

UVA LAW | Solum Chair Lecture

INTERVIEWER: Welcome, everyone. It is such a pleasure to see you all here, I'm so glad that you've come. I know we're getting into the busy time of the year, and so especially to you students, it's a real testament to Larry Solum that you all are here. I'm going to talk a little bit about his teaching in a minute.

But it is wonderful to get together and to celebrate one of our faculty and his accomplishments and his scholarship and to do that together in person, which is a wonderful thing. And I want to say a special welcome to the friends and family of Professor Solum's who have come here from far and wide, it is wonderful to see you and to welcome you to the law school.

So the William L. Matheson and Robert M. Morgenthau Distinguished Professorship in Law was funded by William Matheson, the class of 1950 from the law school, in honor of his friend, Robert Morgenthau. Bill Matheson practiced at Patterson, Belknap, & Webb and other New York firms. Before opening his own firm, he was the chair of the Michigan energy resources company and its predecessors from 1959 to 1989. And he retired from law practice in 1993, and he died in 2000.

Robert Morgenthau was a bit more famous, perhaps, to some of you. He was a graduate of Amherst College and Yale Law School and a Naval officer during World War II. He served as the US Attorney for the Southern District of New York for much of the 1960s.

And then from 1975 to his retirement in 2009-- that is a very long time-- he served as the Manhattan District Attorney-- as someone who grew up in New York, I'm not sure I knew there could be anyone else who served as District Attorney-- presiding, as the New York Times put it in his obituary, a battalion of 500 lawyers, a \$75 million budget, and a torrent of cases every year that helped to shape the quality of life for millions in a city of vast riches and untold hardships.

This professorship has been one of distinction since its beginning, held by John Jeffries, here today, Robert Scott, Jim Ryan, and Dana Matthew. I am delighted and honored to add Lawrence Solum to this distinguished group of scholars and teachers.

Lawrence received his BA with highest departmental honors in philosophy from the University of California, Los Angeles. He earned his JD, Magna Cum Laude from Harvard, where he was an editor of the Law Review. After law school, he clerked for Judge William A. Norris on the Ninth Circuit and then practiced at Cravath, Swaine, & Moore in New York City.

Lawrence has been a member of the law faculty at the Georgetown University Law Center, the University of Illinois, the University of San Diego, and Loyola Marymount University, as well as being a visitor at Boston University and the University of Southern California.

He joined our faculty in 2020 after visiting in the fall of 2019. Lawrence is, it is fair to say, one of the country's preeminent legal and constitutional theorists. His scholarly interests are as wide ranging as his work is influential. In addition to his seminal scholarly impact on constitutional interpretation, he has also made enduring and influential contributions to the theory of legal interpretation generally, to the analysis of procedural justice, to Aristotelian virtue ethics as applied to legal decision making, and to the philosophical underpinnings of the idea of freedom of speech.

He is especially interested in the relationship of law to the philosophy of language and to moral and political philosophy. He has published several books and more than 80 articles in law reviews and philosophy journals.

He is best known for his work in three areas. His most prominent scholarship, published widely and several books and in major articles in Harvard, Yale, Chicago, Virginia Law Reviews, among others, focuses on issues of constitutional theory and constitutional interpretation.

He is, perhaps, best known for two related contributions. The first, what he calls the fixation thesis, is the way in which constitutional meaning is fixed at the time of enactment. What makes this thesis so important is how it captures the insights of so-called constitutional originalism while remaining agnostic among competing theories of originalism, including, most prominently, original intent originalism and original public meaning originalism.

By being agnostic, as among these and other forms of originalism, Lawrence is able to theorize and also to relate to important ideas in the philosophy of language, the basic impetus behind all of the originalisms, and the way in which, for him, they capture something central about the idea of constitutionalism itself.

Lawrence's second major contribution, perhaps even better known and more influential than the one I just described, is the distinction that he draws between constitutional interpretation and constitutional construction. Between what the language of the constitution means as a semantic matter and how courts then apply that language to particular controversies.

Lawrence has carved out a position, largely distinctive to him, widely cited and discussed in the literature, which draws on insights and scholarship in the philosophy of language in a sophisticated and cutting edge way, matched by no one in the legal academy.

Lawrence's second most important area of scholarship has been in virtue jurisprudence. In a series of major works, including a book of that name, he has situated legal and judicial decision making within a rich philosophical tradition, dating back to Aristotle, and he has engaged a large number of the world's most prominent philosophers on these issues.

Somewhat distinct from these areas of scholarship is his writing about procedure. His almost book-length article on procedural justice remains the standard source on the philosophical underpinnings of legal procedure. And in a much more practical vein, Lawrence continues to be one of the contributors to the annual updating of Moore's federal practice, a treatise on federal civil procedure, widely considered to be the standard for practitioners who litigate in federal courts.

I am constantly amazed, not only by the depth and expertise of Lawrence's scholarship, but by its breadth, which seems to know no bounds. Whatever topic is up for discussion, intellectual property, freedom of expression, law and linguistics, law and artificial intelligence, evidence, and law in the philosophy of public reason, Lawrence has written about it.

And even when the topic is somewhat distant from his major preoccupations, his contribution is often of crucial importance to the field. His ideas are discussed, borrowed, embellished, challenged, and in various ways, located at the center of the academic debates about the subjects in which he is involved.

Lawrence's generosity as a colleague and a teacher are as noteworthy as his influence and prominence. He authors and maintains the *Legal Theory Blog*, where he curates and disseminates the most important work in the field. And his related *Legal Theory Lexicon* explains scholarly ideas and concepts for students and the broader public.

As a teacher, Lawrence's deep knowledge is matched by his enthusiasm for and engagement with his students. And I will note again how many of them are here today, at their lunchtime, to hear him speak. And I did, indeed, begin hearing about Lawrence's attachment and care to his students when he first began teaching here in the fall in 2019. And from the very beginning of his time here, they could not get over the amount of time that he spends with his students individually and in groups and that this legendary scholar is as committed to teaching as he is.

When he was interviewed for an article for our website last year, he said, quote, I love teaching, and especially enjoy teaching first-year students. Even after 35 years, I still prepare for several hours for each class I teach, and I learn new things almost every time from every class. My goal is to teach a first-year class in such a way that the students acquire the ability to say new things and make new arguments about the cases and to teach me about the cases.

Lawrence's is, indeed, a rare mind, incisive and expansive, brilliant and generous. We are lucky to count him as one of our own. I look forward to hearing him speak today about the return of legal formalism. Please welcome Lawrence Solum, our William L. Matheson and Robert M. Morgenthau Distinguished Professor in Law.

SUBJECT: Thank you.

[APPLAUSE]

Thank you, Risa, for that very, very generous introduction. It has been a great pleasure to spend time here at the University of Virginia as a visitor, and now for almost a year and a half, as a member of the faculty. And I want to express my gratitude, not only to Dean Goluboff, but to Fred Schauer and Debbie Hellman, who both played important roles in enabling me to be here. And to my former student, Greg Strauss, who for me, was one of the great attractions of coming to the University of Virginia.

I'd like to acknowledge the presence of my sister Alexandra, my partner, Alison Bailey, her father Holmes Bailey, his wife Sarah Bailey, and my longtime friends and treasured colleagues Randy Barnett of Georgetown University and Kurt Lash from the University of Richmond. One of the most special things about being at Virginia is that somehow, after all these years, I'm only an hour away from the homes of two of my closest, dearest, and longest-term friends.

So today's talk about formalism begins with the question, what is formalism? And there is no single answer to that question, formalism is many things. There are many theories that are called formalist, Fred Schauer, who is in the room today, is the author of some very influential work on legal formalism.

I think that most, but perhaps not all, formalist theories are united by a central idea, the view that judges ought to apply the law, they out to apply pre-existing legal norms, and that judges should not be law makers. Even courts of last resort, the formalist says, should rely on laws that already exist before they apply them.

The Supreme Court, the supreme courts of the various states, and of course, this theory transcends the American context, courts in other legal systems should be law appliers, not lawmakers.

The great opponent of legal formalism is sometimes called legal realism, sometimes called legal instrumentalism. And the debate between these two families of views has, in some sense, been the most important and dominant debate in, at least, American jurisprudence for more than a century.

Legal formalism ranges across all of the great topics of legal theory, all areas of law. There are formalist views about the Constitution, that's constitutional originalism. There's a very influential formalist theory of statutory interpretation, which is sometimes called plain meaning textualism. There is a formalist theory of contract interpretation. I think Professor Gulati, some of his students are here today, and they've heard about that in class from him.

And there is a formalist theory of the Common Law, of the great topics where legal norms are recognized and articulated by Common Law courts, topics that are studied by first year law students in courses like torts and contracts and property.

So what are these theories and how do they work? I want to just give a brief overview of some of the most important forms of legal formalism, beginning, I think, with the form of formalism, the kind of formalism that is most prominent in public discourse, constitutional originalism. Risa has already mentioned the idea that originalists believe that the linguistic meaning of the constitutional text-- the communicative content, to use the philosophical phrase, of the constitutional text-- is fixed, at the time, each constitutional provision is framed and ratified.

So for example, Article IV of the Constitution includes the phrase domestic violence. That phrase, today, means violence within a family, spousal abuse, elder abuse, child abuse. But in 1787 when Article IV was written, that phrase had no such meaning. It referred to riots, insurrections, rebellions within the territory of a state. And if we're going to get Article IV right, we ought to use that meaning, the original meaning, not the meaning that the phrase has acquired in subsequent years.

The second idea that characterizes contemporary originalism is the constraint principle. The constraint principle expresses the idea that the original meaning of the constitutional text should be binding, it should constrain judges, that judges are not free to modify, alter, nullify, disregard, make up rules of constitutional law, they are bound by the original meaning of the constitutional text.

There are many forms of originalism. Original intent originalism, original methods originalism, most recently, original law originalism, but the predominant form of contemporary originalism is public meaning originalism. And the case for public meaning can be expressed as the public meaning thesis. This is my current project, an article is forthcoming shortly in the Boston University Law Review.

The public meaning thesis is the claim that the best understanding of the meaning of the Constitution, of the content communicated by the Constitution, is the public meaning. It is a document that was adopted by we the people, its first three words are we the people. Early exponents of the Constitution consistently emphasize the idea that the Constitution was written for the people, for the public, that it was written in a way so that its meaning could be accessed by the public.

Now of course, there are some technical phrases in the Constitution. Letters in marque and reprisal, doubtful that everyone in western Massachusetts would have understood exactly what that meant. But even in the cases of technical language, the idea is that the public could access that meaning, because it would be visible to them recognizable to them that a technical term was being employed. And then they could consult an expert, look up a phrase in a dictionary, and acquire, if they wanted to, an understanding of the meaning of the phrase.

Of course, there are many rivals of originalism, common good, constitutionalism, a right-wing form of living constitutionalism is the most recent. Constitutional theorists talk about common law constitutionalism, constitutional pluralism, and the theory and idea of deference, all of these are among the diverse forms of living constitutionalism.

In the statutory realm, textualism has probably been even more influential than originalism has been in the constitutional realm. So textualists accept two of the ideas that are central to originalism. Textualists accept the idea that the meaning of a statutory text is fixed at the time the statute is enacted. And they accept the idea that statutes should constrain judges, that the communicative content of a statutory text ought to be binding on judges.

But statutes are different than constitutions. The Constitution of the United States was written for the public, it has public meaning. But not all statutes are written for the public. Some statutes are, some statutes, criminal statutes of general application or written in such a way to be understood by the public at large. But other statutes are addressed to regulatory agencies and regulated industries. They may, pervasively, employ technical language and use ordinary words in ways that differ from the way the same words are used by the public-at-large.

So the public meaning thesis, the central idea that makes constitutional originalism distinct does not hold in the statutory realm. Instead, we have what is sometimes called the plain meaning thesis, the idea that a statutory text should be read the way that its primary intended audience would read it.

So a statute that is directed to a regulatory agency might have pervasively technical meaning. A statute that is addressed to chemical factories and regulates the way in which they treat harmful compounds should be understood the way that a chemical engineer or a chemical plant manager would understand the language.

Once again, there are rivals. The rivals of textualism include purposivism, the idea that statute's should be interpreted not in light of their communicative content, but instead, in light of the objective purpose of the statute, the purpose that would be attributed to the statute by an idealized legislature motivated by the public good.

And internationalism, the so-called congressional intent theory or legislative intent theory, the idea that statutes should be interpreted in light of the intentions of the lawmakers, the will of the lawmakers, the policy goals of the lawmakers.

Like public texts, public law texts, statutes and Constitutions, so too formalism comes to private law texts, to contract interpretation, and the interpretation of wills and trusts and corporate charters, documents created by private parties, but with important legal effects. And so formalism says that when we interpret contracts, our goal ought to be to determine what the contract says.

But contracts aren't written for the public and they are probably not written for regulatory agencies, contracts are usually written for the parties. And so the relevant question is, how the parties to the contract would understand the text.

But not all contracts work that way, some contracts are written by lawyers for lawyers. They are written in technical legal language, and there might be quite a bit of boilerplate in those contracts. And some of the words and phrases in the contract, and indeed whole clauses of the contract, might be decades old, or in some cases more than a century old. And so we have a complex problem of deciphering old language and figuring out what meaning that language was intended by the contract drafters to obtain, in the event that the contract gave rise to a legal dispute.

There is, in all of these areas, something new and something important about contemporary formalism, sometimes called the new formalism. And that is a much deeper and more sophisticated approach to the interpretation of language with legal significance. Part of that approach relies on a very old distinction that Risa mentioned, the interpretation construction distinction, the distinction between interpretation, the activity that discerns the communicative content or meaning of a text, and construction, the activity by which we give a text legal effect.

Interpretation of the Constitution, we want to know what the words mean in context. Construction, we're talking about what legal doctrines or constitutional norms are derived from the text. The interpretation side of the equation has become much more sophisticated and interdisciplinary.

So I think that if you think of the legal formalists of decades ago, they relied, primarily, on the linguistic intuitions of judges to discern the meaning of legally significant texts. But in the 21st century, there's an increasing awareness of sophisticated work in the philosophy of language and in linguistics.

One aspect of that work that is especially important has to do with what is called the semantics pragmatics distinction. So semantics is about word meaning and syntax, or what we sometimes call grammar or punctuation. And lawyers call the kind of meaning that we can get from the words on the page alone, they call that kind of meaning literal meaning.

And a grave misunderstanding of contemporary formalism is the idea that formalists are seeking the literal meaning of legal texts, and nothing could be further from the truth. And that's because once we become acquainted with the philosophy of language, we realize that verbal communication, oral communication, written communication does not rely on words and punctuation marks alone to convey meaning, it also relies on context.

We almost never say, explicitly, everything we wish to convey. Instead, we rely on a mutual recognition of reader or listener and author or speaker of the context of communication to fill in the gaps.

So a famous example from the philosophy literature, Jack and Jill are married. And most of the time, we fill in that utterance with to each other. Because usually, when you say Jack and Jill are married, you mean to each other, although there are contexts where you might say those words in order to convey that Jack and Jill are actually married to other people.

In the law, it is the same. Context does much of the work of legal communication. So the United States Constitution almost never includes geographic qualifiers. Most constitutional provisions are limited in various ways to the United States, but that to the United States is not explicit, it is understood, it is part of the context of communication.

The role of context is what the philosophers of language call pragmatics. An unfortunate word for us, because pragmatism, in the legal context, has many other connotations that are unrelated to this sense of the word.

Another way in which the new legal formalism, the legal formalism of the 21st century, is radically different than the legal formalism of decades ago is the use of big data techniques to determine meanings, to determine the meanings of words and phrases and grammatical constructions.

So this is called corpus linguistics, and the idea of corpus linguistics is that the way to figure out what a word means or what a phrase means is to actually investigate the linguistic data. To, if we are dealing with the Constitution of 1787, to go back to a corpus, the corpus of founding era American English or COFEA, as it's called, and systematically code all of the usages of the word or phrase in order to determine what the range of meanings are, what the frequency of various meanings was, and then, to revisit the problem of interpretation in that light.

That is very different than relying on the linguistic intuitions of 21st century judges, which may not reflect the linguistic practices of 1787, for example. And it is very different than simply looking up words in dictionaries, whether they're contemporary dictionaries or the dictionaries of the period. Dictionaries attempt to capture the data, but the dictionaries of 200 years ago were the efforts, for the most part, of single authors.

They're incomplete, in the case of Noah Webster's dictionary. It sure looks like Noah Webster was aware that some of the terms he was defining were evolved in constitutional controversies, and his definitions include positions that have legal significance that might be contested. And of course, a single dictionary compiler, even one as diligent and hardworking and meticulous as Noah Webster, can only partially reflect actual linguistic practice.

So the new formalism is different than the old formalism, formalism is back. But the formalism that is back is not a formalism of dictionary definitions and literal meanings. The formalism that is back is a formalism that fully takes context into account and that attempts to use the tools of modern linguistics and the theories from the philosophy of language to systematically investigate the communicative content of legal texts.

What about the common law? I think that for many lawyers, common law formalism is the toughest nut to crack. I remember vividly a conversation from, I think now, some 30 years ago, with a very distinguished young scholar at the University of California at Los Angeles, Eugene Volokh, and we were talking about legal formalism. And Eugene made the what he thought was just an undeniable point that it just has to be the case that in common law cases, courts of last resort are lawmakers. They must be taking into policy account, there is no alternative to that.

Well common law formalism is back, and it has an answer to this challenge. And it turns out that this is a very old answer, an answer with a very long and distinguished historical pedigree. One way of articulating this answer is in the phrase, the common law is discovered, not made. But what does that mean? What does it mean to discover the common law? What is out there to discover?

And of course, immediately to American lawyers, we think of Justice Oliver Wendell Holmes Jr. and his famous opinion in *Southern Pacific v. Jensen* and the brooding omnipresence in the sky accompanied by the assertion that all law must be the command of some sovereign or quasi-sovereign. And hence, Holmes thought common law judges are legislators, they make law, they must make law, there is nothing else that it could be.

But of course, there is something else that common law could be. In the first instance, in a well-developed common law system, of course the content of almost all the law is given by already rendered legal decisions by precedents and the doctrine of stare decisis. But that only pushes the question back another step, where do those precedents get the law? And the answer to that question is that they derive the law from custom, from social norms.

Aristotle, in his *Nicomachean Ethics* in book five, offered the first systematic authorization of the nature of law. And he used the Greek word, so a law is a *nomos*, laws are *nomoi*. But that Greek word had a different meaning than our 21st century word, law. It included what we call laws. But for Aristotle, laws were fundamentally, at their bottom, at their core, social norms, widely shared and deeply held norms that govern human interaction.

So the common law, then, is discovery, but it does not need to be the discovery of a brooding omnipresence of the sky, no brooding omnipresence is required. It's the discovery of the norms of the community that constitutes the polity. It's the discovery of pre-existing customs and social norms that govern human interaction.

So once again, 21st century formalism is very different than the formalism of many decades ago. If our object is to discover the social norms of our community, we now have tools to do this that might be both more accurate and more objective than relying on judicial intuition.

There's a problem with relying on judicial intuition alone. For one thing, the views of one person about the social norms of their community could be inaccurate. And for another thing, people who have power might be tempted to report intuitions that accord with their own desires about what the law ought to be.

Of course, we are equipped in the 21st century with the methods of empirical legal studies and what is now called experimental jurisprudence, that is, research methods that can answer questions about the content of social norms in a rigorous and objective way, that is not reliant on the intuitions of individual judges.

So at this point, with only a few minutes left, I come to the big question. I've said quite a lot about what formalism is, but I've said nothing about the fundamental normative question, why would you want to be a formalist? What's normatively attractive about formalism? After all, don't we all want the law to reflect our views about what the Constitution ought to mean, what the statute ought to say, what the common law ought to be? And formalism says that our views, that what I want, is not the source of the law, that the law is already out there, and it's in texts and norms that are independent of the judge.

Well, there is a fundamental and serious problem with the view that the content of the law should reflect each individual's view about what the law ought to be. And that problem is that we live in a pluralist society, in which there is fundamental disagreement. Not about everything, there's so much agreement about many basics, but there is fundamental disagreement on many questions that the law must resolve.

So realist judging, instrumentalist judging, common law constitutionalism, purposivism and statutory interpretation, the theory that the common law is incremental judicial legislation, they have to cope with that problem of pluralism, the problem of disagreement. And of course, if we entrust judges to create the law, to make the law, to decide what the constitution is, to give to statutes their content, to legislate the common law, then we run into a problem of legitimacy.

If the United States Supreme Court has the power to create the Constitution and the state supreme courts have the power to create the common law and both kinds of courts have the power to determine the actual content of statutes, we have a juristocracy, not a democracy. If you believe that the United States Supreme Court has the power to make the Constitution, then you have given, to a committee of nine, the power to make ultimate decisions about the most fundamental questions facing our democracy, and it is hard to imagine a system that is less democratic, although history teaches us that there are systems much worse than ours.

And there is an even graver problem with the instrumentalist or realist approach to judging. This is the problem of politicization. This problem is especially grave in 2021. So if you assign to judges the ultimate power to make law, sooner or later, the politicians will figure that out. Sooner or later, presidents and senators will come to realize that the process of nominating and confirming Justices of the Supreme Court and judges of the Court of Appeals in the district courts is actually where ultimate political power rests. And that creates an incentive to politicize the judicial selection process.

And you can hope that, even though the process is politicized, that the judges will retain a devotion to the rule of law, except, maybe, on a few important questions where we really want them to decide our way. But the history of judicial selection in the last 50 years is a story of a downward spiral of politicization, of increasing politicization of the judicial selection process.

And as a consequence, the increasing politicization of the judiciary itself, it is no accident that three Supreme Court justices have recently given speeches in which they have loudly asserted, we are not political hacks, we are not at the bottom of the downward spiral of politicization.

But the bottom of such a spiral is a very, very grim place, indeed. Because we know, from the experience of other societies with thoroughly politicized judiciaries, what the bottom looks like. At the bottom of the downward spiral of politicization are judges who view every case as pure partisan politics, as an opportunity to reward your political friends or to punish your political enemies. The bottom of the downward spiral of politicization is an end to the rule of law.

And here, and in this building, in these halls, and elsewhere in the legal academy and in courtrooms and law firms and public interest law offices and government lawyers across the country, we still know the value of the rule of law. So what about justice, you ask? If you are suggesting that the law should be formalist, how can we achieve justice? And of course, this is a very powerful idea.

Many American lawyers were motivated to become lawyers because they believed that the law could be an instrument of justice and that as an advocate or as a judge, they could tame the law and achieve just outcomes. And I would like to suggest that those energies need to be re-channeled into very different mechanisms for the achievement of justice.

Now of course, legal justice, the rule of law, that is the domain of lawyers and judges. But the transformation of society and the transformation of social norms, that's a different business, that's the business of democratic politics and what is sometimes called norm-entrepreneurship, changing the social norms of your society and changing the legal structures of the Constitution and the statutes. That's the business of democratic politics and civic engagement.

Well the title of the talk was formalism is back, a title that was intended to be provocative, but it, perhaps, is a bit misleading. So formalism is back, in legal theory. Formalist ideas are more important in 2021 than they have been for many, many, many decades. But legal realism is still here in the courts. Legal realism is still taught in the law schools, an instrumental approach to law is, in some sense, still the dominant approach. So maybe the topic of the lecture should have been formalism should come back, and that would be a very good thing.

Thank you all very, very much for coming.

[APPLAUSE]