Constitutional Interpretation: Testing New Originalism

Interview with Lawrence Solum

Lawrence B. Solum is an internationally recognized legal theorist, who works in constitutional theory, procedure, and the philosophy of law. Professor Solum received his J.D. from Harvard Law School and received his B.A. with highest departmental honors in philosophy from the University of California at Los Angeles. Nowadays, he is the Carmack Waterhouse Professor of Law at the Georgetown University. Professor Solum has written several books and essays on legal theory, and is also the Editor of Legal Theory Blog, an influential weblog that focuses on developments in contemporary normative and positive legal theory.

The interview was focused on issues related to constitutional interpretation. Especially, we talk about legal originalism, its practical and theoretical challenges, and some of its implications within the Argentine constitutional system.

Revista Jurídica de la Universidad de San Andrés (RJUdeSA): —Professor Solum, we can say that all originalists agree upon two core ideas. Firstly, that the linguistic meaning of the Constitution was fixed when each provision was framed and ratified. Secondly, that the original meaning of the constitutional text should be regarded as legally binding. These are the so-called "fixation thesis" and "textual constraint thesis".

However, the new originalists present another thesis: the public meaning thesis. Could you explain to our audience what is the public meaning thesis?

Lawrence Solum: —The idea of the public meaning thesis is that the original meaning of the constitutional text, in the case of the United States Constitution, it its public meaning. So, the public meaning of the constitutional text is the meaning that would have been gleaned by ordinary people, or accessible to ordinary people, at the time that each provision of the constitution was adopted. The U.S constitution has 27 amendments, so different provisions were adopted in different times, but irrespective of the time of adoption, the question is what the text meant to the public at that time.

RJUdeSA: —What happens when there is a new historical discovery that changes the public meaning? Is this possible?

Lawrence Solum: —This is possible, because we have a very old constitution and some provisions of the constitution have meaning that have been forgotten or neglected for quiet some period of time. Originalism, despite its importance, is relatively recent as a theorized approach to constitutional interpretation in the contemporary period. So, that means that there are many constitutional provisions where substantial research has not been done or has recently been done.

Let me just give one example of this: the 8th amendment of the united states constitution prohibits cruel and unusual punishment. So, most of the discussion of this provision has focus on the word "cruel" and neglected the word unusual. Most people have just assumed that it meant something like "rare" or "infrequent", but an American law professor John Stinneford has recently done an extensive historical investigation of the word unusual and discovered that at the time it had a quite different meaning, a related meaning. He concluded that the word unusual meant "contrary to long practice" and it was particularly connected with the idea in the common law that legal practices that have endured for a substantial period of time enjoyed a presumption of rationality and rightness. So, this has very significant implications for the interpretation of the clause because it means that the clause is specially focused on novel punishment, new punishment. This is a discovery that's just been made in the last ten years

RJUdeSA: —One of the main criticisms that is usually made to Originalism is its attachment to a Constitution that is not updated in terms of the changes in society and new developments. For example, the creation of the Internet as a means of communication, which today could be contained within the meaning of "press", did not exist at the time of the drafting of the constitutional text. How can we read the Constitution by its public meaning without leaving aside these new developments?

Lawrence Solum: —Yes, this is an important problem, and it's a problem not just for originalism and constitutional interpretation but for textualism of any form beau case many statues are old. The first thing to understand is that many of the provisions of the constitution are written in such a way that they automatically take into account changes in

technology. So, discuss the fourth amendment to the United States Constitution which is a Prohibition on "unreasonable searches and seizures". So, the idea of a search the concept of searching is quite general, and a means of searching can change technologically. So, there could be a search by visual inspection but there could be high tech searches, searches that involves surveillance technology or small robot, and those with nonetheless be searches. So, a provision like that really is applicable despite technological change.

Sometimes the constitution is framed in ways such that it is pined to particular technologies and the freedom of the press would be an example of that. The provision is quite outdated because the term press in 1791 did not refer to the institutional press, so it referred instead to the printing press and of course the printing press it's an outdated technology. So, that provision of the constitution by itself does not provide protection for alternative forms of the production of text, including a word processors and the distribution of text by the Internet, and many other phenomenon.

This conclusion has to be qualified because the constitution also contains the ninth amendment which provides that the enumeration of certain rights in this constitution shall not be construed to deny or disparage others retained by the people. So, as applied to the federal government the ninth amendment would protect rights that are not specifically numerated. Now, there's controversy over exactly how we determine what those right are, but at the very minimum, it seems to protect rights that are closely analogous to the enumerated rights. So, the right to Free Press is enumerated but there is a unenumerated right retained by the people that would apply to the production of text by other means and the distribution of text by other means.

So even in case of the first amendment of the Free Press clause, the Constitution provides a mechanism by which our rights can be protected in the more abstract level. Of course, free speech is a little different, right now I am speaking on the internet, you can speak in person, you can speak on the internet, you can speech via a loudspeaker. Speaking in person the only form of address people in 1791 when the first amendment was framed and ratified, but a speech on the Internet is speech, and speech by a loudspeaker is speech, so those technological changes can be accommodated with a fixed meaning for constitutional text.

RJUdeSA: —There are some concepts in the Constitution which are underdetermined either because they are vague, or because they are ambiguous. These concepts fall under what Herbert L. A. Hart used to call the "penumbra of uncertainty". In these cases, is hard to reconstruct the public meaning of the Constitution. How should an originalist judge decide in such cases?

Lawrence Solum: —So, the problem of underdeterminacy has to be addressed by any constitution theory, because even if you are a living constitutionalist and you are focus on general values, as Ronald Dworkin might be, or on common law constitutionalism as professor David Strauss advocates, there is going to be underdeterminacy. So, all legal theories need an account of what to do in the zone of underdeterminacy.

Contemporary originalism approaches this via an important conceptual distinction: the interpretation/construction distinction. So, this is it a technical distinction of the words that can be used to describe the same ideas, it's an old distinction in American legal theory, it goes back at least to 1839 and the very distinguished American lawyer Fritz Liber, who wrote the first treatise on legal hermeneutics in the United States. Interpretation is the determination of the meaning of the provision, roughly the linguistic meaning in context. Construction is the determination of legal effect. When the meaning of a provision is sufficient to answer the legal question before the court, then originalist just follow the meaning but when it's underdeterminate, we have a contraction zone, a zone of underdeterminacy.

In that zone we need to distinguish between different sources of underdeterminacy. So, you have mentioned both ambiguity and vagueness. So, let me discuss each of those because I think they raise separate and distinct problems. Ambiguity occurs when a word or phrase or grammatical construction admits more than one meaning. So, famously the word "bank", which is not in the United States Constitution, but is in many statutes has two meanings in English, one meaning refers to financial institutions like the bank of the United States to use a historical example from our constitutional history or the bank of a river. But in context, ambiguity is almost always resolved. So, for example, the United States Constitution uses the word Senate, contextually this could refer to the Roman Senate or the senate of the universe of University College London, but in context it refers to the Senate of the United States that is one of the two constituency bodies of the Congress of the United States. This resolution of ambiguity is so clear and so natural that

we don't even notice the ambiguity. So, the United States constitution includes many ambiguities but very few of them are not resolved by context.

Some provisions may be ambiguous even after we look at context and one example might be the provisions that were drafted in such a way as to avoid using the word slavery in the constitution. So, the constitution drafted in 1787 had provisions that referred to “persons bound to service”, that phrase might refer to slaves but it also could refer to other classes of persons, to apprentices that were bound for service and bond servants who were bound to service. Whether it included slaves was a matter that was not necessarily resolved by the reference to context, this is in party because these phrases may have been used to create a deliberate ambiguity so that anti-slavery states in the north could ratify the constitution because it does not explicitly encompass slavery, but southern states could ratify the constitution for a different reason because “bound to service” does refer to slavery. So, this would be at the deliberate ambiguity and in such cases, we would need some method of construction to resolve this irreducible ambiguity, ambiguity not eliminated by context.

That's different than vagueness. Technically vagueness refers to a very particular phenomenon, the idea of borderline cases, so for example the word “cool” is vague, it has multiple senses and in all of its senses is vague. One sense is the temperature sense, so there's no bright line between a room that's cool and a room that is normal, and on the other end of the spectrum, at some point, there's a gradual transition from "cool” to “cold”. In such cases we need some precise specification that would allow us to draw lines.

Originalist are still developing theoretical positions, but probably the most well thought out position is that articulated by my colleague at Georgetown University Randy Barnett and his co-author Evan Bernick, and they argue that, in the construction zone we need to pars the original design of the constitutional text in order to determine the purpose or function which each provision was designed to serve and that precisicifications implementing rules constitutional constructions that resolve underdeterminacy should aim to serve the purpose of the constitutional text. That position is in contrast with another one, that's associated with professors Gary Lawson of Boston University and in Michael Paulson of St. Thomas University. They argue that when the constitutional text is unclear and that lack of clarity is not resolved by context, there should be a presumption of constitutionality, a default rule that would require courts to deferred to the democratically elected institutions, like the president, the executive branch and Congress, and similar

officials in the case of state legislatures and state executive branches. So, these are two of the approaches that can be used in the construction zone, in the zone of underdeterminacy that can be created by vagueness or ambiguity

RJUdeSA: —You just explained how an originalist would respond to the underdeterminacy problem. Let us now explore what you explained in your essay "Originalism, a debate" about the possibility that living constitutionalism and originalism can be compatible. In the essay you say that by defining their domain, these two theories can be compatible by defining the domain of constitutional interpretation for originalism and constitutional construction for living constitutionalism. In that case, how these two theories articulate and how would a judge a underdeterminacy case would have to resolve.

Lawrence Solum: —So, the question as to the conceptual relationship of living constitutionalism and originalism is something that I wrestle with. My position on that has evolved and changed over time, so at the time I wrote the essay to which you refer, this is now many years ago, I believed that we have to think about three categories of constitutional theories. One category would be living constitutionalist theories that are not originalist, these would be versions of living constitutionalism that reject the idea that the constitutionalism text has any constraining force. So, if you were a living constitutionalist who believed that the living constitution could directly override the constitutional text, then you would be a non-originalist living constitutionalist. Then we might imagine the other extreme forms of originalism that rejected any idea of constitutional change, this is a very extreme form of originalism because it said that all the constitutional doctrine, all the implementing rules are fixed at the time the constitution is adopted and no change is permitted. That form of originalism would obviously have a serious problem with technological change because it would have no mechanism for accounting for doctrines that needed to change and adjust in response to changing circumstances. So, we've got those two extremes.

Back then, my position was that there could be forms of living constitutionalism that were compatible with originalism, this would be a form of living constitution that accepted the constraint principal combined with a form of originalism that accepted constitutional change in the zone of underdeterminacy in the cases where the constitutional text was

vague or open textured, and therefore left room for change for a living constitution within those construction zones. So that was my position several years ago, but in response to that what occurred "linguistic push back". Many people on both sides of the debate, both originalist and living constitutionalist who said that is a confused way of talking, originalism and living constitutionalism are opposites, they compete with each other, they are not compatible.

So, in a recent article entitled "Originalism versus living constitutionalism: the conceptual structure of the great of a debate" I responded to that push back and suggested a slightly different picture. I accepted the idea that the core positions of originalism and living constitutionalism should be conceptualized as inconsistent because these labels name a debate and for the debate to be clear, we need a sharper divide between sort of the core cases of originalism and living constitutionalism.

So then, my proposal is that the acceptance of the constraint principle, the idea that the original meaning of the constitutional text is binding provides a sharp line. So, a constitutional theory that rejects the constrained principal will be defined as living constitution and a constitutional theory that accepts the constraint principal will be defined as originalism. There might be some hybrid case because they partially accept and partially reject the constrained principal.

So, this picture says that constitutional change within the limits of constraint ought to be called originalism. This takes more of the territory and puts it on the originalist side of the divide. So, we'll see what happens, this is an area where people fight over the terminology, people fight to exclude ideas from originalism and living constitutionalism, people fight over the labels that they think command political salience and support. We will see if my new proposal does a better job of providing clarity for the debate.

RJUdeSA: —In Argentina, as you pointed out during your visit in 2019, there is a certain complexity in constitutional law due to the incorporation of international treaties like the American Convention of Human Rights. In some sense, it could be argued that the Argentine constitutional text has become an example of formal living constitutionalism. Indeed, some authors assert that it is subject to changes introduced by international bodies, such as the Inter-American Court of Human Rights. Do you think there is still room for

originalism within constitutional interpretation in Argentina, or, on the contrary, is the text necessarily open to reinterpretation?

Lawrence Solum: —So, this is a question not just in Argentina but in any constitutional system that incorporates treaty obligations as having the power and force that overrides a domestic law and that can modify constitutional law. So, I want to make two points about such relationship between search treaty obligations and originalism using the argentine case as an example. So, first international treaty obligations focus on a particular part of constitutional law, international treaty obligations are almost entirely concern with the individual rights and to some extent also route rights components of constitutional law and for the most part they have very little to say about structural question such as the separation of powers or federalism. The Argentine constitution is very different than the American Constitution in some of these aspects and similar in another aspect, but the important point now is that there are no international treaties that directly addressed those kinds of questions. So, the second point concerns the domain of individual and group rights and question whether international treaty obligations are inconsistent with originalism within that domain.

So, I think that there are two separate issues regarding international treaties, originalism and individual rights. One issue concern that the role of originalism in treaty interpretation. So, the fixation thesis and the constraint principal can be applied to international human rights treaties and it can be argued that the basic structure of treaty laws, not only is consistent with originalism but that it ought to require originalism with respect to such treaties, that is that the meaning of such treaties, the linguistic meaning in context is fixed for the same reason the constitutional meaning is fixed. The meaning of language, the meaning of the writing is determined at the time of the writing and that the constraint principal also applies because nations that accept a treaty regime accept to the terms of the regime. They don't accept a living treaty; they accept to those terms that were the subject of the treaty itself. So, it might well be the case that international human rights treaties changed Argentine law but that they properly understood that the argentine law in a way that ought to be consistent with treating originalism, even if some international bodies that interpret treaties have gone beyond the original meaning of the treaties and are overriding and modifying treaty provisions.

The second point is that the relationship between international treaties and domestic constitutional law is itself a question of domestic constitutional wall. So, the ability of an international treaty to override provisions of the Argentine constitution is ultimately a question for the constitutional institutions of Argentina for the Supreme Court of Argentina, and also for other key constitutional actors within Argentina the like Congress or executive, may also have a role to play in determining the correct interpretation of the Constitution. So, on that question the originalist position is that is the original meaning of the Argentine constitution that must govern the question of the relationship of the constitution of Argentina to international human rights treaties, and in particular to determine whether or not such trade can ride the constitutional law of Argentina. So, I'm not an expert about the constitutional law of Argentina, so I'm not really qualified to address those two questions, but I think that those are the important questions from an originalist perspective.

RJUdeSA: —There are extremely vague constitutional clauses whose meaning were highly controversial at the time of their drafting. In some cases, such clauses are the result of the impossibility for constituents to reach an agreement on more certain concepts. How is it possible to find a public meaning when it comes to originally abstract concepts that will have to be defined on a case-by-case basis?

Lawrence Solum: —So, the United States Constitution and most constitutions include provisions that are general and abstract but it's very important to distinguish between disagreements about the meaning of an abstract clause and disagreements about the proper application of an abstract clause, and in a particular, disagreements about the resolution of underdeterminacy.

So, there may well be provisions of the United States Constitution, for example where there was substantial disagreement about meaning of the provisions but I believe that such disagreements are relatively rare, that almost all of the constitutional text, even the abstract provisions of the constitutional text had communicative content that was agreed upon. This communicative content was abstract and they were open textured, and therefore there could be disagreements about how to apply the agreed-upon meaning to particular circumstances.

Another point that is relevant here is that in order to determine the degree of constitutional underdeterminacy, the degree of open texture or vagueness is not sufficient to speculate based on contemporary linguistic intuition. A provision that looks like it is general and abstract today may have had a much more determinate meaning at the time it was adopted. So, in the case of the United States Constitution many provisions that look to us more than 200 years after their adoption to be highly underdeterminate may well have been much more determined, particular and concrete at the time they were adopted.

I want to work to this point from the seventh amendment guarantee of a civil jury trials, which illustrates the way in which a provision can be highly determinate, although the wording is very abstract and then moved from that example to another example about freedom of speech. So, seventh amendment of the united states constitution has to clauses, the first one is called “the preservation clause”, this clause specifies that the right to a jury trial in cases where the amount in controversy exceeds $20 shall be preserved. So, that's very abstract, you got an abstraction “preserve”, you have an abstraction in “right to jury trial”, and then we have one very concrete provision $20. So, setting the $20 aside for a moment. Is this provision underdeterminate? No, because it refers to the common law at the time of adoption in 1791 and it requires that the right to a jury trial to be preserved. So, that means that very abstract words have a highly determinate meaning because the right to jury trial at common law was highly determine. Now, it's a very complex structure which I won't attempt to explain but it remotely these ideas rely on the law equity distinction. So, damage actions, that's an accident law, and injunction actions, that's it in action in equity, you get a jury trial in damage actions but not in injunction actions. This is like many particular rules of the common law in 1791. So, this provision although it's worded in a general and abstract way, has a highly determinate meaning, in part because it relies on existing legal rules as of 1791.

Let me down discuss the freedom of speech in the first amendment of the united stated constitution. So people today frequently look at those words and they say that the first amendment created a new right, the right of free speech and this is highly abstract. In fact, they get even more abstract than free speech and say is actually the right to free expression of all kinds, it's not limited to speech, but that approach to the interpretation of the phrase “the freedom of speech” is ahistorical. At the time provisions like the first amendment freedom of speech we're understood to referred to existing common law rights. So, it's not

that the first amendment say, "by these amendment we create a new right, the right of freedom of expression", instead by this amendment we deprive Congress of the power to override a pre- existing right, the pre-existing common law right for free expression. So, the content of that right is determined by legal limits on free speech in 1791. That doesn't mean that it's easy to answer questions about freedom of speech and certainly not as easy in the case of the seventh amendment, And there are competing ideas about the exact shape of that 1791 right is but resolving those debates involves historical investigation not moral theorizing and some principles are easily recovered, although many other principles may be more difficult to determine. So, for example many historians believe that one aspect of the freedom of speech in 1791 was a legal principle that it outlawed prior restraint so people might be subject to punishment to harmful speech such as defamation, libel or slander but they were not subject to an injunction that would forbid them from speaking in the first place.

So, assuming that history is right we now have a rule of free speech law that's quite determine and that can be determined through historical investigation rather than a vague, general, abstract principle of political philosophy concerning the freedom of expression.

RJUdeSA: —Thank you very much, returning to the Argentine constitution, in 1994, Argentina reformed its National Constitution. Although significant changes were made to the Supreme Law, several articles remained the same as their previous wording. In spite of remaining the same, we could say that their public meaning changed. In this case, could there be a change in the interpretation of these articles too? In other words, should we constrain ourselves by the public meaning of the first constitution or by the public meaning of the time of the reform?

Lawrence Solum: —Yes, it's a very interesting question and it's a question because I don't know the facts that I believe are critical. I'm sure many Argentine constitutional lawyers would be able to give an account of those facts. When the Constitution was amendment, there are two possible situations that we could've had. One situation is that the whole constitution is readopted and that the situation of constitutional interpretation is such that it is understood that the re adoption is an adoption of the content communicated by those provisions to the relevant agents. In the United States that would be the public, in

Argentina it's not so clear to me who the constitution communicated to in the 1990s. But whoever it is, it's either that it's the meaning of these provisions to you now or it's these are old provisions and what we are doing is we are carrying forward that original meaning into the present. So, it's an important question and it's one that I believe it's subject to historical investigation.

Now, of course it's possible theoretically that this fundamental aspect of the communicative situation was itself ambiguous, so that some people thought, "no we're not changing these provisions, we are carrying forward the fixed original meaning". Other people thought that this is a new constitution, and this is a new active communication, the words are the same and some of the meanings maybe be the same. The relevant question is what these words communicate to the relevant constitutional actors today and that might be different than their original meaning. If it is evenly divided, if both understandings were present and this was not resolved in the course of debate or the amendment of the constitution, then, we would have a massive irreducible ambiguity, and like all irreducible ambiguity, it would require a constitutional construction. So, that's just a lovely theoretical problem. From the theorist perspective it would a wonderful if this special kind of ambiguity did exist because it would require the development of a very interesting theory to handle this problem. However, practically speaking it would be a terrible thing if this fundamental ambiguity existed because it would introduce a special kind of uncertainty about the meaning of every provision that have been carried forward into the process of amendment and constitutional uncertainty is not generally a good thing because it undermines the rule of law by introducing unpredictability, uncertainty and the possibility of manipulation, all things that we seek to avoid through the process of constitutional settlement.

RJUdeSA: —You advocated through the whole interview about the importance of the historical investigation that we should be doing when reading the constitution. Do you think that universities should be teaching future lawyers about these tools of historical investigation in order to read the constitution following the originalist theory?

Lawrence Solum: —Yes, I believe that the constitution properly interpreted has its original meaning and if you have an older constitution, then historical research methods are

required to recover that meaning and this ought to be a part of the basic course in constitutional law. It might be the case that only the basics could be covered in the basic constitutional law course and an advanced course would be available to students who want to specialize in constitutional law or to become judges, and therefore engage with constitutional issues on a more frequent basis. I also want to say that the practical importance of this training depends on the constitutional culture of a particular national in a point in history. So, teaching these historical methods to ordinary law students in the United States, in say 1969 at the height of unconstrained living constitutionalism, it wouldn't have been a good practical justification for doing that because there were no originalist judges then except, perhaps justice Hugo Black that was still serving on United States Supreme Court. The outcome in practical terms of constitutional controversy depended almost entirely on the decisions of United States Supreme Court. However, in 2020 when this interview is being recorded there are many originalist judges and justices on the American courts, so originalism is at much greater practical importance and we see this on the United States Supreme Court. In the past term original meaning has been an important part of many of the cases decided by the Supreme Court or about to be decided since the term is not quite over. On the United States Courts of Appeal, it's now becoming a regular phenomenon and unimportant constitutional questions there are originalist judges participating on the decisions and, therefore lawyers need the ability to satisfy those judges about the consistency of their position with the original meaning of the constitutional text.

So my answer to the question in the United States today is yes. I don't know that I would've said the same thing in 1969. Then I would've said that this is something important academically and professors of constitutional law need to learn these skills but not necessarily something every practicing lawyer needs to know.

RJUdeSA: —In some of your essays, you assert that the binding force of the original meaning of the constitution can be defeasible regarding some special or extraordinary reasons. These days almost the whole world is suffering for the consequences caused by Covid-19 and some constitutional debates have arisen in relation to governmental powers. Are we before one of those reasons which would allow to leave aside the public meaning of the constitution?

Lawrence Solum: —Ideally, I think is essential to a plausible theory of a originalism, that is if the constraint principal were to require outcomes in truly extraordinary circumstances that would result in the demise of the Constitution itself there would be an internal sort of contradiction with originalism. Originalism properly understood should not be a theory that leads to the demise of the constitution itself. When I say extraordinary, I do mean extraordinary, here is a clear case: The United States Constitution limits the presidency to persons who are thirty-five years of age or older. If there were a global pandemic that resulted in the death of everyone who was older than thirty-five, then it seems to me that that provision would have to be considered to be suspended, the feasibility condition would have been satisfied, at least pending the opportunity to amend the constitution.

What about the current global pandemic? Well, I think that things are not clear in the United States, so it depends on what the original meaning of various constitutional provisions are. In my opinion, the constitutionality of quarantine provisions, to take an example, of shelter at home orders, is not for proposed by the original meaning of the relevant constitutional provisions. In part that's because the understanding of constitutional rights in 1791 was not of rights as trumps, to use a Dworkin phrase it was not that constitutional rights are absolute. Instead, what was understood was that rights have important force and that restrictions relevant to a right require justification, but if there is a strong justification for restriction then there is no violation of the right.

So, for example a stay at home order might be unconstitutional under ordinary circumstances are unconstitutional if instituted for the purpose of preventing political demonstrations but the very same order might be constitutional if it's a response to a public health emergency such as emergency calls by COVID-19. Now, what role judges play, what the burdens of proof and persuasion are, what level of deference is appropriate, these are questions of constitutional construction that I think need to be resolved using a method of constitutional construction that's consistent with the purpose and design of the constitutional text but those questions are not directly answered by the text and there might be a range of reasonable positions, for instance, about the question of how much deference should be given to an executive officials determinations that a stay home order is necessary and how much of that question should be resolved on the basis of evidence produced.

Of course, the ideas that I'm taking about, in other legal traditions, are in encompassed by some approaches to the idea of proportionality. In the United States we can discuss proportionality less and balancing more, or deference more, but some of core ideas are exactly the same.