

## Originalism Is Not Enough

*di Gideon Sapir*

**Abstract: L'originalismo non è sufficiente** – The main argument Solum poses in favor of originalism is that adopting this interpretive method prevents judges from enforcing their personal values on the public. Although this paper shares Solum's fear of juristocracy, it argues that originalism is insufficient to address this danger, and particularly when applied outside the United States, for two main reasons. The first reason is that the effectiveness of the originalist method is reduced in these countries because their structures of constitutional proceeding differ from the United States' one. The second is that there is a growing tendency throughout the rest of the world to push interpretation to the sidelines, as the text is no longer viewed as the source of authority and legitimacy for judicial review. Whoever thinks a democratic state needs a constitution, and yet, seeks to prevent the court from taking over the constitution, cannot settle for adopting originalism as the sole shield.

**Keywords:** Originalism; Comparative constitutional interpretation; Comparative adjudication; Types of scrutiny.

675

---

### 1. Introduction

The main argument Solum poses in favor of originalism is that adopting this interpretive method prevents judges from enforcing their personal values on the public. I am in agreement with Solum's fear of juristocracy. However, in my opinion, the means by which he offers to address this danger are insufficient, particularly when applied beyond the borders of the United States, for the following two main reasons:

- a. The structure of the constitutional proceeding held in the United States differs from most other countries, so that the effectiveness of the originalist method in these countries is drastically reduced.
- b. There is a growing tendency throughout the rest of the world to no longer view the text as the source of authority and legitimacy for judicial review. This trend generally pushes interpretation to the sidelines, particularly the originalist interpretation.

### 2. The two-stage constitutional proceeding and its meaning

It is well known that there is a substantial difference between the United States and other countries when it comes to the structure of the constitutional proceeding. In the United States, the constitutional judicial review involves a single stage, whereas in other countries the review consists of two stages. The first stage reviews whether a law or governmental act violates a constitutional directive. The second stage

reviews whether the violation is justified under the given circumstances. The constitutional text may provide a clear answer in the first stage. However, aside from exceptional cases, the constitution does not provide, and doubtfully has the ability to provide, a decisive answer in the second stage. The second stage balances between constitutional directives and conflicting interests. The variety of potential collisions is unlimited, and a constitution, however detailed it may be, cannot provide judges with a detailed guide leading them to clear decisions in every single case. In the absence of a clear answer, the judge is left with much room (and perhaps even obligation) to use rigorous discretion.

Some claim the difference between the two systems is merely superficial, and that the American proceeding of constitutional review is also divided into two stages.<sup>1</sup> If this is indeed the case, then the abovementioned claim applies to the American context as well, so that the judge's values must play a part also in the United States, even when the originalist method of interpretation is applied.

If we wish to prevent judicial supremacy, we may choose to add another interpretive doctrine to originalism, which is referred to in the United States as "The Presumption of Constitutionality". The origins of this doctrine are found in the writings of Alexander Hamilton, which established that statutes should be invalidated only if they are "contrary to the manifest tenor of the Constitution".<sup>2</sup> However, it appears that the weight of this principle is also restricted, because there is no decisive way to determine whether a clear violation of the Constitution has indeed occurred. As a result, even if we were to restrict the court's involvement to cases in which the Constitution has been clearly violated, the court would still possess a great deal of judicial discretion.

676

This is not to say that originalism should be rejected as a preferred interpretive doctrine. First, one must determine whether a better alternative exists. Clearly, the Living Constitution method, which allows judges to deviate from the original meaning of the Constitution, is a far worse alternative. However, another approach has been recently developed within American discourse, known as 'popular constitutionalism'. Much alike the originalists, those who are in favor of this approach – such as Mark Tushnet<sup>3</sup> and Larry Kramer<sup>4</sup>, also highly regard the constitutional text, which enjoyed broad consensus when it was drafted. But, unlike the originalists, the popular constitutionalists believe the people themselves, or the legislature, possess the authority to interpret the constitutional text (including possible deviation from its original meaning). This approach has its weaknesses, which I discuss elsewhere.<sup>5</sup> However, in so far as seeking to avoid judicial supremacy, popular constitutionalism offers an interesting alternative. That being

<sup>1</sup> See, for example, S. Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. Rev. 789 (2007); J. Mathews, A. Stone Sweet, *All Things in Proportion: American Rights Review and the Problem of Balancing*, 60 Emory L.J. 797 (2011). But see M. Cohen-Eliya, Iddo Porat, *Proportionality And Constitutional Culture* (2013) 44-64 (even if balancing checks are held in the United States, their place is different and far less central than in Europe)

<sup>2</sup> Federalist No. 78, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For the classic paper that establishes this doctrine, see J.B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893) ("It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one – so clear that it is not open to rational question")

<sup>3</sup> M. Tushnet, *Taking the Constitution away from the Courts* (1999)

<sup>4</sup> L.D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004)

<sup>5</sup> Gideon Sapir, *Popular Constitutionalism and Constitutional Dialogue*, R. Levy et al (eds), *Deliberative Constitutionalism* (forthcoming 2017, Cambridge U. Press)

said, we must note that this approach does not offer an interpretive alternative to current interpretive doctrines, but rather a constitutional model that differs from the present one. While in the current model the court is responsible for interpreting and enforcing the Constitution (using either originalist or living constitution methodology) then the model offered by popular constitutionalism shifts most of the responsibility from the court to the legislatures and public.

In conclusion, while the originalist approach may restrict the scope of the discretion that judges had enjoyed when left free to interpret the constitution as they wished, it still leaves broad room for it. This is as a result of the fact that the constitutional proceeding in most countries, possibly in the United States as well, includes more than a review of whether or not a certain constitutional directive is violated. It includes a second stage as well, which balances between conflicting values, to which the constitutional text (including the original intent of its framers) does not give a clear guidance. As a result, even the most ardent follower of originalism is left without a clear originalist answer to many constitutional dilemmas.

### 3. Discarding the text as the binding constitutional source

It appears that Solum and his allies are fighting a battle in a war that was settled long ago in Europe (and Israel). Most parties in the American debate, excluding few exceptions, agree that the constitutional text should serve as the basis for discussion. The debate revolves around the question of whether or not deviation from the original meaning of the text might be legitimate (or possibly desirable). Indeed, there are those who claim that America's academic and judicial preoccupation with constitutional interpretive theories is exaggerated. However, critics are not rejecting the notion that the role of constitutional law is to interpret the Constitution. They only claim that instead of occupying themselves with interpretive doctrines, American constitutional jurists should focus on the interpretation itself.<sup>6</sup>

The reality in Europe and Israel is different. Europe hardly concerns itself with constitutional interpretation. As Jamal Green accurately states, originalism is not characteristic of constitutional systems in Europe.<sup>7</sup> However, truth be told, not only is originalism almost entirely absent from European constitutional discourse, but so is constitutional interpretation, as a whole.

Part of this phenomenon stems from a growing tendency to focus on the second stage of constitutional review – a process referred to by some as "a shift to the culture of justification"<sup>8</sup> – where, as we have explained, interpretation plays a marginal role. However, the tendency to discard interpretive means is evident in the first stage of the constitutional process as well. It draws on a different and more fundamental trend, which rejects the text as the binding constitutional source. Courts are prepared to recognize the binding power of constitutional rights even when it is hard to attribute them to the constitutional text. In many cases they do not even bother to present an interpretive reasoning to validate their position.

---

<sup>6</sup> See, for example, S.A. Solow, B. Friedman, *How to Talk about the Constitution*, 25 Yale J. L. Human. 69 (2013).

<sup>7</sup> J. Greene, *On the Origins of Originalism*, 88 Texas. L. Rev. 1, 63–66 (2009).

<sup>8</sup> M. Cohen-Eliya, I. Porat, *Proportionality and Constitutional Culture* (2013). For a similar view see M. Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 L. & Ethics of Hum. Rts. 142, 143 (2010)

Moreover, courts are occasionally willing to acknowledge the existence of a constitutional right even in the total absence of a written source.<sup>9</sup> Similarly, there are constitutional rulings that relate to "global constitutional law" as a binding source. This, among other things, refers to the existence of customary constitutional law, which is unrelated to a specific text.<sup>10</sup>

Rejecting the text as a binding constitutional source goes hand in hand with another interesting phenomenon: discarding the requirement for broad consent as a condition for establishing the legitimacy of the constitution and judicial review. For example, the German Basic-Law was drafted following the Second World War, while the allies were still in control of Germany. It was initiated by the allies and was subject to their approval<sup>11</sup>, and yet, this fact did not undermine the validity and supremacy of the Constitution in the eyes of the German courts. Similarly, the notion of "a European constitution", which nearly materialized, did not require broad consent from the citizens of the European member states. Israel provides an interesting example here. The basic laws, from 1992, which were described by the Israeli Supreme Court as generating a "constitutional revolution", were adopted in a process that was far from representing broad national consent. However, this deficiency was not enough to undermine the supremacy of the basic laws in the eyes of the Supreme Court.<sup>12</sup> The American scholar, Jed Rubenfeld, was invited by the European Union to serve as a specialist in drafting Kosovo's constitution at the end of the Kosovo war. Rubenfeld reports that when inquired as to why the committee of specialists, in charge of drafting the Constitution, did not include a single member of the Kosovo people, he was answered that it would only complicate the drafting process and introduce irrelevant considerations.<sup>13</sup>

The relationship between these two trends is clear. So long as the legitimacy of judicial review rests on the constitutional text, it is important that the Constitution itself is adopted with broad national consent. Once constitutional principles are recognized independently of the text, then the way the constitutional text is adopted becomes insignificant.

#### 4. Summary

The danger Solum warns us of is real, but the means by which he suggests we overcome that danger is far from satisfactory. Whoever thinks a democratic state needs a constitution, and yet, seeks to prevent the court from taking over the constitution, cannot settle for adopting originalism as the sole shield.

<sup>9</sup>In Israel, there are several such examples. For example, see HCJ 142/89 the Laor Movement v. Speaker of the Knesset, IsrSC 44(3) 529 (1990), paragraph 30 in Justice Barak's ruling ("in principle, a court of law in a democratic society can declare the invalidation of a law that contradicts the basic principles of the system; even if these basic principles are not anchored in a rigid constitution or protected basic-law... this does not harm judgment, as its role is to maintain the rule of law, including the rule of law among the legislator").

<sup>10</sup> A. Stone Sweet, Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L. 72 (2008).

<sup>11</sup> See D.P. Kommers, R.A. Miller, *The Constitutional Jurisprudence of The Federal Republic of Germany* 8-9 (3rd. ed. 2009).

<sup>12</sup> For example, see G. Sapir, *The Israeli Constitution: From Evolution to Revolution*, ch. 2 (Forthcoming 2018, Oxford University Press)

<sup>13</sup> J. Rubenfeld, *Commentary: Unilateralism and Constitutionalism*, 79 NYU L. Rev. 1971, 1992 (2004)