Textualism and the Separation of Powers
A Conversation with Judge Rudofsky
Interview Transcribed and Conducted by Maclain Conlin
(All errors are my own.)

Lee Rudofsky is a Judge of the U.S. District Court for the Eastern District of Arkansas.

Maclain Conlin: Good afternoon, and welcome to Originalist Angles. My name is Maclain Conlin. Today, we are joined by a very special guest, Judge Lee Rudofsky of the U.S. District Court for the Eastern District of Arkansas. Judge Rudofsky holds degrees from Cornell University and Harvard Law School, and after graduation he served as a law clerk to the Massachusetts Supreme Judicial Court and the U.S. Court of Appeals for the Ninth Circuit. In 2019, he was nominated to the U.S. District Court for the Eastern District of Arkansas by President Trump, and was confirmed by the U.S. Senate. During his time on the federal bench, Judge Rudofsky has emerged as a leading scholar on how the Constitution's structural constraints preserve individual liberty, and how the Framers originally understood the separation of powers. Today, he joins us to discuss that philosophy, and offer advice to high school students interested in pursuing a legal career. Judge Rudofsky, thank you very much for offering your time.

Lee Rudofsky: Of course. Thank you for having me!

MC: Absolutely. We're honored! First of all, earlier this year you were asked to decide whether Section 2 of the Voting Rights Act creates a private right of action. Under the Constitution and Supreme Court precedent, how should federal courts evaluate whether or not a statute does so?

LR: I can't talk about particular cases, but let me broaden it to private rights of action and statutory interpretation more broadly.

Certain statutes will say, explicitly, that any citizen with standing may bring an action to enforce its provisions. Where Congress does that, obviously the analysis is easy. There's a private right of action. In some statutes, however, even though Congress does not write a private right of action into the statute, courts have found one to exist anyway. During what I like to call the "olden days" (which is around the middle part of the twentieth century) courts often found private rights of action to exist even though they were not mentioned anywhere in the text. It was not particularly difficult or rigorous for courts to say, "Well, in order for the purposes of the statute to be effectuated, we need to find a private right of action and let people sue under it."

Nowadays, courts are much more reticent to do that. The reason for it is the same as the reason for why courts have embraced textualism and originalism, which is that unelected judges are not supposed to be reading things into statutes. It's the elected branches' job to make the law, including either supplying or not supplying a private right of action, and it's our job as judges to enforce whatever law Congress makes, but not to make extra law or make the law different. I think that's what you've seen recently (and I'm not talking normatively, only descriptively, as to what the law *is*). That's the main difference between 1950 and today. You see, over time, if you read the cases, a march away from having unelected judges just

assume that Congress wanted a private right of action to requiring either an explicit statement or a structure that inevitably and unmistakably requires a private right of action even if it isn't spelled out in the text.

MC: Interesting. I know this may seem fairly boiler-plate for someone who is so well-versed in textualism, but why do you believe that legislative history or statements made on the floor during a debate over a bill are not central to deciding whether or not a private right of action exists? Why does it have to be in the text of the statute itself?

LR: It's a very good question, not only for high school students, but for people at any level, whether they be law students, law professors, or judges. While I certainly have a view on it, I acknowledge that there are a wide variety of opinions about it, all within the Overton window of reasonableness.

Let me broaden it here from simply private rights of action to any law in general. Congress doesn't vote on people's intent. It doesn't vote on what a particular legislator said, or what a committee report said. Members of Congress vote on the language of a bill. If that bill passes, the President either signs it or doesn't sign it based on the writing, not based on what a particular legislator may have said about it or any secret intentions individuals may have. He reads the text and decides whether or not to sign it. It's the bill itself that has gone through the legal procedures to become a law. It's not what a legislator said about the bill, or what a committee report wrote about the bill. No one voted on that. That's just people speaking. Judges should not get to use that kind of information to essentially override what's either in or absent from the text.

I'm not an absolutist on this point. There are certainly times where, as a general matter, reading the debates in Congress or reading the committee reports could possibly give you insight into how everybody was using a particular word in the statute, and therefore it helps you understand what that word means. But that's a little different than saying, "Well, Congress didn't write anything into the statute, but we're going to pretend they did, because they said so in the committee report." Those are two very different uses of legislative history. One says you should use it cautiously if at all, and the other permits judges to use it to override the text or an omission from the text.

MC: Do you believe the same principles apply to constitutional cases? For example, if James Madison made a particular statement about a certain part of the Constitution during the Convention, and it was never written into the Constitution's text, would that quote be directly relevant or only insofar as it informs the actual words of the text?

LR: In my view, it's the same whether you are talking about a statute, a regulation, or the Constitution. The idea here is we are trying to figure out the right way for unelected judges to interpret a legal text, whatever that text may be-whether it's a constitutional provision, or a statute, or something else. The right way to do that is figure out what the words meant at the time they were adopted. More than that, it's what they meant to a reasonable, ordinary person who would have read those words. We do the same thing when we read books. People often say that there is a lot of ambiguity in texts. I understand the point, but when we're reading books, it's not like we have an existential crisis on every page about what the author meant. For the most part, if you read a thousand-page book, there's maybe one word or one sentence that

may be ambiguous, but as a general matter, most of us go through our lives knowing what words mean and what sentences mean.

To directly answer your question, if James Madison said something, the way I would use it is if Madison said a particular provision meant x, and that was a good thing, and the Anti-Federalists agreed, but that it was a bad thing, that's pretty good evidence that the words of a particular provision mean x. That's a way I think you can use something like the Federalist Papers or the Anti-Federalist Papers as a way to understand what a word meant back then. But it's not to ferret out the secret intention of people.

Let me add one more point while we are on legislative intent. I want all of you to think about what it means when we talk about the "intent" of the legislature in enacting a statute. A legislature is not a person. A legislature does not have intent. It's a body. You're really talking about the intent of a variety of different representatives, and perhaps the majority that voted for it. But they all have different intentions, and there is no requirement that they agree. Even if you could possibly figure out from that cacophony of intentions what the true legislative intent was, you then have to take into account the other half of the equation, which is the intent of the President. And what do you do about that if the intentions conflict?

That's a long way of saying that I don't think focusing on intent is even practical even if, theoretically, it was the goal to be achieved, which I also don't think it is.

MC: Many people seem to think of private rights of action as a mere technicality, and that it doesn't matter whether a statute is enforced through private parties or the Attorney General and the Justice Department. Why would there be a substantive difference between the two in some cases?

LR: I'm going to leave the policy and practical questions to the elected branches to figure out. I will say that when I am deciding any case of statutory interpretation, while I certainly think about whether the consequences of a certain interpretation are absurd (and I mean true absurdity), which would imply that it doesn't actually reflect the text, I don't think the way you want to be interpreting statutes is thinking about whether the results are going to have x consequence or y consequence. That's really the bailiwick of politically accountable officials, and not the bailiwick of what I do.

MC: On a somewhat less controversial topic, I recently read that you have invited younger attorneys to file amicus briefs in your court on pressing statutory and constitutional issues. I recently spoke with a federal magistrate judge here in North Carolina named Robert Numbers, who is a committed originalist. Judge Numbers said that he has often encountered difficulties in practicing originalism at the district court level because there are almost no amicus briefs at that stage, whereas there are often hundreds at the Supreme Court. Have you seen the same problem in your court, and what was your reason for making this announcement?

LR: First of all, Judge Numbers is a great friend and a fantastic jurist. I'm very glad you've already spoken to him!

I had a number of reasons for writing that order. First, as Judge Numbers alluded to, it's very difficult at the district court level to do originalism well. There are also other things that can be difficult, including

corpus linguistics. Textualism is a little easier, but originalism as historical research is a little bit harder. One thing you need to think about (and which most people don't) is that the Supreme Court takes somewhere from sixty to eighty cases a year now, and while the appellate courts have a little more, we have an extreme amount. I have around five hundred open cases on my docket at any one time. The amount of time it would take me to perform the same kind of originalist analysis on a case that the Supreme Court does would mean that my other four hundred and ninety-nine cases wouldn't get very much attention.

At the district court level (and I say this for all judges, regardless of who appointed you; my colleagues here in Arkansas are wonderful) we all strive to give each case as much attention as possible, but we also have a competing need to make sure the trains run on time and everybody gets their day in court fairly quickly. We have less of an ability down here at the district court level than they do at the Supreme Court or circuit court level to delve deeply into some of these issues. Plus, (I don't mean this in a bad way; it's how the law is supposed to work) most of the lawyers who come before us are handling day-to-day street law. They're representing their clients on day-in and day-out cases. They're not trying to make Supreme Court cases or delve into these meaty issues. Most attorneys are simply trying to make the most effective argument possible for their client given the time and resources they have. As a result, it would be much better in my view if we had, on some of these harder issues, some help from amicus groups across the spectrum of viewpoints. I truly mean this. The best part about our adversarial system is that you have people making the best arguments on both sides. That's when a judge can make the best decision.

To me, if we can get people who usually write amicus briefs at the Supreme Court and at the circuit courts at least somewhat interested in doing the same thing down here, it would help my decision making process. It doesn't mean I'll accept the amicus position, and it also doesn't mean the amicus gets to inject entirely new issues into the case. The case still belongs to the parties. But I think it will help.

There's also a reason why I specifically created incentives for younger people. One thing you will learn as you go through your law school and early career experience is that if and when you go into a large firm, it is very difficult for younger attorneys to get a lot of courtroom experience. If you think about it, that makes sense. You're not going to have a second-year or third-year lawyer argue a motion to dismiss on a billion-dollar case or a five-hundred-million-dollar case, which is a lot of the cases that the large law firms get. I think there is some difficulty in getting younger lawyers the experience they need to be effective when they are no longer younger lawyers. I was hopeful that with the way I structured the amicus brief invitation, more attorneys might receive this opportunity.

MC: Have any amicus briefs been filed in your court that might be a response to this order?

LR: To be fair, I don't think I have seen amicus briefs that I can directly attribute to that order. The hard part is that it is very difficult for people to track a district court judge's docket and to figure out what cases a judge has in front of him if they don't already independently know about the case. It's easier to do at the circuit court level, because there has already been a ruling at the district court level and the appeal has probably been covered, and it's obviously much easier to do at the Supreme Court.

The problem I face is that, at this point, I don't feel comfortable giving amicus invitations on a case-by-case basis. I'm not sure that's the right thing for a judge to do. That probably goes too far from what a judge's traditional role is. My current method has problems, but it is the best way I have figured out to try so far.
MC: Thank you for that, sir. It sounds like a wonderful program, and when I graduate law school, I hope to take full advantage of it!

LR: I hope you do as well!

MC: Thank you. On another topic, we have many readers here at Originalist Angles who are interested in pursuing a legal career. When did you decide to become a lawyer, and what was your catalyst for doing so?

LR: I would love to tell you a great, American Dream story about how I came from nothing, pulled myself up by my bootstraps, and went to law school. That would not be true. I had the great benefit of having a father who was a lawyer, an uncle who was a lawyer, and numerous other family members who were lawyers. I became interested in policy and public service at a fairly early age, probably at the beginning of high school. I had a couple of social studies teachers, and they were very interested in government and public service, which caused me to become interested in it. When I went to college, I knew I wanted to do something like that, but wasn't sure precisely what. I had already had some experience in law growing up. I had done some work at my dad's firm (not legal work, but box-moving and things like that). I had also done some work at my uncle's firm. In some sense, it was just a natural progression. I like to say that my sister, who is a doctor, was the creative thinker who broke the mold in our family!

MC: There's certainly nothing wrong with following a family tradition! My dad's not a lawyer, but there has continuously been a Conlin on the bench in Ann Arbor, Michigan for the last fifty years, so we have a fairly strong tradition as well.

Today, we've had the pleasure of discussing your views on originalism and legal interpretation. When did you first begin to acquire those views? Were there any texts in high school, college, or law school that you read which contributed to them?

LR: That is a fantastic question. I will admit that I was nowhere near as informed about the law as you and the other students at Originalist Angles when I was in high school, nor was I this informed when I was in college! I would say that my interest in the law peaked in my second to last year of college. That's when I knew that I really wanted to go to law school, although I had had an inkling all the way through.

By this time, I knew about how the law was carried out. I had attended many depositions and hearings, but I hadn't started developing any broad theories about the law and how to interpret it. My first exposure to that was at law school in my 1L year, and while I don't know the precise moment at which I picked up the originalist banner, I think it was probably in my Con Law class, in my second year. Reading the majority opinions and dissents, including those of Justice Scalia (he always said he wrote for law students and future generations!), did more than anything else to convince me of the overall correctness of

textualism and originalism. Nobody, not even me, has it all down, and it's always improving. People are constantly debating the true meaning of originalism in particular cases and how to refine it. That is all healthy and good!

MC: Thank you again for your time, sir, and before we wrap up, I would like to conclude with one final question. Many of our students here at OA probably want to go into law (that's why they are reading this interview and writing articles for this publication). However, they may have no idea what kind of law they want to practice. There are so many varied areas you can go into. Over your career, you have practiced a variety of different kinds of law, ranging from Deputy General Counsel to the Romney campaign to practicing corporate law for Walmart. Do you have any advice about how students can become exposed to different areas of law and ultimately choose a certain one to practice?

LR: I do. First, I've always told people that being a good lawyer does not require you to be a rocket scientist or a brain surgeon. What we do requires a certain level of intellectual competence, but it does not require an Einstein level of intellectual competence. On the other hand, what it does require is a huge commitment of time. One of the things I've learned is that (it doesn't matter what legal job you do) if you want to do a legal job well, you have to spend a lot of time doing it. You have to be persnickety. You have to be organized. You have to pay incredible attention to detail. You have to be the type of person who reads the draft you just wrote another ten times to find the one typo or the one time that you cited something in an incorrect way.

Because you will have to spend so much time doing the law, and because you want to be good at it and show other people you are good at it, you need to find something in the law that you like, and which is important to you. My advice is to make sure that you do what you love. A lot of people can be trapped in the mentality of, "This is what my peer group is doing; this is the next step." I think you should resist that and do what interests you in the law. That will make you a better lawyer, and you will get a better reputation for it.

One other point I will make is that another aspect of being a good lawyer is being a good person, and you cannot be a good person without being a well-rounded person. In addition to spending a lot of time doing the law, you need to spend time doing things other than the law, things like reading, connecting with people, doing a hobby, etc. It's very important that you do other activities to gain experience and judgment which you can use in your job, but which are not directly tied to the law.

MC: Thank you very much for your time, sir! I've really enjoyed this interview, and I know our readers will as well.

LR: My pleasure!