politics over the myth that we can transcend it.¹⁸ Solum dearly wants a way to ground us, to “take politics and ideology out of law”. But try as we might to escape politics, we can't. In human affairs, it's politics all the way down.

¹⁶ It would be more accurate to say not necessarily changed; if we changed Judge Gorsuch's mind on an issue so close to his judicial mindset, we might, in the process, persuade him to see other things differently too. But there is nothing certain or inevitable about this; one's belief in the theory of originalism is not what determines one's restraints. See Fish (no. 6) 186.

¹⁷ See Fish (no. 6) 192. To be clear, this does not at all suggest that originalists act in bad faith; and I would make this same argument about other theories of judging as well.

¹⁸ The arguments I advance are not novel; they have been made before by Stanley Fish and others. But the case they were arguing against is still made, so counterarguments must be made again in new ways.