Originalism: Less to the Picture than Meets the Eye?

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Abstract: ***Originalismo: meno di quanto possa sembrare in apparenza?*** – Originalism is thriving in America today. And yet there is, in an important sense, less to the picture than meets the eye. Even if originalist judges were always to employ originalism with the highest degree of consistency and rigor--which they do not do--they would still not be constrained from imposing their own values on the nation. Simply put, today's sophisticated originalism is not particularly constraining at all. The very changes that academics have made to the theory of originalism in recent years in order to shore it up against criticism and make it more intellectually sophisticated and defensible, also rob the theory of what used to be its very raison d'etre—its claim to be able to constrain judges and prevent them from imposing their own values on the nation. Originalism does not avoid the problem of judges allowing their personal views to affect their constitutional decisions, thereby undermining democratic self-rule. It simply cloaks that process in false (even if well-meaning) claims of historical providence

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Not much more than a year ago, at least one prominent American legal scholar was predicting that originalism's time had come and gone.[1] The thinking was this: Following the death of Justice Scalia—originalism's uniquely vocal, articulate, and recognizable champion—there was only one remaining self-proclaimed originalist on the Supreme Court. Either President Obama or future-President Hillary Clinton would almost certainly replace Justice Scalia with a non-originalist. Even in the then-seemingly unlikely event that a Republican were to win the 2016 presidential election, he or she, like the last Republican president, George W. Bush, would probably not expend political capital trying to appoint an originalist justice. Indeed, the Republican frontrunner, Donald J. Trump, seemed so hostile to all that originalists hold dear that he prompted a long list of prominent originalists to issue a public statement of opposition to him, entitled, "Originalists Against Trump."[2] With only one idiosyncratic originalist Justice left on the high bench, lawyers would no longer bother making serious originalist arguments to the Supreme Court, and originalism would gradually fade away.

What a difference a year makes! Originalism is thriving today. Donald Trump defied the conventional wisdom, won the election, and then, to the surprise and delight of his originalist critics, chose to replace Justice Scalia with Justice

[1] *See* E. Posner, *Why Originalism will Fade*, Feb. 18, 2016, available at www.ericposner.com/why-originalism-will-fade.

[2] *See* www.originalistsagainsttrump.wordpress.com/2016-statement.

Gorsuch—another self-professed originalist.[3] With three aging non-originalist Supreme Courts Justices perhaps on the brink of retirement, the Senate in Republican hands, and a President apparently inclined to appoint originalists to the high court, originalism suddenly seems poised to dominate the constitutional landscape for a generation or more.

Much of the credit for originalism's long-term resurgence belongs to Professor Lawrence B. Solum. Professor Solum is perhaps the most significant and most careful of a large group of serious legal academics who have been honing an increasingly sophisticated form of originalism in the law reviews over the course of the last decade or more. His testimony before the Senate Judiciary Committee at the Gorsuch confirmation hearings[4] does more than just provide a helpful summary of the state of originalist theory. It also embodies originalism's real-world triumph—from the pages of the law reviews, to the halls of Congress, to the Supreme Court bench.

Those critics who continue to dismiss originalism out of hand[5] are making a huge mistake—both politically and intellectually. Politically, originalism is not fading; it is only getting stronger. Declaring it to be unworthy of serious attention will not make it go away. (Critics learned that lesson the hard way with Donald Trump.[6]) Intellectually, the claim that originalism is unworthy of consideration is simply wrong. Academic originalism has become a robust theory (or, more accurately, family of theories) that deserves to be taken seriously—thanks, in no small part, to the work of Professor Solum.

And yet there is, in an important sense, less to the picture than meets the eye. Professor Solum's characteristically modest and careful testimony makes originalism look thoughtful, organized, structured, and rigorous. Which it is, when practiced and hewn by its most able academic champions. But no actual judge—including Justices Scalia and Gorsuch—has in practice approached originalism with anywhere near that level of academic sophistication. There are, broadly speaking, two originalisms in America: the academic one that Professor Solum ably

[3] *See* N.M. Gorsuch, *2016 Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 The Case Western Reserve Law Review, 2016, 905-06 (declaring that "judges should…strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be"); transcripts.cnn.com/TRANSCRIPTS/1703/22/cnr.03.html (remarks of Judge Gorsuch at his confirmation hearing) (describing "originalism" as "what [a] good judge always strives to do," and declaring that a judge's job is to ascertain "the original meaning of [the Constitution's] words").

[4] *See* Statement of Lawrence B. Solum, Carmack Waterhouse Professor of Law, Georgetown University Law Center, Hearings on the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States.

[5] *See* M.C. Dorf, *Book Review*, 125 Harvard Law Review, 2012, 2027 (noting that "critics have argued that no version of originalism can be taken seriously"); J. Greene, *Selling Originalism*, 97 The Georgetown Law Journal, 2009, 657, 658 ("A substantial number of legal academics regard [originalism] as hogwash.").

[6] *See, e.g.*, M. Roza, *When the History of the 2016 Elections is Written, Trump Will Be an Afterthought*, www.qotd.io/read/when-the-history-of-the-2016-elections-is-written-trump-will-be-an-afterthought ("Should Donald Trump's presidential candidacy be taken seriously? In terms of whether or not he can get elected: Absolutely not."); M. Yglesias, *It's Okay to Keep not Taking Donald Trump Seriously*, Vox, Aug. 5, 2015, available at www.vox.com/2015/8/5/9100215/donald-trump-going-to-win.

summarizes in his testimony,[7] and the popular, crude one trumpeted by political commentators and politicians.[8] Sadly, judges are more likely to be crude than erudite in this regard. Scholars have amply demonstrated that originalist judges are nowhere near as rigorous and consistent in their originalism as Professor Solum is in his.[9] Professor Solum is surely correct that "[o]riginalist judges do not believe that they have the power to impose their own values on the nation."[10] And yet, when they invoke originalism crudely, selectively, and inconsistently, that is just what they end up doing—every bit as much as their non-originalist counterparts, but behind the sometimes seemingly smug veneer of professed superior neutrality.[11] In this vein, it is, for instance, difficult to square Professor Solum's statement that an originalist court "should consider itself bound by the text" of the Constitution[12] with the many opinions written by the Supreme Court's self-professed originalist Justices that rely entirely on unwritten supposed principles of constitutional structure to invalidate governmental actions, even

[7] Even in the academy, as Peter Smith and I have written, it is a mistake to imagine originalism as monolithic and coherent. "A review of originalists' work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label…The more accurate picture is one of a collection of rapidly evolving theories, constantly reshaping themselves in profound ways in response to devastating critiques, and not infrequently splintering further into multiple, mutually exclusive iterations." T.B. Colby, P.J. Smith, *Living Originalism*, 59 Duke Law Journal, 2009L 239, 244–45. Professor Solum has resisted this characterization by insisting that, "[w]hile Colby and Smith are correct to observe that there are significant differences among originalists, they are wrong to deny that originalism has a unifying core. That core is specified by the Fixation Thesis and the Constraint Principle." L.B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame Law Review, 2015, 1, 9. That core is, however, a shallow one. All versions of originalism do, indeed, share a commitment to at least a weak version of the "fixation thesis" and the "constraint principle." But that thin shared commitment still allows for a staggering amount of diversity within the originalist family of theories. *See* Colby, Smith, *supra*, 247-62; J. Greene, Heller *High Water? The Future of Originalism*, 3 Harvard Law and Policy Review, 2009, 325, 327 (noting "the little common ground among most originalists").

[8] *See* Greene, *supra* note 7, 326 ("Deciphering what one means by 'originalism' first requires deciding whether it refers to the views of politicians or constitutional lawyers, to academic theory or judicial practice . . . ."); J. Greene, N. Persily, S. Ansolabehere, *Profiling Originalism*, 111 Columbia Law Review, 2011, 356, 358 (noting that "it is not clear that frequent invocations of the founding fathers or original intent on cable news, on talk radio, or even at Supreme Court confirmation hearings has much at all to do with the serious work of historians and legal scholars").

[9] *See, e.g.*, Colby, Smith, *supra* note 7, 291-305; P.J. Smith, *Originalism and Level of Generality*, 51 Georgia Law Review, 2017, 485. Some academic originalists have made this observation as well. *See, e.g.*, V. Kesavan, M. Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 The Georgetown Law Journal, 2003, 1113, 1140 ("But even though Justice Scalia remains the dominant figure in the shift to originalist textualism, his is not always the most refined or consistent version of the theory. In some ways, he is a leader whose followers have bettered the leader's own work. Scholars and judges a half-generation younger than Scalia, who are in some respects his heirs, often appear to be employing more thoroughly and carefully honed versions of originalist textualism."); M.D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 Notre Dame Law Review, 2017, 1945, 1964 (noting "four respects in which Justice Scalia's originalist methodology appears underdeveloped from a practical perspective").

[10] Solum, *supra* note 4, at 2.

[11] For an example, see T.B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 110 Northwestern University Law Review, 2006, 1097, 1126-38.

[12] Solum, *supra* note 4, 2.

where the Justices openly admit that there is "no constitutional text speaking to th[e] precise question."[13]

And there is a deeper feature of originalism that makes it less significant and less consequential than Professor Solum's testimony implies. Even if judges were always to employ originalism with the highest degree of consistency and rigor, they would still not be constrained from imposing their own values on the nation. Simply put, today's sophisticated originalism—Professor Solum's originalism—is not particularly constraining at all.

Professor Solum lists as one of the "Myths about Originalism" that "Originalism Would Require that *Brown v. Board* be Overruled."[14] He is correct; that canard is likely a myth.[15] But the *reason why* it is a myth is telling.

As I have written about at great length elsewhere,[16] the very changes that academics like Professor Solum have made to the theory of originalism in recent years in order to shore it up against criticism and make it more intellectually sophisticated and defensible, also rob the theory of what used to be its very *raison d'etre*—its claim to be able to constrain judges and prevent them from imposing their own values on the nation.

> Originalism—or at least the originalism that fills the pages of law reviews—now allows judges to render decisions that run contrary to the original intent and expectations of the Framers and that are inconsistent with what the Framers thought or would have thought about the issue. It now reads the most important rights-granting clauses at broad levels of generality, thus affording judges substantial wiggle room in which to engage in constitutional construction.[17]

It is true that employing originalism would not require the Supreme Court to overrule *Brown v. Board of Education*. But neither would it *preclude* the Court from overruling *Brown*. Rather, today's originalism would allow a judge to reach just about any result she wanted on the issue of segregation.[18] An honest originalist judge could either defend *Brown*, or reject it.[19] And the same is true for virtually

[13] Printz v. United States, 521 U.S. 898, 905 (1997) (Scalia, J.). *See generally* J.F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 Harvard Law Review, 2009, 2003.

[14] Solum, *supra* note 4, at 4 (citing Brown v. Board of Education, 347 U.S. 483 (1954)).

[15] Solum's claim that *Plessy v. Ferguson* "was a living constitutionalist decision," *id.*, however, is harder to defend. Whether or not the result in *Plessy* was correct on originalist grounds—a subject of continued debate, *compare* M.W. McConnell, *The Originalist Justification for* Brown: *A Reply to Professor Klarman*, 81 Virginia Law Review, 1996, 1937, 1949, *with* J.F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 Stanford Law Review, 2017, 1237, 1296—the opinion itself sounds much more in originalism than it does in living constitutionalism. The opinion relies heavily on "the established usages, customs, and traditions of the people," and on the historical evidence of the original object and understanding of the Fourteenth Amendment. Plessy v. Ferguson, 163 U.S. 537, 543-51 (1896).

[16] *See* T.B. Colby, *The Sacrifice of the New Originalism*, 99 The Georgetown Law Journal, 2011, 713.

[17] *Id.* 747 (footnotes omitted).

[18] *See* R. Turner, *On* Brown v. Board of Education *and Discretionary Originalism*, 2015 Utah Law Review, 2015, 1143.

[19] *See* J.M. Balkin, *Framework Originalism and the Living Constitution*, 103 Northwestern University Law Review, 2009, 549, 555, 600 (explaining that both *Plessy* and *Brown* are

every other highly contested issue of constitutional law today. Originalism could be invoked—and serious originalists have invoked it—both to permit affirmative action, and to preclude it.[20] It can be, and has been, employed both to justify abortion and same-sex marriage rights, and to reject them.[21]

Professor Solum insists that the notion "that the Supreme Court is simply not capable of discovering the original public meaning of the constitutional text" "is simply false," because "lawyers, judges, and scholars can work together to unearth the evidence of original meaning in the hard cases."[22] I am afraid that this assertion is either unduly optimistic, or practically inconsequential. If Professor Solum means by this that we can all work together to uncover an original meaning that is narrow and determinate enough to resolve the hard cases, then I am highly skeptical. Serious originalists have been hard at work seeking to discover the Constitution's original meaning for decades now, and each year only brings more disagreement. Some of our best minds have been coming up with an increasingly dizzying array of alleged original meanings of the most controversial constitutional provisions.[23]

The fact that so many scholars, after years of historical research, have come up with so many different original meanings tells us that, in all likelihood, the original meaning is not as specific and constraining as each of them has sought to establish. That is to say, if there is a discoverable original meaning, it is so abstract and underdeterminate that judges can apply it to reach virtually any result that they want.[24]

Perhaps other countries experimenting with originalism would get different results. Originalism could be constraining if employed to interpret a constitution whose language is specific and whose original, objective public meaning is narrow.[25] But the American Constitution is "exceptional [not only] in how few

consistent with the original meaning of the Fourteenth Amendment); R.E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 Constitutional Commentary, 2005, 257, 260, 265-66 (explaining that originalism now allows either answer to the segregation question).

[20] *Compare* M.B. Rappaport, *Originalism and the Colorblind Constitution*, 89 Notre Dame Law Review, 2013, 71, *with* J. Rubenfeld, *Affirmative Action*, 107 Yale Law Journal, 1997, 427.

[21] *See* J.M. Balkin, *Abortion and Original Meaning*, 24 Constitutional Commentary, 2007, 291. (arguing that, contrary to the views of most originalists, the right to abortion is not inconsistent with originalism); L.B. Solum, District of Columbia v. Heller *and Originalism*, 103 Northwestern University Law Review, 2009, 923, 970-71 (acknowledging the possibility that abortion rights can be reconciled with originalism); Smith, *supra* note 9, 520-24 (explaining that, although most originalists have insisted that originalism precludes a right to gay marriage, an increasing number of originalist scholars have now defended gay marriage rights on originalist grounds).

[22] Solum, *supra* note 4, at 11.

[23] For example, there have been numerous scholarly books and articles in recent years proposing wildly divergent original meanings of the Privileges and Immunities Clause of the Fourteenth Amendment. *See* B. Boyce, *The Magic Mirror of "Original Meaning": Recent Approaches to the Fourteenth Amendment*, 66 Maine Law Review, 2013, 20.

[24] *See* Colby, *supra* note 16, 765 (arguing that "the existence of competing readings of the scope or mandate of constitutional provisions indicates that the original shared or objective 'meaning' of those provisions must have been extremely broad and thus capable of being cashed out through any number of principles yielding any number of doctrinal applications").

[25] *See id.* at 756 ("I do not mean to suggest that a method of interpretation that seeks a text's original public meaning is inherently unconstraining. Such a methodology could indeed prove quite determinative when applied to a wide variety of documents. It could even be meaningfully

enumerated rights it contains," but also in that those rights are "by comparative standards exceptionally vague[…] ones. Almost all other constitutions contain longer lists of more particular liberties and an equality provision setting out prohibited bases of discrimination."[26]

Here in the United States—where our primary constitutional rights guarantees are phrased in curt and lofty generalities like "equal protection of the laws," "freedom of speech," "due process of law," and even "other rights"—today's sophisticated originalism has little practical purchase. Justice Gorsuch's insistence to the contrary notwithstanding, originalism, even though it "focus[es] backward, not forward, and look[s] to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be," does not prevent American judges from deciding "cases based on their own moral convictions or the policy consequences they believe might serve society best."[27] Originalism does not avoid the problem that so concerns Professor Solum of judges allowing their personal views to affect their constitutional decisions, thereby undermining democratic self-rule. It simply cloaks that process in false (even if well-meaning) claims of historical providence.

constraining as a method of constitutional interpretation, if we had a different constitution. But it is not so with ours.").

[26] S. Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 Michigan Law Review, 2008, 391, 399-400.

[27] Gorsuch, *supra* note 3, 906.